

**WHAT'S IN A NAME? THE STORY OF THE
UTAH WILDERNESS REINVENTORY**

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I. FEDERAL LAND USE PLANNING IN A NUTSHELL

- A. Planning mandates are pervasive in natural resources law.
- The National Forest Management Act (NFMA) requires the Secretary of Agriculture to “develop, maintain, and, as appropriate, revise land and resource management plans” for all of the national forests. 16 U.S.C. § 1604(a).
 - The Federal Land Policy Management Act Policy (FLPMA) requires the Secretary of the Interior to do land use planning for the public lands by tract or area. 43 U.S.C. § 1712.
 - The Coastal Zone Management Act presses states to develop coastal zone management plans. 16 U.S.C. § 1452(3).
 - The National Wildlife Refuge Improvement Act of 1997 requires the Secretary of the Interior to maintain the biologic integrity, diversity and environmental health of the Refuge System, and prepare comprehensive conservation plans. 16 U.S.C. § 668dd.
 - The Magnuson-Stevens Fishery Conservation and Management Act establishes Regional Fishery Management Councils to develop fishery management plans that are to provide the “measures necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery [in a manner] consistent with the national standards.” 16 U.S.C. 1853(a).

B. Planning typically occurs in three stages.

1. The first stage in the planning process is some form of inventory of the resource. § 201 of FLPMA, for example, obligates the Interior Department to “prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values.” 43 U.S.C. § 1711. This inventorying obligation grows out of the common sense idea that to manage a resource wisely it helps to have data about the quantity, location and nature of the resource—is it scarce or plentiful? Where is it located? What are its potential uses (e.g., does it have recreation, aesthetic, cultural, or ecosystem service value? Does it have commodity value?)

2. The second stage in the planning process is the creation of the resource management plan. This typically involves notice and the opportunity for comment. In simple terms, the land use plan zones the public lands by describing what sorts of activities and uses may be allowed for particular lands and inventoried resources.

3. A management plan typically describes what uses are *allowed* on particular lands. It does not guarantee that any particular proposal for an allowed use will be permitted. A particular permit proposal—e.g. to build a road, engage in timber harvest—otherwise allowed by a land use plan, will still only be approved after a site-specific analysis under NEPA, the ESA, and other applicable laws.

C. My focus is on this first step in the planning process—the inventory. This might seem relatively uncontroversial, but it seldom is.

II. A BRIEF HISTORY OF PUBLIC LAND USE PLANNING

A. The first century of our country’s history saw very little land use planning, at least not the type we would recognize today. The rectangular survey system imposed a rudimentary land use plan with its division of the public domain into 36 square-mile townships and one square-mile sections. But the survey treated each lot as fungible, whether it contained gold, redwoods, sagebrush or a lake. Other than the occasional consideration given to mineral-bearing lands, until well into the Nineteenth Century, little thought was given to managing land with reference to the resources on that land.

B. A potential point from which to trace the birth of resource planning might be the Report of the 1879 Public Land Commission. In that report John Wesley Powell and Interior Secretary Carl Shurz articulated their developing views that public land policy must reflect the nature of land. The public lands, the Report suggested, should be inventoried and classified according to resources they contained. Different laws and management regimes should then be developed for different resources.

C. The Report’s recommendations were not immediately embraced, but over the succeeding decades at least some classification did occur. Public lands were set aside for preservation and recreation as national parks and national monuments; bird refuges were created to protect the wildlife resource; lands valuable for furnishing continuous supply of timber were reserved as national forests; and lands “chiefly valuable” for grazing were set aside under the Taylor Act, albeit pending future disposal. But beyond this general classification, there was not much in the way of planning. This was particularly true for the national forests and BLM lands, which tended to be managed for commodity production purposes.

D. Because the land use decisions of the BLM and Forest Service seemed so frequently captured by special interests, so often directed at commodity use of public natural resources, and so infrequently dictated by careful science and expert decisions, Congress, beginning in the 1960s and accelerating in the 1970s decided that management changes were needed. Part of the legal response was renewed emphasis on planning.

