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Residents at Risk: Wildlife and the Bureau of Land Management's Planning Process

by

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ARTICLES

RESIDENTS AT RISK: WILDLIFE AND THE BUREAU OF LAND MANAGEMENT'S PLANNING PROCESS

BY
KELLY NOLEN*

In the 1976 Federal Land Policy and Management Act (FLPMA), Congress attempted to usher in a new era of public lands management. Congress hoped to reverse the past land management approach of the Bureau of Land Management (BLM), which historically favored consumptive interests, such as ranching and mining industries, over wildlife. To achieve this goal, Congress directed BLM to prepare comprehensive plans for the lands it oversees. All resources, including wildlife, were to be given equal priority in the planning process. This Article evaluates BLM's implementation of FLPMA's mandate and concludes that the planning process has not yet resulted in equal consideration for wildlife on the public lands.

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I. INTRODUCTION

We are talking about Bureau of Land Management lands. We are not talking about Forest Service. We are not talking about wilderness. . . . These are low production lands. These are not national parks. These are very low rainfall, low moisture content areas, so they are very unproductive.

—Senator Craig Thomas (R-Wyo.), introducing legislation to transfer Bureau of Land Management lands to the states.¹

How important to society is this species? What is the biological significance of the species? Is it the last of its kind? Will it provide a cure for a deadly disease?

—Senator Slade Gorton (R-Wash.), introducing legislation to weaken the Endangered Species Act²

Times are tough for wildlife on the public domain. It is now fashionable for elected officials to attack the nation's environmental and natural resources laws. Politicians speak of restoring balance, putting people back into the equation, and curbing federal agencies that have spun out of control.³ The new Republican majority in Washington is backing its rhetoric with action. They have introduced a host of bills designed to accomplish these goals by dramatically weakening existing environmental and natural resources laws⁴ even though polls show that most Americans support current levels of environmental regulation.⁵

¹ 141 CONG. REC. S9913 (daily ed. July 13, 1995).

² 141 CONG. REC. S6339 (daily ed. May 9, 1995).

³ See, e.g., *Young Maps Priorities As Natural Resource Chairman*, Daily Env'tl. Rep. (BNA) No. 248, at D-13 (Dec. 30, 1994), available in WESTLAW, BNA-DEN.

⁴ For example, bills have been introduced that weaken the protections afforded by the Endangered Species Act, S. 768, 104th Cong., 1st Sess. (1995) and H.R. 2275, 104th Cong., 1st Sess. (1995), transfer Bureau of Land Management lands to the states, S. 1031, 104th Cong. 1st Sess. (1995), "reform" grazing practices on federal lands, S. 852, 104th Cong., 1st Sess. (1995) and H.R. 1713, 104th Cong., 1st Sess. (1995), and mandate the management of the country's largest national forest for the sole benefit of the timber industry, S. 1054, 104th Cong., 1st Sess. (1995). Legislation authorizing salvage logging with few environmental protections has already been enacted. Pub. L. No. 104-19, § 2001, 109 Stat. 194 (1995). Appropriations and budget reconciliation bills for fiscal year 1996 also contain numerous substantive provisions that will, among other things, open the Arctic National Wildlife Refuge to oil drilling, dramatically limit the Environmental Protection Agency's ability to enforce environmental laws, and cap the Bonneville Power Authority's obligation to spend funds to restore the Columbia Basin's salmon runs. H.R. 1977, 104th Cong., 1st Sess. (1995) (Department of Interior Appropriations Bill); H.R. 1814, 104th Cong., 1st Sess. (1995) (Environmental Protection Agency Appropriations Bill).

⁵ For example, a September 1995 nationwide poll conducted by Yankelovich Partners for Time/CNN found that only 29% of Americans supported reduced protection for endangered species. Fifty-nine percent of Americans opposed expanded logging, mining, and

In this political climate, both wildlife and the Bureau of Land Management (BLM) have come under fire. The "wise use" movement, which battles both federal land ownership and environmentalists, has gained visibility and clout.⁶ Some federal lawmakers have followed the wise use lead and proposed legislation that will gut the Endangered Species Act⁷ and transfer BLM lands to the states.⁸ According to the sponsors of these bills, the pendulum that historically swung toward development and exploitation of our public land resources has now swung completely the other way, and correction is necessary.⁹ Unfortunately for the wildlife living on BLM lands, the pendulum actually never traveled far from the historic orientation toward consumptive resource use. These residents of the public domain have not been adequately considered in BLM's land and resource planning process, and now face ever-increasing risks.

As reflected by Senator Craig Thomas's statement above, the approximately 270 million acres of land managed by BLM¹⁰ have often been called "the lands no one wanted."¹¹ BLM lands went unclaimed during the federal government's disposition of the public domain and unreserved by the government for any special purpose,¹² and many viewed them as a vast arid wasteland of little use to anyone.¹³ However, the public lands overseen by BLM are in fact incredibly diverse, encompassing grasslands, forests, high mountains, arctic tundra, and deserts.¹⁴ Far from being unwanted, these lands are used today by numerous groups for many different purposes. Ranchers, hardrock miners, oil and gas companies, timber interests, and

ranching on public lands. Richard Lacayo, *This Land Is Whose Land?*, TIME, Oct. 23, 1995, at 70.

⁶ Andrea L. Hungerford, "Custom and Culture" Ordinances: Not a Wise Move for the Wise Use Movement, 8 TUL. ENVTL. L.J. 457, 458-59 (1995). The Wise Use movement had its roots in the Sagebrush Rebellion of the late 1970s, during which a number of western states passed laws claiming ownership of federal lands within their borders. See generally John Leshy, *Unraveling the Sagebrush Rebellion*, 14 U.C. DAVIS L. REV. 317 (1980). This strategy, which had no legal support, was unsuccessful and has faltered in recent years. See John Leshy, *Natural Resources Policy in the Clinton Administration: A Mid-Course Evaluation from Inside*, 25 ENVTL. L. 679, 682 (1995). However, the spirit of the Sagebrush rebels is now embodied in the "wise user's" attempts to weaken federal natural resources and environmental laws.

⁷ 16 U.S.C. §§ 1531-1544 (1994).

⁸ Endangered Species Reform Act of 1995, S. 6339, 104th Cong., 1st Sess. (1995); Lands Administered by the Bureau of Land Management, Transfer, S. 1031, 104th Cong., 1st Sess. (1995).

⁹ See 141 CONG. REC. S6423 (daily ed. May 10, 1995) (statement of former Sen. Robert Packwood (R-Or.)).

¹⁰ U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 6 (1993) [hereinafter PUBLIC LAND STATISTICS]. Lands managed by BLM are often referred to as the "public domain," or simply "public lands." Most BLM lands are in western states: Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. *Id.* at 5.

¹¹ See DYAN ZASLOWSKY, THESE AMERICAN LANDS 113 (1986).

¹² See generally GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 55-106 (3d ed. 1993).

¹³ ZASLOWSKY, *supra* note 11, at 138.

¹⁴ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC REWARDS FROM PUBLIC LANDS (1995) [hereinafter PUBLIC REWARDS].

recreational users all seek their piece of the public lands pie and often disagree over the proper allocation of resources on BLM lands.

The wildlife residing on BLM lands form a user group whose interests have historically been ignored. Over three thousand species of mammals, birds, fish, reptiles, and amphibians depend on the public lands for their last strongholds of habitat.¹⁵ At least 216 of these are listed as threatened or endangered species under the Endangered Species Act,¹⁶ with several hundred additional species being considered for listing.¹⁷ Human activities on the public lands, including both consumptive and nonconsumptive uses, often disturb or destroy the habitat on which these species rely and leave future prospects for survival uncertain.¹⁸ Because the best way to ensure healthy wildlife populations is to protect and restore prime habitat, species preservation requires effective land use planning and management.¹⁹ BLM's management of wildlife habitat on the public domain, which comprises approximately one-eighth of the land in the United States, clearly has a significant impact on the nation's wildlife.²⁰

As a "multiple use" management agency, BLM must administer the public lands for the benefit of numerous values, including wildlife.²¹ In developing and implementing land use plans, BLM must balance competing demands for both consumptive and nonconsumptive uses and arrive at a combination of uses that will best meet present and future public needs.²² Observers have often criticized the manner in which BLM has carried out this difficult task.²³ Chief among these criticisms is that when BLM attempts to arrive at a balanced mix of uses, it gives greater weight

¹⁵ PUBLIC LAND STATISTICS, *supra* note 10, at 37.

¹⁶ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, MANAGING THE NATION'S PUBLIC LANDS—ANNUAL REPORT OF THE DEPARTMENT OF THE INTERIOR'S BUREAU OF LAND MANAGEMENT FISCAL YEAR 1992, at 7 (1993) [hereinafter 1992 BLM ANNUAL REPORT].

¹⁷ U.S. GEN. ACCOUNTING OFFICE, PUBLIC LAND MANAGEMENT—ATTENTION TO WILDLIFE IS LIMITED 9 (1991) [hereinafter ATTENTION TO WILDLIFE].

¹⁸ Human modification or destruction of habitat is the main cause of most extinctions. RICHARD B. PRIMACK, ESSENTIALS OF CONSERVATION BIOLOGY 3, 111-66 (1993).

¹⁹ See COGGINS ET AL., *supra* note 12, at 784 (quoting ALDO LEOPOLD, GAME MANAGEMENT (1933)).

²⁰ Generally, federal agencies such as BLM are responsible for habitat management on federal lands, while states take responsibility for managing wildlife through such measures as regulating hunting and fishing practices on federal lands. See, e.g., Federal Land Policy and Management Act, 43 U.S.C. §§1701-1784, 1732(b) (1994) (FLPMA in no way diminishes the states' responsibility and authority for management of fish and wildlife).

²¹ *Id.* § 1702(c).

²² *Id.*

²³ See, e.g., U.S. GEN. ACCOUNTING OFFICE, CHANGE IN APPROACH NEEDED TO IMPROVE THE BUREAU OF LAND MANAGEMENT'S OVERSIGHT OF PUBLIC LANDS (Apr. 11, 1989) (statement of James Duffus III, Director of Natural Resources Management Issues, U.S. Gen. Accounting Office, Testimony Before the Subcomm. on National Parks and Public Lands of the House Comm. on Interior and Insular Affairs) [hereinafter CHANGE IN APPROACH NEEDED]; NATIONAL WILDLIFE FED'N, GRAZING TO EXTINCTION: ENDANGERED, THREATENED, AND CANDIDATE SPECIES IMPERILED BY LIVESTOCK GRAZING ON WESTERN PUBLIC LANDS (1994) [hereinafter GRAZING TO EXTINCTION]; PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, PUBLIC TRUST BETRAYED: EMPLOYEE CRITIQUE OF BUREAU OF LAND MANAGEMENT RANGELAND MANAGEMENT (1994); Michael C. Blumm, *Public Choice Theory and the Public Lands: Why Multiple Use Failed*,

to the demands of consumptive interests such as grazing and mining than the needs of wildlife.²⁴

The root cause of BLM's historic orientation toward the interests of ranchers and other commercial users of the public lands is difficult to identify. Some point to BLM's identification with the grazing and mining industries, arguing that the agency was in the past "captured" by these interests.²⁵ This "capture" was facilitated by BLM's reliance on local, state, and national advisory boards whose members were elected by ranchers²⁶ and whose influence affected the agency at all levels.²⁷ Local grazing advisory boards were especially influential because BLM created them in order to emphasize the importance of the agency's local constituents.²⁸ These boards reinforced the relationships between BLM field staff and local individuals and groups, and created an agency orientation toward satisfying local needs and ensuring community stability that continues today.²⁹ BLM thus finds itself susceptible to local pressure to favor extractive industries that are perceived as providing steady sources of jobs and money for the community.³⁰ This local influence is especially powerful in light of BLM's decentralized approach to decision making, which allows local agency employees a great deal of power to make key decisions.³¹ In addition, the agency's traditional constituents, the livestock and mining industries, have long been successful at staving off legal and management reforms that would result in equal consideration of all public lands resources.³² These industries have benefitted from a well-organized and well-funded lobbying capacity that historically was not matched by advocates for wildlife and other nonconsumptive resources.³³ BLM's vague mandate to manage lands for multiple uses also provides the agency with a great deal of discretion in making management decisions and leaves it

18 HARV. ENVTL. L. REV. 405 (1994); George Cameron Coggins, *Some Directions for Reform of Public Natural Resources Law*, 3 ENVTL. L. & LITIG. 67 (1988).

²⁴ Blumm, *supra* note 23, at 407; ATTENTION TO WILDLIFE, *supra* note 17, at 17, 38-39.

²⁵ CHANGE IN A APPROACH NEEDED, *supra* note 23; PAUL J. CULHANE, PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT 17-19 (1981); Rod Greeno, *Who Controls the Bureau of Land Management*, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 51, 52-53 (1990).

²⁶ 43 U.S.C. § 315h (1994); *see infra* notes 103-11 and accompanying text.

²⁷ Greeno, *supra* note 25, at 52.

²⁸ CULHANE, *supra* note 25, at 85.

²⁹ *See* 43 C.F.R. § 1610.4-4(g) (1995) (during planning process, BLM may consider local dependence on public lands resources); BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, BLM MANUAL § 1612.27 (1986) (planning decisions may be based upon the need to stabilize communities).

³⁰ *See* Raymond Rasker, *A New Look at Old Vistas: The Economic Role of Environmental Quality in Western Public Lands*, 65 U. COLO. L. REV. 369, 369-370 (1994) (arguing that BLM's policy of "community stability" is outdated and ineffective).

³¹ *See infra* notes 251-62 and accompanying text.

³² *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 33, 110-11 (1992) (arguing that federal range policy is dictated by the highly organized, historically entrenched cattle industry).

³³ *Id.* at 33, 106, 110-11; Greeno, *supra* note 25, at 55-56. This is changing, however, as environmental groups have dramatically increased their lobbying and media capabilities in recent years.

vulnerable to pressure from consumptive users who want the agency to favor their preferred use.³⁴

Dissatisfied with BLM's past efforts at land planning and administration, and desiring to provide BLM with comprehensive authority to manage public lands, Congress enacted the Federal Land Policy and Management Act (FLPMA)³⁵ in 1976. FLPMA directs BLM to develop resource management plans (RMPs) containing comprehensive long-range guidance for the use of the public lands.³⁶ RMPs are the middle tier in BLM's three-tier planning system. The top tier is national policy, including statutes, executive and court orders, guidance from the BLM director, the *BLM Manual*, and nationwide programs for the management of the public lands.³⁷ The bottom tier involves the more detailed activity planning necessary to implement completed RMPs, such as the preparation of individual habitat management plans, grazing allotment management plans, or plans for areas of critical environmental concern.³⁸

RMPs must 1) be prepared in conjunction with an environmental impact statement, 2) reflect public involvement and participation, and 3) deal specifically with resource conflicts.³⁹ RMPs must also give priority to the designation and protection of "areas of critical environmental concern,"⁴⁰ which include areas where special management attention is required to protect and prevent irreparable damage to fish and wildlife resources.⁴¹ Unfortunately, Congress's high hopes for the planning process have not been fully realized. Commentators have criticized BLM for its continuing inability to truly balance multiple resources through planning and its inconsistent treatment of areas of critical environmental concern in completed RMPs.⁴² While agency biases toward consumptive interests may have been reduced, they are still present.⁴³ Observers have also argued that the planning process itself is a major contributor to polarization and gridlock over the proper approach to public lands management.⁴⁴ In addition, BLM has completed RMPs at a very slow pace—the agency must

³⁴ CULHANE, *supra* note 25, at 18-19.

³⁵ Pub. L. No. 94-579, 90 Stat. 2745 (1976) (codified as amended at 43 U.S.C. §§ 1701-1784 (1994)).

³⁶ 43 U.S.C. § 1712 (1994).

³⁷ David C. Williams, *Public Land Management: Planning, Problems, and Opportunities*, in *THE PUBLIC LANDS DURING THE REMAINDER OF THE 20TH CENTURY: PLANNING, LAW, AND POLICY IN THE FEDERAL LAND AGENCIES 7*, (Natural Resources Law Center, University of Colorado School of Law ed., 1987).

³⁸ *Id.*

³⁹ 43 U.S.C. § 1712 (1994).

⁴⁰ 43 C.F.R. § 1610.7-2 (1995).

⁴¹ 43 U.S.C. § 1702(a) (1994).

⁴² See generally FAITH T. CAMPBELL & JOHANNA H. WALD, *AREAS OF CRITICAL ENVIRONMENTAL CONCERN: PROMISE VERSUS REALITY* (1989); Joseph M. Feller, *What is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 *IDAHO L. REV.* 555 (1993-94).

⁴³ See, e.g., Feller, *supra* note 42, at 555-56 (arguing that BLM gives livestock grazing higher priority than other uses).

⁴⁴ See HOUSE COMM. ON INTERIOR & INSULAR AFFAIRS, *MULTIPLE USE AND SUSTAINED YIELD: CHANGING PHILOSOPHIES FOR FEDERAL LAND MANAGEMENT?*, 102d Cong., 2d Sess. 274, 313

prepare approximately 144 RMPS, of which only 79 were finalized as of 1993.⁴⁵ For these reasons, some commentators have concluded that the planning process has failed.⁴⁶

This Article examines BLM's consideration of wildlife in the resource management planning process and concludes that the agency has failed to give this resource the attention it is due under FLPMA. Part II explains why it remains critical to ensure the survival of wildlife residing on BLM lands and why the planning process must play an integral role in achieving this goal. Part III provides a brief history of BLM's management of its public lands and its past approach to planning. Part IV summarizes the resource management planning process required by FLPMA. Part V analyzes BLM's efforts to fulfill FLPMA's mandate and evaluates an RMP from the perspective of an advocate for balanced consideration of all public land resources, including wildlife. Part VI explores several legal and practical obstacles to full consideration of wildlife needs under the present planning system. The final section suggests changes in the existing statutory and regulatory scheme that would better equip BLM to fulfill FLPMA's mandate to plan for a balance of values, including resident wildlife.

II. WILDLIFE AND THE PLANNING PROCESS

An increasingly vocal segment of the population is attempting to weaken statutes and policies designed to protect wildlife. In the face of arguments that "people are more important than animals," a variety of reasons make it crucial that society continue to preserve species other than *Homo sapiens*. Although BLM's planning process is flawed, with improvement it could be an important tool for achieving this goal.

A. Why Wildlife Is Important

Wildlife merits protection for both its extrinsic and intrinsic values. Even from an anthropocentric perspective, wildlife is a valuable resource that provides economic, ecological, and psychic benefits. In fiscal year 1994, wildlife-associated recreation on BLM lands alone pumped over \$680 million into the economy.⁴⁷ Hunting trips on these same lands generated another \$1.7 billion.⁴⁸ Each year, fishers harvest over 58 million pounds of anadromous fish that spawn in BLM-managed streams, at an estimated

(Comm. Print 1992); Robert H. Nelson, *Government as Theater: Toward a New Paradigm for the Public Lands*, 65 U. COLO. L. REV. 335, 335-36 (1994).

⁴⁵ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, SUMMARY OF RMP BACKGROUND INFORMATION AND CURRENT PLANNING STATUS (June 2, 1993) [hereinafter RMP SUMMARY]; see also U.S. GEN. ACCOUNTING OFFICE, PUBLIC LANDS: LIMITED PROGRESS IN RESOURCE MANAGEMENT PLANNING 3-5 (1990) [hereinafter LIMITED PROGRESS].

⁴⁶ George Cameron Coggins, *Commentary: Overcoming the Unfortunate Legacies of Western Public Land Law*, 29 LAND & WATER L. REV. 381, 393 n.127 (1993) (stating that John Leshy, Solicitor of the Department of the Interior, has concluded that federal land planning programs have failed).

⁴⁷ PUBLIC REWARDS, *supra* note 14.

⁴⁸ *Id.*

market value of \$40 million.⁴⁹ Wildlife contributed about \$59 billion to the nation's economy in 1991.⁵⁰ Figures such as these show to local communities that wildlife is an asset that can produce economic benefits, just like minerals or timber, and can do so on a sustainable basis.⁵¹ Engaging in activities that destroy this resource would be akin to killing the goose that laid the golden egg.

Each wildlife species also contributes to the stability of the ecosystem in which it resides.⁵² Aldo Leopold's early recognition of the importance of each "cog and wheel" in the natural system has been confirmed by recent scientific advances.⁵³ Animals and plants within an ecosystem are intricately interrelated, and the decline of any one species may have serious effects on the balance of the entire system, with unexpected consequences for humans.⁵⁴ This linkage between species, which is not readily apparent to a casual observer, illustrates the importance of maintaining species diversity within each ecosystem.⁵⁵

Stable ecosystems benefit humans in numerous ways. "Ecosystem services" include maintenance of atmospheric quality, climate control, soil generation and preservation, waste disposal, pest and disease control, and crop pollination.⁵⁶ Ensuring ecosystem health also preserves future opportunities to derive benefits from the land. The spotted owl controversy in the Pacific Northwest illustrates the danger of exploiting resources at such a rapid pace that species are left at risk.⁵⁷ Such resource use that

⁴⁹ U.S. DEP'T OF THE INTERIOR, BUDGET JUSTIFICATIONS, F.Y. 1996: BUREAU OF LAND MANAGEMENT 3-48 (1995) [hereinafter BUDGET JUSTIFICATIONS].

⁵⁰ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, FISH AND WILDLIFE 2000: ANNUAL REPORT OF ACCOMPLISHMENTS FISCAL YEAR 1994 5 (1994) [hereinafter FISH AND WILDLIFE 2000].

⁵¹ See Rasker, *supra* note 30.

⁵² DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 16 (1989).

⁵³ Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 298 (1994); see also PRIMACK, *supra* note 18, at 34-43 (describing biological communities and ecosystems).

⁵⁴ See PRIMACK, *supra* note 18, at 36-37.

⁵⁵ The relationship between sea otters and kelp forests illustrates this principle. Kelp forests supply food and shelter for large numbers of ocean fish and shellfish. *Id.* In recent years, however, kelp forests have declined. *Id.* at 37. This "deforestation" is due in part to local extinctions of sea otters, which prey on sea urchins that feed on kelp. *Id.* In a stable ecosystem, sea otters control sea urchin populations, kelp flourishes, and fish and shellfish populations increase. *Id.* Where otters are not present, sea urchins feed heavily on kelp, and contribute to the decline of kelp forests that are important to fish and shellfish populations. *Id.*

⁵⁶ REED F. NOSS & ALLEN Y. COOPERRIDER, SAVING NATURE'S LEGACY: PROTECTING AND RESTORING BIODIVERSITY 21 (1994); John C. Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 523-24 (1994); ROHLF, *supra* note 52, at 16.

⁵⁷ For an overview of the ongoing controversy over management of the old-growth forests that are home to the spotted owl, see Michael C. Blumm, *Ancient Forests, Spotted Owls, and Modern Public Land Law*, 18 B.C. ENVTL. AFF. L. REV. 605 (1991); Andrea L. Hungerford, *Changing the Management of the Public Land Forests: The Role of the Spotted Owl Injunctions*, 24 ENVTL. L. 1395 (1994); Victor M. Sher, *Travels with Strix: The Spotted Owl's Journey Through the Federal Courts*, 14 PUB. LAND L. REV. 41 (1993).

threatens individual species is likely occurring at an unsustainable rate.⁵⁸ Declines in wildlife species thus should be taken seriously, as they may signal a deeper weakness in the ecosystem as a whole.⁵⁹ In contrast, a stable, biologically diverse ecosystem functions at its highest potential and provides the most productive habitat for people as well as animals.⁶⁰

Wildlife also provides what may be termed "psychic" benefits. Many species, such as the panda and the tiger, occupy a special place in people's hearts and minds. Although one may never come face to face with these charismatic creatures, one may derive pleasure from knowing they exist.⁶¹ Other creatures, such as the bald eagle, serve as symbols for nations, states, and schools, or represent ideals and qualities like freedom, courage, or power.⁶² A community's proximity to wildlife can also increase the quality of life its residents enjoy.⁶³

Conserving wildlife can also be justified on ethical grounds unrelated to species' extrinsic value to humans. A moral duty to protect and care for the animals that share the land with us can be drawn from many of the world's religions.⁶⁴ For example, the prophet Muhammed, founder of Islam, emphasized the human responsibility for nature with the following words: "The world is green and beautiful and God has appointed you His stewards over it. He sees how you acquit yourselves."⁶⁵ The Biblical story of Noah and his ark gives an early example of a species preservation project.⁶⁶ Many view wildlife as having intrinsic value, with a right to exist equal to humans.⁶⁷ Additionally, people may feel an ethical obligation to minimize their impacts on resources and ecosystems and preserve species for the benefit of future generations.⁶⁸

B. Why the BLM Planning Process Is Important to Wildlife Preservation

Most people would agree with at least one of the above arguments in favor of wildlife preservation. The difficulty arises when efforts to conserve species conflict with other goals, which on BLM lands might include cutting timber, mining gold, grazing cattle, or driving off-road vehicles for recreation. Congress intended the resource management planning process

⁵⁸ See Keiter, *supra* note 53, at 298-99.

