Articles

Areas of Critical Environmental Concern: FLPMA's Unfulfilled Conservation Mandate[1]

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Authors' note: The analysis and citations in this article to "current" Bureau of Land Management (BLM) planning regulations are to the regulations in effect in 2015, when the article was initially prepared. In 2016, BLM issued new planning regulations, to be effective in January of 2017. However, on March 7, 2017, Congress voted to rescind these regulations pursuant to the Congressional Review Act. As of this writing, the President has not signed the bill into law, but there is little doubt that he will. When he does, the references in this article to the "current" regulations will continue to be to those in effect in 2015 and will be correct. Even if the President does not sign the bill, and the 2016 regulations stand, this article still provides a valuable history and examination of the enactment and current implementation of the ACEC provisions in FLPMA.

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ABSTRACT

The Federal Land Policy and Management Act of 1976 (FLPMA) directs the Secretary of the Interior, and by delegation the Bureau of Land Management (BLM), to provide special protection for Areas of Critical Environmental Concern (ACECs) on the public lands by according ACECs priority over other land uses in the agency's inventory, land designation, and planning activities. ACECs are a unique land and resource protection designation not found in any other federal land management statute. BLM was a partner in the establishment of FLPMA's statutory provisions on ACECs and initially promulgated robust regulations and guidance to implement them. Yet today, despite the clear mandate of Congress to give special attention to ACECs, references to them are virtually non-existent in BLM's regulations and administrative materials. The absence of strong regulations and guidance, coupled with the decentralized organization of BLM and certain of its management traditions, has hobbled the agency's use of this potent conservation tool to respond to the increasing pressures on the public lands from energy development, recreation demands, habitat fragmentation, and climate change.

This Article examines the legislative history of the ACEC provisions in FLPMA, reviews the ACEC regulations and guidance, and appraises BLM's on- the- ground management of ACECs. It also offers recommendations for improvements in the regulations and guidance to assure compliance with the requirements of FLPMA and enable BLM to make better use of ACECs to conserve and protect the remarkable and varied lands and resources under its care.

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I. INTRODUCTION

Ask almost anyone familiar with the lands managed by the Bureau of Land Management (BLM) about "Areas of Critical Environmental Concern," ACECs for short, and the response is likely to be either a puzzled look or a scoff. Although prominently featured in the declarations of policy, definition, and planning sections of the Federal Land Policy and Management Act (FLPMA), BLM's organic act, ACECs are largely ignored in agency regulations and guidance, and frequently overlooked or disparaged by land managers, scholars, and even environmental lawyers as an important tool for conservation. This is unfortunate. ACECs are a gem hidden in plain sight, a unique land and resource protection designation not found in any other federal land management statute. FLPMA gives BLM managers broad and flexible management authority. ACECs can be used to safeguard specific sites or resources, or large natural areas and processes on a landscape scale. They can also provide special management to assure preservation of fish and wildlife, cultural, historic, and scenic treasures.

The legislative history of FLPMA establishes Congress' clear intent to provide for special protection of ACECs and to direct BLM to accord priority for that protection over other multiple uses in the agency's inventory, land designation and planning activities. ACECs were an important aspect of Congress' effort to give BLM a modern land management mission that would assure conservation of valuable resources under the agency's administration. BLM was an early and enthusiastic partner in this effort and played an important role in the enactment of FLPMA in general, and the ACEC provisions in particular. The agency initially promulgated robust regulations and guidance to implement FLPMA's directives. During the Reagan Administration and the tenure of Interior Secretary James Watt, however, many FLPMA regulations and guidance directives—including nearly all those addressing ACECs—were significantly altered or eliminated as "burdensome" or "policy statements." Today, there are virtually no references to ACECs in BLM's administrative materials. No current regulation expressly sets out the statutory priorities to be given ACECs; no agency guidance defines "priority" or interprets how it is to be accorded, and ACECs are not a recognized agency program.

The absence of strong regulations and uniform guidance, coupled with the decentralized organization of BLM and certain of its management traditions, has resulted in a collection of ACEC designations without coherent administration. The BLM national office has no accurate database of ACECs and there is no standard format for reporting information about ACECs either within the agency or to the public. There is no prescribed approach for discussion of ACECs in Resource Management Plans (RMPs), creating disparities in how ACECs are treated in planning and

management. BLM managers deal with ACECs inconsistently, often considering their protection as simply one possible management choice—the basic approach for multiple use decisions in general, but one that ignores the special priority status Congress directed be given to them.

The weakness of BLM's administration of ACECs leads to impaired enforceability, loss of resources and values Congress intended to protect, and probably fewer ACEC designations and reduced funding for them. Most importantly, BLM's administration of ACECs hobbles the agency's use of this remarkable tool for landscape-level planning and management, and its ability to respond to the increasing pressures on the public lands from recreation demands, habitat fragmentation, and climate change.

How did the extraordinary ACEC provisions come to be included in FLPMA? Why did BLM's implementation go from enthusiastic engagement to the virtual absence of ACEC guidance today? How are ACECs currently being managed on the ground and how might the current deficiencies be addressed to more fully realize the potential of ACECs to contribute to public land conservation?

This article provides some answers to these questions through an examination of the legislative history of FLPMA, a review of BLM's ACEC regulations and guidance, and observations about BLM's management of ACECs on the ground. The article offers recommendations for improvements in BLM's ACEC regulations and guidance that would restore their original vigor and enable BLM to use ACECs to protect and preserve worthy lands and natural resources. The article is organized as follows:

II. The ACEC Provisions of the Federal Land Policy and Management Act

The article begins with a summary of some key features of FLPMA and its four directives concerning Areas of Critical Environmental Concern.

III. The Bureau of Land Management: History and Efforts to Define a Modern Management Mission

This section offers a brief account of the establishment of BLM and its early efforts to create a conservation agenda to balance its traditional role as the agency in charge of land disposal and commodity production.

IV. ACECs: From Concept to Enactment

This section traces the ACEC concept from its appearance in early BLM regulations and the report of the Public Land Law Review Commission (PLLRC), to the first use of the actual term in a model land use code, through its adoption in a number of congressional bills, to the final passage of FLPMA.

V. Agency Interpretation of ACECs: Disappearance of Statutory Priorities

BLM's treatment of ACECs changed markedly from the initial robust regulations and guidelines promulgated soon after the enactment of FLPMA to the limited administrative requirements and guidance of today. This section describes the decline that occurred after 1981, when the majority of ACEC provisions were weakened or removed from the regulations, erased from most of the agency's Manual, scattered among Handbooks, and ultimately deleted altogether.

VI. Observations from the Field: On-the-Ground Management of ACECs

In order to assess how BLM is managing ACECs on the ground, the authors reviewed a representative sample of 111 individual ACECs identified in 36 BLM Resource Management Plans (RMPs) in 11 Western states. This section summarizes the review, which showed extensive gaps in the information about ACEC resources and values in the RMPs examined, inconsistent treatment of the same or similar resources among field offices and RMPs, and a dearth of the special management prescriptions necessary to protect and prevent irreparable harm to the resources and values for which the ACECs were designated.

VII. Recommendations for Change in ACEC Interpretation and Management

The information collected from the field review, along with the assessment of the shortcomings in BLM's ACEC regulations and guidance, formed the basis for recommendations for improvements in the regulations, guidance, and on-the-ground management of ACECs. These recommendations include, *inter alia*, managing ACECs as an agency program, providing agency-wide guidance on the statutory requirements of FLPMA, and consistent procedures for planning for, designating, and managing ACECs.

II. THE ACEC PROVISIONS OF FLPMA

The Federal Land Policy and Management Act of 1976 (FLPMA)[2] is the organic management act for the Bureau of Land Management (BLM) in the United States Department of the Interior. The policy section of FLPMA calls for protection of the many resources and values of the public lands by demanding that:

> the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve

[2] Act of October 21, 1976, Pub. L. No. 94-579, 90 Stat. 2744, 43 U.S.C. §§1701 *et seq*.

> and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.[3]

FLPMA requires BLM to establish a planning process to guide the agency's management decisions, and directs that the public lands be managed under multiple use–sustained yield principles. The definition of multiple use–sustained yield specifies that the use of some lands for less than all of the resources is permitted, and that consideration should be given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output. The definition further states that the lands and their resource values should be utilized in the combination that will best meet the present and future needs of the American people.[4] FLPMA also requires the Secretary of the Interior to "take any action necessary to prevent unnecessary or undue degradation of the lands."[5]

In addition to this general protective mandate, FLPMA includes four distinctive provisions on "areas of critical environmental concern" (ACECs). These provisions call for special attention to be paid to the protection of such areas and require priority to be given to them in the inventorying, designation, and protection aspects of planning. ACECs appear only in FLPMA—there is no counterpart in any other federal land legislation. This singularity is particularly significant since the National Forest Management Act[6] (NFMA), which modernized planning and management of the national forests, was passed in the same year as FLPMA, but does not include ACEC language. Other federal land statutes, including those for the national parks, national wildlife refuges, and wilderness areas, designate lands to protect natural resources and values ranging from wildlife to wildness, but none contain the ACEC formulation found in FLPMA.

ACECs are distinguished from other land designations, as well, by their expansive scope. They may be used to provide special management of biological, cultural, historic, scenic, geological, and natural systems or processes.

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[3] FLPMA § 102(a)(8), 43 U.S.C. § 1701(a)(8).

[4] FLPMA § 103(c), 43 U.S.C. § 1702(c). Sustained yield means "the achievement and maintenance in perpetuity of a high-level annual or periodic output of the various renewable resources of the public lands consistent with multiple use." FLPMA § 103(h), 43 U.S.C. § 1702(h).

[5] FLPMA § 302(b), 43 U.S.C. § 1732(b).

[6] Act of October 22, 1976, Pub. L. No. 94-588, 90 Stat. 2949, 16 U.S.C. §§ 1601 *et seq*.

The four provisions of FLPMA on ACECS are:

1)The definition of 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.[7]

2)The requirement in the FLPMA policy section that "regulations and plans for the protection of public land areas of critical environmental concern be promptly developed."[8]

3)The direction to the Secretary to "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to outdoor recreation and scenic values), *giving priority to areas of critical environmental concern.* This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values."[9]

4)The mandate to the Secretary to "*give priority to the designation and protection of areas of critical environmental concern*" in developing and revising land use plans.[10]

The congressional insistence on priority for ACECs is unique for a multiple use land management statute. Both the Multiple Use–Sustained Yield Act of 1960 (MUSY), for the national forests, and FLPMA list various surface and subsurface resources on the federal lands and direct the agencies to determine the management of "the combination [of these resources] that will best meet the present and future needs of the American people . . . ."[11] The goal of the planning process in both statutes is to find an appropriate balance among the possible multiple uses. Yet, remarkably, in FLPMA Congress insisted that priority protection be accorded to areas of critical environmental concern, both in general and through inventory, designation, and protection in the planning process.

FLPMA gives the Secretary of the Interior, and by delegation BLM, cohesive and modern land management authority. The ACEC provisions not only afford BLM the opportunity to implement conservation measures,

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[7] FLPMA § 103(a), 43 U.S.C. § 1702(a).
[8] FLPMA § 102(a)(11), 43 U.S.C. § 1701(a)(11).
[9] FLPMA § 201(a), 43 U.S.C. § 1711 (emphasis added).
[10] FLPMA § 202(c)(3), 43 U.S.C. § 1712(c)(3) (emphasis added).
[11] Act of June 12, 1960, Pub. L. No. 86-517, 74 Stat. 215, 16 U.S.C. § 531(a); FLPMA § 103(c), 43 U.S.C. § 1702(c).

but *direct* that the agency do so in its planning for and administration of these special areas of the public lands.

III. THE BUREAU OF LAND MANAGEMENT: HISTORY AND EFFORTS TO DEFINE A MODERN MANAGEMENT MISSION

BLM manages approximately 255.8 million acres of land, predominantly in the West, as well as most of the federal government's mineral estate. These vast lands vary greatly, and include arctic, desert, range, and timber lands—lands prized for resources such as oil, coal, and other minerals, and for scenic, wildlife, wilderness, historic, recreational, and open space values.

Almost from its beginnings BLM has vacillated between two opposing philosophies of land and resource management: disposal or development on the one hand, and retention and conservation on the other. Conservation policies appeared early in the history of federal land management, but were initially outweighed by demands for resource production, and only gradually came to be acknowledged as important components of public land management. In recent years, BLM has been given significant responsibilities for conservation activities and policies.[12] Yet despite statutory changes that establish conservation requirements, priorities, and processes, the agency still has difficulty integrating these obligations into its traditional resource extraction and development agenda. This fundamental conflict in philosophy is exacerbated by the BLM's decentralized management structure and some aspects of agency culture, which resist outside involvement in agency decisionmaking and management choices. The story of ACECs reveals these ongoing tensions in BLM's policy and approach.

A. Origins of the Agency

The early history of the BLM and one of its predecessor agencies, the General Land Office, shows almost a presumption that conservation-oriented land management would be provided by other agencies. And when concern for environmental protection, multiple use–sustained yield management, and land use planning policies arose in the 1960s and 1970s, BLM and the public lands were initially left out of the responsive legisla-

[12] In 2000, then Secretary of the Interior Bruce Babbitt established the National Landscape Conservation System (NLCS) that encompassed a number of newly designated National Monuments on BLM lands, monuments that were notable for historic, cultural, and outstanding natural resource values.

tion. Nonetheless, BLM accomplished important conservation results administratively until "catch up" legislation was enacted for the public lands. The agency's efforts were so successful that when the Public Land Law Review Commission (PLLRC) recommended in its 1970 report that Congress provide federal land management agencies with modernized land use planning authority, the Commission expressly pointed to the "sophisticated" land classification criteria and planning approaches taken by BLM as a good starting point for Congress to consider.[13]

How did BLM, well before FLPMA, develop such sophisticated planning processes and regulations that anticipated the ACEC priorities and protections?

The BLM was created administratively in Reorganization Plan No. 3 (1946)[14] from the merger of the General Land Office (GLO) and the Grazing Service. No new statutory mandate was provided; rather BLM was to continue to administer the approximately 3,500 laws enacted during the previous 150 years.[15]

The GLO was established in 1812 and originally located in the Treasury Department. It was tasked with raising money to finance the federal government by disposing of the government's vast land holdings and encouraging various types of development on those lands remaining in federal ownership. Many of the disposal statutes were patterned on the Jeffersonian ideal of family farms. Lands that could not sustain a family (primarily those in the arid West) came to be known as "the lands nobody wanted" and continued to be managed by GLO, and later the Grazing Service and BLM, under a potpourri of laws.

Despite the strong emphasis on conveying land out of federal ownership, the beginnings of American conservation policies were discernible by the end of the nineteenth century; *e.g.*, with the creation of national parks, starting with Yellowstone in 1872, the enactment of the Antiquities Act in 1906, which authorized the designation of national monuments by the President, and the establishment of the first wildlife refuge property by Presidential Proclamation on March 14, 1903. However, the GLO was so

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[13] ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW Commission (hereafter PLLRC REPORT) at 9, 45-46, and 52 (June 1970).

[14] Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 11 Fed. Reg, 7875, 60 Stat. 1097 (May 16, 1946).

[15] JAMES MUHN, OPPORTUNITY AND CHALLENGE – THE STORY OF BLM, USDOI at 54 (1988).

identified with land disposal and development that more conservation-oriented management was taken away from that agency.[16] BLM's administration of the residual "lands nobody wanted" continued to emphasize extraction and production, so much so that BLM was referred to as the "Bureau of Livestock and Mining." The emblem of the agency in the 1950s featured a logger, a cowboy, an oil driller, and a surveyor—in contrast to the current badge which features a winding river, a tree, and a mountain.