E. As part of its emphasis on increased resource planning, Congress began refocusing public land management on what it termed *multiple use* and *sustained yield*, passing the Multiple-Use, Sustained Yield Act for the Forest Service in 1960 and the Classification and Multiple Use Act in 1964 for the BLM. Although the Forest Service already had such authority, the idea was that the agencies should begin to think more broadly about the alternative uses of the natural resources on the public lands and more deeply about the sustainability of particular uses. The method of implementing these concepts of multiple use and sustained yield—the way of mediating between the various public land interests—was to be planning.

F. This emphasis on multiple use and planning continued with the adoption of the two organic acts that govern the BLM lands and national forests today: the Federal Land Policy Management Act (FLPMA) for the BLM and the National Forest Management Act for the Forest Service. These “modern” planning statutes should be understood partly as a response to the failures of progressive era hopes for scientific management. Yet, because planning statutes are mostly a renewed effort to have agencies do a better, more expert, job of management, they also should be understood partly as products of a progressive era impulse.

G. As indicated in FLPMA’s “multiple use” definition, the object of planning was to enable

management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values 43 U.S.C. § 1702(c).

H. As revealed in this statutory definition, which allows agencies to decide upon some “combination of balanced and diverse resource uses,” multiple use management gives the agencies wide latitude in choosing how the public lands will be used. Given this broad discretion, the public lands managed by the BLM and the Forest Service have triggered the most frequent and bitter disputes about public land management as different interests have worked to encourage the agencies to exercise their discretion in favor of particular resource uses and values. Commodity and extractive interests have urged the agencies in one direction, preservation interests have pushed in another, and recreation and other interests have tugged in still more directions. The same push and pull has occurred within the agencies themselves as different administrations have emphasized different multiple use values.

III. INVENTORYING BLM’S LANDS UNDER FLPMA

A. Inventorying is a critical and basic component of planning regimes. FLPMA's basic inventorying requirement is found in § 201. It obligates the BLM to "maintain on a continuing basis an inventory of all public lands and their resource and other values." 43 U.S.C. § 1711(a). In addition to this basic continuous inventory requirement that was designed to undergird all planning, § 603 of FLPMA required the Secretary, within fifteen years of FLPMA's passage to review the lands identified during the § 201 inventory and make a recommendation to the president about which of those lands was suitable for preservation as wilderness. 43 U.S. C. § 1782(a).

B. The story of this paper focuses on the BLM's wilderness inventory and review, and particularly about how it worked in Utah which has been ground zero in the national wilderness debate. This is a story not just about inventorying, but about the importance of labeling, naming and classifying in public land policy making, and about how public land management agencies work. Before telling that story, however, a bit more background on wilderness inventorying is necessary.

1. The Wilderness Act originally designated as wilderness areas only 9.1 million acres of land that had previously been set aside by the Forest Service as "wilderness," "wild," or "canoe" areas. 16 U.S.C. § 1132(a). However, the Act also provided for an inventory, or what it called a "review," to be completed within ten years, of the wilderness potential of all the areas within the national forests that had previously been designated as "primitive areas," as well as a review of "every roadless area of five thousand contiguous acres or more in the national parks, monuments and other units of the national park system and every such area of, and every roadless island within, the national wildlife refuges and game ranges." 16 U.S.C. § 1132(c).

2. The search for wilderness in various public land management units proved to be quite controversial, particularly in the national forests which were otherwise designated as available for multiple uses, including logging, grazing, mining and other extractive and commodity uses, as well as high intensity, motorized recreation.

3. Although the Wilderness Act on its face seemed to confine the wilderness inventory in national forests to those areas previously designated as primitive areas, 16 U.S.C. § 1132, in the end the Forest Service inventoried all of the national forests for acreage that might qualify as wilderness. How this happened is a fascinating story that begins with the decision in *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972), and encompasses RARE I, RARE II, as well as the Clinton Administration's roadless area rule and its subsequent undermining by the Bush Administration. 33 millions acres of national forest land have now been designated as wilderness. Although a fascinating story, it is not the story of this paper.

C. Hewing to the old adage that the public lands managed by the BLM were the lands no one wanted, the Wilderness Act completely ignored them. As preservation sentiments continued to mount, Congress decided to rectify that omission when it passed FLPMA in 1976 and called for BLM to conduct its own wilderness inventory and review. *See* 43 U.S.C. § 1782. Section 603 of FLPMA provided:

Within fifteen years after October 21, 1976, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.) and shall from time to time report to the President his recommendation as to the suitability or unsuitability of each such area or island for preservation as wilderness 43 U.S.C. § 1782(a).