⁵⁹ PRIMACK, *supra* note 18, at 228-29.

⁶⁰ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, RANGELAND REFORM '94: DRAFT ENVIRONMENTAL IMPACT STATEMENT 27 (1994) [hereinafter RANGELAND REFORM].

⁶¹ *Id.* at 233; Christopher A. Cole, *Species Conservation in the United States: The Ultimate Failure of the Endangered Species Act and Other Land Use Laws*, 72 B.U. L. REV. 343, 348 n.22 (1992).

⁶² Kunich, *supra* note 56, at 527.

⁶³ See Rasker, *supra* note 30.

⁶⁴ PRIMACK, *supra* note 18, at 7-9.

⁶⁵ *Id.* at 9.

⁶⁶ *Id.*

⁶⁷ This is the basic premise of the Deep Ecology movement. BILL DEVAL & GEORGE SESSIONS, DEEP ECOLOGY: LIVING AS IF NATURE MATTERED 67 (1985).

⁶⁸ PRIMACK, *supra* note 18, at 244-45; Kunich, *supra* note 56, at 528.

under the Federal Land Policy and Management Act (FLPMA)⁶⁹ to resolve these types of conflicts and produce a prescription for future management of an area that balances all resource needs.⁷⁰ However, many observers see failure when they look back at the nearly twenty years of planning under FLPMA.⁷¹

Some commentators characterize public lands planning as a meaningless exercise in paper pushing.⁷² To these observers, planning has meant an explosion of procedure that has not led to the resolution of any of the difficult issues facing today's public lands managers.⁷³ In fact, some commentators assert that BLM uses the planning process to postpone difficult decisions such as whether to reduce grazing levels in response to new data regarding rangeland conditions.⁷⁴ Instead, the agency often merely adopts plans that require further monitoring to determine if changes are needed.⁷⁵ FLPMA's vague and imprecise language, which gives BLM little guidance and leaves agency decision makers with a great deal of discretion in the planning process, made this problem inevitable.⁷⁶ Others argue that existing processes for federal land planning and decision making are ineffective because they encourage divisiveness, separate different interest groups into warring camps, and discourage efforts to reach compromise solutions that are acceptable to all parties.⁷⁷ Finally, many contend that federal lands planning processes fail to provide opportunities for meaningful public participation, resulting in little more than "formalized nose counting" of views expressed by various segments of the public.⁷⁸

Each of these criticisms has some validity, and the BLM planning process can certainly be improved to address these and other concerns. However, none of the alleged weaknesses of the planning process justifies abandonment of the effort. Although planning will not remedy all of the agency's perceived ills, the advantages of the planning process clearly outweigh the disadvantages, especially with respect to wildlife.

⁶⁹ 43 U.S.C. §§ 1701-1784 (1994).

⁷⁰ H.R. Rep. No. 1163, 94th Cong., 2d Sess. 2-3 (1976), reprinted in 1976 U.S.C.C.A.N. 6175, 6176-77.

⁷¹ See *supra* notes 42-46 and accompanying text.

⁷² See Nelson, *supra* note 44, at 335-36 (observing that public lands management is highly ineffective); Leshy, *supra* note 6, at 685 (stating that agency decision making is sometimes jammed with processes whose value is not readily discernible, and calling for a reexamination of agency planning and environmental impact evaluation).

⁷³ Nelson, *supra* note 44, at 335-36; Leshy, *supra* note 6, at 685.

⁷⁴ See, e.g., JOHN LOOMIS, INTEGRATED PUBLIC LANDS MANAGEMENT: PRINCIPLES AND APPLICATIONS TO NATIONAL FORESTS, PARKS, WILDLIFE REFUGES, AND BLM LANDS 330 (1993).

⁷⁵ *Id.*

⁷⁶ See 2 GEORGE CAMERON COGGINS, PUBLIC NATURAL RESOURCES LAW § 13.04[3][d] (1990).

⁷⁷ See JULIA WONDOLLECK, PUBLIC LANDS CONFLICT AND RESOLUTION: MANAGING NATIONAL FOREST DISPUTES 87-105 (1988); Mary Lou Franzese, *National Forest Planning: Looking for Harmony*, in MANAGING PUBLIC LANDS IN THE PUBLIC INTEREST 47, 57-58 (Benjamin C. Dysart III & Marion Clawson eds., 1988). Although these authors were analyzing the national forest planning process, their criticisms are equally applicable to BLM planning.

⁷⁸ See, e.g., Rick Applegate, *The Multiple Use Planning Process: Descent Into the Maelstrom?*, 8 ENVTL. L. 427, 446-51 (1978); Franzese, *supra* note 77, at 58.

Resource management planning remains valuable for several reasons. First, the process itself helps "democratize" federal land management.⁷⁹ Affected members of the local and national public have an opportunity to scrutinize proposed BLM decisions and influence final plans by making their views known to the agency. Agency efforts to work with a variety of public lands users and accommodate all values can build a base of support for the final plan.⁸⁰ Absent a formal and public planning process, BLM personnel would be more susceptible to pressure from resource user groups that wield the most clout, such as the livestock and mining industries. Thus, BLM personnel would be more likely to make resource management decisions that favor those groups to the detriment of other public lands users. Second, the planning effort requires systematic data collection and analysis of existing resources and uses.⁸¹ This enables agency personnel to make more informed decisions, both in the planning process and in the course of on-the-ground management. Third, plans that contain specific direction for future land and resource administration provide all users with some degree of certainty regarding prospective management direction. Once a plan is completed, subsequent BLM decisions will not be unduly influenced by changing administrations and personnel.⁸²

Finally, comprehensive planning requires BLM to take a proactive approach to resource management by setting goals and strategies, both for today and the future.⁸³ Such an approach is surely preferable to a reactive management style, in which BLM merely resolves issues as they arise, without coordination or long-range vision. Forward-looking planning is also the best way to avoid future endangered species "train wrecks," such as that initiated by the listing of the spotted owl in the Pacific Northwest.⁸⁴ Considering wildlife in the planning process enables BLM to take steps to preserve individual species *before* they are on the brink of extinction. The Endangered Species Act (ESA),⁸⁵ which takes effect only when a species is on its "deathbed," should not be relied upon to save all creatures.⁸⁶ By using the planning process to formulate strategies that will keep wildlife species from becoming endangered, BLM can more successfully prevent extinction crises and avoid the strict mandates and loss of

⁷⁹ John Leshy, *Planning as a Tool of Public Land Management*, in *THE PUBLIC LANDS DURING THE REMAINDER OF THE 20TH CENTURY: PLANNING, LAW, AND POLICY IN THE FEDERAL LAND AGENCIES* 7, (Natural Resources Law Center, University of Colorado School of Law ed., 1987).

⁸⁰ See WONDOLLECK, *supra* note 77, at 181-85.

⁸¹ Leshy, *supra* note 79, at 2.

⁸² Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 400-01 (1994).

⁸³ See George Cameron Coggins & Parthenia B. Evans, *Multiple Use, Sustained Yield Planning on the Public Lands*, 53 U. COLO. L. REV. 411, 413 (1982) (defining public lands planning).

⁸⁴ 50 C.F.R. § 17.11 (1995); see *supra* note 57.

⁸⁵ 16 U.S.C. §§ 1531-1544 (1994).

⁸⁶ See *generally* Kunich, *supra* note 56 (criticizing the ESA for delaying intervention until species are either threatened or endangered).

agency discretion that accompany ESA listings.⁸⁷ As BLM has acknowledged, protecting species prior to listing is the most effective approach and is in the public interest.⁸⁸

For the above reasons, the remainder of this Article is based on two propositions. The first is that wildlife residing on BLM lands merits attention equaling that given to other resources. The second is that although BLM's planning process has not yet resulted in this balanced consideration, the process can and should be improved to ensure that wildlife receives the attention it is due.

III. HISTORY OF PUBLIC LANDS MANAGEMENT AND PLANNING

An understanding of today's conflicts over the public lands requires some knowledge of historical events. BLM lands are still governed in large part by what Professor Charles Wilkinson described as "the lords of yesterday"—laws, policies, and ideas from the past.⁸⁹ These outdated principles of land management encouraged consumptive uses of public lands, including grazing, mining, and logging. Nonconsumptive uses and other land values, including wildlife, were of secondary importance. Because this bias continues to influence BLM's approach to land management, this Part presents a brief overview of public lands history and BLM's past approaches to managing and planning for the public lands.

A. Nature of BLM Lands

From early in the nation's history until the beginning of the twentieth century, the federal government directed its efforts toward disposing of publicly owned lands.⁹⁰ Congress enacted statutes designed to privatize public resources and encourage pioneers to carve a new nation out of the vast western wilderness.⁹¹ The government granted land to states, railroads, settlers, and miners.⁹² In all, the United States transferred more than one billion acres of public lands to private ownership.⁹³ Disposal policies resulted in scattered patterns of land ownership, with privately and publicly held lands often arranged in a "checkerboard."⁹⁴ These patterns persist today, hindering effective management of wildlife habitat that spans lands under the control of numerous federal and state agencies and private parties.

The great land rush had a dramatic impact on wildlife. Pioneers altered and even destroyed habitat, and hunted some species, such as buf-

⁸⁷ See Robert L. Fischman, *Endangered Species Conservation: What Should We Expect of Federal Agencies?*, 13 PUB. LAND L. REV. 1 (1992) (describing the loss of agency discretion under the ESA); Hardt, *supra* note 82, at 385 (noting the limitations on land uses that arise if the land is habitat for a listed species).

⁸⁸ FISH AND WILDLIFE 2000, *supra* note 50, at 35.

⁸⁹ See WILKINSON, *supra* note 32, at xiii.

⁹⁰ MARION CLAWSON, *THE FEDERAL LANDS REVISITED* 20-27 (1983).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 26.

⁹⁴ See COGGINS ET AL., *supra* note 12, at 98.

falo, to near extinction.⁹⁵ In the late 1800s, public awareness of widespread abuses of the land disposal system and shifting public sentiments brought about a change in public lands policy. The program of land disposal gradually gave way to a policy of retention and management of the public lands. Beginning with the establishment of the "pleasuring ground" that became Yellowstone National Park,⁹⁶ the government began to withdraw lands from the public domain. Congress authorized the withdrawal of millions of acres for inclusion in what are now the national forests.⁹⁷ The government reserved other lands for the establishment of wildlife refuges and a system of fossil fuel leasing.⁹⁸ Private parties could no longer acquire lands set aside in this manner, and federal agencies managed them according to various statutory standards.⁹⁹ BLM now oversees all "left-over" lands that settlers did not appropriate and the government did not withdraw during the disposal and reservation eras.

B. *The Taylor Grazing Act*

Until the mid-1930s, there was no statutory authority for managing these "left-over" public lands, and they were freely used by stockmen as a grazing commons.¹⁰⁰ By 1934, however, a combination of overgrazing, drought, and the Great Depression made the collapse of the grazing industry appear imminent.¹⁰¹ In that year, Congress enacted the Taylor Grazing Act to promote the orderly use and regeneration of the range.¹⁰² To achieve this goal, the Act authorized the Secretary of the Interior to divide the public lands into grazing districts and regulate their use through a system of grazing permits.¹⁰³

On paper, the Act was a step in the right direction. It provided that grazing on the public lands was a privilege, not a right,¹⁰⁴ and brought the public domain under regulation for the first time. The statute also established the first forward-looking management direction for the public lands by requiring BLM to "preserve the land and its resources from destruction

⁹⁵ Frank J. Popper, *A Nest-Egg Approach to the Federal Lands*, in *MANAGING PUBLIC LANDS IN THE PUBLIC INTEREST*, *supra* note 77, at 83-85.

⁹⁶ Act of Mar. 1, 1872, ch. 24, 17 Stat. 32 (codified as amended at 16 U.S.C. §§ 21-40 (1994)).

⁹⁷ The General Revision Act of 1891 originally authorized the reservation of forest lands. Act of Mar. 3, 1891, ch. 561, 26 Stat. 1103 (codified at 16 U.S.C. § 471 (repealed 1976)).

⁹⁸ CLAWSON, *supra* note 90, at 29.

⁹⁹ For example, the national forests were managed by the National Forest Service in accordance with the terms of the Forest Service Organic Administration Act of 1897. Act of June 4, 1897, ch. 2, 30 Stat. 34 (1994) (codified at 16 U.S.C. §§ 473-481 (1994) (repealed in part 1976)).

¹⁰⁰ CLAWSON, *supra* note 90, at 30.

¹⁰¹ MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 151 (2d ed. 1983).

¹⁰² Ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315-315r (1994)).

¹⁰³ 43 U.S.C. §§ 315, 315b (1994). Lands not included in grazing districts were to be grazed through a system of leases. *Id.* § 315b.

¹⁰⁴ *Id.* § 315b.

or unnecessary injury."¹⁰⁵ Finally, the Act introduced some consideration for wildlife into BLM's management approach.¹⁰⁶

However, the Taylor Grazing Act also validated and formalized the ranching industry's historic domination of range policy. The Act preserved the industry's traditional power by creating "stockmen's advisory boards" whose members were elected by ranchers.¹⁰⁷ These boards wrote grazing regulations, allocated range improvement funds, and influenced Grazing Service (a predecessor agency to BLM) and BLM personnel decisions.¹⁰⁸ When the agency did make efforts to comply with the Taylor Grazing Act's directives to reduce grazing use to sustainable levels, it quickly succumbed to political pressure from advisory boards and the livestock industry the boards represented.¹⁰⁹ When board members were dissatisfied with BLM decisions on grazing levels, they took their grievances to high-level Department of the Interior (DOI) officials and influential Congressmen and got results.¹¹⁰ Many have criticized these boards as a perfect example of industry "capture" that has perpetuated ranchers' dominance of BLM decision making.¹¹¹

Congress attempted to answer this criticism in the Federal Land Policy and Management Act (FLPMA) by authorizing grazing advisory boards only through 1985.¹¹² FLPMA also created new entities, called advisory councils, to counsel BLM on land planning and management issues.¹¹³ These councils differ from advisory boards in that they are supposed to be composed not only of ranchers, but also of representatives of other groups interested in the public lands.¹¹⁴ Unfortunately, the livestock industry has often dominated these advisory councils as well.¹¹⁵ BLM has also proved

¹⁰⁵ *Id.* § 315a.

¹⁰⁶ *Id.* § 315m. This section requires BLM to cooperate with other parties interested in the use of grazing districts, including state wildlife agencies. The extent of BLM's consideration of wildlife during this period was to set aside a few areas for wildlife use. Coggins & Evans, *supra* note 83, at 447 n.261.

¹⁰⁷ 43 U.S.C. § 315h (1994).

¹⁰⁸ PHILIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* 135-36, 199-201 (1960).

¹⁰⁹ CULHANE, *supra* note 25, at 89-91; Coggins & Evans, *supra* note 83, at 447.

¹¹⁰ CULHANE, *supra* note 25, at 18, 90-91.

¹¹¹ *See, e.g.*, NATIONAL AUDUBON SOC'Y, *AUDUBON WILDLIFE REPORT* 1987, at 41 (1987) [hereinafter 1987 WILDLIFE REPORT] (arguing that grazing advisory boards do not represent all uses because the majority of board seats are filled by livestock industry boards); CULHANE, *supra* note 25, at 17-18.

¹¹² 43 U.S.C. § 1753 (1994). This statutory provision authorized BLM to establish advisory boards in each district and directed that they be composed entirely of representatives from the livestock industry. *Id.* The section expired on December 31, 1985. *Id.* BLM's director subsequently reinstated grazing advisory boards by directive. 43 C.F.R. 1784.0-1 to 1784.6-5 (1995).

¹¹³ 43 U.S.C. § 1739 (1994).

¹¹⁴ *Id.*

¹¹⁵ 1987 WILDLIFE REPORT, *supra* note 111, at 41. In 1995, the Department of the Interior (DOI) took the first steps toward reducing the ranchers' influence over BLM policy by adopting grazing reform regulations. These regulations call for the creation of balanced resource advisory councils. 43 C.F.R. § 1784.6-1 (1995). The regulations require new councils to be comprised of representatives of consumptive resource industries, recreational, historical, or

reluctant to transfer authority from the advisory boards to the multiple-resource councils, even though Congress intended the boards to dissolve in 1985.¹¹⁶

Commentators often trace BLM's neglect of wildlife to the Taylor Grazing Act's emphasis on grazing interests.¹¹⁷ Grazing policies and wildlife resources are closely interrelated, because grazing is the major activity on the public lands affecting wildlife habitat.¹¹⁸ Numerous impacts of livestock grazing are harmful to wildlife, including degradation of habitat, reduction in forage, introduction of disease and pollution, destruction of riparian areas, and spread of exotic vegetation.¹¹⁹ Three-fourths of the threatened and endangered animals residing on BLM lands are likely harmed by livestock grazing.¹²⁰ Future planning decisions regarding grazing are certain to be critical for wildlife.

C. The Multiple Use Mandate

In the 1960s, public lands law began to change dramatically. Urban Americans with increasing leisure time began to pay more attention to the public lands, and conservation and recreation groups saw their memberships increase.¹²¹ These new constituents of the public lands began to lobby Congress, DOI, and BLM for a new approach to land management.¹²² At the beginning of this new era, Congress directed BLM to manage the lands under its control for multiple uses.¹²³ For the first time, wildlife advocates could point to specific statutory provisions that designated wildlife management as a desired use of the public lands.

The Classification and Multiple Use Act of 1964 (CMU Act)¹²⁴ formally authorized multiple use management of BLM lands.¹²⁵ In the CMU

environmental groups, and governmental, tribal, or scientific interests. *Id.* § 1784.6-1(c). However, some members of Congress have attacked these regulations, and the livestock industry has filed suit to enjoy their implementation. *Public Lands Council v. Babbitt*, No. 95-165B (D. Wyo. filed July 27, 1995).

¹¹⁶ See *supra* note 112. Conservationists requested that the boards be allowed to expire in 1985, and their duties transferred to the councils. BLM refused, and the director reinstated the advisory boards by a 1986 administrative order. 1987 WILDLIFE REPORT, *supra* note 111, at 41.

¹¹⁷ See e.g. WILKINSON, *supra* note 32, at 93-94.

¹¹⁸ RANGELAND REFORM, *supra* note 60, at 25-27; GRAZING TO EXTINCTION, *supra* note 23, at 3; 1987 WILDLIFE REPORT, *supra* note 111, at 31.

¹¹⁹ GRAZING TO EXTINCTION, *supra* note 23, at 7.

¹²⁰ *Id.* at 8-9.

¹²¹ JAMES MUHN & HANSON R. STUART, OPPORTUNITY AND CHALLENGE: THE STORY OF BLM 104-05 (1988).

¹²² *Id.* at 105; R. MCGREGGOR CAWLEY, FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS 15-33 (1993). Among other topics, these groups voiced concern about unplanned resource use, explosive growth, endangered wildlife, and pollution. MUHN & STUART, *supra* note 121, at 104-05.

¹²³ Classification and Multiple Use Act of 1964, Pub. L. No. 88-607, 78 Stat. 986, 987-88 (expired 1970).

¹²⁴ Pub. L. No. 88-607, 78 Stat. 986 (expired 1970).

¹²⁵ *Id.* § 1(a). Prior to 1964, the BLM administered its land for some multiple uses without statutory authority. The CMU Act was passed pursuant to a compromise between Congress-

Act, Congress first recognized nonconsumptive uses, such as outdoor recreation, watershed protection, wilderness preservation, and fish and wildlife management, as desired uses of the public lands.¹²⁶ The statute directed BLM to balance these values with traditional consumptive uses, such as timber production, grazing, and mining, and to authorize a combination of uses that best met present and future needs of the American public.¹²⁷ This new multiple use mandate induced several organizational changes at BLM. The agency created new divisions dealing with wildlife, watershed protection, and recreation, and gave state and district personnel greater responsibilities for on-the-ground activities.¹²⁸ BLM also established Resource Area Offices, increasing the agency's decentralization.¹²⁹

Because Congress did not provide BLM with any guidance as to how to balance resource allocation to best meet the public's needs, the agency had broad discretion in making management decisions under the CMU Act.¹³⁰ Observers have accordingly criticized multiple use statutes such as the CMU Act for providing agencies with unbridled discretion in making resource allocation decisions.¹³¹ While some commentators have argued that the multiple use standard does set enforceable, substantive limitations on agency action,¹³² courts have been reluctant to curb BLM's discretion.¹³³ This debate remains important because BLM continues to plan and manage its lands for multiple uses pursuant to FLPMA.¹³⁴ The extent to which courts are willing to review BLM planning decisions that do not sufficiently consider the needs of wildlife will have significant impacts on the way BLM balances competing uses of the public lands.

man Wayne Aspinall (D-Colo.), who advocated commodity use of public lands resources, and preservationist-minded DOI Secretary Stewart Udall. MUHN & STUART, *supra* note 121, at 111-15, 117. The Act was a temporary measure intended to govern management of the public lands pending the results of the newly created Public Land Law Review Commission's comprehensive study of public land laws. *Id.*

¹²⁶ Pub. L. No. 88-607, § 1(a), 78 Stat. 986 (1964) (expired 1970).

¹²⁷ *Id.* § 5(b).

¹²⁸ MUHN & STUART, *supra* note 121, at 116.

¹²⁹ *Id.* at 116-17.

¹³⁰ *Id.*

¹³¹ See, e.g., Applegate, *supra* note 78, at 451-55 (criticizing U.S. Forest Service decision-making process under multiple use statutes); Blumm, *supra* note 23, at 407, 414 (calling multiple use a "wholesale delegation of authority to land managers to act in the public interest").

¹³² See, e.g., George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 100-09 (1983) (discussing judicial review of BLM land use plans). However, Professor Coggins appears to have changed his opinion on this issue somewhat in recent years. See Coggins, *supra* note 46, at 388-90 (arguing multiple use is ambiguous and obsolete).

¹³³ See *Perkins v. Bergland*, 608 F.2d 803, 806-07 (9th Cir. 1979) (quoting *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975) (multiple use standard "breathe[s] discretion at every pore")); *Natural Resource Defense Council v. Hodel*, 624 F. Supp. 1045, 1056-57 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987).

¹³⁴ See *infra* part IV.

D. Pre-FLPMA Planning Process

In 1969, BLM responded to the CMU Act's multiple use mandate by beginning its first formal planning effort.¹³⁵ Congress passed the National Environmental Policy Act¹³⁶ soon thereafter, significantly influencing the agency's planning process. During this period, the advisory boards created by the Taylor Grazing Act, which disproportionately represented ranching interests, pressured BLM to maintain historically high levels of grazing.¹³⁷ This pressure often produced unbalanced decisions that damaged range and riparian areas crucial to wildlife.¹³⁸

1. Planning Under the CMU Act

During the 1960s, BLM adopted a complex "competitive" planning model that resulted in the management framework plan, or MFP.¹³⁹ BLM aptly named the planning model because it required BLM's divisions to "compete" to ensure that each resource received sufficient attention in each plan.¹⁴⁰ Preparing an MFP under this process required three steps. First, each BLM resource division projected how the planning area could be managed to optimize the resource overseen by that division.¹⁴¹ Second, BLM personnel compared projections for each resource and integrated them to achieve a "multiple use solution."¹⁴² Finally, the BLM district manager reviewed, adjusted, and approved the solution as an MFP.¹⁴³ During this process, each division had the opportunity to advocate on behalf of the resource it oversaw.¹⁴⁴

Not surprisingly, this process resulted in plans that benefitted those BLM divisions with the most power, such as the grazing and minerals divisions. Managers of the newly created wildlife, recreation, and watershed resources divisions remained on the outside looking in.¹⁴⁵ The less powerful divisions worked with smaller budgets and lacked the support of influential constituencies such as the livestock and mining industries.¹⁴⁶ As a result, BLM's early plans did little to resolve difficult resource conflicts,

¹³⁵ Coggins & Evans, *supra* note 83, at 448; *see also* MUHN & STUART, *supra* note 121, at 121 (describing early BLM efforts to implement multiple use management).

¹³⁶ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified as amended at 42 U.S.C. §§ 4321-4370(d) (1994)).

¹³⁷ *See supra* notes 107-16 and accompanying text.

¹³⁸ BEAN, *supra* note 101, at 152.

¹³⁹ Coggins & Evans, *supra* note 83, at 449-51.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 450.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 449.

¹⁴⁵ *Id.* at 451. These divisions were created after the 1964 CMU Act. Prior to that time, BLM was divided into five groups tied to the agency's traditional management functions: survey, minerals, lands, forestry, and range. MUHN & STUART, *supra* note 121, at 118. After the agency's reorganization in the 1960s, BLM's Assistant Director for Resources oversaw six divisions: land and realty, range, recreation, forestry, watershed, and wildlife. Minerals management had its own separate division. *Id.* at 174.