By the end of the 1950s there was a growing awareness of the value—economic and otherwise—of the federal lands. As our country became increasingly urbanized, the worth of these lands for recreation, wildlife, history, and just plain open space began to be appreciated. The concepts of "multiple use" provided for the recognition and protection of non-extractive and "natural" resources, and "sustained yield" embodied the conservation of commodity resources in perpetuity. Both the BLM and the Forest Service were made multiple use–sustained yield agencies by law—under the Multiple Use–Sustained Yield Act of 1960[17] for the Forest Service, and the Classification and Multiple Use Act of 1964[18] (CMUA) for BLM. Legislation for these management changes for BLM was temporary, not permanent. The CMUA was set to expire six months after the Public Land Law Review Commission submitted its report to Congress. (See discussion of the CMUA in the following section.) Similarly, the Wilderness Act of 1964, which created the system of congressionally designated wilderness areas and directed the study of federal natural areas that could be designated in the future, did not include BLM lands. Twelve years later, FLPMA authorized formal studies of BLM roadless areas with wilderness characteristics.

Despite the lack of a legislative mandate, BLM provided administrative protection for natural and primitive areas well before FLPMA, broke

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[16] For example, for a time the Army managed Yellowstone, Yosemite, and Sequoia National Parks (*see* HARVEY MEYERSON, NATURE'S ARMY – WHEN SOLDIERS FOUGHT FOR YOSEMITE (2001). Early national monuments were removed from GLO management, primarily to the National Park Service when that entity was created in 1916, and management of early wildlife refuges went to the Bureau of Biological Survey in the Department of Agriculture (*see* ROBERT L. FISCHMAN, THE WILDLIFE REFUGES – COORDINATING A CONSERVATION SYSTEM THROUGH LAW, at 40 (Island Press 2003)). Similarly, although GLO had established a division to manage the new forests reserves authorized in 1891 and 1897, management of the federal forests was transferred to the Division of Forestry (now the Forest Service) in the Department of Agriculture (*see* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT, prepared for the PLLRC (1968) at 578-579). Scandals relating to GLO forest management and the professional forest management efforts of Gifford Pinchot in the Department of Agriculture prompted the transfer. A preference for the less conservation-oriented management of GLO played a role in Congress' decision to place management of the revested "O & C" lands in Interior in 1937.

[17] Act of June 12, 1960, Pub. L. No. 86-517, 74 Stat. 215, 16 U.S.C. §§ 528 – 531.

[18] Pub. L. No 88-607, 78 Stat. 986.

significant new ground in management planning in the mid-1960s, and developed the concept and use of environmental assessments before the Council on Environmental Quality regulations required them.

B. Early Legislation: The Classification and Multiple Use Act

On September 19, 1964, Congress enacted three statutes in sequence that had far-reaching impacts on the BLM lands. The first established the Public Land Law Review Commission (PLLRC), charged with studying land use policy in general and the management of the federal lands in particular, and making recommendations to Congress.[19] The second was the Classification and Multiple Use Act (CMUA), which addressed the BLM lands specifically.[20] The third was a land sales act to guide the disposal of public lands classified as available for transfer out of federal ownership under regulations implementing the CMUA.[21]

After 1964, the PLLRC and BLM began *simultaneously* to study BLM management of the public lands and consider changes. BLM quickly developed classification criteria and land use planning processes, circulated proposed regulations, involved the states and the public in its considerations, and promulgated regulations beginning in 1965.

Passage of the CMUA, and BLM's response to it, marked a sea change in BLM's management of the public lands. The CMUA was a bridge from the previous practice of cobbling together management under the huge number of lands-related statutes that had accumulated over the years to the cohesive system that was accomplished with FLPMA in 1976.[22] The 1964 congressional enactments and the significance of BLM's response to them cannot be overstated.

The CMUA contained language and direction[23] that both presaged and affected subsequent events. It included language on multiple use–sustained yield very similar to language that appeared twelve years later in FLPMA. The CMUA also ordered the Secretary of the Interior to develop classification regulations and criteria to determine which BLM lands

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[19] Pub. L. No. 88-606, 78 Stat. 982.

[20] Pub. L. No. 88-607, 78 Stat. 986.

[21] Pub. L. No. 88-608, 78 Stat. 988.

[22] *See* the pages of repealed statutes listed in uncodified Title Seven of FLPMA.

[23] Section 5(b) of the CMUA defined "multiple use" as "the management of the various surface and subsurface resources so that they are utilized in the combination that will best meet the present and future needs of the American people; 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 need and conditions; the use of some land for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."

should be disposed of and which should be retained—at least during the period the CMUA was in effect. Retained lands would be managed for many purposes, including domestic livestock grazing, fish and wildlife development and utilization, industrial development, mineral production, occupancy, outdoor recreation, timber production, watershed protection, wilderness preservation, or for preservation of public values that would be lost if the land passed from federal ownership.

In making the classification determinations, the Secretary was to "give due consideration to all pertinent factors, including, but not limited to, *ecology*, *priorities of use*, and the relative values of the various resources in particular areas" (emphasis added). The reference to considering "ecology" was cited favorably in the PLLRC report,[24] and the concept of establishing "priorities of use" was repeated in pre-FLPMA BLM regulations and later in the ACEC language of FLPMA. Classification of lands for retention or disposal is still part of BLM's planning process.

The CMUA was a "temporary" statute—the statute and regulations implementing it were to expire six months after the submittal of the final PLLRC report.[25] BLM began immediately to design a system to classify the public lands for retention or disposal, and to address management of those lands retained in federal ownership. BLM interacted with states and localities regarding the classification criteria and the directions expressed in the CMUA. To implement the required multiple use-sustained yield management and to consider ecological needs and establish "priorities of use," the agency created a system of land use planning for the lands retained by the federal government, including the initial "Unit Resource Analysis" and later "Management Framework Plans" (MFPs). The 1970 PLLRC report expressly praised the "sophisticated" BLM planning processes and opined that they were a good starting point for Congress to develop similar planning guidance for all federal land management agencies.[26]

It is important to note that because BLM considered planning to be an integral part of how it performed its duties, the development and implementation of MFPs was carried out in-house with management guidance contained in agency manuals and other materials, rather than in regulations, even though regulations were issued to implement other aspects of the CMUA. MFPs remained in effect for years after the enactment of FLPMA. It was not until post-FLPMA regulations were promulgated that

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[24] PLLRC REPORT at 46.

[25] The CMUA was to expire six months after the final report of the PLLRC; the deadline for that report was extended to December 31, 1970. However, BLM also cited R.S. 2478 as continuing authority to regulate the public lands.

[26] PLLRC REPORT at 46.

Resource Management Plans (RMPs) were developed and published in the now customary manner.

C. Pre-FLPMA Regulations

Significantly, the first CMUA regulations proposed by BLM in 1965 noted that, because the statute *did not assign overall priority for any specific use*, "the Secretary or his delegate will authorize that use or combination of uses which will best achieve the objectives of multiple use" and "the lands will be managed for optimum production of the various products and uses for which they are physically and economically suited."[27] The 1965 regulations did recommend a system of classifying "recreation lands" that included wilderness and roadless areas. This approach – of retaining and protecting "recreation lands" – was broadened in subsequent regulations that increasingly approximated the enacted ACEC language.[28]

BLM regulations were reconfigured in 1970. These regulations retained the classes of recreation lands from the 1969 publication and added a fourth.[29] Most significantly, the 1969 Part 6000 regulations on "outdoor recreation" (the catch-all term for many non-extractive values) were included in a section on management policy that stipulated giving priority to the *"preservation and protection of natural and cultural resources, including but not limited to scientific, scenic, historic, and archeological*

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[27] 30 Fed. Reg. 2384-2385 (Feb. 20, 1965) (emphasis added).

[28] The 1965 regulations expressly proposed retaining and protecting lands to provide for "enjoyment of scenery, water, primitive or natural landscape (including roadless areas), wildlife, natural phenomena *(i.e.*, petrified wood), and archeological and historical sites … to further a national program for the provision of necessary recreational, conservation and scenic areas and open space (42 U.S.C. § 1500), and for the assurance of outdoor recreation resources for present and future generations of Americans." (16 U.S.C. § 460:1-3), 30 Fed. Reg. 2384, 2388 (Feb. 20, 1965). Wilderness protection was also addressed at 2389. 1966 regulations authorized the designation of areas, some of which could be quite large, including: scenic, habitat, roadless and primitive areas, and historic and cultural sites. Lands could be classified as one or more of the six classes adopted by the Bureau of Outdoor Recreation and would be identified and described at the time of designation. Some of the areas, *e.g.*, Class IV – outstanding natural areas, and Class V – primitive undeveloped areas, clearly could be large. (43 C.F.R. Part 1720 – Programs and Objectives; Subpart 1720 – Designation of Areas and Sites, § 1727.1, 31 Fed. Reg. 13914 (Oct. 29, 1966). Still later regulations moved closer to ACEC language in several respects. They addressed the identification of "circumstances under which *use of such lands may be restricted* in order to protect the public health and safety, and natural resources and values." They authorized additional rules and temporary closures to protect health and safety, prevent erosion, unnecessary destruction of plant life and wildlife habitat, the natural environment, areas having cultural or historical value, or to protect scientific studies or preserve scientific values. Most importantly, the regulations directed that priority be given to recreation development and enhancement and to the *preservation and protection of* natural and cultural resources, including but not limited to scientific, scenic, historic, and archaeological values, and primitive environments. 34 Fed. Reg. 857-858 (Jan. 18, 1969) (emphasis added).

[29] 35 Fed. Reg. Part 2, 9533-9534, 9560, 9793-9795 (June 13, 1970).

values, and primitive environment…."[30] This language is clearly a forerunner of the FLPMA provisions on ACECs.

To summarize: well before FLPMA, and by the time of the 1970 PLLRC report, BLM had developed a system of land management planning and had promulgated regulations requiring that priority be given to the preservation and protection of natural and cultural resources on what were referred to as the "National Resource Lands."[31] In FLPMA, the ACEC provisions broadened these BLM denominations beyond "recreation" lands, and expressly applied the principles of designation, protection, and priority to many other resource values and land categories. FLPMA language directs the agency to inventory lands and "values (including, but not limited to outdoor recreation and scenic values), giving priority to areas of critical environmental concern."[32] This parenthetical language appears to be a nod to the 1970 BLM regulations that couched protection of many lands and values under the heading of recreation and scenic values.

IV. ACECs: FROM CONCEPT TO ENACTMENT

The ACEC concept – recognition of the compelling need to identify and protect public lands areas containing special ecological, aesthetic, historic and cultural resources and values – represents the confluence of a number of sources and influences that arose simultaneously in the decade and a half from 1964 to the passage of FLPMA in 1976. This was a time of growing public concern about the quality of the environment, a realization that the degradation of air, water and landscapes was no longer a local problem but required a national response. It was an era in which a bi-partisan Congress produced the Clean Water and Clean Air Acts, the National Environmental Policy Act (NEPA), and the Endangered Species Act, among others. Federal lands received congressional attention, as well, in the Multiple Use-Sustained Yield Act of 1960 for national forests, the National Forest Management Act of 1976, the Wilderness Act of 1964, and the National Wildlife Refuge System Act of 1966.

As discussed in the preceding section, BLM, alone among the land managing agencies, was without an organic act or a modern mission and management authority. The agency was charged with the implementation of "an archaic and often conflicting conglomeration" of more than 3,000 laws, many of which focused on the disposal of public lands and the disposition of commodity resources. A primary source for its land managing

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[30] *Id*. at 9793-9794 (emphasis added).
[31] 43 C.F.R. § 2071.1(b)(5), 35 Fed. Reg. Part 2, 9533-9534 (June 13, 1970).
[32] FLPMA § 201(a), 43 U.S.C. § 1711.

authority was the Taylor Grazing Act of 1934 which authorized the Secretary of the Interior to establish grazing districts on BLM lands "in order to promote the highest use of the public lands pending its (sic) final disposal."[33]

This untenable situation was recognized by members of Congress, among them Rep. Wayne Aspinall of Colorado, Chair of the House Committee on Interior and Insular Affairs, who called for the creation of a congressional commission to review all lands remaining in federal ownership, with the goal of deciding how best to manage them in the future. On September 19, 1964, Congress established the Public Land Law Review Commission (PLLRC)[34] with Rep. Aspinall as its Chair.

A. The Public Land Law Review Commission

In substantial measure, FLPMA, including the ACEC provisions, is the ultimate legislative outcome of the recommendations provided to Congress by the PLLRC and efforts within BLM itself.[35] The Commission's report *One Third of the Nation's Land* (PLLRC Report) noted "the ever growing concern of the American people about the deterioration of the environment"[36] and the public's "almost desperate need to determine the best purposes to which their public lands and the wealth and opportunities of those lands should be dedicated." [37] The Commission regarded its work and recommendations as a "rare opportunity" to respond to those concerns.[38]

Two fundamental themes were expressed in the PLLRC Report and its recommendations. The first was the need to reverse the policy in many of the statutes implemented by BLM of wide-spread disposal of unappropriated public lands, *i.e*., areas not reserved or designated for specific uses. The Report recommended that "[t]he policy of large-scale disposal of public lands reflected in the majority of statutes in force today be revised and that future disposal should be of only those lands that will achieve maximum benefit for the general public in non-Federal ownership, while retaining in Federal ownership those whose values must be preserved so that

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[33] Taylor Grazing Act, Act of June 28, 1934, ch. 865, 43 U.S.C. § 315 (1934). Because the grazing districts were to be created from lands "chiefly valuable for grazing and raising forage crops," most public lands were withdrawn for classification after enactment. R.S. 2478, now codified as 43 U.S.C. § 1201 (1946), also gave BLM general authority to regulate the public lands.

[34] Pub. L. No. 88-606, 78 Stat. 982.

[35] As evidenced by BLM regulations promulgated by 1970, BLM had already put in place language and protections that were precedents for the ACEC provisions and concept. BLM, the PLLRC, CEQ, and others were all working on land use reform in general and protection of special areas in particular.

[36] PLLRC REPORT at 3.

[37] *Id*. at 1.

[38] *Id*.

they may be used and enjoyed by all Americans."[39] The PLLRC added that it supported the concepts embodied in the establishment and maintenance of the national forests, the National Park System, the National Wildlife Refuge System and other named conservation designations.[40]

The second theme in the PLLRC Report was the valuable role of land use planning in responding to public concerns about the environment and determining the most appropriate management for the lands retained in federal ownership.[41]

To address both these matters the Commission recommended review of all lands not previously designated for specific purposes, in order to identify the types of uses and activities that would provide the maximum benefit to the public. The Commission called for national goals and standards for land management to assure that public lands would be administered in a manner that "not only will not endanger the quality of the environment, but will, where feasible, enhance the quality of the environment…."[42]

The Commission proposed that all public agencies be required to formulate long range, comprehensive land use plans for each state or region, relating such plans to internal agency programs and to the plans and programs of other agencies.[43] To assure that plans achieved environmental protection, the PLLRC advocated that "environmental quality be recognized by law as an important public objective of public land management, and public land policy should be designed to enhance and maintain a high quality environment both on and off the public lands."[44]

Although the PLLRC did not use the term ACEC, the importance of identifying and protecting land areas with special resources and values is manifest throughout its Report. One of the clearest illustrations of the significance of such a policy is the Report's table of a "possible classification system for environmental management" on the public lands.[45] The section of the table called "Quality of Experience" lists four categories of environmental attributes: "visual and esthetic environments," "cultural, historical, and informational values," "personal and social experiences" and "natural biological and physical features" to be monitored and managed to preserve, protect, enhance and/or restore these resources and values. The table describes the types of agency actions necessary to accomplish the management goals, including prohibiting, limiting, or avoiding conflicting

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[39] *Id*.
[40] PLLRC REPORT at 1.
[41] *Id*. at 1, 9.
[42] *Id*. at 3.
[43] *Id.* at 9, 52.
[44] *Id*., Recommendation 16 at 68.
[45] PLLRC REPORT, Quality of Experience Table at 78-79.

activities.[46] Much of the language that was ultimately included in FLPMA and in the ACEC provisions is used in the table. Even without the ACEC label, therefore, classification and protection of areas with special characteristics is explicit in the Commission's recommendations for a public land management system.