D. Section 603 also provided that the areas identified by the Secretary as potential wilderness (what are typically called “wilderness study areas” or “WSAs”) were to be managed by the Secretary, and therefore the BLM, for non-impairment of their wilderness characteristics until Congress decided to designate the WSAs as part of the wilderness preservation system or release them for multiple use management. *See* 43 U.S.C. § 1782(c).

E. Like the RARE process for the national forests, the inventory of the BLM’s lands for wilderness proceeded on a state-by-state basis. By the conclusion of the initial inventory in November 1980, out of almost 174 million acres surveyed, BLM had identified 919 WSAs covering some 24 million acres. 45 Fed. Reg. 77,574 (Nov. 14, 1980). BLM recommended to the President that only a portion of this acreage be designated as wilderness. As I’ll discuss in more detail with respect to Utah, there was significant controversy about whether BLM had identified enough WSAs and about the even lower acreage figure of WSAs recommended for wilderness designation. From the environmental community’s perspective, BLM had hearkened too closely to the wishes of its traditional extractive industry constituency and had improperly failed to classify as WSAs and/or recommend for wilderness designation areas of the public land with real wilderness quality.

F. In the years following completion of the inventories, Congress added 6.7 million acres of BLM lands to the National Wilderness Preservation System but the question of what BLM land should be designed as wilderness has remained largely, although not entirely, stalemated. In broad strokes, Western Republicans in whose states the wilderness study areas lie have proposed state-by-state wilderness bills that largely track the BLM’s wilderness recommendations while congressional Democrats and like-minded Republicans have proposed wilderness bills that include not just the BLM’s recommended wilderness, but also all WSAs as well as areas outside WSAs identified by preservation advocates as having wilderness potential.

G. At first glance, the stalemate might seem odd—why not at least designate as wilderness those areas on which the two sides agree? One prominent source of the stalemate is disagreement about what is known as “release” language. So-called “soft release” language in wilderness legislation removes non-designated land from wilderness study area

status but does not prohibit the area from being designated as wilderness in the future. The “hard release” language favored by some Western Republicans bars non-designated areas of the state from being considered for possible wilderness designation forever or for some fixed period of time. In essence, hard release language is designed to eliminate wilderness management from the range of multiple uses available to the BLM in its land use planning. For preservation advocates it makes little sense to compromise on release language when WSAs must already be managed for non-impairment.

H. It is this congressional stalemate that sets the stage for a story about wilderness inventories in Utah, which has been ground zero in the national wilderness debate.

IV. THE UTAH WILDERNESS INVENTORY

A. Recall that § 603 of FLPMA instructed the Secretary of the Interior to review all BLM lands identified in its initial § 201 inventory to determine whether those lands should be classified as WSAs. This review and recommendation was to occur “[w]ithin fifteen years after October 21, 1976.” 43 U.S.C. § 1782(a). At the end of that process in Utah, BLM had identified 82 WSA’s that included approximately 3.2 million acres of land.

B. As was the case with many of BLM’s other state inventories, the environmental community believed that the BLM had vastly understated potential wilderness areas. In February of 1985 they formed the Utah Wilderness Coalition and sent their members into the field to map their view of which BLM lands should be designated as WSA’s. After thousands of hours of work, in 1990 the Coalition concluded that Utah actually contained 5.7 million acres of wilderness. The contrast between their view and that of the BLM only became more apparent when BLM recommended to the President that of the 3.2 million acres of WSAs in Utah, just under 2 million were suitable for designation as wilderness.

C. Over the next few years, competing Utah wilderness bills were proposed in Congress. Utah Representative Jim Hansen introduced a series of bills proposing to designate first 1.4 million acres and later 1.9 million acres as wilderness. Competing bills were introduced relying on the work of the Utah Wilderness Coalition and proposing 5.7 million acres of wilderness. These competing bills were supported by the Clinton Administration. Partly because Congress and the Presidency were divided throughout the 1990s, none of these bills could garner sufficient support.