¹⁴⁶ *See supra* notes 32-33 and accompanying text.

servicing instead to formalize pre-existing agency biases and management approaches.¹⁴⁷

Although BLM lost the statutory authority to engage in multiple use planning when the CMU Act expired in 1970, the agency continued to use this planning procedure until 1975.¹⁴⁸ In 1976, Congress enacted FLPMA. By that time, BLM had already promulgated MFPs for eighty to eighty-five percent of the public lands outside of Alaska.¹⁴⁹ Critics have attacked MFPs as documents that merely formalized existing BLM tendencies to favor grazing and mining, leaving other public lands uses on the sidelines.¹⁵⁰ Nonetheless, preexisting MFPs will remain in effect until replaced by the new generation of plans prepared under FLPMA.¹⁵¹

2. *The National Environmental Policy Act*

The National Environmental Policy Act (NEPA),¹⁵² passed only six months after the preparation of MFPs began, had a large impact on BLM planning and on BLM's overall approach to management of the public lands. NEPA is "our basic national charter for protection of the environment,"¹⁵³ and it declares a national policy of encouraging harmony between humans and nature, promoting efforts to prevent or eliminate environmental damage, and increasing knowledge of ecological systems and natural resources.¹⁵⁴ Although the statute does not require an agency to make the most environmentally preferable decisions, it does direct federal agencies to consider the environmental impacts of their actions.¹⁵⁵ NEPA and its implementing regulations also set forth procedures designed to ensure public input regarding agency decisions.¹⁵⁶ With NEPA's passage, agencies were, for the first time, required to integrate environmental considerations into their decision making and planning processes.

The statute requires any agency considering a major federal action that will significantly affect the environment to prepare a detailed statement considering the following: 1) the impacts of the proposed action, including any unavoidable adverse effects; 2) alternatives to the proposed

¹⁴⁷ See Coggins & Evans, *supra* note 83, at 450-51.

¹⁴⁸ *Id.* at 450.

¹⁴⁹ 1987 WILDLIFE REPORT, *supra* note 111, at 21.

¹⁵⁰ Coggins & Evans, *supra* note 83, at 451.

¹⁵¹ 43 U.S.C. § 1732(a) (1994). The *BLM Manual* explains that a qualified MFP remains in effect until replaced by a FLPMA plan. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, *BLM MANUAL* § 1618.1 (1984) [hereinafter *BLM MANUAL*]. A qualified MFP is one that was prepared with public participation and intergovernmental coordination, and incorporated the principles of multiple-use and sustained yield established in FLPMA. *Id.* § 1618.11. However, these requirements do not alter the fact that the "competitive" MFP planning process was skewed from the start in favor of consumptive uses, such as mining and grazing, that are managed by the most powerful BLM divisions. See *supra* notes 128-49 and accompanying text.

¹⁵² National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1994).

¹⁵³ 40 C.F.R. § 1500.1(a) (1995).

¹⁵⁴ 42 U.S.C. § 4321 (1994).

¹⁵⁵ *Id.* § 4332(2)(C).

¹⁵⁶ *Id.*; 40 C.F.R. § 1500.1(b) (1995).

action; 3) the relationship between short-term uses of the environment and long-term productivity; and 4) any irreversible or irretrievable commitments of resources involved in the proposed action.¹⁵⁷ Agencies faced with unresolved conflicts over different uses of resources must also develop and study appropriate alternatives to a proposed action.¹⁵⁸ According to NEPA's implementing regulations, agencies may fulfill these obligations by preparing either an environmental assessment (EA) or an environmental impact statement (EIS).¹⁵⁹ The proposed action and its potential impacts dictate which type of document will be adequate to fulfill NEPA's mandate.

Every proposed agency action falls into one of three categories for NEPA purposes.¹⁶⁰ First, agencies may determine that certain types of projects do not have significant impacts on the environment and should therefore be "categorically excluded" from the requirement to prepare an EA or EIS.¹⁶¹ Second, agencies may identify projects for which an EA or EIS is generally required.¹⁶² For example, BLM has determined that an EIS must be prepared in connection with every resource management plan.¹⁶³ Third, agencies may wait to determine whether an EA or EIS should be prepared in connection with a particular action.

When an agency begins to plan an action that is not categorically excluded from or included in NEPA's requirements, it may choose to first prepare an EA.¹⁶⁴ An agency may use an EA to evaluate whether to prepare an EIS or to facilitate compliance with all of NEPA's requirements, including the mandate to consider alternatives to the potential project. Each EA must explain the need for the proposed action, describe alternatives to the action, and analyze the environmental impacts of all alternatives.¹⁶⁵ Generally, an agency issues an EA in draft form and accepts public comment on its discussion and conclusions.¹⁶⁶ After considering public input and the EA, an agency must then determine whether the proposed project will significantly affect the human environment. If the project will not, the agency issues a "finding of no significant impact" (FONSI),¹⁶⁷ which concludes the NEPA process with respect to the pro-

¹⁵⁷ 42 U.S.C. § 4332(2)(C) (1994).

¹⁵⁸ *Id.* § 4332(2)(E).

¹⁵⁹ 40 C.F.R. §§ 1501.3-4 (1995).

¹⁶⁰ ENVIRONMENTAL LAW REPORTER, ENVIRONMENTAL LAW INST., NEPA DESKBOOK 9 (1989).

¹⁶¹ 40 C.F.R. § 1507.3(b)(2) (1995). For example, BLM determined that the reintroduction of native species into their historical habitats (except threatened or endangered species) and the issuance of certain grazing permits and leases are categorically excluded from the requirement to prepare an EA or EIS. U.S. DEP'T OF THE INTERIOR, 516 DEPARTMENTAL MANUAL 6, App. 5.

¹⁶² 40 C.F.R. § 1507.3(b)(2) (1995). Agencies can thus "categorically include" certain projects under NEPA's requirement that an EA or EIS be prepared.

¹⁶³ *Id.* § 1601.0-6; BLM MANUAL, *supra* note 151, § 1601.06.

¹⁶⁴ 40 C.F.R. § 1501.3 (1995).

¹⁶⁵ *Id.* § 1508.9(b).

¹⁶⁶ NEPA's implementing regulations, however, do not require that an agency accept comment on a draft EA. *See id.* § 1503.1 (regulations requiring an opportunity for public comment apply only to EISs).

¹⁶⁷ *Id.* § 1508.13.

ject at issue. If the project will have a significant impact, the agency must next prepare an environmental impact statement (EIS).¹⁶⁸

An EIS provides a more detailed and in-depth examination of issues than an EA. The most critical sections of an EIS are the discussions of the alternatives to the proposed action and the environmental consequences of the proposed action and all alternatives.¹⁶⁹ An agency preparing an EIS must initiate the process with formal scoping, during which other agencies and members of the public can identify significant issues for consideration in the EIS.¹⁷⁰ Agencies must also accept written comments on each EIS from the public and other agencies.¹⁷¹ In addition, to ensure that agencies make decisions based on the most up-to-date information, NEPA's implementing regulations direct agencies to supplement an existing EIS under certain circumstances.¹⁷² Supplemental EISs are required when an agency makes substantial changes to a proposed project that alter its environmental consequences, and when there are significant new circumstances or information relevant to the proposed action and its effects.¹⁷³

As noted above, BLM must prepare an EIS when preparing a resource management plan¹⁷⁴ and must follow NEPA's procedures when proposing any other major federal actions. NEPA's requirements thus permeate the agency's decision-making process. In hindsight, BLM personnel have praised NEPA for forcing the agency to take a "holistic" approach to decision making.¹⁷⁵ Unlike BLM's approach to planning under the CMU Act, in which the agency considered each resource separately, implementing NEPA required a joint examination of all resources.¹⁷⁶ Observers have also credited the statute with increasing the diversity of BLM's employees—wildlife biologists and other specialists were important additions to agency staff.¹⁷⁷ In practice, however, BLM was reluctant to dramatically alter its MFP planning process to integrate NEPA's requirements.¹⁷⁸ For example, although NEPA required the agency to examine the environmental impacts of its grazing management program, BLM chose not to prepare individual, site-specific EISs considering the local impacts of grazing decisions. Instead, the agency prepared one programmatic EIS for its entire grazing program.¹⁷⁹ BLM intended to prepare brief environmental analysis

¹⁶⁸ 42 U.S.C. § 4332(C) (1994); 40 C.F.R. § 1501.4 (1995).

¹⁶⁹ 40 C.F.R. § 1502.14 (1995) ("This section is the heart of the environmental impact statement."); *id.* § 1502.16 (requiring a discussion of impacts to form the basis for comparison of alternatives). An agency must consider all reasonable alternatives, including a "no action" alternative. *Id.* § 1502.14(a), (d).

¹⁷⁰ *Id.* § 1501.7.

¹⁷¹ *See, e.g.*, 42 U.S.C. § 4332(C) (1994); 40 C.F.R. § 1506.6 (1995).

¹⁷² 40 C.F.R. § 1502.9(c) (1995).

¹⁷³ *Id.*

¹⁷⁴ *See supra* note 163 and accompanying text.

¹⁷⁵ MUHN & STUART, *supra* note 121, at 165 (quoting Ron Hofman, Associate State Director, BLM California State Office).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 166.

¹⁷⁸ Coggins & Evans, *supra* note 83, at 451.

¹⁷⁹ *Id.* BLM also prepared one programmatic EIS for its entire mineral leasing program.

records considering the local impacts of specific allotment management plans and complete a full site-specific EIS only if these analyses revealed significant environmental effects.¹⁸⁰

In 1974, the Natural Resources Defense Council (NRDC) successfully challenged the sufficiency of BLM's programmatic grazing EIS.¹⁸¹ The court agreed with NRDC's claim that BLM's general EIS on the grazing program did not fulfill NEPA's requirements.¹⁸² In its opinion, the district court stated that a programmatic EIS was insufficient to analyze the site-specific impacts of local allotment management plans.¹⁸³ The court also held that one nationwide EIS would not provide local BLM decision makers with adequate on-the-ground information to analyze the available alternatives and their consequences, as NEPA required.¹⁸⁴ In a 1975 court-approved settlement, BLM agreed to prepare 212 site-specific EISs considering the local impacts of grazing decisions.¹⁸⁵

To meet this obligation, BLM formulated a new planning process that involved completion of MFPs, preparation of an EIS for each management area, and adoption of individual grazing decisions.¹⁸⁶ Professor Coggins has called the initiation of this new planning process the beginning of true planning for BLM lands.¹⁸⁷ Although NEPA mandates no particular substantive outcome in BLM planning and management decisions, compliance with NEPA procedures does require agencies to collect available data and analyze alternative management decisions.¹⁸⁸ These preliminary steps are necessary to a successful formal planning effort.

The grazing EISs BLM prepared to comply with the NRDC settlement reveal NEPA's role in fostering comprehensive planning and agency consideration of wildlife on the public lands.¹⁸⁹ BLM has paid more attention to a wide variety of land uses formerly given short shrift, such as wildlife, because NEPA requires BLM range managers and overseers of other consumptive resources to evaluate the environmental impacts of their decisions in advance. In addition, NEPA's procedural requirements have increased public access to the public lands decision-making process. Wild-

¹⁸⁰ *Id.* at 452. The Council on Environmental Quality did not promulgate regulations formalizing the requirements for preparing EAs until 1978. Prior to that time, BLM prepared environmental analysis records. These were brief documents, similar to EAs, that the agency used to determine whether to consider the impacts of an allotment management plan in an EIS. *Id.* Allotment management plans actually allocate forage to grazing permittees at the local level. *Id.* at 452 n.303.

¹⁸¹ *Natural Resources Defense Council v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976).

¹⁸² *Id.* at 841.

¹⁸³ *Id.* at 839.

¹⁸⁴ *Id.*

¹⁸⁵ *Natural Resources Defense Council v. Andrus*, 448 F. Supp. 802, 803-04 (D.D.C. 1978). Loomis, *supra* note 74, at 50; Coggins & Evans, *supra* note 83, at 453. The parties later agreed to reduce the number of site-specific EISs to 153. *Natural Resource Defense Council v. Andrus*, 448 F. Supp. at 806.

¹⁸⁶ Coggins & Evans, *supra* note 83, at 453.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See id.* at 455-56.

life advocates, recreationists, and other public lands constituencies have taken advantage of this greater access and brought their interests to BLM's attention. NEPA did not, however, provide BLM with the comprehensive guidance for planning that it had always lacked, nor did it give agency decision makers substantive direction. In 1976, Congress finally gave BLM greater authority and direction for land planning by enacting FLPMA.

IV. PUBLIC LANDS MANAGEMENT AND PLANNING UNDER FLPMA

Prior to 1976, BLM lacked an organic act that specified its mission, authorities, and responsibilities. Following the 1970 issuance of the Public Land Law Review Commission's report on management of the public domain,¹⁹⁰ BLM sought such a statutory mandate.¹⁹¹ Congress enacted the Federal Land Policy and Management Act (FLPMA)¹⁹² to establish a permanent policy for the BLM's administration of the public lands, arguably as a result of congressional dissatisfaction with past BLM management practices.¹⁹³ The increasing degradation of the public lands had also prompted sponsors of the legislation to act.¹⁹⁴ FLPMA reaffirmed the principle of multiple use and sustained yield management of BLM lands originally contained in the Classification and Multiple Use Act (CMU Act) of 1964,¹⁹⁵ and called for extensive planning for those lands. FLPMA also recognized fish and wildlife as one of several significant public lands resources.¹⁹⁶ Importantly, FLPMA placed some limits on BLM's discretion in planning for and managing public lands that were missing from the CMU Act.¹⁹⁷ Several other statutes also restrict BLM discretion and mandate consideration of the wildlife resource. This section discusses the impetus for FLPMA's passage, the planning process it requires, and national BLM

¹⁹⁰ PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND (1970) [hereinafter PLLRC REPORT].

¹⁹¹ See MUHN & STUART, *supra* note 121, at 166-71.

¹⁹² Pub. L. No. 94-579, 90 Stat. 2745 (codified as amended at 43 U.S.C. §§ 1701-1784 (1994)).

¹⁹³ See, 43 U.S.C. § 1751(b)(1) (1994) (reciting congressional finding that a substantial amount of the public lands are deteriorating and that range improvements could halt deterioration and benefit wildlife, watershed protection, and livestock); Coggins, *supra* note 132, at 5.

¹⁹⁴ 121 CONG. REC. S507 (Jan. 30, 1975) (remarks of Senator Floyd K. Haskell (D-Colo.)).

¹⁹⁵ Pub. L. No. 88-607, 78 Stat. 986 (1964) (expired 1970).

¹⁹⁶ See 43 U.S.C. § 1701(8) (1994) (stating that BLM will manage public lands in a manner that will provide food and habitat for fish and wildlife); *id.* § 1702(c) (including wildlife and fish within the definition of multiple use).

¹⁹⁷ See Coggins, *supra* note 132, at 54-63, 100-08. For example, section 103(c) of FLPMA warns BLM not to view maximum monetary return or maximum resource output as the primary management goal and prohibits the agency from managing the land in a way that would permanently impair its productivity or environmental quality. 43 U.S.C. § 1702(c) (1994). Section 103(h) requires BLM to manage for sustained yield of all renewable resources, barring planning and management decisions that bring short-term benefits but jeopardize future outputs of resources. *Id.* § 1702(h). Notwithstanding these limits, BLM retains a great deal of discretion under FLPMA.

initiatives and other statutes, that affect BLM's planning decisions regarding wildlife.

A. *Impetus for Public Lands Law Reform*

In 1964, the same year Congress enacted the CMU Act, Congress also created the Public Land Law Review Commission (PLLRC).¹⁹⁸ PLLRC was established as part of a compromise between conservation-minded members of Congress and advocates of disposal and development of the public domain.¹⁹⁹ Congress directed PLLRC to undertake a comprehensive review of the three thousand public lands laws in the United States, study the policies and practices of the federal land management agencies, and recommend modifications to existing laws and practices.²⁰⁰ PLLRC released its report in 1970. Although many environmentalists criticized the report for its commodity-oriented approach,²⁰¹ many of its recommendations were in fact aimed at protection and rehabilitation of public lands and the wildlife living there.²⁰² Ultimately, Congress incorporated many of the PLLRC's recommendations in FLPMA.²⁰³

FLPMA provides BLM with an organic act and addresses a wide variety of issues concerning public lands. FLPMA gives BLM permanent authority to manage public lands on a multiple use, sustained yield basis,²⁰⁴ calls for protection of the public lands,²⁰⁵ provides for public participation in management of BLM lands,²⁰⁶ and limits BLM's discretion in planning and management activities by prescribing management standards²⁰⁷ and promising closer congressional oversight in the form of several legislative vetoes.²⁰⁸ FLPMA also requires BLM to engage in a comprehensive planning effort to resolve conflicts on the public lands,²⁰⁹ and directs the

¹⁹⁸ Pub. L. No. 88-606, 78 Stat. 982 (1964) (codified as amended at 43 U.S.C. §§ 1391-1418 (1994)).

¹⁹⁹ Muhn & Stuart, *supra* note 121, at 120.

²⁰⁰ PLLRC REPORT, *supra* note 190, at x.

²⁰¹ See MUHN & STUART, *supra* note 121, at 120 (describing criticism of PLLRC).

²⁰² See, e.g., PLLRC REPORT, *supra* note 190, at 7 (stating that a fundamental premise of public lands law should be providing responsible stewardship of the public lands and their resources), 157-75 (stating that land managers should give greater emphasis to fish and wildlife values in allocating public lands to various uses, and setting forth recommended actions to accomplish this goal).

²⁰³ MUHN & STUART, *supra* note 121, at 166.

²⁰⁴ 43 U.S.C. § 1732(a) (1994). An exception is provided for "revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands" in western Oregon, which are managed for the dominant use of timber production. *Id.* § 1181(a).

²⁰⁵ *Id.* § 1732(b).

²⁰⁶ *Id.* § 1712(f); see also Coggins, *supra* note 132, at 18 (explaining how FLPMA encourages public participation).

²⁰⁷ 43 U.S.C. § 1713 (1994); see MUHN & STUART, *supra* note 121, at 120.

²⁰⁸ See 43 U.S.C. §§ 1713(e)(2), 1714(c); see Coggins, *supra* note 132, at 18. FLPMA did not repeal the Taylor Grazing Act, 43 U.S.C. §§ 315-315r (1994), but supplements its provisions. See 43 U.S.C. §§ 1751(b)(1), 1752(a) (1994) (referring to provisions of the Taylor Grazing Act).

²⁰⁹ 43 U.S.C. § 1712 (1994).

agency to act in accordance with its land management plans once they are completed.²¹⁰

B. The FLPMA Planning Process

In FLPMA, Congress placed a great deal of faith in the planning process as a way to ensure an appropriate allocation of the various resources on the public lands. For example, the House committee report on FLPMA stated that "the proper multiple use mix of retained public lands is to be achieved by comprehensive land use planning."²¹¹ In addition, Congress declared that the national interest required present and future uses of public lands be projected through a land use planning process.²¹² The multiple resources for which BLM must plan under FLPMA include fish and wildlife, recreation, range, timber, minerals, watershed, and natural scenic, scientific, and historical values.²¹³ Unfortunately, BLM's efforts to comply with FLPMA's planning mandates have been hindered by the statute's lack of specific requirements and guidelines for the planning process.

1. Statutory Requirements for Plan Content and Preparation

FLPMA contains few specific standards against which the contents of a Resource Management Plan (RMP) can be measured. In fact, the statute sets forth no required RMP elements. The statute also fails to provide guidance regarding the procedures BLM should use in preparing plans, beyond emphasizing that RMPs will be prepared with public participation and involvement.²¹⁴ In addition, FLPMA establishes no timetable for plan completion.

Instead of giving BLM explicit direction, the statute contains nine "criteria" for the planning effort.²¹⁵ These criteria are intended to ensure that all values are considered in the planning process, leading to a balanced multiple use, sustained yield allocation of resources.²¹⁶ However, the criteria may be too broad to achieve this goal. According to FLPMA's criteria, BLM must observe principles of multiple use and sustained yield, use a systematic interdisciplinary approach, and rely on an inventory of public lands, resources, and values when preparing plans.²¹⁷ The agency must also consider present and potential uses of public lands and the relative scarcity of values involved, compare long-term and short-term benefits, and coordinate its planning process with that of state and local governments and Indian tribes.²¹⁸ Plans must provide for compliance with federal and state pollution control laws, be consistent with state and local

²¹⁰ *Id.* § 1732(a).

²¹¹ H.R. REP. NO. 1163, 94th Cong., 2d Sess. 2 (1976), reprinted in 1976 U.S.C.C.A.N. 6175, 6176.

²¹² 43 U.S.C. § 1701(a)(2) (1994).

²¹³ *Id.* § 1702(c).

²¹⁴ *Id.* § 1712(a), (f).

²¹⁵ *Id.* § 1712(c).

²¹⁶ See Coggins & Evans, *supra* note 83, at 456.

²¹⁷ 43 U.S.C. § 1712(c)(1)-(2), (4) (1994).

²¹⁸ *Id.* § 1712(c)(5)-(7), (9).

plans to the maximum extent possible, and give priority to areas of critical environmental concern.²¹⁹

These criteria sound promising, but only one provides an objectively enforceable restriction on BLM's discretion.²²⁰ The requirement that plans result in compliance with applicable pollution control laws can be monitored with reference to numerical standards. The other standards give BLM little concrete assistance in formulating RMPs.

Commentators have criticized these provisions for offering little direction for BLM to follow in carrying out its planning efforts and balancing multiple uses of the public lands.²²¹ The broad principles for planning described above still provide BLM with a good deal of discretion when preparing RMPs, leaving the agency vulnerable to pressure from consumptive users of the public lands who seek decisions which will favor their interests. In addition, BLM's compliance with even these general guidelines has been questioned.²²² BLM thus has operated in a statutory vacuum in developing and implementing its formal planning process.²²³

Once BLM completes an RMP, the plan controls the management of the public lands.²²⁴ Numerous FLPMA provisions refer to the importance of conforming to RMPs when taking specific actions such as selling or acquiring lands or changing existing land classifications.²²⁵ Both BLM regulations and the *BLM Manual* emphasize that resource management actions, budget proposals, and more detailed implementation plans must conform to approved RMPs.²²⁶ BLM personnel wishing to depart from the course of action called for in an RMP must obtain an amendment to or revision of the plan, each of which requires public participation, inter-agency coordination, and the preparation of an environmental assessment

²¹⁹ *Id.* § 1712(c)(3), (8)-(9). Areas of critical environmental concern are areas requiring special management attention to, among other things, prevent irreparable damage to fish and wildlife resources. 43 U.S.C. § 1702(a) (1994); see discussion *infra* part V.A.2.

²²⁰ See George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. 307, 321-22 (1990) (arguing that the requirement to "give priority to the designation and protection" of areas of critical environmental concern may also be a definite standard; however, it is hard to objectively measure what degree of consideration is called for by the "giving priority" standard) (citing 43 U.S.C. § 1712(c)(3) (1994)).

²²¹ See, e.g., COGGINS, *supra* note 76, § 13.04[3][c].

²²² Coggins & Evans, *supra* note 83, at 460-64 (criticizing BLM's adherence to each of the statutory guidelines).

²²³ BLM's experience with planning can be contrasted with that of the U.S. Forest Service, which is guided by the much more detailed requirements contained in the National Forest Management Act (NFMA). See 16 U.S.C. §§ 1604-1729 (1994). For example, NFMA requires the Forest Service to protect waterbodies from detrimental impacts, sets limits on where timber harvesting may occur, and directs the agency to ensure a diversity of plant and animal communities. *Id.* § 1604(g). Unlike FLPMA, NFMA sets a deadline for forest plan completion. *Id.* § 1604(j).

²²⁴ 43 U.S.C. § 1732(a) (1994). Until an RMP is completed for a resource area, BLM decisions must conform to the provisions of pre-existing management framework plans. 43 C.F.R. § 1610.5-5 (1995).

²²⁵ 43 U.S.C. §§ 1712(d) (modifying land classification), 1713(a) (selling), 1715(b) (acquisition) (1994).

²²⁶ 43 C.F.R. § 1610.5-3(a) (1995); BLM MANUAL, *supra* note 151, § 1617.3.

or environmental impact statement.²²⁷ Final RMPs thus restrict the discretion that BLM personnel might otherwise have when making resource management decisions on the public lands.

