A Conservationist's Guide to BLM Planning and Decision-Making

Using FLPMA and NEPA to Protect Public Lands

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Although the author assumes responsibility for any errors in this guide, every effort was made to ensure accuracy of fact and law.

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Preface

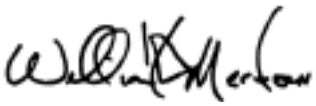
As Erik Schlenker-Goodrich so eloquently describes in his foreword to this guide, America's public lands embody a wide range of irreplaceable resources and values that are becoming increasingly rare and thus increasingly in need of conservation and protection. The Bureau of Land Management (BLM) oversees 262 million acres of our public estate and is responsible for affirmative management policies, decisions, and actions that carefully consider the need to maintain the land's resources and values for future generations. Federal law requires the agency to do so.

For The Wilderness Society — and others who monitor the agency's actions — the BLM has failed on many counts in its stewardship duties. And it is likely to continue down this same path unless citizens mobilize their significant power as individuals and join together in effective coalitions to enforce the conservation-oriented obligations mandated by law.

Bringing about such a seminal change requires a commitment of time, energy, and financial resources. It requires dedication to finding a way through the complicated and arcane mazes of the BLM planning and decision-making processes. It requires patience. And it requires a basic understanding of relevant law and policy plus the application of tools developed by some remarkable conservationists who have devoted themselves to keeping the BLM on the right track.

The purpose of this guide is to help equip you for your own commitment to preserving our nation's wild places and to sustain you and countless other partners as we move forward together toward success. We hope that you will not only gain a love for citizen involvement and action, but also will master some tried-and-true methods for pursuing sound conservation management of our public lands.

Erik Schlenker-Goodrich was our first Research Fellow at The Wilderness Society. His legal background and unyielding dedication to conservation made this guide a reality. Our goal has always been to engage the BLM in new and strategic ways. To that end, Erik's expertise will help us all better understand both the Federal Lands Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA) — and how to use these laws more effectively in influencing the agency's land management decisions. Erik is continuing his work to conserve lands managed by the BLM with the Western Environmental Law Center in Taos, New Mexico.



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Overview

This guide is structured in eight separate, but interconnected, chapters.

Chapter I. The Nuts and Bolts of Public Lands Advocacy: Questions and Answers (pages 1-4). Basic questions and answers, with page number links to more detailed discussions, give you a jumping off point for the rest of the guide. This chapter is especially helpful to those who are not familiar with BLM management.

Chapter II. Public Participation (pages 5-11). A basic map to citizen participation in the BLM planning and decision-making processes, with emphasis on how to leverage place-based information to force the BLM to take conservation-oriented action consistent with the law. The remainder of the guide expands on three of the elements in this section: collect information, plan, and implement decisions.

Chapter III. The Legal Landscape: Preservation, Conservation, and Exploitation of the Land (pages 12-15). A summary of underlying legislation for the BLM's planning and decision-making processes. Includes descriptions of various conservation units managed by the agency. If you're already familiar with these basics, skip this section.

Chapter IV. The BLM's Core Policy Framework (pages 16-38). A detailed overview of the general mission and core obligations of the BLM. The mission and related obligations have been ignored for decades.

Chapter V. Collecting Information: Inventories, Monitoring, and Evaluations (pages 39-49). Examines the role of information as the first element of the BLM's planning and decision-making process.

Chapter VI. Planning and Decision-Making (pages 50-89). Discusses the next two elements of the BLM's basic planning and decision-making process — how the BLM develops plans and how the agency subsequently puts those plans into practice. The most significant part of this chapter deals with the BLM's comprehensive resource management planning process.

Chapter VII. NEPA (pages 90-117). Also discusses planning and implementation, but with a focus on the role of the National Environmental Policy Act of 1969, one of the most important environmental laws ever enacted.

Chapter VIII. Appeals, Protests, and Litigation (pages 118-135). Outlines your options to challenge decisions when the BLM's planning and decision-making process breaks down and results in potentially illegal decisions.

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"What we do with the public lands of the United States tells a great deal about what we are, what we care,for and what is to become of us as a nation."

— SENATOR HENRY M. JACKSON[1]

Foreword

Imagine.

It is August and you stand on the ridgeline of a redrock canyon. The air, warm from the day, begins to cool, and a light breeze rustles your hair. Your mind relaxes and your breathing slows. Around you, the gnarled trunks of juniper trees grip fragile, centuries-old soils. Below, a sky-lit river weaves its lifeblood across the otherwise arid landscape. Above, the sun dips beneath the western horizon, flashing for one final moment on petroglyphs etched into a nearby rock overhang. A network of ice blue stars dances into view as darkness takes hold; you trace the lonely journey of a low-orbit satellite making its way across the sky.

You stand west of the 100th meridian in the midst of 262 million acres of land managed by the federal Bureau of Land Management. These lands include not just deserts and canyons, but also lush river valleys, ancient forests, sweeping grasslands, arctic tundra, marine ecosystems, and countless archaeological, paleontological, and historic sites.

Utterly amazing in their complexity, beauty, and value, these lands demand significantly elevated protection from exploitation and careless development. Many are already part of one of this nation's greatest conservation systems, the National Landscape Conservation System, but often even they come under fire from hostile interests. Other lands contain little protection and are exposed to degradation.

You ask yourself, "What can I do?"

This guide helps answer that question. It contains a toolbox, analysis, and progressive policy framework for the protection and management of these irreplaceable landscapes.

The laws and policies discussed in the guide are important not just to attorneys. They are vital and practical components of all advocacy efforts, and they are important to *all of us* in *all* circumstances. Whether you are drafting comments, crafting a concise political message, communicating to politicians, educating fellow citizens, or challenging an illegal action, a good understanding of law and policy is a necessity. In fact, a strong argument can be made that our public lands face continued threats and ongoing degradation because the law has been ignored, circumvented, diluted, misinterpreted, and misapplied for decades. Law, fundamentally, is a single strand in a web that weaves together people and place. Without informed citizens to ensure that the BLM follows applicable law and policy, the risk and adverse impact to the land only intensifies.

It is absolutely vital for you to assert legally and factually defensible arguments during BLM planning and decision-making processes. Because decision-makers and the courts often defer to

The laws and policies discussed in this guide are important to *all of us* in *all* circumstances

[1] Senator Jackson was Chairman of the Committee on Energy and Natural Resource on January 30, 1975, when he made this statement during his introduction of S.507, the Senate precursor to the Federal Land Policy and Management Act of 1976. See *Legislative History of the Federal Land Policy and Management Act of 1976*, p. 64.

agency decisions, it is difficult to challenge a given management action on appeal or in court. If you assert your arguments while planning and decision-making are underway, the BLM may reject or appropriately modify an adverse decision. Furthermore, you define the debate on your terms — refusing to merely respond to the agency's actions — and establish a solid administrative record, thus making easier the inherently difficult task of challenging the decision on appeal or through the courts.

To help you, this guide condenses a significant amount of information into a single source. Each chapter is designed to stand alone, leading to quick and easy access to necessary information without compromising depth of detail. This means that some information and some suggestions are repeated in different places. You don't have to read the guide from front to back; simply go to the chapter that interests you the most.

Although the guide is lengthy, keep in mind that many decisions take years to reach, the issues you will face are often wildly disparate, small opportunities to change BLM decisions abound that in total can have a powerful effect, and, finally, many issues, although not charismatic or politically cogent in the near term, have significant implications over the long term. The guide attempts to establish a basic framework that is helpful and sufficiently flexible in any situation you might encounter to ensure long-term protection of our public lands.

The guide builds from the premise that the health and ecological integrity of our public lands is fundamentally linked to the health and integrity of our democratic processes. The importance of the land's health and ecological integrity is most eloquently expressed in the sage writings of Aldo Leopold, who, in postulating a "land ethic," declared:

> A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.[2]

The link to democratic processes, predicated on undisputed American political values, is also an element of Leopold's land ethic. The land ethic looks at the land and, just as importantly, at humanity's relationship to the land and to itself, bridging the alleged divide between people and nature. As Leopold explains in the foreword to *A Sand County Almanac*:

> We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect. There is no other way for land to survive the impact of mechanized man, nor for us to reap from it the esthetic harvest it is capable, under science, of contributing to culture.
>
> That land is a community is the basic concept of ecology, but that land is to be loved and respected is an extension of ethics. That land yields a cultural harvest is a fact long known, but latterly often forgotten.[3]

Thus, to effectively move into the future, the task is legal, legislative, economic, scientific, and perhaps most significantly, as suggested by Leopold, cultural.

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[2] Aldo Leopold. *A Sand County Almanac* p. 262 (1966).

[3] *Id.* Pp. xviii-xix (1966).

Chapter I.
The Nuts and Bolts of Public Lands Advocacy

Questions and Answers

What are the public lands?

At one time or another, the federal government "owned" nearly all of the lands that now form the western United States. To encourage settlement, and the formation of new states, Congress enacted a variety of laws to dispose of these public lands. Many passed from the federal government's hands, but millions of acres were retained in trust for the American people. These lands are generally known as public lands and are managed by several federal agencies, most notably the Bureau of Land Management (BLM), U.S. Forest Service, National Park Service, and U.S. Fish and Wildlife Service.

The focus of this guide is on the public lands managed by the BLM. Historically, these lands were tragically under-protected, but we now recognize them as a key element of a broader network of ecologically important wildlands.

Public lands administered by the BLM presently consist of 262 million acres located principally in Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.[4] These lands provide significant conservation, recreation, and commercial values. They contain 2.7 million acres of lakes, 116,000 miles of fishable streams, 23 million acres of riparian and wetland habitat, 182 million acres of big game habitat, 213 million acres of small game habitat, and 30 million acres of waterfowl habitat.

Many of these lands protect and preserve our natural and cultural heritage, including 15 National Monuments on 4.7 million acres; 15 National Conservation Areas on 14.4 million acres; 148 Wilderness areas on 6.3 million acres; 604 Wilderness Study Areas on 17.2 million acres; 36 Wild and Scenic Rivers covering 1 million acres and 2000 miles; and National Scenic and Historic Trails extending 4200 miles. These conservation values are weighed against commercial uses such as grazing, logging, and the development of energy resources.

In recent years, recreational pursuits, including hiking, camping, hunting, fishing, rafting, kayaking, mountain bike riding, and off-road vehicle (ORV) use, have become highly visible issues on BLM public lands. Note too that the BLM is entrusted with responsibilities for the entire onshore federal mineral estate, not just the minerals on BLM public lands.

What is the Bureau of Land Management?

The BLM is a federal agency, more specifically a bureau within the federal Department of the Interior. Historically, the BLM and its administrative precursors were predisposed to allow damaging uses of the public lands, generally for commercial gain. Other land management agencies, especially the National Park Service and U.S. Fish and Wildlife Service, were viewed as the conservation agencies.

The tendency to favor damaging resource extraction began to change in 1934 with passage of the Taylor Grazing Act. A more significant shift occurred with passage of the National Environmental Policy Act of 1969 (NEPA) and Federal Land Policy and Management Act of 1976 (FLPMA).

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[4] All facts derived from the U.S. Department of the Interior, Bureau of Land Management, *Public Land Statistics* (2000 and 2001).

NEPA obligates the BLM to think carefully about public land management and how management impacts the land. FLPMA grants the BLM organic management authority; in other words, a fundamental mission. This mission is intrinsically rooted in conservation, although not without qualification (Chapter IV.B).

How does the BLM manage the public lands?

The BLM manages the public lands under a complicated set of laws and policies (Chapter III]) that are applied through a relatively basic process. First, the agency collects information (Chapter V). Second, the agency develops plans and in conformance with those plans, makes specific management decisions (Chapter VI.C.3). Third, once the plans and decisions are finalized, the agency carries out the decisions. The entire process is designed to be cyclical: once a plan or decision is implemented, the agency collects information about on-the-ground results and consequences, using that new information to determine whether the underlying plans and decisions need to be revised or amended.

What is the basic philosophy of public land management, and what role does conservation play?

The BLM manages the public lands under the general philosophy of multiple use and sustained yield (Chapter IV.B). Multiple use and sustained yield have long been maligned and, in general, misinterpreted and misapplied by interests hostile to conservation. However, multiple use and sustained yield are grounded in conservation. Under these principles, the BLM is directed to optimize the public good, giving equal footing to conservation, recreation, and commercial values. The agency is also obligated under all circumstances to take any action needed to prevent unnecessary or undue degradation of the public lands (Chapter IV.C).

What is land-use planning, and why is it important?

Land-use planning, called resource management planning in the BLM's vocabulary, establishes goals, objectives, and standards for a prescribed planning area (Chapter VI). Once developed, the plan itself, called a Resource Management Plan (RMP), identifies which lands are preserved, which lands can be used under restrictive conservation-oriented provisions, and which lands are available for more intensive commercial exploitation. Land-use planning is important because it is arguably your best opportunity to achieve long-term protection for the land. Notably, once an RMP is completed, it must be implemented — a process that takes place consistent with NEPA (Chapter VII).

What objectives should you pursue in the land-use planning process?

As a general proposition, ensure that the RMP is focused on protecting, not exploiting, the public lands. Although the specific actions you can take are infinite, three general objectives should be considered (Chapter VI.C.4). First, try to establish a conservation-oriented vision for the entire planning area. This vision may not be minutely detailed, but it nevertheless plays an important role in defining the type and nature of all site- and issue-specific decisions designed to implement the RMP.

Second, establish an enforceable adaptive ecosystem management (AEM) program. In basic terms, AEM accounts for scientific uncertainty, allowing us to learn from our actions and modify those actions accordingly.

Properly structured, AEM can also provide the means to enforce the conservation-oriented elements of the RMP. Third, build coalitions. Your use of laws and policies is undermined if you are unable to achieve broad public support. Use the RMP planning process to communicate your message to important stakeholders and communities.

What role does the public play in managing the public lands?

The public plays an incredibly important role: the BLM must involve the public in a host of management planning and decision-making processes (Chapter II). In general, this includes land-use planning and implementation of land-use plans and also the ability to challenge decisions through appeals and litigation (Chapter VIII). Use public involvement as a bullhorn for your objectives. Recognize that in a hostile political environment, your ability to participate in public land management is likely to come under fire.

What is the National Landscape Conservation System (NLCS)?

The NLCS is a system of land units managed for the express purposes of preservation and conservation (Chapter IV.D.5). The system is composed of six different types of land units: Wilderness, Wilderness Study Areas, National Monuments, National Conservation Areas, Wild and Scenic Rivers, and National Historic and Scenic Trails. Each of these units is managed under a separate underlying legal authority that provides different types of use and protection. Defending the NLCS is a key tool to protect public lands, define a positive and proactive campaign, and reform the BLM so that the agency is more accountable for preservation and conservation.

How do you go about participating in the planning and decision-making processes, and how do you review and comment on agency proposals?

Work thoughtfully but aggressively. Assess your resources and capabilities and think about how the process can either aid or impair your work to achieve your objectives. Act proactively to define the debate; don't allow the BLM or interests that are hostile to conservation goals set the parameters (Chapter VII.C.2).

How does the agency collect information and make sure that management decisions are consistent with current conditions and circumstances?

The BLM must conduct inventories of the lands and resources it manages on a continuing basis (Chapter V.C). The inventories are used in the land-use planning process. After land-use plans are completed and implemented, the BLM should continue to conduct inventories. Monitoring and evaluation information acquired during implementation of specific management prescriptions complements the inventory information (Chapter V.D, E). Combined, the information should be used to determine whether management activities conform with the land-use plan and the BLM's various legal obligations (Chapter VI.C.3.c). In certain instances, information can trigger mandatory action on the part of the BLM; for example, the agency may be compelled to halt activities that degrade the land and return to the planning drawing board (Chapters V.E, VI.C.6, and VII.B.5).

Is it futile to advocate for conservation in a hostile political climate?

No!
It is critical to advocate for conservation on the public lands, especially in a hostile political climate. You hold considerable power to counter environmentally adverse decisions, define the public land conservation debate, and achieve conservation victories. Work thoughtfully, unrelentingly, diligently, and creatively.

How do you challenge an environmentally adverse agency action?

You may pursue a number of avenues to challenge adverse agency actions, depending on the type and nature of the underlying decision (Chapter VI.C.3.b). The three basic types of challenges are protests, appeals, and litigation (Chapter VIII). A protest essentially requests the BLM to reconsider its decision. An appeal is a request to the Interior Board of Land Appeals (IBLA) to review an issue similar to the way a court would, although the IBLA is housed within the Department of the Interior and has more limited review powers. Litigation is a challenge to an agency action — including an IBLA decision — that is brought in the courts. Challenges of all types should be used judiciously as part of broader campaigns.

What roles do science and economics play in public lands management?

Science and economics are infused into all public land management planning and decision-making, though often with uncertain results. Work closely with scientists and economists to craft arguments and objectives and cultivate experts over the long term to ground your advocacy with credible, objective, and justifiable information. The BLM must respond to your scientific and economic arguments and consider them in the planning and decision-making processes.

What if the BLM isn't doing anything, but the land is still being degraded?

Just because the agency does not take affirmative action to protect the land and, in so doing, passively allows degradation to occur, does not mean that you are without recourse. When the BLM fails to meet its conservation responsibilities, it may be time to challenge the agency (Chapter VIII). To enhance your credibility and chances for success, first go through relevant internal administrative channels. Sometimes, just a phone call or strongly worded letter will be sufficient to prompt agency action. In the event that these channels prove fruitless or futile, consider other options, including appeals and litigation. Ultimately, the action you take should eventually lead to enhanced protection of the land. Remember to place challenges of agency actions in the context of a broad, integrated, strategic campaign.

Chapter II.
Public Participation

A. The Importance of Public Participation

Public participation is premised on the idea that the pursuit of the public interest should not be the "exclusive preserve of a professional bureaucracy."[5] Participation in the BLM's planning and decision-making processes can take multiple forms. You can comment on plans and decisions, protest Resource Management Plans, appeal implementation decisions through administrative channels, or go to the courts with citizen suits. As public servants, BLM personnel should respond to your concerns, although ultimate responsibility for management falls on the BLM's shoulders.

How much time and energy you invest in public involvement requires a

Key Recommendations

- Use opportunities for public participation to achieve objectives and establish long-term relationships. Public participation should be viewed as an opportunity not just to protect the land, but to engage fellow stakeholders, the government, and the broader community to get them on board your campaign.
- Keep an eye on the ball. Participation in BLM planning and decision-making processes is often incredibly complex. Do not lose perspective. Keep an eye on the relationships and basic elements of public lands management and integrate big picture thinking into your efforts.
- Understand the BLM's thought process. Recognize how the BLM thinks and makes decisions. An understanding of bureaucratic processes, although not sexy, is absolutely critical to effective advocacy. Don't let the agency trap you in a maze of bureaucratic processes.
- Recognize that the BLM is highly decentralized. Planning and decision-making is largely carried out at the field office level, and field offices are responsible for determining how to carry out broad, agency-wide initiatives on the land. This presents you with both risk and opportunity.
- Sign on to the BLM's mailing and notification lists for the issues and areas that interest you. This keeps you informed of the agency's official happenings, but don't rely exclusively on mailing and notification lists. Anticipate and be aware of decisions and events before they are formally announced.
- Obtain relevant planning and decision-making documents along with underlying administrative records. These materials can provide the basis for determining critical management issues, identifying potential solutions to those issues, obtaining baseline data to gauge trends and pinpoint information gaps, and understanding the agency's internal management "momentum."
- Use public processes to define the parameters of the administrative record. Make use of opportunities for public input to develop the administrative record for individual plans and decisions, even where participation otherwise appears futile. This is important because future judicial review of the agency action, if challenged, is generally limited to the administrative record that was before the agency at the time the decision was made, and you must establish your standing to challenge any action through appeal or litigation.
- Use special land designations: invest heavily in public processes involving special land designations (for example, National Monuments and Wilderness). These land designations provide the most protection and are tied to the strongest substantive legal provisions — provisions that must be reflected within the administrative record for a particular plan or decision.

[5] Joseph Sax, *The People, No — Environment and the Bureaucracy, The New Republic*, June 19, 1971, quoted in Michael D. Axline, *Environmental Citizen Suits* 1-7 (2000).

clear delineation of what is and is not possible in a given situation. In this regard, an understanding of law and policy — and where the BLM does and does not have flexibility — is important. Law and policy establish a defined, finite decision space, but there is ample room for adaptation to achieve broad public buy-in to a particular plan, decision, or program.

The Federal Land Policy and Management Act (FLPMA) and National Environmental Policy Act (NEPA) establish an unequivocal directive to intensively involve the whole public (not merely a subset thereof) in the management of the public lands. Public involvement is the hallmark of a transparent, accountable, and credible agency, and it includes more than simply the opportunity to comment on a proposed plan or decision. It provides the opportunity to *participate* At all times, encourage the BLM to involve the public more effectively and work toward collaborative solutions (see Note on Collaboration in the box on page 7). Recognize that public involvement provisions in FLPMA and NEPA may obligate the agency to provide information and respond to public input even when a traditional notice and comment process is not underway.

FLPMA contains the primary authority for public participation. Section 1739(e) states that:

> In exercising his authorities under this Act, the Secretary [of the Department of the Interior], by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.[6]

Section 1739(e) is linked to section 1712(a) and (f). Section 1712(a) obligates the BLM to develop, maintain, and revise Resource Management Plans only "with public involvement."[7] Section 1712(f) fleshes out this duty in more detail:

> [t]he Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.[8]

Public involvement is defined in section 1702(d) of FLPMA as:

> the opportunity for participation by affected citizens in rulemaking, decision-making, and planning with respect to the public lands, including public meetings or hearings at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance.[9]

FLPMA's public participation provisions absorb the basic framework of NEPA. In its declarations of policy, NEPA states that it is the continuing policy of the federal government to cooperate with "concerned public and

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[6] 43 U.S.C. § 1739(e).

[7] 43 U.S.C. § 1712(a).

[8] 43 U.S.C. § 1712(f).

[9] 43 U.S.C. § 1702(d).

private organizations."[10] Under NEPA, the BLM must make all environmental impact statements and the comments and views of federal, state, and local agencies available to the public.[11] And the agency must "make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment."[12]

The Council of Environmental Quality developed a comprehensive set of implementation regulations for NEPA that detail how federal agencies must engage the public. Section 1500.1(b) of the Council's regulations states that:

> NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.[13]

The regulations further require the BLM "to the fullest extent possible … implement procedures to make the NEPA process more useful to decisionmakers and the public"[14] and furthermore to "encourage and facilitate public involvement in decisions which affect the quality of the human environment."[15]

A note about collaboration

Collaboration and consensus-building among various entities concerned about the public lands are often fruitful. But collaboration also has several pitfalls. In particular, some may use collaboration to preserve the *status quo*, dilute definitive management obligations, and weaken conservation initiatives. You should obtain a copy of "Collaboration: A Guide for Environmental Advocates" published in 2001 by the University of Virginia's Institute for Environmental Negotiations, The Wilderness Society, and National Audubon Society,[16] a highly informative source. In general, follow these guidelines:

- Collaboration must promise to preserve and enhance environmental protection.
- Representation should be balanced, include the broader public, and reflect the fact that public lands are part of our local, regional, and national heritage.[17]
- The process establishes defined goals and is fair and effective.
- You (or your organization) are ready and able to participate.
- Decisions are based on an objective analysis of the socioeconomic and ecological conditions — past, present, and potential — of the landscape, not the limited and often arbitrary judgment of those few seated at the table.
- The process respects and adheres to environmental and public participation laws.

Effective decisions reached through collaboration are those with legitimacy and credibility, that can be implemented fully, and that can be monitored to ensure the results are what were intended.

[10] 42 U.S.C. § 4331(a).

[11] 42 U.S.C. § 4332(C).

[12] 42 U.S.C. § 4332(G).

[13] 40 C.F.R. § 1500.1(b).

[14] 40 C.F.R. § 1500.2(b).

[15] 40 C.F.R. § 1500.2(d).

[16] The guide can be requested from the University of Virginia or downloaded at http://www.virginia.edu/ien/ien_project.

[17] The National Park Service in its 2001 management policies eloquently articulated the importance of public lands to the nation as a whole. See U.S. Department of the Interior, National Park Service, *Management Policies* § 1.4.3 (2001).

B. The General Process

Public efforts to watchdog the BLM are essential to ensure that the BLM carries out its planning and decision-making obligations in a responsible and proper fashion. To be most effective in your advocacy, it is necessary to have an informed understanding of the BLM's legal framework, which consists of procedural and substantive components. Procedural components direct the process by which a decision is made. Substantive components dictate the content of the decision. This guide helps you link process with content to protect our public lands. The importance of this linkage cannot be overstated: it is a fundamental principle of our democratic process.

The BLM's planning and decision-making processes comprise a three-step cycle that includes public involvement in each step (Figure 1).

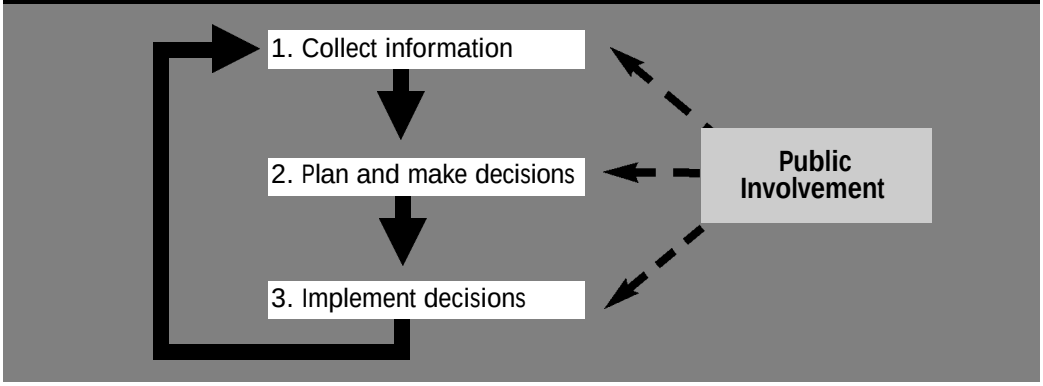
Collect information. Information is used to determine the values and conditions of the land. Sometimes, the information is collected as part of the BLM's ongoing responsibility to inventory the public lands. Other times, the information is collected in response to a proposed action.

Plan and make decisions. The BLM must analyze and apply collected information within a planning process that evaluates potential or proposed actions and their benefits or costs. This process provides for the disclosure of the direct, indirect, and cumulative impacts of actions that affect the environment. The plan — through the study of alternatives and environmental impacts — presumably allows the BLM to make reasoned and informed decisions. These decisions are sometimes contained within the plans. Sometimes they are made after the plan is completed but in conformance with the plan.

Implement decisions. Decisions are carried out. The BLM must ensure that the decisions conform to the plan and all environmental analyses throughout the lifetime of the action and also the lifetime of the impacts caused by the action.

Though simplistic, this process is extremely important: it forms (or should form) the procedural basis for all land management. Once a plan is completed and decisions are made and implemented, the BLM (hopefully) monitors and evaluates actions and their impacts across time to ensure that the actions still conform to the plan. The BLM compiles information that results from monitoring and evaluation and feeds it into the agency's ongoing inventory responsibilities. The information may necessitate a re-evaluation of existing plans and decisions, adjustments (amendments) of plans and decisions, or a full revision of

FIGURE 1.
The BLM Management Process



plans and decisions. Properly constructed and implemented, this process can form the basis of a sound adaptive ecosystem management (AEM) program that accounts for uncertainty and puts the health and integrity of the landscape first.

Plans and decisions are made and completed at a variety of geographic and time scales. Individual plans and decisions may reference separate but related plans or decisions developed earlier in time or developed at a broader spatial scale. This is called *tiering* and it allows the BLM to operate efficiently, eliminate redundancies, and study and make decisions at the proper place and time. In practice, however, the interplay between these plans and decisions is often incoherent and can be used by the agency to hide management failures, justify poor decisions, and insulate itself from criticism. In this sort of shell game, it is difficult to determine exactly when, where, how, why, and if a decision was actually made. This reinforces the need for sustained, informed, and vigorous public advocacy.

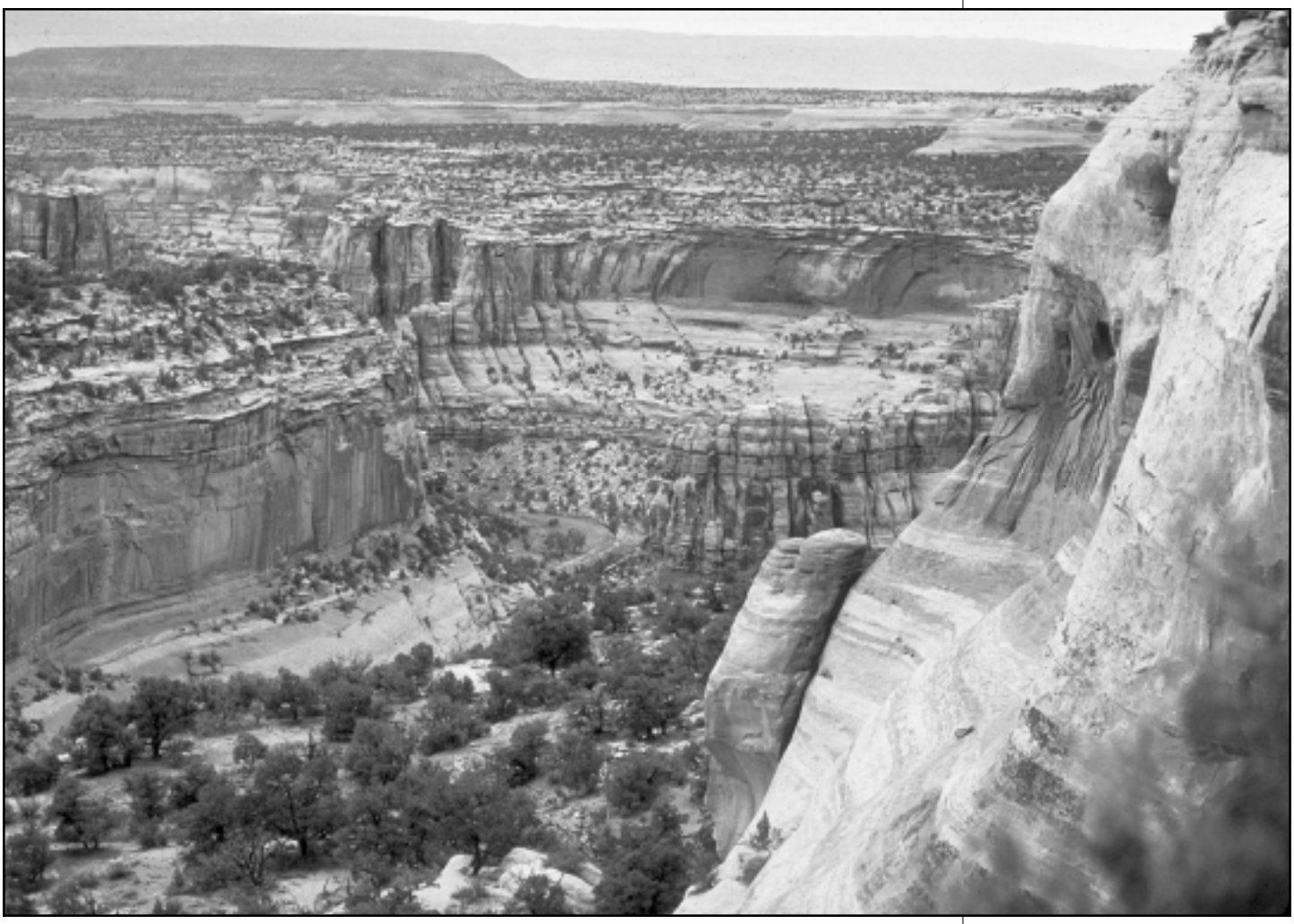


PHOTO COURTESY BLM

Mee Canyon, Colorado
Canyons National
Conservation Area, Colorado.

C. The Administrative Record

Law and policy can be highly complex, but you do not have to be an attorney to affect positive change. It is more important to know how to use place-based information to force the BLM to take a specific conservation action. Much of this involves the administrative record, which is vital to grassroots advocacy. If a BLM decision is overturned, it is usually because of information in the record.[18]

An administrative record is a simple concept. For every decision that the BLM makes, there is an administrative record — accumulated information used to make the decision. The information includes written documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic and other tapes, electronic data-processing records, or other documentary studies, regardless of physical form or characteristics. The administrative record includes information that supports the selected decision and information that does not support the selected decision. Note that the administrative record may be scattered and not necessarily kept in a single file drawer or specific BLM office.

For the BLM, the administrative record establishes the baseline values and conditions of the land and informs the agency as to the best possible management decision. The core of the administrative record for most decisions consists of the Resource Management Plan and related activity-level plans, decisions, and environmental analyses. Inventory, monitoring, and evaluation data used to make the decision are also essential components of the administrative record. Perhaps most importantly, public input is a part of the administrative record. And don't forget that special land designations such as Wilderness, Wilderness Study Areas, Wild and Scenic Rivers, National Monuments, and Areas of Critical Environmental Concern provide a wealth of information that should contribute to the administrative record. Often, the decision to designate the special unit resulted in a fairly in-depth and comprehensive discussion of the values of the area and the threats to it. In addition, the management unit may be a focus of more intensive monitoring and evaluation because of its sensitivity.

From an advocacy perspective, all of this information provides a powerful means to leverage protective action. The first step is to sign onto official government mailing and notification lists to receive ongoing planning and decision-making activities that are relevant to your issue or place. Second, obtain existing core data and the specific planning and decision-making documents, including their underlying administrative records, for decisions relevant to your objectives. Third, track and participate in BLM planning and decision-making processes — complementing your knowledge of a particular area with the information used by the agency — to load the administrative record for future decisions with conservation-oriented information. This optimizes your ability to achieve sound decisions, whether in the decision-making process or through a challenge to the decision once it is final.

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[18] Legal counsel can help you understand how to effectively collect and leverage information to challenge adverse agency actions. Challenges to agency actions pursuant to the Administrative Procedures Act of 1946 (for example, a NEPA challenge) are usually, but not always, limited to the administrative record. However, a citizen suit brought pursuant to, for example, the Endangered Species Act or Clean Water Act is not necessarily limited to the administrative record for a particular decision, although any records related to relevant decisions or actions addressed in the suit will be extremely important.

D. Petitions

Even if the BLM is not engaged in a public planning or decision-making process, you can petition the agency through a formal, written document at the national, state, or field office level to take a specific action. The range of options is wide. For example, you can ask the BLM to close a road to protect wilderness-quality lands, wildlife habitat, rare plant species, or an important archeological site. A petition must be adequately justified, containing pertinent legal provisions and appropriate factual documentation. Do not send the BLM a frivolous or poorly researched petition. If your petition is well reasoned, the BLM may grant your request or, as is more often the case, your petition will spark an open public process that deals in some fashion with your proposal. Thus, before preparing a petition think through how the agency will respond and whether or not the response will actually help you. And follow up on your petition. At times, it may seem as if your petition was never even received, so it is important to track its progress at the agency.

Structure your petition, and any other written correspondence, in four basic parts:

Background: Briefly summarize the context of your petition. Specify, up front and in detail, the exact actions you are asking the BLM to take. Give basic background information concerning the place or issue at the center of your request. Include a table of contents and headings so that the petition is easily accessible and understandable to the reader.

Statement of Reasons : Justify your request by integrating documented evidence with applicable law and policy.

Conclusion: Conclude with a concise summary of your request.

Appendices: Attach documentation that is otherwise difficult for the BLM to get. As one example, include photos that you have collected to document off-road vehicle impacts.

Before you take action, it's a good idea to have some understanding of the basic legal framework so you know what the BLM can and cannot do. That is the purpose of the rest of this guide.

Exceptional scenery and recreation opportunities characterize the Blackfoot River Corridor in Montana, part of an ancient Indian trail known as "Road to the Buffalo" that Captain Meriwether Lewis and his party followed during the Lewis and Clark expedition in the early 19th century. Today, this mountain river remains largely pristine through a management partnership that includes the BLM, other federal agencies, state government, and private landowners.

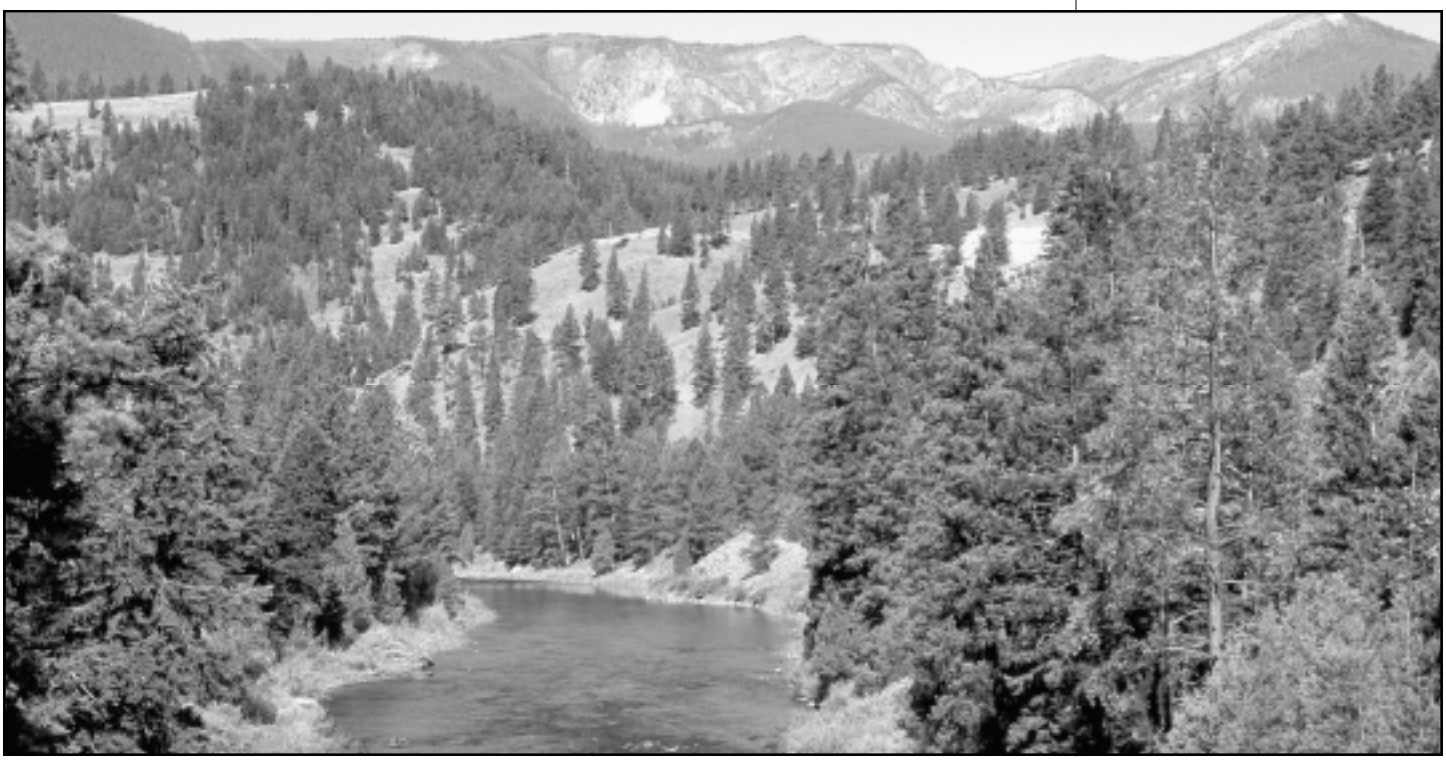

PHOTO COURTESY BLM

Chapter III.
The Legal Landscape: Preservation, Conservation, and Exploitation of the Land

The BLM's general management framework derives from and depends on multiple laws, regulations, manuals, executive orders, and quasi-judicial administrative opinions. To protect the land, it is important to understand how these laws and policies interact and how they restrict or empower the agency to take action. In general, note that while all law and policy should bind the BLM, this does not necessarily mean that you can enforce it against the agency.

The most important laws affecting the BLM, and the focus of this guide, are the Federal Land Policy and Management Act of 1976 (FLPMA) and the National Environmental Policy Act of 1969 (NEPA). Challenges of decisions made pursuant to FLPMA and NEPA are generally limited to the administrative record discussed in the preceding chapter, and therefore it is a good idea to become familiar with the mechanics of these laws.

Key Recommendations

- Become familiar with the mechanics of FLPMA and NEPA. These laws, the bread and butter of advocates for responsible public lands management, afford the BLM considerable discretion. But don't discount them. A sophisticated understanding of what they contain can make or break your advocacy efforts.
- Use powerful laws such as the Endangered Species Act (ESA) and Clean Water Act (CWA) to constrain the agency's broad discretion. Many national environmental and natural resource laws obligate the BLM to protect our land, air, and water. Use these laws to elevate the importance of conservation and environmental protection in planning and decision-making processes and to provide clarity to otherwise vague or ambiguous agency mandates.
- Leverage public involvement provisions aggressively and creatively to achieve objectives. How you accomplish this in a given situation depends on the situation's specific dynamics. Don't get trapped in a formulaic response mode: always think creatively. Be assertive in using public participation provisions: they provide you with the best opportunity to bring about change.

FLPMA obligates the BLM to manage the public lands for multiple use and sustained yield and to prevent unnecessary or undue degradation. Comprehensive land-use plans, called Resource Management Plans (RMPs), must be developed for all public lands, including, generally, each Resource Area, National Conservation Area, and National Monument. All activities must conform to the RMP.

NEPA requires the BLM to involve the public in the agency's decision-making process, consider alternatives to a proposed decision, and disclose the environmental impacts of each alternative. NEPA — and the Council on Environmental Quality (CEQ) regulations implementing NEPA — must be followed in developing an RMP and for all actions that implement the RMP.

The broader legal framework outside of FLPMA and NEPA is critical, but is given less attention by this guide. It is helpful to view these other laws as falling into one of four categories.

Preservation/Conservation-Based Land-Use Laws. This category includes, for example, the Wilderness Act of 1964, the Antiquities Act of 1906, and the Wild and Scenic Rivers Act of 1968. These laws establish special protections for geographically specific areas, most of which are components of the National Landscape Conservation System (discussed below).

Protection-Based Environmental Laws. This category includes, for example, laws such as the Endangered Species Act of 1973, National Historic Preservation Act of 1966, Clean Water Act, and Clean Air Act. It also includes Executive Orders, in particular Executive Orders 11644 and 11989 that are designed to protect public lands from

recreational off-road vehicle use. These laws restrict development and guide the BLM in protecting the public lands from overexploitation.

Natural Resource Laws. This category includes, for example, the Mining Act of 1872, the Mineral Leasing Act of 1920, and the Taylor Grazing Act of 1934. These laws establish specific mechanisms for the extraction and use of resources on public lands by the private sector.

State Law. State law is also vitally important. The most significant example is water resources law, a blend of federal and state statutes that deal with issues of both quantity and quality. Water resources law cannot be ignored: water, as the lifeblood of the West, is vital to the health and integrity of the landscape and is an inseparable component of all (market and non-market) resource values. Fundamentally, in relation to quantity and quality, the federal government holds untapped authority over water and will likely play an instrumental role in shaping water resources law.

These laws, and the BLM's general management process, are not merely abstract constructs. They have a profound impact on what the land actually looks like. The BLM, through the management process — in particular the resource management planning process — identifies which lands should be preserved, which lands should be used under restrictive, conservation-oriented provisions, and which lands are readily available for more intensive exploitation such as the extraction of energy resources. In other words, the public lands are subject to a complicated overlay of provisions and programs that we must try to reconcile in determining how to best achieve conservation objectives.

Special attention should be given to the variety of protective management units that the BLM is required to conserve, if not preserve, into perpetuity. The BLM manages most of these units as a comprehensive system called the National Landscape Conservation System (NLCS), composed of six types of management units described below, each with its own underlying authority.

Wilderness. Passage of The Wilderness Act of 1964 charted a new course in the history of nations: preservation of some of this country's last remaining wild places to protect their natural processes and values from exploitation.[19] Wilderness affords the highest degree of protection on public lands managed by the BLM and the other federal land management agencies. Wilderness is managed according to the specific authorizing legislation for a particular Wilderness area and, in general, the principles of The Wilderness Act. All Wilderness managed by the federal government, regardless of agency, constitutes a single system — the National Wilderness Preservation System. Congressionally designated Wilderness managed by the BLM currently comprises 6.3 million acres in 148 areas.[20]

Wilderness Study Areas (WSAs). WSAs protect wilderness-quality lands pending their official designation as Wilderness or release to general management. The decision to designate or release WSAs is a congressional, not agency, prerogative. FLPMA required the BLM to complete an initial inventory of wilderness quality lands,[21] but the agency conducted that process hastily and, in many instances, failed to include millions of acres of land suitable

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[19] The Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136. See also The Wilderness Society, *Wilderness Act Handbook* (2001).

[20] U.S. Department of the Interior, Bureau of Land Management, *Public Land Statistics 2001*, Table 5-4.