The PLLRC's Report contains other specific recommendations to address what the Commission saw as the inadequacies in public land policy and management at the time. While not all of these were adopted by the Congress, many of the Commission's fundamental policy ideas are expressed in FLPMA. Of particular relevance to the ACEC concept are the following:

> Number 4—"Management of public lands should recognize the highest and best use of particular land areas as dominant over other authorized uses."[47]
>
> Number18—"Congress should require classification of the public lands for environmental quality enhancement and maintenance" and recognize the need "to provide for different degrees of environmental quality" on the federal landscape.[48] The environmental factors to be considered in land use plans should include "topography, geology, soil, hydrology, vegetation, wildlife, climate, and visual and spatial form . . . ."[49]
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> Number 64—"Public lands should be reviewed and key fish and wildlife habitat zones identified and formally designated for such dominant use."[50] This recommendation states that "[f]ormal commitment of specific areas where wildlife values will consistently receive dominant treatment in all resource decisions is (sic) an essential step in converting stated policy goals to operational form in the field." Various classifications are suggested, including big game wintering and summering areas, bird nesting and feeding habitats, cover zones for migratory birds, and fish zones, which could be stream systems or perhaps whole watersheds.[51]

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[46] *Id.*

[47] *Id*., Recommendation 4 at 48.

[48] *Id.*, Recommendation 18 at 10, 73.

[49] PLLRC REPORT, Recommendation 18 at 73-74.

[50] *Id*., Recommendation 64 at 168.

[51] *Id.* at 12, 168. Recommendations 64 and 4 call for the commitment of certain public land areas to limited "dominant uses." The term "dominant use" appears in the PLLRC report with respect to timber, mining and other activities, as well as to non-commodity uses. The PLLRC regarded multiple use as of "little practical meaning as a planning concept or principle" and preferred more of a zoning approach to the classification of lands. *Id.* at 45. In FLPMA, Congress adopted multiple use-sustained yield as the over-

> Number 78—"An immediate effort should be undertaken to identify and protect those unique areas of national significance that exist on public lands." "[A] comprehensive inventory …to identify all such areas should be conducted as soon as possible, and . . . they should be assigned a priority for protection pending designation under established procedures."[52] While this recommendation was intended to place nationally significant areas in a holding pattern pending their designation as a National Park or Wilderness, the emphasis on their identification as a planning priority in order to protect values and resources from damage or loss is repeated in FLPMA for the designation of ACECs.

B. Legislative Precursors to FLPMA

1. 91st Congress: Response to the PLLRC

Beginning with the 91st Congress in 1970, Congress and the Administration responded to the Public Land Law Review Commission's Report with a series of legislative efforts to address public land policy. Over the next five years, more than a dozen bills were introduced and considered in committee and by both House and Senate.[53] The legislation took two basic approaches: bills that authorized nationwide land use planning – on state as well as federal lands- and bills that focused on planning provisions for the BLM and other federal agencies. Both types of bills included some form of ACEC language. The bills that emphasized national land use planning were not enacted; those that dealt with federal land policy, particularly for lands under the management of the Bureau of land Management, ultimately resulted in FLPMA, passed by the 94th Congress in 1976.

2. 92nd Congress: Appearance of the Term "Areas of Critical Environmental Concern"

The term "Areas of Critical Environmental Concern" first appeared in 1971 in the National Land Use Policy Act and the National Resource Land Management Act. Both were Administration proposals and part of

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all management paradigm for the public lands, but retained the idea, even in the definition of multiple use, that some land uses will take precedence over others and some land areas will be restricted in the activities that may occur on them.

The BLM worked to replace its previous single use emphasis with the new multiple use-sustained yield system, and to develop comprehensive planning to implement it. *See* Charles H. Stoddard, *A Director's Perspective: 1963-1966* in MUHN, *supra* note 15, at 119.

[52] PLLRC REPORT at 13, 198-199.

[53] SEN. COMM. ON INTERIOR AND INSULAR AFFAIRS, National Resource Lands Management Act of 1975, S. REP. NO. 94-583, at 36 (Dec. 18, 1975), LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 (PUBLIC LAW 94-579), US Government Printing Office Publication 95-99, April 1978 (hereafter FLPMA LEGIS. HISTORY) 101.

President Nixon's Program for the Environment.[54] Both were introduced in both houses of Congress in 1971 and combined for consideration in committee. Neither was enacted.

a. The National Land Use Policy Act

The National Land Use Policy Act was drafted by the President's Council on Environmental Quality (CEQ), then under the direction of Russell Train. The Act declared that state and local institutional arrangements for planning and regulating land uses with greater than local impact were "inadequate," with the result that "important ecological, cultural, historic and aesthetic values in areas of critical environmental concern which are essential to the well-being of all citizens are being irretrievably damaged or lost." [55]

According to William K. Reilly, senior staff member of the CEQ, the ACEC concept and language in the Land Use Policy Act were "adapted, and to a substantial extent simply lifted" from the Model Land Use Code developed by the American Land Use Institute in the late 1960's, the same time the PLLRC carried out its studies and drafted its report.[56] The Model Land Use Code called for designation and protection of "areas of critical state concern" which it defined as areas "containing or having a significant impact upon historical, natural or environmental resources of regional or statewide importance."[57]

In the proposed National Land Use Policy Act, ACECs were defined as "areas where uncontrolled development could result in irreversible damage to important historic, cultural, or aesthetic values, or natural systems or processes, which are of more than local significance; or life or safety as a result of natural hazards of more than local significance."[58] As examples of areas qualifying for ACEC protection the Act listed coastal zones and estuaries, shorelands and flood plains, rare or valuable ecosystems, scenic or historic areas, and "areas of familiar, valuable or hazardous characteristics which a State determines to be of critical environmental concern." [59]

The goal of the National Land Use Policy Act was not to create a system of land use planning for the federal lands, but rather to "[encour-

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[54] Charles Callison, *Areas of Critical Environmental Concern on the Public Lands: Part I. Origins of the Concept and Legislative History (hereafter* Callison Report*)* A Report for the Wild Wings Foundation, The Public Lands Institute, Washington, D.C. ((1984) at 3.

[55] *Id.* at 4.

[56] *Id*.

[57] *Id.* at 2.

[58] Callison Report, *supra* note 54, at 4.

[59] *Id.*

age] the States to exercise their full authority over the planning and management of non-federal lands by assisting the States, in cooperation with local governments, in developing land use programs…for dealing with land use decisions of more than local significance."[60]

The National Land Use Policy Act never became law. Real estate associations and other groups opposed it out of concern that it would lead to federal zoning controls on the states.[61] However, the coastal zone sections of the proposal survived in the Coastal Zone Management Act of 1972.[62]

b. The National Resource Land Management Act

The ACEC concept, and much of the language in the National Land Use Policy Act, was adopted for federal land management in the National Resource Land Management Act of 1971.[63] This Administration proposal was drafted by Mike Harvey, Counsel for the Senate Committee on Interior and Insular Affairs (and formerly a BLM employee), and Irving Senzel, Assistant Director of BLM for Legislation and Planning,[64] and introduced "by request" by Senators Jackson and Allott in August of 1971 as S. 2401.[65] The bill defined ACECs as "areas where uncontrolled use or development could result in irreversible damage to: important historic, cultural, or aesthetic values, or natural systems or processes, or life or safety as a result of natural hazards."[66] Specific examples of such areas included coastal zones and estuaries, shorelands and flood plains, "*rare and valuable ecosystems*," (emphasis added) scenic or historic areas; and "such additional areas of similar valuable or hazardous characteristics which the Secretary determines to be of critical environmental concern."[67]

The bill called for "priority" consideration of ACECs in the required inventory of "national resource lands and their resources," the designation

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[60] *Id*.

[61] *Id*.

[62] Callison Report, *supra* note 54, at 5.

[63] S. 2401, The National Resource Land Management Act of 1971 (Aug. 3, 1971), *reprinted in* FLPMA LEGIS. HISTORY 1111.

[64] Callison Report, *supra* note 54, at 3.

[65] *Id.* at 5.

[66] S. 2401 at 3, *reprinted in* FLPMA LEGIS. HISTORY 1113.

[67] *Id.* Although the CMUA directed consideration of "ecology," the inclusion of the term "ecosystem" in both the National Land Use Policy Act and the National Resource Land Management Act is unusual for 1971. It indicates that the drafters of the legislation contemplated the use of ACECs for large land areas, possibly even landscape-scale designations. Although the list of examples of types of ACECs was dropped from the final definition of ACEC adopted in FLPMA, there is nothing in the legislative history to suggest that Congress intended to restrict the designation of ACECs to small plots. Indeed, the current group of designated ACECs includes many areas of significant acreage, for example, the 84,108 acre San Rafael Reef ACEC in Utah, the 51,197 acre Beaver Dam Slope ACEC in Arizona, and the 44,521 acre Trickle Mountain ACEC in Colorado.

of ACECs in land use plans, and the prompt development of regulations for ACEC protection, all provisions that appear in FLPMA.[68]

In a July 20, 1971 letter to Vice President Agnew explaining the National Resource Land Management Act, Secretary of the Interior Rogers C.B. Morton noted that the legislation directed the Secretary of the Interior to inventory and develop comprehensive land use plans for the national resource lands, "giving priority to lands in critical environmental areas," including flood plains, coastal zones and scenic or historic areas. The letter continued, "The identification of the most critical environmental areas will be given a high priority by this Department so that those areas may be given the protection they so urgently need."[69]

The Senate Committee on Interior and Insular Affairs favorably reported on S. 2401 and recommended its passage on September 18, 1972. The Committee's Report stated that the purpose of the bill was to provide

> The first comprehensive statement of congressional goals, objectives, and management guidelines for the use and management of 450 million acres of Federally-owned lands administered by the Bureau of Land Management. . . .The bill establishes as national policy the need to preserve and protect the quality of the national resource lands and their numerous values to assure their continued enjoyment by present and future generations. S. 2401 emphasizes the importance of non-quantifiable as well as quantifiable values to the national interest by providing numerous assurances that scientific, scenic, recreational, historical, and archeological values; natural areas, and fish and wildlife habitats will be afforded ample protection and significant consideration in the national resource land management process.[70]

3. 93rd Congress: The Definition of ACECs Is Refined

S. 2401 never made it to the Senate floor. Senator Jackson introduced a similar bill on January 18, 1973 as S. 424, the National Resource Lands Management Act of 1973.[71] The definition of ACECs in S. 424 closely resembled the definition set out in S. 2401, but eliminated the list of spe-

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[68] S. 2401 at 4-6, *reprinted in* FLPMA LEGIS. HISTORY 1114-1116.

[69] Letter concerning the National Resource Land Management Act of 1972 from Sec. of Int. Morton to Vice Pres. Agnew, SEN. COMM. ON INTERIOR AND INSULAR AFFAIRS, S. REP. NO. 92-1163, at 23 (Sept. 18, 1972), *reprinted in* FLPMA LEGIS. HISTORY 1174.

[70] SEN. COMM. ON INTERIOR AND INSULAR AFFAIRS, National Resource Lands Management Act of 1972, S. REP. NO. 92-1163, at 5, *reprinted in* FLPMA LEGIS. HISTORY 1156.

[71] FLPMA LEGIS. HISTORY 1475.

cific examples included in the previous bill. In S. 424, ACECs were defined as "areas within the national resource lands where uncontrolled use or development could result in irreversible damage to important historic, cultural, or scenic values, or natural systems or processes, or life and safety as a result of natural hazards."[72] The bill emphasized the priority to be given to ACECs in the inventory and land use planning processes.[73]

The Report of the Senate Interior and Insular Affairs Committee accompanying S. 424 noted that this was a "new definition [of ACECs] so far as the public lands are concerned; however it also appears in a longer form in the Land Use Policy and Planning Assistance Act" of 1973.[74]

S. 424 was passed by the Senate on July 8, 1974, but no action was taken on it by the House of Representatives during the 93rd Congress.[75]

The Administration also submitted a bill in 1973. The National Resource Lands Management Act, S. 1041, was introduced on February 28, 1973, at the request of the Administration, by Senators Jackson and Fannin.[76] It, too, stressed the importance of ACEC designation and protection, and included a similar definition of the term.

> [ACECs are] those national resource lands as designated by the Secretary where uncontrolled development could result in irreversible damage to important historic, cultural, or aesthetic values, or natural systems or processes, or could unreasonably endanger life and property as a result of natural hazards.[77]

S. 1041 included a kitchen sink list of potential candidate areas: "coastal wetlands, marshes, and other lands inundated by the tides; beaches and dunes; significant estuaries, shorelands, and flood plains; rivers, lakes, and streams; areas of unstable soils and high seismic activity, rare or valuable ecosystems; significant agricultural, grazing, and watershed lands; forests and related land [requiring] long stability for continuing

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[72] National Resource Lands Management Act of 1973, S. 424 at 3, *reprinted in* FLPMA LEGIS. HISTORY 1477.

[73] *Id*. at 4-7, FLPMA LEGIS. HISTORY 1478-1479.

[74] S. REP. 93-873 (MAY 22, 1974), at 31, *reprinted in* FLPMA LEGIS. HISTORY 1563. This explanation of the origin of the definition of ACECs was repeated in the Report of the Senate Committee on Interior and Insular Affairs accompanying S. 507, the bill that actually became the Federal Land Policy and Management Act. SEN. COMM. ON INTERIOR AND INSULAR AFFAIRS, National Resource Lands Management Act of 1975, S. REP. 94-583 (Dec. 15, 1975), at 43, *reprinted in* FLPMA LEGIS. HISTORY 108. *See* note 87 *infra.*

[75] *Memorandum on the Legislative History of FLPMA by the Chairman of the Senate Committee on Energy and Natural Resources*, FLPMA LEGIS. History v.

[76] For the text of S. 1041, the National Resource Lands Management Act of 1973 (Feb. 28, 1973), *see* FLPMA LEGIS. HISTORY 1491.

[77] National Resource Lands Management Act, S. 1041, at 3, FLPMA LEGIS. HISTORY 1493.

renewal; scenic or historic areas; and such other areas as the Secretary determines to be of critical environmental concern, including lands with wilderness qualities.[78] Neither the Senate nor the House acted on this bill.[79]

Between 1973 and 1975 the House "worked fruitlessly" on public land management bills,[80] primarily because of wrangling over a complex proposal from Rep. Aspinall to establish planning and management policy for all public lands, including both Forest Service and BLM lands.[81] As with the Senate bills, officials of the Department of the Interior consistently recommended ACEC provisions be incorporated in House bills.[82] The House did report a bill in 1974 which was subsequently revised a number of times.[83] The final version was favorably reported on May 13, 1976 as HR 13777.[84]

4. 94th Congress: FLPMA is Enacted

In 1975, Sen. Jackson tried again to move the National Resource Land Management Act through the Congress. On January 30, he and Sen. Haskell reintroduced S. 424, with "minor modifications" as S. 507.[85] According to Sen. Jackson, the title "National Resource Land Management" Act was "a symbolic gesture of respect" to lands neglected, damaged and degraded. Once more the Senator stressed that the legislation fulfilled the tremendous need for BLM to have organic authority and a clear set of goals and objectives for management and use of the public lands "to give focus and direction to the planning process" and correct "the appalling absence of enforcement authority so necessary for any land management agency."[86]

S. 507 contained a concise definition of ACECs: "areas within the national resource lands where special management attention is required to protect important historic, cultural, or scenic values, or natural systems or processes, or life and safety as a result of natural hazards."[87] This definition would have eliminated the necessity of finding irreparable harm to

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[78] *Id*.

[79] *Memorandum of the Chairman of the Senate Committee on Energy and Natural Resources*, FLPMA LEGIS. HISTORY v.

[80] Callison Report, *supra* note 54, at 8.

[81] *Id.* at 5.

[82] *Id*. at 8.

[83] *Id*.

[84] Callison Report, *supra* note 54 at 8.