2. BLM Planning Regulations and Guidance

After Congress enacted FLPMA, BLM evaluated its approach to planning for the public lands in light of the new statutory mandate. After some debate over whether to improve the MFP approach or develop an entirely new planning process, the agency chose to follow the latter course.²²⁸ In 1979, BLM issued regulations that substantially upgraded the existing advocacy model of planning²²⁹ and called for an interdisciplinary approach instead.²³⁰ These regulations did away with the "competitive" planning procedures used to prepare MFPs and established a nine-step planning process.²³¹ Under these regulations, BLM would engage in truly comprehensive planning by considering all resources on all lands within each planning area.²³² This new process had great promise for assisting BLM in balancing multiple uses, because it required BLM to begin with a clean slate in considering resource allocation issues, collecting data, and evaluating alternative management approaches for all resources.²³³ Decisions previously made in management framework plans (MFPs) would not be viewed as necessary elements to be included in the new RMPs. Unfortunately, the new Reagan administration soon initiated changes in the regulations that reduced their effectiveness as a tool for comprehensive planning.²³⁴

During the early 1980s, new BLM director Robert Burford established a task force to "streamline" the planning regulations.²³⁵ This review of the regulations proceeded on the assumption that funds for planning would be greatly reduced.²³⁶ Although the revised regulations did little to change the nine-step planning process established under the initial rules, they did take a step back from comprehensive planning by failing to require that all resources be considered during the planning for each area.²³⁷ Instead, new RMPs would focus solely on resource issues that needed resolution and

²²⁷ 43 C.F.R. 1610.5-3(c) (1995).

²²⁸ Loomis, *supra* note 74, at 52.

²²⁹ See *supra* notes 139-43 and accompanying text.

²³⁰ Loomis, *supra* note 74, at 52. At the same time, the U.S. Forest Service developed regulations to implement NFMA's planning mandate. The regulations initially adopted by both agencies were very similar. *Id.* at 52, 285.

²³¹ Williams, *supra* note 37, at 6.

²³² *Id.* at 10; Loomis, *supra* note 74, at 285.

²³³ Loomis, *supra* note 74, at 52.

²³⁴ *Id.* at 285.

²³⁵ Williams, *supra* note 37, at 10.

²³⁶ *Id.*

²³⁷ See 43 C.F.R. §§ 1610.4-1 to 4-2 (1995) (BLM shall analyze public concerns and available information to identify issues to be addressed during the planning process and shall select criteria tailored to those issues).

were not covered by other plans, such as MFPs.²³⁸ The new BLM regulations stand in contrast to the planning rules adopted by the U.S. Forest Service, which contain specific direction regarding how each resource is to be considered during the planning effort.²³⁹

In 1986, BLM took a small step back toward truly comprehensive planning by issuing supplemental program guidance applicable to each of the multiple-use resources.²⁴⁰ This guidance instructs staff on how to consider each resource during the planning process.²⁴¹ For example, each RMP is to identify priority species and habitats, establish objectives for habitat maintenance, and consider the role of wildlife in regional economies.²⁴² Each plan must also identify public lands where grazing will be excluded and should analyze the effects of grazing on other resources.²⁴³ Implicit in the guidance is the expectation that each plan will fully consider each resource. However, the guidance still allows BLM managers to exclude certain issues from the planning process if the agency determines that an evaluation of the issue would be "premature."²⁴⁴ Accordingly, even since the adoption of the supplemental guidance, BLM frequently avoids resolving key resource issues during the planning process.²⁴⁵

3. Sufficiency of Incremental Planning

The pitfalls of this type of incremental planning have been well illustrated in many RMPs prepared to date. For example, BLM often considers existing grazing levels as an external constraint on a final plan, rather than as a resource allocation issue to be resolved through the planning process.²⁴⁶ Such an approach to planning cannot lead to a true balancing of all public lands resources, because certain resource issues may receive little or no consideration during the planning process. Consequently, pre-FLPMA management choices remain effective indefinitely. The end result is an agency decision to avoid preparing an RMP for certain resources.

Such an approach is poor policy and also arguably violates FLPMA, which requires BLM to develop plans for the public lands "regardless of whether such lands previously have been classified, withdrawn, or otherwise designated for one or more uses."²⁴⁷ In addition, BLM's tendency to exclude certain resources from the planning process fails to fulfill

²³⁸ *Id.* LOOMIS, *supra* note 74, at 285; Williams, *supra* note 37, at 20 (BLM initiates a new plan only when the state director determines that issues require a plan and that the existing MFP is insufficient).

²³⁹ See 36 C.F.R. §§ 219.14-.26 (1995).

²⁴⁰ BLM MANUAL, *supra* note 151, § 1620.

²⁴¹ *Id.*

²⁴² *Id.* §§ 1622.11A.1-2, 1622.12E.

²⁴³ *Id.* §§ 1622.31A.1, 1622.32A.

²⁴⁴ *Id.* § 1620.06D.

²⁴⁵ See *infra* note 246 and accompanying text; BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, SAFFORD DISTRICT RESOURCE MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT 12 (1991) [hereinafter SAFFORD RMP] (stating that grazing would not be analyzed in planning effort or NEPA analysis because it had been analyzed in previous documents).

²⁴⁶ Feller, *supra* note 42, at 577.

²⁴⁷ 43 U.S.C. § 1712(a) (1994).

FLPMA's directive that plans be developed in accordance with multiple use and sustained yield principles.²⁴⁸ A true multiple use, sustained yield approach necessarily requires the agency to consider and balance *each* public lands resource. Although BLM maintains a great deal of discretion when preparing plans,²⁴⁹ FLPMA does not provide the agency with discretion to avoid adequate planning altogether. The D.C. Circuit has validated this view in holding that pre-FLPMA MFPs do not satisfy Congress's expectation that the agency would adopt comprehensive land use plans.²⁵⁰ The court rejected BLM's argument that FLPMA authorized the extended use of existing MFPs in place of the new plans required under FLPMA.²⁵¹ The same reasoning leads to the conclusion that BLM's current practice of excluding certain issues from consideration in the RMP process, and its overall delay in finalizing new plans, violates FLPMA.

a. Decentralized Planning Process

BLM's planning process has always been decentralized.²⁵² RMPs are generally prepared for individual resource areas, which are portions of BLM districts. BLM will eventually develop RMPs for approximately 144 such areas.²⁵³ The BLM area manager is the key person in the planning process, because he prepares, implements, and monitors the RMP for the resource area.²⁵⁴ District managers supervise the RMPs in their district and approve or modify the area manager's proposed RMP.²⁵⁵ State directors must approve each RMP in their state and issue guidance to assist area and district managers in the planning effort.²⁵⁶ State directors have a good deal of discretion in formulating guidance documents, which reflect the state directors' coordination with the governors' offices and affected agencies within states.²⁵⁷ Ultimately, the national BLM director has re-

²⁴⁸ *Id.* §§ 1702(c) (defining multiple use as management of resources in the combination that best meets the needs of the American people; providing that resources to be considered include recreation, range, timber, minerals, watershed, wildlife and fish, and scenic values), 1712(c)(1) (requiring BLM to develop plans according to sustained yield and multiple use principles).

²⁴⁹ *Natural Resources Defense Council v. Hodel*, 624 F. Supp. 1045, 1058 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987) (upholding ambiguous BLM plan because FLPMA's general clauses grant BLM great discretion).

²⁵⁰ *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 322 (D.C. Cir. 1987), *rev'd on other grounds sub nom.*, *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990).

²⁵¹ *Id.* at 321-22.

²⁵² *Williams*, *supra* note 37, at 10.

²⁵³ RMP SUMMARY, *supra* note 45.

²⁵⁴ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, BLM PLANNING: A GUIDE TO RESOURCE MANAGEMENT PLANNING ON THE PUBLIC LANDS 5 (1983) [hereinafter BLM PLANNING GUIDE].

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ For example, state directors issue guidance regarding the designation of areas of critical environmental concern (ACECs). See *infra* part V.A.2. These guidance documents further refine national guidance issued by BLM headquarters. Variations in these guidance documents have led to noticeable differences in implementation of the ACEC program

sponsibility for the entire planning system, including issuing national guidance and setting budget priorities.²⁵⁸

This distribution of responsibilities for planning mirrors BLM's overall decentralized management structure. Nearly all decision making occurs at local and state levels.²⁵⁹ Although policies emanate from national headquarters,²⁶⁰ national division chiefs often lack the power to enforce their directives.²⁶¹ This produces inconsistent policy implementation and a lack of oversight of local BLM management decisions, particularly if some resources are not fully considered during the planning for each area. Also, local BLM managers are often left vulnerable to strong pressures from ranchers and other commodity interests, resulting in resource allocation decisions that are harmful to wildlife and habitat.²⁶²

b. Plan Substance

Like FLPMA's planning provisions, BLM planning regulations have been criticized for their failure to give specific guidance to agency personnel.²⁶³ Unlike U.S. Forest Service planning regulations, which contain detailed requirements regarding plan content,²⁶⁴ BLM regulations provide little direction and allow the situation in any given resource area to dictate an appropriate plan.²⁶⁵ The regulations simply define a resource management plan as a written document that generally establishes eight "decisions."²⁶⁶ These include identifying land areas for limited, restrictive, or exclusive use, such as designating an important wildlife habitat area as an area of critical environmental concern.²⁶⁷ The plan must also determine allowable resource uses and levels of production to be maintained and must set resource condition goals.²⁶⁸ For example, an RMP could establish a goal of improving the condition of deer habitat to a certain level.²⁶⁹

among the states. CHARLES CALLISON, AREAS OF CRITICAL ENVIRONMENTAL CONCERN ON THE PUBLIC LANDS, PART II (1986).

²⁵⁸ BLM PLANNING GUIDE, *supra* note 254, at 5.

²⁵⁹ 1987 WILDLIFE REPORT, *supra* note 111, at 12. The extent of BLM's decentralization was vividly illustrated during attempts to determine how many RMPs had been completed as of 1995. The national BLM office does not possess this information and suggested calling each state office to determine which RMPs had been completed in the states. Telephone Interview with Kurt Kotter, BLM (Feb. 1995).

²⁶⁰ For example, BLM's headquarters has issued guidance and directives concerning the designation of ACECs. CALLISON, *supra* note 257, at 3-6.

²⁶¹ 1987 WILDLIFE REPORT, *supra* note 111, at 12. As an illustration, state directors are required to submit fish and wildlife data to Washington annually. *Id.* However, the small staff at headquarters cannot ensure that states comply with reporting requirements. *Id.*

²⁶² Blumm, *supra* note 23, at 421. With the changing political climate and the rise of the Wise Use movement in recent years, this type of pressure may become even more difficult to resist.

²⁶³ Coggins & Evans, *supra* note 83, at 464-65.

²⁶⁴ 36 C.F.R. § 219 (1995) (Forest Service planning regulations).

²⁶⁵ Williams, *supra* note 37, at 21.

²⁶⁶ 43 C.F.R. § 1601.0-5(k) (1995).

²⁶⁷ *Id.* § 1601.0-5(k)(1).

²⁶⁸ *Id.* § 1601.0-5(k)(2)-(3).

²⁶⁹ BLM PLANNING GUIDE, *supra* note 254, at 8.

A plan also indicates which areas need to be covered by more detailed activity plans, such as habitat management plans.²⁷⁰ Program constraints, management practices, support actions, and general implementation sequences necessary to achieve plan goals must be set forth.²⁷¹ Finally, plans must include standards for monitoring and evaluating plan effectiveness.²⁷²

c. *BLM's Nine-Step Planning Process*

The regulations require BLM to follow nine steps when preparing each RMP.²⁷³ The planning process and the National Environmental Policy Act (NEPA) process are fully integrated.²⁷⁴ The agency formally initiates preparation of an RMP by publishing a notice in the *Federal Register* and in newspapers of general circulation in the affected area.²⁷⁵ Then, BLM follows nine steps to develop a final RMP.²⁷⁶ It takes at least three years to complete each new plan.²⁷⁷ Once a plan is completed, many years may elapse before it is reexamined. Unlike U.S. Forest Service plans, which must be revised every fifteen years,²⁷⁸ RMPs have no mandatory revision date.

(1) *Issue Identification*

As the first step in the planning process, the regulations require BLM to accept suggestions from federal agencies, state and local governments, Indian tribes, and the public regarding concerns, needs, and resource use and protection opportunities that the agency should consider in preparing the RMP.²⁷⁹ The BLM area manager responsible for plan preparation gathers these suggestions (as well as those from BLM staff) and identifies major issues to guide RMP preparation. Step one also serves as the scoping process required under NEPA.²⁸⁰

²⁷⁰ 43 C.F.R. § 1601.0-5(k)(5) (1995). Activity plans are third-tier plans prepared after RMPs are completed. The first tier of the planning system is national policy, including statutes, guidance, the *BLM Manual*, and nationwide programs for land management. RMPs, and MFPs where they have not yet been replaced, comprise the second tier. *See supra* notes 37-38 and accompanying text.

²⁷¹ 43 C.F.R. § 1601.0-5(k)(4), (6)-(7) (1995).

²⁷² *Id.* § 1601.0-5(k)(8).

²⁷³ *Id.* §§ 1601.0-1 to 1610.8.

²⁷⁴ BLM PLANNING GUIDE, *supra* note 254, at 8.

²⁷⁵ 43 C.F.R. § 1610.2(c) (1995).

²⁷⁶ The nine-step planning process is comprehensively described in BLM PLANNING GUIDE, *supra* note 254, at 10-18.

²⁷⁷ BUDGET JUSTIFICATIONS, *supra* note 49, at 3-109.

²⁷⁸ *See* 36 C.F.R. § 219.10(g) (1995) (forest plans are ordinarily revised on a 10-year cycle, or at least once every 15 years).

²⁷⁹ 43 C.F.R. § 1610.4-1 (1995).

²⁸⁰ *Id.* Scoping is a process during which an agency determines what issues its NEPA analysis for a proposed project will address. Agencies conduct scoping by consulting with other federal, state, and local agencies and Indian tribes, and by accepting input from interested members of the public. 40 C.F.R. § 1501.7 (1995). Once scoping is completed, preparation of an environmental assessment (EA) or environmental impact statement (EIS) begins. BLM has taken the position that the approval of every RMP is a major federal action with

The process of issue identification is crucial to the entire planning process. If the agency believes certain resource issues have been adequately resolved by existing plans, it may give those questions less than full attention during RMP preparation or ignore them altogether.²⁸¹ To ensure that wildlife and habitat management issues receive careful examination and analysis, advocates for these issues must make BLM aware of the significance of the issues at the outset of the planning process.

(2) *Planning Criteria*

After identifying major resource issues, the regulations require the area manager to develop planning criteria to guide RMP preparation.²⁸² The planning criteria established for each RMP tailor the planning process to the resource issues previously identified. This allows BLM to avoid unnecessary data collection and analysis and establish standards and measures to be used in preparing an RMP.²⁸³ These criteria determine what the agency will consider during the planning process and how the agency will evaluate various alternatives.²⁸⁴ Because these criteria are such an important aspect of the planning process, BLM accepts public comment on the proposed criteria before adopting them.²⁸⁵ Members of the public and other agencies may also suggest adding or deleting certain criteria.²⁸⁶

(3) *Inventory Data and Information*

The planning criteria identify the types and levels of data necessary to resolve the selected resource issues.²⁸⁷ Next, the area manager arranges for the assembly of available resource, environmental, social, economic, and institutional data and information or, if required, the collection of new data.²⁸⁸

(4) *Management Situation*

After assembling necessary data and information, agency regulations direct the area manager to analyze available facts to gain familiarity with the present status of the resource area that is the subject of the planning

significant effects, requiring agency personnel to prepare an EIS at the same time they develop each RMP. 43 C.F.R. § 1601.0-6 (1995); see *supra* note 162 and accompanying text.

²⁸¹ *LOOMIS, supra* note 74, at 288; *Williams, supra* note 37, at 10 (noting that RMPs are initiated only when issues are not covered by existing plans); *SAFFORD RMP, supra* note 245, at 12 (refusing to reanalyze the allocation of lands within the planning area to grazing and merely incorporating prior decisions). The BLM Manual directs that resource uses not covered by identified issues be analyzed "as appropriate" and "as necessary to support decisions" made in the plan. BLM MANUAL, *supra* note 151, §§ 1616.1, 1616.13B. In practice, this may amount to no analysis at all. See *SAFFORD RMP, supra* note 245, at 12.

²⁸² 43 C.F.R. § 1610.4-2 (1995).

²⁸³ *Id.*

²⁸⁴ BLM PLANNING GUIDE, *supra* note 254, at 12.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 13.

²⁸⁸ 43 C.F.R. § 1610.4-3 (1995).

effort.²⁸⁹ This analysis provides the basis for formulating and evaluating various management alternatives.²⁹⁰ Factors BLM may consider include the following: 1) the types of resource use and protection authorized by FLPMA and other statutes; 2) resource demand forecasts and analyses; 3) estimated sustained levels of uses under existing and differing management practices; 4) requirements necessary to achieve consistency with policies and plans of other federal, state, and local agencies and Indian tribes; 5) opportunities to resolve public concerns; and 6) the degree of local dependence on public lands resources.²⁹¹

BLM compiles this information into an internal document called the management system analysis (MSA).²⁹² The MSA includes projections of the various levels of resource uses that can be achieved under different management approaches and a description of the present management situation to be used as a baseline for evaluating other alternatives.²⁹³ To conduct this analysis, BLM uses computerized mapping techniques to display resource uses on each parcel of land in the resource area.²⁹⁴ In addition, the *BLM Manual* requires agency personnel to perform a cost-benefit analysis of uses that will significantly constrain resource production or require substantial investment.²⁹⁵

Preparation of the MSA is a critical aspect of the planning process. This analysis is meant to inform BLM and the public about the area's capability to resolve the planning issues and satisfy various resource demands,²⁹⁶ and will be relied upon by decision makers throughout the planning process. BLM formulates alternative resource management approaches based on the MSA results.²⁹⁷ The methods used to complete the MSA are thus very important. For example, an overly optimistic estimate of an area's ability to provide forage may lead to overallocation of grazing rights with adverse effects for wildlife. Also, the assumptions upon which BLM bases its cost-benefit analyses, and the frequency with which it undertakes these analyses, are crucial. Cost-benefit analyses should not be reserved solely for projects that restrict the outputs of consumptive resources, but should also examine projects that constrain management of nonconsumptive resources. For example, the costs of activities that will harm nonconsumptive resources such as wildlife or habitat should be taken into account. Similarly, the benefits of preserving wildlife and habitat should be quantified, perhaps with reference to income from tourism or hunting and fishing activities. In this way, BLM will be prepared to evaluate the total effects of proposed management actions and will not

²⁸⁹ *Id.* § 1610.4-4.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² LOOMIS, *supra* note 74, at 289.

²⁹³ *Id.*

²⁹⁴ *Id.* at 290.

²⁹⁵ BLM MANUAL, *supra* note 151, § 1616.43C.

²⁹⁶ LOOMIS, *supra* note 74, at 289.

²⁹⁷ BLM MANUAL, *supra* note 151, § 1616.52.

rely solely on predictions of expected economic outputs from traditional consumptive resources.²⁹⁸

(5) *Formulate Alternatives*

The area manager must next identify reasonable resource management alternatives.²⁹⁹ These alternatives reflect a range of combinations of resource uses and management practices that are feasible given the resource capabilities identified during the management system analysis and respond to the planning issues previously identified.³⁰⁰

The identification of alternatives is another critical step in the planning process. NEPA requires that BLM propose a broad spectrum of alternatives to provide a real basis for resolving conflicts.³⁰¹ To satisfy NEPA, the agency must include a "no-action" alternative.³⁰² Generally, this means "no development" or "no use" of a particular resource. However, BLM has interpreted "no action" to mean the continuation of present levels or types of resource use.³⁰³ Under this interpretation, BLM is not required to consider a "no grazing" or "no mining" alternative during the planning process. The planning effort is thus biased from the start in favor of the status quo, such as existing grazing levels. Although BLM's approach seems to contravene NEPA's directive that agencies consider a wide range of alternatives, it was upheld in 1985 in an unsuccessful challenge brought by the Natural Resources Defense Council.³⁰⁴

Although BLM need not study a true "no action" alternative, it must examine alternatives that favor resource protection, as well as alternatives that are more commodity and production oriented.³⁰⁵ BLM has taken this directive to heart, often proposing alternatives at each end of a spectrum of resource use.³⁰⁶ However, linking together all "preservationist" management options in one alternative and all "commodity" management options in another is often counterproductive, because the agency can then avoid

²⁹⁸ An administrative law judge (ALJ) in the Department of the Interior recently required BLM to carry out this type of cost-benefit analysis before authorizing grazing in certain Utah canyons. The ALJ directed BLM to determine whether the benefits of grazing outweighed costs such as damage to vegetation, riparian areas, and scenic and recreational values. *National Wildlife Fed'n v. BLM*, UT-06-91-01 (Dep't of Interior, Office of Hearings & Appeals, Hearings Div., Dec. 20, 1993); see Joseph Feller, *'Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Lands Grazing Policy*, 25 ENVTL. L. 703, 707 (1995) (discussing above case).

²⁹⁹ 43 C.F.R. § 1610.4-5 (1995).

³⁰⁰ BLM PLANNING GUIDE, *supra* note 254, at 15; Loomis, *supra* note 74, at 292-93.

³⁰¹ 40 C.F.R. § 1502.14 (1995). NEPA's implementing regulations describe the evaluation of alternatives as "the heart" of the environmental impact statement. *Id.*

³⁰² *Id.* § 1502.14(d).

³⁰³ BLM MANUAL, *supra* note 151, § 1616.52B.

³⁰⁴ *Natural Resources Defense Council v. Hodel*, 624 F. Supp. 1045 (D. Nev. 1985), *aff'd* 819 F.2d 927 (9th Cir. 1987).

³⁰⁵ BLM MANUAL, *supra* note 151, § 1616.52E.

³⁰⁶ Feller, *supra* note 42, at 571.

seeking a truly balanced management approach that may satisfy the needs of all public lands users.³⁰⁷

(6) Evaluate Alternatives

Once the area manager has formulated the alternatives, she must estimate their impacts, including the physical, biological, economic, and social effects of each alternative planning approach. BLM must conduct this evaluation in accordance with the procedures mandated by NEPA.³⁰⁸ At this step, the manager must consider any unavoidable adverse impacts, relationships between short-term uses of the public lands and the long-term maintenance or enhancement of the environment's productivity, any irreversible commitments of resources, and ways to mitigate adverse impacts.³⁰⁹ This process is designed to inform the BLM manager and the public about the trade offs and changes associated with the various alternatives, as well as the manner in which each alternative resolves the issues identified in step one.³¹⁰

(7) Select Preferred Alternative

After the area manager has estimated the effects of the various alternatives, she and the district manager evaluate the alternatives and their estimated impacts according to the planning criteria.³¹¹ The area manager identifies the "preferred alternative," which is the alternative that in the manager's judgment best resolves planning issues and promotes balanced multiple use objectives.³¹² This is clearly a key step in the planning process, because the preferred alternative is BLM's proposed plan for the resource area. The district manager reviews this alternative, which BLM then incorporates into the draft RMP and analyzes in the draft environmental impact statement (EIS).³¹³ The draft documents are then forwarded to the state BLM director for approval.³¹⁴ Once the state BLM director approves the draft RMP and EIS, the agency publishes the drafts and accepts public comment for a period of ninety days.³¹⁵ BLM announces the availability of the draft RMP and draft EIS in the *Federal Register*, through local news media, and to interested persons on BLM's mailing lists.³¹⁶

³⁰⁷ *Id.*; Franzese, *supra* note 77, at 57-58 (making same point with respect to U.S. Forest Service planning).

³⁰⁸ 43 C.F.R. § 1610.4-6 (1995).

³⁰⁹ BLM PLANNING GUIDE, *supra* note 254, at 16.

³¹⁰ LOOMIS, *supra* note 74, at 294.

³¹¹ 43 C.F.R. § 1610.4-7 (1995).

³¹² BLM MANUAL, *supra* note 151, § 1616.73.

³¹³ *Id.* § 1616.73.B.

³¹⁴ *Id.* § 1616.73C.

³¹⁵ 43 C.F.R. § 1610.2(e) (1995).

³¹⁶ BLM PLANNING GUIDE, *supra* note 254, at 17.