[21] 43 U.S.C. § 1782.

for permanent protection as Wilderness. New wilderness inventories are underway to correct earlier failures and determine whether or not conditions have changed since the initial inventory.[22] Once designated for study, WSAs are given interim protection.[23] Currently, the BLM manages 604 WSAs on 17.2 million acres.[24]

National Monuments. National Monuments are established by the President, under the authority of the Antiquities Act of 1906, and sometimes by Congress. They protect critical "objects of historic and scientific interest."[25] The National Park Service manages most of the more than 100 National Monuments that have been designated since 1906. But in 1996, Congress designated the BLM as manager of the newly established Grand Staircase-Escalante National Monument in Utah. The agency now manages a total of 15 National Monuments on more than 4.7 million acres.[26]

National Conservation Areas (NCAs). These areas provide for the conservation, use, enjoyment, and enhancement of certain natural, recreational, paleontological, and other resources, including fish and wildlife habitat. NCAs are established by acts of Congress, and the legal mandates for each NCA vary widely. It is therefore necessary to obtain and understand the enabling legislation for each NCA to gauge what types of actions are or are not appropriate. The BLM administers 15 NCAs on 14.4 million acres.[27]

Wild and Scenic Rivers . The Wild and Scenic Rivers Act of 1968, by protecting qualified rivers and adjacent lands, is a powerful tool to protect free-flowing rivers with outstandingly remarkable natural and cultural values.[28] The Wild and Scenic Rivers Act protects 2,000 miles of river and one million acres of adjacent lands managed by the BLM,[29] in one of three classifications:

- Wild river areas — those rivers or sections of rivers free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.
- Scenic river areas — those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and

[22] 43 U.S.C. §§ 1711(a), 1712 (continuing obligation to inventory and protect wilderness quality lands). See also Erik Schlenker-Goodrich, *The Bureau of Land Management's Continuing Obligation to Inventory and Protect Wilderness Values: A Citizen's Reference Guide*, The Wilderness Society (2002), available at www.wilderness.org.

[23] For interim management protections, see U.S. Department of the Interior, Bureau of Land Management, *Interim Management Policy for Lands Under Wilderness Review*, H-8550-1 (January 1, 1995), http://www.ut.blm.gov/wilderness/wimp.html.

[24] U.S. Department of the Interior, Bureau of Land Management, *Public Land Statistics 2001*, Table 5-5.

[25] The Antiquities Act of 1906, 16 U.S.C. §§ 431-433.

[26] U.S. Department of the Interior, Bureau of Land Management, *Public Land Statistics 2001*, Table 5-2.

[27] *Id.* at Table 5-3.

[28] The Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271-1287.

[29] U.S. Department of the Interior, Bureau of Land Management, *Public Land Statistics 2001*, Table 5-6.

shorelines largely undeveloped, but accessible in places by roads.

- Recreational river areas — those rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.

National Scenic and Historic T rails. The National Trails System was established in 1968 by the National Trails System Act.[30] These trails, more than 4,200 miles in all, help meet growing demand for outdoor recreation and promote the preservation of, public access to, travel within, and enjoyment and appreciation of the nation's open air, outdoor areas, and historic resources.[31] On BLM lands, this important system of trails is composed of two different types of units and a series of connecting and side trails:

- National scenic trails — extended trails that emphasize outdoor recreation potential and aid in the conservation and enjoyment of the nationally significant scenic, historic, natural, or cultural qualities of the desert, marsh, grassland, mountain, canyon, river, forest, and other areas and significant landforms through which such trails pass.
- National historic trails — original travel routes or trails of historic significance.

A Note about Alaska

This guide is designed to be helpful across the nation, including for people and organizations at work on issues in Alaska. However, it is important to keep in mind that federal land management in Alaska is heavily influenced by a series of Alaska-specific laws, in particular the Alaska National Interest Lands and Conservation Act of 1980 (ANILCA, applicable across Alaska) and the Naval Petroleum Reserve Production Act of 1976 (applicable to the 23 million-acre National Petroleum Reserve-Alaska managed by the BLM). Conservation advocates in Alaska are advised to acquire The Wilderness Society's "Citizen Guide to ANILCA."[32]

Both FLPMA and NEPA are applicable in Alaska, including FLPMA's basic mandate to conduct resource management planning. In the context of planning, one critical value, Wilderness, is inventoried and studied at the discretion of the Secretary of the Department of the Interior (except for the Central Arctic Management Area).[33] In 1981, then-Secretary of the Interior James Watt exercised that discretion to prevent wilderness inventories and studies. In 2001, then-Secretary of the Interior Bruce Babbitt rescinded the Watt directive, thereby initiating wilderness inventories and studies as part of the planning process.

Note that resource extraction or use is not automatically prohibited on lands in the NLCS. Again, you must examine the specific management prescriptions for each management unit. Often, the prescriptions are the result of political compromise and differ between units that otherwise share the same broad designation. The prescriptions are found in a variety of sources, including statutes, executive orders, regulations, agency policies, the land-use plan for the management area, implementation-level decision documents, and court decisions.

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30 The National Trails System Act of 1968, 16 U.S.C §§ 1241-1251.

31 U.S. Department of the Interior, Bureau of Land Management, *Public Land Statistics 2001,* Table 5-7.

32 Allen E. Smith, Michael Anderson, Heather Kendall-Miller, Peter Van Tuyn, *Alaska National Lands Conservation Act Citizen's Guide*, The Wilderness Society (2001).

33 Pursuant to ANILCA sections 1001 and 1004 (16 U.S.C. §§ 3141, 3144), the Central Arctic Management Area is managed as a WSA, 41,000 acres of which was recommended for wilderness designation by the BLM, although that recommendation was never forwarded to the Secretary of the Department of the Interior.

Chapter IV.
The BLM's Core Policy Framework

This chapter is an overview of the BLM's core responsibilities, emphasizing restraints on the agency's planning and decision-making processes. In many respects, these restraints have been ignored or diluted to accommodate political circumstances. More often than not, this has resulted in environmental degradation. The BLM's core legal authority and mission are broad, and all activities must fall beneath that large umbrella. Conservation advocates can help define the parameters of the umbrella to achieve long-term conservation objectives. In particular, federal laws such as The Wilderness Act, Clean Water Act, and Endangered Species Act are useful to define green-tinged boundaries of the agency's authority and mission.

Key Recommendations

- Assert the BLM's fundamental conservation mission. The BLM must protect the public lands to ensure their use by current and future generations. While the agency can allow degrading activities, its discretion is not limitless. Moreover, the agency holds considerable — but underused — authority to restrict environmentally adverse activities on the public lands to protect the land and its flora and fauna.
- Carefully assert the agency's duties to prevent permanent impairment and unnecessary or undue degradation. There is considerable opportunity to leverage these provisions to enact change. Work cautiously, however, to avoid setting a negative precedent that impedes the work of others.
- Work to infuse Land Health Standards and Guidelines into all BLM management areas. The BLM, in reforming its rangeland management policies, adopted a watershed management approach that emphasized fundamentals of rangeland health. Each BLM state office adopted the resulting Land Health Standards and Guidelines. The standards and guidelines have considerable landscape-level implications and should be applied to all program areas, not just rangeland management.
- Use Areas of Critical Environmental Concern (ACECs) to force the agency to make consideration of environmental values a priority. ACECs provide you with a dynamic tool to elevate environmental protection. The BLM must prioritize ACEC designation and management. Given the fact that the agency has considerable discretion in this area, do not put all of your eggs in one basket. Use ACEC policies to get your foot in the door while contemporaneously employing other conservation tools.
- Use the National Landscape Conservation System to root the BLM in the fertile ground of conservation. The NLCS presents the BLM with the opportunity to shift course in accord with overwhelming public sentiment that the public lands should be protected. However, the nuances of the debate are more complicated. The NLCS can be used to develop a positive, proactive agenda. That said, anticipate arguments that undermine the protections within the NLCS or that assert too many lands are already protected.
- Don't tilt at windmills. While this guide outlines a progressive management framework that the BLM should heed, the agency will paint a different picture. Given the deference afforded to the agency by decision-makers in Congress and by the courts, it is important for you to consider whether or not advocating for a given position will succeed. Choose the tools that will bring you closest to achieving your objectives and don't forget the importance of investing in the long-term evolution of law and policy.

A. Core Management Policies

The BLM's mission stems in part from a series of policy directives in the Federal Land Policy and Management Act of 1976 (FLPMA). These directives are generally construed as binding and effective, giving focus and direction to all BLM planning, decision-making, and public involvement. They are also solidly rooted in conservation.

1. BLM Public Lands Are Retained in the National Interest

The BLM manages the public lands in trust for present and future generations of all Americans whether or not they live in the vicinity of the public lands. Management is based on two key policy declarations in FLPMA. First, Section 1701(a)(1) declares that the federal government will retain ownership of the public lands.[34] Second, Section 1701(a)(2) highlights that two of the principle management activities — inventories and land-use planning — carried out on the public lands are intended to realize the "national interest."[35]

Retention of the public lands in the national interest confirms that our public lands and their values and resources are a fundamental aspect of our local, regional, *and* national heritage. The BLM's responsibilities in managing the public lands are analogous to the responsibilities inherent in a legal trust. The trustee (the BLM) holds a fiduciary duty to manage the trust's assets (the public lands) for the benefit of all beneficiaries (current and future Americans).[36] Retention *and* its invocation of legal trust duties are critical justifications for the allocation of public lands to protect and conserve nationally undervalued or under-produced non-market goods, services, and values such as Wilderness.

2. Knowledge Is Important

FLPMA's policies emphasize the importance of knowledge. In section 1701(a)(2), the Act declares that the "national interest" is "best realized" through a periodic and systematic inven-

[34] In limited circumstances, consistent with the relevant land-use plan, the BLM can sell, transfer, or exchange public lands to state, local, or tribal governments or private parties. This is called "disposal" or "disposition." See, for example, 43 U.S.C. §§ 869 (conveyance for recreation and public purposes) 1713 (sales), 1716 (exchanges). However, relevant to the critical point in section 1701(a)(1), FLPMA settled a long-standing debate over the proper role of the federal government with regard to the public lands. Until 1934, the United States sought to dispose of most public lands to state and private entities. Passage of the Taylor Grazing Act of 1934 and subsequent executive withdrawals in 1934 and 1935, though leaving the disposal laws on the books, effectively ended disposal. Still, even the Taylor Act, in 43 U.S.C. § 315, provided that management would continue on the public domain only "pending its final disposal." FLPMA eliminated this provision, repealing most of the disposal laws — or providing a definitive end to their operation — and solidly affirmed the principle that the federal government holds a major role in protecting our nation's lands for the present and future benefit of all Americans. Note that some disposal laws are still viable, including the Desert Lands Act, and that FLPMA, as stated, allows limited disposal.

[35] 43 U.S.C. §§ 1701(a)(1), 1701(a)(2).

[36] Note that this relates to the public trust doctrine, an aspect of environmental law that works primarily at the state level, as well as general trust relationships. The public trust doctrine has not been extended to the federal level. Nonetheless, the legal duties inherent in the public trust doctrine and general trust relationships are informative as to the responsibilities of the BLM in managing the public lands and could, by reference, supply a court with well-established principles to review and judge BLM management principles.

tory of the public lands and their resources.[37] Inventories elicit information about the land, information that is necessary for the BLM to make reasoned and informed decisions.

Sections 1711(a) and 1782(a) of FLPMA implement the section 1701(a)(2) inventory provision. Section 1711(a) directs the BLM to complete and maintain a comprehensive inventory of the public lands on a continuing basis, while Section 1782(a) obligated the BLM to complete initial wilderness inventories and studies of BLM public lands by 1991.[38] Importantly, the BLM still carries out wilderness inventories and studies pursuant to inherent authority in sections 1711(a) (inventories) and 1712 (studies).[39]

The inventories must be incorporated into land-use plans: FLPMA declares that the "national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts."[40] FLPMA directs the BLM to conduct land-use planning consistent with a set of "goals and objectives … established by law" that operate as "guidelines" for the planning process.[41] The resource management planning process, detailed in section 1712 of FLPMA, obligates the BLM to use a "systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences."[42] This mandate is consistent with the BLM's duties under other statutes such as NEPA and the Endangered Species Act that obligate the agency to justify decisions with good science and only after a careful consideration of direct, indirect, and cumulative impacts.[43]

3. Multiple Use and Sustained Yield Drive Protection and Management

The knowledge acquired through the inventory process and applied in the land-use planning process allows the BLM to make reasoned and informed

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[37] 43 U.S.C. § 1701(a)(2).

[38] FLPMA obligated the BLM to complete the § 1782(a) wilderness inventory process by October 21, 1991. Although § 1782(a) no longer obligates nor authorizes a wilderness inventory process, wilderness inventories continue under the broader authority of § 1711(a), and Wilderness Study Areas can be designated through the resource management planning process of § 1712.

[39] U.S. Department of the Interior, Bureau of Land Management, *Wilderness Inventory and Study Procedures*, H-6310-1, http://www.blm.gov/nhp/efoia/wo/fy01/ib2001-043.html. See also Erik Schlenker-Goodrich, *The Bureau of Land Management's Continuing Obligation to Inventory and Protect Wilderness Values: A Citizen's Reference Guide*, The Wilderness Society (2002), available at www.wilderness.org.

[40] 43 U.S.C. § 1701(a)(2).

[41] 43 U.S.C. § 1701(a)(7). The planning guidelines are set forth in 43 U.S.C. § 1712(c)(1)-(9).

[42] 43 U.S.C. § 1712(c)(2).

[43] See, for example, 42 U.S.C. § 4332(1)(A) (requiring integrated consideration of the natural and social sciences and the environmental design arts in the NEPA process), 16 U.S.C. § 1533(b)(1)(A) (requiring that the listing of a species pursuant to the ESA be carried out solely on the "basis of the best scientific and commercial data").

management decisions. These decisions are made consistent with the management philosophy of multiple use and sustained yield.[44] The meaning of the multiple-use and sustained-yield doctrines is detailed on pages 22-27. This section highlights the legal framework that shapes how those doctrines should be interpreted.

The multiple-use and sustained-yield doctrines must be read in light of national environmental policies expressed in NEPA,[45] particularly Section 101 that directs:

> the Federal Government … to use all practicable means and measures … in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[46]

This section is closely related to section 1701(a)(8) of FLPMA, which, in underscoring the conservation-oriented intent and meaning of multiple use and sustained yield states that:

> the public lands [shall] be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.[47]

Fundamentally, Section 1701(a)(8) directs the BLM to preserve the capability of the land to satisfy human needs and desires, a principle reinforced by the definition of sustained yield in Section 1702(h). Although Section 1701(a)(8) gives the BLM a considerable amount of flexibility, use of the land should be prohibited if it sacrifices the land's underlying structure, function, and composition. Only in this way is the land's full capability preserved.

Notably, neither the Section 1701(a)(8) policy declaration nor the definition of multiple use in Section 1702(c) establishes a priority for any given resource. All resources are considered to be coequal — with one major exception: where the land has been reserved for a dominant purpose (that is, management units within the National Landscape Conservation System), the BLM must prioritize the protection and management of that dominant purpose over all other uses.[48] Secondary uses are not necessarily prohibited, but, generally speaking, are allowed only if they are compatible with the management unit's primary purpose.

Multiple uses are not limited to a list that includes current and potential uses such as water, air, cultural, energy and minerals, livestock grazing, recreation, and Wilderness. Establishing a dominant preservation-oriented purpose to a dis-

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[44] 43 U.S.C. § 1701(a)(7).

[45] Section 102(1) of NEPA (42 U.S.C. § 4332(1)) states that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with [section 101; 42 U.S.C. § 4331]."

[46] 42 U.S.C. § 4331(a).

[47] 43 U.S.C. § 1701(a)(8).

[48] 43 U.S.C. § 1732(a).

crete parcel of land is fully consistent with Section 1701(a)(8)'s directive to "preserve and protect" the land in its "natural condition." Consequently, highly protective designations, such as Wilderness, are key components of the BLM's multiple-use and sustained-yield mission.

Extractive and commercial uses are particularly important given the "human occupancy and use" provision of Section 1701(a)(8). FLPMA, in 43 U.S.C. 1701(a)(12), gives meaning to "human occupancy and use," directing that:

> the public lands [shall] be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands.

This section indicates that public land management must take into account commodity and market-based uses of the public lands. However, the section does not dictate a particular level or intensity of use. Rather, the BLM must simply recognize these potential uses of the public lands. In addition, FLPMA identifies a series of "principal or major uses" that "includes, and is limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production."[49] However, this in no way restricts the BLM's authority to reduce, restrict, or even eliminate these uses from specific portions of the public lands to protect other resource values (for example, Wilderness).[50]

To balance conflicting, overlapping, or complementary uses requires a separate determination that accounts for place-based conditions in any given area. Such determinations are to be made through FLPMA's Section 1712 (resource management planning process) and NEPA's section 102(2) (Environmental Impact Statement process), a double-barreled, action-forcing mechanism. In some instances, Congress will dictate the determination: for example, in Wilderness and National Conservation Area designations. Even in those circumstances, however, site-specific and activity-level determinations are very important.

4. Other Important Declarations

Additional policy declarations are equal in importance to those discussed above, but are more directed.

- The United States is to review all pre-FLPMA classifications and undesignated areas in accordance with FLPMA's Section 1712 resource management planning process.[51]
- The executive branch is given an explicit withdrawal power.[52]
- The Secretary of the Department of the Interior must "establish comprehensive rules and regulations after considering the views of the general public" and to establish adjudication procedures.[53]

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[49] 43 U.S.C. § 1702(l).

[50] See 43 U.S.C. § 1712(e)(2) (providing for congressional oversight over decisions eliminating principle or major uses for two or more years with respect to a tract of land of 100,000 acres or more).

[51] 43 U.S.C. § 1701(a)(3).

[52] 43 U.S.C. § 1701(a)(4). Withdrawals are made through a set of procedures detailed in 43 U.S.C. § 1714.

[53] 43 U.S.C. § 1701(a)(5)

PHOTO BY CONRAD/BLM

Rock formation in the Upper West Little Owyhee Wilderness Study Area, Oregon

- The United States intends to receive "fair market value" for use of the public lands, notably qualified by the statement "unless otherwise provided for by statute."[54] Significant questions surround BLM's valuation practices, especially in regard to land exchanges.
- The United States intends to establish uniform disposal, exchange, and acquisition procedures "consistent with the mission" of the BLM and subject in certain situations to congressional oversight.[55] Such land tenure decisions are initially assessed through the Section 1712 resource management planning process.
- Regulations and plans for Areas of Critical Environmental Concern are to "be promptly developed."[56] Inventories carried out through Section 1711(a) must give ACECs priority.[57] Likewise, the Section 1712 resource management planning process must prioritize the designation and protection of ACECs.[58]
- FLPMA states that the "Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local government for burdens created as a result of the immunity of Federal lands from State and local taxation."[59]
- FLPMA declares that "judicial review of public land adjudication decisions be provided by law."[60] Notably, FLPMA has been interpreted as not providing citizen litigants an independent cause of action. While a court is given authority to review decisions based on FLPMA, the cause of action must be predicated on a separate statute.[61]

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[54] 43 U.S.C. § 1701(a)(9).

[55] 43 U.S.C. § 1701(a)(10).

[56] 43 U.S.C. § 1701(a)(11).

[57] 43 U.S.C. § 1711(a).

[58] 43 U.S.C. § 1712(c)(3).

[59] 43 U.S.C. § 1701(a)(13).

[60] 43 U.S.C. § 1701(a)(6).

[61] In effect, the Administrative Procedure Act of 1946.

B. Multiple-Use and Sustained-Yield Management

1. Purpose: Optimizing the Public Interest

The multiple-use and sustained-yield doctrines are designed to achieve the policies set forth in Section 1701 of FLPMA and provide guidance to the BLM.[62] As the overarching management philosophy for the public lands, these doctrines must be accounted for in planning and decision-making processes — from the strategic and programmatic levels through Resource Management Plan development and implementation.[63]

Multiple use and sustained yield could be significant tools to protect and manage the public lands. But they have been captured by stakeholders who do not have land conservation as their priority and drained of vitality, in part because the doctrines do not provide clear standards to determine priorities for use of public lands or guidelines for resolving conflicts. The Public Land Law Review Commission noted this problem in 1970, but Congress did not rectify it in enacting FLPMA in 1976. That said, the doctrines should *not* be ignored.

2. Multiple-Use Management Is Not Without Limits

Although multiple use grants considerable discretion to the BLM, such discretion is not without limits. The definition of multiple use reflects a variety of conservation-oriented themes and, though worded broadly, provides direction and guidance to the BLM. Overall, the definition of multiple use defines the public good in the context of the public lands and directs the BLM to optimize the public good.

As a general doctrine of land management, multiple use directs the BLM to manage the public lands for a variety of uses and purposes. The concept is premised on the assumption that considerable value can be extracted from the public lands through overlapping compatible uses across space and time. Accordingly, the public lands are divided into a variety of management units, including National Landscape Conservation System units that are dedicated to specific preservation-oriented purposes and general multiple-use lands that are dedicated to a broad variety of uses and values — from conservation to resource extraction. Although NLCS units are an element of the BLM's broad multiple-use management responsibilities, once designated, those lands are managed consistent with the underlying authority used to create each unit.[64]

In the context of general multiple-use lands, confusion often arises because some entities — and often, the BLM itself — contend that multiple-use management requires that an area must be used for the maximum number of purposes and values. Otherwise, the argument goes, the land is not managed for multiple use. In fact, however, the multiple-use doctrine is fully consistent with conservation-oriented management, even when such management prohibits or limits uses. Conservation

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[62] See 43 U.S.C. §§ 1701(a)(7), 1702(c), 1712(c)(1), 1732(b)

[63] 43 U.S.C. §§ 1712(c)(1) (requiring consideration of multiple use and sustained yield at the RMP level), 1732(a) (requiring management of the public lands pursuant to multiple use and sustained yield; *National Wildlife Federation v. BLM*, 140 IBLA 85, 101 (August 21, 1997) (requiring consideration of the multiple use values at the implementation level).

[64] Note that 43 U.S.C. 1732(a) directs the BLM to manage the public lands under principles of "multiple use and sustained yield … except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law."

lands provide benefits that are often ignored: clean air and water, wildlife habitat, prime backcountry recreation opportunities, and quality-of-life attributes for nearby communities.

Multiple use is not a rigid doctrine that orders the BLM to provide for all uses in all locations. Rather, it is a directive to choose from a continuum of potential uses and values — both market and non-market — to optimize the public good. For the most part, the BLM has not embraced this conclusion. Instead, the agency touts multiple use as a justification to authorize environmentally and ecologically harmful activities, at the same time ignoring or discounting the conservation- and preservation-oriented aspects of multiple use.

What follows is a breakdown of the long-winded definition of multiple use in 43 U.S.C. § 1702(c). The following individual clauses are accompanied by lessons pertinent to each.

Clause 1: [Multiple use is] the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people.

Lesson 1: Manage for all Americans. The public lands must be managed for the good of the whole people, not an individual subset defined by geography or economic interest. The BLM should prioritize the national interest in the public lands in relation to current and long-term needs.[65]

Lesson 2: Optimize the public good. The use of the word "best" directs the agency to optimize the public good. In other words, the BLM should give concurrent, equal, and informed consideration to each use during the resource management planning process.

Clause 2: [Multiple use is] making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions.

Lesson 3: Geographic scale. Geographic scale is a critical facet of multiple-use management.[66] Management scales should reflect the dynamic nature of ecological systems and the fact that they function within multiple scales of both time and space.[67]

Lesson 4: Reasoned and informed decisions. All management must be "judicious." This means decisions must be reasoned and informed.

Lesson 5: Precautionary principle. Acting with caution is an important precept of multiple-use management: the BLM must retain flexibility to accommodate "changing needs and

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[65] FLPMA's policy declarations in sections 1701(a)(1) and 1701(a)(2) reinforce this conclusion.

[66] The BLM, subject to reservations of the land for a dominant purpose (for example, wilderness), usually allocates the allowable multiple uses of the land at a fairly broad scale, ranging anywhere from several thousand to several million acres, through a comprehensive Resource Management Plan. RMPs are also developed for most National Monuments and National Conservation Areas. Usually, the allocation of multiple uses at the land-use plan scale requires refinement through site-specific implementation plans and decisions. Even where an RMP fully allocates the allowable uses of a given area, the BLM must still account for any impacts to the "human environment" in accord with its NEPA obligations.

[67] As a key baseline management scale, many stakeholders — and not only conservationists — advocate for watershed planning scales. The BLM usually does not, at least not meaningfully, follow this suggestion.

conditions," presumably to protect management options for future generations.

Clause 3: [Multiple use is] the use of some land for less than all of the resources.

Lesson 6: Exclusion of incompatible uses. The BLM does not have to allow all uses on all land. The BLM can exclude non-beneficial, incompatible, and environmentally adverse uses of resources and bundle together complementary, conservation-oriented uses to optimize the public good relative to place-based conditions.

Clause 4: [Multiple use is] a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.

Lesson 7: Future generations. The land is important to future generations.

Lesson 8: Multiple uses. Multiple uses are defined in an open-ended fashion, allowing for future but as yet unknown or currently undervalued uses that arise from changing needs and conditions.[68]

Lesson 9: Market and non-market values. The listed uses are market (for example, energy resources) and non-market (for example, ecosystem services).

Lesson 10: No use is preferred. No use of resources should be preferred over another. Consistent with the directive to optimize the public good, the BLM should consider each potential use on an equal footing.[69] FLPMA does establish a series of "principal or major uses,"[70] including domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.[71] However, designation as a "principal or major use" does not establish a preference for that use.[72] The designation is relevant only with respect to two things: (1) a mandate not to foreclose options concerning the principal or major uses in land-use plans by leaving decisions "subject to reconsideration, modification, and termination,"[73] and (2) congressional

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[68] This clause is clarified by FLPMA, 43 U.S.C. § 1701(a)(8), which directs the BLM to protect the capability of the land to satisfy human needs and desires. This should be read as justification to protect the land's underlying structure, function, and composition, thus ensuring the landscape's health and integrity into the future.

[69] BLM policies and procedures often circumvent this requirement. For example, the BLM develops Reasonably Foreseeable Development Scenarios (RFDs) during the planning process. RFD scenario policies and procedures create a *de facto* presumption in favor of energy resource development. In other words, the BLM carves out those areas open to energy resource development without giving adequate consideration to whether that area should be dedicated to an alternative use.

[70] 43 U.S.C. § 1702(l).

[71] *Id.*

[72] Note the statement of the House Report concerning a pre-finalized, yet relevant, version of FLPMA (H.R. 13777, 94th Cong., 2d Sess. (1976)): "[t]he term 'principal or major uses' is defined for the purposes of section 202 [i.e., § 1712] of the bill. They represent the uses for which Congressional oversight is particularly needed. The definition does not mean to imply that other uses such as 'watershed' are not of great public significance." H.R.Rep.No. 1163, 94th Cong., 2d Sess. (1976), p.5.

[73] 43 U.S.C. 1712(e)(1).

oversight (that is, veto power) of BLM management.[74]

Clause 4: And [multiple use is] harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

Lesson 11a: Permanent impairment. The mandate to prevent permanent impairment should be used to protect the structure, function, and composition of the landscape to ensure that the land's health and integrity are guaranteed into the future.[75] It should also be used to preserve future opportunities for use of those lands that would otherwise be irreversibly and irretrievably eradicated. The reference to "permanent" means the BLM cannot allow impairment to continue indefinitely. It gives the agency a limited amount of flexibility to implement or enforce reclamation activities. This provision must be employed aggressively and early in any planning or decision-making process for it to have an impact.

Lesson 11b: Permanent impairment. The prevention of permanent impairment mandate gives meaning to FLPMA's section 1732(b) — "take any action necessary to prevent unnecessary or undue degradation of the lands" — by establishing an absolute ceiling on the level of allowed impact.[76] Importantly, impairment is not the equivalent of degradation. The interplay between the two provisions is important because, standing alone, the permanent impairment provision could be construed as permitting management to the very edge of harm. Section 1732(b) prevents such action if it is unnecessary or undue. In other words, an action could cause unnecessary or undue degradation, but not cause permanent impairment.

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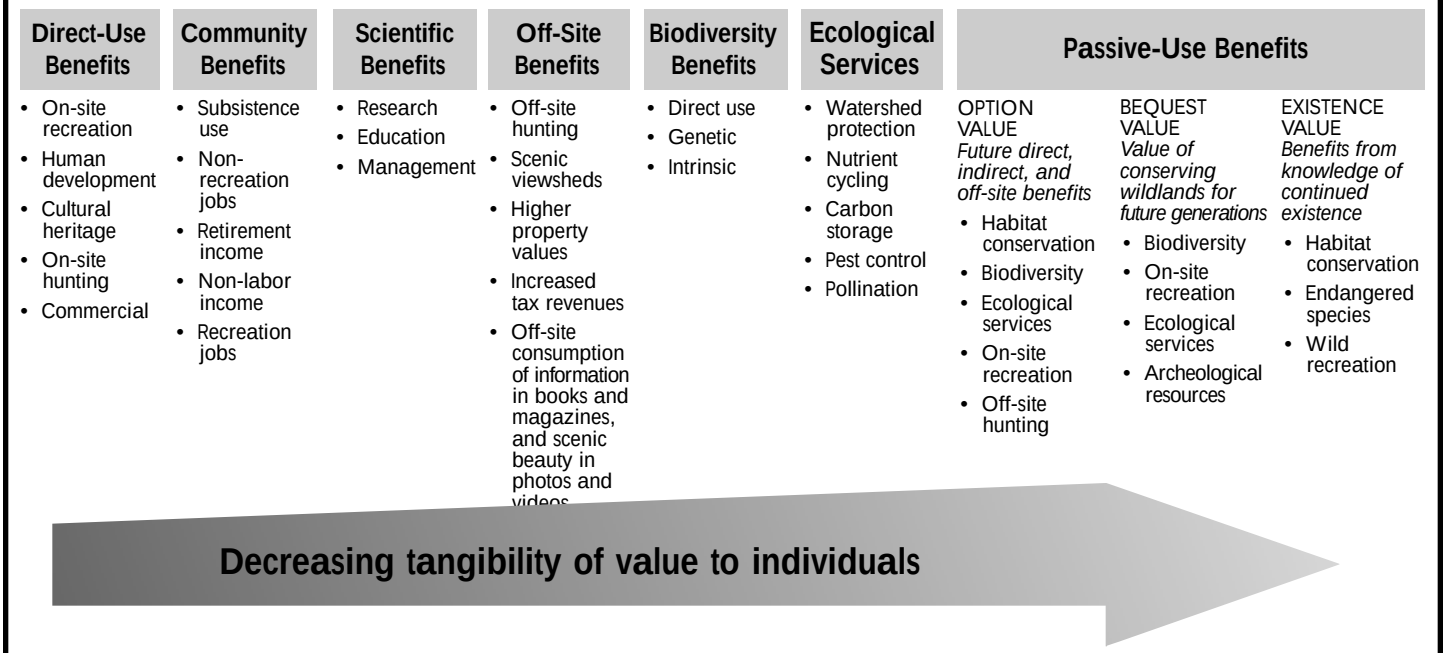
[74] 43 U.S.C. § 1712(e)(2). Congressional oversight is provided for any "management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more." *Id.* Note that the constitutionality of this provision is in question as a violation of bicameralism and presentment. See U.S. Const. art. I, § 7, cl. 2; *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (Holding that a one-house veto provision violated the constitutional requirements of bicameralism and presentment).

[75] The BLM has historically ignored the "permanent impairment" provision, despite its apparent statutory weight. Generally, the BLM will disclose impacts and then leap to the decision; rarely if ever is there a discernible evaluation of the impacts in the context of substantive legal thresholds. Moreover, the courts have not established any meaningful precedent; the very limited case law on the subject indicates that the BLM determines whether or not an action causes permanent impairment by looking at the *entire* resource area. See *Sierra Club v. Clark*, 756 F.2d 686 (9th Cir. 1985) (holding that substantive provision limiting ORV damage could be gauged on the basis of the entire management unit rather than the footprint of the activity); *Sierra Club v. Clark*, 774 F.2d 1406 (9th Cir. 1985) (holding the same). This approach is flawed because it ignores the fact that ecological systems are not bounded by administrative boundaries but operate within multiple scales of space and time. Although the "Fundamentals of Rangeland Health," implemented through state-specific land health "standards and guidelines," provide a possible tool to infuse the BLM with a more thoughtful understanding of its legal mandates, the long-term impact of the program is uncertain. See 43 U.S.C. §§ 4180.1, 4180.2

[76] 43 U.S.C. § 1732(b).

FIGURE 2.
Total Economic Value of a Wildland Network



Adapted from, Peter Morton, *The Economic Benefits of Wilderness: Theory and Practice*, 76 DENV. U. L. REV. 465 (1999).

Lesson 11c: Permanent impairment. For each proposed action, the BLM should make an impairment determination and gauge whether the activity causes unnecessary or undue degradation.[77]

Lesson 12: Minimization of conflicts. The BLM must minimize conflicts between resources and thoughtfully consider how a particular resource use affects other resource values.

Lesson 13: Protection of market devalued services. The BLM must consider the "relative" value of resources, a potential justification for protecting historically undervalued uses of the land (for example, Wilderness). This is especially important where the BLM uses cost/benefit analysis to inform and support planning and decision-making.[78]

Lesson 14: Total economic valuation. The BLM cannot authorize a particular use based purely on the contribution of that use to the economy. Nor can the agency maximize the output of a given resource without justification. Rather, the BLM must assess uses based on their value to all facets of society, including but not limited to the market economy. This suggests the appropriateness — in fact, the necessity — of total economic valuation techniques to optimize the public good.[79] Figure 2 (above) reflects the various market and non-market values associated with our public lands, values that provide a rich foundation for a network of wildlands.

[77] Procedurally, as key legal thresholds, "impairment" and "degradation" should be determined through the NEPA process, especially through use of cumulative impact analysis (40 C.F.R. §§ 151508.7). In this regard, spatial analysis of activities and their impacts on the landscape is especially important.

[78] 43 U.S.C. § 1712(c)(2), (6), (7).

[79] See Peter Morton, *The Economic Benefits of Wilderness: Theory and Practice*, 76 DENV. U. L. REV. 465 (1999).

3. Sustained Yield Should Focus on the Land

The sister provision to multiple use is sustained yield, defined as:

> The achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.[80]

Sustained yield is notable for adding an additional time component to the concept of multiple use, establishing a framework for managing resources across both space *and* time. For example, uses can be allocated on distinct parcels of land, or uses can be allocated on the same parcel of land but during different seasons.

Sustained yield deals only with renewable resources (not hardrock or fluid minerals), directing the BLM to provide a "high-level annual or periodic output" of those resources. As a management concept, sustained yield is subordinate to multiple use: achieving and maintaining use of renewable resources must be "consistent with multiple use."

Sustained-yield management should be perceived more broadly as sustainability, which is based on the assumption that economic need and environmental consequences must be viewed as connected. Although sustained yield uses the terms "high-level" and "periodic output," neither multiple use nor sustained yield directs the BLM to maximize economic return or resource output. Instead, sustained yield focuses on long-term management potential to meet the needs of current and future generations. Needs are satisfied only to the extent that they do not permanently impair the productivity of the land or quality of the environment (43 U.S.C. § 1702(c)) and do not cause unnecessary or undue degradation (43 U.S.C. § 1732(b)).

Sustained yield should be represented in terms of: (1) time period and (2) the proportion of ecosystem structure, function, and composition maintained.[81] It is impossible to guarantee that a specific amount of a renewable resource will be available several decades into the future. However, the BLM can influence — through action or inaction — the structure, function, and composition of the landscape in the near term.

Consequently, the BLM can (hopefully) continue the ecological baseline and, in effect, let nature run its course while providing a sustained yield of renewable resources. It is difficult to envision a scenario whereby the landscape can continue producing multiple renewable resources without protection of ecosystem structure, function, and composition on an adequate scale.

The roadblock to this understanding is the well meaning but misguided view that is about socioeconomic conditions and not the biophysical environment. In this view, sustained yield is used to justify industrial and commercial uses of public land and the jobs that they create. This view fails to incorporate the simple fact that the environment sustains the economic sector and not the other way around. Protecting the structure, function, and composition of the landscape is the only way to ensure sustained use of public land resources by the economic sector into the future. FLPMA supports this logic: to provide authority for the protection and management of the land, not to preserve socioeconomic conditions. The BLM is, fundamentally, a land management agency.

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[80] 43 U.S.C. § 1702(h).

[81] Reed F. Noss, et. al., *Some Thoughts on Metrics of Ecological Integrity for Terrestrial Ecosystems and Entire Landscapes* 13 (Unpublished 2000).

C. Prevention of Unnecessary or Undue Degradation Standard: A Powerful Restraint

One of the most significant mandates of the BLM, at least in theory, is the "prevention of unnecessary or undue degradation" provision (43 U.S.C. § 1732(b)). This provision imposes an affirmative obligation on the agency to protect the environment. Like the permanent impairment provision in Section 1702(c), it is important to link your conservation-oriented objectives and positions to this provision during planning processes — especially the resource management planning process. The mandate reads in full:

> In managing the public lands the Secretary [of the Department of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

Degradation is the consequence of a use that impairs, inhibits, degrades, or damages the structure, composition, or function of the landscape.[82] The landscape includes both biological and ecological resources like wildlife and wildlife habitat as well as geologic resources (such as free-flowing rivers and waterways), healthy and stable soils, and archaeological and historic resources.

So, how much degradation is unnecessary or undue?

Unnecessary degradation. If the BLM could avoid harm to the land or the environment, or if the BLM's actions are ill advised (as examples, the costs outweigh the benefits, the resources harmed are rare, or the action is not environmentally or economically sustainable), then the action could be deemed *unnecessary*.

Undue degradation. An action could be deemed *undue* even if its impacts are considered necessary (for example, unavoidable). Such a situation could arise where the action violates legal thresholds such as permanent impairment of the productivity of the land or the quality of the environment (43 U.S.C. § 1702(c)). It could also arise where the action has an exceptionally high negative impact on other resources or, similarly, where the action substantially degrades other resource values (for example, authorization for widespread use of off-road vehicles [ORVs] degrades the opportunity for high-quality hiking or wildlife watching).

To show how the two prongs of the provision work in practice, take a proposed activity that could occur in one of two locations. Assume that the first location contains a sensitive riparian area that would be degraded by the activity, while the second location is not particularly sensitive. The BLM must locate the activity in the second location because locating in the first location is "unnecessary." If, however, the second location is also sensitive (for example, it contains an endangered species) and would be degraded by the activity, and if the degradation could not be adequately mitigated, the BLM could prohibit the activity as "undue." If the agency fails to prohibit the activity under these circumstances, it could be challenged on appeal or in court.

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[82] The BLM has not defined the meaning of this Section 1732(b) provision. The interpretation presented here is based on the provision's plain language relative to the intent and meaning of FLPMA and NEPA, especially Section 101 of NEPA (40 U.S.C. § 4331) and sections 101(a)(8) and 103(c) FLPMA (43 U.S.C. §§ 1701(a)(8), 1702(c)).

PHOTO COURTESY TERRY L. FREWIN

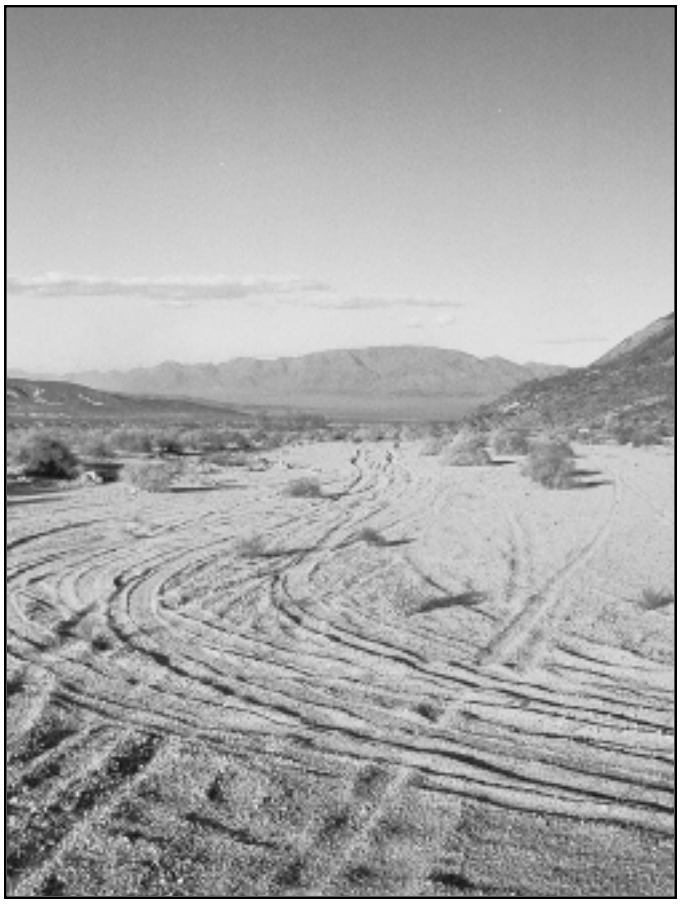

PHOTO BY WILLIAM H. MULLINS

Fragile desert landscapes can be destroyed in a very short time by unregulated off-road vehicle use.

D. Areas of Critical Environmental Concern: An Important Tool for Conservation

Areas of Critical Environmental Concern are defined as:

> areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.[83]

The BLM must prioritize ACECs for inventories under section 1711(a) of FLPMA.[84] The agency must also give priority to the designation and protection of ACECs in the resource management planning process.[85] ACECs are not limited to a maximum size. Note that the no irreparable damage standard within the ACEC definition provides more

[83] 43 U.S.C. § 1702(a).

[84] 43 U.S.C. § 1711(a).

[85] 43 U.S.C. § 1712(c)(3).

protection than either the non-impairment provision of Section 1702(c) or the prevention of unnecessary or undue degradation standard of Section 1732(b).[86] Consequently, for ACECs you should assert that no level of irreparable damage to the values for which the ACEC was designated is allowed, even if such damage does not permanently impair the underlying structure, function, or composition of the landscape.[87]

ACECs are designated through the resource management planning process based on two key criteria:

The land must be r elevant (the "relevance" criteria). Relevance is determined by assessing whether the area contains significant historic, cultural, or scenic value, fish and wildlife resources, a natural system or process, or natural hazard.[88] This is a fairly broad criterion.

Even if the land contains relevance, such relevance must have substantial significance or value (the "importance" criteria).[89] The land should have more than local significance and special worth, meaning, distinctiveness, or cause for concern.[90] A natural hazard is considered important if it threatens human life or property.

Request the BLM to identify the designation and management of ACECs as a management issue during the planning process, and nominate specific ACECS for designation during the scoping process, although a nomination can take place at any time.[91] Ideally, you should make nominations, give the BLM a map of the nominated ACECs, and specify how such areas should be managed if and when they are designated. Also, consider pairing your recommendations with a request for the BLM to withdraw the lands contained in your proposal from operation of mining and mineral leasing laws pursuant to Section 1714 of FLPMA.[92] The BLM has in fact made such withdrawals, and ACEC designations do not in and of themselves constitute withdrawals.

The BLM must respond to your recommendations by analyzing and evaluating your nominations, using the information you provide and the agency's own information. Once the analysis and evaluation are complete, the BLM makes an "identification finding" during the inventory and analysis stage (see pages 61-63 in this guide) of the resource management planning process to determine whether or not the nominated ACEC meets the two criteria discussed above. This finding may take the form of a published report or analysis. If a potential ACEC is "identified," the District

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[86] As per standard rules of statutory construction, "irreparable damage," "unnecessary or undue degradation," and "impairment" must be given "distinct meanings" and that it is "sensible to infer" that given the purpose and intent of ACECs as distinctly protective management units, the "irreparable damage" standard "is more rigorous." Debra L. Donahue, *The Western Range Revisited*, 209 (1999).

[87] *Id.*

[88] 43 C.F.R. § 1610.7-2(a)(1).

[89] 43 C.F.R. § 1610.7-2(a)(2).

[90] *Id.*

[91] This could be used to leverage a base level of protection for lands that you believe should be included within the NLCS (e.g., Wilderness) in an area where such designations are currently unlikely because of the political climate.

[92] 43 U.S.C. § 1714.

Manager must "take all feasible action to assure that those qualities that make the resource important are not damaged or otherwise subjected to adverse change pending an ACEC designation decision."[93]

Subsequent to the identification process, the BLM funnels the identified potential ACECs into the rest of the resource planning process, develops alternatives, and eventually designates — as part of the chosen alternative — ACECs. Note that where the BLM proposes to designate ACECs in the draft RMP, RMP amendment, or RMP revision, the agency must provide at least a 60-day public review and comment period on the proposed ACEC designations.[94]

On a final note, prior to FLPMA, the BLM made use of protective management units called Research Natural Areas (RNAs) and Outstanding Natural Areas. The agency still employs these designations, but considers them types of ACECs rather than distinct administrative creatures. RNAs, unlike other types of ACECs, have specific regulations that define their purpose and management: to protect lands containing unusual, scientific, or otherwise special natural values.[95] RNAs are defined as "an area that is established and maintained for the primary purpose of research and education…."[96] Use of an RNA by scientists and educators must be consistent with the area's purpose and "non-destructive." It is BLM policy that RNAs "shall be of sufficient number and size to adequately provide for scientific study, research, and demonstration purposes."[97] To be designated an RNA, an area must have one or more of the following five characteristics:

- A typical representation of a common plant or animal association.
- An unusual plant or animal association.
- A threatened or endangered plant or animal species.
- A typical representation of common geologic, soil, or water features.
- Outstanding or unusual geologic, soil, or water features.[98]

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[93] U.S. Department. of the Interior, Bureau of Land Management, *Areas of Critical Environmental Concern; Policy and Procedures Guidelines*, 45 Fed. Reg. 57318, 57326 (August 27, 1980).