[85] SEN. COMM. ON INTERIOR AND INSULAR AFFAIRS, National Resource Land Management Act of 1975, S. REP. 94-583, at 37 (Dec. 18, 1975), *reprinted in* FLPMA LEGIS. HISTORY 102. For the text of S. 507 *see*, VOL. 21, PART 2, CONG. REC. S. 1847 (daily ed. Jan. 30, 1975), *reprinted in* FLPMA LEGIS. HISTORY 54.

[86] VOL. 21, PART 2, CONG. REC. S. at 1857, FLPMA LEGIS. HISTORY 64.

[87] SEN. COMM. ON INTERIOR AND INSULAR AFFAIRS, National Resource Lands Management Act of 1975, S. REP. 94-583, at 2 (DEC. 15, 1975), *reprinted in* FLPMA LEGIS. HISTORY 67.

trigger special protective management of an ACEC, a position similar to that ultimately enacted.

As noted earlier, the Report of the Senate Committee on Interior and Insular Affairs on S.507 explained the genesis of ACECs in this way. "'Areas of Critical Environmental Concern' is a new term in relation to the national resource lands, but a term familiar to the Congress. It is found in the Land Resource Planning Assistance Act (S. 984), passed by the Senate in 1972 and 73, and in Clean Air Act amendments under consideration by the Senate Public Works Committee." [88]

The Committee Report confirmed the recommendations of the Public Land Law Review Commission as a source for the concepts embodied in the term ACEC. The Report pointed to three recommendations in particular: Number 27 which calls for the creation and preservation of a natural area system for scientific and educational purposes, Number 78 which urges an "immediate effort . . . to identify and protect those unique areas of national significance that exist on the public lands," and Number 18 which would require "classification of the public lands for environmental quality enhancement and maintenance."[89]

The Committee Report again stressed the importance of ACECs in the BLM planning process, particularly the priority to be given to their identification and protection. "This directive insures that the most environmentally important and fragile lands will be given special, early attention and protection." [90] The Report noted that other uses might be allowed in ACECs, but without "unduly risking" life, safety or permanent damage to the resources and values[91]—i.e., with a margin of safety.

S. 507 passed the Senate on February 25, 1976. The House Interior and Insular Affairs Committee reported a counterpart proposal to S. 507 on May 13, 1976. This bill, H.R. 13777, was called "The Federal Land Policy and Management Act."[92] It mandated that both the Forest Service and BLM inventory the lands under their jurisdictions and develop land

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[88] *Id*. at 43, FLPMA LEGIS. HISTORY 108.

[89] *Id*.

[90] *Id.*

[91] *Id*. The Committee emphasized that, unlike wilderness areas, ACECs were not necessarily areas where no development could occur. "[L]imited development, when wisely planned and properly managed can take place in these areas without unduly risking life or safety or permanent damage to historic, cultural or scenic values or natural systems or processes."

[92] Federal Land Policy and Management Act, H.R. 13777, *reprinted in* FLPMA LEGIS. HISTORY 223.

use plans.[93] These requirements drew strong objections from both agencies. The Department of Agriculture called the addition of the Forest Service to the legislation unnecessary, given that the agency already had sufficient statutory authority to manage its lands. [94] The Department of the Interior stated that the organic act so badly needed by BLM "should not be cluttered by inclusion of authority for other agencies, such as the Forest Service, with different management responsibilities established by separate statutes."[95]

H.R. 13777 offered another variation on the ACEC definition. ACECs were described as "areas within the national resource lands where special management attention is required when such areas are developed or used to protect, or where no development is required to prevent irreparable damage to important historic, cultural, or scenic values, or natural systems or processes, or life and safety as a result of natural hazards."[96]

When the bill reached the floor on July 22 1976, Rep. Melcher proposed an amendment to this ACEC language to insert "fish and wildlife resources" after the word "values" in order to "make clear that protection of fish and wildlife resources may be a basis for designating lands as an 'area of critical environmental concern' deserving special management attention." There was no objection to the amendment and it was approved by a voice vote.[97] The House passed the Federal Land Policy and Management Act on July 22, 1976.

On August 30, a House Senate conference committee convened to reconcile the differences between the two measures, including the title of the act, the inclusion of the Forest Service in the land use planning requirements, and the differences in the definition of ACECs. The conference committee adopted the title "Federal Land Policy and Management Act" instead of "National Resource Lands Management Act," and substituted

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[93] Federal Land Policy and Management Act § 202(a), at 11, *reprinted in* FLPMA LEGIS. HISTORY 233; H. R. COMM. ON INTERIOR AND INSULAR AFFAIRS REP. 94-1163, at 5 (May 15, 1976), *reprinted in* FLPMA LEGIS. HISTORY 435.

[94] Letter concerning H.R. 13777, Federal Land Policy and Management Act of 1975, from Under Secretary of Agriculture Campbell to Rep. James Haley, Chair of the H. Comm. on Interior and Insular Affairs (Oct. 21, 1975), at 37, *reprinted in* FLPMA LEGIS. HISTORY 467.

[95] Letter concerning H.R. 13777, Federal Land Policy and Management Act of 1975, from Asst. Secretary of the Interior Horton to Rep. James Haley, Chair of the H. Comm. on Interior and Insular Affairs (Nov. 21, 1975), at 42, *reprinted in* FLPMA LEGIS. HISTORY 472.

[96] H.R. COMM. ON INTERIOR AND INSULAR AFFAIRS, Federal Land Policy and Management Act of 1976, H.R. REP. NO. 94-1163, at 6 (May 15, 1976), *reprinted in* FLPMA LEGIS. HISTORY 330.

[97] Callison Report, *supra* note 54, at 8.

the term "public lands" for "national resource lands" throughout the bill.[98] The Forest Service was dropped from the planning provisions, except for the direction to the Secretary of Agriculture to "coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian tribes."[99]

The Committee relied on the definition of ACECs in H.R. 13777, with two important additions. The words "protect and" were added before the phrase "prevent irreparable harm," making it clear that Congress intended priority to be given to designating areas where special management attention was required to both protect their special attributes and prevent irreparable harm. In addition, parentheses were placed around the phrase "when such areas are developed or used or where no development is required."[100] In many earlier definitions of ACECs, the reference to preventing "irreparable damage" (or irreversible damage) was consistently linked to areas where no development was allowed – as though the possibility of prohibiting development was only appropriate when necessary to prevent irreparable harm. The final language in FLPMA eliminated this linkage, and imposed the duties to both protect *and* prevent irreparable harm to all ACECs, whether they "are developed or used or where no development is required."

With these, and other issues of dispute not relevant to ACECs or planning, resolved, the conference report was accepted in the House on September 30 and in the Senate on October 1, 1976. President Ford signed FLPMA into law on October 21, 1976.[101]

The final definition of ACECs in FLPMA is: "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."

C. Lessons from the Legislative History

The history of FLPMA shows the engagement of the Department of the Interior, particularly BLM, throughout the development of the statute. The Department provided concepts, language and process recommendations to the crafting of organic authority that ended the general policy of

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[98] Joint Statement of the Conference Committee, CONF. REP. NO. 94-1724, at 57 (Sept. 29, 1976), *reprinted in* FLPMA LEGIS. HISTORY 927.

[99] *Id.* at 929; FLPMA § 202(b) (43 U.S.C. § 1712(b)).

[100] CONF. REP. NO. 94-1724, at 4, *reprinted in* FLPMA LEGIS. HISTORY 874.

[101] *Memorandum of the Chairman of the Senate Committee on Energy and Natural Resources*, FLPMA LEGIS. HISTORY v.

disposal of public lands and put in place a framework for retaining, managing and protecting the marvelous array of lands and resources under its jurisdiction. Areas of Critical Environmental Concern were strongly promoted by the Department, and embraced by the Congress, as a vital statutory tool in that effort.

Although the term ACEC had a number of definitions as the concept worked its way through the legislative proposals that ultimately became FLPMA, several principles remained constant, and are embedded in the meaning and intent of the statute today. The purpose and goal for ACECs is to "insure[] that the most environmentally important and fragile lands will be given special, early attention and protection."[102] It is evident from the increasingly protective language that evolved through three Congresses that Congress intended to accord ACEC designation and protection temporal, procedural and substantive precedence in BLM's planning and management. The agency was directed to identify areas that might qualify for ACEC designation as a first order of business in the inventory process. As a substantive matter, although other uses might be allowed in ACECs, BLM was to determine appropriate management prescriptions "to protect *and* prevent irreparable damage"[103] to the resources and values for which the ACEC designated (emphasis added). Congress changed the wording specifically to eliminate the previous linkage between protecting areas only if necessary to avoid irreparable harm. The enacted language authorizes special management to restrict or eliminate development both to avoid irreparable damage and to protect ACECs, thereby imposing two management standards on BLM: a special duty to protect ACECs, even in the absence of activities that might cause irreparable harm, and the duty to actually prevent such harm from occurring.

V. AGENCY INTERPRETATION OF ACECs

There are so many Departmental directives and guidance and BLM documents interpreting FLPMA[104] that attempting to determine exactly which BLM planning and management provisions apply to an ACEC can feel like assembling a 500 piece puzzle without an overall picture to go by. The consequences of the agency's decentralization and fragmentation

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[102] SEN. COMM. ON INTERIOR AND INSULAR AFFAIRS, National Resource Lands Management Act of 1975, S. REP. 94-583, at 43 (Dec. 15, 1975), *reprinted in* FLPMA LEGIS. HISTORY 108.

[103] FLPMA § 1702(a), 43 U.S.C. § 1702(a) (1976).

[104] *See e.g.*, Departmental Strategic Plan, Secretarial Orders, Departmental Manual, BLM Strategic Plan, Guidance and Direction from the BLM Director and from State Directors, Regulations, BLM Manual, BLM Handbooks, other Guidance, and Instructional Memoranda.

will be discussed in the "Observations from the Field" and "Recommendations" sections of this article. This section examines only the agency regulations and guidance affecting ACECs, and reviews the extent to which they comport with the language of FLPMA and its legislative intent.

A. The Disappearance of Statutory Requirements

The first post-FLPMA regulations were proposed during the Carter Administration on December 15, 1978[105] and finalized on August 7, 1979.[106] In between these dates, draft policy and guidance on the designation and management of ACECs was issued.[107] Final ACEC Guidelines were published on August 27, 1980.[108] The Guidelines addressed many crucial aspects of ACECs, including definitions of "protect" and "priority" and provisions to implement them. BLM described the Guidelines as "a good start in carrying out a potentially significant mandate of the Federal Land Policy and Management Act."[109] It is not clear whether these Guidelines are still in effect, or, if not, when they were rescinded. In either event, they are neither referred to nor applied in any current agency materials. New regulations were issued on December 16, 1980,[110] but never finalized.

Administrations changed in January, 1981.[111] The Reagan Administration proposed new FLPMA regulations on November 23, 1981, seeking to "to delete burdensome, outdated and unneeded regulations"– including almost all of those relating to ACECs.[112] Final FLPMA regulations were published on May 5, 1983,[113] and basically remain in effect today. An ACEC "Handbook," BLM Manual § 1613, was issued on September 29, 1988.

The treatment of ACECs changed markedly from the regulations, policies, and guidance promulgated soon after the enactment of FLPMA to the regulations and guidance currently in effect. The first FLPMA regulations in 1979 and the Guidelines of 1980 included more substantive requirements for ACECs. These strong provisions were to have been put into the new regulations, but were not. Nor were they incorporated in the

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[105] 43 Fed. Reg. 58764 (proposed Dec. 15, 1978).
[106] 44 Fed. Reg. 46386 (Aug. 7, 1979).
[107] 44 Fed. Reg. 32590 (proposed June 6, 1979).
[108] 45 Fed. Reg. 57318 (Aug. 27, 1980).
[109] 45 Fed. Reg. 57320.
[110] 45 Fed. Reg. 82679 (proposed Dec. 16, 1980).
[111] Implementation of FLPMA occurred during the transition from President Jimmy Carter to President Ronald Reagan and from Interior Secretary Cecil B. Andrus (1977-1981) to Interior Secretary James G. Watt (1/23/1981 – 11/8/1983). These political changes resulted in changes to post-FLPMA regulations in general, and to ACECs in particular. The 1983 regulations are generally in effect today, supplemented twice in 2005, primarily to add provisions related to environmental documentation and processes.
[112] 46 Fed. Reg. 57448 (proposed Nov. 23, 1981).
[113] 48 Fed. Reg. 20368 (May 5, 1983).

last regulations proposed during the Carter Administration in December, 1980. As noted, the Reagan Administration issued different regulations when it took office. After 1981, the 1980 Guidelines disappeared and ACEC provisions were either weakened or removed from the regulations, scattered among sections of the BLM Manual which were later relocated (except for BLM Manual § 1613 – the ACEC "Handbook") to Appendix C of the Planning Handbook (BLM Manual § 1601-1), and later deleted from that document as well. Currently, the term "ACEC" does not even appear in the BLM Glossary of Terms.

As explained in the frontnote on page one of this article, unless otherwise stated, the analysis and citations in this article to "current" BLM planning regulations are to the regulations in effect in 2015. In 2014, BLM began to revise its land use planning regulations, a process the agency dubbed the "Planning 2.0 Initiative." This effort included a review of the regulations and guidance for ACECs. New planning regulations were proposed early in 2016.[114] A final version of these new planning regulations was issued in December of 2016 and became effective January 11, 2017.[115] However, on March 7, 2017, Congress voted to rescind these regulations,[116] pursuant to the Congressional Review Act.[117] Although the President has not yet signed this Joint Resolution into law, there is little doubt that he will. Consequently, all references to the current regulations remain correct. Even If the President does not sign the Joint Resolution and the 2016 regulations stand, this article still provides valuable history on the enactment and current implementation of the ACEC provisions in FLPMA.

The regulations in effect in 2015 and BLM's land use plans reflect an agency preference for discretionary management choices over enforceable regulatory requirements. In the ACEC context BLM frequently avoids designating ACECs in favor of other administrative classifications. [118] The

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[114] 81 Fed. Reg. 9674 (proposed Feb. 25, 2016).

[115] 81 Fed. Reg. 89580 (Dec. 12, 2016), effective January 11, 2017. (Rescinded on March 7, 2017 by H.R.J. 44. *See* text above and notes 116 and 117).

[116] H.R.J. Res. 44, 115th Cong. (2017).

[117] 5 U.S.C, §§ 801-808 (1996). Congressional disapproval procedures are set forth in § 802.

[118] BLM has used various labels to identify priority habitat areas or movement corridors for wildlife protection. The 2007 RMP for the Lake Havasu Field Office in Arizona refers to "Wildlife Habitat Areas" and "Wildlife Movement Corridors" (pp 18-21 and Map 9). A more recent designation is "Crucial Habitat" for areas necessary for the survival of sensitive species. This term is derived from the "Crucial Habitat Assessment Tool (CHAT), an initiative of the Western Governors Association. The plans for the Greater Sage Grouse rely on "Priority Habitat" areas. None of these administrative classifications are called for by FLPMA or any other statute and many are areas that appear suitable for ACEC designation. Although BLM may use different terms, perhaps because of cooperation with state or federal wildlife agencies, ACEC protection is not precluded and may provide additional desired management.

reasons offered by agency planners for this preference include the difficulty of changing an ACEC once it is designated, and political opposition among the agency's constituents to the label "area of critical environmental concern."

B. Deficiencies in Current Regulations and Guidance

The 2015 regulations and administrative guidance for ACECs suffer from the following shortcomings: 1) lack of visibility; 2) failure to require inventory and data collection; 3) abridged treatment in planning criteria; 4) absence of consistent information in Resource Management Plans; 5) omission of statutory priorities; 6) and misconstrued protection obligations. The current regulations and guidance also 7) miss the opportunity to deal effectively with FLPMA's consistency provisions, and 8) to support a significant role for ACECs in landscape level planning and management.