(8) *Approving the RMP*

BLM regulations next require the area manager to review public comments on the draft RMP and draft EIS.³¹⁷ The manager uses the public's opinions and suggestions in determining whether to stay with the preferred alternative or select another alternative described in the draft documents.³¹⁸ The BLM district manager forwards the proposed RMP, containing the chosen alternative and the final EIS, to the state director for review.³¹⁹ The state director must also submit the proposed plan to the state governor, who has sixty days in which to identify any inconsistencies with state or local plans and policies and suggest any necessary changes.³²⁰ BLM is not required to adopt the governor's recommendations, but must accept public comment on proposed changes under certain circumstances.³²¹

Once the state director and governor have completed their review, the proposed RMP is published. Publication begins a thirty-day review period, during which persons who participated in the planning process and have an interest that may be adversely affected by the RMP may protest the plan.³²² Protests are filed with the national BLM director and may raise only those issues that were submitted during the planning process.³²³ The national BLM director resolves each protest, and his decision constitutes the final decision of the Department of the Interior (DOI).³²⁴ There is no further avenue for administrative appeal.³²⁵ Thirty days after the review period has passed and all protests have been resolved, the state BLM director may approve the RMP.³²⁶

(9) *Evaluating the RMP*

After BLM adopts the final RMP, the agency monitors and evaluates plan implementation in accordance with standards set forth in the RMP.³²⁷ BLM must track changes in the environment and the impacts of plan implementation on an ongoing basis and must identify new developments that may make plan amendment or revision appropriate.³²⁸

C. *The Effect of the "Top Tier" on the Planning Process*

As previously noted, the resource management planning process described above is only the middle tier of BLM's three-tier planning sys-

³¹⁷ 43 C.F.R. § 1610.4-8 (1995).

³¹⁸ BLM PLANNING GUIDE, *supra* note 254, at 18.

³¹⁹ 43 C.F.R. § 1610.4-8 (1995).

³²⁰ *Id.* § 1610.3-2(e).

³²¹ *Id.*

³²² *Id.* § 1610.5-2(a).

³²³ *Id.*

³²⁴ *Id.* § 1610.5-2(b).

³²⁵ Williams, *supra* note 37, at 22.

³²⁶ 43 C.F.R. § 1610.5-1(b) (1995).

³²⁷ *Id.* § 1610.4-9.

³²⁸ BLM PLANNING GUIDE, *supra* note 254, at 19; BLM MANUAL, *supra* note 151, § 1616.91.

tem.³²⁹ The top tier includes statutes, the *BLM Manual* and national guidance, and nationwide resource management initiatives. This section describes several statutes and national programs that fall within the top tier and protect wildlife and its habitat. The statutes, notably the Endangered Species Act,³³⁰ the Sikes Act,³³¹ and the Public Rangelands Improvement Act,³³² restrict BLM's discretion in preparing RMPs and ensure that wildlife receives a certain degree of consideration in the planning process. BLM has also adopted two national initiatives, Fish and Wildlife 2000³³³ and the Riparian-Wetland Initiative for the 1990s,³³⁴ which also influence the planning process and have special importance for wildlife on the public lands. Because BLM actions in preparing and implementing RMPs must conform to the requirements of these statutes and programs, they can have a significant impact on the land planning process.

1. The Endangered Species Act

The Endangered Species Act (ESA)³³⁵ requires no formal planning. It does, however, restrict BLM's actions on lands inhabited by threatened or endangered species and commands BLM to conserve listed species.³³⁶ Unlike FLPMA, which requires BLM to consider all wildlife in making resource allocation decisions, the ESA protects only listed species. However, unlike FLPMA, the ESA provides BLM with much less discretion and furnishes much stronger protection for those species to which it does apply.

For example, section 9 of the ESA prohibits any person, including federal agencies such as BLM, from "taking" any endangered species.³³⁷ "Take" is defined broadly to include harassing, harming, and pursuing species, as well as hunting, killing, or wounding them.³³⁸ The U.S. Supreme Court recently confirmed the long-standing view of many lower courts that degradation or destruction of a listed species' habitat may constitute

³²⁹ See *supra* notes 37-38 and accompanying text.

³³⁰ 16 U.S.C. §§ 1531-1544 (1994).

³³¹ 16 U.S.C. §§ 670g-670o (1994).

³³² 43 U.S.C. §§ 1901-1908 (1994).

³³³ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, FISH AND WILDLIFE 2000 (1987).

³³⁴ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, RIPARIAN-WETLAND INITIATIVE FOR THE 1990'S (1991).

³³⁵ 16 U.S.C. §§ 1531-1544 (1994).

³³⁶ The ESA also requires BLM to take affirmative action to preserve endangered species. *Id.* § 1536(a)(1). BLM works with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to develop recovery plans for threatened and endangered species inhabiting the public lands, and BLM must implement these plans. *Id.* § 1533(f); ROHLF, *supra* note 52, at 89. In addition, BLM must generally promote the recovery of all listed species on its lands. 16 U.S.C. §§ 1531(c), 1536(a)(1) (1994); ROHLF, *supra* note 52, at 92. In fulfilling the ESA's requirements, BLM expects to complete 50 recovery plans in fiscal year 1996. BUDGET JUSTIFICATIONS, *supra* note 49, at 3-56.

³³⁷ 16 U.S.C. § 1538(a)(1)(B) (1994). This proscription has in many cases been extended by the DOI Secretary to cover threatened species as well. See *id.* § 1533(d); 50 C.F.R. § 17.31(a) (1995).

³³⁸ 16 U.S.C. § 1532(19) (1994).

a taking under section 9.³³⁹ This interpretation has had a significant impact on agency land management decisions, as illustrated by a recent case challenging U.S. Forest Service policies that allowed clear-cutting in the habitat of the endangered red-cockaded woodpecker.³⁴⁰ The district court of the Eastern District of Texas ruled that these policies were a taking under the ESA and prescribed a substitute set of management practices for the Forest Service to follow near woodpecker nesting sites.³⁴¹

Section 7 of the ESA requires BLM to ensure that its actions are not likely to jeopardize the continued existence of listed species or damage these species' critical habitat.³⁴² To comply with this mandate, BLM must go through several steps before moving forward with a project. First, BLM must informally consult with either the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) to determine whether a listed species may be present in the area affected by a proposed action.³⁴³ If a listed species is present, BLM must prepare a biological assessment before beginning a project.³⁴⁴ A biological assessment must identify listed species that may be affected by the proposed action and evaluate the proposed project's likely impacts on the species.³⁴⁵

If an agency's biological assessment reveals that the proposed action "may affect" listed species or critical habitat, BLM must undertake formal consultation with the FWS or NMFS.³⁴⁶ During consultation, the FWS or NMFS will determine whether the proposed action will jeopardize listed species and issue an opinion stating its conclusion.³⁴⁷ The fish and wildlife agencies may also suggest mitigation measures that should be taken to avoid jeopardizing listed species.³⁴⁸ While a "jeopardy opinion" would not prohibit BLM from proceeding with a proposed action, going forward in the face of such an opinion is likely to result in a finding that the agency acted arbitrarily and capriciously if litigation over the action ensues.³⁴⁹ Because both the adoption of a new RMP and the continuation of management direction contained in an existing plan are agency actions subject to

³³⁹ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2413-15 (1995) (upholding U.S. Fish and Wildlife Service regulation, 50 C.F.R. § 17.3 (1995), that defines "take" to include habitat modification).

³⁴⁰ *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in part, vac'd in part sub nom.*, *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

³⁴¹ 694 F. Supp. at 1272 (directing the Forest Service to implement several measures to maximize the probability of woodpecker survival). While federal agencies may obtain exemptions from section 9's restrictions for actions that result in "incidental" takings, such exemptions are unavailable for actions that destroy or degrade critical habitat. 16 U.S.C. § 1536(b)(4) (1994).

³⁴² 16 U.S.C. § 1536(a)(2) (1994).

³⁴³ See RICHARD LITTELL, *ENDANGERED AND OTHER PROTECTED SPECIES* 53 (1992).

³⁴⁴ 16 U.S.C. § 1536(c)(1) (1994).

³⁴⁵ *Id.*; ROHLF, *supra* note 52, at 105-06.

³⁴⁶ 16 U.S.C. § 1536(a)(3) (1994); 50 C.F.R. § 402.14(a) (1995).

³⁴⁷ 16 U.S.C. § 1536(b)(3)(A) (1994).

³⁴⁸ *Id.*

³⁴⁹ See *Hill v. Tennessee Valley Auth.*, 549 F.2d 1064, 1070 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978) (observing that although DOI Secretary may not veto projects he believes violate the ESA, the Secretary's compliance standards may influence judicial review of the project).

the ESA's requirements, BLM must initiate consultation if a proposed or already-approved plan is expected to affect listed species.³⁵⁰

2. *The Sikes Act Extension*

Congress gave BLM specific wildlife management authority in the Sikes Act Extension of 1974.³⁵¹ Traditionally, BLM has devoted its efforts to maintaining and enhancing wildlife habitat on the public lands, while states have taken responsibility for managing wildlife itself through regulating hunting and fishing practices.³⁵² The Sikes Act requires BLM and the states to cooperate on efforts to conserve and enhance wildlife resources on the public lands.³⁵³

The Sikes Act directs BLM to develop comprehensive plans for wildlife conservation.³⁵⁴ These site-specific plans, called habitat management plans (HMPs), identify priority species and their habitat, establish objectives, and set forth a series of actions necessary to achieve these objectives.³⁵⁵ HMPs fit into the bottom tier of the BLM planning process.³⁵⁶ Resource management plans often specify what areas will require preparation of HMPs. Once a final RMP is adopted, BLM then prepares these site-specific HMPs.

When HMPs are completed, BLM enters into cooperative agreements with state wildlife agencies or other federal agencies to carry out the plans.³⁵⁷ Nearly four hundred HMPs, covering 50 million acres of habitat, were in varying stages of implementation in 1985.³⁵⁸ During fiscal year 1996, BLM will write or revise sixty HMPs, with an emphasis on threatened and endangered species.³⁵⁹

3. *Public Rangelands Improvement Act*

The continuing poor condition of the public rangelands prompted Congress to enact the Public Rangelands Improvement Act (PRIA)³⁶⁰ in 1978. Congress recognized the dangers unsatisfactory range conditions posed to a variety of resources, including wildlife.³⁶¹ PRIA affirmed a strong con-

³⁵⁰ See *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995) (holding that a Forest Service land management plan is a continuing agency action requiring consultation).

³⁵¹ Pub. L. No. 93-452, 88 Stat. 1369 (1974) (codified as amended at 16 U.S.C. §§ 670g-670o (1994)).

³⁵² BUREAU OF LAND MANAGEMENT, *FISH AND WILDLIFE 2000*, at 10 (1987) [hereinafter 1987 *FISH AND WILDLIFE 2000*].

³⁵³ 16 U.S.C. § 670g(2) (1994).

³⁵⁴ *Id.* § 670h.

³⁵⁵ George Cameron Coggins & Michael E. Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 OR. L. REV. 59, 146-47 (1981).

³⁵⁶ See *supra* notes 37-38 and accompanying text.

³⁵⁷ Coggins & Ward, *supra* note 355, at 146.

³⁵⁸ 1987 *FISH AND WILDLIFE 2000*, *supra* note 352, at 11.

³⁵⁹ BUDGET JUSTIFICATIONS, *supra* note 49, at 3-57.

³⁶⁰ Pub. L. No. 95-514, 92 Stat. 1803 (1978) (codified as amended at 43 U.S.C. §§ 1901-1908 (1994)).

³⁶¹ *Id.* § 1901(a)(3).

gressional commitment to improvement of the public lands for the benefit of all rangeland values.³⁶²

PRIA directs BLM to manage the public rangelands so that the lands become as productive as feasible in accordance with the objectives established through the land use planning process.³⁶³ This language arguably elevates rangeland improvement above all other management goals.³⁶⁴ To enable BLM to accomplish this objective, PRIA authorizes the agency to temporarily or permanently discontinue grazing on certain lands.³⁶⁵ BLM has reinforced this authority in regulations that permit the agency to adjust grazing intensity in the land use planning process.³⁶⁶

Unfortunately, BLM has often refused to work toward PRIA's range improvement goals. The agency rarely reduces historic livestock levels or prohibits livestock grazing on selected lands.³⁶⁷ It is thus unclear whether PRIA's promise for improving the rangelands has been fully realized. Recent surveys of range conditions would say it has not. For example, in 1993 BLM admitted that forty-three percent of BLM uplands were nonfunctioning (threatened by livestock grazing) or functioning at risk (not maintaining the necessary soil conditions to sustain natural biotic communities).³⁶⁸

4. *Fish and Wildlife 2000*

In 1987, BLM adopted a long-range plan for its fish and wildlife program.³⁶⁹ This plan, known as Fish and Wildlife 2000, establishes goals and objectives to serve as a guide for the management of BLM's public lands through the 1990s. Fish and Wildlife 2000 outlines many strategies intended to improve BLM's management of fish and wildlife and enable a more proactive approach to habitat protection and restoration.³⁷⁰ To accomplish these goals, Fish and Wildlife 2000 calls for three programs: wildlife habitat management, fisheries habitat management, and threatened and endangered species habitat management.³⁷¹

The goals and objectives contained in Fish and Wildlife 2000 are broad and ambitious, but the plan lacks enforceable standards. For example, the goal of the habitat management program is to "[e]nsure optimum populations and a natural abundance and diversity of wildlife resources on public lands by restoring, maintaining, and enhancing habitat conditions through management plans and actions integrated with other uses of public lands."³⁷² One of the plan's purposes is to enable the public lands to be

³⁶² *Id.* § 1901(b).

³⁶³ *Id.* § 1903(b).

³⁶⁴ See Coggins, *supra* note 132, at 116-17.

³⁶⁵ 43 U.S.C. § 1903(b) (1994).

³⁶⁶ 43 C.F.R. § 4110.3 (1995).

³⁶⁷ See Feller, *supra* note 42, at 577.

³⁶⁸ RANGELAND REFORM, *supra* note 60, at 26.

³⁶⁹ 1987 FISH AND WILDLIFE 2000, *supra* note 352.

³⁷⁰ NATIONAL AUDUBON SOC'Y, 1988 WILDLIFE REPORT 142 (1988).

³⁷¹ 1987 FISH AND WILDLIFE 2000, *supra* note 352, at 12.

³⁷² *Id.* at 14.

managed in a manner that will provide habitat for fish and wildlife; this goal is to be reached in part through the development and implementation of RMPs.³⁷³ Unfortunately, the plan includes no mechanism to ensure that its objectives are incorporated into the resource management planning process or day-to-day management.

However, the plan's provisions have been included in the *BLM Manual*, which arguably should be enforceable against the agency.³⁷⁴ The *BLM Manual* also expands on Fish and Wildlife 2000's goals by directing BLM personnel to fully consider fish and wildlife in land use plans, develop and implement habitat management plans, and ensure that all activity plans include site-specific objectives for wildlife.³⁷⁵ Finally, because the plan demonstrates some commitment to wildlife at BLM's national level, it provides support for BLM wildlife experts involved in the planning process who must convince range managers and other resource specialists that balanced land use decisions are important. BLM officials indicate that initiatives such as Fish and Wildlife 2000 exemplify the "new BLM," an agency committed to a balanced approach to lands management.³⁷⁶ Under this balanced approach, the agency will increase the attention it pays to a variety of resources including wildlife and recreation, ensure that consumptive resources are used in an environmentally sound manner, and improve stewardship of the public lands.³⁷⁷

BLM implements Fish and Wildlife 2000 at the state and local levels. Each state's BLM office must develop its own fish and wildlife plan, setting forth state-specific goals and objectives.³⁷⁸ State plans are more detailed than the national plan and include projections of actions and plans to be completed in coming years, including funding and personnel necessary to fulfill the established objectives.³⁷⁹ State BLM offices are to meet these goals through a combination of habitat management plans, cooperative wildlife management agreements with state agencies and private organizations, recovery plans for threatened and endangered species, and acquisitions of critical habitat with the assistance of private groups.³⁸⁰

The real effects of Fish and Wildlife 2000 on habitat and the resource management planning process are difficult to evaluate. BLM uses a variety of benchmarks to assess its progress in implementing the plan. BLM's fish

³⁷³ *Id.* at 13.

³⁷⁴ See *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (requiring Bureau of Indian Affairs (BIA) to follow *BIA Manual* guidelines regarding the publication of directives affecting the public); *Service v. Dulles*, 354 U.S. 363, 388 (1957) (requiring Secretary of State to follow provisions in Department's Manual); *Sierra Club v. Lujan*, 716 F. Supp. 1289, 1293 (D. Ariz. 1989) (holding National Park Service must follow its own policies).

³⁷⁵ BLM MANUAL, *supra* note 151, § 6500.06.

³⁷⁶ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, MEETING THE CHALLENGE IN 1991: EXECUTIVE SUMMARY ON IMPLEMENTATION OF THREE INITIATIVES 1 (1992) [hereinafter EXECUTIVE SUMMARY].

³⁷⁷ *Id.*

³⁷⁸ See, e.g., BUREAU OF LAND MANAGEMENT IDAHO STATE OFFICE, IDAHO FISH AND WILDLIFE 2000 (1990).

³⁷⁹ *Id.*

³⁸⁰ *Id.*

and wildlife habitat management budget has more than doubled under Fish and Wildlife 2000, increasing from \$16.3 million in 1987 to nearly \$50 million in 1994.³⁸¹ The number of full-time fish and wildlife biologists on staff jumped from approximately 210 to 350 during the same time period.³⁸² In addition, BLM has established numerous partnerships with private groups and significantly increased the amount of private contributions used to finance conservation work.³⁸³ Other recent BLM achievements include finalizing an implementation strategy plan for waterfowl habitat, issuing an updated strategic plan for mountain sheep residing on over 630,000 acres of BLM land, and completing riparian area restoration projects on streams in the Columbia Basin and along the Oregon coast.³⁸⁴ The agency carried out wildlife habitat improvement projects on 1.5 million acres in 1994 and 1995, and has requested funding for similar projects on 1.6 million acres for 1996.³⁸⁵

While noteworthy, these accomplishments represent only a small step toward attainment of the lofty goals established by the Fish and Wildlife 2000 plan. For example, while the budget for habitat management has increased, it will still take BLM a minimum of twenty years at existing funding levels to complete all necessary habitat restoration and protection projects.³⁸⁶ Adequate budget and staffing levels, together with a continued commitment to the plan's goals, will be crucial to the future success of the Fish and Wildlife 2000 program.

5. Riparian-Wetland Initiative for the 1990s

Healthy riparian areas are critical to the survival of most wildlife species. These areas provide habitat for fish; support populations of insects, mollusks, and crustaceans which are important links in the food chain; supply cover and nesting sites for birds; and furnish water, food, and shelter for larger wildlife species.³⁸⁷ Outside of Alaska, BLM manages approximately 1.3 million acres of riparian and wetland areas.³⁸⁸ In September

³⁸¹ EXECUTIVE SUMMARY, *supra* note 376, at 7; FISH AND WILDLIFE 2000, *supra* note 50, at 35. However, these gains are now at risk as many in Congress attempt to both revamp federal agencies' approaches to resource management and balance the federal budget. See *supra* notes 3-9 and accompanying text.

³⁸² FISH AND WILDLIFE 2000, *supra* note 50, at 37.

³⁸³ *Id.* at 12. Private contributions are received through the Challenge Cost Share program. Between 1987 and 1994, annual donations increased from approximately \$1 to \$8 million. *Id.* at 120.

³⁸⁴ *Id.* at 13-24. As examples of BLM's on-the-ground restoration work, the agency built in-stream structures and planted willow trees to curb erosion on four streams in the Columbia Basin, and replaced culverts with bottomless arches allowing fish passage in coastal streams. *Id.* at 23-24.

³⁸⁵ BUDGET JUSTIFICATIONS, *supra* note 49, at 3-46. Fisheries habitat improvement projects covered 1150 miles of stream in 1994, 1300 miles in 1995, and are projected to affect 1500 miles in 1996. *Id.* at 3-51.

³⁸⁶ FISH AND WILDLIFE 2000, *supra* note 50, at 35. These projects include those that are needed to aid the recovery of listed species and prevent additional listings. *Id.*

³⁸⁷ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, RIPARIAN-WETLAND INITIATIVE FOR THE 1990'S, at 6-7 (1991) [hereinafter RIPARIAN INITIATIVE].

³⁸⁸ *Id.* at 4.

1991, BLM published its Riparian-Wetland Initiative for the 1990's,³⁸⁹ which establishes four nationwide goals for the management of these riparian areas on BLM lands. These goals are to 1) restore and maintain riparian-wetland areas so that seventy-five percent or more are in functioning condition by 1997; 2) protect riparian-wetland areas and associated uplands through proper land management and avoid or mitigate negative impacts; 3) ensure an aggressive riparian-wetland information and outreach program; and 4) improve cooperative restoration and management efforts in implementing the initiative.³⁹⁰

Like those in Fish and Wildlife 2000, these goals are quite broad, and the Riparian-Wetland Initiative does not establish specific objectives or priorities. However, the Riparian-Wetland Initiative is more detailed than Fish and Wildlife 2000 in that it sets forth approximate numbers of wetlands to be improved, activity plans to be prepared, and riparian-related projects to be undertaken through 1995.³⁹¹ Also included are estimates of the cost of implementing the initiative and the number of additional staff needed to complete the various projects.³⁹² BLM will carry out most of the initiative at the state level.³⁹³ Although the initiative does not require that its terms be incorporated in the land planning process, it has had some positive impacts on the BLM planning. For example, BLM personnel developing RMPs often include riparian area management as a planning issue, and some completed RMPs have incorporated the goal of seventy-five percent restoration.³⁹⁴

By the end of 1991, BLM had undertaken numerous projects to implement the Riparian-Wetland Initiative. The agency initiated nearly seven hundred on-site restoration projects and maintained over five hundred existing projects.³⁹⁵ One million acres of wetland management areas were inventoried, as well as 1.5 million acres and nearly three thousand miles of riparian areas.³⁹⁶ BLM also acquired 21,000 acres of riparian or wetland property through land exchanges, including habitat for the endangered Lahontan cutthroat trout.³⁹⁷ However, BLM has yet to evaluate the condition of over half of its riparian areas.³⁹⁸ The agency also remains a long way from the seventy-five percent restoration goal. Only fifteen percent of BLM riparian areas are known to be properly functioning, while twenty-one percent are functioning at risk and nine percent are nonfunctioning.³⁹⁹ The agency has conceded that riparian areas will not recover on a

³⁸⁹ *Id.*

³⁹⁰ *Id.* at 1.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.* at 2.

³⁹⁴ See, e.g., SAFFORD RMP, *supra* note 245, at 490.

³⁹⁵ EXECUTIVE SUMMARY, *supra* note 376, at 5.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ RANGELAND REFORM, *supra* note 60, at 3-33.

³⁹⁹ *Id.*

large scale absent changes in grazing policy, regulations, and management.⁴⁰⁰

V. EFFECTS OF THE PLANNING PROCESS ON WILDLIFE

Congress enacted the Federal Land Policy and Management Act (FLPMA)⁴⁰¹ to work a fundamental change in BLM's approach to managing public lands. The statute was intended to improve the deteriorated condition of public rangelands, shift BLM's management focus from emphasizing local economic interests to the national interest,⁴⁰² and protect multiple values on the public lands.⁴⁰³ To meet these goals, Congress directed BLM to undertake the comprehensive planning effort described in the previous Part. However, some commentators have criticized BLM's progress in fulfilling this congressional directive.⁴⁰⁴ Preparation and implementation of resource management plans (RMPs) and designation of areas of critical environmental concern (ACECs) has proceeded at a slow pace. BLM's attention to wildlife has been limited throughout the planning process.⁴⁰⁵ The legacies of outmoded principles of resource management continue to influence BLM, and ranchers and other consumptive users of the public lands still wield a great deal of political clout, resulting in BLM decisions that often favor consumptive resources over wildlife values and other nonconsumptive resources.⁴⁰⁶ Unfortunately, the FLPMA planning process has not yet resulted in a balanced approach to management of the public lands.

This Part discusses BLM's progress in preparing and implementing RMPs and designating ACECs, focusing on impacts to wildlife and habitat. A completed RMP is examined, with an emphasis on plan provisions that affect wildlife.

A. BLM Progress in Planning

Some BLM officials have declared the BLM planning program to be a success,⁴⁰⁷ but other reviewers do not agree with this assessment.⁴⁰⁸ BLM has been slow to complete and implement RMPs. The agency's designa-

⁴⁰⁰ *Id.* at 3-32.

⁴⁰¹ Pub. L. No. 94-579, 90 Stat. 2745 (1976) (codified as amended at 43 U.S.C. §§ 1701-1784 (1994)).

⁴⁰² See 43 U.S.C. §§ 1701(a)(2) (stating that the national interest will be best realized if public lands and resources are inventoried and their uses are projected through a land use planning process); *id.* § 1701(a)(8) (requiring public lands to be managed in a manner that protects their values) (1994).

⁴⁰³ *Id.* § 1701(a)(7) (requiring land management decisions to be made on the basis of multiple use and sustained yield); *id.* § 1701(a)(8) (requiring scenic, historical, ecological, environmental, and archaeological values to be protected, and lands managed to provide food and habitat for fish and wildlife).

⁴⁰⁴ See, e.g., LIMITED PROGRESS, *supra* note 45, at 30.

⁴⁰⁵ See ATTENTION TO WILDLIFE, *supra* note 17, at 30.