[94] 43 C.F.R. § 1610.7-2(b).

[95] 43 C.F.R. § 8223.0-1.

[96] 43 C.F.R. § 8223.0-5(a).

[97] 43 C.F.R. § 8223.0-6. This provides a possible leverage point for conservation advocates where the allocation of multiple uses on the land does not contain a "sufficient" proportion of areas dedicated to science and education. Note that determination of "sufficient" is largely left to the BLM's discretion.

[98] 43 C.F.R. § 8223.0-5(a)(1)-(5).

E. Opportunities and Risks

1. Multiple Use and Sustained Yield

The multiple-use and sustained-yield mandates are criticized as meaning everything to everybody. In part, this criticism is on target: the provisions lack definitiveness, do not provide clear guidelines to determine priorities of use or to resolve conflicts, and are difficult to enforce in a court of law, thus making it tough to hold the agency accountable for its actions. However, the somewhat ambiguous nature of the mandates is only one facet of a broader problem related to the contentious social, economic, scientific, political, and institutional dynamics on BLM public lands and the often dysfunctional management and organizational structure of the BLM itself. Too often, we cite multiple use and sustained yield as scapegoats without adequate justification. This suggests that:

Legislative reform alone is insufficient. Reformation of the BLM through legislative means — that is, the replacement of the multiple-use and sustained-yield mandates — if deemed necessary, must be viewed as merely one part of a broader, integrated strategy.

Multiple use and sustained yield present untapped opportunities. There are opportunities to invigorate and define the multiple-use and sustained-yield mandates through a conservation-tinged lens that is wholly consistent with FLPMA and other applicable laws.

To make full use of the multiple-use and sustained-yield mandates, use a two-step process: (1) define conservation-oriented objectives and policies in light of the two mandates and (2) aggressively assert the combined package in BLM planning and decision-making processes.[99] You should keep in mind that the courts have held that multiple use and sustained yield give the BLM considerable leeway to manage the public lands.[100] At the same time, the agency should not expect the courts to rubberstamp its actions.[101]

In 1997, a decision by the Interior Board of Land Appeals (IBLA) breathed life into the multiple-use and sustained-yield mandates. In *National Wildlife Federation v. Bureau of Land Management*, more commonly referred to as *Comb Wash*, the IBLA rejected the BLM's

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[99] For example, if an objective is to establish a new Wilderness area in a sensitive high-quality watershed, encourage the BLM to inventory the targeted land for watershed values. Define your objective as a tool for the BLM to meet its 43 U.S.C. § 1702(c) obligation to prevent permanent impairment of the productivity of the land and quality of the environment. Depending on the facts of the situation, you could contend that protection of the land as Wilderness preserves the capability of the land to produce high-quality water, a resource important to many downstream users, including wildlife and people.

[100] See, for example, *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000); *Sierra Club v. Clark*, 756 F.2d 686 (9th Cir. 1985); *Headwaters, Inc. v. Bureau of Land Management, Medford District*, 914 F.2d 1174, 1183 (9th Cir. 1990); *Sierra Club v. Clark*, 774 F.2d 1406 (9th Cir. 1985); *American Motorcyclist Association v. Watt*, 714 F.2d 962, 966 (9th Cir. 1983); *Perkins v. Bergland*, 608 F.2d 803 (9th Cir. 1979); *Natural Resources Defense Council v. Hodel*, 624 F.Supp. 1045 (D. Nev. 1985); *National Wildlife Federation v Burford*, 677 F.Supp. 1445 (D.Mont. 1985).

[101] See *Natural Resources Defense Council v. Jamison*, 815 F.Supp. 454, 463 (D.D.C. 1992); *Natural Resources Defense Council v. Hodel*, 618 F.Supp. 848 (E.D.Cal. 1985); *National Wildlife Federation v. Burford*, 676 F.Supp 271, 277 (D.D.C. 1985); *American Motorcycle Association v. Watt*, 543 F.Supp. 789 (C.D.California 1982).

planning and decision-making activities on a grazing allotment in Utah.[102] The IBLA required the agency to conduct a "detailed analysis of the site-specific resources and impacts of grazing…."[103] *Comb Wash* reaffirmed an essential principle of the 1974 NEPA decision, *Natural Resources Defense Council v Morton*, that the BLM could not paper over its NEPA obligations through broad analyses that did not adequately take into account site-specific conditions.[104] The IBLA further held that the BLM must incorporate reasoned and informed decision-making in balancing competing resource values to ensure that the public good is served. In *Comb Wash*, the IBLA held that the BLM had done neither.[105]

Comb Wash, though not radical, is vitally important. Keep in mind a couple of principles derived from the decision:

Timing. The BLM can tier from a site-specific plan to a broader plan to reduce redundancy, but must in fact develop that site-specific planning document after the broader plan and before making a site-specific management decision.

Balancing. The BLM must consider the multiple uses of the land and the various management tradeoffs of particular bundles of uses at the site-specific planning stage. The BLM cannot take action without a full analysis of the impacts of that action on other uses, an analysis that must be completed before the decision to take action is made and that is adequately tailored to place-based conditions.

Experts. The BLM must consult appropriate experts. For example, where archaeological resources are implicated, the BLM must consult with an archaeologist.

Decisions. The BLM must make a reasoned and informed decision. This consists of complying with all process-oriented requirements and justifying the final content of the decision. The public and the courts must be able to understand the decision of the agency and, importantly, exactly where, when, and how the decision was made.

In leveraging these principles, involve yourself in the development of RMPs and subsequent implementation plans. Such multi-level involvement arms you with a place-based understanding of BLM planning and decision-making and protects your ability to challenge BLM decisions through administrative and legal channels. A Supreme Court decision, *Ohio Forestry Association v. Sierra Club*, restricts your ability to challenge substantive decisions in RMPs without linking the plan to site-specific activities (see page 120 in this guide).[106]

2. The Permanent Impairment and the Prevention of Unnecessary or Undue Degradation Provisions

The Section 1702(c) permanent impairment and Section 1732(b) prevention of unnecessary or undue degradation provisions are extremely important. They restrain the BLM's ability to authorize certain activities and may require the agency to take affirmative action to prevent environmental impacts or restore land harmed by use. To be most effective, equip yourself with an understanding of both the law and the facts on the ground.

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[102] *National Wildlife Federation v. Bureau of Land Management*, 140 IBLA 85 (1997).

[103] *Id.* at 95.

[104] *Natural Resources Defense Council v. Morton*, 388 F.Supp. 829 (D.D.C. 1974).

[105] *National Wildlife Federation v. Bureau of Land Management*, 140 IBLA 85, 101 (1997).

[106] *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998).

In your efforts to ensure that these provisions are applied to land management, you will likely face the BLM's unwillingness to heed (or even recognize) these provisions, and you will have to contend with two 1985 decisions of the 9th Circuit Court of Appeals that involved the proper geographic scale for measuring impairment and degradation.

In *Sierra Club v. Clark I*, the 9th Circuit sanctioned the BLM's application of an ORV regulation that required the agency to close areas to ORV use if there were "considerable adverse effects."[107] The BLM applied the regulation to the *entire* California Desert Conservation Area (CDCA) rather than to the specific footprint of the authorized ORV use and found that the damage was not "considerable" despite the fact that, as the court concluded, the BLM's actions constituted a "virtual sacrifice of a priceless natural area in order to accommodate a special recreational activity."[108] The BLM's action was challenged as illegal under the ORV regulation and sections 1702(c) and 1732(a) of FLMPA, but the court rejected the challenge.

The principles of *Sierra Club v. Clark I* were applied in another decision, under slightly different circumstances involving the now-banned Barstow to Reno ORV race, in *Sierra Club v. Clark II*.[109] Once again, the court found in favor of the BLM.

To counter these two decisions and engage the BLM to ensure that the permanent impairment and unnecessary or undue degradation provisions are complied with, consider the following.

- The decisions are overly expansive. The decisions were premised on a provision that established the CDCA (43 U.S.C. § 1781(a)(4)) and allows ORV use in the CDCA "where appropriate." According to the 9th Circuit, because Congress explicitly allowed ORV use in the CDCA, the restrictive provisions could not be read in a way to prohibit ORV use.[110] This is a highly tenuous and extraordinarily expansive reading of the provision.
- Compliance with the provisions does not necessarily preclude use. Imposing the non-impairment and prevention of unnecessary or undue degradation provisions within the specific footprint of a given activity does not automatically prohibit use of the land. Use can be allowed even where there are some impacts; the provisions merely give the BLM the authority — and in fact may obligate the agency — to prohibit activities with unreasonable impacts or require mitigation measures to restrain the use and protect the land. Moreover, FLPMA grants the BLM the explicit authority to "use … some land for less than all the resources."[111]
- The decisions did not address the permanent impairment or unnecessary or undue degradation provisions. Neither decision analyzed these provisions, resolved their meaning, or reconciled the provisions in light of the BLM's actions.[112] These elements of the plaintiff's challenge were only inferentially dismissed.

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[107] *Sierra Club v. Clark*, 756 F.2d 686 (9th Cir. 1985).

[108] *Id.* at 691.

[109] *Sierra Club v. Clark*, 774 F.2d 1406 (9th Cir. 1985).

[110] *Sierra Club v. Clark*, 756 F.2d 686, 691 (9th Cir. 1985).

[111] 43 U.S.C. § 1702(c).

[112] The BLM is likely to argue that the same principle applied to the "considerable adverse effects" standard applies to the Section 1702(c) permanent impairment and Section 1732(b) unnecessary or undue degradation provision.

Thus, the decisions are of uncertain precedent in the context of sections 1702(c) and 1732(b).

- **The BLM must still justify its actions.** Emphasize that the BLM must in fact make a decision based on the administrative record. Concurrently, assert the need for the BLM to comply with both of these provisions in planning and decision-making processes. This puts the BLM on notice that it needs to justify its action based on both the facts and the law before taking action, not merely as an afterthought in response to litigation.
- **The decisions are unworkable in practice.** In the decisions, it was never disputed that the specific area in question was sacrificed for recreational ORV use.[113] From a technical perspective, the BLM has difficulty justifying its site-specific decisions within the footprint of the activity, let alone the ability to relate that activity to the entire planning area.
- **The decisions can be distinguished on the facts and the law .** As long as your issue does not involve the CDCA, you can convincingly contend that the *Sierra Club v. Clark* decisions relied on specific language within section 1781(a)(4), a provision that is not relevant to anything except ORV management inside the CDCA.
- **Use the decisions.** You could challenge BLM management by asserting that the entire management unit is impaired or unnecessarily or unduly degraded, an exceptionally difficult task. Practically, this may involve challenging the cumulative effects of a variety of plan provisions and implementation decisions, not simply the individual action in question.[114] Alternatively, you could identify precise inconsistencies among generally applicable legal standards, land-use plans, and implementation decisions.

3. The Fundamentals of Rangeland Health

In 1995, the BLM finalized revised rules for rangeland management. These rules contain an innovative set of provisions called the Fundamentals of Rangeland Health (Fundamentals),[115] which adopted a watershed management approach to rangeland management premised on the Endangered Species Act and Clean Water Act. As stated in the final notice for the rule:

> These fundamentals address the necessary physical components of functional watersheds, ecological processes required for healthy biotic communities, water quality standards and objectives, and habitat for threatened or endangered species or other species of special interest.[116]

The Fundamentals are innovative because they are tied (albeit somewhat indirectly) to the Section 1702(c) multiple-use mandate and Section 1732(b)

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[113] *Sierra Club v. Clark*, 756 F.2d 686, 691 (9th Cir. 1985).

[114] George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands* 61 U.Colo. L. Rev. 307, 328 n. 185 (1990).

[115] In fiscal years 1999, 2000, 2001, 2002, and 2003, Congress granted the BLM a temporary exemption from complying with environmental laws — most notably NEPA — in reauthorizing grazing permits. The practical effect of this action is a continuation of the *status quo* that severely undermines the implementation and effectiveness of the Fundamentals.

[116] BLM Grazing Administration Final Rule, 60 Fed. Reg. 9893, 9898 (February 22, 1995).

prevention of unnecessary or undue degradation provisions. The Fundamentals explicitly reference the Endangered Species Act and Clean Water Act, which do not authorize but do restrain rangeland management. Authorization of grazing is carried out pursuant to a trinity of laws: the Taylor Grazing Act of 1934, the Public Rangeland Improvement Act of 1978, and, most importantly, FLPMA.[117] Pursuant to these laws, grazing is a multiple use, thus linking the Fundamentals to sections 1702(c) and 1732(b). Given the right blend of institutional support by the BLM, oversight by the public (you), and acceptance by public land users (especially ranchers), the Fundamentals could be instrumental in moving the BLM toward a deep, lasting, and meaningful focus on conservation.

The Fundamentals are implemented through a series of state-specific Land Health Standards and Guidelines that relate to all public land uses, not simply livestock grazing, and provide descriptions of the ecological conditions necessary to sustain public land health. The Fundamentals are also supported by guidance documents that give BLM officials the necessary tools to implement the Standards and Guidelines.[118] Based on these ecological conditions, the BLM should allocate and manage all public land uses accordingly. While the Standards and Guidelines may not be directly applicable to certain uses, most notably development of energy resources, they should still be reflected in, for example, reclamation stipulations built into development and use authorizations or permits.

Accountability for the creation and administration of the Land Health Standards and Guidelines falls on the shoulders of the BLM's state directors, although implementation is largely left to field offices. Recent analysis indicates that the program has broken down at nearly all levels and is, in effect, perpetuating the *status quo* in many areas.[119] The fledgling legal framework of the Fundamentals is wounded, but still relatively intact. This suggests that intensified public pressure on the BLM could prove in the long term to be an important aspect of invigorating the multiple-use mandate (especially the no permanent impairment provision) and related obligations such as the potentially powerful prevention of unnecessary or undue degradation provision.

4. Areas of Critical Environmental Concern

ACECs have considerable potential to protect special BLM public lands, in part because they can act as a catalyst for conservation-oriented action. They are also a method to comply with other legal obligations such as those mandated by the Endangered Species Act and Clean Water Act. An innovative potential use of ACECs is as a landscape management tool to protect large-scale ecological processes over broad geographic expanses. FLPMA gives ACECs priority for inventories, designation, and management, and you can make a compelling argument that the BLM must address ACEC issues before dealing with other issues or concerns.

Because of the BLM's flexibility to prescribe their management, ACECs

[117] Taylor Grazing Act of 1934, U.S.C. §§ 315-315r; The Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908.

[118] See U.S. Department of the Interior, Bureau of Land Management, IM 2001-079 (January 19, 2001) (implementation of rangeland reform policies). See also U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook* H-1601-1 Appendix C (2000) (outlining possible application of standards and guidelines to land use planning efforts).

[119] Cathy Carlson and Johanna Wald, *Rangeland Reform Revisited* (2000).

become a strong tool in the resource management planning process where tradeoffs are necessary to accomplish objectives. But use of ACECs carries a risk: the BLM has not taken ACECs seriously. The agency manages ACECs unevenly across the country and generally under-utilizes the designation. Moreover, if an ACEC is included in a conservation-oriented management unit (for example, a National Monument), the ACEC could be used as an anti-conservation tool (albeit incorrectly) by diluting the protection afforded to the broader landscape and providing real protection only for the footprint of the ACEC. Nonetheless, in the right circumstance there is a definite opportunity to capitalize on the importance that FLPMA gives to ACECs.

ACECs are likely inadequate to protect entire landscapes, but they could be effectively used to protect core areas or especially vulnerable sites such as riparian corridors, wetlands, fragile soils, wildlife habitat, etc. ACECs could also be used as buffer or linkage zones for National Landscape Conservation System units (Wilderness, National Monuments, National Conservation Areas, Wild and Scenic Rivers, and National Trails). Once established, an ACEC provides a mechanism and justification for closing the land to high-impact recreational use such as ORVs and, if a mineral withdrawal can be leveraged, to new mining and minerals operations.

5. The National Landscape Conservation System

The National Landscape Conservation System is a critical element in any campaign to protect the public lands and to root the BLM in the fertile ground of conservation. The BLM should prioritize the protection and management of these irreplaceable lands to demonstrate its commitment to long-term land stewardship. Importantly, advocacy that is oriented around the NLCS can be used to develop a positive, proactive campaign and counter adverse activities within and proximate to NLCA management units. Such advocacy includes protection of existing NLCS units and requests for additional NLCS units, in particular Wilderness Study Areas and, eventually, Wilderness. Note that hostile political interests will attempt to undermine protection for NLCS units and concurrently argue that non-NLCS units should be open to a variety of environmentally adverse uses.

An excellent opportunity to leverage and expand the NLCS rests with the inventory, study, and protection of wilderness-quality lands as Wilderness Study Areas. FLPMA obligates the BLM to maintain a current inventory of wilderness values and authorizes the agency to designate wilderness quality lands as Wilderness Study Areas on all BLM public lands, including those in Alaska.[120] This power protects the congressional prerogative to include public

[120] 43 U.S.C. §§ 1711(a), 1712 (continuing obligation to inventory and protect wilderness quality lands). *See also,* Erik Schlenker-Goodrich, *The Bureau of Land Management's Continuing Obligation to Inventory and Protect Wilderness Values: A Citizen's Reference Guide*, The Wilderness Society (2002), available at www.wilderness.org. Note that the initial wilderness inventory ordered by 43 U.S.C. § 1782 of FLPMA does not relieve the BLM of its current wilderness inventory and study obligations pursuant to 43 U.S.C. §§ 1711(a), 1712. In terms of Alaska, the Alaska National Interest Lands Conservation Act of 1980 grants the Secretary of the Department of the Interior the discretion to evaluate the wilderness potential of BLM lands in Alaska (P.L. 96-487 § 1320; 43 U.S.C. § 1784). In 1981, Secretary of the Interior James Watt prohibited the BLM from exercising this discretion. In 2001, Secretary of the Interior Bruce Babbitt rescinded the Watt directive, setting in motion wilderness inventories and studies pursuant to sections 201 and 202 of FLPMA.

lands within the National Wilderness Preservation System, lands that are otherwise exposed to environmentally adverse management decisions. The public plays an important role in this process: we can raise Wilderness as a vital management issue and submit information relating to potential wilderness-quality lands. The BLM must consider this information in its planning and decision-making processes.

All communications that identify wilderness-quality lands should express how those lands meet the definition of Wilderness in section 2(c) of the Wilderness Act of 1964 (P.L. 88-577, § 2(c); 16 U.S.C. § 1131(c)). Furthermore, in accordance with the Wilderness Inventory and Study Procedures Handbook (available online at http://www.blm.gov/nhp/efoia/wo/fy01/ib2001-043.html), you must satisfy several criteria:

Maps. You must include a map that identifies the specific boundaries of the area in question.

Narrative. You must include a detailed narrative that describes the wilderness characteristics of the area and documents how that information significantly differs from the information in prior inventories conducted by the BLM regarding the wilderness values of the area.

Photographic documentation. You must include photographs of the area that document its wilderness values.

PHOTO BY JOHN CRAIG/BLM

PHOTO BY DEAN E. BIGGINS/U.S. FISH AND WILDLIFE SERVICE

Public lands managed by the BLM harbor an amazingly diverse array of plants and wildlife. Shown here are the Red Glove flower in the Owyhee Canyon/Double Mountain area of southeastern Oregon (left) and the Rufous Hummingbird, a brightly colored Neotropical migrant species that makes good use of migratory and nesting habitat across a wide spectrum of BLM public lands.

Chapter V.
Collecting Information: Inventories, Monitoring, and Evaluations

A. Overview

The BLM's information management responsibilities are broken down into three distinct but closely interrelated activities: inventories, monitoring, and evaluations. Each activity contributes to the sum total of data that informs management decisions. Information, as the keystone of the administrative record for a particular decision, can be used, critiqued, or supplemented. In fact, one of the most powerful ways to challenge adverse agency plans and decisions is to assert that the data are inaccurate, incomplete, or incorrect and that as a consequence, the decisions reached by the BLM are not reasoned and informed. In so doing, you can optimize your effectiveness by crafting your scientific arguments as NEPA or other appropriate procedural framework arguments.

Technological advances in remote-sensing as well as geographic information systems, geographic positioning systems, and other forms of technology only heighten the importance of understanding, analyzing, and leveraging information to adequately protect the landscape. These tools can help quantify ecological and social variables — in particular, cumulative impacts (under NEPA) — and are thus important elements of an adaptive ecosystem management (AEM) program.[121]

As currently structured and implemented, there are numerous problems with the BLM's information management programs. First, baseline inventories are incomplete and do not adequately account for the varied resources of the public lands, most notably preservation-oriented resources and values (for example, Wilderness). Second, the fact that inventory information is incomplete and often inadequate suggests that the BLM's capability to estimate environmental impacts and make reasoned and informed management decisions is suspect. Third, because the inventory baseline is suspect, the BLM cannot adequately track management actions over time (monitoring) through a comparison of the actual impact of a given activity relative to the estimated impact disclosed in the initial decision documentation (for example, through NEPA). Fourth, inventories, monitoring, and evaluations can be used to delay changes in the *status quo* pending their completion, and completion might never come about because of insufficient staffing and funding. In the event that the *status quo* is an intrusive activity, this becomes an arguably illegal situation.

The following sections discuss the BLM's information management responsibilities in more detail and provide you with the necessary knowledge base to improve the role of science and place-based information in public lands management.

Key Recommendations

- Define the debate. Decision-making is a matter of perspective: take control of the process by making sure that decision-making is about protection of the land and the environmental consequences of intrusive activities. To do this, anticipate decision-making processes and communicate to the BLM which data are necessary — and why — for the agency to come to a reasoned and informed decision.
- Use data to your advantage. Oversee the information collected by the agency, the methodology used to collect that information, and how that information is applied to the decision-making process. Use, critique, collect, and counter data to achieve conservation objectives. When the agency goes forward with an adverse decision, you want to be able to point out that the agency's decision is unreasonable and uninformed because the agency ignored data without reason, or that the specific data relied upon by the agency are inaccurate, incomplete, false, or otherwise deficient. This requires that you engage in planning and decision-making early on to ensure that the agency's administrative record contains the information that you think it should consider. It is essential for you to assert control over information collection and application in defining the debate.

[121] Council on Environmental Quality, *Cumulative Effects Analysis Under the National Environmental Policy Act* (1997).

B. Four Key Aspects of BLM Information Management

Keep an eye on four vital aspects related to BLM data collection and analysis: (1) the burden of proof in planning and decision-making, (2) the management and application of information, (3) the role of the public, and (4) understanding information in context.

1. Burden of Proof

In general, the amount of data needed to justify a management action should be linked to the potential intensity of the impacts of the action: the greater the intensity of the impacts, the higher the burden of proof on the BLM to authorize the action. Justified by NEPA, this management principle is too often ignored. In fact, the BLM imposes a *de facto* burden of proof on actions that shift management away from the *status quo* This is troubling given the proportion of lands exposed to off-road vehicles (ORVs), grazing, and energy resource development. In the context of protective management units, the burden of proof should always be on the proponent of an action to provide compelling and convincing evidence that the action will not impair or degrade the protective values for which the management unit was dedicated.[122]

The BLM may attempt to justify an action with adverse environmental consequences, using data that give short thrift to those consequences or is otherwise inadequate. In this situation, question the agency's logic and request that it reconsider the decision by arguing that the action is uninformed related to the type and intensity of the impacts. It is extremely important to provide the BLM with the information or request that the agency collect such information as early as possible — ideally before the decision is reached. This is an important step in defining the administrative record for the planning and decision-making processes, and it increases your chance of getting the BLM to listen and hopefully respond positively to your issues and recommendations.

2. Management and Application of Information

Encourage the BLM to improve its information management practices. Inventory, monitoring, and evaluation activities should be clearly integrated into the Resource Management Plan and contain definitive and specific information concerning when, where, how, and why these activities are carried out. Without definitive and specific provisions within the RMP and other decision documents, it is likely that inventories, monitoring, and evaluation either will not take place or will be haphazard.

All data should be identified in relation to source, location, and time. Furthermore, the public should be able to independently review and evaluate data and data application in planning and decision-making. The BLM should disclose the results of a given analysis and the underlying methodology and data management practices used. On a broader level, data collection and application practices should be standardized so that the BLM can aggregate data to better understand the landscape and the impact of management on that landscape.

Inventories, monitoring, and evaluations should be used to identify baseline landscape conditions, current trends, stress points, and threshold levels to understand the landscape's resiliency and responsiveness to management actions. Where the BLM does not articulate adequate baselines, tell appropriate agency personnel that if this problem is not corrected, it will undermine the legitimacy, credibility, and legality of the entire plan or decision. Information should be collected in light of regulatory and statutory

[122] As a practical matter, if you challenge an agency decision, you bear the *de facto* burden of proof to overcome the deference oftentimes granted to the BLM.

thresholds beyond which there are legal ramifications. This is one of the BLM's most glaring management failures: inadequate and insufficient links among individual management programs/actions and the statutory and regulatory provisions that define and limit the BLM's authority to manage the landscape.

The focus of data collection should be on the impacts — adverse and beneficial — caused by particular activities, not the activities themselves. The NEPA process, especially the cumulative impact analysis (40 C.F.R. § 1508.7), is important as it can glue seemingly disparate decisions together to ensure that overall management conforms to the RMP. Actions with environmentally adverse or questionable impacts should be prohibited unless enforceable monitoring and evaluation programs with defined time frames are built into decisions and implemented.

Finally, data collection should involve a variety of management activities. For example, the BLM should monitor and evaluate the role of an ACEC designed to improve water quality and also monitor the role of livestock grazing practices that degrade or limit water quality. Both perspectives are important. Together they provide a comprehensive understanding of issues and illuminate potential management solutions to problems that may arise.

3. The Role of the Public

The BLM should not rely solely on its own data collection capabilities. Instead, the agency should reach out to the public to obtain information for compiling and use, especially when the information conforms to or exceeds BLM data standards and its source and use is clearly outlined and available to the public. This allows the BLM to grasp the broader interconnections among environmental and social variables. And you should analyze the BLM's own data to determine whether or not they are adequate. It is critical to point out information deficiencies and how those deficiencies have led or will lead to unreasonable or uninformed decisions.

If you have the capacity, conduct citizen inventories, monitoring, and evaluations. The resulting data collection can be a powerful tool to justify conservation-oriented actions. Citizen data collection is a tool that has proved valuable in many cases, especially in the identification of wilderness-quality lands that deserve permanent protection as Wilderness pursuant to The Wilderness Act of 1964.

Tailor your data collection activities to meet or exceed the BLM's standards. Then leverage your data in BLM planning and decision-making processes (thus injecting the data into the administrative record) or any other forum — for example, before Congress or the courts — where the data could prove useful.

4. Understanding Information in Context

While the dissemination of information and data is critical to effective public participation, the BLM should be cautious about wasting limited resources to collect nonessential data. It should also take care in presenting data outside of the proper context. This is certainly a problem with respect to roads and other routes and potential energy resources on public lands. Information about these issues, if presented without accompanying information about the environmental consequences of road use or development of energy resources, can create a false impression with the public that is difficult to counter.

Thus, while the BLM should make raw data available for expert analysis and scientific peer review, in general the agency should present data principally within the context of a reasonable range of management alternatives and an objective discussion of the environmental consequences of each alternative. In this manner, the BLM promotes its own credibility and encourages informed public debate.

C. Inventories

Inventories establish a baseline of current resources and values and identify what the land is currently being used for and what the land could be used for. FLPMA obligates the BLM to acquire, maintain, and continuously update inventory information to reflect changes in resource conditions and identify "new and emerging" resources.[123] Inventory information helps the BLM balance multiple uses and ensure that activities are constrained within appropriate legal thresholds. In particular, inventories are intertwined with the Section 1712 resource management planning process, allowing the BLM to develop and implement reasoned and informed Resource Management Plans.

Inventories should also guide the agency in determining when it must take action to prevent unnecessary or undue degradation of the public lands.[124] As such, Section 1711(a) establishes an inherently cautious, conservation-oriented approach:

> The Secretary [of the Department of the Interior] shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values. The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands.[125]

The BLM must conduct an inventory of the public lands and also update the inventory. Inventories are carried out with varying degrees of intensity depending on need. Updates are motivated by changes in conditions, both ecological and social. Note that the inventory process is not of itself a management action. Instead, the inventory establishes an information baseline for management actions that should be completed prior to taking action.[126]

During the inventory process, use of the land is not frozen or terminated. The inventory is to be relied upon only "to the extent it is available."[127] However, FLPMA expects the BLM to exercise a higher level of caution where inventories are not complete to ensure that future

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[123] 43 U.S.C. § 1711(a).

[124] 43 U.S.C. § 1732(b).

[125] 43 U.S.C. § 1711(a).

[126] Sen. Rep. 94-583, 94th Cong., 1st Sess. (December 15, 1975) pp. 44-45 (stating "[t]he Committee fully expects that the Secretary wherever possible, will make management decisions which will insure that no future use or combination of uses which might be discovered as appropriate in the inventory and identification processes — be they wilderness, grazing, recreation, timbering, etc. — will be foreclosed by any use or combination of uses conducted after enactment of S. 507 [FLPMA's Senate precursor], but prior to the completion of [inventory and identification processes]"). The only difference between the inventory provision of S.507 and FLPMA is the use of "national resource lands" instead of "public lands," minor grammatical changes that did not substantively change the provision, and the inclusion in S.507 of language pertaining to wilderness inventories, language which, in FLPMA, is consolidated with other wilderness provisions in a single section (43 U.S.C. § 1782).

[127] 43 U.S.C. § 1712(c)(4).

PHOTO COURTESY PETER AENGST

Road network and drill pads, Jonah II natural gas field, Upper Green River Basin, Wyoming. This photo illustrates the impacts of new oil and gas development across a large landscape. Despite use of the latest technology (all of the drilling you see is post-1995), public lands in this picture have essentially been converted from important habitat for antelope, mule deer, sage grouse, and other wildlife species to an industrial mix of roads, drill pads, powerlines, compressor stations, and other infrastructure.

uses or bundles of uses are not foreclosed before completion of the inventory.[128] In practice, this should impose a higher burden of proof on the BLM to justify actions in areas where knowledge about the resources and values of the area is unknown or limited. This conclusion is reinforced by Section 1711(a)'s specification that ACECs must be given priority for inventories, a priority also infused into the Section 1712 resource management planning process.[129] All information deficiencies must be accounted for through NEPA.[130]

The BLM's inventory obligations are tempered by reality: it is nearly impossible to have a fully updated, comprehensive inventory for every square foot of the public lands. Moreover, in some instances, a high degree of data specificity is unnecessary. The BLM thus conducts inventories based on prioritized need, staffing levels, funding, and the degree of data specificity required. Inventories are carried out in a multi-level format that allows the BLM to complete the inventory so that it corresponds to the data needs of a particular

[128] See footnote 126.

[129] 43 U.S.C. §§ 1711(a), 1712(c)(3).

[130] 40 C.F.R. § 1502.22.

management action. Each level should be refined based on field experience and the particular resource program involved. The basic inventory system consists of the following five increasingly specific and refined levels:[131]

- Level 1 Inventories . Broad-based inventories for use at the national or regional level.
- Level 2 Inventories . Provide data for use in resource management planning to establish baseline values and conditions. Generally require a mapping unit of 160 to 1000 acres.
- Level 3 Inventories . Provide data for use in resource management planning where Level 2 data are insufficient (for example, a sensitive resource or a resource that requires a more refined data set). Generally requires a mapping unit of 40 to 160 acres.
- Level 4 Inventories . Provide data for critical management issues. Generally requires a mapping unit between 5 and 40 acres.
- Level 5 Inventories . Provide intensive data for detailed activity plans and project design. Generally requires a mapping unit between 0.5 and 5.0 acres.

The BLM does not have to involve the public in the inventory program, although the public can proactively contribute information that the agency may or may not be use.[132] Public involvement comes into play during planning and decision-making carried out in response to the inventory.[133] Note that in some instances, the BLM may solicit volunteers to help with the inventories. You should take advantage of these opportunities. And remember, while you may not have the chance to participate physically in the inventory, you should not be silent regarding how the BLM carries out its inventories. Where you have concerns, express them to agency personnel.

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[131] U.S. Department of the Interior, Bureau of Land Management, *Inventory and Monitoring Coordination*, Manual § 1734.12B3(a)-(e).

[132] *Utah v. Babbitt*, 137 F.3d 1193, 1210 (10th Cir. 1998). This holding involves the public participation requirements of 43 U.S.C. § 1712 and 43 U.S.C. §§ 1739(e), 1740. Notably, the 10th Circuit left the door open with regard to 43 U.S.C. § 1740, holding not that 43 U.S.C. § 1740 provided no opportunity for notice and comment involving the development of inventory procedures (not the inventory itself) but that the plaintiffs failed to identify a concrete injury resulting from the alleged procedural violation. *Utah v. Babbitt*, 137 F.3d 1193, 1210 n. 26 (10th Cir. 1998).

[133] *Utah v. Babbitt*, 137 F.3d 1193, 1209 (10th Cir. 1998).

D. Monitoring

Monitoring is used in day-to-day management actions to assess whether management prescriptions are achieving estimated results, whether ecological thresholds are being surpassed, and whether new information has arisen. Monitoring acts as part of a feedback loop that builds on the initial baseline of information established through the Section 1711(a) inventory process. This loop has two principal uses: first, adapt site-specific management action to reflect new information; second, analyze the Resource Management Plan in light of new information. The latter use is termed an evaluation.

Monitoring information feeds into the evaluation process and a broader determination of "whether there is sufficient cause to warrant amendment or revision of the plan."[134] In addition, monitoring helps the BLM develop annual budgets and track whether management activities have been completed and what actions still need to be carried out. In total, monitoring is an integral part of making the RMP a "living" document.[135]

The planning regulations obligate the BLM to integrate monitoring and evaluation intervals and standards into the RMP: "[t]he proposed plan shall establish intervals and standards, as appropriate, for monitoring and evaluation of the plan."[136] The insertion of "as appropriate" gives the BLM discretion to determine what intervals and standards are appropriate, but does not excuse the agency from instituting a formal monitoring and evaluation program.[137] The BLM's discretion is constrained by the planning regulations:

> Such intervals and standards shall be based on the sensitivity of the resource to the decisions involved and shall provide for evaluation to determine whether mitigation measures are satisfactory, whether there has been significant change in the related plans of other Federal agencies, State or local governments, or Indian tribes, or whether there is new data of significant to the plan.[138]

This regulation suggests that the BLM should prioritize sensitive resources that could include threatened wildlife habitat, degraded watersheds or riparian areas, relatively pristine ecological systems, and land adjacent to the footprint of an ongoing high-impact activity (for example, oil and gas wells and their supporting infrastructure such as roads). Monitoring should include measurable indicators of the magnitude and direction of ecological and social change, an appropriate time frame, appropriate spatial scale, means of assessing causality, means of measuring mitigation efficacy, and provisions for adaptive management.[139] Plan monitoring must address whether the monitoring activities are in

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[134] 43 C.F.R. § 1610.4-9.

[135] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (V)(A) (2000).

[136] 43 C.F.R. § 1610.4-9.

[137] The Handbook appears to dilute the mandate of the planning regulations, indicating that "the land use plan *may also* identify intervals and standards for "resource" monitoring. U.S. Dept. of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (V)(A) (2000) [emphasis added]. If the regulations and Handbook conflict *as applied*, the regulations control.

[138] 43 C.F.R. § 1610.4-9.

[139] Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* 46-47 (1997).

PHOTO BY JOHN CRAIG/BLM

Riparian vegetation on lands managed by the BLM along the John Day River near Bridge Creek, Oregon.

fact implemented.[140] The monitoring conducted under the RMP is documented in a plan implementation tracking log or report that must be made available to the public.[141]

Like inventories, the BLM is not required to involve the public in its monitoring activities, although the BLM may solicit volunteers. Therefore, raise any issues pertaining to the monitoring programs with the agency and submit data that may be helpful to ensure that monitoring is carried out in a meaningful way and that sufficient data are collected to protect the land and mitigate adverse environmental impacts.

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[140] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (V)(A) (2000).

[141] *Id.*

E. Evaluations

Evaluations are required by the planning regulations.[142] They are used to determine whether there is new information of significance to the planning base and whether amended or revised plans or decisions are necessary. The BLM must include an evaluation schedule in the RMP.

The BLM's planning guidance recommends an evaluation at least every five years. Unlike inventory and monitoring programs, the public can be involved in evaluations. The BLM allows new data or information to originate with the public, whether through formal comments or informal communications.[143] The public can request that the BLM complete an evaluation (even if not scheduled) to support the need for a plan amendment or revision.

Generally, evaluations and new planning and decision-making actions are undertaken where there are new proposals, circumstances, or information. In lobbying the BLM to undertake an evaluation and then revise or amend a land use plan, tailor your evidence and arguments to the specific factors considered by the BLM:

- Non-conformance. A proposed action does not conform to the current land use plan.
- Policy development. A new or revised policy that changes management decisions.
- Land use. New, intensified, or changed uses of the public land.
- New information. Whether information obtained from resource assessments, monitoring, or scientific studies changes management decisions.
- Intergovernmental inconsistencies. Ongoing actions are inconsistent with resource-related plans of other federal agencies and state, local, and tribal governments.
- Management Framework Plans (MFPs): MFPs, developed under a now-expired law (the Classification and Multiple Use Act of 1964), must eventually be replaced with RMPs.
- Administrative. BLM workload priorities, budgetary constraints, and staff capabilities.

If an evaluation is conducted, the BLM must document a decision to engage or not engage in a new planning or decision-making effort and must provide interested parties with written documentation of the decision after the evaluation is completed.[144] This decision can be appealed.

Notably, if there are new data or information, the BLM may have responsibilities independent of the planning process. For example, even if after an evaluation the BLM decides not to amend or revise a land-use plan, the agency may be required to supplement its NEPA base (if the new data or information are relevant to environmental concerns and pertains to ongoing activities and their impacts) or initiate or reinitiate consultation with the National Marine Fisheries Service or U.S. Fish and Wildlife Service (if the new data or information are relevant to an endangered or threatened species).[145]

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[142] 43 C.F.R. § 1610.4-9 (evaluation requirement); 43 C.F.R. § 1610.5-5 (necessity of a plan amendment); 43 C.F.R. § 1610.5-6 (necessity of a plan revision).

[143] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (VI)(B)(4) & (15) (2000).

[144] *Id.* at (VI)(D).

[145] 40 C.F.R. § 1502.9(c) (NEPA supplementation); 50 C.F.R. § 402.16(b) (ESA interagency consultation).

PHOTO BY SUSAN L. EARNST

Nesting Yellow-billed Loon, Colville River Delta, northern Alaska. This species, along with Red-throated and Pacific loons, may suffer negative impacts from oil development at Colville River and in the nearby National Petroleum Reserve — two public land areas managed by the BLM.

F. Countering the Continuation of the *Status Quo*

The BLM may cite the need to conduct lengthy studies to inventory, monitor, and evaluate resource conditions before it can take any action to alter the *status quo*. Most often, the *status quo* consists of continued intrusive uses of the land, including logging, livestock grazing, and ORV use. If the BLM tries to shield itself from taking protective action by citing the need to collect more information, strongly question the agency's actions: the agency could be acting illegally.

Fundamentally, the BLM must "prevent permanent impairment of the productivity of the land and quality of the environment" (43 U.S.C. § 1702(c)) and "take any action necessary to prevent the unnecessary or undue degradation of the lands" (43 U.S.C. § 1732(b)). The inventory, monitoring, and evaluation programs were designed to help the BLM meet these obligations, *not* to preserve the *status quo*. The BLM's obligations require the agency to step forward and take action to protect the land. In other words, the agency cannot refuse to protect land and resources that could be harmed as a result of ongoing activities by claiming that it has to inventory, monitor, and evaluate resources and activities before taking protective action. The initial burden of proof is on the agency to present evidence sufficient on its face that a given intrusive activity will not harm the land.[146] Stated another way, it is not the initial responsibility of the land (or its advocates — us) to prove that the land is being harmed. It is consistent with the BLM's obligations under NEPA for agency personnel to stop and think before taking a major action that significantly affects the environment.[147]

The BLM is not excused from its duties even if it claims lack of staff or funding. In such an instance, the BLM should halt the intrusive activity until the agency can obtain the necessary staff and funding.

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[146] You face a difficult hurdle in overcoming the often specious deference afforded agency actions by federal courts.

[147] 42 U.S.C. § 4332(C).

G. Enforcing Inventory, Monitoring, and Evaluation Requirements

The BLM's responsibilities to inventory the land, monitor activities, and evaluate current conditions and circumstances are exceptionally important tools. They increase the probability that planning and decision-making processes are reasoned and informed and give the public information that can be used to ensure agency accountability. Plans and decisions should explicitly specify when, where, how, when, and why information collection and analysis is to be carried out on the land.[148]

Public participation in BLM planning and decision-making processes can help ensure that the agency adopts enforceable inventory, monitoring, and evaluation programs. In *Seattle Audubon Society v. Lyons*, the court found that if an agency land-use plan is to remain lawful, then monitoring, evaluations, and mitigation measures must be faithfully executed and, if necessary, alterations made in management.[149] The question becomes whether the public can enforce the inventory, monitoring, and evaluation requirements against the agency once they are adopted in plans and decisions. The short answer is *maybe*.

Inventory, monitoring, and evaluations guarantee a particular process, not a particular result. The failure to carry out any of these obligations is analogous to a failure to develop an adequate Environmental Impact Statement: there is a heightened risk that impacts will be overlooked and not disclosed.[150] Understanding this basic concept can help overcome difficult obstacles to judicial review in the event that you seek to enforce the requirements through the courts. But note that case law on this subject is in a state of flux.[151]

The easiest way to circumvent these problems is to link an allegation that the BLM failed to inventory, monitor, or evaluate to an allegation of site-specific harm. Your likelihood of success is greater if the agency completely failed to carry out a specific obligation to inventory, monitor, or evaluate. Your likelihood of success is lower if your challenge is based merely on the alleged insufficiency of the BLM's inventory, monitoring, or evaluation activities. Because the state of the law is so unsteady and because of the risk of negative precedent, it is strongly recommended that you consult with legal counsel before challenging the BLM's failure to fulfill inventory, monitoring or evaluation obligations through appeals or litigation.

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[148] 43 C.F.R. §§ 1610.4-3, 1610.4-9.

[149] See *Seattle Audubon Society v. Lyons*, 871 F.Supp 1291, 1324 (W.D. Wash 1994) (stating that monitoring, analysis, and mitigation detailed in plan is central to the validity of a management plan and that if not funded or otherwise not carried out, the legality of the plan must be reconsidered).

[150] See *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1514-1516 (9th Cir. 1992).

[151] See, for example, *Ecology Center, Inc. v. United States Forest Service*, 192 F.3d 922 (9th Cir. 1999) (holding that monitoring duties, standing alone, could not be challenged as they did not amount to final agency action).

Chapter VI.
Planning and Decision-Making

Key Recommendations

- Invest in comprehensive land-use planning. Resource Management Plans (RMPs) developed for all of the public lands set the stage for all decision-making. Thus, it is critical to participate in the planning process and ensure that the BLM hears your voice.
- Establish short- and long-term objectives. To be effective, participation in the planning process must be focused and linked to defined objectives. Determine exactly what you want to accomplish in the long term and what is realistic and feasible for you to achieve through the planning process. Then use the planning process to define future decision-making after finalization of the RMP.
- Focus on the broader landscape and its ecological values. This allows you to shift the debate to conservation (clean air, clean water, wildlife, healthy land) and a positive, forward-looking message. This approach imposes the burden of proof on opposing interests. And it gives you the opportunity to build a broader constituency.
- Take the initiative and define the debate. Identify legal handles early on, before the planning process starts, and determine how to assert those handles throughout the entire planning process. If you come armed with such information and the intent to use it, the BLM may well choose to do the right thing or, if not, the agency will still be forced to act on the grounds that you have chosen. Be sure to carefully assess the merits of your argument and the risk involved. Expose only as much of your argument as necessary.
- Make use of all planning stages. The planning process consists of several stages wherein public participation is formalized and required. But several stages take place behind the scenes within the agency. Understand and do not discount or ignore these stages: they have a powerful impact on the ultimate decisions reached in the RMP.
- Participate in implementation. A plan — whether good or bad — is irrelevant unless it is actually implemented. After RMPs are finalized, it is critical to ensure that their positive elements are carried out and that bad decisions are challenged if they are implemented.
- Keep a pulse on national and field-level activities. While participating in the development and implementation of an RMP, it is important to understand what the BLM is doing at both the field and national levels. At the national level, activities may strengthen or dilute management policies. And always consider political dynamics and whether or not any activities occurring in the planning area are being scrutinized by the administration or Congress.