D. In an effort to break this deadlock, the Clinton Administration decided upon two different administrative approaches to wilderness in Utah. The first was to use the Antiquities Act to proclaim some of the proposed wilderness off-limits to development. Most of the 1.7 million acres proclaimed as part of the Grand Staircase-Escalante National Monument had been identified as potential wilderness in the 5.7 million acre wilderness bill in Congress. The Administration’s second effort to change the terms of the wilderness debate was to begin a “reinventory” of the BLM’s lands in Utah. Basically, Secretary of the Interior, Bruce Babbitt, proposed to find out whether the Utah Wilderness Coalition’s

estimate of 5.7 million acres of wilderness was right. If Secretary Babbitt could find more potential wilderness than identified in the BLM's initial inventory, it would give a leg up to the advocates of the larger wilderness bill. As discussed below, the Secretary likely also hoped that any areas with wilderness potential identified during the reinventory could be classified as WSAs and managed for non-impairment of their wilderness characteristics.

E. Concerned that the reinventory might restrict development on additional BLM lands beyond those already classified as WSAs, the State of Utah, Utah's School and Institutional Trust Lands Administration, and the Utah Association of Counties (collectively "Utah") sued Secretary Babbitt seeking an injunction against the reinventory. *Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998). Utah argued that Secretary Babbitt did not have authority to conduct a reinventory of Utah's BLM lands in a search for more wilderness. In Utah's view, the time for wilderness inventories had ended when the fifteen year period specified in § 603 of FLPMA had expired. Utah also alleged that the Secretary would improperly begin managing for non-impairment lands identified in the reinventory as having potential wilderness quality, asserting that the Secretary was already doing so with respect to those lands outside WSAs that had been identified in the Utah Wilderness Coalition proposal as potential wilderness. Utah pointed to a November 1, 1993 Memorandum in which the Secretary had directed the BLM to give "careful attention" to these Coalition-identified areas before allowing any development proposal to go forward.

F. The Tenth Circuit concluded that Utah lacked standing to challenge the reinventory because the reinventory itself worked no injury to Utah. It was, after all, just labeling lands as potential wilderness didn't actually decide how the lands were to be managed. *Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998). The Tenth Circuit opined, however, that Utah had standing for its claim that the BLM was improperly affording WSA-type management to non-WSA lands identified by the Utah Wilderness Coalition and included in the 5.7 million acre bill in Congress. Under § 302 of FLPMA, the BLM is required to manage the public lands in accordance with its land use plans. 43 U.S.C. § 1732(a). In theory, therefore, to the extent the BLM's existing land use plans had zoned as open to leasing and development areas identified by the Utah Wilderness Coalition as potential wilderness, BLM was supposed to manage those areas as if they were open for leasing and development unless it amended its existing land use plans. Although the Tenth Circuit saw little evidence of such *de facto* wilderness management, it remanded that issue to the district court.

G. In the meantime, the reinventory went forward and the Interior Department decided that in addition to the 3.2 million acres originally identified as WSAs, another roughly 2.6 million acres of BLM lands in Utah had wilderness quality, just as the Utah Wilderness Coalition had suggested. Interestingly enough, about this same time preservation groups in Utah completed another inventory and suggested that Utah actually had 9.1 million acres of potential wilderness. The latest version of the America's Red Rock Wilderness Act, introduced by Representative Hinchey in April 2007, seeks designation of 9.4 million acres of wilderness. *See* H.R. 1919, 110th Cong., 1st Sess. (2007).

H. To distinguish the areas inventoried pursuant to its § 201 authority from those areas originally inventoried and designated WSAs during the fifteen-year window provided in § 603 of FLPMA, the Department of the Interior called the new areas “Wilderness Inventory Areas” or “WIAs.”

I. The issue for the BLM was how to manage these WIAs for non-impairment of their wilderness qualities without running afoul of the existing land use plans which had effectively zoned some of those areas as open to development. So what happened?

1. In April 1999, the Department of the Interior Solicitor issued a directive that the BLM should use NEPA to give “careful attention” to any proposal for development within a WIA, including consideration of a “no action” alternative to preserve the area’s wilderness characteristics.