⁴⁰⁶ *Id.*

⁴⁰⁷ See BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PLANNING STRATEGIES FOR THE '90s, at 3 (1992); WILLIAMS, *supra* note 37, at 11-23.

⁴⁰⁸ See *supra* notes 72-78 and accompanying text.

tion and protection of ACECs has also been quite inconsistent throughout the states. In addition, agency consideration of wildlife in the planning process has been hindered by a lack of funding for the planning program in general and wildlife programs in particular.

1. RMP Completion

As of 1993, BLM had completed barely half of the 144 RMPs it intends to prepare to guide the management of the public lands.⁴⁰⁹ At that time, thirty-six plans were in progress, and thirty-seven had not even been started.⁴¹⁰ BLM continues to push forward its estimated completion date for all RMPs. In 1990, the agency predicted that all plans would be finalized by 1997.⁴¹¹ By 1993, this target date had been extended to 2013, nearly forty years after FLPMA's passage.⁴¹² The slow pace of plan preparation concerns wildlife advocates because the pre-FLPMA management framework plans remain in place until RMPs are developed.⁴¹³ Changing needs and conditions on the public lands have no doubt rendered many management framework plans (MFPs) obsolete and ineffective in guiding present-day management of resource areas. In addition, MFPs have been criticized as imbalanced plans that favor grazing as the preferred use of the public lands, giving little consideration to other resources.⁴¹⁴

Budgetary and personnel cutbacks hinder BLM's planning efforts and have an especially harsh impact on wildlife programs. Beginning in 1982, the Reagan Administration proposed sharp cuts in the budgets for BLM's renewable resource programs, resulting in a twenty-two percent decline in the wildlife habitat management program budget by 1986.⁴¹⁵ Between 1981 and 1989, when a full-scale effort to develop RMPs should have been underway, budget cuts reduced BLM's planning staff by fifty percent.⁴¹⁶ These cuts resulted in enormous workloads for remaining professionals. For example, in August 1986, nineteen wildlife biologists were left responsible for land use planning, inventory and monitoring, and other management activities on forty-eight million acres in Nevada.⁴¹⁷ Effective planning for and management of such extensive areas is nearly impossible.

Budgets have increased since the Reagan years but are certainly facing a downward trend as current pressures on the federal budget escalate. Although staffing and appropriations for wildlife programs have nearly recovered to pre-Reagan era levels, BLM's planning staff continues to be

⁴⁰⁹ LIMITED PROGRESS, *supra* note 45, at 15.

⁴¹⁰ RMP SUMMARY, *supra* note 45.

⁴¹¹ *Id.*

⁴¹² *Id.* It takes BLM about three years to complete each plan. BUDGET JUSTIFICATIONS, *supra* note 49, at 3-109.

⁴¹³ 43 C.F.R. § 1610.5-5 (1995); *see also* 1987 WILDLIFE REPORT, *supra* note 111, at 23.

⁴¹⁴ Coggins & Evans, *supra* note 83, at 451.

⁴¹⁵ *See* 1987 WILDLIFE REPORT, *supra* note 111, at 19. This figure represents the decline in constant dollars from 1982 to 1986.

⁴¹⁶ LIMITED PROGRESS, *supra* note 45, at 15.

⁴¹⁷ *Id.* at 18.

threatened with reductions.⁴¹⁸ Appropriations for BLM's 1995 resource management planning process totaled about \$9.5 million, a slight decrease from previous years.⁴¹⁹ This amount may initially appear large, but it seems less significant when compared to the costs of plan development. In 1987, BLM estimated the average cost of preparing an RMP was \$450,000.⁴²⁰ The average cost is much greater today, because plans have become more controversial and complex.⁴²¹ BLM lands and wildlife thus continue to suffer the effects of past neglect and management directives based on obsolete MFPs.

Competing demands on BLM staff have magnified the impacts of personnel and funding reductions. The teams that assist in RMP development include specialists in various areas. Because these BLM personnel also have day-to-day responsibilities for managing certain resources, they often delay plan preparation.⁴²² Staff often give tasks with established deadlines a higher priority than planning, because FLPMA sets no mandatory completion date for RMPs. Similarly, staffing cutbacks have resulted in resource specialists assisting in tasks outside their fields of expertise, to the detriment of the planning process.⁴²³

2. Designation and Protection of ACECs

In FLPMA, Congress directed BLM to give priority to the designation of areas of critical environmental concern (ACECs) in the planning process.⁴²⁴ These areas are the most sensitive of the public lands administered by BLM. FLPMA defines ACECs as "areas . . . where special management attention 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."⁴²⁵ Congress envisioned the ACEC program as a way to give special early attention and protection to the most environmentally important and fragile BLM lands.⁴²⁶ Accordingly, Congress directed BLM to develop a separate management plan, providing guidance for the preservation of sensitive values, for each ACEC.⁴²⁷

⁴¹⁸ FISH AND WILDLIFE 2000, *supra* note 50, at 36-37; BUDGET JUSTIFICATIONS, *supra* note 49, at 3-108. In 1989, 179 full-time employees were engaged in resource management planning. By 1995, this staff had been cut to 122. BUDGET JUSTIFICATIONS, *supra* note 49, at 3-108.

⁴¹⁹ BUDGET JUSTIFICATIONS, *supra* note 49, at 3-108; 1992 BLM ANNUAL REPORT, *supra* note 16, at 68.

⁴²⁰ Williams, *supra* note 37, at 22.

⁴²¹ BUDGET JUSTIFICATIONS, *supra* note 49, at 3-109 to 3-110. BLM estimates that the cost of preparing a plan is increasing by six percent per year. Due to escalating costs, BLM now anticipates initiating only two new plans per year. *Id.*

⁴²² LIMITED PROGRESS, *supra* note 45, at 18.

⁴²³ *Id.* at 19. For example, a lack of firefighting personnel in Phoenix, Arizona delayed RMP completion for two years while planning staff assisted in firefighting efforts. *Id.*

⁴²⁴ 43 U.S.C. § 1712(c)(3) (1994).

⁴²⁵ *Id.* § 1702(a).

⁴²⁶ S. REP. NO. 583, 94th Cong., 2d Sess. 43 (1975).

⁴²⁷ 43 U.S.C. § 1701(a)(11) (1994). ACEC plans fall within the bottom tier of BLM planning. See *supra* notes 37-38 and accompanying text.

The ACEC program provides BLM with a unique tool to protect critical environmental values on its lands, including wildlife habitat. No other land management agency has a similar mechanism. However, BLM's field offices in various states have approached the program inconsistently. Although BLM has publicly praised the program,⁴²⁸ its implementation of Congress's directive to give priority to the designation and protection of ACECs in many states has been less than enthusiastic.⁴²⁹

a. The Designation Process

BLM regulations require that areas having potential for ACEC designation be identified and considered throughout the resource management planning process.⁴³⁰ BLM personnel or members of the public may nominate areas for designation.⁴³¹ To qualify as a potential ACEC, an area must meet two criteria. First, it must exhibit "relevance," which may be satisfied by the presence of a fish or wildlife resource.⁴³² Second, it must have "substantial significance," which generally requires qualities of special worth, distinctiveness, or meaning, and greater than local importance.⁴³³ Examples of areas that have qualified for ACEC status for wildlife protection purposes include bald eagle roosting sites, desert tortoise habitat, fish spawning grounds, and elk wintering ranges.⁴³⁴

BLM evaluates all areas nominated for ACEC status, including those proposed by the public.⁴³⁵ Those that qualify as potential ACECs must be included in a draft RMP.⁴³⁶ Potential ACECs must also be specifically identified in a notice published in the *Federal Register*.⁴³⁷ This notice must identify any resource uses that would be limited if the potential ACECs were formally designated.⁴³⁸ Members of the public then have sixty days in which to comment on the potential ACECs.⁴³⁹ An ACEC is considered to be formally designated once the RMP in which it appears is approved.⁴⁴⁰ Members of the public may challenge BLM's decision to des-

⁴²⁸ Williams, *supra* note 37, at 21.

⁴²⁹ See LIMITED PROGRESS, *supra* note 45, at 27 (concluding that the treatment of ACECs varied at BLM field offices); CAMPBELL & WALD, *supra* note 42, at ii-iv (arguing that BLM has failed to promulgate clear and comprehensive ACEC regulations).

⁴³⁰ 43 C.F.R. § 1610.7-2 (1995). BLM designates ACECs only through the resource management planning process. If an RMP is already in place in an area that warrants additional ACEC designations, the existing RMP must be amended. BLM MANUAL, *supra* note 151, § 1613.2.

⁴³¹ BLM MANUAL, *supra* note 151, § 1617.81B.

⁴³² 43 C.F.R. § 1610.7-2(a)(1) (1995). An area may also be "relevant" for ACEC purposes if it contains a significant historic, cultural, or scenic value or a natural hazard. *Id.*

⁴³³ *Id.* § 1610.7-2(a)(2).

⁴³⁴ CAMPBELL & WALD, *supra* note 42, at 20, 24-26, 32.

⁴³⁵ BLM MANUAL, *supra* note 151, § 1613.2A.

⁴³⁶ *Id.* § 1613.21C.

⁴³⁷ 43 C.F.R. § 1610.7-2(b) (1995).

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* ACECs may also be designated outside the RMP process through amendments to existing land use plans. *Id.*

ignate or not to designate an area as an ACEC by filing a protest of the RMP with the BLM director.⁴⁴¹

BLM field offices have a great deal of discretion in the ACEC decision making process. The agency's ACEC guidance, issued in 1988, allows a BLM manager to decide not to designate an eligible area if he concludes that the area can be protected with standard management practices or that no reasonable special management actions will protect or restore the area.⁴⁴² Accordingly, field office managers may avoid designating ACECs as long as their decisions may be justified under the terms of this guidance.⁴⁴³ As a result, ACEC designations often depend on the philosophical views of local BLM managers.⁴⁴⁴

b. Progress in ACEC Designation

As of the end of fiscal year 1993, BLM had designated 589 ACECs, covering 9.5 million acres.⁴⁴⁵ The different attitudes of BLM state offices toward the ACEC program are apparent when various state's records of ACEC designation are compared. By 1993, only seven ACECs had been designated in Nevada, where BLM administers almost fifty million acres of land.⁴⁴⁶ BLM also has designated few ACECs in Arizona, Montana, and Colorado.⁴⁴⁷ In contrast, BLM has approved 105 ACECs on the 15.7 million acres the agency manages in Oregon.⁴⁴⁸

These differing approaches to the ACEC program have been attributed to various factors. BLM's Oregon office has taken the program seriously and has designated numerous ACECs due to firm leadership by the state BLM director, good statewide coordination, and public support for environmental protection.⁴⁴⁹ On the other hand, Nevada's BLM leadership generally has been opposed to ACEC designation and has instructed its field offices that wildlife areas, such as sage grouse strutting grounds and desert tortoise habitat, which would otherwise qualify for ACEC status, should not be designated as ACECs where other management options are available.⁴⁵⁰ BLM's reluctance to designate ACECs in some states has been linked to pressure from mining and grazing interests, which fear any steps that could restrict their use of the public lands.⁴⁵¹ The agency's record on ACEC designation well illustrates the extent of decentralization

⁴⁴¹ BLM MANUAL, *supra* note 151, §§ 1613.43, 1617.84B. The RMP protest procedures are described in *supra* part III.B.2.

⁴⁴² See BLM MANUAL, *supra* note 151, § 1613.33E.1, E.3; LIMITED PROGRESS, *supra* note 45, at 31.

⁴⁴³ A manager must discuss his rationale for not proposing designation of a potential ACEC in the draft resource management plan. BLM MANUAL, *supra* note 151, § 1613E.

⁴⁴⁴ LIMITED PROGRESS, *supra* note 45, at 4.

⁴⁴⁵ PUBLIC LAND STATISTICS, *supra* note 10, at 55.

⁴⁴⁶ *Id.* at 6, 56.

⁴⁴⁷ CAMPBELL & WALD, *supra* note 42, at 27, 29-31, 33-34; PUBLIC LAND STATISTICS, *supra* note 10, at 56.

⁴⁴⁸ PUBLIC LAND STATISTICS, *supra* note 10, at 56.

⁴⁴⁹ CALLISON, *supra* note 257, at 13.

⁴⁵⁰ *Id.* at 26.

⁴⁵¹ *Id.* at 22-23; CAMPBELL & WALD, *supra* note 42, at iii.

within BLM and the lack of a uniform approach to implementing any agency program.

c. Impacts of Designation on Wildlife and Habitat

To date, a majority of the ACECs designated were approved to protect wildlife resources.⁴⁵² The unique values contained in most ACECs are subject to actual or potential threats, with BLM identifying the most common as abusive recreational use and mineral or oil and gas development.⁴⁵³ Surprisingly, BLM ranked livestock grazing only the third most common threat to ACECs,⁴⁵⁴ although grazing is the most extensive economic use of the public lands and has an enormous impact on wildlife living on the range.⁴⁵⁵ Observers have suggested that this illustrates BLM's reluctance to designate areas threatened by grazing as ACECs due to the influence of the livestock industry.⁴⁵⁶ Such reluctance would clearly reduce the beneficial impacts of the ACEC program on wildlife and habitat.

Designation as an ACEC, in and of itself, provides no protection for an area. Congress contemplated that each ACEC would be managed in accordance with a site-specific activity plan tailored to the needs of the ACEC.⁴⁵⁷ Although BLM has taken the contrary position that a specific ACEC plan is not always required,⁴⁵⁸ in practice BLM has completed or intends to complete individual plans for most of its designated ACECs. These individual ACEC plans can include such measures as restrictions on grazing and logging, required fencing of riparian areas, prohibitions on motorized access and road construction, and recommendations for withdrawal of areas from mining activities.⁴⁵⁹ Like ACEC designation, BLM's progress in preparing and implementing ACEC plans has varied greatly from state to state. Principal reasons for the lagging protection of ACECs include a lack of adequate funding and personnel, as well as pressure from politically powerful users of the public lands such as recreationists, ranchers, and miners.⁴⁶⁰

BLM's efforts to protect wildlife in the California Desert Conservation Area (CDCA)⁴⁶¹ through the ACEC process may be representative of

⁴⁵² CAMPBELL & WALD, *supra* note 42, at 4.

⁴⁵³ *Id.* at 6.

⁴⁵⁴ *Id.*

⁴⁵⁵ See U.S. GEN. ACCOUNTING OFFICE, RANGELAND MANAGEMENT: BLM'S HOT DESERT GRazing PROGRAM MERITS RECONSIDERATION 29-39 (1991).

⁴⁵⁶ CAMPBELL & WALD, *supra* note 42, at 7.

⁴⁵⁷ 43 U.S.C. § 1701(a)(11) (1994) (stating policy that "regulations and plans for the protection of public land areas of critical environmental concern be promptly developed").

⁴⁵⁸ BLM MANUAL, *supra* note 151, §§ 1613.12, 1613.33C, 1613.62. This interpretation arguably conflicts with the Congressional goal for ACECs set out in FLPMA. See *supra* note 457.

⁴⁵⁹ See, e.g., J. STICKLER, MANAGING THE FIRST AREAS OF CRITICAL ENVIRONMENTAL CONCERN IN WESTERN OREGON (1991).

⁴⁶⁰ CAMPBELL & WALD, *supra* note 42, at 13-15.

⁴⁶¹ Congress established the California Desert Conservation Area, which encompasses 25 million acres, in FLPMA. See Pub. L. No. 94-579, 90 Stat. 2782 (1976) (codified as amended at 43 U.S.C. § 1781 (1994)). In 1980, it became the first area for which BLM completed an RMP. In 1994, much of the area was designated as wilderness or incorporated in the newly created

BLM's larger attempts throughout the West. The initial RMP for the CDCA, approved in 1980, called for the preparation of twenty-eight individual ACEC plans.⁴⁶² Three of these plans still had not been completed nine years later.⁴⁶³ Even when BLM does finalize ACEC plans, there is still a delay in implementing many action items called for by the plans, often with harmful consequences for wildlife. One example is the Chuckwalla Bench ACEC in the CDCA, which includes important habitat of the threatened desert tortoise. The ACEC plan for this area, approved in 1982, called for monitoring of the tortoise population, which had been considered healthy when BLM wrote the plan.⁴⁶⁴ However, BLM did not monitor the tortoise for a number of years. When the agency finally initiated monitoring it revealed a fifty to seventy percent decline in the tortoise population over the previous six-year period.⁴⁶⁵ This decline was attributed to disease, off-road vehicle use, and vandalism.⁴⁶⁶ If this decrease had been discovered sooner, BLM could have taken prompt corrective action. Unfortunately, by the time BLM and California Fish and Game Department biologists learned of the population decline, any actions taken to save the tortoise may have been too late to be effective.⁴⁶⁷ The desert tortoise was subsequently listed as a threatened species under the Endangered Species Act.⁴⁶⁸

B. Consideration of Wildlife and Habitat in the Planning Process—A Case Study

This Article has considered BLM's planning process from a broad perspective. Now, it examines a completed RMP in detail. This narrower inquiry illustrates how BLM attempts to balance wildlife interests with other uses of the public lands when planning for a specific resource area. The RMP for the Safford District in Arizona, completed in 1992, is the subject of this case study.⁴⁶⁹ Although each RMP is unique, this plan provides a good example of BLM's planning process in action and BLM's consideration of wildlife during planning.

Death Valley and Joshua Tree National Parks and the Mojave National Preserve. California Desert Conservation Act, Pub. L. No. 103-433, 108 Stat. 4471 (1994) (codified as amended at 43 U.S.C. § 1781 (1994)).

⁴⁶² U.S. GEN. ACCOUNTING OFFICE, CALIFORNIA DESERT: PLANNED WILDLIFE PROTECTION AND ENHANCEMENT OBJECTIVES NOT ACHIEVED 12 (1989) [hereinafter CALIFORNIA DESERT].

⁴⁶³ *Id.* at 15.

⁴⁶⁴ *Id.* at 18. Many wildlife managers consider monitoring to be the most essential element of any wildlife plan, but BLM consistently assigns this activity a low priority. *Id.*

⁴⁶⁵ *Id.* at 19.

⁴⁶⁶ CAMPBELL & WALD, *supra* note 42, at iii.

⁴⁶⁷ CALIFORNIA DESERT, *supra* note 462, at 19.

⁴⁶⁸ 50 C.F.R. § 17.11 (1995).

⁴⁶⁹ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PARTIAL RECORD OF DECISION FOR THE APPROVAL OF THE SAFFORD DISTRICT RMP (1992) [hereinafter SAFFORD ROD]; SAFFORD RMP, *supra* note 245. Although many RMPs are prepared for individual resource areas, the Safford District RMP encompasses two resource areas.

1. Background

The BLM Safford District includes 1.4 million acres of public land in southeastern Arizona.⁴⁷⁰ Several mountain ranges reaching elevations of nearly eleven thousand feet lie in the area, separated by broad basins. The district is drained by the Gila River and its tributaries. Weather conditions are similar to those throughout the desert Southwest, with annual rainfall averaging seven to sixteen inches in the valleys and up to fifteen or more inches in the mountains.⁴⁷¹ Twenty-one percent of the rangelands in the district are in poor condition, and twenty-nine percent are in fair condition, with a trend toward improvement.⁴⁷²

The principal consumptive uses of the public lands in the district are grazing and hardrock mining. These activities are also key industries in the counties in which the district is located.⁴⁷³ In the Safford planning area, major producers are extracting minerals from twenty-seven mining districts, estimated to have values totaling \$815 billion.⁴⁷⁴ Ranchers in 262 grazing allotments within the district are permitted up to nearly 130,000 animal unit months of active use.⁴⁷⁵

The Safford District contains diverse wildlife habitat, including riparian and aquatic areas, maternal bat caves, desert grasslands and washes, woodlands, and rocky ridges and canyons.⁴⁷⁶ As a result, the district is home to a wide variety of wildlife, including three hundred species of birds, forty species of amphibians and reptiles, and eighty species of mammals.⁴⁷⁷ Seventy-three of these species are listed under the federal or Arizona Endangered Species Acts or are candidates for listing.⁴⁷⁸ The district's riparian and aquatic areas shelter twenty-eight priority species,⁴⁷⁹ including the desert pupfish, bald eagle, black bear, and plains leopard frog.⁴⁸⁰ Riparian areas also provide migration corridors for birds moving from tropical wintering areas to northern breeding grounds.⁴⁸¹ Caves scattered throughout the district serve as maternity roosts for Mexican free-tailed bats, whose population has been declining drastically.⁴⁸² Terrestrial habitats support priority species such as the desert tortoise, bighorn sheep, desert mule deer, wild turkey, Montezuma quail, and Texas

⁴⁷⁰ SAFFORD RMP, *supra* note 245, at iii.

⁴⁷¹ *Id.* at 125.

⁴⁷² *Id.* at 147.

⁴⁷³ *Id.* at 154-59.

⁴⁷⁴ *Id.* at 131.

⁴⁷⁵ *Id.* at 137. Animal unit months, or AUMs, measure the allowable grazing level on each allotment. One AUM is the amount of forage needed to sustain one cow, one horse, or five sheep for one month.

⁴⁷⁶ *Id.* at 135-37.

⁴⁷⁷ *Id.* at 135.

⁴⁷⁸ *Id.* at 138-40.

⁴⁷⁹ BLM "priority species" include 1) species listed as threatened or endangered under the Endangered Species Act, 2) species identified in cooperation with the Arizona Game and Fish Department, and 3) other species of local importance. *Id.* at 135.

⁴⁸⁰ *Id.* at 138-39.

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 135-36.

horned lizard.⁴⁸³ In the Safford RMP and accompanying EIS, BLM acknowledged that habitat degradation and loss is a major threat to all of these species.⁴⁸⁴

2. *Planning Issues and Management Concerns*

The Safford RMP and EIS addressed four planning issues and ten management concerns important to the Safford District.⁴⁸⁵ BLM identified these priorities based on public comments, interagency consultation, and the judgment of BLM planning team members and managers.⁴⁸⁶ The resolution of each planning issue affects wildlife and habitat. The identified planning issues were 1) providing access across and to public lands, 2) designating ACECs and other special management areas, 3) opening public lands to off-road vehicles, and 4) managing riparian areas.⁴⁸⁷ The management concerns most directly affecting wildlife were wildlife habitat management and regulation of mining.⁴⁸⁸

Because these issues and concerns shaped the planning process, it is also important to note what issues BLM chose not to analyze in the preparation of the RMP. BLM did not examine the appropriate levels of livestock grazing, a key consumptive use of the district's public lands.⁴⁸⁹ BLM also failed to consider the impacts of grazing on wildlife habitat.⁴⁹⁰ Other agencies and numerous members of the public asked that BLM address these issues in the planning process,⁴⁹¹ but it declined to do so. BLM justified the omission of grazing by pointing to two grazing EISs completed in 1978 and 1987.⁴⁹² According to BLM, the decisions analyzed in those EISs were being implemented, and monitoring showed that rangeland condition was improving under allotment management plans developed in accordance with the EISs.⁴⁹³ However, the EISs did not contain up-to-date information regarding the impacts of grazing in the Safford District. The 1978 EIS covered a large portion of the rangeland in the Safford District, but it

⁴⁸³ *Id.* at 136-37.

⁴⁸⁴ *Id.* at 135-37.

⁴⁸⁵ As previously discussed, identification of issues and concerns to be resolved through the planning process is Step One in the preparation of an RMP. *See supra* part IV.B.3.c.1.

⁴⁸⁶ SAFFORD RMP, *supra* note 245, at 6.

⁴⁸⁷ *Id.* at iv.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 12.

⁴⁹⁰ *Id.*

⁴⁹¹ *See, e.g.*, Letter from Fish and Wildlife Service to BLM (Apr. 5, 1990), *in* SAFFORD RMP, *supra* note 245, at 281 [hereinafter FWS Letter] (stating that the BLM's exclusion of grazing issues was a "serious problem"); Letter from Sierra Club to BLM (June 4, 1990), *in* SAFFORD RMP, *supra* note 245, at 248 [hereinafter Sierra Club Letter] (recommending that grazing be included in the BLM's analysis); Letter from Environmental Protection Agency to BLM (June 8, 1990), *in* SAFFORD RMP, *supra* note 245, at 362 [hereinafter EPA Letter] (expressing concern over the potential impact of livestock grazing on the area).

⁴⁹² SAFFORD RMP, *supra* note 245, at 12, 381.

⁴⁹³ *Id.* at 12. Allotment management plans specify permitted levels of livestock, seasons of use, required range improvements, monitoring plans, and evaluation procedures for a specific unit of rangeland. *Id.* at 137.

was out-of-date by 1991.⁴⁹⁴ The 1987 EIS covered all of Eastern Arizona, but did not even include maps showing the areas being analyzed.⁴⁹⁵ By relying upon these outdated, general documents, and refusing to consider grazing issues during the planning process, BLM disregarded a key provision in its own manual. This provision states that RMPs must "identify public lands where livestock grazing will be excluded" and should analyze the effects of various intensities of livestock grazing on other resources.⁴⁹⁶ BLM did not follow this directive in preparing the Safford RMP.