A. Risks and Opportunities

In practice, it is difficult to track an issue through the imperfect BLM planning process, to understand and analyze land-use decisions and their impacts, and to understand how land-use decisions relate to the BLM's legal obligations. Ultimately, the planning process promotes segregated resource management by program area (as does the BLM's organizational structure) and discourages integrated, interdisciplinary management. From a management perspective, these problems strongly suggest that the BLM, in attempting to maximize discretion through its internal policies and procedures, is capable of intentionally or unintentionally obstructing the implementation of congressional mandates.

These problems are indicative of systemic failures within the BLM that open the door to excessive political influence and de-emphasize objective, science-based management. That said, you can use a solid understanding of the planning process to effectively navigate the murky waters of BLM law and policy.

Public participation during the planning process — and this holds true for any open public process — should be thought of as a closing door. In the early going, the door is wide open, and the BLM is receptive to a variety of issues and recommendations. As the process proceeds, less and less becomes possible. Once the decision is finalized, the door is closed, and your ability to affect change is limited. Intense advocacy, including litigation, can operate as a battering ram against the closing door, but keep in mind that this type of work is time and resource intensive.

B. Overview

Planning and Decision-Making Occurs at Four Levels

The BLM's process for developing and implementing plans and decisions focuses on two key statutes, the Federal Land Policy and Management Act of 1976 (FLPMA) and the National Environmental Policy Act of 1969 (NEPA), discussed in detail in Chapter VII. These two statutes are applied in a multi-level approach to planning and decision-making (Figure 3). In the highest levels, the BLM develops a strategic plan and, in some instances, a series of nationwide programmatic plans.

Strategic Plan. Developed pursuant to the Government Performance and Results Act of 1994, the strategic plan is not subject to public involvement, and the agency cannot be forced to follow its prescriptions. On the other hand, the strategic plan is a potentially useful source of information. It can indicate nationwide management direction and priorities, funding allocations, and upcoming management actions in the field.

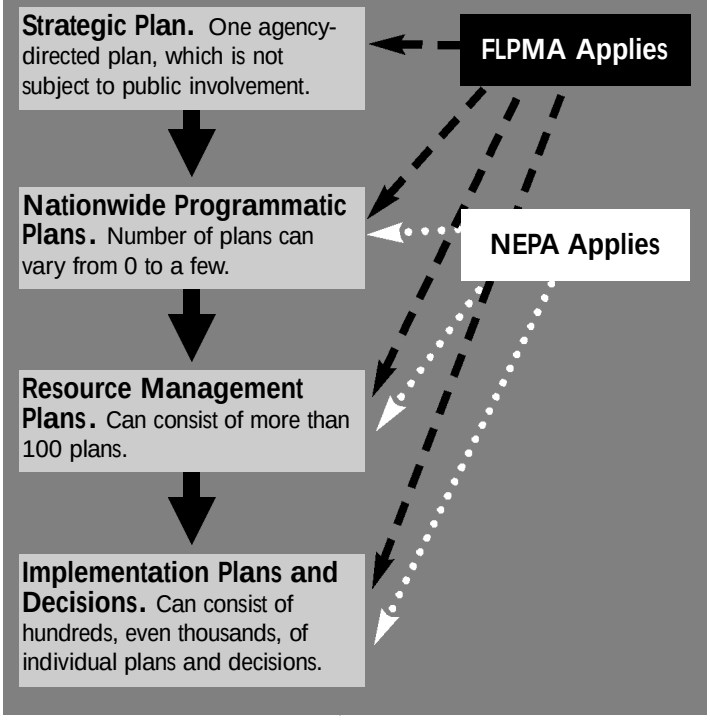
Nation-wide programmatic plans are developed within NEPA's procedural framework. They govern a specific resource use or issue (as examples, invasive species and fire management) and provide guidelines that are usually applied in the middle and lower levels.

This guide focuses on the middle and lower levels. In the middle level, the BLM develops Resource Management Plans through a multi-stage process. Once completed, RMPs guide and control future management actions for years and, in some instances, decades.

In the lowest level, the BLM engages in implementation-level planning and decision-making. These plans and decisions contain the most refined information and carry out specific programs and actions of the Resource Management Plan on the ground. They come in two forms. First are issue specific plans such as the Travel System Management Plan. These types of plans contain very specific decisions and guidelines concerning a particular issue and generally affect an entire BLM planning area. Second are site-specific implementation plans and decisions such as the Allotment Management Plans for rangeland management, which apply only within a very specific geographic footprint. All implementation plans and decisions must conform to the relevant RMP and comply with NEPA.

The collective interactions (tiering) among individual plans and decisions can become extremely complex. They should be apparent and easily understandable; that is, logical. In reality, the interactions often prove to be fertile ground for confusion that the BLM may take advantage of to hide its rationale, justification, and environmental analysis for a given decision. In this manner, the agency can shield its decision from criticism and scrutiny. This is commonly referred to as the "shell game." Therefore, be wary if the BLM relies on a previous plan or decision to justify a proposed action. If the BLM does this, the agency should articulate in the NEPA document for the proposed action why tiering is justified in the present circumstances.

FIGURE 3.
BLM Planning and Decision-Making Levels



C. Resource Management Planning

1. Authority

Resource Management Plans create a framework for managing a defined geographic area. The BLM has considerable — but not unbounded — discretion under FLPMA to develop, maintain, amend, and revise RMPs.[152] Thus participation is critical to the planning process: planning opens the door to a wide variety of possible conservation-oriented management actions (for example, the protection of wilderness-quality lands).

Public participation is involved in each individual planning effort. In addition, the BLM Director must disclose a planning schedule for each fiscal year.[153] The planning schedule details the status of each RMP planning process underway, each planning process that will be initiated, the major actions to be taken in each planning action, and the projected new planning starts for the subsequent three fiscal years. The BLM is required to request comments on the projected planning start-up dates to refine its planning priorities.[154] This list gives you an understanding of the BLM's national and regional management direction, a hint at upcoming initiatives, and a look at outdated or infirm plans where the BLM should be managing the land very cautiously.

Changes to existing land-use plans (through maintenance, amendment, or revision) are triggered by new information or data on an as-needed basis: the passage of time does not itself trigger the need to plan.[155] The BLM often shields itself from the need to develop, amend, or revise RMPs. Fundamentally, however, the BLM must have an adequate base of RMPs. If the agency meanders too far from this requirement, the courts, through citizen-initiated litigation, can step in and hold the agency accountable.[156]

2. Brief Overview of the Nine Planning Stages

The RMP planning process is divided into nine stages with several opportunities for formal public involvement. This process allows the BLM to tailor RMPs to specific place-based conditions. The nine stages (more detail is provided throughout the rest of this chapter) are:

- Stage 1. Issue Identification . The BLM determines the issues to resolve in the RMP.
- Stage 2. Planning Criteria . The BLM determines the sideboards of the planning process.
- Stage 3. Inventor y. The BLM compiles necessary information.
- Stage 4. Inventory and Issue Analysis . The BLM analyzes compiled information relative to identified issues.
- Stage 5. Formulation of Alternatives. The BLM creates several distinct bundles of decisions (alternatives) to resolve identified issues.
- Stage 6. Effects of Alternatives Estimated. The BLM determines the direct, indirect, and cumulative costs and benefits of each alternative.

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[152] 43 U.S.C. § 1712(a).

[153] 43 C.F.R. § 1610.2(b).

[154] 43 C.F.R. § 1610.2(b).

[155] 43 U.S.C. § 1712(a).

[156] See *Natural Resources Defense Council v. Jamison*, 815 F.Supp. 454 (D.D.C. 1992) (holding that BLM failed to comply with FLPMA planning requirements and requiring the agency to submit a schedule to the court to move towards full compliance with FLPMA).

- Stage 7. Selection of a Preferred Alternative. The BLM identifies a preferred alternative and publishes a draft RMP/Environmental Impact Statement.
- Stage 8. Selection of a Proposed Management Plan. The BLM selects a proposed alternative and publishes a final RMP/EIS.
- Stage 9. Maintain, Amend, and Revise Plan. As new issues, information, or data comes to light, the BLM alters the plan accordingly.

3. Decisions Made in the Planning Process

a. Land-Use Plan Decisions

"Land-use plan decisions" (a technical term) made in the RMP are based on the Purpose and Need that evolves throughout the planning process from management priorities and public review and comment. Generally, at the RMP level, the Purpose and Need is broad and highly inclusive and provides the BLM with considerable discretion to define the management direction for the entire planning area.

Land-use plan decisions are of two types: desired outcomes and allowable uses and actions. Where these decisions intersect with your interests, it is good to gain an understanding of what each type of decision is, what it does, and how it is implemented.

Desired outcomes include individual goals, standards, and objectives. Goals are generally broad and not quantifiable; for example, to "maintain ecosystem health and integrity." A standard is more particular: it describes the physical and biological conditions or degree of function necessary to achieve a goal. For example, the BLM's grazing regulations directed BLM state offices to develop rangeland health "Standards and Guidelines" for incorporation into all new land-use plans and into all existing land-use plans through maintenance, amendment, or revision processes.[157] The standards are then supposed to be linked to specific public land activities to describe which impacts are permissible and to set out the spatial and temporal components that determine whether the standard is attained. Objectives identify the specific conditions desired within specific time frames, and they should be quantifiable and measurable.[158]

Allowable uses and actions define which activities are allowed and which are necessary to achieve the desired outcomes.[159] This consists of identifying specific lands where specific activities are allowed (or necessary) and any restrictions on those activities to ensure conformance with desired outcomes. Generally, the allowable uses are not site specific (although there are exceptions). Instead, they establish a framework for future implementation and activity-level planning.

Simply because a land-use plan decision — no matter the type — is articulated in an RMP does not mean that it is immediately effective. For most decisions, program-specific actions are usually necessary before the BLM can authorize on-the-ground activity. Such actions are generally phased in over time through implementation-level planning and decision-making. The BLM has said that it will conduct such planning through a multi-resource, interdisciplinary approach,[160] and you should hold the BLM accountable for this stated

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[157] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (II)(B)(1) (2000).

[158] *Id.*

[159] *Id.* at (II)(B)(2).

[160] *Id.*

intent. If further site-specific planning is necessary, it should be articulated and scheduled in the final plan. Notably, some land-use decisions are immediately effective, including the entire set of desired outcomes and particular allowable use/action decisions such as designations of Areas of Critical Environmental Concern, visual resource management classes, wild horse and burro herd management areas, off-road vehicle (ORV) designations, and areas open or closed to oil and gas leasing.[161]

The allowable uses and actions articulated within the RMP are often somewhat speculative, generally punting to the implementation-level determinations. As a consequence, "reasonably foreseeable development (RFD) scenarios" developed during the planning process are important because they project likely use throughout the anticipated lifetime of the plan. RFD scenarios, especially significant in the context of energy leasing, exploration, and development, should:

- Consider all potential uses on an equal footing.
- Account for environmental consequences.
- Incorporate economics and estimate defensible estimates of supply and demand.
- Ensure a consistent approach to implementation- and activity-level planning.
- Facilitate effective cumulative impact analyses at implementation- and activity-level scales by identifying reasonably foreseeable management actions.
- Constrain activities within the parameters set out in the RMP and accompanying EIS.

BLM management is not focused solely on development and use of the resources: the BLM must also identify proactive measures needed to achieve the desired outcomes.[162] These measures account for the fact that the agency cannot protect the land and comply with the law merely by prohibiting or limiting a degrading use. Proactive measures can include active restoration of damaged areas, implementation of special designations such as Areas of Critical Environmental Concern, protection of wilderness-quality lands as Wilderness Study Areas, recommendations to designate WSAs as Wilderness, and suitability determinations for Wild and Scenic rivers.

The RMP also identifies lands for retention, disposal, or acquisition. Such decisions are extremely important given the highly fragmented land ownership patterns in the West — a confusing network of federal, state, tribal, and private lands. These decisions must, like all management decisions, conform to the desired outcomes for the planning area.[163] In general, the BLM sets out criteria under which the agency will make a land-tenure decision. In the context of disposal, whether by sale or exchange, "[i]t must be clear to the public that all lands within areas covered by any disposal criteria may be transferred out of federal ownership based on the application of such criteria."[164] To do this, the BLM must identify those lands in a fashion that is "clearly understood by the public," identify the legal authority under which a land-tenure decision will be made, the criteria that factor into the decision, and the management objectives served by the decision.[165]

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[161] *Id.* at (IV)(A).

[162] *Id.* at (II)(B)(2)(b) [emphasis added].

[163] *Id.* at (II)(B)(2)(c).

[164] *Id.* [emphasis in original].

[165] *Id.*

b. Distinguishing between Land-Use Plan and Implementation Decisions

It is important to distinguish RMP land-use plan decisions from implementation decisions because there are differences in how each type of decision is made and how each type of decision can be administratively challenged. Land-use plan decisions are made through the RMP planning process. Implementation decisions are made consistent with program-specific guidance in conformance with the RMP. In both situations, NEPA is applicable, adding an important procedural component to planning and decision-making. In terms of challenging the decision:

Land-use plan decisions must be administratively challenged through the BLM protest process within 30 days after the release of the Final RMP.[166]

Implementation decisions must be administratively challenged through the appeals process run by the Interior Board of Land Appeals (IBLA) in the Department of the Interior's Office of Hearings and Appeals.[167] In certain instances, you must first seek administrative review of the decision by the BLM before you can appeal the decision to the IBLA. If a decision is immediately effective, you should be able to go to the federal courts immediately, skipping the IBLA. Whether or not you choose that option is a strategic question.

Program-specific guidance (regulations and policies for grazing, wilderness, ORVs, etc.) usually gives a good indication of how each type of decision is made. In addition, the BLM should indicate the proper forum for challenging decisions in the Record of Decision or Decision Record.[168]

c. All Decisions Must Conform to the RMP

All management authorizations and actions, budget and action proposals to higher administrative levels, and implementation planning and decision-making must conform to the RMP.[169] In other words, if BLM actions do not conform to the RMP and no exemption has been provided by statute, the agency is acting illegally and you should be able to enforce the RMP against the agency.

For each proposed action, the BLM should complete a conformity analysis to determine whether an action conforms to the RMP. If the BLM determines that the action does not conform to the RMP, the action must be prohibited unless the agency has been granted an exemption by statute. Remember: the RMP evolves with time, and the BLM may reconsider, modify, or terminate its provisions. This power could be used to authorize an action that the unchanged RMP otherwise prohibits. Importantly, if the BLM decides to reconsider, modify, or terminate provisions in the RMP, it can only do so through a plan amendment or revision, both of which require public participation.[170]

The conformity analysis is thus intrinsically linked to public participation. In a sense, it represents a binding mandate on the BLM to manage the lands consistent with the negotiated plan — the RMP. If the BLM fails to take actions in conformity with the plan, the agency violates the sanctity of public participation, a fundamental component of land management required by FLPMA and NEPA.

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[166] 43 C.F.R. § 1610.5-2

[167] 43 C.F.R. § 4.411; U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Manual*, § 1601.06(E)(1)-(2) (2000); U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (IV)(D).

[168] See U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (IV)(D).

[169] 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3.

[170] 43 C.F.R. § 1610.5-3(c).

4. Suggested Conservation Objectives in the Planning Process

a. Creating a Vision for the Land

One of the most important objectives in the resource management planning process is to get the BLM to develop a detailed vision or mission statement for the planning area. A vision outlines the resources and values of the landscape, how that landscape should look within the time frame that the RMP is to be implemented, and how management is designed to achieve the BLM's myriad legal obligations. Thus, a vision is place-based, providing the public and other governmental entities with a defined and ideally enforceable understanding of BLM management in the present and into the reasonable future. Once crafted, a vision should be reflected in more specific land-use decisions — including the desired outcomes and allowable uses and actions.

Although creating a vision for each planning area sounds logical in theory, getting the BLM to do so is a different matter. Encourage the agency by creating your own vision for the land and submitting it to the BLM during the early stages of the resource management planning process or, even better, before the planning process gets underway. Use the various legal tools at your disposal to justify your vision, identify management issues, and specify recommended actions to implement your vision. Your vision statement should be short, compelling, easy for the broader public to understand, enforceable, and unequivocal in its purpose. Although it is unlikely that the BLM will adopt your vision wholesale, it could strongly influence the RMP.

Once developed, all management decisions within the planning area — including desired outcomes, management priorities, and funding requests and allocations — would have to conform to the vision. Although certain management units (for example, National Monuments) may have a more definitive conservation focus, all of the public lands should be managed to ensure the continued health and integrity of the landscape within and without the planning unit. For a model, and to show the BLM that they can actually create a vision, take a look at the vision established for the Grand Staircase-Escalante National Monument.[171]

Some suggested elements for your vision statement:

- Focus on the positive values of the landscape — clean water and air, free-flowing rivers, native biodiversity, and large blocks of contiguous, unfragmented habitat.
- Encourage landscape-scale and ecologically based land management versus site-specific, segregated, program-specific management.
- Link the BLM's mission on the land to conservation-oriented legal mandates; for example, Section 101 of NEPA (42 U.S.C. § 4331) and Section 102 of FLPMA (43 U.S.C. § 1701(a)(8)).
- Emphasize that the public lands are managed in the national interest for the entire American public, not just for the local public (43 U.S.C. § 1701(a)(1), (2)).
- Articulate the importance of adaptive ecosystem management principles (discussed below) as a necessary element of landscape-scale and ecologically based land management.

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[171] U.S. Department of the Interior, Bureau of Land Management, Approved Management Plan and Record of Decision for the Grand Staircase-Escalante National Monument pp. 4-5 (1999).

b. Establish an Adaptive Ecosystem Management Program

Once a vision is established, the RMP must provide tools to implement and achieve that vision. This requires a general framework for practical day-to-day management. Considering the need to emphasize ecological systems, adaptive ecosystem management holds considerable promise. AEM is a method of managing the land in the face of undeniable uncertainty. Accepting this uncertainty, AEM recognizes that management is, to a significant extent, a huge experiment. AEM provides the BLM with a tool to allow reasoned and informed use of the land, but recognizes that as time goes by, we should learn more and apply that evolved knowledge to decisions. AEM thus emphasizes learning about and adapting to the land.

Through AEM, agencies should predict the impacts of proposed activities, mitigate adverse environmental consequences, implement decisions consistent with legal obligations, and monitor and evaluate those decisions to determine the accuracy of initial predictions. Where monitoring and evaluation show that initial predictions are inaccurate or incomplete, new information and knowledge is applied to change existing management decisions.

AEM can also play an active role in determining whether or not a given action should proceed in the first place by determining the risk involved in implementing the action. The greater the level of uncertainty, the higher the BLM's burden of proof to justify going forward with the activity. If the agency cannot meet the burden of proof, it should not proceed with the activity. This is consistent with the precautionary theory — a practical and logical management perspective that is consistent with (and some argue is required by) the BLM's statutory duties under NEPA Section 101 (42 U.S.C. § 4331) and FLPMA Section 102(a) (43 U.S.C. § 1701(a)). The precautionary theory is not an impediment to management activities. Rather, it is a call for reasoned and informed planning and decision-making. And it is doubly important because AEM in and of itself does not prevent resource damage. It simply makes such damage less probable and builds in a safety valve to modify an action if, as implemented, the action causes unintended consequences.

A critical facet of AEM is the need to understand management within the context of the broader landscape and the multiple activities that take place across the landscape over time. In this light, NEPA's cumulative impact analysis must play a key role. Cumulative impact analysis allows us to understand the collective impacts of individual activities over space and time. Cumulative impact analysis should link the NEPA process to BLM's substantive management obligations, starting with Section 101 of NEPA and Sections 102(a), 103(c), and 302(b) of FLPMA.[172]

To be effective, the cumulative impact analysis must start with a comprehensive landscape-scale cumulative impact analysis completed for the RMP and subsequently step down to more site- or action-specific levels. Thus linked, data and analysis can flow between multiple geographic and time scales. As a consequence, AEM heightens the need for standardized and scaleable information management systems (inventory, monitoring, and evaluation programs). These systems feed the cumulative impact analysis so that it can better provide land managers and the public with accurate

[172] 42 U.S.C. § 4331 (NEPA Section 101); 43 U.S.C. §§ 1701(a)(1)-(13) (FLPMA Section 102(a) policies), 1702(c) (Section 103(c) permanent impairment provision), 1732(b) (Section 302(b) mandate to prevent unnecessary or undue degradation).

information to compare individual management actions and gauge whether the agency is moving toward the desired outcomes articulated for the land in the RMP.

Overall, the AEM framework should be designed to protect the structure, function, and composition of the landscape while providing for the land's use and enjoyment. The AEM framework should provide front-end disclosure of how the system operates to ensure that both the BLM and the public are fully informed and not caught by surprise if actions need to be modified. But take care: AEM is sound in theory but difficult in practice. There is a large gray area between providing the BLM with the necessary management flexibility while concurrently ensuring that the agency is accountable for its actions and the public is provided with sufficient certainty as to how the public lands are used and protected. Parameters for an AEM framework should therefore be defined, realistic, and enforceable. Moreover, the framework should include specific timetables for action and contingency provisions to protect the land and its resources in the event that staff and funding prove insufficient.

Developing an AEM program involves a considerable amount of negotiated give and take between the stakeholders. It is important to highlight those areas where compromise is possible or impossible to move forward with an AEM framework. Ignoring such issues will only undermine the effectiveness of the AEM framework down the line. AEM programs can easily lose focus and become symbolic of the intractable nature of public land conflicts and the penchant of the BLM to commit to data collection and study without action, even in the face of widespread and obvious resource damage. Any management framework, whether based on AEM or not, should take into account the institution implementing the framework. In the case of the BLM, this means a careful consideration of the agency's institutional capacity — its limited staff and resources, uncertain commitment to conservation, and predilection to cave to political pressure.

c. Build Conservation-Oriented Coalitions

The RMP planning process presents an important opportunity to build coalitions. Use the planning process to rally support for conservation-based objectives. Reach out to both traditional and non-traditional constituencies with common objectives, especially when such constituencies come at a problem from a different angle. Increasing the pressure on the BLM from a coalition of environmental activists, biologists, hiking clubs, archaeologists, faith institutions, gardening clubs, and more can pay significant dividends down the road.

5. Early Planning Efforts: Classifications and Management Framework Plans

It is a continuous struggle for the BLM to reconcile current responsibilities under FLPMA and NEPA with past plans and decisions. If you encounter plans and decisions that do not comply with these laws, it is helpful to understand pre-FLPMA planning and decision-making.

A basic form of land-use planning began with the passage of the Taylor Grazing Act of 1934. Section 315f of the Taylor Act granted the BLM the power to classify lands as suitable for statutorily authorized purposes, a process that continues to this day largely through the resource management planning process.[173] In 1961, the BLM emphasized a nationwide inventory and classification

[173] 43 U.S.C. § 315f (classification authority); 43 U.S.C. § 1712(d) (role of classifications in the planning process).

program to improve natural resource management and began to use Master Unit Plans to determine desirable land-tenure arrangements. Master Unit Plans are no longer in use. Pursuant to the Classification and Multiple Use Act of 1964, a temporary law no longer on the books, the BLM developed its first set of comprehensive land-use plans, called Management Framework Plans. Still in limited operation, they classified the public lands for retention and management or disposal.[174]

6. Resource Management Plans: Policy and Procedures

NOTE: Refer to Figure 4, page 60, as you read the rest of this chapter

a. Legal Guidance

i. Statutory Criteria

FLPMA sets out a series of statutory criteria that the BLM must comply with in developing and revising RMPs. For the most part, these criteria are broad and do not specify procedures that the BLM must follow in the planning process or the content that must be included in RMPs. But despite their lack of specifics, the criteria do constrain the BLM's discretion. You should aggressively leverage the criteria in the resource management planning process, as they can be, when properly used and respected, important tools for protecting the land.

Request the BLM to disclose how it intends to satisfy the statutory criteria in its RMPs during the planning criteria stage (Stage 2) of the resource management planning process. The public should be able to trace each criterion in that process and how it is used to justify a given course of action. The BLM should not merely state that it will comply or has complied with the criteria.

Each individual criterion is applied in the RMP planning process somewhat differently; some criteria are broadly applicable throughout the planning process, while others have heightened importance in specific stages. The statutory criteria are as follows.

Multiple use and sustained yield (43 U.S.C. § 1712(c)(1)). The multiple-use and sustained-yield mandates must be applied as the driving force behind the development of RMPs (unless the land is reserved for a dominant purpose such as a National Monuments[175]). Multiple use and sustained yield are important in each stage of the planning process.

Encourage the BLM to recognize that multiple use encompasses market and non-market resources and values and that sustained yield should focus on the biophysical environment. Ultimately, multiple use and sustained yield are about optimizing the public good for current and future American publics. Challenge the BLM where the agency maintains the *status quo* without justification, undervalues resources, permanently impairs or unnecessarily or unduly degrades other resource uses, or otherwise violates legal obligations.[176]

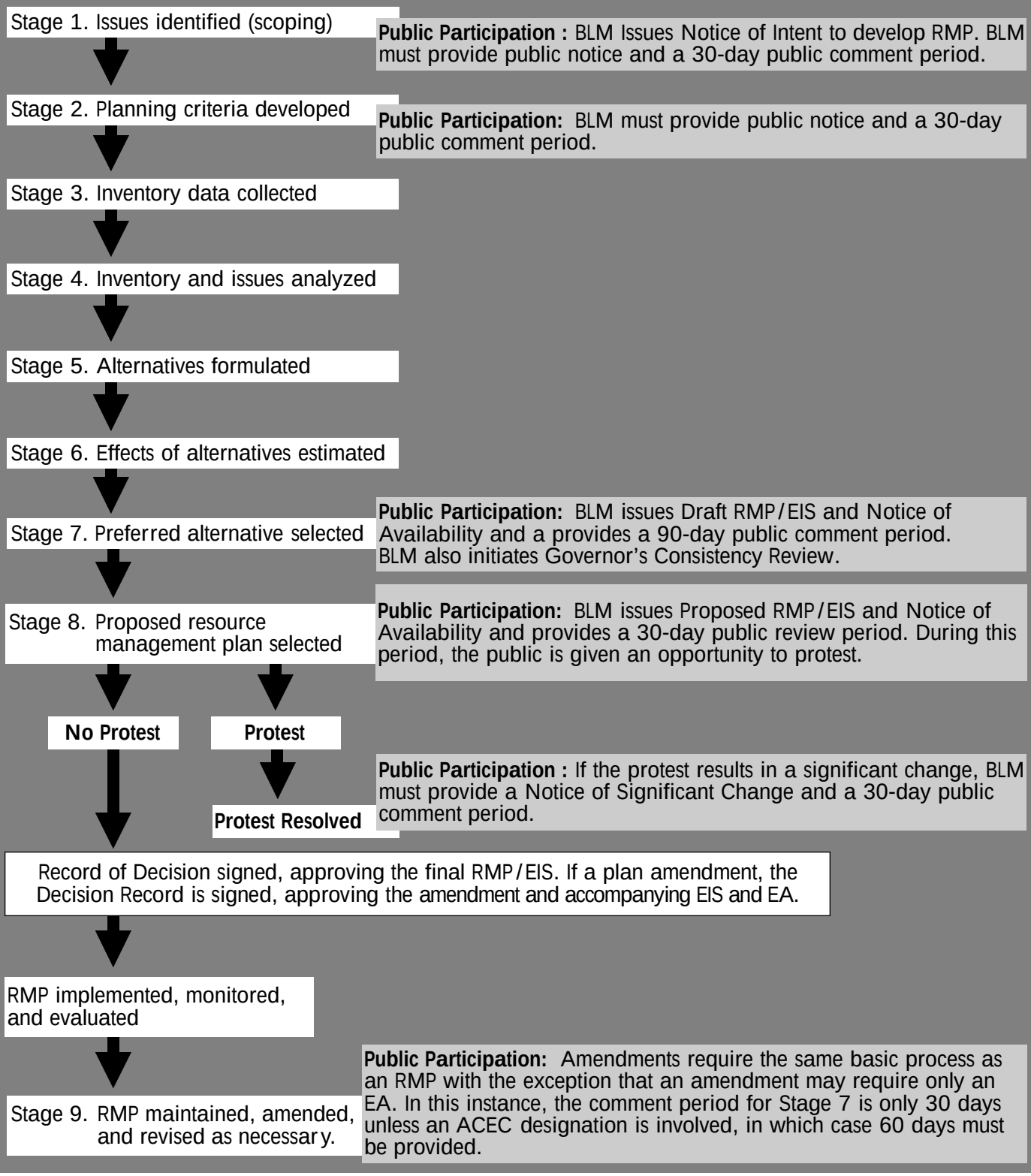
Systematic, interdisciplinary approach (43 U.S.C. § 1712(c)(2)). RMP planning should be comprehensive and reproducible. Every RMP must reflect an integrated consideration of physical, biological, economic, and other sciences

[174] MFPs *must* be replaced. See *National Wildlife Federation v. Burford*, 676 F.Supp 271, 277 (D.D.C. 1985) (holding that MFPs do not satisfy FLPMA's "expectations" of "land use plans" and that FLPMA allowed the BLM to rely on MFPs only temporarily); *Natural Resources Defense Council v. Jamison*, 815 F.Supp 454 (D.D.C. 1992) (holding that BLM violates FLPMA if it abandons a move to replace MFPs with RMPs and that merely amending existing MFPs does not satisfy FLPMA's statutory requirements).

[175] 43 U.S.C. § 1732(a).

[176] See 43 U.S.C. §§ 1702(c), 1732(b).

FIGURE 4.
The BLM Resource Management Planning Process



Note: Public hearings may occur throughout the planning process. Each hearing requires a minimum 15-day advance notice.

applied during each stage of the resource management planning process. The BLM should use the best available science; adequate environmental data are essential.

Ensure that plans and decisions incorporate information from all relevant disciplines. This information should be apparent during each stage of the planning process. Also make sure that the BLM uses an interdisciplinary planning team to sufficiently consider all identified issues. The RMP should reflect interdisciplinary professional experience and explicitly obligate the BLM to use an interdisciplinary approach at the implementation level.

Areas of Critical Environmental Concern (43 U.S.C. § 1712(c)(3)). The planning process must give priority to the designation and protection of ACECs, but this priority must be balanced with other management obligations. For example, in a National Monument, the BLM must give priority to the protection of the objects of interest that are articulated in the proclamation or enabling legislation. Designation and protection of ACECs can complement but not detract from or degrade such objects of interest.

Aggressively assert the statutory primacy of ACECs and work with the BLM to use ACECs in a creative fashion to leverage resource protection. Raise the issue of ACEC designation and management in the issue identification or scoping phase (Stage 1) of the planning process and track the progress of the issue through subsequent stages. Where appropriate, you should nominate ACECs. Each nominated ACEC should contain defined management objectives and allowable uses.

Inventories (43 U.S.C. § 1712(c)(4)). This provision is relevant in two important ways. First, in the planning process the BLM must rely on inventories (to the extent available) of public land resources and values (43 U.S.C. § 1711(a)). The BLM generally relies on existing data and rarely verifies information on the ground during the planning process. So you should ensure the adequacy of inventories before the planning process is underway. Data and information collected in inventories ripple through the entire planning process: inventory information drives issue identification (Stage 1) and the development of planning criteria to resolve identified issues (Stage 2) and defines the nature and scope of information compiled in the inventory stage (Stage 3) and inventory and issue analysis stage (Stage 4). These stages, in turn, profoundly affect the formulation of alternatives (Stage 5), analysis of the effects of each alternative (Stage 6), and, invariably, the selection of a preferred alternative (Stage 7) and proposed management plan (Stage 8).

Second, once the plan is completed the BLM's inventory obligations are not over. The agency must prepare and maintain its inventories on a continuing basis (43 U.S.C. § 1711(a)). This is an extremely important component of a sound AEM program. Therefore, request during the issue identification stage (Stage 1) that the BLM structure a comprehensive inventory, monitoring, and evaluation program into the selected alternative. During the scoping stage (Stage 1), planning criteria stage (Stage 2), and in commenting on draft plans (Stage 7), request that the BLM limit or restrict uses where the multiple resources of the public lands are not fully or adequately inventoried or understood.

Present and potential uses of the land (43 U.S.C. § 1712(c)(5)). The BLM must consider use of the land in both present and potential terms (that is, resources that may become more valuable as time passes such as wilderness-quality lands, wildlife habitat, and watershed protection).

Request the BLM to consider whether the land could be used for better purposes relative to current uses and state what

those better purposes should be. In this context, inventories (43 U.S.C. §§ 1711(a), 1712(c)(4)) compiled in the inventory stage (Stage 3) are of special importance: if you don't really know what *is* out there, you don't really know what *could* be out there. Ensure that the BLM analyzes costs and benefits (43 U.S.C. § 1712(c)(7)) for present and future uses in the inventory and issue analysis (Stage 4) and in estimating the effects of alternatives (Stage 6).

Scarcity of values (43 U.S.C. § 1712(c)(6)). The BLM must consider the relative scarcity of values and the availability of alternative sources of those values. This could be read as a justification for using the public lands to correct market failures: where the private sector has not adequately protected or valued a certain value such as Wilderness, then it is appropriate for the BLM to do so.

This criterion should influence how the BLM accounts for the costs and benefits of a given action (43 C.F.R. § 1712(c)(7)). Request the agency to consider whether adequate opportunities for a specific resource use exist elsewhere. This gives you a tool to leverage alternative and undervalued resource uses of the public lands in formulated, selected, and proposed alternatives (Stages 5, 7, and 8). To be effective, the BLM must concurrently assess all potential uses. Unfortunately, BLM policies and procedures and how those policies and procedures are applied in practice, often give *de facto* dominance to certain types of resource uses (for example, mineral extraction) and subordinate the consideration of alternative uses.

Cost/benefit analysis (43 U.S.C. § 1712(c)(7)). Cost/benefit analysis, carried out principally during Stage 6 of the resource management planning process, can justify the prohibition or mitigation of resource uses and practices to protect the health and integrity of the landscape. In conducting the analysis, the BLM must balance short- and long-term costs and benefits. In advocating for a sound cost/benefit analysis, keep in mind the overarching intent and meaning of multiple use to gauge the total costs and benefits to all resources (market and non-market) from a given action over time (short and long terms).[177] Program-specific policies and procedures should be designed to ensure that resource allocations at the RMP level are made on an equal footing based on the cost/benefit analysis and, on a broader level, the overall environmental consequences of alternative management regimes.

As per the BLM's duty to consider the relative scarcity (43 U.S.C. § 1712(c)(6)) of resources and values, additional weight should be given to resources and values such as wilderness-quality lands that are scarce across the nation as a whole. Resources and values considered within the analysis need not be immediately tangible: the BLM must look at potential uses.[178] For example, the closure of a road could open the door to the potential use of the land as wildlife habitat or even Wilderness. These are significant benefits that the BLM should consider.

Ask the agency to disclose its cost/benefit analysis, the data supporting the analysis, and the factors and criteria that determined the weight given to particular elements (for example, market and non-market resources or values that benefit from or are harmed by a particular action). Strongly encourage the agency to use Total Economic Valuation to justify management actions. This method is fully consistent with the BLM's statutory obligations. In fact, a good argument can be made that failure to use Total Economic Valuation renders

[177] 43 U.S.C. § 1712(c)(1).

[178] 43 U.S.C. § 1712(c)(5).

a decision infirm. Depending on the facts, traditional BLM economic analyses fail to accurately consider costs and benefits to all public land market and nonmarket resources, values, and uses over time within the context of the broader landscape; that is, within and without the boundaries of the management unit.

Pollution control (43 U.S.C. § 1712(c)(8)). The BLM must comply with applicable pollution-control laws such as the Clean Water Act and with relevant standards and implementation plans. Often, this involves intensive coordination with the U.S. Environmental Protection Agency and state environmental quality agencies.

Pollution-control laws have yet to be effectively integrated into BLM planning and decision-making processes. But this presents an opportunity for you. Request that the BLM disclose in the RMP the content and procedures of how it intends to comply with pollution-control laws, standards, and plans. And note that federal pollution-control programs contain extensive public participation requirements independent of BLM planning and decision-making requirements. These may prove fruitful venues for enhanced participation, especially where your interests involve air or water quality and the state government is favorably disposed to your position.

Intergovernmental coordination (43 U.S.C. § 1712(c)(9)). The BLM must coordinate inventory, planning, and management activities with other federal departments and agencies, Indian tribes, and state and local governments to ensure consistency with those entities to the maximum extent practical and legal. This criterion is important in the context of adjacent lands, policies (especially pollution-control laws), and programs under the jurisdiction of other governmental entities.

Work with relevant government agencies to leverage pressure against the BLM from other angles. This can be an effective method to achieve your objectives, build coalitions, and work toward consideration of the broader landscape. Be wary of BLM attempts to grant state and local government entities "cooperating agency status" under NEPA. If those entities are dominated by industry, motorized recreation organizations, livestock grazers, or other parties that focus on development or extraction of resources, the political balance may be tipped in favor of intensified resource development and against environmental protection.[179]

ii. Planning Regulations

The BLM implements its resource management planning process through a series of regulations developed in the early 1980s that do little more than describe the various stages of the planning process. Supplemental guidance issued by the BLM in a land-use planning manual and handbook (discussed below), revised in 2000, clarifies the planning process and generally, though of less legal weight, provides some valuable guidance.

Pursuant to the regulations, an Environmental Impact Statement must accompany every RMP.[180] The two documents are published in the same, often multi-volume document.[181]The RMP planning process is applicable to all public lands, governing the protection and

[179] 40 C.F.R. §§ 1501.6 (selection and responsibilities of cooperating agency), 1508.5 (definition of cooperating agency).

[180] 43 C.F.R. § 1601.0-6.

[181] *Id.* See also 40 C.F.R. § 1500.2(c) (requiring federal agencies to the fullest extent possible to integrate the requirements of NEPA with other planning and environmental review procedures required by law or agency practice so that all such procedures run concurrently rather than consecutively).

management of both surface and subsurface interests overseen by the BLM.[182] Related to the NEPA process, the regulations require the BLM to establish intervals and standards to monitor and evaluate the RMP.[183] The monitoring and evaluation standards are tailored to the "sensitivity of the resource to the decisions involved." [184] Consistent with FLPMA's statutory planning guidance (43 U.S.C. § 1712(c)(2)) and NEPA (42 U.S.C. § 4332(2)(A); 40 C.F.R. § 1502.6), the regulations require the BLM to use an interdisciplinary approach.[185]

The BLM's planning regulations direct the agency to consider "the impact on local economies and uses of adjacent or nearby non-Federal lands and on non-public land surface over federally-owned mineral interests…."[186] Note that the regulations do not require the agency to prioritize or give preference to such impacts. More stringent requirements are imposed in the context of official non-BLM governmental plans and programs: the BLM must coordinate its planning efforts with other federal, state, local, and tribal entities, trying to seek common ground where possible.[187] Furthermore, RMPs and associated planning guidance:

> shall be *consistent* with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands, including Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise, and other pollution standards or implementation plans.[188] (emphasis added)

This provision requires the BLM to seek common ground and ensure consistency with other government entities as long as this complies with the BLM's legal framework. The obligation also extends to other governmental policies and programs even if they are not articulated in a plan.[189] The consistency requirements implement FLPMA 43 U.S.C. § 1712(c)(9). Input is also obtained through use of Advisory Councils established under Section 1739 of FLPMA.[190]

iii. Land-Use Planning Guidance

The BLM's land-use planning policy guidance is found in two documents, a Manual and a Handbook. The guidance focuses on preparation of new RMPs, revisions, amendments, the adoption of plans from other agencies, and subsequent implementation

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[182] 43 C.F.R. § 1601.0-7(a)-(b).

[183] 43 C.F.R. § 1610.4-9.

[184] *Id.*

[185] 43 C.F.R. § 1610.1(c).

[186] 43 C.F.R. § 1601.0-8.

[187] 43 C.F.R. § 1610.3-1.

[188] 43 C.F.R. § 1610.3-2(a) . See also 43 C.F.R. § 1610.3-1(a) (the BLM must resolve "to the extent practicable" inconsistencies with non-Federal government plans).

[189] 43 C.F.R. § 1610.3-2(b).

[190] 43 C.F.R. § 1610.3-1(f).

plans.[191] These guidelines are subordinate in authority to the planning regulations and statutory planning criteria.

Through the planning process, the BLM describes specific constraints and establishes baseline management restrictions and opportunities. All land-use plan decisions must meet "approved standards and documentation requirements."[192] However, neither the Manual nor Handbook states where to find those requirements.

The Manual and Handbook are more thoughtful than the regulations in that they expressly link land-use planning with the BLM's overall legal authority, mission, and policies such as the agency's Strategic Plan developed under the Government Performance and Results Act of 1994. The BLM's authority and mission, as articulated in the Manual, should be infused into all aspects of the planning process. Although the authority and mission are stated in fairly general terms, when applied to place-based facts and conditions they could form the foundation for sound, environmentally conscious plans and decisions. As the Manual states:

> The BLM's mission is to sustain the health, diversity, and productivity of the public lands for the use and enjoyment of present and future generations. Land use plan decisions will further this mission by identifying desired outcomes and actions that restore and maintain the health of the land; preserve natural and cultural heritage; reduce threats to public health, safety, and property; and provide opportunities for environmentally responsible recreational and commercial activities.[193]

To fulfill this mission, the BLM states in the Manual that it intends to make planning decisions "in concert with sustainable development concepts … [that] include a vision of economic prosperity, a healthy environment, and a just and equitable society."[194] Linked to place-based information, the BLM's policies could operate as an effective catalyst for change, orienting the BLM around ecologically based rather than use-based thinking. Be cautious, however: BLM policies and procedures still contain a variety of risks and opportunities heavily influenced by political dynamics.

The Manual and Handbook emphasize that all plans — programmatic plans, RMPs, and implementation-level plans — are developed at multiple scales to provide a comprehensive planning base and to facilitate effective decision-making and public involvement.[195] Planning at multiple scales underscores the importance of NEPA, especially the need to accurately define the study area of a given impact, whether ecological or socioeconomic, and

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[191] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Manual*, § 1601.01 (2000) (http://www.blm.gov/nhp/efoia/wo/manual/manuals.html); *Land Use Planning Handbook*, H-1601-1 (2000) (http://www.blm.gov/nhp/efoia/wo/handbook/handbook.html). Authority to issue planning guidance is provided by 43 C.F.R. §§ 1610.0-4(a), 1610.1(a).

[192] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (III)(C) (2000). See also H-1601-1 (III)(A)(2)(d)(4) (discussing data collection, display, and management).

[193] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Manual*, § 1601.06(A)(2) (2000).

[194] *Id.* at § 1601.06(A)(1) (2000).

[195] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Manual*, § 1601.06(D); *Land Use Planning Handbook*, H-1601-1 (I)(A)(1) (2000).

PHOTO BY LISA HOLZAPFEL/BLM

Volunteers on trash pick-up duty, Gulkana National Wild and Scenic River, Alaska. Across the country, people give of their time to assist the BLM through a variety of volunteer tasks — from river and land clean-up to resource monitoring and record-keeping.

complete a sound cumulative-impact analysis.[196] Multiple-scale planning and decision-making will likely make generous use of tiering, which allows the BLM to rely on relevant existing NEPA documents to authorize a proposed action in the present.[197] If used properly, tiering is a productive method of managing the land consistent with ecological processes at various spatial and time scales. However, keep a close eye on tiering: the agency regularly abuses its authority.

Given the fragmented ownership patterns in the West, a move toward landscape-scale management inherently implicates the interests of state and private interests within and proximate to federal public lands. The Manual says that the BLM intends to use "collaborative and multijurisdictional approaches" to encourage more consistent planning across the entire landscape.[198] These approaches are also emphasized as a method to identify and resolve BLM management issues, improve land stewardship, and involve the public.[199] Ensuring consistency among plans and decisions across the landscape is important but potentially contentious. Affected tribal, state, county, and local governments can be granted cooperating or joint lead agency status under NEPA's implementing regulations (40 C.F.R. § 1508.5).[200] Be wary of coordinated NEPA arrangements where the partner entities are predisposed toward commercial exploitation and hostile toward conservation objectives and the national interest in public lands.

Two other points relevant to collaboration bear mentioning. First, tribes are given heightened attention in the planning process. They are involved to the same extent as state and local governments, and in addition the BLM must affirmatively protect treaty rights and take into account specific legal protections given to tribes and Indian communities.[201] In other words, the federal government has a higher responsibility to tribal governments than to state or local

[196] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (III)(A)(2)(b) (2000).

[197] 40 C.F.R. §§ 1502.20, 1508.28.

[198] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Manual*, § 1601.02(D) (2000). *See also* 43 C.F.R. §§ 1610.3-1 (requiring BLM to coordinate and resolve inconsistencies with non-BLM government plans, policies, and programs) 1610.3-2 (requiring consistency, to the extent possible, among BLM plans and official non-BLM government plans, policies, and programs).

[199] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Manual*, § 1601.06(C)(1)-(2); *Land Use Planning Handbook*, H-1601-1 (I)(A)(2).

[200] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (I)(C).