1. Lack of Visibility of ACECs

ACECs have gone from being an exceptional part of FLPMA, and a prominent feature of early FLPMA regulations and guidelines, to being nearly absent from BLM's administrative materials. Only one current regulation specifically relates to ACECs, and their statutory priorities are not expressly stated at all. Aside from BLM Manual § 1613, ACECs are barely mentioned in other agency documents, and information on ACECs is now obtainable primarily by reading the statute itself.

ACECs are also conspicuously missing from BLM's budget requests. To secure funding for its operations, BLM prepares a budget justification as part of the Department of the Interior's request to the Congress for financial support. BLM's budget document, like those of other Interior Department agencies, is primarily organized by "goals and activities," which are described under "program" headings. Section 311 of FLPMA[119] requires an annual report to be submitted to Congress to assist in its responsibilities for oversight of the public lands. This report is to include information, evaluations, and budgetary information on public land *programs.*

Because BLM does not currently consider ACECs to be a program, there is no description of them in the agency's budget justification, and no mention of the funds needed for the priority ACEC activities of inventorying, designation, planning or protection. Indeed, in the Department of the Interior's more than 400 page 2016 budget justification, ACECs are mentioned only once—when funds were requested for land acquisitions for particular ACECs.[120]

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[119] FLPMA, 43 U.S.C. § 1741.

[120] Available through the DOI website, or at www.doi.gov/budget/appropriations/2016/upload/FY2016_BLM_Greenbook.pdf. Last accessed June 27, 2015.

BLM Manual §§ 1613.22 and 1613.3 require that management prescriptions for a potential ACEC be developed and discussed in detail in draft RMPs or amendments. Our review of RMPs showed that there is considerable variation in the amount and clarity of information provided in both plans and Records of Decision (RODs). State office websites differ widely, as well, in whether and how they provide information on ACECs to the public. In addition, BLM Manual § 1613.65 requires each BLM state Director to submit an Annual Report on all ACECs within a state to the Director of BLM. These Annual Reports are not uniformly being prepared or sent to the Director, leaving the national office of BLM without an accurate, centralized ACEC data base.

As a result, it is difficult to determine how ACECs were intended to be, and actually are being managed. The lack of visibility of ACECs in BLM regulations, the BLM Manual, the budget justification, and online sites likely translates into fewer ACEC designations, reduced funding for ACEC data collection and management, and a greater probability that ACECs will not receive the priority Congress intended in the inventorying, designation and protection phases of planning.

2. Failure to Require Inventory Data Collection and Identification of ACECs

FLPMA directs that priority be given to ACECs in the inventory of public land resources and values.[121] Designation of a potential ACEC[122] is based on inventory data demonstrating that an area meets the criteria necessary for designation; yet there is currently no requirement that inventory data on ACEC values in potential areas actually *be* collected.

The BLM Manual states that "[A]ll areas which meet the relevance and importance criteria must be identified as potential ACECs and fully considered for designation and management in resource management planning. Information and data on the criteria will usually be obtained from inventory and data collection… [and other sources]."[123] This circular statement falls short of requiring that collection of appropriate inventory

[121] FLPMA § 201(a), 43 U.S.C. § 1711(a) and BLM Manual § 1613.33 (1988) require a detailed description of the resources and values of potential ACECs.

[122] 43 C.F.R. § 1610.7-2(a)(1), (2) (2015). Potential areas must meet two criteria. They must be "relevant" – have a "significant historic, cultural, or scenic value; a fish or wildlife resource or other natural system or process; or natural hazard." They must also have "importance" – have "substantial significance and values. This generally requires qualities of more than local significance and special worth, consequence, meaning, distinctiveness, or cause for concern. A natural hazard can be important if it is a significant threat to human life or property."

[123] BLM Manual § 1613.21.

data on ACEC resources and values be carried out, and on a priority basis.[124]

The absence of an express mandate to inventory and collect data on areas with possible ACEC resources and values is significant because those activities may be conducted by non-BLM personnel who need to be aware of the FLPMA duties. And the adequacy of inventory data relates directly to the place of ACECs in planning. Together, the two concepts complete a circle: to be included in planning an area must meet the criteria for possible designation as an ACEC, a determination that rests on whether there is inventory data indicating that an area qualifies—data that might not be collected. This circularity occurs throughout all categories of agency documents.[125]

3. Abridged Role of ACECs in Planning

The current (1983) regulations significantly changed the former planning regulations, especially as to ACECs. Although some of the general features of planning remained the same, the specific directions regarding potential ACECs were removed or modified.[126] The permissive language about "considering" ACECs, rather than according them priority throughout planning, was retained. All express statements of the priorities to be given ACECs were omitted. The omission was justified in part as making the planning process more streamlined and responsive to program needs.[127] The separate requirement for public comment on the planning criteria (which included guidance on ACEC designation) was eliminated. Some planning criteria were deleted and relegated to "guidance for the program involved," but details on ACECs were removed from these documents as well. Other provisions were excised as being operational in nature and more appropriate for inclusion in the BLM Manual or other directives. The regulation on analysis of the management situation was modified "to ensure that this process does not generate analysis beyond that needed to address management issues." [128]

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[124] Ironically, several of the RMPs reviewed for this report mentioned that inventorying cultural resources in the planning area was a priority under the National Historic Preservation Act, but did not mention the priority for inventorying ACEC resources under FLPMA.

[125] The 1979 regulations at 43 C.F.R. § 1601.5-4(b) stated that "*In all cases*, the inventory data shall be analyzed to determine whether there are areas containing resources, values, systems or process or hazards eligible for further consideration for designation as an ACEC…." (emphasis added). This language came close to establishing a priority for ACECs in the inventory process, but was removed in 1983.

[126] *Compare* 44 Fed. Reg. 46386, 46398 (Aug. 7, 1979) *with* proposed regulations at 46 Fed. Reg. 57448, 57449 (Nov. 23, 1981) *and* final regulations at 48 Fed. Reg. 20364, 20367 (May 5, 1983).

[127] 46 Fed. Reg. 57448 (Nov. 23, 1981).

[128] *Id*.

The current planning regulations do not describe the statutory priorities for the designation and protection of ACECs, but simply cross-reference the principles of § 202 of FLPMA.[129] Similarly, BLM Manual § 1601-1 notes that FLPMA statutory mandates "will influence agency priorities," and sets out several examples, but does not mention the ACEC priorities.[130] Thus, although the ACEC priorities are alluded to indirectly, they are out of sight.

The current regulations call for areas having potential for ACEC designation to be "identified and *considered* throughout … [planning],"[131] but do not state that designation is a priority and, therefore, should always be a "planning issue." Determination of the relevant planning issues is the first step on which subsequent planning processes depend.[132] Although issues may be modified, and a potential ACEC may be nominated and identified for consideration at any time if inventory data gathering or other evidence indicates an area may meet the criteria,[133] subsequent planning usually builds on the issues identified in the first step. And in practice, issues are initially derived from a "pre-planning preparation plan" developed by BLM staff.

The failure to specify that ACECs are always a planning issue is important, because the next step in the planning process is for the Field Manager to *tailor planning to issues previously identified*, and avoid *unnecessary data collection and analyses*.[134] Again, a circularity is set up – all subsequent planning rests on a matter being identified as an issue, yet ACECs need not be noted as such. Similarly, new information and inventory data collection "will emphasize significant issues and decisions with the greatest potential impact" and be conducted "in a manner that aids ap-

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[129] 43 C.F.R. § 1601.0-8 (2015).

[130] BLM Manual § 1601-1 IV. E. 2a 2 (2005) (This portion of the Manual is known as the Land Use Planning Handbook).

[131] 43 C.F.R. § 1610.7-2 (2015) (emphasis added).

[132] Under 43 C.F.R. § 1610.4-1 (2015) the public, other agencies, and groups may suggest topics or concerns for the planning process. Manual §§ 1613.21 and .41 provide that anyone can nominate an area for consideration as a potential ACEC and such recommendations "are actively solicited at the beginning of a planning effort." There are no formal procedures associated with nominations or recommendations and no special forms or other submission requirements for identifying potential ACEC's. However, the public "should be advised that nominations should be accompanied by descriptive materials, maps, and evidence of the relevance and importance of the resources or hazards in order to facilitate a timely evaluation."

[133] 43 C.F. R § 1610.1(c) (2015), BLM Manual § 1613.21C. The initial evaluation of each resource or hazard to determine if it meets ACEC criteria is done by an interdisciplinary team with skills appropriate to the values involved and the issues identified. In practice, this interdisciplinary team usually will evaluate a group of potential ACECs as part of the planning process.

[134] 43 C.F.R § 1610.4-2 (2015) (emphasis added).

plication in the planning process, including subsequent monitoring requirements."[135] Therefore, unless it is clear that ACEC are a required planning issue, and a priority one, they are unlikely to receive the priority treatment in planning directed by FLPMA.

The Field Manager is to analyze the inventory data and other available information to determine the capability of a resource area to respond to *identified issues and opportunities*. This "analysis of the management situation" provides the basis for formulating reasonable alternatives for further planning and for compliance with NEPA.[136] Although uses and protection authorized by FLPMA and other relevant legislation may be "considered,"[137] once again there is no mention in the planning regulations of the *priority* that FLPMA directs be given to ACECs.[138]

If a proposed ACEC designation is included in an approved draft resource management plan, revision, or amendment, the State Director must publish a notice in the Federal Register listing each proposed ACEC and "specifying the *resource use limitations*, if any, which would occur if it were formally designated"[139] (emphasis added). There is no similar requirement to describe the special *resource values* of the proposed ACEC. Although a 60-day public comment period must be offered, it is not clear how the public can understand the decisions to be made if the notice discusses only the restrictions and not the values of the area that might be lost. According to the BLM Manual § 1613, publication of a proposed plan containing similar information may satisfy the notice requirement.[140] Our review of RMPs showed that adequate information on ACEC values and management is not uniformly provided.

A State Director's approval of a plan, revision, or amendment containing an ACEC constitutes formal designation of the ACEC.[141] By implication, de-designation, or a decision "not to carry forward" an existing ACEC must also be done through plan revision or amendment. Existing ACECs are reconsidered in new or revised RMPs, and BLM Manual § 1613.32 states that RMPs or amendments "should" also identify potential ACECs that are not proposed for designation and explain why. "Maintenance" (minor) decisions can be made to adjust activities to conform to

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[135] 43 C.F.R § 1610.4-3 (2015).

[136] 43 C.F.R. § 1610.4-4 (2015); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 42 U.S.C. § 4332(C) (Jan. 1, 1970).

[137] 43 C.F.R § 1610.4-4 (2015).

[138] *Compare* 43 U.S.C. § 1712(c)(3), (5) *and* (6) (2012).

[139] 43 C.F.R. § 1610.7-2(b) (2015). Additional requirements for these special notices are stated in BLM Manual § 1613.32.

[140] *See* BLM Manual § 1613.33.

[141] 43 C.F.R. § 1610.7-2 (b) (2015).

plan requirements, but expansion of the scope of resource uses or restrictions, or a change in the terms and conditions of an approved RMP may only be accomplished through plan amendments or revisions.[142]

An RMP must establish intervals and standards for monitoring and evaluation of the plan, based on the sensitivity of the resource to the decisions involved. It must also provide for an assessment to determine whether mitigation measures are satisfactory, whether there have been significant changes in the related plans of other federal agencies, state or local governments, or Indian tribes, and whether there is new data of significance to the plan. The Field Manager is responsible for this monitoring and evaluation, in accordance with the established intervals and standards, or at other times as appropriate.[143]

In sum, the current planning regulations contain no express statement of the statutory priorities for ACECs, and no explicit requirement that ACECs always be a planning issue and receive priority in inventorying and data collection. Rather, the regulations rely solely on a cross reference to § 202 of FLPMA to incorporate the priority principles for ACEC planning. This failure to provide explicit and visible priority for ACECs in planning may result in a lack of adequate funding for ACEC data collection and management, a failure to adequately consider some areas with ACEC potential, and a failure to designate and protect them.

4. Absence of Consistent Information in Resource Management Plans

The current regulations do not require uniform, consistent information on ACEC values and management prescriptions to be presented in Resource Management Plans. Finding information on the management of an ACEC may be a challenge. As discussed in detail in Section VI, Observations from the Field, our review of RMPs showed substantial variation in how much information on ACECs is offered and where it is located in an RMP. Moreover, although proposed RMPs and the Records of Decision (RODs) that finalize them are generally available online, amendments to RMPs may not be published, so the information in a posted RMP may not be up to date. Significant pieces of the management picture may not be in the Plan.

5. Omission of Statutory Priorities for ACECs

As discussed in Section III B, the *Classification and Multiple Use Act*, the first regulations implementing the CMUA noted that the Act did not call for giving priority to any particular uses of the public lands and,

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[142] 43 C.F.R. §§ 1610-5, § 1610.5-6 (2015).
[143] 43 C.F.R. § 1610.4-9 (2015).

therefore, none would be given priority.[144] By contrast, FLPMA expressly set out priorities for inventorying, designating, and protecting ACECs, but these priorities have not been implemented.

BLM's current regulations and guidance do not define "priority." "Priority" can mean either procedural priority—*i.e.*, certain and early consideration, or substantive priority—*i.e.*, greater weight in decision-making processes, or both.[145] The 1980 ACEC Guidelines defined priority as "[a] preferential rating or ranking, or prior attention in terms of time and precedence, for allocation of services or resources in limited supply."[146] The call for a preferential ranking for "allocation of resources in limited supply" indicates that priority was meant to have a substantive, as well as procedural meaning. This interpretation comports with BLM's regulatory efforts from 1965-1970 which moved toward specifying priority for environmentally sensitive areas, and with congressional intent to provide substantive, as well as procedural priority.

Present regulations are nearly silent on the ACEC statutory priorities, in contrast to the early regulations and agency guidance.[147] Some current BLM guidance treats ACECs favorably. For example, BLM Manual § 1613.06 states that the ACEC

> is the principal BLM designation for public lands where special management is required to protect important natural, cultural, and scenic resources or to identify natural hazards. Therefore, BLM managers will give precedence to the identification, evaluation, and designation of areas which require special management attention during resource management planning.

However, other sections of BLM Manual § 1613 repeatedly refer to "highlighting" ACEC areas through designation, or to overriding their designation. BLM Manual § 1613 states that one of the questions to ask when

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[144] 30 Fed. Reg. 2384-2385 (Feb. 20, 1965).

[145] Webster's New World Dictionary, Third College Edition (1988) defines priority as: **1)** the fact or condition of being prior; precedence in time, order, importance, etc. **2)** (a) a right to precedence over others in obtaining, buying, or doing something, (b) an order granting this, as in an emergency **3)** something to be given prior attention. *Priority*, YOURDICTIONARY.COM, http://www.yourdictionary.com/priority#websters (last visited Sept. 30, 20016).

[146] 45 Fed. Reg. 57323 (Aug. 27, 1980).

[147] The 1980 Guidelines expressly required priority attention be given to the identification of important environmental resources and natural hazards on BLM lands during the identification of planning issues, development of planning criteria, and inventory data and information collection phases of the resource management planning processes. The Guidelines also concluded that ACEC designation was not merely a way of recognizing or "highlighting" areas, but required management restrictions as well.

evaluating a potential ACEC is whether "the values of other resources outweigh the need for protection of important values." If a planning choice "would necessitate the sacrifice of the potential ACEC values to achieve other purposes" then an area will not be designated. Neither of these provisions mentions the priority to be given the designation and protection of ACECs, or indicates that priority was taken into account in the decision. Rather, protecting a potential ACEC seems to be considered as just one multiple use among many.

The 1980 Guidelines attempted to come to grips with the crucial issue of how to accord priority to ACECs in decisionmaking, and reasoned that ACEC designations had to be made on "the basis of a determination as to which of the alternative possible uses for the important environmental resources involved will best serve the public interest…."[148] In evaluating the impacts of other uses on a qualifying ACEC, the Guidelines stated that actions and uses inconsistent with ACEC protection could be allowed if "the public benefits of such an action outweigh the public benefits of continuing the ACEC protection, and that there is no feasible alternative to the proposed inconsistent action ….," a decision with which the State Director had to concur.