This situation illustrates a major flaw in BLM's approach to the planning process—it is not truly comprehensive. Where preexisting plans address an issue to BLM's satisfaction, the agency does not consider the issue again when preparing an RMP.⁴⁹⁷ This is a poor approach to planning and may violate FLPMA.⁴⁹⁸ This practice, which led BLM to refuse to consider grazing issues in the Safford District RMP, is troubling for wildlife in the area for several reasons. First, BLM had approved allotment management plans on less than half of the 262 grazing allotments within the district.⁴⁹⁹ The remaining grazing allotments were apparently not covered by any site-specific plan. Second, changing conditions since the completion of the EISs may require a change in management approach and the preparation of new or supplementary EISs.⁵⁰⁰ For example, BLM had acquired 250,000 acres of new lands since 1978 and disposed of a like amount.⁵⁰¹ Several wildlife species found in or near the Safford District had also been listed under the ESA in the intervening time.⁵⁰² The comprehensive resource management planning process mandated by FLPMA would have been an ideal means to update the grazing analysis and determine whether new management actions are necessary. Third, grazing practices have an enormous impact on the condition of key wildlife habitats such as riparian areas and grasslands.⁵⁰³ Considering wildlife habitat management without also looking at grazing does not permit a full evaluation of all relevant factors. This is especially true in an area such as the Safford District, where over half of the range is in fair or poor condition

⁴⁹⁴ FWS Letter, *supra* note 491.

⁴⁹⁵ *Id.*

⁴⁹⁶ BLM MANUAL, *supra* note 151, §§ 1622.31A.1, 1622.32A.

⁴⁹⁷ See *supra* notes 246-51, 281 and accompanying text.

⁴⁹⁸ *Id.*

⁴⁹⁹ SAFFORD RMP, *supra* note 245, at 137, 140.

⁵⁰⁰ Regulations implementing the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1994), require agencies to supplement an earlier EIS whenever there are significant new circumstances or information bearing on the impacts of a proposed action. 40 C.F.R. § 1502.9(c)(1)(ii) (1995). Because the implementation of an existing land use plan is a continuing agency action, BLM should be required to supplement an EIS prepared in connection with the plan if circumstances change or new information is discovered. See *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (holding that a land use plan is an ongoing agency action throughout the plan's duration), *cert. denied*, 115 S. Ct. 1793 (1995).

⁵⁰¹ FWS Letter, *supra* note 491.

⁵⁰² *Id.*

⁵⁰³ See *supra* notes 118-120 and accompanying text.

and merits improved management practices.⁵⁰⁴ BLM cannot accomplish the complete balancing of all competing uses of the public lands required by FLPMA if it allocates resources to a major consumptive use outside of the planning process.

3. *Alternative Land Use Plans*

To resolve the planning issues and management concerns identified at the beginning of the Safford planning process, BLM developed three new alternative land use plans. Each alternative provided for a different combination of resource uses for the Safford District. The three general themes of the alternatives were balanced multiple use (Alternative A, the Preferred Alternative); resource protection (Alternative B); and resource production (Alternative C).⁵⁰⁵ These alternatives reflect the tendency of BLM and other land management agencies to present one alternative at each end of the spectrum, with the agency's preferred alternative falling somewhere in between. This approach polarizes conservationist and consumptive interests and highlights the preferred alternative as the only reasonable plan that achieves FLPMA's mandate for balanced multiple use management.⁵⁰⁶ The preferred alternative, with few changes, was ultimately adopted as the final Safford District RMP.⁵⁰⁷

4. *Comparison of Alternatives*

Each alternative would have differing impacts on wildlife and habitat in the Safford District. These impacts are organized by planning issue and management concern and are summarized in this section. BLM analyzed the impacts of each alternative in an EIS prepared at the same time as the RMP. Although it would have facilitated the public's participation in the planning process, BLM failed to explain why it chose the preferred alternative and rejected the other potential approaches that addressed each planning issue and management concern.

a. *Access to Public Lands*

Each alternative called for the reconstruction of various roads to provide access to the public lands and acquisition of legal access across private lands in different locations.⁵⁰⁸ BLM completely failed to analyze the effects of the proposed roads and access points on environmental values, including wildlife.⁵⁰⁹ Some commenters expressed concern that re-opening certain roads would have harmful effects on wildlife and habitat due to

⁵⁰⁴ SAFFORD RMP, *supra* note 245, at 147. Of the range on the Safford District, 4.7% is in excellent condition, 38.3% is in good condition, 28.7 % is in fair condition, 20.5% is in poor condition and, 7.8% is not yet classified. *Id.*

⁵⁰⁵ BLM also analyzed a "no-action" alternative that would continue implementation of existing land use plans. *Id.* at 17-93.

⁵⁰⁶ See *supra* note 77 and accompanying text.

⁵⁰⁷ SAFFORD ROD, *supra* note 469, at 3.

⁵⁰⁸ SAFFORD RMP, *supra* note 245, at 26-27, 48, 68.

⁵⁰⁹ *Id.* at 94-97, 163-73.

increased vehicle use, greater numbers of human visitors, and erosion that could alter stream water quality.⁵¹⁰ BLM ignored these concerns and likely violated NEPA's mandate to consider the environmental impacts of proposed agency actions.⁵¹¹

b. Areas of Critical Environmental Concern

During the planning process, BLM personnel and members of the public nominated thirty areas for ACEC status.⁵¹² Of the nominated areas, both the Preferred Alternative and Alternative B would have designated thirteen ACECs, and Alternative C would have designated ten.⁵¹³ Consistent with the "preservation" and "production" emphasis of the alternatives, ACEC acreage would be largest under Alternative B and smallest under Alternative C.⁵¹⁴ All alternatives contemplated the preparation of site-specific activity plans to protect each ACEC.⁵¹⁵ In the preferred alternative, four ACECs would have specifically protected wildlife values, including bat maternity caves, riparian areas, and bighorn sheep habitat.⁵¹⁶ Five other ACECs would have provided additional protection and moderate benefits to wildlife species.⁵¹⁷ Protective actions called for in the preferred alternative and in all other alternatives included partial withdrawals from entry for mining, suspensions of grazing,⁵¹⁸ rehabilitation of riparian vegetation, and limitations on off-road vehicle use.⁵¹⁹

BLM's treatment of proposed ACECs in the Safford District mirrors the national experience.⁵²⁰ From among thirty nominated areas, BLM proposed only thirteen for designation in even its most protective RMP alternative. The agency rejected the other potential ACECs for a variety of reasons. BLM determined that some of the areas lacked more than local importance because they only provided habitat for regionally localized species without federal status, such as the black-tailed hawk.⁵²¹ Other areas were not designated as ACECs because BLM concluded that they did not require special management attention.⁵²² Designated acreage and protective measures targeted specifically at the wildlife resource varied only slightly among the various alternatives. BLM estimated that under each

⁵¹⁰ Sierra Club Letter, *supra* note 491, at 6.

⁵¹¹ See 42 U.S.C. § 4332(C) (1994).

⁵¹² SAFFORD RMP, *supra* note 245, at 8.

⁵¹³ *Id.* at 30, 49, 68.

⁵¹⁴ *Id.* at 49, 68.

⁵¹⁵ *Id.* at 19.

⁵¹⁶ *Id.* at 28-29. These ACECs would cover 15,448 acres of federal land. *Id.*

⁵¹⁷ *Id.* at 164.

⁵¹⁸ Despite its refusal to comprehensively reevaluate grazing levels throughout the district, BLM did propose limiting grazing in some ACECs where necessary to protect unique values. *Id.* at 28.

⁵¹⁹ *Id.* at 28-29, 50-51, 69-70.

⁵²⁰ See *supra* part V.A.2.

⁵²¹ SAFFORD RMP, *supra* note 245, at 449.

⁵²² *Id.* at 451. By making such a determination, BLM can easily avoid designating ACECs. See *supra* notes 442-44 and accompanying text.

alternative, including the most protective, ACEC designations would provide only moderate benefits to wildlife by enhancing habitat.⁵²³

Higher benefits for wildlife could have been achieved in several ways. First, BLM could have considered a greater range of options for designating ACECs. Several areas nominated for their importance to wildlife were not even included in the most protective alternative.⁵²⁴ Second, the agency failed to include an adequate analysis of truly protective management options in any alternative. Each alternative provided some protection from mining, grazing, and off-road vehicle use in ACECs, but left the majority of ACEC acreage open to these uses in some form.⁵²⁵ Prohibiting these types of activities seems to be exactly the type of special management Congress envisioned for these unique areas.⁵²⁶ Allowing these harmful uses in ACECs greatly reduces the protective value of the ACEC designation. ACECs are only a small fraction of the total acreage in the district,⁵²⁷ and fully protecting them would not have unduly restricted other uses of land throughout the remainder of the district.

c. Off-Highway Vehicles

Off-highway vehicle (OHV) use is a recreational use of the public lands that has continued to grow in popularity.⁵²⁸ Unfortunately, OHV traffic can significantly damage the public lands by causing erosion, harming vegetation, and disturbing and killing wildlife. BLM regulations require the agency to designate all areas of the public lands as either open, limited, or closed to OHV use, and the agency fulfills this requirement through the planning process.⁵²⁹ "Open" areas are lands where all types of vehicles are permitted at all times, while "limited" areas accommodate traffic only at certain times and in specified areas (such as roads and trails).⁵³⁰ OHV use is totally prohibited in "closed" areas.⁵³¹

Each Safford District alternative would have permitted some degree of OHV use. The Preferred Alternative would have closed some acreage, designated a small area as open, and classified the remainder as limited.⁵³² Alternative B called for no open areas⁵³³ while Alternative C would have been dramatically different, classifying most BLM land in the district as open to unlimited OHV use.⁵³⁴

⁵²³ SAFFORD RMP, *supra* note 245, at 95.

⁵²⁴ *Id.* at 449-52.

⁵²⁵ *Id.* at 437-49.

⁵²⁶ See 43 U.S.C. § 1712(a) (1994).

⁵²⁷ The district contains 1.4 million acres. ACEC acreage proposed in Alternative B, the most protective of the alternatives, totals only 97,057 acres of federal land, or just 6.9% of the district. SAFFORD RMP, *supra* note 245, at 49.

⁵²⁸ *Id.* at iv.

⁵²⁹ 43 C.F.R. §§ 8342.1-.2 (1995).

⁵³⁰ *Id.* § 8340.0-5(f), (g).

⁵³¹ *Id.* § 8340.0-5(h).

⁵³² SAFFORD RMP, *supra* note 245, at 32.

⁵³³ *Id.* at 49.

⁵³⁴ *Id.* at 71.

The Safford District presented special problems because bighorn sheep lambing grounds were open to OHV use when the planning effort began. The Preferred Alternative and Alternative B would close these areas to OHV use, resulting in considerable benefits to bighorn sheep by reducing disturbances and thereby increasing lamb survival.⁵³⁵ Overall, the Preferred Alternative's classifications of BLM land for OHV use would produce high benefits for seventeen priority wildlife species.⁵³⁶ Alternative B, the most protective alternative, would have restricted OHV use so as to benefit nearly twice as many priority species, a total of thirty-six.⁵³⁷ Alternative C, which would open most land to unlimited OHV use, would have adverse effects on wildlife ranging from low to high depending on the intensity of use.⁵³⁸

Greater benefits for wildlife could have been realized while still permitting recreational OHV use by adopting Alternative B. In addition, the Preferred Alternative could have required that areas open to OHV use be well-marked and be located near highways or access points to facilitate monitoring. The chosen alternative could also have banned OHV use near riparian areas or areas of priority habitat.

d. Riparian Areas

Healthy riparian areas support diverse wildlife species and are crucial to the health of overall ecosystems.⁵³⁹ In each alternative, BLM set the goal of improving seventy-five percent of riparian acreage to good or excellent condition by 1997.⁵⁴⁰ If met, this goal would be quite beneficial for numerous wildlife species. However, as several members of the public pointed out, BLM should ultimately strive to restore and preserve one hundred percent of riparian areas.⁵⁴¹

Each alternative's strategy for riparian areas was virtually identical. Each alternative provided for the protection of specific riparian areas through the ACEC process. BLM also set out various actions, identical in each alternative, that would be necessary to achieve the seventy-five percent restoration goal.⁵⁴² These strategies were a good first step and included developing a riparian area inventory, cooperating with the Arizona Game and Fish Department to prioritize needed riparian area management, acquiring in-stream water rights to protect riparian areas, and prohibiting firewood cutting in riparian areas.⁵⁴³ However, none of the al-

⁵³⁵ *Id.* at 164, 167.

⁵³⁶ *Id.* at 95.

⁵³⁷ *Id.*

⁵³⁸ *Id.* at 170.

⁵³⁹ *See id.* at 128; *supra* part IV.C.5.

⁵⁴⁰ SAFFORD RMP, *supra* note 245, at 32, 49, 72. This goal was contained in BLM's *Riparian-Wetland Initiative for the 1990's*. RIPARIAN INITIATIVE, *supra* note 387; *see supra* part IV.C.5.

⁵⁴¹ Sierra Club Letter, *supra* note 491; Letter from The Wildlife Society to BLM (June 12, 1990), *in* SAFFORD RMP, *supra* note 245, at 380-G [hereinafter Wildlife Society Letter].

⁵⁴² SAFFORD RMP, *supra* note 245, at 32-33, 52-53, 72.

⁵⁴³ *Id.*

ternatives provided specific guidance or timetables for carrying out these actions. The RMP also did not specify which riparian areas would be among the seventy-five percent to be restored.

The alternatives also called for continued development of grazing systems to "manage livestock use for the improvement of riparian areas."⁵⁴⁴ Cattle are extremely destructive to riparian areas because they trample stream banks, disturb stream bottoms, and remove riparian vegetation.⁵⁴⁵ The most effective way to restore riparian areas is to limit livestock access so that native vegetation has ample opportunity to grow and rejuvenate.⁵⁴⁶ Simple steps such as fencing off riparian areas, limiting livestock numbers, or restricting grazing to certain periods of the year can have dramatic effects.⁵⁴⁷ For example, BLM conducted a study project on the west fork of Nevada's Deer Creek that involved fencing out cattle and adding rock structures to deepen fish pools.⁵⁴⁸ These measures improved the creek's condition from poor to excellent in only four years.⁵⁴⁹ However, none of the Safford District alternatives specified what steps would be taken to manage livestock in riparian areas. BLM deferred consideration of this crucial issue to subsequent planning efforts at the allotment level, without explaining why these measures would not be more appropriately considered in the resource management plan.⁵⁵⁰

e. Wildlife Habitat Management

Each alternative set the same objectives for wildlife habitat management.⁵⁵¹ BLM's goals included maintaining and enhancing priority species and their habitat, conserving candidate species to avoid additional listings under the ESA, managing priority species habitat to maintain or enhance population levels, and focusing management efforts on enhancing biological diversity.⁵⁵² The alternatives differed in the ways these objectives would be reached. First, each alternative designated a different number of species and habitat as priorities, which results in special monitoring and management under the RMP. The Preferred Alternative and Alternative B specified a comparable number of species, while Alternative C designated far fewer.⁵⁵³ Alternative B was much more beneficial for wildlife than the

⁵⁴⁴ *Id.*

⁵⁴⁵ See *GRAZING TO EXTINCTION*, *supra* note 23, at 11. In the West, livestock grazing is the major cause of degraded riparian habitat on the public lands. *RANGELAND REFORM*, *supra* note 60, at 3-43; U.S. GEN. ACCOUNTING OFFICE, *PUBLIC RANGELANDS: SOME RIPARIAN AREAS RESTORED BUT WIDESPREAD IMPROVEMENT WILL BE SLOW* 11 (1988) [hereinafter *SOME RIPARIAN AREAS RESTORED*].

⁵⁴⁶ *SOME RIPARIAN AREAS RESTORED*, *supra* note 545, at 18, 35, 51.

⁵⁴⁷ *Id.* at 18.

⁵⁴⁸ *Id.* at 22.

⁵⁴⁹ *Id.*

⁵⁵⁰ See *SAFFORD RMP*, *supra* note 245, at 397.

⁵⁵¹ *Id.* at 33, 53-54, 72-73.

⁵⁵² *Id.*

⁵⁵³ *Id.* at 33-34, 54, 73. Alternative A designated at least 50 priority species, Alternative B designated a minimum of 51, and Alternative C designated only 24. It is impossible to determine the exact number of species designated in any alternative because the alternatives

other alternatives because it included additional groups of species as priorities.⁵⁵⁴ Unlike the other alternatives, Alternative B designated as priorities native species which have been eradicated from the district, such as grizzly bears, jaguars, and river otters.⁵⁵⁵ Alternative B also prioritized desert grasslands songbirds, reptiles, small game, wetlands waterfowl, and shore birds.⁵⁵⁶ None of the other alternatives included any of these species on the priority list.

Second, each alternative set forth different future actions designed to meet wildlife habitat objectives. All alternatives included 1) managing habitat for "optimum" wildlife populations,⁵⁵⁷ 2) transplanting and augmenting populations if necessary, 3) monitoring priority habitat, 4) suppressing and prescribing burning where beneficial to habitat, 5) closing certain areas to animal damage control activities, and 6) inventorying and categorizing desert tortoise habitat.⁵⁵⁸ The Preferred Alternative and Alternative B went further, calling for preparation of several site-specific habitat management plans in cooperation with the Arizona Game and Fish Department⁵⁵⁹ and consideration of wildlife needs in the allotment planning process.⁵⁶⁰ Alternative B also called for the reintroduction of priority species that had been eradicated from the district, such as grizzly bears and jaguars.⁵⁶¹ No alternative provided specifics on how, where, or when these actions would be carried out.

The alternatives established more specific management objectives for several priority species and habitats.⁵⁶² These objectives are still quite broad, however. For example, the management objective for a herd of pronghorn antelope is to improve habitat so it will support a viable population of the species.⁵⁶³ This goal will be met by improving forage condition, providing water where shortages are a limiting factor, reducing mortality factors, and conducting or supporting monitoring of pronghorn and its habitat.⁵⁶⁴ No alternative identified where or how forage will be improved. Nor did any alternative specify what number of pronghorns constitutes a viable population. More specific directives would have provided more guidance for habitat management for priority species and facil-

designate both individual animals and entire categories of species, such as "wetlands waterfowl" and "small game." *Id.* at 54.

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.*

⁵⁵⁶ *Id.*

⁵⁵⁷ Determination of an optimum wildlife population depends on the reproductive potential, longevity, management objectives, and ecological conditions present, as well as the role a species plays in the ecological community. *Id.* at 417. An optimum population falls somewhere between a minimum viable population and the carrying capacity of an area. *Id.*

⁵⁵⁸ *Id.* at 34-35, 54-55, 73-74.

⁵⁵⁹ The Sikes Act, 16 U.S.C. §§ 670g-670o (1994), requires BLM to work with state fish and wildlife agencies to prepare and implement habitat management plans. 16 U.S.C. § 670g(a) (1994); *see supra* part IV.C.2.

⁵⁶⁰ SAFFORD RMP, *supra* note 245, at 34, 55.

⁵⁶¹ *Id.* at 473-74.

⁵⁶² *Id.* at 473-760. These objectives were common to all alternatives.

⁵⁶³ *Id.* at 475.

⁵⁶⁴ *Id.*

itated the evaluation of progress being made toward achieving established goals.

f. Energy and Minerals

Together with grazing, mineral extraction is one of the major consumptive uses of the Safford District's public lands. BLM's policy is to foster and encourage mineral development, while protecting the public lands from undue degradation.⁵⁶⁵ Mining can in fact be very hazardous to the environment and to wildlife, because it disrupts habitat and may contaminate waterways with toxic heavy metals.⁵⁶⁶ To balance mining's perceived benefits to society with its disadvantages, each alternative included protective actions such as withdrawing varying amounts of land from mineral entry,⁵⁶⁷ prohibiting the sale of materials such as sand and gravel on other lands, and requiring leases on certain acreage to be issued with "no surface occupancy" stipulations.⁵⁶⁸ Alternative B protected the largest amount of land in this manner. Alternative C protected the smallest. The Preferred Alternative fell in the middle.

Areas at least partially protected from mining activity included ACECs, riparian areas, and bighorn sheep lambing grounds.⁵⁶⁹ These measures will benefit wildlife, but the alternatives could have provided additional protection, particularly in ACECs. BLM should fully use its authority to regulate mining activities and require mitigation and reclamation measures to protect the wildlife resource.⁵⁷⁰

5. The Final RMP

BLM's Arizona state director approved the proposed RMP following its publication and the expiration of the public protest period.⁵⁷¹ Several protests were filed challenging the designation of certain ACECs and objecting to the suspension of grazing in a key riparian area.⁵⁷² In spite of these protests, the state director signed a Record of Decision approving the Preferred Alternative as the final plan, with certain actions deferred pending resolution of the protests.⁵⁷³ Postponing these actions reduced the plan's effectiveness for protecting wildlife and habitat. First, BLM de-

⁵⁶⁵ 43 U.S.C. §§ 1701(a)(8) (public lands are to be managed in a manner that will protect their quality), 1702(c) (multiple use management means productivity of the land should not be permanently impaired) (1994); SAFFORD RMP, *supra* note 245, at 10.

⁵⁶⁶ Sierra Club Letter, *supra* note 491. Extraction of minerals is often more damaging to the environment than other resource uses. 2 COGGINS, *supra* note 76, at H-1.

⁵⁶⁷ BLM does not have the authority to withdraw lands from mining but can only recommend their withdrawal. Final decisions on withdrawal must be made by the Secretary of the Interior. 43 U.S.C. § 1714(a) (1994).

⁵⁶⁸ SAFFORD RMP, *supra* note 245, at 40, 60-61, 78. A "no surface occupancy" stipulation precludes a mineral lessee from occupying the land's surface unless such activity is specifically approved by BLM. *Id.* at 416.

⁵⁶⁹ *Id.* at 40, 60, 78.

⁵⁷⁰ See 43 C.F.R. § 3809 (1995).

⁵⁷¹ SAFFORD ROD, *supra* note 469.

⁵⁷² For a description of the procedures for protesting see *supra* part IV.B.3.c.

⁵⁷³ SAFFORD ROD, *supra* note 469, at 3.

ferred the designation of five ACECs, including three of the four specifically approved to protect wildlife.⁵⁷⁴ Second, the agency postponed the suspension of grazing in a key riparian area.⁵⁷⁵

The agency justified its selection of Alternative A, the preferred and "balanced" alternative, as the final RMP by referring to FLPMA's directive that the public lands be managed under the principles of multiple use.⁵⁷⁶ According to BLM, inherent in this mandate is the need for trade-offs between environmental and socio-economic values, such as those represented by the final RMP.⁵⁷⁷ BLM described Alternative A as being the best compromise between the production- and protection-oriented alternatives.⁵⁷⁸ However, BLM reached this conclusion without ever comparing the economic values of the wildlife, recreation, and other resources given more protection by Alternative B to the value of devoting the affected public lands to grazing and other consumptive uses.

It is difficult to determine the motivations behind BLM's decision. In selecting the RMP, BLM largely ignored the comments of numerous citizens, conservation and recreation and tourism groups, and government agencies, including the Environmental Protection Agency and the Fish and Wildlife Service.⁵⁷⁹ These members of the public had urged the agency to adopt the more protective Alternative B or to incorporate certain parts of Alternative B, such as those dealing with ACECs or riparian areas, into the preferred alternative.⁵⁸⁰ The agency also disregarded many requests that BLM not accept current levels of grazing as a given, but instead reevaluate grazing in a comprehensive manner during the planning process.⁵⁸¹ Speaking from a different perspective, a small number of ranchers and county government officials opposed even the Preferred Alternative, stating that it withdrew too much acreage from grazing and designated too many ACECs.⁵⁸² Ultimately, BLM's decision probably reflects the agency's his-

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.*

⁵⁷⁶ *Id.* at 12.

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.*

⁵⁷⁹ See, e.g., Sierra Club Letter, *supra* note 491 (making several recommendations to enhance environmental protection); FWS Letter, *supra* note 491 (same); EPA Letter, *supra* note 491 (same); Letter from Southern Arizona Guides and Outfitters Association to BLM (Jan. 26, 1990), in SAFFORD RMP, *supra* note 245, at 187 [hereinafter Southern Arizona Guides and Outfitters Association Letter] (recommending fee increases or cattle reductions to benefit wildlife).

⁵⁸⁰ Sierra Club Letter, *supra* note 491; FWS Letter, *supra* note 491; EPA Letter, *supra* note 491; Southern Arizona Guides and Outfitters Association Letter, *supra* note 579.