[201] See U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Manual*, §§ 1601.03(N), (Z), (AA), (BB)), (DD), (EE), (FF); Land Use Planning Handbook, H-1601-1 (III)(D) (2000).

governments. Second, local input is obtained through Advisory Councils.[202]

No matter how the BLM engages tribal, state, county, and local governments and the public, "the ultimate responsibility regarding land use plan decisions on BLM-administered lands rests with BLM officials…."[203] Such decisions are to be made consistent with legal mandates and should reflect the BLM's collective professional judgment, incorporating the best ideas from the various stakeholders of the public lands.

b. Administrative Structure

At the national level, the BLM's Washington, DC office (WO) provides policy and procedural guidance through the land-use planning Manual and Handbook. The WO works, with limited success, to standardize specific elements of the planning process to improve consistency. The WO also develops teams that continuously review planning efforts and act as a resource for field offices as they conduct planning. The WO team's review is carried out from a broad policy perspective and generally shies away from micro management at the field level. For high profile planning efforts or issues, the level of scrutiny by the national office and, in particular, by political appointees intensifies significantly.

State offices, through the state directors, provide "quality control and supervisory review, including plan approval" and "additional guidance" to district and area managers[204] who supervise plan preparation and give field staff "general direction and guidance."[205] The brunt of the workload falls on the team of agency staff directed by the district or area manager to develop the RMP. This team must be interdisciplinary and include appropriate experts for the issues, resources, and values implicated in the planning process.[206] Overall, the planning team has considerable flexibility to adapt the process to local conditions and circumstances. Combined with a lack of standardization, this fact suggests the need for caution in generalizing about the planning process.

Contingent on staff and funding, the BLM may enter into contracts with private consulting firms. Such contracts may involve the entire planning process or individual components of it. The field office generally manages the contracts with oversight from the state office.

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[202] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601 (I)(C) (2000). See also 43 C.F.R. § 1610.3-1(f) (requiring BLM to involve Advisory Councils in planning). Advisory Councils are authorized by 43 U.S.C. § 1739. BLM's implementing regulations are located in 43 C.F.R. Subpart 1784. Note that Resource Advisory Councils (RACs) (created for rangeland management) are the dominant type of Advisory Council used by the BLM, with specific regulations at 43 C.F.R. § 1784.6. Advisory Councils have also been created for certain National Monuments such as Canyons of the Ancients (CO), Santa Rosa and San Jacinto Mountains (CA), Grand Staircase-Escalante (UT), and Carrizo Plain (CA) and certain National Conservation Areas such as Colorado Canyons (CO), Steens Mountain CMPA (OR), Gila Box Riparian (AZ), and San Pedro Riparian (AZ). If a unit-specific Advisory Council is created, the jurisdiction of overlapping Advisory Councils (in most case the RACs) should recede as, pursuant to 43 U.S.C. § 1739(a), Advisory Councils should not overlap.

[203] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601 (I)(D) (2000).

[204] 43 C.F.R. § 1610.0-4(b); *see also* 43 C.F.R. § 1610.1(a).

[205] 43 C.F.R. § 1610.0-4(c).

[206] 16 C.F.R. § 1610.1(c).

Where the BLM contracts out elements of the planning process, ensure that there are no conflicts of interest. Sometimes, the consulting firms may have ongoing contracts, investments, or relationships with resource-development interests that could bias their work. Conflicts should be fully disclosed in writing.[207] In certain cases, conflicts disqualify the consulting firm from taking the contract.[208]

c. The Process

i Understanding the Process

Anticipate planning actions and communicate your ideas, issues, and concerns to the BLM before planning gets underway. The agency often conducts pre-planning preparation activities such as inventories, resource assessments, and evaluations before the process officially starts. If your voice is not heard early on, the BLM will take actions that you do not like and that gain considerable momentum as the process progresses.

In addition, define the debate. If you don't, the BLM will and you'll likely lose on your issues. Remember to convey your legal arguments carefully, exposing only as much as is necessary to make your point.

Once engaged in the planning process, become familiar with its basic, nine-stage, cyclical structure. The following sections describe each stage of this process, most of which were alluded to earlier in this chapter and all of which are portrayed in Figure 4, page 60. The discussion for most of the stages is divided into subsections: Mechanics (an overview of the primary components of the stage), Role of the Public, and Analysis (highlighting problems that often arise and your potential approaches).

In reading this discussion, remember that each BLM field office has a considerable amount of flexibility. In addition, some planning stages provide for formal public participation, while some do not. Whatever the "formal" level of public participation, do not wait for the BLM to ask you for your input: provide relevant comments at any stage and at any time.

Stage 1: Issue Identification and Scoping

Mechanics

The formal planning process begins with a Notice of Intent (NOI) issued by the BLM.[209] The NOI identifies the start of the formal planning process, which may or may not coincide with the date of the NOI. Sometimes, the BLM includes proposed issues in the NOI for public review and comment and a proposed Purpose and Need (see pages 109-110 of this guide) for the entire planning action. The BLM uses this stage to solicit public input before decisions are made, obtain a general understanding of the major resource issues, and begin to think about the management actions needed to resolve conflicts and manage the land.[210]

During this stage, the BLM must comply with the scoping requirements of NEPA and Council on Environmental Quality regulations.[211] The BLM often holds public meetings or workshops designed to give the public and various stakeholders a voice.[212] However, NEPA

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[207] 40 C.F.R. § 1506.5(c); Council on Environmental Quality, *NEPA's Forty Most Asked Questions*, No. 17a & 17b (1981).

[208] *Id.*

[209] 43 C.F.R. § 1610.2(c). See also 40 C.F.R. § 1501.7 (NEPA requirement of Federal Register NOI for EIS).

[210] 43 C.F.R. § 1610.4-1.

[211] *Id.*

[212] 40 C.F.R. § 1501.7(b).

and CEQ regulations do not obligate the BLM to conduct public hearings.[213] NEPA's scoping process is also an important step in the development of an adequate cumulative impact analysis in the Environmental Impact Statement that accompanies an RMP, so scoping should be used to identify cumulative impact issues, establish study area boundaries, identify relevant past, present, and reasonably foreseeable future actions in the study areas, and identify the basic elements of potential alternatives.[214]

Once comments are compiled, the relevant field manager formally establishes a set of issues to be addressed in the planning process.[215] The BLM eliminates issues that are insignificant, irrelevant, or covered by a previous NEPA document.[216] The agency must briefly justify any decision to eliminate an issue[217] and can later revisit this stage to modify, delete, or add issues if new information arises.[218] If a particular resource value or use is deemed to be unaffected by the identified issues, then existing management prescriptions for that resource use are usually carried forward as a common feature in all designed alternatives.

The BLM should also identify other legal obligations that must be complied with during the planning process and take steps to initiate parallel legal processes.[219] This allows the agency to integrate and coordinate various legal processes underneath the comprehensive umbrella of the RMP process. Two of the most important parallel legal processes are the Section 7 Endangered Species Act consultation process and the Section 106 National Historic Preservation Act consultation and impact analysis process.[220]

The Role of the Public

The BLM must provide the public with notice and an opportunity to comment (at least 30 days) during scoping.[221] The agency may also hold public meetings or workshops that require 15 days of advance notice.[222] If you need more time to prepare, write a letter (sent by certified mail) to the field

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[213] Joseph Feller, *Public Participation Under NEPA*, in *The NEPA Litigation Guide* 112, Karin P. Sheldon and Mark Squillace, eds., (American Bar Association 1999) (citing *Aberdeen and Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 321-22 (1975); *Richland Park Homeowners Association v. Pierce*, 671 F.2d 935, 943 (5th Cir. 1982); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1286 (9th Cir. 1973); *Hanly v. Leindienst*, 471 F.2d 823, 835 (2nd. Cir. 1972), cert. denied, 412 U.S. 908 (1973)).

[214] Council on Environmental Quality, *Considering Cumulative Effects* (1997) p. v.

[215] 43 C.F.R. § 1610.4-1.

[216] 40 C.F.R. § 1501.7(a)(3).

[217] *Id.*

[218] 43 C.F.R. § 1610.4-1.

[219] 40 C.F.R. §§ 1500.2(c) (requiring federal agencies to the fullest extent possible to integrate the requirements of NEPA with other planning and environmental review procedures required by law or agency practice so that all such procedures run concurrently rather than consecutively), 1502.25(a)(requiring agency develop draft NEPA documents concurrently with other legal obligations).

[220] 16 U.S.C. §§ 470(f) (NHPA section 106), 1536(a)(2) (ESA section 7).

[221] 43 C.F.R. § 1610.2(e).

[222] *Id.*

manager and the state director. It may help to call first and let them know a written request is on its way. Extending the scoping period provides you with a variety of benefits. First, you may need the time to fully understand the variety of issues that should be raised. Second, it gives you more time build public interest in the planning effort. This is especially important in the context of elected officials and constituency groups such as archaeological societies with different perspectives and expertise to contribute.

With luck, your BLM office will not view public participation as a hindrance but rather as an opportunity to improve public consensus and create effective and durable RMPs. Workshops, meetings, and other forums can be more productive if participants believe they are on a level playing field that is conducive to communication — defined as talking, listening, and exchanging ideas and concerns.

Analysis

In this stage, raise all necessary issues and specify recommendations to resolve those issues. In choosing issues and formulating recommendations, recognize that social, political, and ecological dynamics change and that it is difficult to anticipate exactly which issue or recommendation can become important. Think broadly and comprehensively and build into your comments the flexibility to adapt to changing conditions.

Your participation lays the groundwork for the RMP's administrative record. As discussed in Chapter II of this guide, the administrative record is critically important in the event of an adversarial challenges such as protests, appeals, and litigation. Raising a widespread set of issues may thus be important in the context of preserving your options for a variety of challenges. Depending on your time and resources, however, you may or may not have the ability to focus on more than a few key issues. Furthermore, by focusing on a concisely defined set of issues, your comments may resonate with the agency to a greater degree. Still, don't put too many eggs in one basket: outline priority areas up front, spend most of your time and energy to flesh out those priority issues, and while raising minor issues, give them less space and consideration in your comments.

To optimize your effectiveness, convey the value and worth that the land holds for you personally or for you as a representative of an organization or coalition of organizations. Your place-based information proves that you know the land, understand the issues, will invest in the area's management over the long term, and will defend the land through citizen advocacy. Specify and justify places for protection and explain the negative consequences of known or likely damaging or unmitigated activities in that area. Such comments are far more powerful than generic comments.

Your comments should include what you want the BLM to do and how you want the agency to do it. Integrate your recommendations into a detailed vision or mission statement that you create for each planning area. To do so will require careful review of the Purpose and Need for the planning action. Although the Purpose and Need for an RMP is usually broad and extremely inclusive, the BLM sometimes prioritizes certain management issues for the planning process, deferring lesser priority issues into the future. Thus, it is important to critique the Purpose and Need for the planning action to ensure that your management issues are not deferred. In this regard, the BLM might argue that a given issue or recommendation is outside of the scope or "inconsistent with the Purpose and Need" of the planning process. Challenge this position aggressively: both the scope and the Purpose and Need must *always* be responsive to public input.

Keep an eye on the BLM's screening process for identified issues. If the agency makes a determination that an existing set of management prescriptions satisfies an identified issue, those prescriptions are likely to be carried out unaltered through the entire planning process. This can facilitate efficiency. But this approach is problematic given the dynamic nature of ecosystems and economies and the intent of the FLPMA planning process to provide for integrated management.[223] Resource activities and management prescriptions do not occur in isolation, independent of the surrounding environment. A finding that an issue is resolved presumes that changes to other resource activities and management prescriptions will have no affect on the validity of that finding, a presumption that the BLM may not necessarily support (or be able to support) with evidence.[224] Such a presumption also acts to maintain the *status quo* and skirt proactive management duties to protect undervalued resources.

Acknowledge the human element of any endeavor: reach out to other groups, organizations, and individuals, especially where their interests do not necessarily coincide with but do overlap your own. The BLM is often motivated to act when similar issues and recommendations are forwarded from different stakeholders, not just the "usual suspects." Plant and archaeological societies, gardening clubs, low-impact recreation users, hunters, anglers, religious groups, and business groups — all who likely benefit from the proximity of an intact and healthy landscape — are potential allies. Gathering allies admittedly may require that you dance a fine line between accommodating other interest groups and compromising the nature of your fundamental objective, but it is worth the try. Action alerts, sign-on letters, workshops, and strategy sessions all help.

Recognize that the BLM does not give much credence to stacks of form letters; while they suggest public support for your objectives, they do not otherwise help the BLM resolve management issues. Still, form letters can be important to achieve broad public buy-in, reach out to constituents who have little time or expertise to participate otherwise, and achieve political and communications purposes.

Stage 2: Development of Planning Criteria

Mechanics

Once the BLM identifies the full range of issues, the agency prepares planning criteria. Take note that in practice, the agency often develops planning criteria concurrently with the issue identification stage. The planning criteria shape the development of the RMP, ensure that the RMP is tailored to the identified issues, and help the BLM avoid unnecessary data collection and analysis.[225] In essence, planning criteria apply legal obligations in light of place-based circumstances and conditions, establishing (in theory) the legal, ecological, and socioeconomic thresholds under which the BLM must operate. The planning criteria should be intimately linked to the Purpose and Need for the planning area[226] and may apply uniformly to all proposed activities and alternatives (bundles of activities).[227] Or the plan-

[223] John B. Loomis, *Integrated Public Lands Management* 288 (1993).

[224] *Id.* at 291.

[225] 43 C.F.R. § 1610.4-2.

[226] See 40 C.F.R. § 1502.13.

[227] See John B. Loomis, *Integrated Public Lands Management* 288-289 (1993).

ning criteria may be specific and relevant to only particular activities or a single management alternative.[228]

The Role of the Public

The BLM must notify the public of proposed planning criteria and make them available for public review and comment before they are officially adopted.[229] You are given at least 30 days for review and comment.[230] Once approved, the planning criteria can be changed or modified depending on public suggestions and new information.[231] If the proposed change or modification is significant, the BLM must once again notify the public of the changes and give you an opportunity to review and comment on them.[232]

Analysis

You should analyze the proposed planning criteria to ensure that they (1) reflect the issues and concerns you identified during scoping, (2) are consistent with the BLM's legal obligations, (3) do not prejudge identified issues and restrict potential solutions, and (4) provide sufficient specificity to comparatively evaluate the responsiveness of alternatives to identified issues. Tension, risk, and opportunity are associated with each of these factors.

As you watch-dog the BLM, take into account two primary problems. First, BLM planning criteria are often too general to contribute meaning and focus to the planning process. Second, the BLM often completes this stage concurrently with the issue identification phase. In general, these problems strongly suggest the need to get involved in the planning process before the Notice of Intent for the planning area is issued if you want to have input into pre-planning activities that influence the formal planning process.

Concerning the first problem, the planning criteria should provide standards with which to resolve identified issues through management decisions. Furthermore, the public should be able to compare the RMP to the planning criteria to determine if the BLM has actually resolved identified issues consistent with place-based legal thresholds set by the criteria. However, as implemented, the planning criteria do not provide this opportunity and are indicative of systematic problems — unclear objectives, unclear decisions, and unclear methodology — within the planning process that degrade the statutory importance of public participation.

Usually, the planning criteria merely articulate the obvious. For example, the BLM may craft a planning criterion "to comply with the Endangered Species Act." A more thoughtful criterion would attach time frames, identify tools, and outline objectives needed to comply with the Endangered Species Act. Such a criterion would then drive the development of a series of management alternatives and thus afford the public an opportunity to determine whether the BLM's proposals will in fact resolve identified issues and fully comply with the law. Properly constructed, the criterion need not eliminate flexibility, but can direct how that flexibility must be exercised. In fact, such a criterion could improve flexibility by encouraging all stakeholders, including the BLM, to sit down at a defined

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[228] *Id.*

[229] 43 C.F.R. § 1610.4-2.

[230] 43 C.F.R. § 1610.2(e).

[231] 43 C.F.R. § 1610.4-2.

[232] *Id.*

table and work out solutions. Without such a defined table, stakeholder discussions rapidly devolve into unfocused and overly politicized horse-trading that does little to advance the BLM's obligation to optimize the public good.

Specificity does have a risk. If the BLM drafts a criterion wherein the planning action will "protect and maintain traditional uses of the public lands at current levels," this could easily (though unjustifiably) maintain the *status quo* of, say, forage allocations for livestock grazing. Efforts to protect resources and values that are adversely affected by grazing would therefore likely take the form of mitigation measures with an uncertain chance of success. While this criterion could be legally challenged, such an action will require the expenditure of valuable and limited time and resources, while success is not assured. Don't request specificity unless you define explicit legal boundaries to the agency's discretion and explicit criteria capable of resolving your identified issues.

Concerning the second problem, the BLM's Land Use Planning Handbook indicates that the initial Notice of Intent should include preliminary issues and planning criteria for review and comment.[233] If the planning criteria are tailored to the identified issues but the identified issues do not yet reflect public input, then any review and comment on the proposed planning criteria is somewhat speculative. In other words, the BLM is placing the cart before the horse, or perhaps more appropriately, the cart on top of the horse. Proper review of the planning criteria can only occur when the identified issues are compiled subsequent to public scoping.

The BLM can change the planning criteria based on the comments and suggestions in the planning process, thus placing the cart in the right spot — behind the horse. As a practical matter, this leads to a new round of notice, review, and comment, an activity that the BLM, with limited resources, will likely be hesitant to enter into. The agency therefore has an incentive to stick to criteria developed before the public has an opportunity to identify issues. Though perhaps more efficient, structuring the issue identification stage and planning criteria stage concurrently is not necessarily conducive to full, fair, and effective public participation. It indicates a predisposition to an internally defined course of action, an internally defined set of issues, and an internally defined set of planning criteria.

Stage 3: Inventory

Mechanics

Once the BLM has identified a set of issues and developed planning criteria to resolve those issues, the agency collects raw data and information related to various resources (that is, multiple uses), ecological conditions, economic conditions, and the BLM's capability to manage the land.[234] In the context of special designations such as those within the National Landscape Conservation System, the inventories should be carried out to advance the designation's protective purpose. As an example, for a National Monument information should be collected to enhance the protection of the objects of scientific and historic interest listed in the proclamation or enabling statute.

The BLM, with limited exceptions, does not carry out extensive field

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[233] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 Appendix E, page 2 (stating that "[t]he [Notice of Intent] identifies the preliminary issues *and* planning criteria …").

[234] 43 C.F.R. § 1610.4-3

inventories during the planning process. Field inventories are conducted only as necessary to resolve identified issues. Generally, the agency relies on existing internal data and data held by other government agencies (federal and state) and private organizations. In this context, information derived from state National Heritage Programs or other like entities, public or private, can be instrumental in ensuring a sound set of baseline data for the planning area. The BLM must compile this information consistent with approved standards.[235]

The inventory planning stage is a component of the BLM's obligation under Section 1711(a) of FLPMA to prepare and maintain an inventory of the public lands and their resources and values on a continuing basis.[236] Inventories provide an information base for the agency to make reasoned and informed decisions through RMPs and implementation level plans. Inventories are also (or should be) closely linked to each RMP's monitoring and evaluation program.[237]

The Role of the Public

You are not given notice or a chance to formally review and comment on the inventory. Nonetheless, you can play an important role. In evaluating whether a land-use plan must be amended or revised, the BLM defines new data or new information to include information from the public regarding conditions or uses of the public lands.[238] That information can be gathered from public comments submitted to the BLM on a particular activity or can be an entirely separate document developed with the intent of getting the BLM to conduct a planning action. Moreover, once the planning process reaches this stage, the BLM is still open to public data and information. It's just that the agency does not formally request such data and information.

Analysis

Once you have gathered information relevant to the planning process and your objectives, give it to the BLM at the earliest opportunity. It can be influential in getting the BLM to take action, especially if it is tied to a powerful legal handle such as the Endangered Species Act. In submitting your information, you put the BLM on notice that the information exists and that the agency may have to justify its actions if they are inconsistent with the submitted information.

Keep a careful eye on the BLM's inventory efforts before and during the planning process. This includes reviewing the substance of the inventory (what they are looking at) and the methodology used in the inventory (the process and criteria). Ensure that the inventories are focused on protecting the land and complying with legal mandates, including FLPMA's mandates to prevent permanent impairment of the productivity of the land (43 U.S.C. § 1702(c)) and the quality of the environment and prevent unnecessary or undue degradation (43 U.S.C. § 1732(b). Too often, the BLM collects limited inventory data focused on traditional resource uses or obvious issues such as roads without applying proper criteria and without relating such criteria to management obligations (for

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[235] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (III)(A)(2)(d)(4), (III)(D) (2000).

[236] 43 U.S.C. § 1711(a).

[237] 43 C.F.R. § 1610.4-3.

[238] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (V)(I)(B)(4), (15) (2000).

example, to protect the health of the land). This skews the results of subsequent planning stages, creating an inertial presumption in favor of environmentally harmful uses. It also makes it difficult to challenge specific management actions as the dispute becomes buried in a confusing mass of data and information that the courts are hesitant and often unable to untangle.

Stage 4: Inventory and Issue Analysis

Mechanics

After the BLM completes the inventory, the agency analyzes the compiled data and information relative to the identified issues and opportunities.[239] The analysis is documented in what is sometimes referred to as a Management Situation Analysis (MSA), which contains four types of information.

1. Status. Describes current characteristics and conditions of the landscape, including ecological and socioeconomic components. Status information bestows a relative value for resources and indicates their relative scarcity. It compares current characteristics and conditions to a historical baseline that presumably was established during the FLPMA Section 1711(a) inventory process.[240]

2. Trend. Expresses the direction of change between the present and some point in the past or future.[241]

3. Risk. Discloses the probability that a specific action or inaction will cause an undesired effect and gives the degree to which ecological and socioeconomic components are vulnerable to existing and contemplated actions.[242]

4. Opportunity. Indicates the potential responsiveness of the land to actions that are intended to improve resource conditions or reduce risk. Opportunity information also involves ecological and socioeconomic components.[243]

Many factors determine how the analysis is conducted. Most prominent are legal authority, internal guidance, resource needs, human relationships to the land, economic viability, the plans and programs of other government entities, the opportunity to resolve public issues and management, local dependence on public lands resources, and critical threshold levels.[244] The MSA must be conducted consistent with approved standards[245] and in light of the Purpose and Need defined for the RMP,[246] which should be in a nearly complete and final form by the time the MSA is developed.

Because the information is so wide ranging, it can become unwieldy, and the BLM often uses indicators as surrogates for factors or groups of factors that are too expensive or difficult to characterize directly. These indicators are often a combination of multiple measures brought together in a single composite rating, or index. The agency

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[239] 43 C.F.R. § 1610.4-4.

[240] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (III)(A)(2)(a)(1) (2000).

[241] *Id.* at (III)(A)(2)(a)(2).

[242] *Id.* at (III)(A)(2)(a)(3).

[243] *Id.* at (III)(A)(2)(a)(4).

[244] 43 C.F.R. § 1610.4-4(a)-(i).

[245] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (III)(A)(2)(d)(4), (III)(D) (2000).

[246] See 40 C.F.R. § 1502.13.

selects indicators based on three factors: relevance, affordability, and credibility[247] and presents them in the status, trend, risk, and opportunity information described above. The indicators "should be assembled in a logical format and maintained in the field office for public review."[248]

Properly constructed, indicators help in the development of sound, cumulative-impact analyses (40 C.F.R. § 1508.7). However, identified issues (Stage 1) are screened to determine which will be addressed. If the BLM decides not to address an issue, the agency could also decide (whether legitimately or not is an open question) to incorporate existing management prescriptions that are relevant to the dismissed issue into the final RMP without further NEPA review.[249]

The Role of the Public

You are not given a formal opportunity to participate in this stage of the planning process. So, obtain the BLM's MSA (it may not be generally available to the public), review it, and if necessary comment on it, even though the agency is not likely to solicit your comments. In other words, where you have analyzed the management situation and where you have information relating to the status, trend, risk, and opportunity of public lands resources, communicate that information to the BLM. It is important to bring ideas and information to the attention of the agency, force the agency to consider that information, and relieve some of the agency's burden of carrying out expensive and time-consuming analyses.

Analysis

Encourage the BLM to conduct a scientifically defensible analysis within its limited resources and technical capabilities. In many respects, completing a scientifically defensible front-end analysis can facilitate the development of more effective and useful RMPs, thus reducing expenditures in staff time and resources during the implementation stage. If the RMP is scientifically defensible, the BLM and the public can have confidence in it, and that promotes subsequent development of properly tiered and scientifically defensible implementation and activity level plans and decisions in conformance with the RMP. It also reduces stakeholder conflicts over the plans and decisions.

Currently, the principal problems with the BLM's compliance during this stage are (1) the sufficiency of data compiled (or not compiled) and (2) the adequacy of analytical methodology used to develop the MSA, especially in the context of NEPA's cumulative-impact analysis requirement. In general, the agency lacks sufficient data and formal, quantitative analytical tools capable of sufficiently assessing the landscape's capacity to support resource uses.[250]

In addition, the MSA often takes a narrow view of the landscape's ecological and socioeconomic components. FLPMA's statutory criteria require the BLM to consider not just existing resources and uses, but also potential resources and uses of the land.[251] MSAs generally fixate on commercial uses of the land, especially, energy resources. Alternative resources and uses such as

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[247] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (III)(A)(2)(c) (2000).

[248] *Id.* at (III)(A)(2)(e).

[249] 40 C.F.R. 1610.4-1.

[250] John B. Loomis, *Integrated Public Lands Management* 291 (1993).

[251] 43 U.S.C. § 1712(c)(5)

conservation-oriented resources and uses that are undervalued by the BLM and private markets are often not considered or considered only after the agency commits areas to commercial uses. BLM analyses are too limited and narrow, and they impede the agency's ability to identify more beneficial management uses and prescriptions, thereby favoring a continuation of the *status quo*.

It is certainly possible to undertake analysis that incorporates the BLM's legal mandates. For example, in the context of rangeland management, the agency uses "state and transition" models that gauge the interaction of management and climate with soils and vegetation to produce various rangeland conditions. Each "state" represents a relatively stable range of vegetation and soil properties. The "transitions" represent changes in management and biophysical conditions that induce a move from one state or another. The model is used to identify thresholds that pinpoint critical points in time when irreversible changes between states occur in certain areas.

Similarly rigorous models can be adopted in the context of other ecological systems. These models should then be aggregated to provide a more complete view of the landscape and to design management alternatives (Stage 5) that resolve identified issues (Stage 1) within the parameters of the planning criteria (Stage 2). The models, individually and in the aggregate, also operate as the base of the environmental analysis conducted for each alternative (Stage 6). Such models promote science-based management and reasoned and informed decision-making. Down the line, the BLM could incorporate the models as key AEM tools to (1) act proactively to seize opportunities and avoid hazards and (2) determine whether overall management objectives (the vision) are achieved.

The BLM should use this stage to design models that are scaleable to implementation- and activity-level planning and decision-making, thus lessening the workload at the action-specific level. In particular, the use of spatial analysis can provide useful models of landscape-level metrics to formulate alternatives (Stage 5) and evaluate the impacts of those alternatives (Stage 6).[252] Notably, spatial analysis heightens the importance of scaleable data that can be accurately used and aggregated at a variety of spatial and time scales. Clearly defined models also promote public participation in that they provide opportunities for independent scientific peer review. They also promote confidence in BLM planning and decision-making, which leads to (but does not guarantee) informed and reasoned debate and gives groups that are not well financed or politically connected a chance to compete on the merits with stronger stakeholders.

Models need not drain the BLM's limited resources. The level of detail and refinement can be tailored to available staff and funding. And it is impossible to gauge precisely all risks and opportunities at all times. But even rudimentary models developed from spatial analysis can help choose the best way to manage the land.

Stage 5: Formulation of Alternatives

Mechanics

Based on the MSA (Stage 4), the BLM identifies the desired outcomes for the planning area and the allowable uses and land-health protection and restoration

[252] Spatial analysis is the use of geographic information systems that are designed to store, update, analyze, display, and manipulate spatial data (information about a specific, geographically defined place). Spatial analysis can arrange and display all kinds of data in a variety of forms, including maps, charts, and tables. Environmental Systems Research Institute, Inc., *Explore Your World With a Geographic Information System: A Teaching Supplement for Grades 5-12 Introducing Basic GIS Concepts and Components* (1995).

measures designed to achieve those outcomes.[253] The desired outcomes are predicated on the Purpose and Need identified for the planning action. Generally, but not always, the Purpose and Need is broadly defined and highly inclusive of whatever set of alternatives the BLM formulates. The various combinations of allowable uses and outcomes are considered within a "complete set of management alternatives,"[254] and the BLM identifies a reasonable range of alternatives from that set for more detailed study. The agency reduces the number of alternatives to a manageable number by treating "reasonable variations" as "subalternatives,"[255] but must disclose the basic elements of even discarded alternatives in the RMP.[256]

The choice of alternatives is not fully discretionary: the selected reasonable range of alternatives "shall reflect the variety of issues and guidance applicable to the resource uses."[257] This includes alternatives outside the capability or desire of any permit applicants and outside the legal jurisdiction of the BLM, even if in conflict with local or federal law.[258] And one alternative must be a "no action" alternative that maintains the *status quo* of resource use and protection.[259]

The purpose of formulating a reasonable range of alternatives is largely informative, although it could and should have more meaning. Alternatives allow the BLM to evaluate different levels or degrees of protection and use to satisfy the agency's multiple-use mandate to best meet the present and future needs of the public and to ensure to the greatest degree possible the long-term health of the land and its resources.[260] By considering a range of alternatives, the agency can structure specific spatial and time management prescriptions to reduce conflict.

In practice, this means that the BLM could isolate a single use within a defined area to reduce conflict with competing, incompatible uses. For example, the BLM could limit ORV use to specific routes and redirect other recreational uses such as backpacking to other areas through the careful development and maintenance of trails and campsite facilities. In areas allocated for backpackers, the BLM could close the area to ORVs, post signs, and reclaim ORV trails. The agency can also allocate resources on a time basis. For example, in a river area used for both livestock grazing and recreation, the BLM could restrict livestock grazing during the peak rafting season, thus reducing the chance of conflict. These allocations should not be construed as zoning: all public lands demand a base level of protection that cannot be compromised by

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[253] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (III)(A)(3), (III)(A)(4) (2000).

[254] 43 C.F.R. § 1610.4-5.

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972). See also Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, Nos. 2a & 2b (1981)

[259] 43 C.F.R. § 1610.4-5.

[260] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (III)(A)(4) (2000).

carving the lands into distinct sacrifice or protection areas. Wildlife, free-flowing water, clean air, and — broadly speaking — ecological systems cannot be zoned but must be viewed across entire, contiguous landscapes.

The Role of the Public

You are not given a formal opportunity to participate in the process of formulating alternatives, although you can critique the alternatives during the draft RMP stage (Stage 7). Regardless, continue to communicate your concerns and issues to the BLM. This helps ensure that alternatives are designed with the public interest in mind, rather than only the interests of a specific stakeholder group. Suggest elements of management prescriptions and articulate which actions are necessary, desired, acceptable, or unacceptable to help the agency create viable alternatives.

If you have the time and resources, submit a conservation alternative to the BLM, the earlier the better. Work with the agency to format the conservation alternative in line with BLM policies and procedures. But recognize that BLM formatting and structure often reflect the agency's intended management direction. Your conservation alternative may not fit that approach. If so, don't compromise your alternative merely for the sake of format: critique the BLM's format as indicative of an underlying management direction that you oppose.

Analysis

The composition of the alternatives is important to provide the BLM and the public with real choices.[261] Each alternative should have a defined objective and the individual management prescriptions should be designed to achieve that objective. Each objective should be consistent with the Purpose and Need for the planning action, but represent alternative means of conforming to that Purpose and Need. Too often, the BLM designs alternatives that are only incrementally different and do not provide the public or the decision-maker with a meaningful view of what the landscape could look like under a different management regime.

In formulating alternatives, the BLM should emphasize the interactions between resource allocations. Each alternative should provide a picture of what the landscape would look like under a set of area-wide management prescriptions. This proves valuable in determining whether or not a given alternative is in fact consistent with the Purpose and Need, identified issues, and planning criteria established for the planning process. The agency should view each alternative as what it really is: a bundle of individual activities, some of which are physically or ecologically connected and others which are not. This enables development of a preferred alternative based on the best available information and the best possible combination of individual management actions.

If the probability or intensity of negative environmental impacts from an individual action is high, the BLM should prohibit that action. At the least, the agency should act with heightened caution and build in enforceable mitigation, monitoring, and evaluation programs. If the probability or intensity of adverse environmental impacts is low, and where damage can be repaired, monitoring impacts and adaptive management practices can improve protection, expedite project design and implementation, reduce costs, and shorten the length and complexity of environmental documents. These conclusions are consistent with FLPMA's inventory mandate[262] and

[261] John B. Loomis, *Integrated Public Lands Management* 202 (1993).

[262] 43 U.S.C. § 1711(a).

with the BLM's twin duties "to prevent permanent impairment of the productivity of the land and the quality of the environment" and to take any action necessary "to prevent unnecessary or undue degradation."[263]

In practice, the BLM takes on a predetermined course of action and designs alternatives around that predetermined course. This means that the agency generally takes two, sometimes overlapping, approaches in designing the range of alternatives. First, the agency proposes obviously untenable alternatives for the purpose of comparison. Second, each alternative is designed so that it is only incrementally different from the predetermined course of action — an approach that is taken not to inform the agency but to insulate it from litigation.

As an example, in relation to livestock grazing the BLM may decide to stick with the *status quo* of, say, 90,000 animal unit months of forage in a planning area, then design a maximization alternative for 110,000 animal unit months and one (a so-called "conservation-oriented" alternative) for 70,000 animal unit months. Choosing the middle ground *status quo* of 90,000 animal unit months may look reasonable, but that choice actually says very little about the impacts on the environment.

The same is true for other land-use decisions, most notably travel systems (miles of roads and trails), ORV designations (acres open, limited, or closed), and energy and mineral resource development (number of wells, amount of resources extracted).

Stage 6: Estimating and Displaying the Effects of Alternatives

Mechanics

The BLM is required to "estimate and display the physical, biological, economic, and social effects of implementing each alternative considered in detail."[264] In other words, the alternatives are supposed to be studied through the systematic and interdisciplinary NEPA process.[265] At this stage, the BLM also determines whether each alternative is consistent with the plans, policies, and programs of other federal agencies, state and local governments, and tribes.

Results are given for both environmental impacts and resource outputs. This means the BLM is to balance resource use and protection through a quantitative recognition of tradeoffs (the cost/benefit analysis criteria required by FLPMA, 43 U.S.C. § 1712(c)(7)). In the process, the BLM is given an opportunity to resolve the issues identified in Stage 1 of the planning process. If the agency can't present results in precise, quantitative terms, it is allowed to use "probable ranges."[266] This does not imply that the agency has a choice. Rather, it implies the agency has an obligation to present results in precise terms if it is feasible to do so.

The BLM generally presents its results in a matrix format.[267] Resource effects or output levels should be expressed in absolute units such as tons of minerals or numbers of animal unit months of forage. Resource effects and or output levels should also be presented, where possible, in absolute potential *and* probable terms. For example, the BLM should present the amount of *technically* recoverable oil

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[263] 43 U.S.C. §§ 1702(c), 1732(b).

[264] 43 C.F.R. § 1610.4-6.

[265] 42 U.S.C. § 4332(2)(A); 43 U.S.C. § 1712(c)(2); 40 C.F.R. § 1502.6.

[266] 43 C.F.R. § 1610.4-6.

[267] John B. Loomis, *Integrated Public Lands Management* 294 (1993).

or gas in addition to the amount of *economically* recoverable oil or gas, which is as — or more — important than data related to technically recoverable energy resources.

The Role of the Public

You are not given a formal participatory role as the BLM develops its effects analysis, although you can critique the analysis once the draft RMP is published (Stage 7). Nevertheless, keep up informal communication with and provide information to the agency during this stage.

Analysis

The BLM should evaluate the effects of each alternative by aggregating information and analysis in a way that discloses the impact of resource activity interactions at varying degrees of intensity and rates of change relative to current resource activity levels. And the individual and aggregate effects should be related to evaluation criteria such as equity, efficiency, and administrative feasibility. This gives the BLM the ability to provide the public with quantitatively rigorous but analytically flexible data, which facilitates optimization of the public good.

Using this approach, it is relatively easy to alter the balance of uses in each alternative without having to return to the drawing board. Notably, once the BLM proposes an RMP (Stage 8), any changes upon review or protest often require a change in the underlying effects analysis (this stage).

The agency generally does not follow these principles.[268] Instead, the agency presents data in a disaggregated fashion. Results are often presented as unrelated lists and in units such as acres of use or tons of minerals that quantify how public lands function as an economic input but that do not accurately quantify actual economic output or the impacts on the socioeconomic and ecological environment. This clouds the contribution of each resource activity to the achievement of landscape-level resource management objectives (desired outcomes).

Expressing results in a disaggregated, input-oriented fashion violates a fundamental rule in policy analysis: "to know not just how inputs change by alternative (land, labor, BLM budget), but what society receives for this use of inputs."[269] Furthermore, the rates of change are confusing; often the BLM uses ambiguous, qualitative terms such as "low," "moderate," or "high"[270] that hold little meaning and make correlation to legal and ecological thresholds difficult, if not impossible.

Related to socioeconomic analysis, the RMP should contain a quantitative analysis of the potential impacts on employment, expenditures, and revenues associated with local and regional economies, but also with an eye to the impacts on the broader national economy. The analysis should also integrate the costs and benefits to both market and non-market resources. Note that most RMPs fail in this regard. At the same time, they usually predict gains in local income and employment in part on the federal expenditures to implement the plan. But those expenditures represent an economic transfer not a net economic gain — taxpayers pay for it.[271] At best, the typical RMP socioeconomic analyses are limited. At worst, they induce bias in decisions and discount important socioeconomic costs and benefits.

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[268] *Id.* at 294.

[269] *Id.* at 322.

[270] *Id.* at 294.

[271] *Id.* at 322.

Stage 7: Selection of a Preferred Alternative

Mechanics

The BLM selects a preferred alternative that "best meet[s]" BLM guidance established by the agency's director and state directors.[272] In general, the selected preferred alternative should be the one most in tune with the Purpose and Need for the planning action identified early in (but potentially modified during) the planning process and the desired outcomes and future conditions developed during the formulation of alternatives (Stage 5). The draft Environmental Impact Statement that accompanies the draft RMP must "list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal" or whether the need for a federal permit, license, or other entitlement is "uncertain."[273]

Within the BLM, the unit manager responsible for the area in question usually selects the preferred proposed alternative but does not have final say over the decision. The relevant field manager must concur with the selection and the state director retains final approval power. Once the state director approves the preferred alternative and the overall draft RMP/EIS, the public is notified of the document's availability through the *Federal Register*, mail, and the media. The BLM gives the draft RMP/EIS to the state's governor, officials of other federal agencies, and tribal, state and local governments for review and comment.[274]

The Role of the Public

You are given at least 90 days to review and comment on the draft RMP/EIS.[275] The time starts on the day that the Environmental Protection Agency publishes the notice of the filing of the draft EIS in the *Federal Register*.[276]

Analysis

The political acceptability of management choices often drives the selection of an alternative, regardless of the underlying scientific basis for the management choice. That is why your informed participation is essential and, if strategically used, can level the political playing field.

In reviewing the draft RMP/EIS, first read the Purpose and Need and desired outcomes articulated for the planning area for each alternative. The Purpose and Need is critical because it is the basis of all decisions within the management unit and thus should be consistent with the BLM's overarching conservation obligations. The desired outcomes and future conditions developed from the Purpose and Need should provide a measure of certainty as to the agency's overall goals in the planning area and should provide a means to determine whether a given management action conforms to the RMP. As noted earlier, to maximize its discretion the BLM often poorly defines and structures the Purpose and Need and desired outcomes.

Second, review and critique each individual alternative, paying special attention to the preferred alternative — if one is identified. Look also at the

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[272] 43 C.F.R. § 1610.4-7.

[273] 40 C.F.R. § 1502.25(b).

[274] 43 C.F.R. § 1610.4-7.

[275] 43 C.F.R. § 1610.2(e), (f)(3).

[276] 43 C.F.R. § 1610.2(e). Note that where the BLM proposes ACEC designations in the draft RMP/EIS, the agency must provide at least a 60-day public review and comment period on those designations. This time frame usually coincides with the 90-day comment period for the draft RMP/EIS. 43 C.F.R. § 1610.7-2(b).

actual range of alternatives presented. Generally, the BLM designs and articulates alternatives to hide impacts in a pile of data with little, if any, true meaning. Alternatives often differ only incrementally and provide little real management difference.

Each alternative should instead be designed based on an actual and central guiding theme that is consistent with the Purpose and Need for the planning action. This theme should be the springboard to determine locations, amounts, and intensities of activities on an integrated basis. The BLM often fails in this regard, instead giving preference to on traditional commodity-based programs or, increasingly, to existing road, trail, and tire track networks for off-road vehicles. Little real choice is possible; continuation of the *status quo* is thus inevitable.

Third, consider the timing of the decision-making process. The BLM should identify a preferred alternative only after the effects are fully analyzed and all parallel legal processes, to the extent practical, are concluded (as examples, the consultation processes required by Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act). When analysis is complete, the BLM can construct the preferred alternative from a multitude of individual resource activity choices to eliminate the potential for fixation on a single and often artificial bundle of resource activities initially formulated in Stage 5. In effect, that bundle is less important than the *interrelationships* between resource activities. The formulated alternatives merely provide models to evaluate aggregate effects and act as a baseline to build an effective management strategy predicated on the Purpose and Need. If the agency follows this prescription, it can optimize the role of science and objective analysis in choosing management solutions and gain credibility with the public.

Similarly, make sure that uses are allocated on an equal footing subsequent to the completion of the effects analysis and any parallel legal processes as described above. If the BLM's policies and procedures are designed in such a way that certain program areas, most notoriously energy resource development, are given a first bite at the land, then alternative uses such as conservation-oriented proposals are left with the scraps. This could be a basis to challenge that RMP planning process and the overarching regulations, policies, and procedures relied upon by the BLM, to the extent that they contribute to the problem without express statutory authority. The argument would assert that the BLM has created an inertial presumption in favor of a specific use in contravention of the fundamental purpose and intent of the multiple-use mandate.[277]

In reviewing and commenting on the Draft RMP/EIS, consider the following criteria:

Legal viability. The draft should set out desired outcomes and land-use decisions consistent with the BLM's overarching legal mandates. The outcomes and decisions should contain adequate justification, not merely a statement that they were developed consistent with the law. The BLM should do this by linking desired outcomes and land-use decisions to the planning criteria (Stage 2), presumably developed in conformance with the agency's legal obligations.

Adequacy of planning scale. The draft and all of its components should be tailored to the intensity of the identified

[277] *National Wildlife Federation v. Morton*, 393 F.Supp. 1286, 1292 (D.C.D.C. 1975) (holding that regulations providing for the designation of ORV use areas and routes violated Executive Order 11644 for creating "a subtle, but nevertheless real, inertial presumption in favor of off-road vehicle use" in contravention of the Executive Order).

issues and likely impacts. The more invasive the action, the more intensive the inventory required, the more rigorous the technical analysis, the more comprehensive the discussion of alternatives, and the more resources that should be directed at mitigation, monitoring, and evaluation programs.

Physical and biological feasibility . The draft should acknowledge that all activities are derivative of the landscape. In other words, the natural variables of the landscape impose finite limits on human use. Technology is important, but cannot replace native ecological processes. The draft should disclose the levels of renewable and nonrenewable resources within the planning area and the rates of change under each alternative. Such rates should disclose how the landscape is altered by each alternative. The draft should also disclose the naturally occurring rate of change and the rate of change caused by the current management regime. Without such information, planning and management is suspect.

Economic efficiency . The draft should include an analysis of costs and benefits, and the selected alternative should have more benefits than costs. Such a determination must account for market and non-market goods and services (Total Economic Valuation).

Distributional equity . The draft should disclose how costs and benefits are distributed throughout society. Costs and benefits can be shown based on age group, geographic placement, race, occupational category, and generation (current and future generations).

Social and cultural acceptability . The draft should be generally acceptable to the public in the long term. Otherwise, implementation of the RMP is likely to be thwarted.

Administrative feasibility . The draft should disclose how staff will be allocated to implement the RMP. Excellent management decisions mean little without excellent implementation.

Stage 8: Selection of Resource Management Plan

Mechanics

The planning team analyzes the compiled comments and determines whether to propose changes to the preferred alternative. If changes are proposed, the BLM determines whether the altered mix or intensity of resource activities requires a revision to the effects analysis (Stage 6). This suggests that structuring the alternatives and their evaluation in a quantitatively rigorous but analytically flexible manner could prove efficient (Stage 6). Once the revisions are made, the BLM chooses whether or not to make the proposed changes and completes the RMP. Once completed, the field manager recommends and submits the revised RMP/EIS to the state director.

The state director reviews the proposed RMP/EIS.[278] If the review uncovers problems, the state director returns the RMP/EIS to the district manager "with a written statement of the problems to be resolved."[279] The district manager resolves the problems and sends the revised RMP/EIS back to the state director. If the state director is satisfied, the proposed RMP is published.[280]

The BLM then initiates a 60-day Governor's Consistency Review and a 30-day public Protest Period. Once each of these actions runs its course, the agency documents final approval of the RMP/EIS in a concise public Record of Decision (ROD) in compliance with NEPA. The plan is then final and operational.