2. On January 10, 2001, BLM adopted a new Wilderness Inventory and Study Procedures Handbook which provided that the § 201 WIAs could be designated as WSAs through the § 202 land use planning process, after which they would be managed for non-impairment until Congress made a decision on these areas or until the land use plan was amended to remove the WSA designation. This administrative designation of WSAs under the § 202 land use planning process was not limited to wilderness inventory areas but also included “lands included in proposed legislation, or land within externally generated proposals” that were determined to have wilderness characteristics in the land use planning process. 2001 Wilderness Handbook at 5.

3. Based on the new Handbook’s guidance, on August 20, 2001, the Utah BLM State Director instructed all Utah field office managers to manage WIAs so as to prevent any change that might prevent their future designation as wilderness.

4. Thereafter, and even before this specific guidance, BLM field office managers in Utah declined to offer leases or allow road work within WIAs despite the fact that almost all such areas were open to leasing under the relevant land use plans.

J. Following the Tenth Circuit’s remand, Utah’s lawsuit against the Department lay dormant until the early months of 2003 when Utah amended its complaint and alleged that the BLM’s adoption of the new Wilderness Inventory and Study Procedures Handbook and the guidance from the BLM’s state director had improperly adopted a wilderness management standard for WIAs without having amended the relevant land use plans. Utah argued that management in accordance with the land use plan was required not only by § 302 of FLPMA as discussed above but also by § 201, which provided that an inventory under § 201 “shall not, of itself, change or prevent change of the management or use of the public lands.” 43 U.S.C. § 1711. :

K. When Utah sent its proposed amended complaint to President Bush’s Department of the Interior, the Department recommended that the two sides attempt to settle the dispute. In April 2003, Interior announced that it had settled the case with Utah.

L. In the settlement agreement, the Department of the Interior conceded, as it had before the Tenth Circuit, that its authority to conduct wilderness reviews under § 603 had expired as of October 21, 1993. It also agreed to rescind the new Wilderness Handbook and promised not to manage its WIAs as if they were WSAs:

Defendants will not establish, manage or otherwise treat public lands, other than Section 603 WSAs and Congressionally designated wilderness, as WSAs or as wilderness pursuant to the Section 202 [planning] process absent congressional authorization. . . .

The agreement provided, however, that

[N]othing herein is intended to diminish BLM’s authority under FLPMA to prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values, as described in FLPMA Section 201. These resources and other values may include, but are not limited to characteristics that are associated with the concept of wilderness. . . .

[Nothing herein shall be construed to diminish the Secretary’s authority under FLPMA to utilize the criteria in Section 202(c) to develop and revise land use plans, including giving priority to the designation and protection of areas of critical environmental concern (Section 202(c)(3)).

In other words, the BLM was still free to conduct wilderness inventories under § 201 and it was still free to revise its land use plans under § 202 to adopt a management plan that protected an area’s wilderness characteristics. What it was not free to do was to name or label those areas “WSAs.”

M. The BLM’s authority to manage WIAs for non-impairment was further confirmed by the reference in the settlement agreement to the BLM’s authority to designate WIAs, or any other area of the public lands, as “areas of critical environmental concern,” so-called ACECs. Under § 201 of FLPMA, BLM is obligated to “maintain on a continuing basis an inventory of all public lands and their resource and other values . . . giving priority to areas of critical environmental concern.” 43 U.S.C. § 1711(a). Under § 202, BLM is required “[i]n the development and revision of land use plans” to “give priority to the designation and protection of areas of critical environmental concern.” 43 U.S.C. § 1712(c)(3). FLPMA defines ACECs as

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

43 U.S.C. § 1702(a).

N. The Utah Settlement Agreement produced cheers from the public land development community and an uproar among preservation advocates. Both seemed to perceive the Settlement Agreement as a significant legal change in the meaning of FLPMA. This reaction was curious to me. Prior to the Settlement Agreement, the BLM was free to offer oil and gas leases within WIAs or on lands identified as having wilderness quality by a citizen group, as long as it acted in compliance with the existing land use plan and complied with NEPA. After the Utah Settlement Agreement, BLM was free to do the same thing. Likewise, both before and after the Settlement Agreement, the BLM was free to identify wilderness under § 201 inventories and to amend its land use plans under § 202 to provide for the protection of the wilderness characteristics of such areas.