> No use or action that would be inconsistent with an ACEC's special management requirements or that would adversely impact an ACEC-protected resource shall be permitted unless the District Manager, after considering all pertinent factors, including the results of environmental analysis and public comment, makes the following findings: (1) The public benefits of the proposed incompatible action clearly outweight [sic] the public benefits of continuing protection of the ACEC-protected resource; (2) There is a clear public need for the proposed action and such action is clearly in the public interest; (3) There is no feasible alternative to, or alternative location for, the proposed action, and (4) Such action includes all feasible planning and management requirements to prevent, minimize, mitigate, or restore the effect of adverse impacts. [149]

The failure of the current regulations to accord ACECs their statutory priorities makes it difficult to enforce their status, and the failure to define "priority" as having both substantive and procedural aspects weakens ACECs significantly. There is evidence in both the agency and legislative

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[148] 45 Fed. Reg. 57322 (Aug. 27, 1980).

[149] *Id.* This language is similar to the requirements in 23 U.S.C. § 138 for a decision to route a road through a national park.

records that the term priority was intended to be procedural *and* substantive. Given the number of factors BLM must consider and balance in planning and management decisions, a vague or limited concept of priority for ACECs is likely to result in ACEC designations and protections being outweighed by other factors, to their detriment and contrary to congressional intent.

6. Misconstrued Protection Obligations

ACEC designations are more than an honorary status. They are, by definition, areas where special management attention is required to both "protect *and* prevent irreparable damage" of the area's resources and values.

FLPMA provides generally for the protection of the public lands. It is the policy of the United States:

> to manage the public lands in a manner that will "*protect* the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values that, where appropriate, will preserve and *protect* certain public lands in their natural condition, that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use….[150]

FLPMA also directs that all public lands be managed to "prevent unnecessary or undue degradation of the lands."[151]

These duties clearly relate to the protection of ACECs. Given that FLPMA imposes general duties to protect the public lands, the inclusion of *particularized* language directing the protection of the distinct values of ACECs through "special management attention" indicates that Congress meant that heightened protection was to be given to them. While some RMPs do provide an increased level of protection for ACECs, several of the plans reviewed for this article expressed the view that "protect" with reference to ACECs means simply the same duty owed the public lands in general, and, therefore, the ACEC designation is called for only when necessary to prevent irreparable damage. Congress rejected this constrained interpretation in the final version of FLPMA.[152]

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[150] FLPMA, § 102(a)(8), 43 U.S.C. § 1701(a)(8) (2012) (emphasis added).

[151] FLPMA, § 302(b), 43 U.S.C. § 1732(b).

[152] *See, e.g.*, the 2008 Monticello, Utah Record of Decision and RMP at 16 and 31-32 stating that ACECs are designated where special management attention is required to "prevent irreparable harm," and noting that since standard management protects the relevant and important values in the planning area, only seven ACECs were designated where special management is necessary to avoid such irreparable harm.

At times, BLM Manual § 1613 uses protective language for ACECs: *e.g.*, management actions "near or within an ACEC" must accommodate their special values; designation may support a funding priority;[153] and management prescriptions "should" receive priority for implementation.[154] BLM Manual § 1613 also describes monitoring as "essential for ensuring the protection of ACEC values and resources,"[155] and "given the FLPMA priority for ACECs, an ACEC implementation schedule must be prepared for each ACEC that identifies the priority, sequence, and costs of implementing activities to protect the ACEC resources or values, including monitoring."[156] Monitoring should be based on the sensitivity of the resource in question. Since ACECs "are assumed to be sensitive" careful monitoring is critical.[157]

Other BLM Manual provisions fail to accord ACECs protection and priority, especially in decisionmaking. Some refer to "highlighting" ACECs, which may connote a non-substantive, recognition status. Several relate to analyzing the management situation, developing planning criteria to evaluate potential ACECs, and making decisions. Some provisions impose dubious constraints. For example, a potential ACEC must be considered in relation to other resources or activities – a reasonable approach under multiple use-sustained yield principles, but questionable given that ACECs are to take precedence. Planners are to consider what uses are compatible with a potential ACEC, and under what conditions, as well as what uses are not compatible with ACEC values, even when conditioned. But then the planner is directed to decide "considering the objectives of the RMP alternative, do the values of other resources outweigh the need for protection of the important and relevant values [of the ACEC]?" Further, the planner is asked to determine what measures can be taken to protect and/or restore potential ACEC values "without restricting other resource uses" and whether it is "feasible to protect the resource value(s)."[158] "Feasible" is not defined, nor is there any elaboration on how "feasible" relates to weighing the potential ACEC designation against limitations on other uses.

The ACEC priorities are not mentioned in these decision-making provisions. And there is no definition of "protect" in current agency regulations or guidance. The 1980 Guidelines defined "protect" as meaning:

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[153] BLM Manual § 1613.02.
[154] BLM Manual § 1613.12.
[155] BLM Manual § 1613.6.
[156] BLM Manual § 1613.61.
[157] BLM Manual § 1613.63.
[158] BLM Manual § 1613.22A.3.

> To defend or guard against damage or loss to the important environmental resources of a potential or designated ACEC. This includes both damage that can be restored over time and that which is irreparable….[159]

The 1980 Guidelines also provided that no use or action that would be inconsistent with an ACEC's special management requirements, or that would adversely impact an ACEC-protected resource, would be permitted unless the manager made certain findings.[160] See the "Priority" section, *supra*.

The legislative history of FLPMA sheds light on what was meant by the duties to "protect and prevent irreparable damage." Early FLPMA bills consistently linked "prevention of irreparable damage" to those ACECs in which no development was to be allowed – as though development could be prohibited only if necessary to prevent irreparable harm. FLPMA eliminated this linkage and stated that ACEC-related protective duties applied not only to areas where no development was allowed, but also to areas where some development could be approved. The enacted language allows a 'no development' approach where necessary to protect ACEC values, imposes broader duties, and provides stronger management options than did previous iterations.

The effects of ACEC designation on particular land uses will vary depending on the particular proposed uses, the values for which the ACEC was designated, and the special management provisions necessary to protect them, but clearly some other uses and activities may be allowed. The Senate Report on S. 507 stated:

> The Committee wishes to emphasize that unlike wilderness areas to be designated pursuant to section 103(d) 'areas of critical environmental concern' are not necessarily areas in which no development can occur. Quite often, limited development, when wisely planned and properly managed, can take place in these areas *without unduly risking life or safety or permanent damage* to historic, cultural, or scenic values or natural system or processes.[161]

Even this 1975 language – written before the final language of FLPMA expressly decoupled management restrictions from a necessity to prevent irreparable harm – contemplated that a margin of safety should be

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[159] 45 Fed. Reg. 57318, 57323 (August 27, 1980).

[160] *Id*. at 57328.

[161] SEN. COMM. ON INTERIOR AND INSULAR AFFAIRS, National Resource Lands Management Act of 1975, S. REP. 94-583, at 43 (Dec. 18, 1975), *reprinted in* FLPMA LEGIS. HISTORY 108 (emphasis added).

built into the protection of ACECs. It is evident from the repeated provisions with which Congress addressed ACECs that "protect" in the ACEC context means to give greater protections than otherwise might be the case for public lands in general. "Special management" is required to safeguard the important resources and values of an ACEC. Many of these resources are rare or fragile, represent an aspect of history, or play a pivotal role in an ecosystem. By creating the ACEC designation, by specifically directing that the important resources and values of ACECs be defended, and by affording ACECs priorities in planning, it is evident that Congress intended that proposed uses in them be carefully reviewed and either barred entirely or restricted through "special management" that secures a margin of safety to avoid unduly risking degradation or permanent damage.

7. Unfavorable Response to Consistency Provisions

The "consistency" provisions of § 202(c)(9)[162] of FLPMA may affect the use of ACECs and interact with the priorities that should be accorded them. These provisions require that plans developed by the Secretary be consistent with state, local, and Tribal plans "to the maximum extent he finds consistent with Federal law and the purposes of this Act."[163]

Although land use planning processes for the BLM and the Forest Service were intended to be similar, there are no comparable consistency requirements in the National Forest Management Act. Nor do the Forest Service's regulations allow an equivalent level of input or control over agency decisions from external entities.[164]

BLM regulations implementing the statutory consistency requirements include extensive additional detail and requirements. Among other

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[162] 43 U.S.C. § 1712(c)(9).

[163] *Id.* The Secretary is to coordinate the land use inventory, planning, and management activities for the public lands with the land use planning and management programs of other federal departments and agencies, state and local governments, and with Tribes. "To the extent practical" the Secretary is to keep apprised of such plans, assure that germane plans are considered, assist in resolving inconsistencies between federal and non-federal plans, and provide for meaningful public involvement of state and local government and Tribal officials, both elected and appointed, in the development of land use programs, regulations, and land use decisions for the public lands. The officials may advise the Secretary on plans, guidelines, rules and regulations, and other land use matters he refers to them. Most importantly, "[l]and use plans … shall be consistent with State and local plans to the maximum extent [the Secretary] finds consistent with Federal law and the purposes of this Act."

[164] The Forest Service regulations require outreach to other agencies, the public, Tribes, and state and local governments, as well as consultation, coordination, and cooperation under NEPA. But the regulations state that nothing in the outreach section "should be read to indicate that the responsible official will seek to direct or control management of lands outside of the plan area, nor will the responsible official conform management to meet non-Forest Service objectives or policies" – a very different posture from that taken in the BLM regulations. 36 C.F.R. § 219.4(b)(3)) (2015).

things, the regulations give outside officials, especially governors of relevant states, considerable authority to challenge BLM management decisions as inconsistent with state purposes, policies, and programs.[165] Such BLM decisions expressly include uses allowed and constraints imposed—topics obviously relevant to ACECs and other conservation areas. However, although BLM guidance and resource management plans and amendments must be "consistent with officially approved or adopted resources related plans, and the policies and programs contained therein, for other Federal agencies, State and local governments and Indian tribes," compliance is only required "so long as the guidance and resource management plan are also consistent with the *purposes, policies and programs of Federal laws and regulations applicable to public lands*…."[166]

These statutory and regulatory consistency provisions can result in significant pressure on BLM planners and managers to avoid discretionary decisions that would curtail or constrain uses of the federal lands. If ACECs were interpreted to better reflect the priorities and protections intended by Congress, and especially if BLM were to consider them to be a land management "program," ACECs could be an especially helpful tool for managers to *resist* consistency pressures to allow uses that might damage important resources on the public lands.[167]

8. Missed Opportunity for ACECs in Landscape-level Planning

If ACECs are accorded the priorities that FLPMA directs, they could play a more important role in future land use planning. In recent years, both the BLM and the Forest Service have moved toward planning for larger management areas, often referred to as landscape-level or ecosystem planning. BLM historically has managed large land areas, including

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[165] BLM regulations provide that State Directors should seek the policy advice of the relevant Governor(s) on many issues, including "the multiple use opportunities and constraints on public lands." (43 C.F.R. § 1610.3-1(c)(2015)). State Directors must ensure that guidance provided to Field Managers is as consistent as possible with existing officially adopted and approved resource related plans, policies or programs… of State agencies, Indian tribes, and local governments that may be affected. . . ." 43 C.F.R. § 1610.3-1(d) (2015). Governors may identify inconsistencies between provisions in a proposed RMP or amendment and state, local, policies or programs, and provide recommendations to a State Director to resolve them, which must be considered under formal procedures, and which the State Director shall accept "if he/she determines that they provide for a reasonable balance between the national interest and the State's interest." 43 C.F.R. § 1610.3-2(e) (2015).

[166] 43 C.F.R. § 1610.3-2(a) (2015).

[167] At times BLM refers to designated ACECs as a "program," and at other times denies that they are considered as such. Perhaps now that BLM has undertaken many more "conservation" duties, the character of ACECs and nomenclature applied to them will be reconsidered.

scenic, natural areas, and primitive areas.[168] Multiple use-sustained yield management under FLPMA may involve expansive areas and natural processes as well. Mixed land ownerships – such as state lands, tribal lands, and private lands – combined with overarching goals such as open space, water allocation, endangered or threatened species habitats, etc., that often necessitate multi-jurisdictional management of resources-- have provided additional impetus to engage in broader scale planning.

The Beaver Dam Slope resource area is an example of coordinated planning and management. There are three contiguous ACECs with that name in three states (Nevada, Arizona, and Utah). Management responsibilities for the Beaver Dam Slope area are shared by three Field Offices and involve coordination with three state programs. There are many other examples of landscape agreements and coordinated planning efforts, especially for management of the habitat of threatened or endangered species. Several new approaches and tools are being devised to further these federal/nonfederal coordinated planning efforts.

ACECs have always been important for conservation, and several have been designated by Congress as National Conservation Areas. ACECs can be of any size and can protect a diversity of important resources and values. Because ACECs should be a priority designation, they could lend stability and integrity to a larger area. Furthermore, in many of the RMPs reviewed for this article, ACECs are shown as unavailable for disposal and as high priority for acquisition of inholdings and additions. Large individual ACECs could protect entire ecosystems or groups of resources, while smaller ACECs could safeguard crucial individual resources or areas and provide a framework or backbone for a more expansive landscape-level planning effort.

VI. OBSERVATIONS FROM THE FIELD: ON-THE-GROUND ACEC MANAGEMENT

A major objective of the research for this article was to determine the extent to which BLM's on-the-ground administration of ACECs fulfills FLPMA's statutory directive to "give priority in to the designation and protection of areas of critical environmental concern" in the development and revision of land use plans. This analysis is support for our recommendations to BLM for improvement in ACEC designation and management.

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[168] The Classification and Multiple Use Act of 1964, Pub. L. No.88-607, 78 Stat. 986, directed BLM to classify lands, considering ecology, among other things, and BLM responded with classifications that included large and significant areas. *See* note 28, *supra*.

A. Field Research Methodology

To assess on-the-ground management of ACECs, the authors reviewed 36 Resource Management Plans (RMPs) and Records of Decision (RODs) from eleven Western states.[169] From these RMPs we selected a sample of 111 individual ACECs. The sample was chosen to represent the various types of ACECs[170] and management prescriptions and to illustrate how BLM is using the designation to protect resources and values of the lands under its administration. In making our selection we relied on the criteria and requirements for ACECs set forth in BLM Manual § 1613, which remains the principal agency authority on these areas.[171]

For our investigation we assumed the role of a member of the public interested in a particular ACEC or in an area of BLM land because of its natural beauty, recreational opportunities, interesting geology or other outstanding natural resources or values. Our intent was determine whether information on ACECs was easy to find on BLM websites and/or in RMPs, or was missing or so scattered that it would discourage even an enthusiastic member of the public from pursuing their interest in an area.

Our research procedure involved the following steps:

- Review of the website for each BLM state office to see what information was provided about planning in general, and ACECs in particular;
- Selection of at least 3 field offices in each state, chosen for geographical and resource diversity;

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[169] The states were Alaska, Arizona, California, Idaho, Montana/the Dakotas (treated as one state by BLM), Nevada, New Mexico, Oregon/Washington (treated by BLM as one state), Utah and Wyoming. The information was compiled in a table included with the authors' report to the Pew Charitable Trusts. The table is available from the authors on request.

[170] FLPMA identifies 4 categories of areas where special management is required for "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). *See also* BLM Manual § 1613.1.

[171] BLM Manual § 1613.33 (1988) requires that proposed ACECs and their associated management prescriptions be "identified and fully described" in RMPs and plan amendments. For each proposed ACEC, a plan "shall contain" a name based on the resource or value or particular physical feature of the area (§ 1613.33A), and a description of the "value, resource, system or hazard which warrants special management attention." This description must include sufficient detail to "clearly indicate" why the area qualifies for ACEC designation. (§ 1613.33B). Management activities and future uses considered compatible with purposes of ACEC designation and those considered incompatible must be described when an ACEC is proposed, along with information "unique" to the ACEC. (§ 1613. 33C). The rationale for designating or not designating an ACEC "must be discussed." (1613.33E).