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[278] 43 C.F.R. § 1610.4-8.

[279] 43 C.F.R. § 1610.5-1(a).

[280] 43 C.F.R. § 1610.4-8.

The Role of the Public

The state director must provide at least a 30-day period, beginning with the day the proposed RMP/EIS is published in the *Federal Register*, before approving the RMP.[281] During this time, the proposed RMP/EIS can be administratively protested.[282] If that occurs, the state director cannot approve the RMP/EIS until the protest is resolved, although in the case of a delay due to protest, only those elements of the RMP/EIS that are challenged in the protest are prohibited from final approval.[283] If the protest results in a significant change to the RMP/EIS, then the BLM must provide for public notice and comment.[284]

You are also given an indirect voice through your state's governor. The BLM must give the governor 60 days to review the proposed RMP/EIS for consistency with state plans, policies, and programs, a process generally carried out by the state's attorney general.[285] If the BLM knows of inconsistencies, those inconsistencies must be disclosed. If the governor does not respond, then the BLM assumes that the proposed RMP/EIS is consistent with state plans, policies, and programs or, where the BLM has noted inconsistencies, that the governor has not recommended changes. If, however, the governor recommends changes in the proposed RMP/EIS and those changes do not reflect issues vetted during the public participation process, the BLM state director must reopen the RMP/EIS for an additional 30-day public review and comment period. If the BLM does not incorporate the governor's recommendations, the governor can appeal the BLM's decision in writing to the BLM state director, who must respond to the governor in writing and publish the response in the *Federal Register*.[286]

Oversight

This stage is your final opportunity to affect the content of the RMP before it becomes final. Your involvement is limited to review and protest. The protest is important. It maintains your standing to challenge the RMP in court if that becomes necessary.

In reviewing the proposed RMP, make sure that the BLM justifies each of its decisions adequately in both fact and law. You should be able to trace each decision back through the planning stages to see how it was analyzed and whether it comports with the planning criteria, resolves identified issues, and is carried out in accordance with the law.

Do not underestimate the Governor's Consistency Review. The governor holds considerable influence over federal land management issues. If you can convince your governor of the validity of your positions, you can leverage pressure against the BLM from a different angle — one that includes the backing of the state where the planning area is located. If the governor is hostile to your interests, keep careful watch on how the state tries to influence the RMP.

Stage 9: Maintaining, Amending, and Revising Resource Management Plans

RMPs and their accompanying EISs are living documents that must be kept consistent with current resource conditions. In legal terms, an RMP is a

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[281] 43 C.F.R. § 1610.5-1(b).

[282] 43 C.F.R. § 1610.5-2.

[283] 43 C.F.R. § 1610.5-1(b).

[284] *Id.*

[285] 43 C.F.R. § 1610.3-2(e).

[286] *Id.*

"continuing agency action."[287] Note that the BLM is not obligated to revise RMPs within a definitive time period. But if conditions change, the agency cannot use an RMP indefinitely without modification.

The BLM uses three processes — maintenance, amendment, and revision — to ensure that the RMP/EIS is up to date, valid, and consistent with new information, actual circumstances, and conditions of the land. Maintenance actions are minor, technical changes carried out without public participation. Amendments are more significant and represent "mini" resource management planning actions focused on a particular subject, place, or issue. Revisions are a comprehensive, full review and revision of all aspects of the RMP.

In some instances, as described below, the BLM must employ these processes. But NEPA imposes obligations independent of the resource management planning process that may require the BLM to take action whether or not the agency needs or wants to maintain, amend, or revise the RMP. This holds true for other parallel legal processes such as the consultations called for by Section 7 of the Endangered Species Act and Section 106 the National Historic Preservation Act.[288]

Maintenance

The BLM incorporates minor changes in data into the RMP through maintenance.[289] The agency's ability to use this process is limited: the BLM can only refine or further document a previously approved decision that is incorporated in the RMP. The agency cannot expand the scope of resource uses or restrictions or change the terms, conditions, or decisions of the approved RMP.[290] Maintenance does not constitute a plan amendment and does not involve public participation or interagency coordination, although the BLM must document the action in the RMP and keep any supporting records.[291]

Amendments

Amendments are responses to new information, policy shifts, and a desire to authorize uses or activities that do not conform to the existing RMP. The planning regulations set out the legal threshold triggering an RMP amendment:

> An amendment shall be initiated by the need to consider monitoring and evaluation findings, new data, new or revised policy, a change in circumstances or a proposed action that may result in a change in the scope of resource uses or a change in the terms, conditions and decisions of the approved plan.[292]

As a practical matter, whether a plan is amended depends on resource conditions and BLM's workload priorities and capabilities. If the agency cannot amend an otherwise nonconforming use or activity, then the use or activity is prohibited. Importantly, the BLM can amend multiple

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[287] See *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1051-1052 (9th Cir. 1994) (holding that Land and Resource Management Plan of the Forest Service, the equivalent of a BLM RMP, constitutes a continuing agency action requiring consultation under the Endangered Species Act).

[288] 16 U.S.C. §§ 470(f) (NHPA section 106), 1536(a)(2) (ESA section 7).

[289] 43 C.F.R. § 1610.5-4.

[290] *Id.*

[291] *Id.*

[292] 43 C.F.R. § 1610.5-5.

RMPs simultaneously through a single NEPA process, defining the scope of the amendment on the basis of either geography or type of decision.[293]

Amendments undergo the same basic process as the full RMP. The BLM must allow for public involvement,[294] undergo interagency and intergovernmental coordination and consistency reviews,[295] and collect and analyze any appropriate data or information.[296]

The amendments must also comply with NEPA, although the BLM is allowed, depending on the significance of the action, to develop an Environmental Assessment rather that a full Environmental Impact Statement at this point in the amendment process.[297] If the BLM completes an Environmental Assessment and makes a Finding of No Significant Impact (FONSI) and the state director approves the amendment, then the agency provides at least a 30-day period for public review and an opportunity to protest the amendment.[298] After this period runs its course, the BLM can implement the amendment through a Decision Record.[299] Note, however, that if the BLM proposes Area of Critical Environmental Concern designations in the approved amendment, the BLM must provide at least a 60-day public review and comment period on the proposed designations.[300]

If the BLM does not make a FONSI, the agency must complete a full EIS, providing at least a 90-day public review and comment period for the draft Amendment/EIS, and at least a 30-day protest period, the same as for an RMP.[301]

Revising Resource Management Plans

RMPs are revised as necessary; that is, once they become outdated or otherwise infirm.[302] To determine whether a revision is necessary, the BLM looks at monitoring and evaluation findings in addition to new data, changes in policy and situations, and whether these factors affect the entire plan or major portions of the plan.[303] While it makes sense to give the BLM flexibility to decide when a RMP must be revised, the agency can use that flexibility as an excuse to evade its legal obligations. Therefore, in the right circumstances (for example, the RMP does not conform to place-based conditions and BLM's legal mandates), consider putting pressure on the BLM to revise the RMP.

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[293] 43 C.F.R. § 1610.5-5(b); U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (VII)(B) (2000).

[294] 43 C.F.R. § 1610.2.

[295] 43 C.F.R. § 1610.3.

[296] 43 C.F.R. § 1610.5-5.

[297] 43 C.F.R. § 1610.5-5

[298] 43 C.F.R. §§ 1610.5-2(a)(1), 1610.5-5(a). See also U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (III), Fig. 2 (2000).

[299] *Id.*

[300] 43 C.F.R. § 1610.7-2(b).

[301] 43 C.F.R. § 1610.5-5(b)

[302] 43 C.F.R. § 1610.5-6.

[303] *Id.*

PHOTO COURTESY RICK AND SUSIE GRAETZ

Missouri River winding through the "badland" habitat of the Upper Missouri River Breaks National Monument, Montana. The Bureau of Land Management oversees this monument as part of the agency's National Landscape Conservation System.

7. Interim Protection of the Land During Planning

a. BLM's Authority and Duty to Protect the Land

Keep your eye on ongoing management activities during the multi-year RMP planning process: earlier management decisions remain in effect, and the BLM can make limited implementation-level decisions consistent with the existing RMP.

Management decisions are subject to NEPA's general requirement that prohibits the agency from adversely impacting the environment or limiting the potential choice of reasonable alternatives.[304] And the BLM is under a continuing obligation to prevent permanent impairment of the productivity of the land and the quality of the environment (43 U.S.C. § 1702(c)) and to take any action necessary to prevent unnecessary or undue degradation (43 U.S.C. § 1732(b)). BLM policies and procedures also contain specific requirements that depend on whether the management decision is ongoing or proposed:

Existing decisions. Halted only if the BLM, the Interior Board of Land Appeals, or the courts determine that continuation of the authorized activity would violate federal law or regulations.[305]

Proposed implementation decisions. The BLM can modify these decisions by imposing conditions of approval or stipulations on the activity, relocating the activity to a less sensitive area, or redesigning the activity. All of these tools can be used either separately or together to reduce the impact of the pro-

[304] 40 C.F.R. § 1506.1(a). If a programmatic EIS, limited exceptions apply, see 40 C.F.R. § 1506.1(c). See also U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (VII)(E) (2000).

[305] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (VII)(E) (2000). (VII)(E).

posed activity on resource values being considered in the amendment or revision process.[306] Note that implementation-level decisions must comply with NEPA, including the requirement to consider a no action alternative.[307]

b. Protect Resources and Values Where the BLM Does Not

Documented evidence points to many — in fact, too many — instances where the BLM has not stopped degradation of resources and values during the planning process. Sometimes, the agency simply acquiesces to the degradation. Sometimes, it refuses to diligently monitor and evaluate ongoing activities whether legal or illegal. Even when confronted with evidence of degradation, the BLM often asserts that it has no authority to take action. In most such cases, however, the agency does have the authority, just not the willingness.

As a result, interim protection of the land requires your diligent oversight. This is important because a failure to provide interim protection could well jeopardize long-term conservation objectives. To halt environmentally adverse activities, make aggressive use of NEPA and the Council of Environmental Quality's regulations that implement NEPA, especially 40 C.F.R. § 1506.1. Courts can and will halt agency actions pending compliance with NEPA where such activities would have interfered with the NEPA process.[308]

Be aware: the above argument is undercut by the fact that CEQ regulations permit an action that is covered by an existing program statement — in essence, an existing land-use plan.[309] To counter this exception, you may have to assert a clear duty to act under NEPA, FLPMA, or another law.[310] The 9th Circuit Court rejected assertions of a clear duty predicated on several FLPMA provisions,[311] in part because FLPMA does not establish specific time periods for revisions to land-use plans. This opinion suggests the need to establish a clear duty through the use of other provisions such as NEPA's requirements for supplemental impact statements or the Endangered Species Act's provisions for consultation with the U.S. Fish and Wildlife Service or National Marine Fisheries Service.[312]

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[306] *Id.*

[307] 40 C.F.R. § 1502.14(d). Although note that the BLM amended its land-use planning handbook, H-1601-1, in section (VII)(E) to eliminate language that require consideration of a no action alternative based on a Solicitor's opinion regarding the interpretation of 40 C.F.R. § 1506.1.

[308] See, e.g., *Portland Audubon Society v. Babbitt*, 998 F.2d 705 (9th Cir. 1993) (affirming a district court injunction against BLM timber sales pending completion of a supplemental EIS required by NEPA).

[309] 40 C.F.R. § 1506.1(c) (stating that an agency in the midst of NEPA process shall not undertake any major federal action not covered by an existing program statement).

[310] *ONRC Action v. Bureau of Land Management*, 150 F.3d 1132, 1138 (9th Cir. 1998).

[311] *Id.* at 1138-1139 (9th Cir. 1998) (finding no clear duty to act in 43 U.S.C. §§ 1701(a)(8), 1712(a), 1732(b); 43 C.F.R. §§ 1601.0-5(k)(8), 1601.0-5(k), 1610.4-9, 1610.5-6).

[312] See *Oregon Natural Resources Council Action v. United States Forest Service*, 59 F.Supp.2d 1085, 1095-1096 (holding, in part, that plaintiffs had not carried burden to compel preparation of an SEIS but so holding only after a hard look at information, agency planning base, and capability of planning base to adapt to new information).

Chapter VII.
NEPA

A. The Importance of NEPA

The National Environmental Policy Act of 1969 (NEPA) permeates nearly every aspect of public lands management. It is your most important advocacy tool.[313] Think of NEPA as statutory and regulatory glue that binds individual management responsibilities into a coherent whole.[314] But remember that NEPA does not dictate particular outcomes. Rather, NEPA forces the BLM to stop and think before proceeding with an action through consideration of alternatives, study of environmental impacts, and encouragement of ecologically friendly designs.[315]

Key Recommendations

- Take the initiative and define the debate. Assess scientific arguments and how the NEPA process can be used to forward those arguments — ultimately with the intent of achieving your objectives. Start as early as possible and use your assessment to define the debate before the BLM or proponents of a potentially harmful action do it for you. Send a preemptive letter, petition, communication, or threat of appeal or litigation, but be sure to carefully assess the merits of your arguments and the risks involved. Expose only as much of your argument as necessary.
- Use NEPA to define the administrative record. Through NEPA, register your scientific, policy, and legal arguments with the BLM. Once received, the BLM must consider those arguments and any associated information in its decision-making process. This creates a paper trail that helps a court more readily determine whether a given decision is reasoned and informed in both fact and law. Without this paper trail, adversarial challenges are akin to abstract political disagreements that the courts are generally reluctant to resolve.
- Use the NEPA process as an entry point for scientific information. Craft your scientific arguments as a NEPA procedural argument. This way, your arguments are given legal weight. Otherwise, the BLM, regardless of the merits of your argument and supporting information, may respond with a thanks and little else.
- Emphasize that the NEPA process is a way to ensure that legal obligations are satisfied. NEPA should be used to ensure that agency actions are lawful. It is not merely a process for the sake of process. The NEPA process should be used to help determine, as examples, whether a given activity causes permanent impairment or unnecessary or undue degradation, violates the Endangered Species Act's jeopardy provision, or exceeds Clean Water Act water quality standards.
- Emphasize that NEPA should be viewed as an ongoing obligation of the agency. NEPA should link the various information management responsibilities of the BLM through spatial analysis, providing a forum to aggregate and evaluate information gleaned from ongoing management, and thereby operate as the cornerstone of an adaptive ecosystem management program.
- Carefully consider NEPA's role in adversarial challenges. NEPA violations generally provide you with merely a procedural remedy that, though strategically important, may not allow you to actually change the decision. Think outside the box and consider how you can enhance NEPA's ability to hold the BLM's feet to the fire to ensure long-term real protection of the land.

[313] 42 U.S.C. §§ 4321-4370e.

[314] 42 U.S.C. § 4332(1) (requiring that policies, regulations, and public laws of the United States to be interpreted in accordance with NEPA); 40 C.F.R. § 1500.2(a) (requiring same).

[315] 40 C.F.R. § 1502.1 (stating that "[a]n environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions").

For NEPA requires the BLM to justify its management actions in both fact and law. To realize NEPA's full potential, you need to ensure that NEPA is integrated into the decision-making process as early as possible.[316] And although NEPA provides you with a key weapon to challenge adverse agency decisions, note that remedies to NEPA violations tend to be procedural: the agency must simply revisit the drawing board, not necessarily come to a different conclusion.[317]

NEPA consists of both substantive (content-based) and procedural (process-based) elements. The procedural elements (Section 102) are, practically speaking, the most important, and they receive the most attention. However, don't underestimate NEPA's substantive potential and purpose in Section 101, which imposes an affirmative obligation on the BLM to act as an ecological steward of our public lands and to interpret agency policies and procedures accordingly.[318] You can help enhance that role by linking NEPA Section 101 with FLPMA's management objectives (43 U.S.C. §§ 1701(a)(1)-(12)). In this context, it is important to reference and quote NEPA's language accurately. Section 101(a) of NEPA states:

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill social, economic, and other requirements of present and future generations of Americans.

Sections 101(b)(1)-(6) build on Section 101(a), directing the BLM to:

1. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
2. Assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
3. Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.
4. Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice.
5. Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.
6. Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.[319]

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[316] 40 C.F.R. §§ 1500.5(a), 1501.2.

[317] This remedy may in and of itself be important to postpone damage to the environment pending other efforts to halt the action permanently.

[318] 42 U.S.C. § 4331.

[319] 42 U.S.C. §§ 4331(b)(1)-(6).

Section 102, the action-forcing procedural arm, implements these substantive objectives. Ultimately, the conclusions reached through the Section 102 NEPA process must (although in practice often do not) reflect NEPA Section 101 and FLPMA. Achieving these objectives can be accomplished in part by focusing the NEPA process on the ecological systems that are impacted by an action rather than on the action itself. In this way, NEPA serves as an irreplaceable component of Adaptive Environmental Management, providing a tool to link BLM's procedural obligations with its substantive obligations. This role is eloquently articulated in the Council on Environmental Quality's regulations to implement NEPA:

> Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork — even excellent paperwork — but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.[320]

B. How a NEPA Document Is Developed

1. Summary of the process

An ongoing NEPA process has real-life implications for the land. During the process, the BLM is prohibited from adversely impacting the environment or limiting the potential choice of reasonable alternatives.[321] This prohibition is lifted only upon conclusion of the process. Overall, in carrying out its NEPA obligations the BLM must take a hard look at the proposed action and its environmental consequences.[322]

The NEPA process itself begins with a proposed action that involves or requires federal participation — in our case, the BLM's participation (see Figure 5, page 93).[323] Once an action is proposed, the BLM should first ensure that the action conforms to the land-use plan. If it does not, the action is prohibited. Assuming that the action does conform, the agency determines which of three NEPA pathways is necessary or desired, a decision that is based on the level of impact. If impacts are deemed significant, a full Environmental Impact statement (EIS) is developed; if impacts are unknown, a less intensive Environmental Assessment (EA) is completed; and if impacts are insignificant and fall within a categorical exclusion, a Categorical Exclusion (CE)

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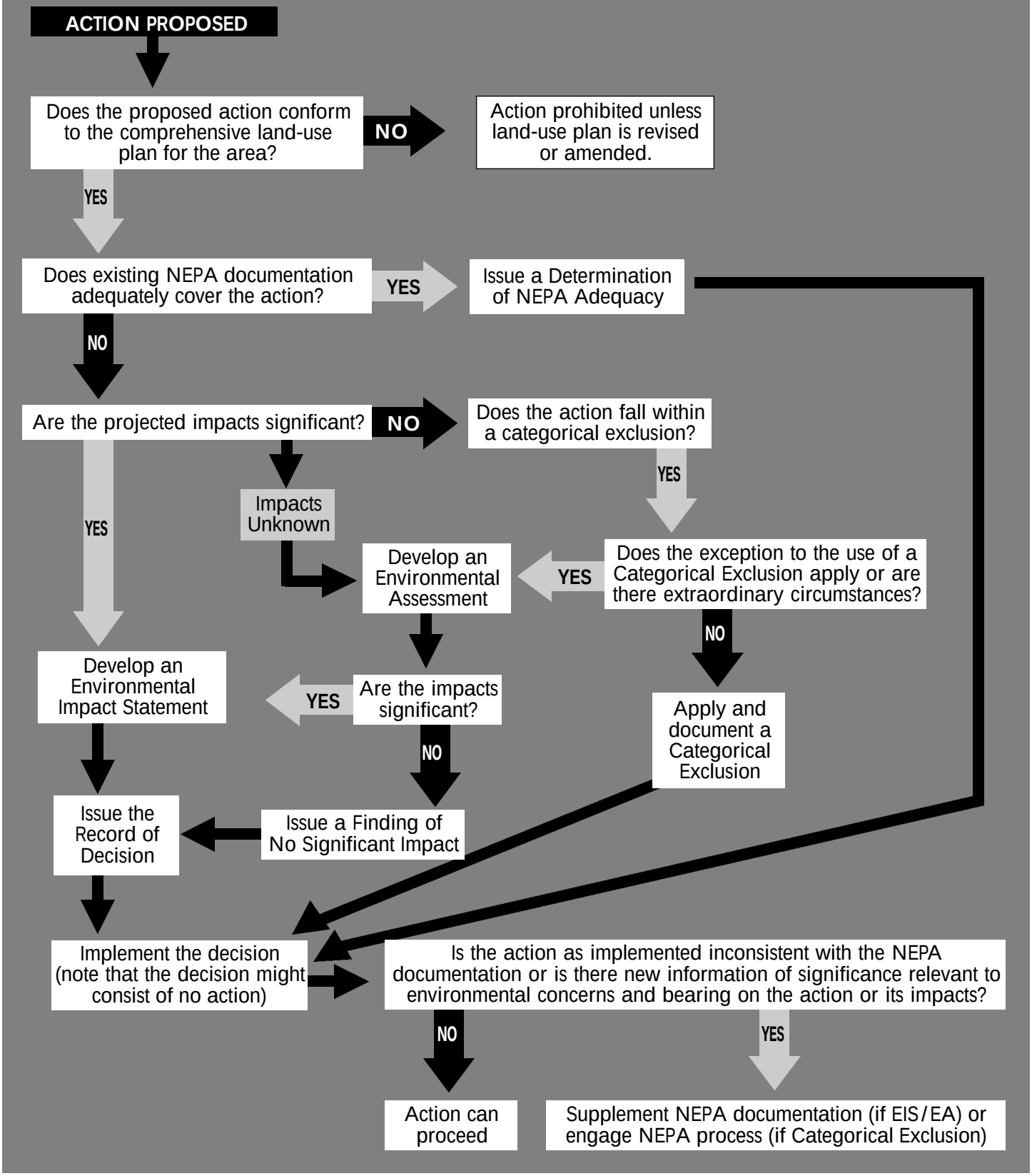
[320] 40 C.F.R. § 1500.1(c).

[321] 40 C.F.R. § 1506.1(a). If a programmatic EIS, limited exceptions apply. See 40 C.F.R. § 1506.1(c).

[322] *Robertson v. Methow Valley Citizen's Alliance*, 490 U.S. 332, 333 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (citing *Natural Resources Defense Council v Morton*, 458 F.2d 827, 838 (1972).

[323] 42 U.S.C. § 4331(2)(C) (NEPA applied to "proposals" for "major federal actions significantly affecting the quality of the human environment"); 40 C.F.R. § 1508.23 (defining "proposal" as event where agency "has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated"). See also, 40 C.F.R. § 1502.5 (stating that NEPA should be initiated early enough to contribute to the decision-making process and not merely serve to rationalize a predetermined decision), *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (holding that mere "contemplation" of an action is insufficient to trigger NEPA).

FIGURE 5.
Overview of the BLM NEPA Process



is applied. In limited instances, a proposed action will simply implement existing decisions that have already complied with NEPA. If such is the case, the BLM need not enter the NEPA process. But the agency must document that decision through a Determination of NEPA Adequacy (DNA).

If the BLM determines that a CE or DNA applies, the NEPA process comes to a close (unless there are significant new circumstances, information, or substantial changes to the action). If not, the agency develops the EA or EIS. The EA and EIS pathways are similar, the principal difference being the intensity of the analysis and the level of public participation. Generally, EA- or EIS-level NEPA processes provide three opportunities for formal public participation: (1) scoping, (2) review and comment of the draft NEPA document, and (3) review and challenge of the final NEPA document.

Scoping is used to identify issues. Once scoping is completed, the BLM identifies study area(s), formulates a reasonable set of alternatives, and analyzes the direct, indirect, and cumulative impacts of the proposed action and each alternative. The results of this process are put into draft form for review and comment. Once review and comment periods run their course, the BLM compiles the comments, considers suggestions and concerns, and modifies the draft as necessary. Once the draft is modified, the BLM publishes the final analysis, providing a period of time for the public to review (which may not occur for an EA) but not necessarily comment on the analysis (note that some decisions are effective immediately, thus totally undermining the public comment period). This public comment period usually runs concurrently with any opportunity to challenge (via protest or appeal) decisions reached through the NEPA process.

2. Scoping

The scoping period is the starting line for both an EIS and EA, although the NEPA process actually begins before scoping — thus, underscoring the need for you to get involved early. Scoping is initiated with a Notice of Intent (NOI)[324] that invites interested parties to participate to determine significant issues.[325] The NOI contains a description of the scoping process, announces any public meetings, and describes the basic details of the proposed action. The NOI is often, but not always, published in the *Federal Register*.

The scoping process is used to reach out to the public, identify the issues for study, eliminate unnecessary issues, establish study area boundaries, determine legal requirements, and establish a projected timeline for the entire process.[326] The BLM should be especially cognizant of its obligation to analyze cumulative impacts. In general, scoping reinforces in varying degrees the BLM's commitment to organized, systematic public involvement early in the planning and decision-making process.[327] Ultimately, however, it is the BLM's obligation to filter issues and concerns raised during the scoping period consistent with the agency's professional expertise and legal requirements; scoping is not a voting process.

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[324] 40 C.F.R. §§ 1501.7 (duty to issue notice), 1508.22 (required elements of the notice).

[325] If the BLM completed an EA that concluded a full EIS is necessary, the BLM cannot rely on the EA-level scoping process to satisfy its scoping obligations at the EIS level: the agency must conduct a new round of EIS-level scoping.

[326] 40 C.F.R. §§ 1501.7(b)(2), 1501.8.

[327] 40 C.F.R. § 1501.2.

3. Creating a Draft

Once scoping is completed, the BLM develops the NEPA document in two phases — draft and final.[328] The draft EIS must be made available to the public and other interested parties such as federal, state, and local agencies for review and comment.[329] For an EA, the BLM has the option to provide for public review and comment of the initially developed EA, which is actually a draft although the agency may or may not call it that.

The draft stage is the most important stage of the NEPA process and is critical in defining the administrative record. This is because the BLM has put its cards on the table, usually identifying a preferred alternative and disclosing its rationale to the public. Remember, good groundwork before the NEPA process gets under way, solid scoping comments, and diligent communication with the BLM during the preparation of the draft can make your job during this phase of the process considerably easier and far more productive. Comment on the draft early and as often as necessary.

Once comments are received, the BLM should respond by modifying its alternatives; developing and evaluating reasonable alternatives that were not given due consideration in the draft; supplementing, improving, or modifying the impact analyses; correcting factual errors; and explaining why particular comments do not warrant further response.[330] If the agency constructs, selects, or modifies the draft such that it differs substantially from the original draft, or if significant new circumstances or information relevant to environmental concerns and relating to the action arise, a supplemental NEPA analysis must be prepared and re-circulated for public review.[331] Once the supplement is completed, or if the modified draft was not significantly different, the NEPA analysis is ready for publication in its final form.

4. Finalizing the Analysis

The BLM completes the final EA or EIS by issuing a notice, which must appear in the *Federal Register* that the document is available for review.[332] Notice of an EA need not appear in the *Federal Register* After the review period ends (if one is required), the BLM makes a decision and issues a public Decision Record for an EA or a Record of Decision for an EIS. A Decision Record is only issued for an EA if the EA concludes with a Finding of No Significant Impact (FONSI). If the EA does not conclude with a FONSI, the BLM must develop a more comprehensive EIS, beginning with a new round of scoping. Regardless, the Decision Record or Record of Decision should identify the actual decision made, the alternatives considered, the environmentally preferable decision (not necessarily the decision taken by the BLM), whether all practicable measures to avoid or minimize environmental harm have been taken, and mitigation measures adopted by the BLM (or explain why mitigation measures were not adopted).[333] The agency's justification for its choices must be set out in the record.[334]

The decision documents should include or link to a monitoring, enforcement, and evaluation program for all

[328] 40 C.F.R. § 1502.9.

[329] 40 C.F.R. § 1503.1.

[330] 40 C.F.R. § 1503.4(a)(1)-(5).

[331] 40 C.F.R. § 1502.9(c).

[332] 40 C.F.R. § 1506.10(a).

[333] 40 C.F.R. §§ 1505.2(a)-(c).

[334] 40 C.F.R. § 1503.4.

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The tranquil beauty of many BLM lands is well illustrated in this photo of the North Fork Wilderness Study Area, Oregon.

subsequent stages of the action. This allows the BLM to ensure that the action is implemented as designed, does not cause unanticipated impacts (in relation to type and intensity), and is consistent with any new circumstances or information. In this way, the nature of NEPA as a living process that accompanies an action from start to finish is realized.

5. Supplements

NEPA documents accompany a decision throughout the decision's life and can change over time. Such changes are recognized through supplements that the BLM can prepare when it determines that the purposes of NEPA will be furthered, although the agency cannot use this authority to shield itself from taking immediate action to prevent damage as required by law).[335]

In two situations, the BLM must supplement its NEPA base:

- The agency makes substantial changes in the proposed action that are relevant to environmental concerns.
- There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. [336]

These situations usually arise after a project has been implemented. In some instances, they occur during the actual NEPA process itself such as when the BLM takes no action subsequent to the release of the DEIS and FEIS and circumstances change or new information comes to the table. A supplement is developed in the same fashion as the underlying EA or EIS; additional scoping is, however, optional.[337]

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[335] 40 C.F.R. § 1502.9(c)(2).

[336] 40 C.F.R. § 1502.9(c)(1)(i)-(ii).

[337] 40 C.F.R. § 1502.9(c); Bureau of Land Management, *National Environmental Policy Act Handbook*,H-1790-1, (III)(D)(4)(a)(1).

C. Public Participation and NEPA

1. Opportunities for Public Involvement

NEPA and its CEQ implementing regulations involve the public at all levels of the NEPA process. The key opportunities to formally participate in the NEPA process depend on whether the BLM is developing an EA or an EIS. An EIS contains more concrete bottom-line requirements relative to an EA, but the BLM has considerable discretion to expand the opportunities for public involvement beyond the bottom-line requirements for either an EA or EIS. For example, the agency can extend the minimum time periods. Public participation is not solicited for a Categorical Exclusion, although documentation for the CE must be available to the public upon request.

Even where the BLM adheres to bottom-line requirements, the agency can be challenged for violating the general public involvement provisions of NEPA and the CEQ regulations.[338] This occurs when the action is so significant as to require enhanced public participation or when the agency acts in a manner that confuses or misleads the public. Voice your concerns and suggestions at any time whether or not the BLM solicits them.

The bottom-line public participation requirements are:

Environmental Assessments . The BLM must diligently provide for public involvement (40 C.F.R. § 1506.6(a)), but has few definitive public participation requirements in the EA process. The agency must merely provide public involvement "to the extent practicable."[339] Thus, you should encourage the BLM to open the EA process to expanded public oversight. In particular, ask the agency to allow public input in the scoping process, review of the EA draft, and review of the final EA.

♦ If the BLM issues a FONSI, the agency must in certain situations provide you with a 30-day public review period.[340] Such situations arise if the decision not to complete an EIS is subject to reasonable disagreement, if the situation is unusual, if the proposed action is new or precedent setting, if the decision is scientifically or publicly controversial (relating to the conclusions of the EA, not merely political opposition), or if it closely resembles an action that normally requires an EIS.[341] Public review must also be provided if the proposed action would be located in a floodplain or wetland.[342]

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[338] The CEQ regulations require the BLM to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a). The BLM must also "[e]ncourage and facilitate public involvement" (40 C.F.R. § 1500.2(d)) and "affirmatively solici[t] comments" from the "interested or affected" public (40 C.F.R. § 1503.1(a)(4). The CEQ regulations further require the federal government to involve the public in NEPA procedures (40 C.F.R. § 1500.1(b)) and to act as an information clearinghouse for relevant environmental information (40 C.F.R. §§ 1506.6(e), (f)).

[339] 40 C.F.R. § 1501.4(b).

[340] 40 C.F.R. § 1501.4(e)(2).

[341] Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, no. 37b (1981) (citing 40 C.F.R. §§ 1501.4(e)(2), 1508.27).

[342] *Id.* (citing Executive Orders 11988, § 2(a)(4), 11990, § 2(b)).

♦ The BLM must give public notice of any EA-related hearings, public meetings, or documents (even if public review is not provided), but such notice does not have to be through the *Federal Register* if the issues are of primarily local concern.[343]

Environmental Impact Statements . Similar to an EA, the BLM must diligently involve the public (40 C.F.R. § 1506.6(a)). In all situations, the BLM must comply with the following:

♦ The BLM must issue a NOI in the *Federal Register* that states the agency is preparing an EIS.[344] Then the BLM begins the scoping process to identify specific issues for study and gather initial information concerning the public's view of a proposed activity. You are invited to participate in the scoping process.[345]

♦ After completion of the scoping process, the BLM develops the DEIS. The agency must issue a Notice of Availability that states the DEIS is available for review, circulate the DEIS on request, ask for comments, and provide at least a 45-day public comment period.[346] The Notice of Availability is generally issued in the *Federal Register* if the issue is of national concern or required by program-specific guidance.[347] The BLM must respond to your comments.[348]

♦ Once the DEIS is finalized, the BLM has the discretion to provide a comment period for an FEIS; at the very least, it must, through a Notice of Availability, provide a 30-day review period prior to making a final decision and circulate the document on request.[349] The review period can run concurrently with any applicable period provided to appeal the decision.[350] The Notice of Availability is generally issued in the *Federal Register* if the issue is of national concern or required by program-specific guidance.[351] If the BLM supplements or revises an existing EIS, it must provide for notice and comment in the same fashion as for a DEIS and FEIS, although additional scoping is not necessarily required.[352]

♦ The entire EIS process can be completed no sooner than 90 days after the BLM issues the Notice of Availability for the DEIS or no sooner than 30 days after the Notice of Availability for the FEIS, whichever is later.[353] In either situation, the BLM must provide the minimum 45-day period for review and comment for the DEIS and the 30-day period for review of the FEIS.[354] These two time periods cannot run concurrently, although they

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[343] 40 C.F.R. § 1506.6(b).

[344] 40 C.F.R. § 1501.7.

[345] 40 C.F.R. § 1501.7(a)(1).

[346] 40 C.F.R. § 1502.19, 1503.1, 1506.10(c).

[347] 40 C.F.R. §§ 1506.6(b)(2), (3).

[348] 40 C.F.R. § 1503.4.

[349] 40 C.F.R. §§ 1502.19, 1503.1(b), 1506.10(2).

[350] 40 C.F.R. § 1506.10(b).

[351] 40 C.F.R. §§ 1506.6(b)(2), (3).

[352] 40 C.F.R. § 1502.9(c); Bureau of Land Management, *National Environmental Policy Act Handbook*,H-1790-1, (III)(D)4)(a)(1).

[353] 40 C.F.R. § 1506.10(b).

[354] 40 C.F.R. § 1506.10(c).

can overlap with the general 90-day minimum time period.[355] The NEPA process is only final once each of these time periods has run its course.[356]

2. Participating in the NEPA Process: Strategy and Comment

The need to participate in the NEPA process is critical to achieve objectives and establish an administrative record. Remember that your opportunities to formally participate in the NEPA process can vary dramatically depending on whether the BLM enters the EA- or EIS-level NEPA pathway. To be most effective, consider the following.

Be proactive. Define the debate. Take the initiative and gain the in the NEPA process. Track issues closely. Maintaining contact with all levels of relevant BLM staff at all times.

Link scientific arguments and positions to BLM's legal obligations. Scientific arguments and positions hold little weight unless they are linked to the BLM's procedural and substantive legal obligations. In accomplishing this task, don't just criticize the agency: ask questions and offer solutions. Otherwise, the agency will respond with "comment noted" and ignore you.

View public participation as a closing door. Your issues and recommendations have the best chance of getting through to the BLM if you raise them early in the NEPA process. As the process proceeds, the door slowly closes until you are left with riskier options such as litigation. Give the BLM concise, carefully considered information, suggestions, ideas, and justifications as early as possible, ideally before the agency establishes the Purpose and Need for the action. And remember that if you fail to include an issue early on or a new issue arises, you can raise that issue at any time during the NEPA process. Although its practical effect may be less, it will be available for purposes of appeal or litigation.

During scoping, the first opportunity for formal public participation, identify issues and provide recommendations. Where the BLM is genuinely committed to an open public process, stay open to new ideas and suggestions and commit to the participatory nature of the NEPA process. Do not, however, get trapped in a futile process: protect yourself and your issues by rallying public attention and challenging the BLM when the agency appears predisposed to an ill-conceived, harmful, and predetermined course of action. Even if participation appears futile, participate to lay the groundwork — that is, the administrative record — for any future challenge that may become necessary. All communications submitted to the BLM should be thoughtful, well documented, and concise.

Once scoping is completed, the BLM analyzes comments and may produce a scoping comment report.[357] Obtain the report to get an idea of the issues the BLM faces. At this point, there will be a time lag of an indefinite period before the BLM issues the draft NEPA document. During that time, keep the BLM apprised of your presence and inject yourself into the process in a professional, but assertive, fashion.

When it is time to review the draft EIS or EA (the BLM must provide a review and comment period for an EIS, but this is optional for an EA), determine your time and resources and the importance of the issues involved. Make a tactical decision as to the most effective means of

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[355] *Id.*

[356] 40 C.F.R. § 1506.10(b).

[357] U.S. Department of the Interior, Bureau of Land Management, Information Bulletin No. 2003-020 (October 31, 2002).

achieving objectives and allocate your time and resources accordingly.

Sometimes, review of and comments on the draft EIS or EA will be the focal point of your advocacy. At other times, review and comments will be secondary in importance and carried out merely to protect your legal interests down the line. There is no simple equation to aid you in deciding how much time and resources to invest in reviewing and commenting on the draft EIS or EA. Such decisions must account for multiple factors, including legal, political, scientific, economic, and social considerations. In general, the more you invest in the process, the greater the risk *and* opportunity.

From a technical perspective, use the same criteria to judge the draft EIS or EA as you would to judge an RMP (see pages 82-84 of this guide): check if the draft is legally viable, physically, and biologically feasible, economically efficient, socially and culturally acceptable, and if it employs a proper planning scale. Also consider the critical elements of the NEPA process (discussed below). In particular, look at the assumptions used by the agency to apply those elements in the NEPA process. Those assumptions may be explicit or implicit. Regardless, a review of them often reveals significant weaknesses in the BLM's NEPA documentation.

Make sure the draft EIS or EA focuses on truly significant issues and does not drown the public in excessive, overly technical detail.[358] NEPA documentation must be in "plain language" and "concise, clear, and to the point."[359] And the NEPA analysis must be analytic rather than encyclopedic.[360] Do not underestimate this requirement: the BLM can't simply list data and information. The agency has to process the information in a justifiable fashion to show that the information was considered and analyzed in the context of the proposed action.

Unfortunately, the BLM's NEPA documents are often written in generalized qualitative rather than specific quantitative terms, owing largely to a lack of data about particular subject matters and the complexity inherent in ecological and socioeconomic systems. From a more cynical perspective, qualitative analyses are easier to manipulate to justify a predetermined course of action. And they are more difficult to challenge as they involve inherently subjective assumptions and conclusions, thus shielding the agency in situations where an action would be less justifiable based on measurable, quantifiable analysis.

The result? The agency asserts a lack of sufficient data to conduct a quantitative analysis of impacts and then proceeds to conclude that there are few if any adverse impacts. If this happens, call the BLM's bluff: assert that the data and analysis do not justify the decision and that, at best, the only thing the agency can say within reason is that the impacts of the decision are uncertain. Couple your assertions with a proposed recommendation that the agency either prohibit the proposed activity or proceed with a slow and incremental approach, monitoring adverse impacts and altering decisions and implementation accordingly; that is, put adaptive environmental management to work.

We emphasize again that comments on the draft should be thoughtful, thorough, well documented, and concise. Emphasize your principal issues, but cover all your bases to preserve your ability to challenge other aspects that although minor in the present may become important in the future. Depending on the range of alternatives,

[358] 40 C.F.R. § 1500.1(b).

[359] 40 C.F.R. § 1500.2(b), 1500.4(d).

[360] 40 C.F.R. §§ 1500.4(b), 1502.2(a).

you may want to respond to the draft EIS or EA with a conservation alternative, which can be used to critique the BLM's draft and present your ideas and issues in a positive format.

When the review and comment period for the draft EIS or EA ends, maintain communication with the BLM and track your issues through the publication of the final EIS or EA. Once the final document is published, you may be given a chance to review it (the BLM must provide a review period for an EIS, but this is may not be the case for an EA). Remember, at this time your recourse in the event of problems is through an administrative appeal or litigation. In challenging an agency action through appeal or litigation based on NEPA, keep in mind not only the deference afforded to agency actions but also the BLM's obligation to substantiate its conclusions based on the facts in hand. NEPA gives you several avenues to challenge an agency action, especially where the agency views NEPA merely as red tape and attempts to downplay or misrepresent the facts to reach a predetermined conclusion.

D. NEPA Documents: Content

1. EIS and EA Documentation

The most important and tangible aspect of the NEPA process is its eventual product: the EIS, EA, or CE. This part of the guide looks at the documents produced in an EIS- or EA-level process. Both documents, including the ultimate decision documents — the Record of Decision for an EIS and the Decision Record for an EA — must be made available to the public. Note that NEPA does not mandate the development of EAs. They are a creation of the Council on Environmental Quality and the federal agencies that must comply with NEPA. The basic purpose of an EA is to comply with NEPA while promoting efficiency by tailoring the level of documentation to the intensity of the potential impacts; an EA is not as comprehensive and detailed as an EIS.

According to NEPA at Section 102(2)(C) (42 U.S.C. § 4332(2)(C)), a NEPA document must contain five different but related elements:

1. The environmental impact of the proposed action.
2. Any adverse environmental effects that cannot be avoided should the proposal be implemented.
3. Alternatives to the proposed action.
4. The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity of the environment.
5. Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.

These elements should appear, to varying degrees, in the Alternatives and Environmental Consequences sections of the NEPA document. The Alternatives section describes each alternative considered by the BLM in the NEPA process. The Environmental Consequences section, which should present the impacts of each alternative on the environment, is closely related to the Affected Environment section — a detailed description of the landscape's baseline ecological conditions and natural resources. In an EA, the BLM will sometimes combine these two sections.

Remember that all sections should be written in light of the Purpose and Need, which should be articulated in its own section of the EIS or EA. As a general proposition, the Purpose and Need, Affected Environment, Alternatives, and Environmental Consequences sections are the most important to read and review.

The entire NEPA document must be reviewed in light of the decision that is

found in the Decision Record (and its FONSI) or the Record of Decision. Both DRs and RODs are especially important in relation to any stipulations or mitigation measures: their placement in the decision document makes them enforceable as a matter of law (not simply an item of consideration in the NEPA process). In terms of an EA-level analysis, the EA itself, the FONSI, and the DR are sometimes combined into a single document and sometimes divided into separate documents. Regardless, each element must be made available to the public.

There are several other sections in each NEPA document that provide useful and sometimes pivotal information. The CEQ regulations (40 C.F.R. § 1502.10) recommend the following sections, which are generally used by the BLM:

- Cover sheet
- Summary
- Table of Contents
- Purpose and Need
- Alternatives
- Affected Environment
- Environmental Consequences
- List of Preparers
- List of Agencies, Organizations, and Persons Receiving Document
- Index
- Appendices (if any)

2. Categorical Exclusions: Documentation

Documentation of a Categorical Exclusion review is generally minimal. If the BLM intends to apply a CE, it must disclose this fact and must, once a decision is reached, indicate that the CE was in fact applied. Beyond these minimal requirements, the application of a CE does not have to be intensively documented. You should press the BLM to indicate why a particular CE applies in the current circumstances and to justify why none of the exceptions to the CE applies in the current circumstances. The agency typically maintains that while managers can document the CE review process, "There are no statutory, regulatory or manual requirements to document a categorical exclusion review."[361]

E. In Depth: Critical Elements of the NEPA Process

1. Overview

The following sections are designed to walk you through the entire NEPA process, focusing on the most critical elements. These elements are particularly relevant in two contexts: (1) formulating and justifying credible scientific arguments and (2) challenging adverse agency decisions. Each element has the potential to either aid or harm your ultimate objectives depending on how you, the BLM, and other stakeholders apply it.

The underlying principles that drive each of the elements are fairly basic and logical. They can become highly technical, however, once applied to the facts of the situation. Allocate time and resources wisely, leveraging these critical elements to achieve conservation objectives. Informed participation in the NEPA process elevates your credibility with the agency, politicians, partner organizations, other stakeholders, and the public — credibility that is invaluable, irreplaceable, and otherwise difficult to obtain.

[361] Bureau of Land Management, *National Environmental Policy Act Handbook* H-1790-1, Chapter II, C.

2. Defining the Scope of the Action or Project

The NEPA process gets underway when the BLM proposes a management action and can evaluate alternatives for and the impacts of that action.[362] Generally, the process is initiated once the agency gets to the "go/no go" stage. This means that the agency has reached a point where further action would result in a "irreversible and irretrievable commitments of resources."[363] As it formulates the proposal, the agency also identifies the action's scope for purposes of the NEPA analysis that is determined by looking at "connected, cumulative, and similar actions."[364] The action's scope is used to identify the affected environment and the specific areas that will be impacted (discussed next) to disclose baseline environmental conditions and thresholds.