O. The Settlement Agreement changed only two things.

1. First, the Clinton Interior Department's 2001 Wilderness Inventory and Study Procedures Handbook was rescinded. But the Handbook was just a statement of the prior Administration's position about how it planned to treat WIAs. It hadn't been adopted with notice and comment and wasn't controlling authority. In essence, the Settlement Agreement's repudiation of the 2001 Handbook was an announcement of the new land use planning policy the BLM intended to apply in Utah and in other states where the Interior Department had conducted wilderness reinventories or where citizen groups had identified potential wilderness under a process similar to that employed by the Utah Wilderness Coalition. It is certainly understandable that there would be angst about this change in multiple use management policy which was another manifestation of the Bush Administration's emphasis on oil and gas leasing and development over wilderness protection. But it is the nature of multiple use management that different administrations choose to emphasize different uses and values in their land use planning.

2. The second change reflected in the Settlement Agreement was that the Bush Administration decided that FLPMA did not allow the WSA label to be assigned to areas with wilderness qualities, which the BLM wanted to protect under the § 202 land use planning process. Such areas would need to be labeled as ACECs or given some other multiple use management label such as "special recreation management area." In fact, some of the WIAs have ended up as ACECs in the revised resource management plans being prepared by the Utah BLM.

P. If public lands with wilderness characteristics can be protected as ACECs, how much does it matter that they can't be labeled as "WSAs"? I would suggest quite a bit and that it was the Settlement Agreement's new labeling, not its legality,¹ that really triggered most of the jeers and cheers.

¹ At first blush, one might believe that the WSA label is important as a matter of law because once an area is labeled a WSA it must be managed for non-impairment until Congress determines otherwise, whereas an ACEC or other area designated for protective management under a § 202 management plan is only protected as long as the management plan remains unchanged. But the requirement of non-impairment management pending congressional determination only applies to WSAs generated under § 603. By contrast, WSAs created from a §

Q. Surely, it was this labeling victory that encouraged Utah and the extractive community, because after the Settlement Agreement the BLM remained free to protect, under an ACEC label, lands with wilderness characteristics. The extractive community may have been further encouraged by the fact that the original Settlement Agreement was styled as a consent decree, which in theory would be an adjudication binding on future administrations that would also prevent them from using the WSA label for § 202 wilderness protection. However, the district court later vacated the Settlement Agreement’s status as a consent decree. *Utah v. Norton*, 2006 WL 2711798, *5 (D. Utah 2006).² Thus, subsequent administrations may be able to revert to the WSA label. Whether they do so will depend primarily upon their perception of the value of the WSA label.

V. WHAT’S IN A NAME?

A. So why did the ACEC versus WSA label matter? And why do names matter so much in public land law more generally? As Holly Doremus has observed:

Rhetoric matters. That is almost too basic to be worth saying, but it bears repeating because sometimes the rhetoric we use to describe problems becomes so ingrained as to be almost invisible. Even if we are unaware of it, though, rhetoric has the very real effect of severely constraining our perception of a problem and its potential solutions.

Terminology is one aspect of rhetoric. The words we use to describe the world around us condition our response to that world. Whether we use the word

201 inventory and § 202 planning process (what might be termed a § 202 WSA), are subject to change under a land use plan. Even the 2001 Wilderness Inventory and Study Procedures Handbook recognized that a land use plan could be amended to eliminate a § 202 WSA

The Settlement Agreement does contain a provision which arguably could impose limits on the Secretary’s § 202 land use planning authority and § 302 management authority. The Agreement provides that “[t]he 1999 Utah Wilderness Inventory shall not be used to create additional WSAs or manage the public lands *as if* they are or may become WSAs.” ¶ 4 (emphasis added). If the “as if” language were read to prohibit non-impairment, WSA-type management under a different label, such as an ACEC label, it would impose a limit on the Secretary’s multiple use planning and management authority not apparent in FLPMA. It seems unlikely, however, that this was the intent of the parties to the Settlement Agreement because the Agreement elsewhere states that nothing in the Agreement “shall be construed to diminish the Secretary’s authority under FLPMA to . . . manage a tract of land that has been dedicated to a specific use according to any provision of law (Section 302(a)) [or to] utilize the criteria in Section 202(c) to develop and revise land use plans, including giving priority to the designation and protection of areas of critical environmental concern.” ¶ 3.