⁵⁸¹ See, e.g., Sierra Club Letter, *supra* note 491; FWS Letter, *supra* note 491; Letter from Amy Schell to BLM (May 31, 1990), in SAFFORD RMP, *supra* note 245, at 333 (May 31, 1990) (charging that "failure to consider grazing as a significant issue in the EIS is a violation of NEPA").

⁵⁸² See, e.g., Resolution of Safford District Grazing Advisory Board (Mar. 30, 1990), in SAFFORD RMP, *supra* note 245, at 243 (stating that the Preferred Alternative would reduce county tax bases); Letter from Arizona Cattle Growers' Association to BLM (June 12, 1990), in SAFFORD RMP, *supra* note 245, at 294 (stating that ACECs exclude grazing on too much land); Letter from Phelps Dodge Mining, Inc. to BLM (Apr. 6, 1990), in SAFFORD RMP, *supra*

toric and continuing identification with grazing and other consumptive industries, the influence still wielded by these groups, and the difficulty of changing the agency's approach to give equal weight to the interests of new constituent groups of the public lands.⁵⁸³

6. Conclusions

This review of the Safford RMP illustrates the difficulty of carrying out FLPMA's directive to plan for balanced, multiple use management of the public lands. The statute's broad provisions give BLM little guidance on how to resolve conflicts over public lands resources during the planning process and leaves local BLM staff with enormous discretion. Few of those who commented on BLM's draft RMP and EIS were satisfied with the provisions of the preferred alternative. Some felt it was overly protective, while most felt it did not go far enough to protect the public lands from the impacts of grazing, mining, and off-road vehicle use.

FLPMA leaves BLM with nearly unbridled discretion in the planning process. BLM is accordingly susceptible to pressure from outside interests, particularly groups with political power favoring extensive grazing and mining.⁵⁸⁴ The influence of members of local communities, who view consumptive industries as key providers of jobs and economic stability, is especially strong. This influence, and the resulting adverse consequences for wildlife, are apparent in BLM's decision not to consider grazing as an issue in preparing this RMP,⁵⁸⁵ in the small number of ACECs designated in the final RMP,⁵⁸⁶ and in the limited protection given to designated ACECs and most riparian areas.⁵⁸⁷ In addition, FLPMA's lack of specificity regarding what an RMP should contain permitted BLM to avoid setting forth specific actions necessary to achieve the broad goals set for wildlife management.⁵⁸⁸ The Safford RMP gives little concrete guidance to the resource managers who must attempt to translate these broad objectives into on-the-ground activities.

VI. OBSTACLES TO BALANCED CONSIDERATION OF WILDLIFE IN THE BLM PLANNING PROCESS

When it enacted FLPMA, Congress envisioned a balanced approach to public lands management, with various resources on those lands being

note 245, at 294 (stating that proposed plans withdraw too much acreage from mineral prospecting and development). These commenters were greatly outnumbered by those favoring Alternative B.

⁵⁸³ See *supra* notes 489-504 and accompanying text (discussing issues omitted from the SAFFORD RMP, *supra* note 245).

⁵⁸⁴ See Blumm, *supra* note 23, at 421 (discussing effects of commodity-based interest group pressure on land management decisions).

⁵⁸⁵ See *supra* notes 489-504 and accompanying text.

⁵⁸⁶ See *supra* notes 512-27 and accompanying text (discussing the limited range of ACECs included in the Safford RMP).

⁵⁸⁷ See *id.*

⁵⁸⁸ See *supra* notes 558-64 and accompanying text (discussing the limited provisions for wildlife habitat management considered by BLM).

given equal consideration.⁵⁸⁹ The resource management planning process was viewed as a way to maximize the national interest in the public lands. It appears, however, that BLM's planning efforts have not yet resulted in balanced resource management for the public domain, because BLM has continued to favor traditional consumptive uses of its lands at the expense of other uses and resources. Although some progress has been made, wildlife is still among the resources most neglected by BLM's present management approach.⁵⁹⁰ At least five legal and practical obstacles hinder the equitable consideration of the wildlife resource and effective wildlife habitat protection through the present BLM planning process. These are: 1) an overly broad statutory and regulatory mandate, 2) an approach to planning that is not truly comprehensive because it does not necessarily consider all resource management issues, 3) an excessively decentralized agency structure, 4) a lack of adequate funding and personnel, and 5) a history of deference to consumptive users of the public lands. This Part briefly discusses each of these problems.

A. *Overly Broad Statutory and Regulatory Mandate*

FLPMA clearly requires a new approach to planning for and management of the public lands. However, its provisions give BLM little specific direction. Congress even neglected to provide a timetable for RMP completion and implementation or to establish the required contents of an RMP. FLPMA gives the designation of ACECs priority status, yet provides no uniform guidelines for the ACEC program. FLPMA also assigns to BLM the difficult task of balancing multiple and often conflicting uses of the public lands to maximize the "national interest," without giving any guidance as to what the "national interest" may be. The level of consideration to be given to wildlife is not specified, making it easier for BLM to prolong its historic allegiance to consumptive users at wildlife's expense. In contrast, the National Forest Management Act⁵⁹¹ specifically directs the U.S. Forest Service "provide for diversity of plant and animal communities" in the planning process.⁵⁹² Congress's failure to provide more precise standards for the BLM planning process has left courts reluctant to closely review BLM planning decisions and require consideration of the wildlife

⁵⁸⁹ See 43 U.S.C. §§ 1712(c)(1) (directing BLM to use principles of multiple use when developing land use plans), 1702(c) (defining multiple use to include a "combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable, including . . . recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values") (1994).

⁵⁹⁰ George Cameron Coggins, *The Law of Public Rangeland Management V: Prescriptions for Reform*, 14 ENVTL. L. 497, 543 (1984).

⁵⁹¹ 16 U.S.C. §§ 1600-1729(h) (1994).

⁵⁹² *Id.* § 1604(g)(2)(B) (1994). Courts have interpreted Forest Service regulations implementing this provision as setting requirements that are enforceable against the Forest Service. See *infra* note 598.

resource.⁵⁹³ In short, FLPMA leaves BLM with too much discretion in interpreting and complying with its provisions.

BLM regulations implementing FLPMA perpetuate this flaw. Unlike Forest Service rules, which provide detailed guidance regarding the planning process and plan substance,⁵⁹⁴ BLM's regulations are too general. Forest Service regulations contain standards for the management of fish and wildlife habitat that are concrete and enforceable.⁵⁹⁵ For example, the Forest Service must manage fish and wildlife habitat to "maintain viable populations of existing native and desired nonnative vertebrate species in the planning area."⁵⁹⁶ The Forest Service regulations also require identification of management indicator species to assist planners in estimating the effects of proposed planning alternatives on wildlife.⁵⁹⁷ Because courts have proved willing to enforce these requirements against the Forest Service,⁵⁹⁸ the agency has been motivated to give more serious consideration to wildlife during the planning process. As an illustration, planners working on a revised forest plan for the Tongass National Forest in Alaska convened panels of experts to analyze population viability of various old-growth dependent species and prepare a strategy for ensuring viability that would be incorporated in the new forest plan.⁵⁹⁹ BLM currently lacks the motivation to take similar steps.

B. Planning Is Not Truly Comprehensive

As demonstrated by the Safford District RMP,⁶⁰⁰ BLM resource management plans do not always start with a clean slate and consider all re-

⁵⁹³ See *Natural Resources Defense Council v. Hodel*, 624 F. Supp. 1045, 1049-63 (D. Nev. 1985), *aff'd* 819 F.2d 927 (9th Cir. 1987) (recognizing inadequacies of BLM plan that contained only very broad provisions regarding grazing, but concluding that plan was not so inadequate as to require an injunction); Coggins, *supra* note 220, at 330-31.

⁵⁹⁴ 36 C.F.R. §§ 219.1-29 (1995).

⁵⁹⁵ See *id.* § 219.19.

⁵⁹⁶ *Id.* A "viable population" is one that "has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area." *Id.* Under the rubric of promoting ecosystem management, the Forest Service recently proposed rules that would replace the viability requirement with a requirement that forest plans protect habitat capability only for sensitive species. 60 Fed. Reg. 18,886 (Apr. 13, 1995). This would be a short-sighted revision, because the habitat protection requirement would apply only to those species whose populations are already at risk. Such an approach would lead to the type of extreme "deathbed conservation" measures taken on behalf of the spotted owl. See *infra* note 613.

⁵⁹⁷ 36 C.F.R. § 219.19(a)(1) (1995).

⁵⁹⁸ See *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 301-02 (9th Cir. 1991) (upholding preliminary injunction against timber sales until Forest Service implemented revised standards and guidelines that would ensure the viability of the northern spotted owl); *Seattle Audubon Soc'y v. Moseley*, 798 F. Supp. 1484, 1490-94 (W.D. Wash. 1992) (same), *aff'd*, 998 F.2d 699 (9th Cir. 1993).

⁵⁹⁹ See A. ROSS KIESTER & CAROL ECKHARDT, *REVIEW OF WILDLIFE MANAGEMENT AND CONSERVATION BIOLOGY ON THE TONGASS NATIONAL FOREST: A SYNTHESIS WITH RECOMMENDATIONS* (1994); *A PROPOSED STRATEGY FOR MAINTAINING WELL-DISTRIBUTED, VIABLE POPULATIONS OF WILDLIFE ASSOCIATED WITH OLD-GROWTH FORESTS IN SOUTHEAST ALASKA: A REPORT OF AN INTER-AGENCY COMMITTEE* (1993).

⁶⁰⁰ See *supra* part V.B (discussing BLM's development of the Safford RMP).

source issues. New RMPs consider in depth only those issues determined by BLM to require resolution at the time planning is initiated.⁶⁰¹ Under this approach, which likely violates FLPMA,⁶⁰² the agency avoids tackling controversial questions such as the propriety of grazing in certain areas or reductions in livestock levels.⁶⁰³ Here also, Forest Service regulations are superior to BLM rules, because they require the Forest Service to identify lands suitable for grazing during the planning process.⁶⁰⁴ Forest Service plans also must integrate detailed consideration of various forest resources, including timber, fish and wildlife, and grazing, into each plan.⁶⁰⁵ Unlike the BLM's approach to grazing in the Safford District, the Forest Service could not easily ignore a major resource issue such as grazing in its planning efforts.

C. Excessive Decentralization

BLM's overall structure and its resource management planning process are both extremely decentralized. The agency's system of state offices is relatively unique among federal natural resource agencies, most of which have regional offices that supervise operations in several states.⁶⁰⁶ Most BLM key management decisions are made at the local level with little oversight by its national office. The agency develops RMPs solely at the resource area level and submits them to the state BLM director for approval. BLM designates ACECs in the same manner.

Of course, the nature of BLM's responsibilities makes it impossible for BLM's Washington, D.C. office to oversee every decision made by BLM's local managers. Local personnel, who are most familiar with the on-the-ground conditions and unique issues facing their areas, should have some flexibility in making decisions. However, the current degree of decentralization is excessive, producing inconsistent policy implementation.⁶⁰⁷ In addition, state BLM directors are likely subject to greater pressure from state and local government officials than the directors of federal agency regional offices that span all or parts of several states.⁶⁰⁸ Because BLM's district and resource area managers have a great deal of discretion and are not subject to close oversight from the national level, they are also vulnerable to pressure from local consumptive interests, such as ranchers and miners, who seek to influence planning and management decisions. The widely varying records of the various states in

⁶⁰¹ See *supra* notes 246-51, 281, 489-504 and accompanying text.

⁶⁰² See *supra* notes 247-51 and accompanying text.

⁶⁰³ See Loomis, *supra* note 74, at 330; Feller, *supra* note 298, at 705-08.

⁶⁰⁴ 36 C.F.R. § 219.20 (1995).

⁶⁰⁵ *Id.* § 219.13.

⁶⁰⁶ For example, the U.S. Forest Service, National Park Service, and Environmental Protection Agency all have regional offices.

⁶⁰⁷ See Ed Marston, *Babbitt is Trying to Nationalize the BLM*, HIGH COUNTRY NEWS, May 16, 1994, at 1, 11 (describing state BLM offices' inconsistent philosophical approaches and differing implementation of policies).

⁶⁰⁸ *Id.* at 10-11.

designating and protecting ACECs illustrate the detrimental effects of this decentralization.⁶⁰⁹

D. Lack of Funding and Personnel

BLM is a poorly funded agency. Cost-saving measures often target BLM resource planning and fish and wildlife programs, because they are not perceived as increasing the production of consumptive resources from the public lands.⁶¹⁰ Accordingly, when BLM's slow progress toward fulfilling FLPMA's planning requirement is criticized, BLM can legitimately point to a lack of funding and personnel as a major stumbling block. Budgetary constraints also severely restrict the effectiveness of BLM's wildlife programs and limit the attention the agency can devote to the wildlife resource. In addition, funds that could be directed toward wildlife habitat improvement projects, such as grazing fee revenues, are rarely used for this purpose. Instead, the agency often directs these funds toward projects that benefit the livestock industry, such as water systems for cattle, prescribed burning and seeding of rangeland, and cattle guards.⁶¹¹ As a result, BLM lacks sufficient funds either to develop RMPs promptly or to implement completed RMPs fully. Although funding cutbacks and agency streamlining are a reality in this era of "re-inventing government,"⁶¹² it is shortsighted to cut budgets for planning and habitat protection programs in the short-term when these programs can help avoid the need for more dramatic and expensive measures in the future.⁶¹³

E. Historic Deference to Consumptive Users

BLM's history and the statutes by which it has been governed in the past aligned the agency closely with ranchers and miners, key consumptive users of the public lands.⁶¹⁴ Many in the livestock industry view grazing on the public lands as a right, not a privilege, making it difficult for BLM to reduce grazing levels and institute other measures designed to improve range condition. Local advisory boards and multiple use councils

⁶⁰⁹ See *supra* notes 445-51 and accompanying text.

⁶¹⁰ The General Accounting Office has determined that BLM wildlife programs receive between 3% and 7% of available funding, while the range, minerals, and timber programs receive up to 33%. ATTENTION TO WILDLIFE, *supra* note 17, at 4.

⁶¹¹ *Id.* at 20. For example, in one BLM district only about 6.5% of the district's \$2.6 million in range betterment funds was allocated to wildlife-related projects in fiscal years 1984 to 1989. *Id.*

⁶¹² See Leshy, *supra* note 6, at 684-85.

⁶¹³ The controversy over management of the Pacific Northwest's old-growth forests provides a good illustration. Hungerford, *supra* note 57, at 1430. For years, BLM and the Forest Service ignored the needs of old-growth dependent species in the Northwest's public forests and allowed environmentally unsustainable logging practices to continue. *Id.* As a result, the northern spotted owl was listed under the ESA, logging in the Northwest came to a halt, and the federal government poured millions of dollars into new planning efforts to ensure species viability and allow some level of logging to continue. *Id.* The Clinton Administration's Option 9 plan for logging in the Pacific Northwest called for the government to spend \$1.2 billion on worker retraining, economic development, and watershed restoration. *Id.*

⁶¹⁴ See *supra* notes 23-34 and accompanying text.

were and continue to be dominated by ranchers, and they exert a great deal of influence over local BLM decision making.⁶¹⁵ Similarly, many view mining as an entitlement. Mining laws dating to the late 1800s permit any interested party to prospect for hardrock minerals free of charge on almost all public lands.⁶¹⁶ BLM has been reluctant to require mineral operators to follow protective mining practices for the benefit of wildlife if the protective measures would substantially increase mining costs.⁶¹⁷

Political pressure from these interests at both the local and national levels has kept BLM from instituting reforms and from giving equal consideration to wildlife and other nonconsumptive uses of the public lands.⁶¹⁸ Preserving "community stability" has always been a key concern for BLM, and the agency often favors consumptive industries that promise local employment in order to achieve this goal.⁶¹⁹ This is true even though the economic value of uses of the public lands that depend on healthy wildlife populations and good environmental quality, such as camping, hiking, and hunting, is rapidly growing.⁶²⁰ There are some indications that BLM is moving away from this traditional deference to consumptive users, but much remains to be done.⁶²¹

VII. SUGGESTIONS FOR CHANGE

Both legal and institutional reforms are required to ensure that BLM gives wildlife resources the same consideration as other values on public lands. This Part suggests some changes that would help achieve the balanced approach to resource management that Congress envisioned when it passed FLPMA. Of course, it is unlikely that sweeping changes will be made overnight. Any improvements will likely be incremental, due to political pressures on BLM and the Department of the Interior and fiscal pressures on the federal government. However, change is necessary to ensure that the national interest in the public lands is maximized.

A. Amend FLPMA

Congress should amend FLPMA to provide greater guidance to BLM in its planning and management efforts. The statute should set forth the required contents of an RMP and instruct BLM to engage in a truly comprehensive planning effort that considers all resource issues in every resource area or district. BLM should not be able to indefinitely postpone consideration of certain issues or continue to operate under plans that do

⁶¹⁵ *Id.*

⁶¹⁶ *Id.*

⁶¹⁷ ATTENTION TO WILDLIFE, *supra* note 17, at 35.

⁶¹⁸ For example, political pressures have resulted in the scaling back of Interior Secretary Bruce Babbitt's efforts to reform grazing management and the removal of BLM's reform-minded director Jim Baca. Tom Kenworthy, *Interior Department Official Resigns Under Pressure*, WASH. POST, Feb. 4, 1994, at A17.

⁶¹⁹ See *supra* notes 25-30 and accompanying text.

⁶²⁰ See PUBLIC REWARDS, *supra* note 14; *supra* notes 47-51 and accompanying text.

⁶²¹ For example, BLM's *Fish and Wildlife 2000* and *Riparian-Welland Initiative* are good first steps in the right direction. See *supra* part IV.C.4-5.

not satisfy FLPMA's requirements. Specifically, Congress should direct BLM to consider the sustainable level of grazing when preparing an RMP for any resource area where grazing occurs and to set allowable grazing levels in the RMP. BLM should not be permitted to rely on grazing allocations made in preexisting MFPs or other outdated plans.⁶²² Congress should mandate that RMPs include 1) specific actions necessary to meet goals and objectives; 2) implementation schedules; and 3) projected budget and staffing requirements for implementation. Congress should also require BLM to consider the economic benefits and environmental costs of all land use activities on the public lands and weigh these benefits and costs carefully. In addition, FLPMA should specify the amount of consideration BLM must give the wildlife resource. Simply requiring that wildlife be balanced with other uses of the public lands has not been sufficient. This broad command leaves BLM too much discretion, enabling the agency to prefer other uses, such as grazing and mining. At a minimum, FLPMA should require that RMPs provide for habitat management practices that will maintain viable wildlife populations.⁶²³

Congress should also direct BLM to adopt binding and enforceable regulations to further assist agency personnel in the planning effort. These regulations should set forth uniform procedures and guidelines for considering and protecting species viability through planning. The new rules should also ensure consistent treatment of areas nominated for ACEC status throughout the various states. These regulations should specify that certain areas, such as critical habitat for endangered species, will automatically qualify for ACEC status. In addition, site-specific ACEC plans should be required for every designated ACEC and should be developed and implemented within three years after designation.⁶²⁴ Stringent protections, such as the withdrawal of ACECs from entry for mineral exploration, should be required.⁶²⁵ Resource uses with potentially adverse impacts should be permitted within an ACEC only if they are found to be compatible with the values the ACEC was designated to protect.⁶²⁶

⁶²² This is similar to a requirement contained in the National Forest Management Act, 16 U.S.C. §§ 1600-1729 (1994), which specifies that Forest Service plans must set forth proposed levels of timber harvest. *Id.* § 1604(f)(2) (1994).

⁶²³ The National Forest Management Act and its implementing regulations contain a similar provision. *Id.* § 1604(g)(3)(B) (1994); 36 C.F.R. § 219.19 (1995).

⁶²⁴ See CAMPBELL & WALD, *supra* note 42, at iv. A similar requirement is contained in the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1994), which directs the responsible agency to prepare a river management plan for each river within three years of its designation under the statute. *Id.* § 1274d.

⁶²⁵ Currently, BLM cannot withdraw areas from mineral exploration, but can only recommend that the Secretary of the Interior do so. 43 U.S.C. § 1714 (1994).

⁶²⁶ This "compatibility" test could be modeled after that contained in the National Wildlife Refuge Act, 16 U.S.C. §§ 661-668dd, 668dd(d)(1)(A) (1994). This provision allows the Secretary of the Interior to authorize uses within wildlife refuges only if he determines they are compatible with refuge purposes. As a result, agencies must investigate the compatibility of consumptive uses, such as grazing, with the purposes for which a refuge was established. See *Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 388-89 (9th Cir. 1993) (holding that Department of the Interior was not substantially justified in renewing annual grazing permits on refuge without first analyzing whether the grazing was compatible with refuge purposes).

While these requirements should not make RMPs so specific and detailed that they constrain future management in response to changing conditions, they should ensure that RMPs will provide concrete guidance for on-the-ground management actions and enforceable standards against which the sufficiency of an RMP can be evaluated by a court. FLPMA should also set deadlines for land use planning completion and implementation. To ensure BLM makes continuing progress in developing plans and putting them into practice, Congress should require BLM to report on its progress annually.⁶²⁷

B. Improve National Oversight

To facilitate uniform nationwide policy implementation, BLM's national office should have greater oversight capabilities. BLM's structure should be streamlined, with state headquarters reorganized into regional offices. Such a reorganization may help reduce BLM's susceptibility to pressure from state government officials and congressional delegations. Local BLM offices should be required to report to the regional and national offices regularly regarding their progress in developing and implementing RMPs, designating and protecting ACECs, and restoring and protecting wildlife habitat. Local BLM offices should not be able to ignore or modify national policies and guidance. BLM's national director should have the authority to review and suggest changes to RMPs before they are finalized to ensure that they reflect BLM's overall goals and objectives.

Of course, it is impossible for BLM's national office to be involved in every local decision. Local agency officials necessarily have a wealth of information about the lands in their districts and the site-specific issues that they must resolve. A large degree of management discretion and decision making authority should thus remain at the local level. However, BLM's national leadership should be confident that each local manager's decisions will conform to BLM's national policies and guidance and not be dependent on each manager's own personal philosophies of public lands management. Strong support from BLM leadership and uniform national guidance will make it easier for local BLM personnel to make planning and management decisions that may be unpopular at the local level due to their perceived impacts on community economies or because they change the status quo.

C. Increase Funding for BLM Planning and Wildlife Programs

Sufficient funding for resource management planning and wildlife programs is necessary to ensure that the FLPMA's mandates are fulfilled. Congress should direct that an adequate portion of BLM's appropriations go toward these areas. Outside of the appropriations process, other sources of funding for projects that benefit wildlife, such as grazing fees and matching grant programs, should be fully utilized. For example, Con-

⁶²⁷ The National Forest Management Act imposes such a requirement on the Forest Service. 16 U.S.C. § 1604(e) (1994).

gress should allocate a specific portion of the grazing fee revenues available for range improvement to wildlife habitat restoration projects. Because grazing is a major contributor to poor range conditions and a lack of forage for wildlife, it is logical that a portion of grazing revenues go toward offsetting this damage. Grazing fees should also be set to reflect the fair market value of the range resource, thereby eliminating subsidies for ranchers and providing additional funds for wildlife habitat restoration.⁶²⁸ BLM should also have sufficient staffing and funding to take full advantage of the Challenge Cost Share Program, a matching grant program allowing state and local governments and private organizations to supplement BLM appropriations and funds received from consumptive use programs.⁶²⁹ These funds have often gone unclaimed in the past due to BLM's inability to match them.⁶³⁰

D. Promote a New Vision

Numerous commentators have demonstrated the need for a "new vision" of public lands management.⁶³¹ Congress intended FLPMA to bring about fundamental changes in the way the public domain is managed, but the potential of the statute has never been fully realized. To achieve truly balanced multiple-use management of BLM lands, a combination of reforms such as those outlined above will be necessary. By adopting such measures, Congress would demonstrate to BLM and to the users of the public lands that all resources, including wildlife, are important and merit equal consideration. Such a firm statement of purpose is needed to preserve wildlife on the public lands and guide the management of those lands for the benefit of present and future generations.

⁶²⁸ FLPMA provides that the United States should receive fair market value for the use of the public lands and their resources, but this policy has not yet been enforced. 43 U.S.C. § 1701(a)(8), (9) (1994). This issue is at the heart of the ongoing grazing reform controversy. See *supra* note 115.

⁶²⁹ ATTENTION TO WILDLIFE, *supra* note 17, at 22.

⁶³⁰ *Id.*

⁶³¹ See, e.g., Symposium, *Clinton's New Land Policies*, 25 ENVTL. L. 679 (1995); Symposium, *A New Era for the Western Public Lands*, 65 U. COLO. L. REV. 183 (1994).