In relation to the legal mechanics, the BLM must evaluate all related activities through a single NEPA process. As the CEQ regulations state:

> Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.[365]

The CEQ also requires the agency to consider "connected, cumulative, and similar actions,"[366] which do not have to occur at the same time. They may have occurred in the past, may be ongoing, or may be reasonably foreseeable. Still, they must be considered in the NEPA analysis for the proposed action.[367] The definitions and criteria for what constitutes connected, cumulative, or similar actions are:

- Connected actions (40 C.F.R. § 1508.25(a)(1)) are closely related and therefore should be discussed in the same NEPA process. Actions are connected if they:
  - (i) Automatically trigger other actions that may require environmental impact statements.
  - (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
  - (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

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[362] 42 U.S.C. § 4331(2)(C) (NEPA applied to "proposals" for "major federal actions significantly affecting the quality of the human environment); 40 C.F.R. § 1508.23 (defining "proposal" as event where agency "has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated").

[363] 42 U.S.C. § 4332(2)(C)(v); 40 C.F.R. § 1502.16.

[364] 40 C.F.R. §§ 1508.25(a)(1)-(3).

[365] 40 C.F.R. § 1502.4(a). "Related" actions include those carried out on non-BLM land. See, for example, *Alpine Lakes Protection Soc. V. Forest Service*, 838 F.Supp. 478 (D.Wash 1993) (District Court rejected use of categorical exclusion for private road use permit across Forest Service lands for excluding an analysis of timber harvest likely to result from use of the road because the impacts from the timber harvests were "connected" actions).

[366] 40 C.F.R. §§ 1508.25(a)(1)-(3).

[367] 40 C.F.R. §§ 1508.25(a)(1)-(3) (connected, cumulative, similar impacts must be considered in NEPA process), 1502.22(b)(4) ("reasonably foreseeable" impacts includes the discussion of catastrophic consequences even where there is incomplete or unavailable information and the probability of the event is low as long as the analysis is scientifically credible, not based on pure conjecture, and within the rule of reason), 1508.7 (cumulative effects include consideration of "past, present, and reasonably foreseeable future actions" regardless of agency or person undertaking such action) 1508.8 (indirect effects include those that are "reasonably foreseeable").

• Cumulative actions (40 C.F.R. § 1508.25(a)(2)) have cumulatively significant impacts.

• Similar actions (40 C.F.R. § 1508.25(a)(3)) are where reasonably foreseeable or proposed agency actions have similarities such as common timing or geography.

In some instances, the BLM or the proponent of the action will ignore these requirements and attempt to segment individual components of broader management activities to hide environmental impacts. A commonly used example is where an agency breaks down a road project that crosses a river into two separate projects: the road and the bridge required to cross the river. The agency may then isolate the environmental impacts of the road and bridge projects in each individual NEPA analysis and ignore the related impacts of the other project — in effect, acting as if the other project doesn't exist.

In such circumstances, challenge the scope of the BLM's NEPA analysis. First argue that the road and bridge projects are connected actions and therefore must be authorized through the same NEPA process. Second, argue that the agency must consider the environmental impacts of not only the road and bridge projects, but also any nearby actions such as a mining operation or timber harvest because they are either cumulative or similar (given their location and timing). In other words, think about individual management actions on a landscape level. This will allow you to use the CEQ regulations to construct sound challenges against the multitude of small adverse actions that occur across a related, contiguous landscape.

Whether actions are connected, cumulative, or similar is closely related to the determination of whether an action is significant. The CEQ regulations state that the significance of the impacts can't "be avoided by terming an action temporary or by breaking it down into smaller component parts."[368] Note, however, that the courts have allowed agencies to complete separate NEPA analyses for individual projects that seemingly appear "connected, cumulative, or similar" where each project holds "independent utility."[369] Projects have independent utility if each would proceed without the other, thus allowing the agency to complete separate NEPA analyses. That said, such a determination is fact intensive, should be challenged where appropriate, and does not relieve the agency of its obligation to study cumulative impacts.

3. Defining the Study Area (the Affected Environment)

A key element of the NEPA process is the determination of the proper spatial and time scales to use in the analysis. That determination eventually becomes the Affected Environment section, although for an EA this section may be merged with the Environmental Consequences section. Look carefully at the Affected Environment section: often, the BLM will dramatically underestimate the size of the area affected by an action and the life span of the impacts.

The BLM encourages its staff to make land-use plan decisions at different geographic scales to "tailor decisions to specific needs and circumstances," recognizing that "[i]t enhances public involvement" and "provides decision-makers with the proper information for particular levels of decision making."[370] Accordingly, it is

[368] 40 C.F.R. § 1508.27(b)(7)

[369] See, for example, *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002).

[370] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (II)(D) (2000).

the initial assessment of the probable impacts of a proposed action that should drive the definition of the study area for the action. If a study area is restricted to, for example, the footprint of an activity, then various impacts — especially indirect and cumulative impacts — will likely go undetermined.

Since the BLM manages land, the focus should be on a defined ecological unit such as a single or connected system of watersheds and not merely the area under the jurisdiction of the agency. Defining the study area as an ecological unit facilitates proper alternatives and impact analysis and opens the door to understanding the full risks and opportunities inherent in a given action. As an example, in an ecologically defined study area the analysis could reveal that the acquisition of a private landholding at the headwaters of the watershed could serve to mitigate the impacts of several downstream activities. This could provide a method to protect the overall health and integrity of the planning area and facilitate economic development that would otherwise be prohibited because of the severity of the impacts.

It is important to note that the study area may be different for different kinds of impacts. If a potential impact affects, say, a migratory species, the study area should include not only the federal land unit and the immediately proximate landscape but also other lands used by the migratory species. Socioeconomic impacts are also important to a determination of the proper study area. The BLM should examine the socioeconomic impacts on not only the local communities immediately adjacent to the federal land unit, but also on regional and national communities, taking into account feasibility and reasonableness factors.

Consider a proposal to alter the amount of forage available for livestock in a particular allotment in Utah. The socioeconomic analysis would look at the impacts on ranchers in the area but not necessarily the impacts on New York livestock producers. Yet, if high numbers of recreational visitors to a BLM management unit in Utah come from New York City, then impacts that degrade or enhance the recreational experience should take into account the New York recreational users.

At the least, the BLM should closely tailor the study area to the nature of the impact and the affected ecological system or socioeconomic concern, not merely the administrative unit. Once identified, the study areas provide a frame of reference for the development of mitigation measures and monitoring and evaluation programs.

In all circumstances, the "[d]ata and analyses … shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced."[371]

4. Choosing the NEPA Pathway

Once an action is proposed, and its legal scope defined, the BLM makes a threshold classification to determine how to comply with NEPA. The choice of pathway is critical as it dictates the extensiveness of the analysis and, often, the weight given to environmental factors. If the agency improperly chooses a lesser pathway, and you attempt to challenge that decision, you must demonstrate not only that the choice was legally wrong but also that the BLM's flawed choice will lead to adverse environmental impacts. This maximizes the effectiveness of your challenge.

In most cases, the BLM will conduct the initial pathway assessment internally, although in limited instances public scoping is provided. The initial assessment process highlights the need for sound information management systems (inventory, monitoring, and evaluation

[371] 40 C.F.R. § 1502.15.

programs) to facilitate accurate assessments and drive the BLM, early on, to the proper level and type of analysis. Ideally, this assessment should also expose fatal flaws in the proposed action — for example, it is obviously illegal or too costly — that prevent it from going forward. The assessment process consists of two basic steps:

1. Does the action conform to the relevant land-use plan? If no, the action cannot proceed unless the land-use plan is amended or revised. If yes, proceed to Step 2.
2. What is the proposed project's estimated level of impact?

Assuming that the action conforms with the land-use plan, Step 2 of the assessment process centers on NEPA's basic trigger: a duty to develop an EIS for all "major federal actions significantly affecting the quality of the human environment."[372] "Significantly" is the operative word; the reference to "major" reinforces significantly, but does not have independent meaning.[373]

To establish "significance," you do not have to prove that significant impacts will occur in advance. You simply have to show that there are substantial questions about whether such impacts may occur. Significance is determined by looking at both context and intensity in light of the human environment, which includes natural, physical, social, and economic components.[374]

Context. The BLM looks at several different social and geographic scales (human, national, the affected region, affected interests, specific localities) and the short- and long-term impacts within that context.[375]

Intensity . Refers to the severity of the impact.[376] The CEQ regulations identify ten criteria for determining the intensity of an impact. These include examination of each impact (whether adverse or beneficial) individually and not on balance; the impact on public health and safety; the sensitivity of the surrounding landscape; how controversial the action is; the uncertainty or risk involved; the precedent-setting effect of the action; the cumulative impacts of the action; the impact on historic resources; the adverse effect on threatened or endangered species; and the potential for legal violations.[377]

Differentiating context from intensity may seem a little fuzzy, but it need not be too difficult. For example, in the context of a river that holds special value and is a potential addition to the Wild and Scenic Rivers System, a fluid minerals operation has the potential for intense impacts at a variety of scales. However, the nature of the impacts is different depending on the context. At a site-specific level, water-quality impacts could affect threatened and endangered fish populations. The BLM might determine that the impacts to the fish are not significant, but that decision should not end the analysis. The agency should determine whether the impacts to water quality are significant in another context, say a regional context where degraded water quality, although not hurting the fish population, might significantly impinge on the ability of a downstream community to provide its residents with safe drinking water.

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[372] 42 U.S.C. § 4332(C).

[373] 40 C.F.R. § 1508.18.

[374] 40 C.F.R. §§ 1508.14 (defining human environment), 1508.27 (requiring look at both context and intensity).

[375] 40 C.F.R. § 1508.27(a).

[376] 40 C.F.R. § 1508.27(b).

[377] 40 C.F.R. § 1508.27(b)(1)-(10).

Based on the significance trigger, the BLM should assess the projected impact of an action, classify that impact into one of the three categories immediately below, and then determine the NEPA pathway:

- Significant impacts. The BLM must develop an EIS.[378]
- Impacts (whether type or intensity) unknown. At the least, the BLM must develop an Environmental Assessment.
- Minimal, insignificant impact. Potentially, the BLM can categorically exclude the decision from NEPA.[379]

In assessing the projected impact of a proposed action, the agency must maintain a list of typical classes of action that normally require an EIS, EA, or CE.[380] However, the list merely provides examples for reference and is not itself determinative of which NEPA pathway must be followed. The BLM must still look at each proposed action individually for its potential to cause significant impacts, and those impacts should be viewed relative to the agency's legal obligations, thus alerting the agency to flaws in the proposed action.

Be wary of mitigated FONSIs, which occur when the BLM concludes that a proposed action crosses NEPA's significance threshold.[381] The agency circumvents its obligation to complete a full EIS by integrating mitigation measures into the management decision — measures that reduce the impact of the action *below* the significance threshold. Therefore, the agency argues that an EIS is not required. These mitigation measures are frequently overly optimistic in what they intend to achieve given staffing levels, funding, and management priorities. Often they are not implemented. You should work to ensure that the mitigation measures within a mitigated FONSI are specific, explicit, and enforceable and that they will be put in place by being articulated in the Decision Record. Note that regardless of what the BLM says, you may be able to enforce mitigation measures in a mitigated FONSI because full NEPA analysis was avoided on the basis of those measures.[382]

5. Categorical Exclusions

The BLM's use of CEs deserves special attention. The agency can implement a categorically excluded decision quickly. Thus, to defend against environmentally

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[378] Note that "an action has significant impacts if it is reasonable to anticipate cumulatively significant impacts, even if the action considered alone has insignificant impacts." John F. Sheperd, *Range of Proposals Covered by NEPA*, in Karin P. Sheldon and Mark Squillace, eds., *The NEPA Litigation Guide* 24 (1999).

[379] 40 C.F.R. § 1508.4 (defining categorical exclusion).

[380] 40 C.F.R. § 1507.3(b)(2)(i)-(iii). The list is located in U.S. Department of the Interior, 516 DM 2, Appendix 2 (Department wide CEs and exceptions to CEs) and 516 DM 6 Appendix 5 (BLM specific list of actions that require an EIS or fall within a CE or CE exception). As of the date of this guide, the Department of the Interior was reviewing its NEPA manual.

[381] See Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18040 (1981) (sanctioning the use of mitigated FONSIs as long as the proposal defined from the beginning to include mitigation measures intrinsic to the action; that is, the action cannot go forward without implementation of those measures). Note, however, that the courts have not rigorously held the agencies to this guidance.

[382] See *Neighbors of Cuddy Mountain v. Forest Service*, 137 F.3rd 1372 (9th Cir. 1998) (holding that the USDA Forest Service failed to take the requisite hard look at mitigation measures to ensure that environmental consequences were fairly evaluated).

adverse CEs, you must understand CE policies and procedure, have foresight, and mount the capability to rapidly mobilize public opposition and legal challenges.

In basic terms, a CE allows the BLM to proceed with a proposal where the proposal's projected impacts are minimal as long as the proposal falls within formally identified categories of action that are determined to have no significant impact. If the proposal does not fall within a CE, at least an EA must be developed regardless of whether or not the agency thinks the specific action has only minimal impacts.[383] If the proposal does fall within a CE, then the agency can potentially end further environmental review pursuant to NEPA.

Before the proposal can be categorically excluded, however, the BLM must check the specific proposal against a list of exceptions. If one of the exceptions applies, then at least an EA is necessary.[384] Even if no exceptions apply, extraordinary circumstances may dictate that the BLM complete an EA or EIS.[385] If no exception applies, and extraordinary circumstances do not exist, the BLM can categorically exclude the action from further NEPA review.

The BLM must explicitly state that it intends to apply a CE at the initiation of a proposed action. If a proposal is implemented without an EA or EIS and the BLM does not disclose that it is applying a CE, any later justification that NEPA was not necessary for the action based on a CE is vulnerable to challenge as a *post hoc* (after-the-fact) rationalization.[386] If a CE is applied, the BLM does not have to circulate the decision to other agencies or provide for formal public involvement. The decision, however, should be documented, becomes part of the public record, and is accessible for public review.[387]

Although the process is fairly simple, the substance behind the BLM's use of CEs is quite murky, necessitating careful oversight and a solid understanding of the legal mechanics behind the application of CEs. The CEQ regulations define a CE as:

> A category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations [40 C.F.R. § 1507.3] and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in [40 C.F.R. § 1508.9] even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances

[383] See 40 C.F.R. §§ 1501.4(b) (stating that if a proposal does not fall within a CE and does not automatically require an EIS, then the agency "shall" prepare an EA), 1508.18 (defining "major federal action").

[384] U.S. Department of the Interior, 516 DM 2.3(A)(3).

[385] 40 C.F.R. § 1508.4; 516 DM 2.3(A)(4).

[386] *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 50 (1983) (stating that "it is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself," and not on "counsel's *post hoc* rationalizations for agency action").

[387] Bureau of Land Management, *National Environmental Policy Act Handbook*, H-1790-1, Chapter II, C (stating the there are no documentation requirements for application of a CE).

in which a normally excluded action may have a significant environmental effect.[388]

This would appear to require the BLM to create and apply a CE only if it first documents through the NEPA process that the CE in fact does not individually or cumulatively cause significant impacts. This, however, is not the case, and the CEs appear to be merely — and inadequately — the product of internal agency deliberation. Regardless, the CEQ regulations obligate federal agencies to create "specific criteria for and identification of" CEs.[389] Department of the Interior policies establish two criteria.[390] The first simply restates the basic principle that a CE is only applicable where the action or group of actions does not significantly affect the environment. The second criterion, worded broadly, prohibits the application of a CE for an action or group of actions that involves unresolved conflicts over alternative uses of resources.

Notably, simply because an issue is politically controversial does not mean that it represents an unresolved conflict: technical and legal conflicts must be present. Although these criteria are not particularly specific, they do highlight the fact that CEs should be limited to uncontroversial and undeniably low-impact activities.

Department of the Interior policies establish several CEs[391] that involve internal administrative affairs (for example, personnel decisions), legal and regulatory enforcement actions (for example, arrests), non-destructive data collection, public education activities, and the like. They do not pertain to actual land management. Notably, all of the Department of the Interior-level exceptions to CEs generally involve actions that have a physical impact to tangible resources such as the land.[392]

BLM-level CEs go considerably farther than Department of the Interior-level CEs.[393] The agency includes a variety of activities with tangible physical effects on the land related to wildlife management, fluid minerals, forestry, rangeland management, realty (property management), and solid minerals. Although drafted in fairly innocuous language, the flexibility built into the BLM-level CEs should raise fire-engine red flags.

6. Defining the Purpose and Need of a Proposed Management Action

All decisions must have a written and defined Purpose and Need established early in the decision-making process that justifies the desired action and highlights deficiencies or problems with the *status quo*.[394] The Purpose and Need is the cornerstone of the entire NEPA analysis, supporting each element of the eventual NEPA document and the ultimate decision reached. Moreover, the Purpose and Need allows the agency to integrate the action with the BLM's overall mission and land-use objectives, which are generally articulated in the desired outcomes and allowable uses sections of the Resource Management Plan for the particular management unit. The Purpose and Need should not regurgitate the self-

[388] 40 C.F.R. § 1508.4.

[389] 40 C.F.R. § 1507.3(b).

[390] 516 DM 2.3(A)(1)(a)-(b).

[391] 516 DM 2, Appendix 1.

[392] 516 DM 2, Appendix 2.

[393] 516 DM 6, Appendix 5.

[394] See 40 C.F.R. § 1502.13.

serving definition provided by the proponent of the action nor limit, restrict, or preclude the agency from considering certain environmental consequences or reasonable environmentally oriented alternatives.[395]

It is crucial to advocate for a strong, conservation-oriented Purpose and Need. It is equally important to critique an environmentally adverse Purpose and Need, which will invariably result in the BLM formulating environmentally adverse alternatives.

7. Alternatives: Formulating a Reasonable Set of Alternatives

The genius of NEPA rests in part on its requirement for agencies to analyze impacts within the context of a reasonable range of alternatives. The alternatives are the heart of the NEPA process[396] and provide a tool by which the agency can compare impacts among a full spectrum of actions to satisfy the Purpose and Need.

In creating alternatives for intensive analysis, the BLM begins with a broad set of potential alternatives, then adds, modifies, and deletes alternatives until it reaches a reasonable range. Other government agencies and the general public can suggest alternatives. Ultimately and consistent with its legal obligations, the BLM must use common sense and determine what is technically and economically practical and feasible. The nature and intensity of the impacts and the study areas identified for those impacts are important factors in defining what sorts of alternatives are reasonable. Also important are funding, design and engineering feasibility, political support, and public acceptance.

Although the objectives of the proponent of the action are considered, they should be viewed as only one factor and should not outweigh the BLM's statutory and regulatory priorities and obligations.[397] Thus, the BLM cannot unreasonably restrict the Purpose and Need of a proposed action to limit the nature and type of alternatives considered in the NEPA process. In some instances, the BLM must consider alternatives outside the capability or desire of the permit applicants and outside the legal jurisdiction of the agency, even if in conflict with local or federal law.[398]

The BLM must include a no action alternative. The no action alternative maintains the *status quo* (current management direction and allocations continue). It does not necessarily constitute a lack of human involvement with the ecological landscape, does not merely list current conditions (that is the role of the Affected Environment section), and is not necessarily the most beneficial environmental action. The no action alternative aids the BLM in comparing and evaluating the various costs and benefits of altering the existing management regime. The nature of the no action alternative depends on whether the proposal is made at the resource management planning or implementation level:

RMP level no action. The no action alternative consists of carrying forward the entire set of management prescrip-

[395] Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, Nos. 2a & 2b (1981)

[396] 40 C.F.R. § 1502.14.

[397] Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, nos. 1a, 1b, 2a (1981).

[398] *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972). See also, Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, Nos. 2a & 2b (1981).

tions contained within the previously developed land-use plan. The BLM must set out the various impacts that current decisions will have on the landscape into the future.

Implementation level no action. If the proposal involves, say, authorization of seismic exploration for oil or gas, the no action alternative would consist of turning down the proponent of the seismic operation. The BLM must set out the implications of the no action alternative for the affected environment into the future (for example, continued connectivity of the landscape, no disruption of wildlife populations, no damage to archaeological sites, protection of soils, etc.).

The no action alternative must be a possible and viable alternative despite the fact that it may not be responsive to the identified Purpose and Need for the planning or decision-making process. This allows an out in the event the NEPA analysis shows, for example, that all alternative designs for a proposed action would cause permanent impairment (43 U.S.C. § 1702(c)) or unnecessary or undue degradation (43 U.S.C. § 1732(b)).

8. Environmental Consequences: Analyzing Direct, Indirect, and Cumulative Impacts

The sheer volume and weight of many NEPA documents suggests that the agency has conducted a thorough and exhaustive analysis of environmental consequences. However, closer examination often reveals that the agency does little analysis, often choosing to simply list data and information. This is most decidedly not NEPA's purpose: NEPA is an analytical tool. Therefore, it is very important to understand how the agency must analyze and consider environmental consequences.

NEPA is used to determine the adverse and beneficial impacts or effects of a given action to the human environment, whether those impacts are ecological, aesthetic, historic, cultural, economic, social, or health related.[399] The NEPA documentation should not merely iterate or describe the action. Once the impacts are understood, the CEQ regulations obligate the agency to:

> Use all practicable means, consistent with the requirements of [NEPA] and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.[400]

The human environment, a term provided in NEPA:

> shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (see the definition of "effects" (sec. 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.[401]

This definition suggests that the trigger for a significant impact is the effect of impacts on the *natural* or *physical* environment. Once that trigger is pulled, the NEPA analysis accounts for impacts on

[399] 40 C.F.R. §§ 1508.8, 1598.14.

[400] 40 C.F.R. § 1500.2(f).

[401] 40 C.F.R. § 1508.14.

not only the natural and physical environment but also the social and economic environment.[402] Impacts on the social and economic environment, standing alone, do not trigger NEPA.

Impacts on the natural, physical, social, and economic environment are a vital part of understanding the tradeoffs involved in authorizing or prohibiting a given action. Impacts should be disclosed in the NEPA document's Environmental Consequences section[403] and should be gauged relative to the baseline environmental conditions. Consequently, an objectively defined Affected Environment section is extremely important. If the BLM exaggerates the baseline condition of the landscape, then the magnitude of the impact is affected accordingly. This could turn an otherwise significant impact into an insignificant impact or, theoretically, vice versa. In general, the BLM will rarely overlook a specific impact. Instead, the agency will conclude, often speciously, that the impacts are expected to be insignificant. This makes it more difficult to challenge an adverse action and suggests the need to fully understand the nuances of the NEPA process to demonstrate that impacts are, in fact, significant.

The intensity of the analysis is dependent on the probability, severity, and longevity of the impacts to the affected resources. In general, the BLM must study all reasonably foreseeable impacts, including those with "catastrophic consequences, even if their probability of occurrence is low," as long as the impact analysis is "supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason."[404] The BLM does not, however, have to consider a worst-case analysis of environmental consequences. Notably, for legally protected resources such as species protected under the Endangered Species Act, the agency must indicate that the resources were considered even if they do not occur in the planning area. These "negative declarations" are important to provide written proof that all laws were considered, followed, and applied (or deemed inapplicable) within the study area.

Impacts are classified as one of three types: direct, indirect, and cumulative. Direct impacts are caused by the action itself within the same time and place. Indirect impacts are caused by the action, but occur later in time or farther removed in distance, although they are reasonable foreseeable.[405] A cumulative impact is defined as:

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-Federal) or person undertakes such other actions. Cumulative impacts

[402] Note however, that the courts may follow the precedent set by the Supreme Court that agencies need only consider socioeconomic impacts causally related to the physical impacts of the proposal. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983).

[403] 40 C.F.R. § 1502.16.

[404] 40 C.F.R. §§ 1508.25(a)(1)-(3) (connected, cumulative, similar impacts must be considered in NEPA process), 1502.22(b)(4) ("reasonably foreseeable" impacts includes the discussion of catastrophic consequences even where there is incomplete or unavailable information and the probability of the event is low as long as the analysis is scientifically credible, not based on pure conjecture, and within the rule of reason), 1508.7 (cumulative effects include consideration of "past, present, and reasonably foreseeable future actions" regardless of agency or person undertaking such action) 1508.8 (indirect effects include those that are "reasonably foreseeable").

[405] 40 C.F.R. § 1508.8.

> can result from individually minor but collectively significant actions taking place over a period of time.[406]

To illustrate direct and indirect impacts, take the example of an improvement project for a dilapidated section of road that connects two small communities across public lands. The direct impacts are obvious: improved travel between the two communities and to trailheads accessed from the roadway and an enlarged, ecologically adverse footprint that further fragments the landscape. The fragmentation could be especially important if the area contains important wildlife habitat. An indirect impact is intensified use of campsites accessed via the trailheads, degradation of sensitive riparian areas adjacent to the trails themselves, and a reasonably foreseeable potential for expansion of those campsites to accommodate increased use and, consequently, further impacts from that increased use.

Cumulative impacts are the most important to disclose because they account for the proposed action in the context of the broader landscape and the actions collectively taken on that landscape through both space and time. Cumulative impacts can be additive or interactive. Additive cumulative impacts involve the same type of action affecting the same environmental factor. Taking the above example of the road improvement project, an additive impact could be caused by another road project over the ridgeline that causes similar intensified use of the hiking trails. Interactive cumulative impacts involve different types of actions that nonetheless affect the same environmental factor. Again using the road improvement project, an interactive impact could be caused by authorization to open the trails to ORV use. This would likely intensify the adverse impacts to the riparian areas beyond the indirect impact of increased numbers of hikers motivated to use the area because of improved access to the trailheads (the direct impact).

Cumulative impacts are the result of crowding in both space and time and associated cause-and-effect relationships. Before the landscape can recover from the impact of a particular action, another action within the boundaries of the impact (whether in space or time) takes place. The impacts of the second action add to or interact with the impacts from the original action. The complexity of these impacts can be daunting, and the BLM must focus the analysis on meaningful environmental impacts to maintain a practical approach. Cumulative impacts — and for that matter, direct and indirect impacts — may last beyond the lifetime of the action or use. The cumulative impact analysis can determine which actions (mitigation, monitoring, etc.) are necessary to ensure the continued productivity and quality of the environment.

Concurrent and future proposed and reasonably foreseeable decisions with additive or interactive cumulative effects must be considered in the same NEPA process. If the BLM considers a new action that was not proposed or reasonably foreseeable at the time of the initial NEPA process, and which may cause significant cumulative impacts, then the agency must consider those impacts through an EIS, even if the direct or indirect impacts of the new action are insignificant.

From a practical perspective, the cumulative impact analysis should not be isolated as a separate entity within the NEPA process. Cumulative impact analysis should instead be infused into the entire process as follows:

✦ During scoping. Past, present, and reasonably foreseeable future actions — not merely those currently funded or engaged in the NEPA process and regardless of whether federal, nonfederal,

[406] 40 C.F.R. § 1508.7.

or private — are identified. Any reasonably foreseeable development/use (inclusive of both market and non-market values) scenarios completed by the BLM are thus important. Affected resources are identified only after looking at the broader environment. This allows the BLM to carry out the cumulative impact analysis within appropriate geographic scales and time frames.

♦ Describing the affected environment. Cumulative impacts inherently occur within and without the footprint of the activity. The BLM should therefore use natural (for example, watershed) rather than political or administrative boundaries. Within these boundaries, based on the affected resources identified during scoping, the agency should determine baseline environmental conditions. Resources should be described in terms of their sensitivity to impacts and their ability to withstand or recover from disturbance. The description of the affected environment is similar if not identical to the affected environment for the analysis of direct and indirect impacts; however, it is extended in terms of geography, time, and potential for resource or system interactions.[407]

♦ Determining environmental consequences. Using the baseline conditions described in the Affected Environment section as a reference, the BLM should address additive and interactive impacts by looking outside of the direct footprint of the action in the context of both place and time. Linking to substantive legal obligations such as NEPA at Section 101 and FLPMA at Section 1701, the agency must address how the action affects the sustainability of resources, ecosystems, and human communities. In addition, the BLM must identify events or impacts that trigger action on the part of the agency to protect the land and its resources.

Solid, well-constructed cumulative impact analyses enhance the entire NEPA process and, for that matter, all BLM planning and decision-making. Through cumulative impact analyses, the BLM can avoid or minimize adverse consequences that are otherwise undetected in the context of a single action at a single point in time. A cumulative impact analysis broadens the agency's perspective by linking individual activities that occur in the same landscape. This provides a vehicle to gauge the total health and integrity of the landscape by focusing on resource sustainability and the relationships between integrated ecosystems and human communities. In so doing, the BLM can track whether individual *and* cumulative activities conform to the RMP and to legal thresholds.[408] Thus, the cumulative impact analysis is a source of information, management tool to choose proper actions, and measure to define substantive legal duties in the context of place-based conditions.

9. Tiering

NEPA and the CEQ regulations do not require the BLM to reinvent the wheel each and every time a proposed action triggers the NEPA process. Many NEPA analyses contain information relevant to future actions. Therefore, to promote efficiency the BLM may be able to use previously prepared analyses to justify a proposed action and comply with NEPA — a process called tiering.[409] Generally, but not always, tiering occurs between programmatic-level NEPA documents

[407] Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* 23 (1997).

[408] *Id.* at 49-50 (1997) (discussing dual, complementary approaches to cumulative effects analysis involving the traditional impact assessment and more contemporary planning approaches).

[409] 40 C.F.R. § 1502.20.

such as an RMP and site-specific later-developed NEPA documents. Programmatic NEPA documents are defined as "systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive."[410] Conversely, a site specific NEPA document is a "single, discrete activity limited in both time and place."[411]

It is critical to understand that despite the ability of the agency to tier NEPA documents, "ultimately, the record as a whole must set forth sufficient site-specific information on the particular matter to support that decision."[412] In other words, tiering cannot be used to evade site-specific analysis, the disclosure of site-specific impacts, or the construction of site-specific alternatives. And any use of tiering must be justified and disclosed. This makes the distinction between programmatic and site-specific NEPA documentation mostly semantic because the critical element is the nature of the decision flowing from the NEPA process and the level of overall NEPA analysis, not its label.

There are two types of tiering — geographic and chronological. Geographic tiering allows the BLM to comply with NEPA through increasingly site-specific review.[413] Chronological tiering allows the agency to carry out its NEPA review in a series of progressive stages over time.[414]

As an example of geographic tiering, take an EIS that accompanies an RMP and contains a broad, landscape-level analysis of the impacts caused by livestock grazing. When the BLM implements the RMP on the ground through allotment-specific NEPA documentation, the agency can use relevant portions of the RMP to justify the decisions reached through the allotment-specific NEPA process. However, the BLM must justify the tiering between the two final NEPA documents in a finding within the allotment-specific NEPA document that the RMP's analysis is relevant, on point, and up to date relative to the specific allotment in question.

As an example of chronological tiering, the BLM may propose a complex, long-term project that will occur over a progressive series of stages. Because of potential uncertainties that could arise during each stage and have impacts on successive stages, the BLM may propose to conduct a series of NEPA analyses over time, rather than a single EIS, to ensure accurate and meaningful analysis at the proper stage. Notably, the agency must not segment the action and should from the onset comprehensively study and anticipate the full impacts of the entire project to the extent feasible.

Such an analysis may contain a fair amount of speculation, but it provides the BLM and the public with a best estimate as to how to proceed. Subsequent

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[410] 40 C.F.R. § 1508.18(b)(3). See also 40 C.F.R. §§ 1500.4(i), 1502.20, 1502.4, 1508.18(b)(3).

[411] Michael J. Gippert and Vincent L. Dewitte, *The Scope of Environmental Analysis*, in Karin P. Sheldon and Mark Squillace, eds., *The NEPA Implementation Guide* 68 (1999) (citing 40 C.F.R. § 1508.18(b)(4) (defining NEPA trigger as inclusive of specific and defined projects).

[412] Michael J. Gippert and Vincent L. Dewitte, *The Scope of Environmental Analysis*, in Karin P. Sheldon and Mark Squillace, eds., *The NEPA Implementation Guide* 69 (1999). Consequently, a programmatic NEPA document could be used, if sufficiently site-specific, to authorize a site-specific action.

[413] 40 C.F.R. § 1508.28(a).

[414] 40 C.F.R. § 1508.28(b).

NEPA analyses can refine the initial NEPA analysis, using chronological tiering to incorporate valid data and analysis. Notably, the fact that much of a project requires speculation should encourage the BLM to incorporate mitigation provisions and a rigorous monitoring and evaluation program. If the level of uncertainty and risk is exceptionally high and may cause significant adverse consequences, the agency should consider not going forward with the project at all, especially where the benefits are speculative, only benefit a few, or are minimal.

Tiering, though providing for administrative efficiencies, is frequently abused by the BLM. First, it is often inappropriately cited as a justification for a proposed action without particularized NEPA review. NEPA requires two NEPA documents — an initial document and a subsequent NEPA document that incorporates the initial NEPA document by reference. It is the link between the two distinct pieces of NEPA documentation that gives rise to tiering, which cannot occur between NEPA documentation and non-NEPA documentation. If a NEPA document happens to fully justify a proposal, the BLM should document and justify the proposal through a Determination of NEPA Adequacy, not through "tiering" between NEPA and non-NEPA documentation. Second, the document tiered to is not always relevant to the action at hand. It may contain outdated information or information that does account for altered types or intensities of use. In either situation, the BLM is exposed to challenge.

10. The Role of Science and Information

The NEPA process affords the BLM with a means of enhancing science-based management of the public lands. But the agency has over the years prepared flawed NEPA documentation that contains faulty assumptions, little or no real analysis, little or no discussion of critical values, infirm logic and reasoning, and predetermined motivations and actions. These flaws are indicative of the BLM's failure to embrace NEPA rather than a failure with NEPA itself. This gives you the opportunity and need to encourage the incorporation of sound science into the NEPA process.

The NEPA process is a "systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking …"[415] Because the NEPA process is science based, the BLM must justify its actions to the public with defensible analysis. At the bare minimum, the agency should explicitly disclose the data sources used, the methodology applied to analyze the data, the assumptions built into the methodology, the results of the analysis, and the conclusion reached on the basis of the analysis. NEPA documentation should also disclose the certainties or uncertainties associated with the analysis and how decisions will be modified as uncertainties are cleared up. All of these elements are basic components of any scientific analysis. They allow the public, including scientists, a chance to review the BLM's thinking as the agency makes decisions that affect millions of acres of public land. As the CEQ regulations state:

> Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.[416]

[415] 42 U.S.C. § 4332(A).

[416] 40 C.F.R. § 1502.24.

The NEPA process reflects the fact that scientific certainty is rarely if ever achieved. NEPA accounts for the lack of information and scientific certainty and affords the BLM flexibility as long as the decision is based on the best available information. Where the risk is high because of a lack of information or uncertainty over the type or intensity of impacts, the agency has a greater burden of proof to justify the decision. Information technology (for example, geographic information systems) can aid decision-makers in assessing risk and opportunity, analyzing data, and accommodating information uncertainties or gaps. In fact, you can make a compelling case that certain types of analyses such as spatial analysis of landscape fragmentation caused by road and route systems, ORV use, and energy resource development are a necessary precursor to any reasoned and informed decision.

When information is currently incomplete or unavailable, the CEQ regulations impose considerable requirements that the BLM often ignores. The crux of the CEQ regulatory requirements is disclosure: "the agency shall always make clear that such information is lacking."[417] At times, the BLM must affirmatively collect information:

> If the incomplete information relevant to reasonably foreseeable adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the [NEPA documentation].[418]

Where such information is too costly to obtain or the BLM does not know how to obtain the information, the agency must explain that fact and its implications to the public. Pursuant to the CEQ regulations (40 C.F.R. § 1502.22(b)(1)-(4)), the disclosure should include:

1. A statement that the information is incomplete or unavailable.
2. A statement of the relevance of the incomplete or unavailable information to evaluations of reasonably foreseeable significant adverse impacts on the human environment.
3. A summary of existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment.
4. The agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

While there may not be an explicit obligation on the part of the BLM to conduct, for example, spatial analysis of environmental impacts, you can make a convincing case based on the CEQ regulations that given the current state of knowledge, NEPA imposes an implicit obligation on the BLM to actually conduct such analyses — or at the very least to sufficiently and explicitly justify why such analyses were not conducted. Where you can provide such analyses, you have a good opportunity to convince the public and if necessary the courts that the agency is acting in an unreasonable and uninformed manner.

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[417] 40 C.F.R. § 1502.22.

[418] 40 C.F.R. § 1502.22(a).

Chapter VIII.
Appeals, Protests, and Litigation

A. Challenge a Land-Use Plan: Protests

1. Procedures

Once the BLM completes, revises, or amends an RMP, you are given an opportunity to protest any land-use plan decisions (this does not necessarily include implementation decisions). You can protest a land-use plan decision only if you have standing, which means that you must have participated in the planning process and that you will be adversely affected whether now or in the future by the plan's approval or amendment.[419] Protests only involve issues "submitted for the record during the planning process."[420] You can challenge issues that you raised or that others raised. You do not need to be an attorney to protest a land-use plan.

Protests must be in writing and addressed and submitted to the Director of the BLM in the agency's Washington, DC office (not the state director).[421] They must be filed within 30 days of the date that the Environmental Protection Agency publishes the notice of receipt of the Final RMP/EIS in the *Federal Register*.[422] In the case of a plan amendment completed with only an EA, the 30-day protest period begins on the day when notice of the amendment's effective date is published.[423] The BLM does not grant extensions of time for protests.[424]

The BLM Director is obligated to decide your protest promptly.[425] Once the decision is made, the Director sends you the written decision with a statement of supportive reasons.[426] You cannot administratively appeal the Director's decision,[427] but it is subject to judicial review in the federal courts.[428]

Key Recommendations

- Do not use appeals, protests, or litigation frivolously. Frivolous challenges undermine your credibility and the credibility of other conservation activists (whether we like it or not). Any use of adversarial options should be carried out only after careful thought and consideration and only where your claim is credible.
- Use appeal, protest, and litigation options strategically. Don't wait to consider these options until after an adverse decision is made. Instead, anticipate when and where these options could become necessary and integrate that potential into your overall campaign strategy.
- Consider political repercussions. Adversarial challenges often incite the wrath of powerful, opposing entities. You should consider how such entities might respond to your challenge as you decide whether or not and how to bring a challenge. This is not a plea for you to drop a challenge. It is simply a plea to act thoughtfully.
- Develop a specific and realistic remedy. Any challenge is only as good as the proposed remedy. If you fail to articulate a sufficiently specific and realistic remedy, you run the risk of undermining the purpose of the challenge and your objectives.
- Engage legal counsel. Challenges to BLM decisions involve very technical and often arcane procedural elements. You should consult an attorney to navigate the entire process effectively.
- Integrate appeals, protests, and litigation with a communications strategy. Be prepared to respond to media inquiries and justify your challenge to the public. A successful communications strategy can be a powerful lever to encourage the BLM to settle, protect your challenge against hostile political interests, and communicate your objectives to the public.

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[419] 43 C.F.R. § 1610.5-2(a).

[420] *Id.*

[421] 43 C.F.R. § 1610.5-2(a)(1).

[422] *Id.*

[423] *Id.*

[424] U. S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1610-1 Appendix F (I)(D)(4) (2000).

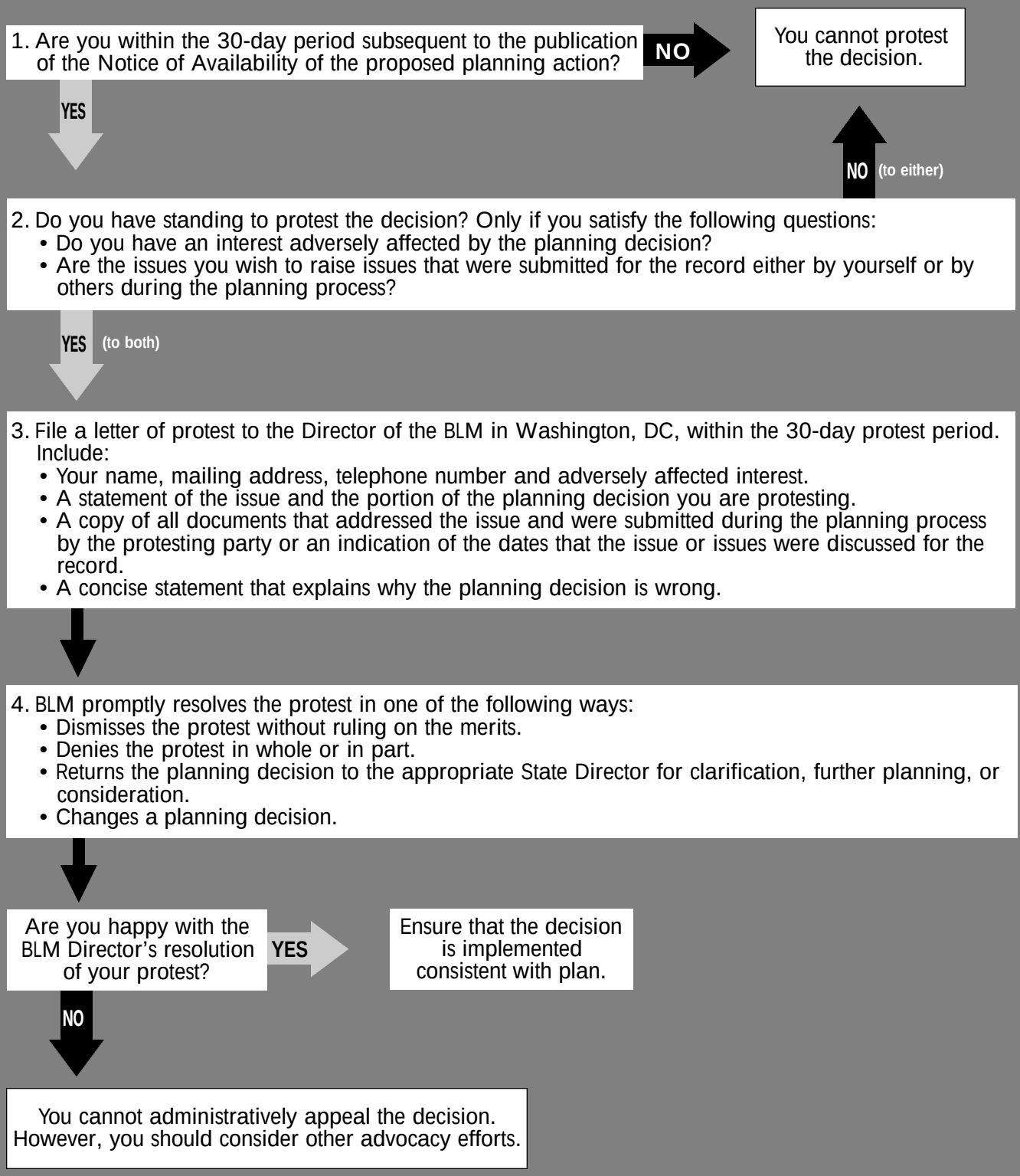
[425] 43 C.F.R. § 1610.5-2(a)(3).

[426] *Id.*

[427] 43 C.F.R. § 4.410(a)(3).

[428] 5 U.S.C. § 704.

FIGURE 6.
Summary of the Protest Process



2. Structure Your Protest

There is no required format for an administrative protest of an RMP, but your protest should be structured consistent with other types of adversarial forums. Consider using the following structure (see Figure 6, page 119), and don't forget to include your name, mailing address, and telephone number.

♦ Notice of Protest. This part tells the BLM that you are challenging the RMP. Specify the aspects of the RMP that you are challenging and provide a concise summary of your arguments, including why you believe the State Director's approval of the plan is wrong.

♦ Statement of Interest. Tell the BLM why you are interested in the lands covered by the RMP and describe your participation in the RMP process. If you use these lands, tell the agency how and indicate as much as possible the specific areas and resources that you use

♦ Request for Relief. Tell the BLM what you want the agency to do to remedy your concerns. Be practical, realistic, and specific.

♦ Appendix. If necessary, provide essential supporting documentation in an appendix. This might include scientific or economic data, journal articles, other types of information, maps, or anything else that is key to justify your positions. Include a copy of all documents that addressed the issue or issues and that were submitted during the planning process or list the dates that the issue or issues were discussed for the record.

B. Court Challenges of Resource Management Plans

If your protest of an RMP fails, you could challenge the RMP in federal court. However, your ability to do so is limited. In 1998, the Supreme Court of the United States in *Ohio Forestry Association v. Sierra Club* rejected a challenge to a Forest Service land-use plan. The challenge alleged that the plan allowed too much logging and clearcutting.[429] The court rejected the challenge on the basis of ripeness, which is a judicial barrier to review. The ripeness doctrine allows courts to resolve only actual cases or controversies rather than abstract policy disputes or premature cases and controversies.

We emphasize that uncertainty surrounds the full implications of the ripeness principle as expressed in *Ohio Forestry Association* and related principles of judicial review — most notably the final agency action requirement (a precondition to obtaining judicial review) and its limited exceptions.[430]

Uncertainty arises because of the blurry line between procedural and substantive obligations. Procedural obligations relate to how the agency is supposed to reach a decision, while substantive obligations relate to the final content of the decision. For example, if the BLM must consider watershed values in the planning process, but does not, or unlawfully weakens the legal protections given to watersheds in its planning criteria, this could be alleged as a procedural violation. If the BLM considers watershed values in the planning process, but the final decision unnecessarily or unduly harms watershed values, this could be alleged as a substantive violation. Recognize that getting a court to agree

[429] *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1998).