² The district court also rejected the environmental community’s challenge to the Settlement Agreement. Judge Benson held that the Southern Utah Wilderness Alliance (SUWA) lacked standing to challenge the Settlement because it could not show injury. The BLM was still free to inventory for wilderness under § 201, to protect wilderness characteristics under § 202, and hadn’t done anything to change management of existing WSAs. See *Utah v. Norton*, 2006 WL 2711798 (D. Utah 2006). In case an appellate court disagreed with his holding on standing, Judge Benson went on to opine on the merits of SUWA’s claims, holding that the BLM did not violate FLPMA when it decided that it could not use § 202 to create WSAs. *Id.* at *24. As the court put it: “under sections 201 and 202 any lands found to have wilderness characteristics could in the exercise of the BLM’s discretion be managed so as to be given protection essentially identical to that afforded a WSA.” *Id.* at *28.

‘swamps’ or ‘wetlands,’ for example, may determine whether we drain or protect those areas. Not surprisingly, the battle to control terminology is an important one in the environmental context.

Holly Doremus, *The Rhetoric and Reality of Environmental Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. 11, 12–13 (2000). See also JOHN S. DRYZEK, *THE POLITICS OF THE EARTH: ENVIRONMENTAL DISCOURSES* 4, 5, 10 (2d. ed. 2005) (“[T]he way we construct, interpret, discuss, and analyze environmental problems has all kinds of consequences.”). We label species as threatened or endangered to protect them. We classify lands as parks, monuments, refuges, recreation areas, conservation areas, wilderness, public domain, open for entry, multiple use, etc. Certainly, each of these labels carries with it an organic act or certain legal proscriptions. But how much of the work of protection do we expect the label itself to accomplish?

B. Labels generally, and the WSA label in particular, matter because they impact bureaucratic decisionmaking. Labels send messages about how particular lands are valued and how they should be managed. Think about the BLM in Utah. The BLM had the same authority over wilderness inventory areas and citizen-nominated areas before and after the Settlement Agreement. Yet, before the Agreement it routinely refused leasing in these areas and after the Agreement it has been quick to open these areas for leasing. Admittedly, the primary explanation for this change is the policy differences of the Clinton and Bush administrations. But isn’t it also possible that no longer thinking of these wilderness areas as potential “WSAs” has impacted the BLM’s approach to leasing. The term WSA, with its accompanying non-impairment mandate under § 603 of FLPMA, has developed a fairly powerful preservation symbolism over the last thirty years.

For a BLM field officer, it may well be more efficient and less risky to manage by label rather than to manage with reference to the individual characteristics of a particular area. If an area is a WIA or WSA, protect it; if an area is open to multiple use, open it up to development. It’s not that a WIA couldn’t be leased under the terms of a land use plan; it’s not that multiple use management means open to development; it’s just that managing according to categories and classifications is a whole lot easier and more efficient. In the end, that’s the primary reason why multiple use management doesn’t often result in wilderness protection.

C. Labels also send messages to courts. Last fall, in *Southern Utah Wilderness Alliance v. Norton*, 457 F. Supp. 1253 (D. Utah 2006), Judge Kimball enjoined sixteen oil and gas leases offered within Utah WIAs. Judge Kimball held that BLM failed to perform an adequate NEPA analysis before offering these areas for lease because it had failed to account for the significant new information about the wilderness qualities of these areas provided by the reinventory. *Id.* at 1264-68 (following *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) for the proposition that federal agencies must supplement their NEPA analysis “if the new information is sufficient to show [the proposed action] will affect the quality of the human environment in a significant manner or to a significant extent not already considered.”). Considering Judge Kimball’s decision, one might ask whether it was

really new information about these areas or the new label that produced the result? Most likely, it was some of both.

D. ACECs versus WSAs may not be quite the same as swamps versus wetlands, but the point is the same. The “wilderness” appellation has powerful connotations in the public consciousness. The fight in *Utah v. Norton* over a wilderness reinventory and a settlement agreement that substituted ACECs for § 202 WSAs was primarily about capturing the rhetorical flag of wilderness. Both Utah and SUWA understood that the perceptions of the public, the agency, and the courts would be impacted by whether an area was labeled a WIA, WSA, ACEC or available for multiple use, even if the same management could legally be accomplished under any of those labels.