- Review of the RMP and ROD prepared by each of the chosen field offices, as posted on the statewide or field office website; [172]

- Choice of at least 3 or 4 ACECs in each RMP,[173] with the objective of including 2 examples of each of the 4 categories of ACECs prescribed in FLPMA, and

- Identification of the resources and values for which the ACEC was designated and the management prescriptions BLM identified as necessary to "protect and prevent irreparable damage" to them.

B. Research Challenges

The research proved difficult and often frustrating. BLM has no up-to-date central data base or compilation of information on ACECs. The agency's master list of ACECs, which gives the name, field office and state where they are located, is incomplete and inaccurate. Information on ACECs is often spread among a number of different documents, in addition to the RMP and its ROD. Statutes such as the Endangered Species Act, the National Historic Preservation Act and the Energy Policy Act of 2005 may provide additional important information relevant to ACEC management, as may also be the case with administrative documents.[174] These documents are not included with an RMP, and may not even be mentioned in it, so it is not always possible to determine all the management prescriptions or guidance applied to a particular ACEC. Since our purpose was to examine information readily available to the public on the treatment of ACECs under FLPMA, we limited our review to the applicable RMP.

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[172] A considerable number of field offices are in the process of revising their RMPs. With a few noted exceptions, we limited our review to RMPs that are not being revised, as these constitute current management in the planning area that is available to the public on agency web pages.

[173] In Alaska, three of the four field offices chosen have designated only a single ACEC each, reducing the sample size for that state.

[174] For example, after 1995, each BLM State Office was required to develop state or regional standards and guidelines for grazing administration on the public lands. These standards and guidelines are set forth in documents separate from RMPs, as are the grazing prescriptions for individual grazing allotments. Thus, as a general matter, from the RMP alone, a member of the public can ascertain only whether an ACEC is open or closed to grazing and not learn what impacts grazing activity might have on other resources. Similar examples that might apply to individual RMPs include the National Management Strategy for Motorized Off-Highway Vehicle Use on Public Lands (USDI-BLM 2001), the National Mountain Bicycling Strategic Action Plan (USDI-BLM 2002), and administrative materials addressing Wind and Solar Development on Public Lands and Statewide Designation of Energy Corridors on Federal Lands in the Eleven Western States.

Even something as simple as determining why an area was designated as an ACEC proved daunting, despite the fact that BLM Manual § 1613.3A states that an ACEC will usually be given a name based on the resource or value warranting special management attention or a particular physical feature of an area.[175] The majority of ACECs have quite generic names (for example, Deep Creek) offering no clue as to the values and resources they protect.

1. BLM State Websites

There is no standard format or list of requirements that each BLM state website must follow to display information on planning, in general, or ACECs in particular. As a result, there is significant disparity in the amount of information about ACECs, as well as its quality and level of detail, presented by the state websites. For example, the BLM website for Arizona has no overview information about ACECs at all. A search of the term on the home page produces a list of PDF documents from Records of Decision. The Wyoming homepage includes a "Special Areas" entry with no mention of ACECs. In contrast, the Utah website has a page dedicated to its ACEC program, with information on ACEC designation criteria and process. There is an FAQ section that provides information on public participation, the importance of ACECs and generally permitted activities. The Utah website lists all of the State's ACECs on a page organized by field office. The list includes basic information on the ACECs and additional information can be obtained by clicking on the name of an individual ACEC.

2. Field Office Websites

Most BLM state websites have a map showing the location of field offices and a viewer can open individual pages for each field office. However, each field office treats information on ACECs differently, making a search burdensome and confusing, and comparisons with other field offices almost impossible. For example, the Southern District of Nevada displays excellent data on ACECs, while the other field offices in the State show virtually nothing.

3. Resource Management Plans

Field offices roughly follow the format for RMPs contained in Appendix F of BLM Manual § 1601 on Planning, but there is a great deal of variation in the content and presentation within that general framework. For example, the Fairbanks, Alaska Field Office prepares its RMPs in a completely different way from the Anchorage Field Office. As detailed in Section V above, there is no prescribed approach for discussion of ACECs, and thus there is considerable inconsistency in how field offices treat

[175] BLM Manual § 1613.33A.

ACECs in their RMPs. Some plans include a separate section on ACECs or Special Areas which describes the designations and their resources and proposed management. Even when this is case, however, an interested person must read the entire RMP to determine whether ACEC management of a particular resource or area is discussed elsewhere in the plan. Many RMPs have little or no separate coverage of ACECs, necessitating reading an entire plan and ROD (which can easily total hundreds of pages) to find the references to ACECs.

C. Conclusions from the RMP Sample

1. Inadequate Identification of Resources and Values Represented in ACECs

BLM has designated over a thousand ACECs --- an assemblage that protects areas of astonishing beauty, rare and unusual plant communities, habitat for imperiled species, geologic records of our planet's history, and sites that are visible memories of the native peoples who came before.

The preponderance of ACECs across all the states were designated for multiple resources and values. They may have scenic qualities and also contain crucial wildlife habitat or cultural properties; they may include a wetland ecosystem, popular hiking trails and a historic settlement. Our sample showed a preference in ACEC designations for often unspecified "scenic values" and for big game species and species listed under the ESA. Not surprisingly, many ACECs in the Southwest were chosen for their archeological and cultural resources. A number of riparian and wetland ecosystems are ACECs, as are areas of paleontological interest.

Unfortunately, many RMPs gave little or no information about the resources and values that warranted ACEC designation. Indeed, it is fair to say that BLM Manual § 1613.33B requirement for a description of ACEC resources and values was almost entirely ignored. For example, the Salem, Oregon FO RMP did not identify *any* resources and values or management prescriptions for the Williams Lake, Soosap Meadows or White Rock Fen ACECs. Many plans failed to name the species of wildlife or plants for which the ACEC was designated, making it impossible to evaluate, or even ascertain, the applicable management prescriptions. For example, the Spokane, Washington FO RMP did not identify the ESA listed species that the Rock Island ACEC was intended to protect, or give any management prescriptions or information on potentially conflicting activities in the area. Similarly, the Yakima and Columbia River Islands ACEC is said to contain "crucial nesting habitat," but the species were not identified. This ACEC is open to oil and gas leasing, but the RMP is otherwise silent on management. It is possible that information on rare species is available in an ESA recovery plan or other agency document, or has been omitted from the RMP to protect the species' security. However, this raises

the question of the utility and relevance of the RMP as a planning instrument if agency managers must refer to numerous other documents to obtain information not included in the RMP as they implement these plans.

Often RMPs used one or two generic words to note the resources and values of ACECs, without further detail. For example, the Monticello, Utah FO 2008 RMP simply stated the San Juan River ACEC listed "scenic, cultural, fish and wildlife, natural systems and processes, and geologic features" as the area's values and resources, with no elaboration. The Coeur d'Alene, Idaho Field Office 2007 RMP describes the Pulaski Tunnel ACEC only as "historic," without any further detail.[176]

The most difficult ACECs to find were Natural Hazards. The 1998 RMP for the Las Vegas, Nevada Field Office identifies the Devil's Throat Sinkhole ACEC as a natural hazard. (The sinkhole is 100 feet wide and 100 feet deep and expanding.) Interestingly, this ACEC is open to oil and gas exploration and development and grazing. No management prescriptions are given for recreational activities or fish and wildlife, which one would assume could be impacted by the hazard. The other natural hazard in the sample is the Four Dances ACEC named in the 2013 RMP from the Billings, Montana Field Office. The RMP gives no information on what the hazard is or how it is to be managed.

2. Incomplete Information on Management Prescriptions

Overall, the single most significant shortcoming in RMP treatment of ACECs was the failure to identify and describe the special management prescriptions necessary to protect them. This is clearly contrary to BLM Manual § 1613 which requires an RMP or plan amendment to identify and fully describe the special management prescriptions necessary to "protect and prevent irreparable damage"[177] to ACEC resources and values.[178] Without this information there is no way to determine whether and/or how agency managers are actually protecting ACEC resources and values on the ground.

A few examples will illustrate the magnitude of the information gaps in the sampled RMPs. The East Pryor Mountains ACEC, identified in the 2013 Billings, Montana Field Office RMP, was designated to protect a herd of wild horses, yet the plan contains no information on the herd or management prescriptions necessary to manage it. The Raised Bog in the

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[176] Coeur d'Alene, Idaho Field Office 2007 RMP at 61. The Pulaski Tunnel was named for Ed Pulaski, who saved his crew of firefighters by ordering them into a mining tunnel during the wildfire that swept through the national forests of Washington, Idaho and Montana in 1910. The riveting story is chronicled in THE BIG BURN by Tim Egan. TIMOTHY EGAN, THE BIG BURN: TEDDY ROOSEVELT AND THE FIRE THAT SAVED AMERICA (2010).

[177] BLM Manual § 1613.02.

[178] BLM Manual § 1613.33.

Winnemucca, Nevada planning area is noted as a "rare example of a quaking bog," but the RMP is devoid of management prescriptions to address recreation, vehicle use, or other activities that may damage the Bog.

RMPs exhibited considerable differences in the management approach to two of the most important resource categories for ACEC designation: historic and cultural properties and wildlife, including Threatened and Endangered Species. Some RMPs contain extensive prescriptions for such properties or species. Others are vague, at best, about how these resources will be managed. Frequently, RMPs noted that certain management prescriptions "should," "would," or "will" be used, but whether they were actually instituted is unclear. Examples include the Virgin River Corridor ACEC in the Arizona Strip, Arizona FO 2008 RMP which is almost entirely prospective in how the area's cultural, historic, and scenic resources and endangered fish populations may be safeguarded. The Fairview RNA/ACEC in the Uncompahgre, Colorado FO 1989 RMP states that plant monitoring studies for the area's endangered plants "will be developed and actions designed to improve habitat conditions initiated," but whether this has occurred is unknown.

Since an ACEC will not be designated unless "special management attention is required . . . to protect and prevent irreparable damage" to resources and values, the absence of information and the equivocation on management prescriptions contravenes BLM Manual § 1613. As noted earlier, one possible explanation is that information relevant to ACEC management is contained in documents prepared pursuant to other statutory or administrative directives. However, not having useful data at hand for the planning process makes RMPs potentially less effective as planning tools and makes public participation more difficult. More vigorous requirements for the inclusion of better information on ACECs in RMPs and in the annual reports could be helpful

The other explanation, and one which is supported by our review of RMPs, is that ACECs often receive short shrift in the planning process. In spite of the clear statutory direction of FLPMA, ACEC designation does not appear to be a priority for BLM field managers. Rather than being used as the starting point in the planning process, ACECs are regarded merely as one of a number of possible categories of designations available for multiple use/sustained yield management in the planning area. The RMPs we examined did not explain the reasons for the management choices made, for example, why an area with the resources and values that qualified it as an ACEC was instead relegated to a wildlife habitat area or some other classification. Perhaps BLM managers are reluctant to designate ACECs *because* they are statutory and, therefore, limit managers' discretion. However, the very fact that ACECs have several statutory priorities

could be helpful to BLM managers, not only for protecting important resources and values on public lands, but for defending agency management decisions from political and other interference.

3. Lack of Correlation between Authorized Activities and Protection of ACEC Resources and Values

The field study showed that the majority of ACECs sampled are open to mineral entry under the Mining Law of 1872, generally with plans of operation required. [179] They are also open to oil and gas leasing, frequently with restrictive conditions, including the No Surface Occupancy (NSO) stipulation.[180] Many ACECs allow grazing, sometimes with restrictions provided by the applicable Grazing Allotment Plan or individual grazing permit.[181]

There was often little correlation in the RMPs sampled between authorized activities, such as mining or oil and gas development, that can damage ACEC resources and values, and the management prescriptions provided to protect them. Many RMPs did not discuss whether the management activities and uses allowed were compatible with the purposes of ACEC designation, although this matter is supposed to be fully described when an ACEC is proposed.[182] Without an evaluation of the selection of

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[179] Approximately 2/3 of the ACECs reviewed are currently open to mineral entry, in part or all of the area. This percentage may be higher because not all RMPs included this information in the description of activities in ACECs. For example, the 229,000 acre Neacola Mountains ACEC in the Anchorage, Alaska FO RMP does not indicate whether the ACEC is open to mining (or oil and gas activity either). The Sleeping Giant ACEC in the Butte, Montana FO 2009 RMP has no information on whether the area is legally available for mineral entry or oil and gas leasing. This is an ACEC with an unusual rock formation, "significant" scenic and watershed values and important historic resources, all of which could be compromised by mining or oil and gas development activities.

A number of RMPs propose withdrawal of parts or all of an ACEC from mining, so in the future the level of this activity may be reduced. Examples include the Hualapai Mountain Research Natural Area ACEC in the Kingman Arizona FO 1993 RMP, the North Fork Cosumnes River ACEC in the Folsom, California Sierra FO 2008 RMP, the Chama Canyon ACEC in the Taos, New Mexico FO 2012 RMP, and the Twin Creek ACEC in the Lander, Wyoming 2014 RMP.

[180] At least 80% of the ACECs included in the sample are currently open to oil and gas exploration and development, in at least part of the area. Again, this percentage may be higher; the information is missing from RMPs such as the Los Osos ACEC in the Bakersfield, California FO 2014 RMP. Given that the Los Osos ACEC was designated to protect rare endemic plants communities and is off-limits to grazing and camping, a management prescription addressing oil and gas activities would seem to be an appropriate aspect of the RMP, although it is possible that the area has no oil and gas potential.

[181] More than half of the ACECs examined in the study are open to grazing in all or part of the area and during all or part of the year. This percentage may be higher because not all ACECs indicated whether they were open or closed to grazing.

[182] BLM Manual § 1613.33C. RMPs are also required to provide information on the "unique" attributes of the ACEC when it is proposed,

appropriate management prescriptions it is questionable whether the RMP is an adequate planning tool.

One example of the disconnect between resource protection and management prescriptions was the Las Cruces, New Mexico FO 1993 RMP treatment of the Old Town ACEC. This ACEC was closed to vehicles and its cultural sites fenced to protect them from damage from pothunters, yet the ACEC was open to mineral entry. Mineral entry could create the very damage the other measures were designed to prevent. Similarly, although the Pueblos ACEC in the Taos, New Mexico FO RMP had several measures in place to conceal the location of the pueblos, vehicles were allowed without restrictions –such as day use only—that would facilitate enforcement on designated routes in close proximity to them.

Recreation is a significant and growing use of numerous ACECs, especially for rock climbing, hiking, and camping. Some ACECs have "developed" BLM recreational facilities such as campgrounds within them or very near them, despite the threat such facilities might pose to vulnerable features.[183] Given the potential impact of recreational activities on ACEC resources, the extent of the omission of management prescriptions to deal with these effects was startling. Of the more than 100 ACECs examined, 47 made no mention of recreational activities within the area.

Vehicle use in ACECs is generally limited to designated roads and trails. Off-highway vehicle use is similarly restricted or prohibited, particularly when necessary to prevent conflicts with protected species or fragile environments. However, many RMPs acknowledge that enforcement of restrictions on OHV use is a challenge for limited agency personnel. Rights of Way (ROWs) are permitted in many ACECs; some RMPs endeavor to restrict their location to minimize the impact on protected resources. RMPs describe the management of visual resources solely in terms of their Visual Resource Management (VRM) class, without further detail on how this is to be accomplished and maintained.

Numerous RMPs called for the subsequent preparation of activity plans to address particular resource issues, or for specialized ACEC plans to guide management of the ACEC as a whole. Examples include the Nulato Hills ACEC described in the Anchorage, Alaska FO 2008 Ring of Fire RMP and the Virgin River Corridor ACEC in the Arizona Strip, Arizona FO 2008 RMP. The number of RMPs that actually include activity or ACEC plans is not known. As far as we could determine, only one of the ACECs in our sample, the Galena Mountains ACEC in the Central Yukon RMP, had an individual ACEC management plan. While activity plans are

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[183] *See*, *e.g*., the campground to be installed near Lavender Mesa, UT, an ACEC designated to protect relict vegetation to serve as a control area in studies on the impacts of grazing and other modern uses on other lands.

not required by BLM regulations or guidance, the promise of such a plan in the future should not take the place of appropriate controls on activities at present.