[430] See 5 U.S.C. §§ 704 (requiring final agency action as a precondition to judicial review), 706(1) (providing the court with the ability to compel agency action unlawfully withheld or unreasonably delayed).

with your position could be difficult. If you are considering a possible challenge to an RMP, obtain the advice of an attorney as far in advance as possible.

It should be understood that *Ohio Forestry* does not prevent all challenges to BLM RMPs brought in federal court. And you can still protest a finalized RMP to the BLM. Once you take that step, the following avenues are open to challenge an RMP:

✦ Alleged Procedural Flaws. If you wish to challenge an RMP because the BLM failed to comply with procedural obligations and restrictions (for example, NEPA violations), you can challenge the RMP in federal court immediately after is the plan is finalized.

✦ Alleged Substantive Flaws. If you wish to challenge the content of the RMP, you can do so only if the plan expressly authorizes site-specific activities that do not require further implementation-level planning and decision-making. Even if you cannot challenge the content of the RMP, the plan is not permanently shielded from review. In this instance, you must wait until the BLM takes site-specific action. When that occurs and if the BLM fails to correct the flaws in the RMP, you can challenge the implementation-level plan and decision and relevant portions of the RMP if those portions are causally related to the agency's site-specific planning and decision-making.

C. How to Challenge Implementation Decisions

1. Nature of the Appeals Process

Once the BLM completes, revises, or amends an RMP, the agency carries out the plan through a series of implementation decisions. To challenge these decisions, appeal to the Interior Board of Land Appeals (IBLA) in the Department of the Interior's Office of Hearings and Appeals (OHA) (see Figure 7, pages 122-123).[431] Note that the IBLA is composed of Administrative Law Judges (ALJs).

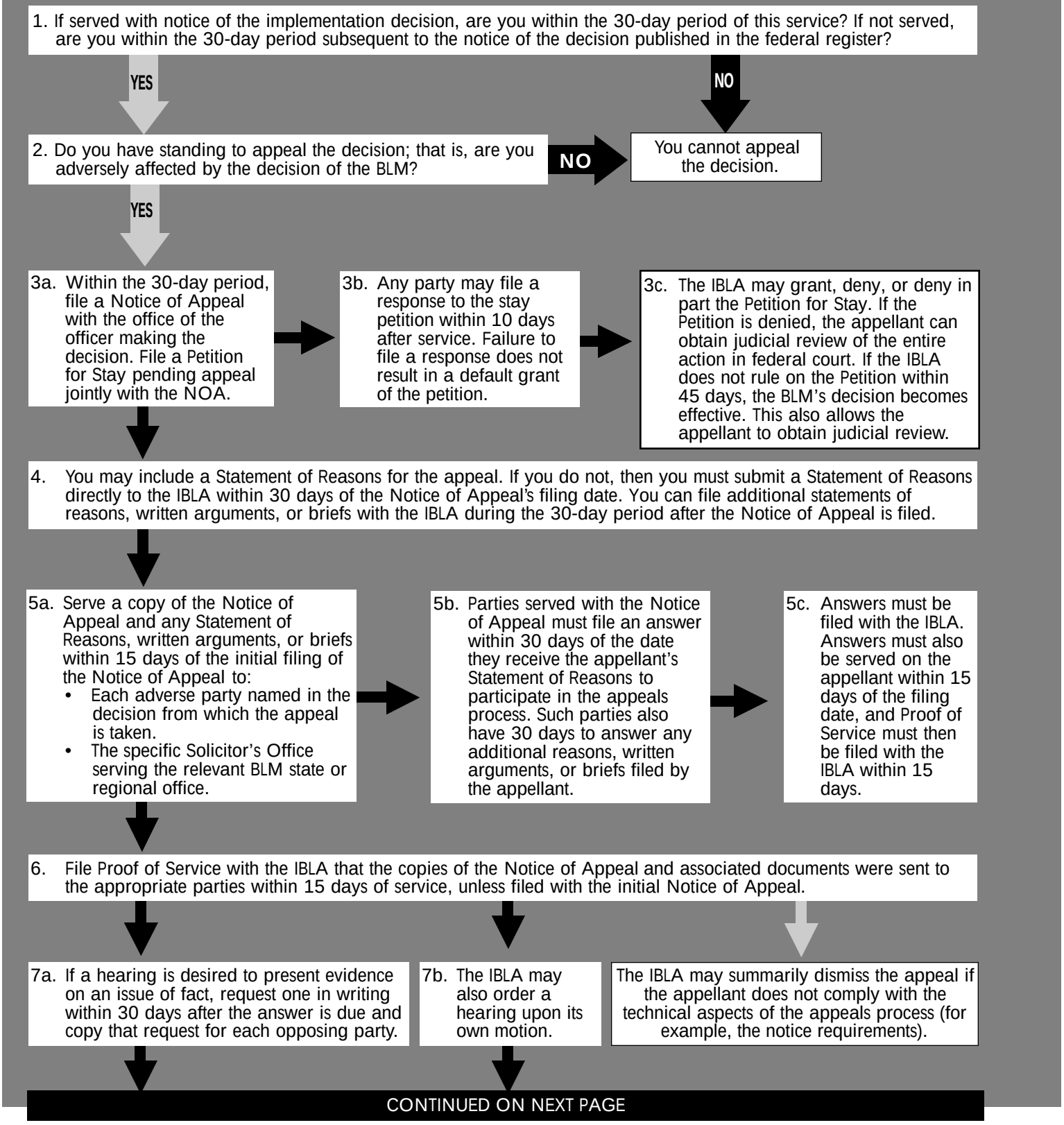
You do not have to be an attorney to appeal a BLM implementation decision, although a non-attorney cannot represent another group.[432] Still, seek an attorney to help you with your appeal at least until you gain a definitive level of expertise and knowledge. The presence of an attorney increases the perception that an appeal will end up in court. Consequently, the BLM and the ALJs will more likely give your appeal serious consideration. An attorney can also help develop sound legal arguments, represent you in negotiations, and navigate the technical intricacies of administrative appeals and other sorts of administrative challenges. Be forewarned: the BLM will be represented by attorneys from the Department of the Interior's Office of the Solicitor.

In considering a challenge against the BLM, keep in mind that the appeals process, though generally less complicated than litigation, is resource intensive. Do not rely upon the appeals process as the sole means of moving your agenda forward. Work with the BLM before a decision is made to negotiate or otherwise persuade the agency to take the proper course of action before a challenge becomes necessary. This entails participation in formal planning and decision-making processes and informal negotiations directly with the agency. Such participation and negotiations usually carry the greatest probability of success and give you standing should you decide to bring formal challenges. If participation and negotiations fail, make well-informed, strategic, and responsible use of the appeals process. If your appeal fails, recognize that IBLA decisions are final

[431] 43 C.F.R. §§ 4.400, 1610.5-3(b).

[432] 43 C.F.R. § 1.3(b)(3).

FIGURE 7.
Summary of the BLM Administrative Appeals Process



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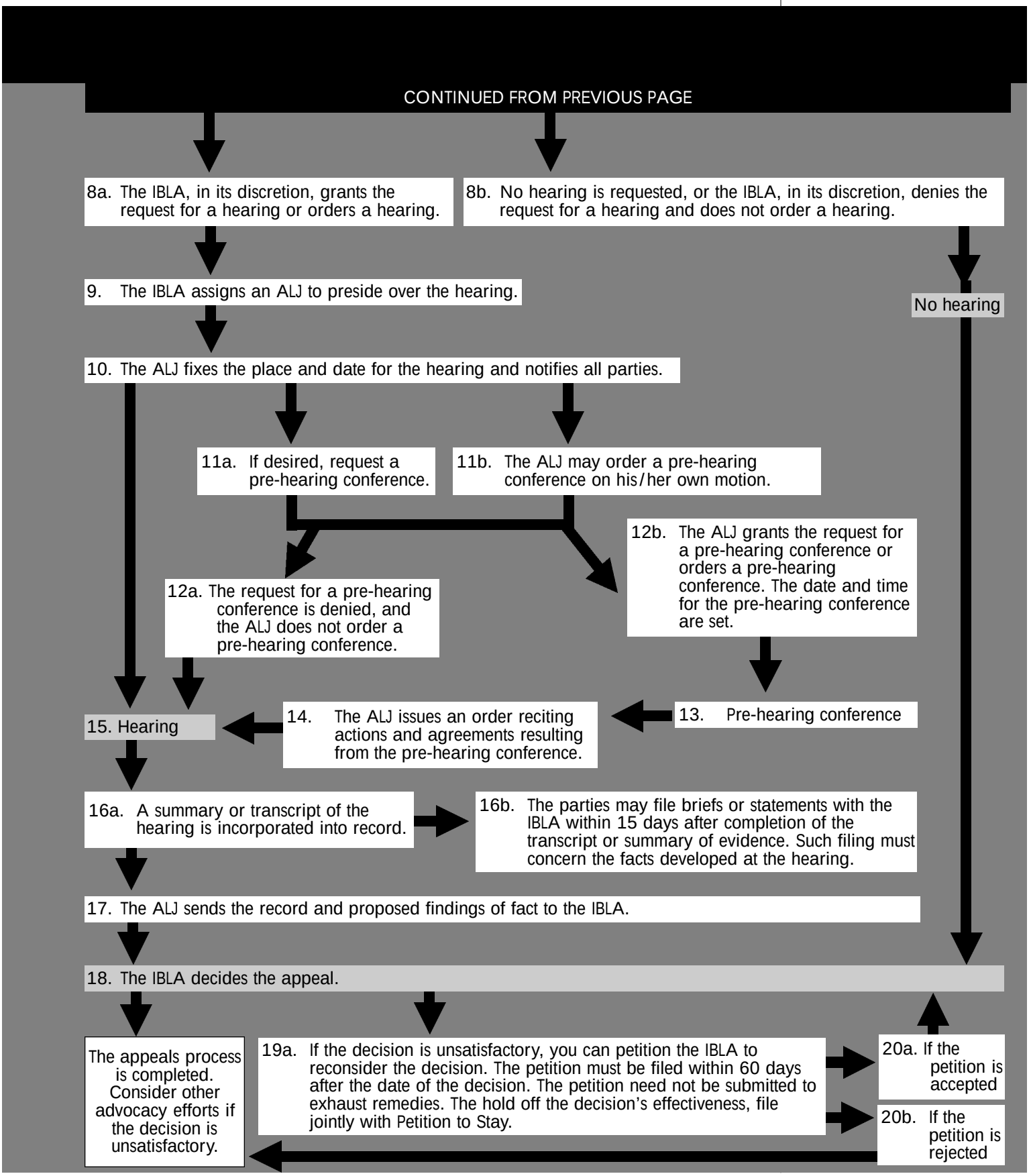
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8a. The IBLA, in its discretion, grants the request for a hearing or orders a hearing.
8b. No hearing is requested, or the IBLA, in its discretion, denies the request for a hearing and does not order a hearing.
9. The IBLA assigns an ALJ to preside over the hearing.
No hearing
10. The ALJ fixes the place and date for the hearing and notifies all parties.
11a. If desired, request a pre-hearing conference.
11b. The ALJ may order a pre-hearing conference on his/her own motion.
12b. The ALJ grants the request for a pre-hearing conference or orders a pre-hearing conference. The date and time for the pre-hearing conference are set.
12a. The request for a pre-hearing conference is denied, and the ALJ does not order a pre-hearing conference.
15. Hearing
14. The ALJ issues an order reciting actions and agreements resulting from the pre-hearing conference.
13. Pre-hearing conference
16a. A summary or transcript of the hearing is incorporated into record.
16b. The parties may file briefs or statements with the IBLA within 15 days after completion of the transcript or summary of evidence. Such filing must concern the facts developed at the hearing.
17. The ALJ sends the record and proposed findings of fact to the IBLA.
18. The IBLA decides the appeal.
The appeals process is completed. Consider other advocacy efforts if the decision is unsatisfactory.
19a. If the decision is unsatisfactory, you can petition the IBLA to reconsider the decision. The petition must be filed within 60 days after the date of the decision. The petition need not be submitted to exhaust remedies. The hold off the decision's effectiveness, file jointly with Petition to Stay.
20a. If the petition is accepted
20b. If the petition is rejected

agency actions.[433] This means that you can seek judicial review of the underlying BLM decision in federal courts.

2. Jurisdiction, Scope of Review, and Burden of Proof

The IBLA holds considerable power to review most (but not all) BLM decisions that affect the use and disposition of the public lands and their resources.[434] In learning about the IBLA appeals process, keep in mind that there are different procedures depending on the particular issue or type of resource at the center of the appeal. The IBLA cannot:

- Invalidate BLM regulations.[435]
- Rule on constitutional questions.[436]
- Review the adequacy of land-use plans,[437] land classifications,[438] or the designation of Areas of Critical Environmental Concern.[439]
- Compel the BLM to comply with its decisions on remand.[440]
- Review a decision approved by the Secretary of the Department of the Interior (although the IBLA can review BLM actions to ensure that the decision was properly implemented).[441] The IBLA also cannot review a BLM decision approved by the Assistant Secretary for Lands and Minerals Management if the Assistant Secretary approves the decision before an appeal is filed with the IBLA.[442]

Within its jurisdiction, the IBLA reviews the record anew and is not bound by the BLM's determinations or assumptions. The IBLA, though bound by duly promulgated BLM regulations, is not bound by BLM policies (for example, manuals, handbooks, and instruction memoranda). In practice, however, the IBLA is highly deferential to all BLM policies, determinations, and assumptions, and in general, the IBLA will uphold BLM decisions as long as such decisions are reasoned and informed.

Note that the Secretary of the Department of the Interior can take jurisdiction over any unresolved case.[443]

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[433] 43 C.F.R. § 4.403.

[434] 43 C.F.R. § 4.1(b)(3)(i)-(iii). Special procedures for hearings, appeals and contests in public land cases are contained in subpart E of part 4 of title 43 of the Code of Federal Regulations. Special procedures for surface coal mining hearings and appeals are contained in subpart L of part 4 of Title 43 of the Code of Federal Regulations.

[435] George C. Coggins and Robert L. Glicksman, *Public Natural Resources Law* § 7.22.

[436] *Id.*

[437] *Id.* (citing *Wilderness Society*, 90 IBLA 221, 224-225 (1986).

[438] 43 C.F.R. § 4.410(a)(1).

[439] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook* H-1610-1 (IV)(A), (D), Appendix F (discussing distinction between protests of land-use plan decisions and appeal of implementation decisions, designating ACEC decisions as land-use decisions and thus subject to protest rather than IBLA appeal procedures).

[440] George C. Coggins and Robert L. Glicksman, *Public Natural Resources Law* § 7.22 (citing *Eugene V. Simmons v. BLM*, 135 IBLA 125 (1996).

[441] 43 C.F.R. § 4.410(a)(3).

[442] *Blue Star, Inc.*, 41 IBLA 333, 335-336 (1979).

[443] 43 C.F.R. § 4.5.

In addition, the Secretary can reverse a decision of the IBLA or direct the IBLA to reconsider a decision. The Director of the Office of Hearings and Appeals can also take jurisdiction over any pending case or direct the IBLA to reconsider a decision.[444]

3. Develop Your Arguments

If you challenge a BLM decision through appeal, think carefully about your arguments. As a rule of thumb, arguments should be concise and well reasoned. Within the boundaries of that rule, you can take one of three routes to craft the specific elements of your argument. You can choose the shotgun approach, in which you raise all issues that float to the surface. You can take a focused, targeted approach that challenges a specific aspect of the BLM's planning or decision-making process. Or, you can compromise and differentiate between major and minor issues.

Each of these types of challenges has advantages and disadvantages. The shotgun approach provides more points of attack for the IBLA to use in overturning a decision. However, the number of arguments may dilute the weight of any single position, however well justified, and require you to conduct significant groundwork to accumulate sufficient supporting evidence. The pinpoint approach allows you to focus resources on a single issue and gives the IBLA a chance to get to the root of the problem (hopefully). However, with this approach you risk putting all of your eggs in one basket.

In the third approach, a compromise of the first two, you can divide your arguments into major and minor categories, emphasizing your most important positions and supporting them with in-depth factual and legal analysis. Raise your less important positions, but give them less support and position them at the back of the appeal. In this way, you focus the appeal on the most important issues but retain your ability to raise minor issues that may become more important as a challenge makes its way through the appeals process.

4. Structure Your Appeal

This section details the structure of your appeal. You should consult program specific regulations and guidance to determine the content and procedural authority for each type of appeal.

There is no required specific model to follow in structuring your appeal. The regulations do require three essential parts: a Notice of Appeal (NOA), a Statement of Reasons, and, to receive a stay, a Petition for a Stay. It is highly recommended that you include three additional parts: Table of Contents, Background, and a Request for Relief. If necessary, include an Appendix. Place the parts in the following order: (1) NOA, (2) Background, (3) Statement of Reasons, (4) Request for Relief, (5) Petition for a Stay, and (5) Appendix.

In drafting your appeal, do not underestimate the human component: if your appeal is poorly written, lengthy without a good reason, unnecessarily pejorative, and poorly structured, it is less likely to be taken seriously and could cause the IBLA to reject your arguments, however valid they may be. Here are a few guidelines for each section.

♦ Notice of Appeal. Present a clear and concise summary of your entire appeal document. Include a statement that the appeal is filed pursuant to 43 C.F.R. § 4.410. This provision gives you, as an adversely affected party, the general right to appeal to the IBLA. Note that several program areas have particular sections that give you the authority to challenge a BLM decision (discussed below). If this is the case, reference those provisions as well.

Also include (1) your name, address, and phone number; (2) the title, subject,

[444] *Id.*

date, and serial number of the decision document, and the name and title of the responsible BLM officer; (3) a statement of your specific interest, how that interest is adversely affected by the BLM's actions, and how you participated in the decision-making process leading up to the appeal; and (4) a brief list of the major factual and legal points.

♦ Statement of Reasons . This part is the heart of your appeal. It conveys your legal and factual arguments and objections to the BLM's decisions. The substantive standards within this guide provide the basic law and policy that is binding on the BLM. Use law and policy that is relevant to the specific facts of your situation. Your arguments carry the most weight when they are well reasoned, based in fact, linked to tangible adverse consequences, and supported by specific citations to applicable legal authority. The IBLA maintains a searchable database of cases that you may find helpful in arguing your appeal.[445] Link your arguments and objections to specific comments that you submitted during the BLM's decision-making process. In all cases, your appeal will likely fail if it is not supported by both fact and law.

Organize and document your arguments under individual, self-contained headings. Identify the specific portions of the BLM's decisions that you object to, citing page numbers from the decision document. Your most important factual allegations should, if possible, be supported by statements from experts or, ideally, the BLM's own documents. You should reference these statements and documents in your appeal and attach them as an appendix.

♦ Request for Relief. This part sets out the actions that you want the BLM to take to remedy the issues raised during your appeal. The most important aspect of this request is specificity. A well-researched, well-written Statement of Reasons is severely weakened if you do not state exactly what you want the BLM to do. In addition, it is extremely important that your Statement of Reasons justifies the requested relief. Be practical, realistic, and specific.

♦ Petition for a Stay . Because your arguments are set out in the Statement of Reasons, this section need not be too long. If, however, you file the NOA without a Statement or Reasons, you must still file your Petition for a Stay with the NOA. In that case, flesh out the content of your Petition for a Stay. In all circumstances, tailor your factual and legal arguments to the standards used in granting a stay (discussed below).

♦ Appendix. This part should contain all necessary supportive material for your appeal. Include affidavits of experts, relevant scientific documents, policy memoranda, excerpts from pertinent plans and decisions, and any other materials vital to your appeal. Do not provide an excessively long appendix that detracts from the primary components of your appeal. Most materials, if readily available, can merely be cited in the body of the appeal without attaching them in the appendix. When in doubt, however, include the materials.

5. Where to Bring a Challenge

In challenging implementation decisions, remember that they differ from land-use plan decisions. Land-use plan decisions (discussed above) cannot be appealed to the IBLA. They must be protested. And the specific procedures involved in appealing an implementation-level decision to the IBLA vary among resource programs. One of the most important variables is where you start — that is, the venue.

Generally, there are three possible venues for an administrative challenge:

♦ BLM review . Sometimes, before formally appealing a decision, you must first ask the BLM to reconsider its decision.

[445] http://hearingsandappeals.doi.gov/Lands.html.

This is usually called a protest (similar, but not identical to, an RMP protest). An implementation-level protest is sent to either the BLM state director or the authorized officer. This level of review does not involve the IBLA; it is an internal BLM review process. Nonetheless, you may have to protest a decision before you can appeal it to the IBLA.

♦ IBLA review (single ALJ). Once a protest is resolved or if a protest period is not provided, a formal appeal must sometimes first go before a single ALJ. The ALJ will conduct a trial-like process to flesh out the facts and legal issues and rule on the issue.

♦ IBLA review (panel of ALJs). An appeal will sometimes skip the above two venues and go directly to a panel of at least two and often three ALJs (although in certain instances, the entire IBLA will review and decide an appeal). At other times, the panel will review decisions only after a challenger has first protested a decision to the BLM and brought it before a single ALJ.

Carefully determine where your challenge must first be brought. Usually, the BLM should identify in its decision document how you can challenge the decision. However, there are still minefields to traverse, especially the point at which a decision becomes effective. The principal protest/appeals procedures (the following list is not exhaustive) can be subdivided into several categories based on their respective program areas.

♦ General. If adversely affected by a BLM decision, you have a general right to appeal the decision to the IBLA.[446] Except for the key program areas described next, most BLM decisions generally follow basic appeals procedures; that is, the challenge goes directly to a panel of ALJs on the IBLA as set out in 43 C.F.R. Part 4. Before proceeding, however, review the underlying decision to see if it explains how to challenge the decision, check with the BLM, and review program-specific guidance.

♦ Forest management decisions (including timber sales). You can protest such decisions to the authorized officer within 15 days of the publication of a notice of decision or notice of sale in the newspaper.[447] If adversely affected by the forest management decision or the resolution of the protest, you can appeal the decision to the IBLA as per 43 C.F.R. Part 4.[448]

♦ Geothermal resource leasing. If adversely affected by a geothermal resource leasing decision made pursuant to 43 C.F.R. Part 3200, you can appeal the decision to the IBLA as per 43 C.F.R. Part 4.[449]

♦ Grazing. You can protest a BLM grazing decision to the authorized BLM officer in writing within 15 days of receipt of the decision as long as you are an "interested member of the public" (this allows you to challenge a decision even if you are not adversely affected).[450]

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[446] 43 C.F.R. § 4.410.

[447] 43 C.F.R. § 5003.3(a).

[448] 43 C.F.R. §§ 4.410 (general right to appeal), 5003.1 (appeal of forest management decisions).

[449] 43 C.F.R. §§ 4.410 (general right to appeal), 3200.5 (geothermal resource leasing appeal provision).

[450] 43 C.F.R. § 4160.2. "Interested public" is defined as "an individual, group or organization that has submitted a written request to the authorized officer to be provided an opportunity to be involved in the decision-making process for the management of livestock grazing on specific grazing allotments or has submitted written comments to the authorized officer regarding the management of livestock grazing on a specific allotment." 43 C.F.R. § 4100.0-5,

If your protest to the BLM fails, you can appeal the grazing decision to the IBLA by filing an appeal and Petition to Stay within 30 days of the decision date.[451] At this stage, to appeal a grazing decision you must have an interest that is adversely affected by the decision.[452] Note that you can also intervene in an ongoing appeal if you hold an interest that may be directly affected by the decision.[453] In this second tier of review, your appeal is considered by a single ALJ.[454] If the ALJ does not rule in your favor, you can appeal to the IBLA pursuant to the general appeals provisions in 43 C.F.R. Part 4.[455]

♦ Off-road vehicle management. You can protest ORV area and route designations to the Director of the BLM in Washington, DC. Such designations are made during the land-use planning process and constitute a land-use decision rather than an implementation decision.[456] This means that, procedurally, protests of ORV designations are a land-use plan protest (discussed above), and the decision of the Director of the BLM cannot be appealed to the IBLA. Other ORV management decisions carried out during implementation of the land-use plan can be appealed pursuant to the general appeal provisions of 43 C.F.R. Part 4.

♦ Oil and gas lease sales. You can protest a lease sale to the relevant BLM state director.[457] If you are adversely affected by the state director's decision, you can appeal the decision to the IBLA.[458] Your appeal must be filed within 30 days of the decision.[459]

♦ Oil and gas operation decisions. Under 43 C.F.R. Part 3160, you can request the state director to review a decision. This request, called a Request for State Director Review,[460] can be made for specific oil and gas projects or individual Applications for Permits to Drill. You must be adversely affected to make the request,[461] and you must file your request with the state director within 20 business days of the decision.[462] If you are adversely affected by the state director's decision (which must be issued within 10 days), you can appeal to the IBLA pursuant to the general procedures set out in 43 C.F.R. Part 4.[463]

♦ Coal. If adversely affected, you can appeal decisions to the IBLA that

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[451] 43 C.F.R. §§ 4.21 (petitions for stays), 4.470(a) (filing requirements), 4160.3(c) (timing and effective date of final decision), 4160.4 (right to appeal).

[452] 43 C.F.R. § 4.470(a).

[453] 43 C.F.R. § 4.471.

[454] 43 C.F.R. § 4.470(a).

[455] 43 C.F.R. § 4.476.

[456] U.S. Department of the Interior, Bureau of Land Management, *Land Use Planning Handbook*, H-1601-1 (IV)(A), (D) (2000).

[457] 43 C.F.R. §§ 4.450-2 (authority for competitive or noncompetitive lease sale protests), 3120.1-3 (authority specifically for competitive lease sale protests).

[458] 43 C.F.R. § 4.410.

[459] 43 C.F.R. § 4.411(a).

[460] 43 C.F.R. § 3165.3(b).

[461] *Id.*

[462] *Id.*

[463] 43 C.F.R. § 3165.4(a).

involve operations for the exploration, development, and production of federal coal under federal leases, licenses, and permits pursuant to the Mineral Leasing Act of 1920.[464] Generally, such proceedings will begin before a single ALJ, whose decision can subsequently be appealed to a panel of the IBLA.

✦ **Hard rock mining.** You can challenge a hard rock mining decision through one of two routes. First, if adversely affected by the decision, you file a Request for State Director Review within 30 calendar days of receiving notification or being notified of the decision.[465] Second, you can bypass the state director review and file an appeal with the IBLA.[466] If you are adversely affected by the state director's decision, you can appeal it to the OHA (IBLA) even if you did not participate in the review but as long as you participated in the underlying process.[467]

6. Protect the Land During Appeals: Stays Pending Appeal

Before you commit to filing an appeal of an implementation decision, take note of the decision's effective date. OHA IBLA regulations provide that a decision is as a general rule (there are lots of exceptions) not effective during the time period you are able to appeal.[468] Once this time period runs out, you must have previously filed a Petition for a Stay to halt the activity.[469] When, where, and how such a petition is filed is discussed below. For our purposes here, note that if you do not file a Petition for a Stay, a management decision becomes effective once the 30-day period to appeal the decision runs out.

Thus, it is highly recommended that you file a Petition for a Stay. Your petition, again with exceptions, automatically halts the effective date of the decision until the IBLA decides on the petition.[470] The IBLA has 45 days to consider the petition[471] and during that time, may grant or deny the petition in full or in part.[472] If denied, the decision takes effect immediately.[473] If the IBLA fails to rule on the petition, the decision becomes effective once the 45-day time period has run its course.[474]

You bear the burden of proof to demonstrate that a stay is warranted.[475] Stays are issued based on four factors set out in 43 C.F.R. §§ 4.21(b)(1)(i)-(iv).

- The relative harm to the parties if the stay is granted or denied.

[464] 43 C.F.R. §§ 4.410 (requirement that challenging party must be adversely affected), 3486.4 (right to appeal pursuant to 43 C.F.R. Part 4).

[465] 43 C.F.R. § 3809.800(a).

[466] 43 C.F.R. § 3809.800(b). See also 43 C.F.R. § 3809.801 (discussing timing for notice of appeal depending on whether or not you file a Request for State Director Review).

[467] 43 C.F.R. § 3809.809(a). However, note that you may not appeal a denial of your request for State Director review or a denial of a request for a meeting with the State Director.

[468] 43 C.F.R. § 4.21(a)(1).

[469] 43 C.F.R. § 4.21(a)(2).

[470] *Id.*

[471] 43 C.F.R. § 4.21(b)(4).

[472] *Id.*

[473] 43 C.F.R. § 4.21(a)(3).

[474] 43 C.F.R. § 4.21(a)(3), (b)(4).

[475] 43 C.F.R. § 4.21(b)(2).

- Appellants' likelihood of success on the merits.
- The likelihood of immediate and irreparable harm if the stay is not granted.[476]
- Whether the public interest favors granting the stay.

If your petition is denied or if the IBLA determines that the BLM's decision is effective before the time period to file a NOA runs its course, the BLM's decision is considered a final agency action and is thus subject to judicial review.[477]

It is vital to recognize that implementation decisions are often immediately effective and, as a consequence, the provisions discussed above are not completely on point. In such circumstances, the BLM can take action (although the agency may have the discretion to delay the action) without waiting for the lapse of the 30-day period provided to the public to appeal the decision. You can still appeal the decision and file a Petition for a Stay, but may be unable to halt the BLM from taking initial groundbreaking actions. The exceptions, which swallow the general rule, include:

- Adopted wild horse and burro removal decisions under 43 C.F.R. Group 4700 (sometimes)[478]
- Coal lease termination decisions for disqualified lessees[479]
- Forest management decisions under 43 C.F.R. Group 5000[480]
- Geothermal operational decisions[481]
- Grazing decisions under 43 C.F.R. Group 4100 (sometimes)[482]
- Hard rock mining surface management decisions[483]
- Lease readjustments for coal, leasable minerals other than oil, gas, coal, and oil shale, and certain hard rock minerals[484]

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[476] Note that for oil and gas operational decisions (43 C.F. R. Part 3160), the third criterion is slightly different, reading "[t]he likelihood of irreparable harm to the appellant or resources if the stay is not granted." 43 C.F.R. § 3165.4 (c)(3).

[477] 43 C.F.R. § 4.21(c).

[478] 43 C.F.R. § 4770.3. Such a decision is not automatically effective immediately; however, the authorized officer has the discretion to make a decision immediately effective, notwithstanding 43 C.F.R. § 4.21(a).

[479] 43 C.F.R. § 3472.1-2(e)(4)(ii).

[480] 43 C.F.R. § 5003.1. The decision is not effective pending resolution of any protest made pursuant to 43 C.F.R. § 5003.3(a). 43 C.F.R. §§ 5003.3(d), (f).

[481] 43 C.F.R. § 3200.5(b).

[482] 43 C.F.R. § 4160.3. According to the regulations, a decision is not effective except as provided in 43 C.F.R. § 4160.3(f). According to Section 4160.3(f), the authorized officer can order that a final decision is effective upon issuance or on a date specified in the decision unless the OHA grants a stay if the authorized officer makes a determination in accordance with 4110.3-3(b) or 4150.2(d). The Director of the OHA or the IBLA can still dictate that a decision is effective pursuant to 4.21(a)(1).

[483] 43 C.F.R. §§ 3809.803 (appeals), 3809.808(a) (Requests for State Director Review also do not halt implementation of the original BLM decision).

[484] 43 C.F.R. §§ 3451.2 (coal), 3511.30 (all others, see 43 C.F.R. § 3501.2).

- Minimum impact permit decisions under 43 C.F.R. Subpart 2920[485]
- Oil and gas competitive leasing decisions[486]
- Oil and gas geophysical exploration decisions[487]
- Oil and gas operational decisions[488]
- Right-of-way decisions under 43 C.F.R. Group 2800[489]

In limited circumstances, the IBLA can dictate that a decision is effective immediately.[490] This only occurs if the public interest is served by expediting the decision's effective date.[491] In all circumstances, once a decision is effective, you do not have to exhaust administrative remedies by going through administrative reviews or appeals: the agency action is deemed final. Consider using the federal courts to challenge the decision and obtain an injunction to halt activities pending resolution of your concerns. Where you can suspend or stay an action before it becomes effective, take that opportunity. Otherwise, the courts may dismiss your case. Moreover, in some instances, using the administrative appeals process even when you can access the federal courts can be a good method of fleshing out the issue and uncovering information that was otherwise unavailable. Depending on how it plays out, this may help or hurt you if you decide to bring a case in federal court. Regardless, it will likely give you a better idea of your chances in federal court and thus allow you to make a fully informed decision on how to proceed.

7. General Appeals

a. Overview

This discussion focuses on the procedures to appeal BLM implementation decisions for all resources except coal. These procedures are immediately

[485] 43 C.F.R. § 2920.2-2(b). These permits are issued upon a determination that a proposed use of the public lands are in compliance with BLM plans, policies, and programs, and local zoning ordinances and other requirements. In addition, the determination includes a finding that the activity will not cause appreciable damage or disturbance to the public lands, their resources, or improvements. Such authorizations commonly occur for construction or development purposes. See 61 Fed. Reg 32351, 3252 (June 24, 1996).

[486] 43 C.F.R. § 3120.1-3. If you challenge the inclusion of a specific parcel in the lease sale offer, the authorized officer in charge of the lease sale offer holds the discretion to suspend the offering of that parcel pending review of the protest. *Id.* If you protest an entire lease sale, you can halt the decision from going into effect only if you make your request directly to the Assistant Secretary for Land and Minerals. Such a suspension is made only after reviewing the basis of the protest. *Id.* The regulation states that the power of the Assistant Secretary to suspend an entire lease sale occurs only upon review of the appeal. There is ambiguity in the regulations as to whether this also applies during protests. A *Federal Registe*notice clears the ambiguity, indicating that the Assistant Secretary's power applies during both appeals and protests. 53 Fed. Reg. 22814, 22828 (June 17, 1988).

[487] 43 C.F.R. § 3150.2(b).

[488] 43 C.F.R. § 3165.4(c). Although for State Director Review, the decision is not effective until the protest is resolved. 43 C.F.R. § 3165.3(a), (b).

[489] 43 C.F.R. §§ 2804.1(b) (generally), 2884.1(b) (Mineral Leasing Act of 1920 rights of way specifically).

[490] 43 C.F.R. § 4.21(a)(1).

[491] *Id.*

applicable in a variety of scenarios, including, but not limited to, geothermal operational decisions,[492] right-of-way decisions,[493] and special recreation permits.[494] For decisions on forest management, oil and gas competitive leasing, oil and gas operations, hard rock mining, and grazing, the procedures are generally not immediately applicable. They constitute the final layer of administrative review after you complete lower layers of review.

If you appeal a BLM implementation decision (or an appealable decision made at an initial layer of review), you must file a Notice of Appeal with the BLM office where the official who made the decision works. The NOA must be filed within 30 days after being served a notice of the decision.[495] If you were not served a notice, you must file the NOA within 30 days of publication of the notice in the *Federal Register*.[496] A maximum 10-day grace period is granted only in the event that the officer hearing the appeal determines that the NOA was transmitted or probably transmitted to the BLM office within the 30-day time period.[497]

You must file a Petition for a Stay with the NOA to ensure that the BLM decision is not implemented on the ground.[498] It is the agency's responsibility to forward the NOA and the complete, original record of the decision to the IBLA. You must also supply a Statement of Reasons that outlines the reason for the appeal.[499] The statement can be submitted jointly with the NOA to the BLM office or submitted separately (but directly) to the IBLA within 30 days of the NOA's filing date.[500] During this time period, submit additional statements of reasons, written arguments, or briefs directly to the IBLA as needed.[501] Although not specifically required by the regulations, you can complement your Statement of Reasons with a Request for Relief, a concise statement that sets forth the actions that you believe the BLM must take to remedy its errors.

Within 15 days after all filings, you must serve the appropriate solicitor and any opposing parties named in your NOA a copy of the NOA and other documents filed with the BLM.[502] Note that

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[492] 43 C.F.R. § 3200.5(a) (generally), 3267.11 (drilling, specifically). Note that a geothermal operational decision is effective immediately and remains in effect while an appeal is pending unless a stay is granted according to 43 C.F.R. § 4.21(b). 43 C.F.R. § 3200.5(b).

[493] 43 C.F.R. §§ 2804.1 (generally), 2884.1 (rights of way under the Mineral Leasing Act of 1920).

[494] 43 C.F.R. § 8372.6.

[495] 43 C.F.R. § 4.411(a).

[496] *Id.*

[497] 43 C.F.R. § 4.401(a). See also 43 C.F.R. § 4.412(c) (providing that appeal should not be considered and directing IBLA to summarily dismiss the appeal if it was not filed within 30-day time period or not granted grace period by authorized officer).

[498] 43 C.F.R. § 4.21(a)(2).

[499] 43 C.F.R. §§ 4.412(a) (stating that the Statement of Reasons shall be filed), 4.412(c) (stating that failure to file the Statement of Reasons will subject appeal to summary dismissal).

[500] 43 C.F.R. § 4.412(a).

[501] *Id.*

[502] 43 C.F.R. § 4.413(a).

the regulations specify the solicitor whom you must serve with the NOA.[503] Within 15 days after completing the service process, you must file Proof of Service with the IBLA unless you filed that document with the NOA.[504] The regulations also state that you should file Proof of Service with the appropriate BLM office[505] and any opposing parties named in your NOA.[506]

Compliance with all of these requirements is important: the IBLA holds the power to dismiss the appeal for procedural errors.[507] The IBLA can also dismiss an appeal on the merits if well-settled precedent governs the issue.[508] If your appeal is dismissed, your ability to obtain judicial review may be hindered if you failed to exhaust administrative remedies.[509]

Where you are not a party to an appeal, you can (possibly) voice your concerns by making a timely request to appear as a "friend of the court."[510] The OHA or IBLA will approve or deny your request,[511] and the IBLA or the Director of the OHA can define the scope of your participation.[512]

b. Hearings

You can request the IBLA to hold a hearing to present evidence on an issue of fact.[513] The IBLA may also, on its own motion, order a hearing.[514] If a hearing takes place, the IBLA assigns a specific ALJ to preside,[515] and that person fixes the place and date of the hearing.[516] The parties or the ALJ can request a pre-hearing conference to outline the nature and scope of the hearing.[517] The ALJ holds the authority to subpoena witnesses, take depositions, call and question witnesses, make proposed findings of fact, and take other actions.[518] Oral testimony is conducted under oath and subject to cross-examination.[519]

A decision on a controlling question of law made by the ALJ during the course of the hearing can be appealed to the IBLA through an interlocutory appeal.[520] To appeal such a decision, you must get

[503] 43 C.F.R. § 4.413(c).

[504] 43 C.F.R. § 4.413(d).

[505] 43 C.F.R. § 4.401(c)(2).

[506] *Id.*

[507] 43 C.F.R. § 4.402(a)-(c).

[508] George C. Coggins and Robert L. Glicksman, *Public Natural Resources Law* § 7.24.

[509] *Id.*

[510] 43 C.F.R. § 4.3(c).

[511] *Id.*

[512] *Id.*

[513] 43 C.F.R. § 4.415.

[514] *Id.*

[515] *Id.*

[516] 43 C.F.R. § 4.431.

[517] 43 C.F.R. § 4.430(a).

[518] 43 C.F.R. § 4.433.

[519] 43 C.F.R. § 4.435(a).

[520] 43 C.F.R. § 4.28.

permission from the IBLA, and ALJ must certify the appealed interlocutory ruling.[521] If the ALJ does not certify the ruling, then it must be shown that the ALJ abused his or her discretion in refusing to certify the ruling.[522] The IBLA generally does not favor interlocutory appeals.

Hearings are recorded verbatim and transcripts made if requested (and paid for) by an interested party.[523] When the hearing is over, the ALJ compiles a record of the hearing and sends it along with proposed findings of fact to the IBLA.[524] The record contains the transcript or summary of the testimony, exhibits, and all papers and requests filed for the hearing.[525] The parties, including the BLM, can file briefs or statements with the IBLA concerning the record and proposed findings of fact.[526]

c. Decisions of the Interior Board of Land Appeals

Once the record is complete, the IBLA rules on the appeal. Prior to making its decision, the IBLA or the Director of the OHA can, if they choose, grant an opportunity for oral argument.[527] The decision is usually based solely on the record compiled during the entire appeals process.[528] Decisions must be in writing and signed by not less than a majority of the ALJs who considered the appeal.[529]

The IBLA's decision is a final agency action subject to judicial review by a citizen party; note that the BLM cannot appeal an IBLA decision.[530] If the decision is unfavorable, you can submit a Petition for Reconsideration within 60 days of the decision that asks the IBLA to review its decision because of "extraordinary circumstances for sufficient reason."[531] Generally, this occurs in two circumstances — one, if the Petition for Reconsideration presents convincing new legal arguments or two, if the Petition for Reconsideration presents newly discovered evidence. If you desire a stay, you must file a Petition for Stay Pending Reconsideration jointly with the Petition for Reconsideration.[532] Otherwise, the decision is effective immediately.[533] The reconsideration process is not necessary for you to exhaust your administrative remedies.[534]

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[521] *Id.*

[522] *Id.*

[523] 43 C.F.R. § 4.23.

[524] 43 C.F.R. §§ 4.24, 4.439.

[525] 43 C.F.R. § 4.24

[526] 43 C.F.R. § 4.439.

[527] 43 C.F.R. § 4.25.

[528] See 43 C.F.R. § 4.24(a)(2)-(4).

[529] 43 C.F.R. § 4.2(b).

[530] 43 C.F.R. §§ 4.21(c), (d), 4.403.

[531] 43 C.F.R. §§ 4.21(d), 4.403.

[532] *Id.*

[533] *Id.*

[534] *Id.*

D. The Role of the Courts: Advocacy and Litigation

The right of a citizen to initiate judicial review against agency conduct, codified largely in the Administrative Procedures Act of 1946 and citizen suit provisions of several environmental statutes, is a bedrock principle of environmental law. Federal courts thus play an instrumental role in ensuring proper management of public lands. In reviewing cases and controversies that arise under federal law, the courts interpret the intent of Congress and sanction or void agency action accordingly. How courts resolve public lands issues is extremely important: it often influences public lands debates far beyond the defined boundaries of the individual case or controversy.

As a general proposition, courts hesitate to involve themselves in what they perceive as political, scientific, or technical disputes. Courts prefer to resolve questions of law, shying away from questions of fact (that is, scientific or technical) that, to the courts, reveal political disputes ill-suited to the judicial branch. Invariably, and taking into account the courts' hesitancy to resolve factual questions, prospective litigants (that is, you) must decide whether to enter into the legal process.

First, attempt to structure your arguments in legal rather than political and scientific terms. This is not to say that scientific or technical arguments should be disregarded. Rather, scientific and technical arguments should be subordinate to and tier from foundational legal arguments. Thus, in challenging an agency action, you are more likely to be successful if you can prove that the agency failed to consider a relevant factor or law. Conversely, you are not likely to succeed if the matter of contention merely reflects a difference of opinion or professional judgment. Second, courts are (usually) practical creatures, so articulate why your arguments are important: convey the tangible adverse consequences that will result if the BLM gets its way.

A risk involved in bringing litigation is the possibility of an adverse decision that undermines your immediate objective and other similar or related efforts. Because of the lack of precedent involving many elements of the BLM's legal framework, this risk is very real. Advocates should carefully consider the impacts of an adverse decision on the land they seek to protect and other efforts that are taking place across the nation. Relating place-based objectives to a broader campaign to protect the public lands can ground advocacy and restrain litigation to strategic efforts that are solidly based in fact and law.

A second risk involves the possibility that litigation can motivate an adverse legislative response. Even where advocates bring litigation solidly based in fact and law, Congress could step in and halt the action through a legislative rider or other means. This should not negate the use of litigation, but it does underscore the importance of thinking through a case and its implications from the start and the need to base advocacy on broader campaigns as a shield from hostile legislation. Tying into far-reaching public land campaigns can also link the advocate on the land to advocates on Capitol Hill in Washington, DC, thus encouraging dialogue, the sharing of advice, and a common defense for our common interests.

List of Principal Acronyms

ACEC:	Area of Critical Environmental Concern
AEM:	Adaptive Ecosystem Management
ALJ:	Administrative Law Judge
BLM:	Bureau of Land Management
CE:	Categorical Exclusion
CEQ:	Council on Environmental Quality
CFR:	Code of Federal Regulations
DNA:	Determination of NEPA Adequacy
DR:	Decision Record
EA:	Environmental Assessment
EIS:	Environmental Impact Statement
FLPMA:	Federal Land Policy and Management Act of 1976
IBLA:	Interior Board of Land Appeals
MFP:	Management Framework Plan
MSA:	Management Situation Analysis
NLCS:	National Landscape Conservation System
NEPA:	National Environmental Policy Act of 1969
NOA:	Notice of Appeal
NOI:	Notice of Intent
OHA:	Office of Hearings and Appeals
ORV:	Off-road vehicle
RMP:	Resource Management Plan
RNA:	Research Natural Area
ROD:	Record of Decision
WO:	Washington, DC office of the BLM
WSA:	Wilderness Study Area

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