4. Inadequate Margin of Safety

Acknowledging that other information may be available elsewhere, and that compromises in ACEC management may be allowed in order to provide public access, even to sensitive areas, some RMPs present contradictory values and management prescriptions that may fail to provide the margin of safety Congress contemplated. As discussed above, the Old Town ACEC in the Las Cruces, New Mexico FO and the Pueblos ACEC in the Taos, New Mexico FO had several protective measures in place (pueblos closed to all mineral development; location not shown on maps; protected by fences or barriers; and out of sight of trails and facilities), yet vehicles were allowed on designated routes. Given the damage from vehicles and visitors disregarding use restrictions, and the scarcity of personnel to monitor and enforce such rules, it would seem that additional limitations on vehicles, such as closing roads, or allowing day use only would be in order to help insure adequate protection of these special sites.

Many other plans allow potentially damaging uses, and it was not possible to determine whether adequate protection was provided. Many plans allow damaging uses "subject to reconsideration if the resources of the ACEC sustain damage." Yet under 43 C.F.R. § 1610.7-2(b), in order to add restrictions, the plan would have to be amended with publication in the Federal Register and public comment, a time-consuming process. Some of the resources and values in ACECs are rare, fragile, and irreplaceable. Management should take into account the limited availability of agency personnel to monitor and enforce protections, and err on the side of an adequate margin of safety in the first place, because even if interim protections are available, resources may sustain damage or irreparable harm.

5. Inconsistent Coordination of Management Among Field Offices

The trend in land use planning recognizes that, in many circumstances, such planning should be carried out at the landscape-level because ecosystems and their components, particularly wildlife, do not conform to administrative boundaries. To plan effectively at this level will require coordination among field offices within a state, between states, and among different federal and state agencies. BLM's current decentralized model of organization discourages coordination, which sometimes results in inconsistent management of the same resource. Admittedly, multi-office, state or agency coordination can be complicated, but it has the potential to vastly improve conservation on significant land areas.

Several ACECs studied involved two field offices with management duties for parts of the same resource, and the management regimens sometimes varied greatly. The Bullhead Bajada Natural and Cultural ACEC in the Lake Havasu, Arizona FO 2007 RMP is valuable as historic Desert Tortoise habitat and habitat for other sensitive and special species. The RMP expressly stated that the ACEC was designated to "protect [Desert Tortoise] from urban expansion." Although the tortoises would be much safer if they retreated further up slope, they had a proclivity to remain on the lands that were more accessible to the expanding population of the town of Bullhead. The Lake Havasu FO responded by designating the lands in its planning area as an ACEC, but with management prescriptions that left many other uses in place.[184]

The Kingman FO, which is responsible for planning for the adjacent habitat, took an opposite approach. The FO declined to designate an ACEC on its lands, concluding that it seemed hopeless to protect the area from the impacts of growing Bullhead City. Instead, the Kingman FO opted to make the public lands contiguous to Bullhead City available for disposal, and to mitigate the Desert Tortoise losses with habitat established elsewhere – in part with moneys obtained from selling the habitat near Bullhead City. Although the disposal of the lands did not ultimately take place, the differences between the approaches of the two field offices in dealing with the same habitat is a telling example of the need for field office coordination.

In contrast to the Lake Havasu/Kingman situation, many field offices have worked together to protect resources and values that transcend administrative boundaries. As previously discussed, the Beaver Dam Slope area includes three contiguous ACECs with that name in three field offices in three states. The RMPs from the St. George, Utah FO (1999 Plan; 48,519 acres) and the Ely District Office, Nevada (2008 Plan; 36,800 acres) contain detailed information on the coordinated management of various resources. The Arizona Strip, Arizona FO RMP (2008 Plan, 51,985 acres) is basically prospective, with few decisions and little management framework to analyze, but does address mineral entry, oil and gas leasing, and grazing as do the other two plans.

At least two other sets of ACECs with resources and values managed by more than one field office were reviewed in our study. The Three Rivers Riparian ACECs were designated by the Lake Havasu, Arizona FO (2007 Plan; 2,246 acres) and the Kingman, Arizona FO (1993 Plan; 32,043

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[184] The lands were open to oil and gas, subject to a No Surface Occupancy stipulation only in a Special Cultural Resource Management Area. Part of the ACEC was recommended for withdrawal from mineral entry. All motorized vehicles were limited to designated roads and trails. The Desert Tortoise management was Category 2: no net loss of quantity or quality of species or habitat.

acres). Nine-Mile Canyon ACECs were designated by the Vernal, Utah FO (2008 Plan; 44,168 acres) and the Price, Utah FO (2008 Plan; 26,200 acres). The Vernal RMP imposed more constraints on acquired riparian lands than on other lands, but both the Vernal and Price plans contained significant management prescriptions. Both ACECs were open to oil and gas leasing, subject to various levels of stipulations. Although the Vernal RMP closed the acquired riparian area to vehicles, vehicles are otherwise allowed on designated routes. Dust and pollution from vehicular traffic used in connection with oil and gas activities has caused controversy by damaging the extensive rock art in the Canyon.

Coordinating management of ACECs that span field office boundaries could reveal issues, problems, and potential paths to success in landscape level management. Perhaps a study of the factors that hinder or facilitate inter-office coordination could be undertaken to assist BLM's efforts to transition to this approach in planning.

VII. RECOMMENDATIONS FOR CHANGES IN ACEC INTERPRETATION AND IMPLEMENTATION

The information collected from the field review, along with the assessment of the deficiencies in BLM's ACEC regulations and guidance, formed the basis for the following recommendations for change in BLM's interpretation and implementation of ACECs. All of these changes could be accomplished administratively.

A. Recognize ACECs as a Land Management Program

BLM could significantly improve its administration of ACECs and elevate their visibility and importance by managing them as a program. The agency commonly uses the program concept to coordinate and facilitate management of groups of related resource activities that require uniform management principles and practices. Section 311 of FLPMA[185] requires an annual report of programs to be submitted to Congress to provide information and evaluations to assist the Congress in its oversight activities of the public lands. The report should also provide budget information on past fiscal years and on expenditures and needs for future fiscal years. Obviously, recognizing ACECs as a program would be appropriate for this high priority management authority, and of great benefit in raising its visibility, importance, and funding.

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[185] *Id*.

In addition to the obvious benefits of a coordinated and comprehensive ACEC management, administration of ACECs as a program would allow BLM to address gaps in the protection of resources and values in the current group of ACECs to achieve a more complete array of the special places, geological features, wildlife species and cultural and historic resources the agency has in its care.

Furthermore, an ACEC program would enable BLM to better secure funding for ACEC activities and to defend its designations and protective management decisions in consistency reviews, which, under FLPMA and current regulations are keyed, in part, to whether proposals in RMPs relate to a BLM program.

An ACEC program could be a more significant part of landscape-level or ecosystem planning. It could play a central role in wildlife and habitat management, water supply, and the amelioration of impacts of climate change, either through designating large areas to protect resources and values, or smaller, but crucial areas that could anchor larger areas or corridors. ACECs can be of any size; they can protect a diversity of important resources and values, and because they are a priority designation with separate formalities for designation and de-designation, they could lend stability and integrity to plans for larger areas. ACECs are generally unavailable for disposal, and are a high priority for acquisition of inholdings and additions. Large individual ACECs could protect entire landscapes or resources, while smaller ACECs could protect crucial individual areas and provide a structure for landscape-level planning efforts.

Finally, recognizing ACECs as a program would complement congressionally-designated BLM conservation units. In the past, many ACECs have subsequently become National Conservation Areas or National Monuments. As a program, ACECs could function to link the conservation options available to BLM, knitting together an extraordinary conservation system for the public lands.

An ACEC program could be readily accomplished by administrative action. Development of agency-wide ACEC protocols would better fulfill FLPMA's mandate for giving priority and protection to ACECs and would improve their effectiveness for conservation. Expanded regulations and guidance on the treatment of ACECs in Resource Management Plans would help eliminate the inconsistent, and sometimes conflicting, approaches to ACEC designation and implementation currently taken by individual BLM states and field offices. A comprehensive organization of ACECs, with readily accessible information on BLM national, state and field office websites, would also increase the public's understanding of the agency's decisionmaking and management processes.

Recommendations for specific elements of an ACEC program include:

1. Substantive program elements:

a. Agency-wide guidance that expressly states the statutory requirements of FLPMA and defines the terms "priority" and "protection" of ACECs;

b. Consistent procedures for the planning process, including explicit steps for recognition of the statutory priorities to be given ACECs;

c. Express requirements for data collection on areas that may qualify as ACECs;

d. Standard principles and procedures for designating and managing ACECs, including guidance on according priority to ACECs in inventorying, designation, and protection in multiple use-sustained yield decisionmaking, and tailoring management to regional and local variations in resources and demands for recreational or commodity uses;

e. Harmonized protocols on the treatment of ACECs in RMPs to eliminate the inconsistent, and sometimes conflicting, approaches to ACEC designation and implementation currently taken by individual BLM states and field offices, and to facilitate research and comparisons;

f. Uniform information on ACECs in RMPs, including:

- Identification of the resources and values for which each ACEC is designated;
- Description of the special management prescriptions necessary to protect the resources and values of each ACEC;
- Discussion of the compatible and incompatible uses of each ACEC, and the relationship of those uses to the selected management prescriptions;
- Explanation of the correlation between the activities authorized in the ACEC and protection of ACEC values.

g. Coordinated ACEC management among field offices with similar lands and resources to accomplish protection.

2. Procedural program elements:

a. A central, on-line and searchable ACEC data base maintained by the national office of BLM and updated annually, as appropriate, with information from the yearly reports required to be submitted by State Directors;

b. A standard template for presenting ACEC information on BLM state and field office websites to simplify information gathering by interested parties and enable the public to better understand the agency's decisionmaking and management processes;

c. A uniform format for discussion of ACECs in RMPs to facilitate inquiries and research and allow for comparisons of management among RMPs (see RMP contents above);

d. Description of opportunities and procedures, listed on all agency websites, for public participation in the identification, evaluation, designation and management of ACECs, including guidance on the timing and content for proposed ACEC nominations.

B. Improve Agency Implementation of ACECs

ACECs have enormous potential to secure the long-term preservation of exceptional public lands and their resources. A number of specific improvements are recommended to resolve the deficiencies in the agency's current administration of ACECs and return this special designation to its statutory priority position in BLM land management. The program elements described above are also appropriate aspects of improved agency implementation of ACECs.

1. Promulgate new regulations and guidance to restore the visibility and effectiveness of ACECs.

As noted, despite the importance of ACECs, they are the subject of only one current BLM regulation, which does not address the priorities directed by Congress. Guidance on the use of ACECs to protect various resources is addressed in BLM Manual § 1613, but otherwise ACECs receive only scant attention in an Appendix to the BLM Manual § 1601 on planning. The purpose and elements of ACECs, the priorities and protection to be given them, and crucial elements of their management could be addressed in new regulations that comport with and implement FLPMA, and a revised BLM Manual § 1613 could elaborate on practical aspects of their designation and management. Regulations have the benefit of enforceability and provide consistency and regularity in management. Guidance can appropriately complement regulations and take account of the need for flexibility and judgment when dealing with the wide variety of circumstances facing land managers in the field.

2. Define and implement the statutory ACEC priorities.

FLPMA mandates that ACECs receive priorities in inventorying, designation, and protection. Protection is to be provided in resource management plans and through "special management." The legislative history of FLPMA, and early agency actions, support the interpretation that these

priorities are both procedural (take precedence in consideration) and substantive (given weight in decisionmaking). As discussed above, the 1980 Guidelines defined "priority" and gave priority to ACECs by requiring findings that: (1) The public benefits of a proposed incompatible action clearly outweigh the public benefits of continuing protection of the ACEC resource; (2) There is a clear public need for the proposed action and such action is clearly in the public interest; (3) There is no feasible alternative to, or alternative location for, the proposed action, and (4) Such action includes all feasible planning and management requirements to prevent, minimize, mitigate, or restore the effect of adverse impacts. Current regulations do not mention, much less provide procedures to implement the ACEC priorities. New regulations and guidance could correct these omissions and assure that the priorities are implemented.

3. Provide BLM-wide guidance on ACECs in the planning process.

The absence of BLM-wide guidance combined with the agency's decentralized management structure has led to inconsistent approaches to ACECs. The current lack of adequate national ACEC guidance may well inhibit area managers from making effective use of ACEC authorities, or securing funding for their implementation. National guidance should be provided on topics such as according ACECs priorities in all planning activities and decisions, inventorying and designating ACECs, developing protective management prescriptions, monitoring and adaptive management.

a. Identify potential ACEC designations as a "planning issue."

The first step in BLM's planning process is the identification of what BLM calls "planning issues." All subsequent planning rests on this step, yet no agency regulation or guidance requires that potential ACEC designations always be considered as planning issues, and this omission should be corrected.

b. Require collection of data on the resources and values that may qualify an area as an ACEC.

Although FLPMA mandates that ACECs receive priority in the inventory process, BLM regulations and guidance do not direct that data on potential ACEC resources and values actually be collected. This omission is significant because non-agency personnel often conduct inventories. In the absence of specific instruction to do so, they may not gather information on ACEC values critical to the identification of the planning issues on which the rest of planning depends. BLM should advise both its staff and non-agency personnel that collecting information on areas that may

qualify as ACECs is not optional, but is an important initial aspect of the planning process.

c. Accord ACECs priority in land use planning.

FLPMA directs that ACECs be given priority in the inventory, designation and protection management aspects of BLM's land use planning processes. Current BLM regulations do not implement these priorities, thereby shortchanging a significant aspect of the planning process. Improved regulations and guidance on incorporating the ACEC priorities could remedy these omissions. ACECS should be afforded priority as a planning issue and in the Assessment of the Management Situation and all other steps in the planning process.

d. Include more detailed discussion of ACEC Resources and Values in draft RMPs and in Federal Register notices.

Draft Resource Management Plans and any Federal Register notices of proposed ACECs should describe the resources and values of the area, and the special management protections and restrictions that may apply.

4. Manage ACECs to achieve the heightened level of protection required by FLPMA.

Because of their special character, Congress intended ACECs be given greater protection than is afforded public lands in general under multiple use-sustained yield principles.

a. Provide heightened protection for ACECs

By definition, ACECs are areas where "special management attention" is necessary to protect their values. FLPMA directs that ACECs be managed to both protect *and* prevent irreparable damage to their resources and values. However, some RMPs concluded that "protection" means that which is provided under FLPMA generally and, therefore, ACECs need only be designated when necessary to prevent irreparable harm. The legislative history of FLPMA indicates that this interpretation is in error. New regulations and guidance should indicate that a heightened level of protection for ACECs is the statutory standard.

b. Include a margin of safety.

Some of the resources and values in ACECs are rare, fragile, and irreplaceable, yet many RMPs allow potentially damaging uses and activities to occur. Guidance should acknowledge the limited availability of agency personnel to monitor and enforce protections, and err on the side of an adequate margin of safety when developing protective management prescriptions for ACECs.

c.Foster better coordination of ACEC management among field offices.

The lack of coordination among field offices sometimes results in conflicting management of the same or similar resources and land types, with consequent impacts on protection. A general directive to field offices to collaborate when appropriate, and specific procedures for harmonized management would help address this problem, as would standardized approaches to website and RMP organization and content identified in the recommendations concerning program management.

5. Facilitate public participation in the evaluation, management and nomination of ACECs.

Current regulations provide for public participation in BLM planning processes and BLM Manual § 1613.4 directs agency managers to facilitate public involvement on ACECs. The use of a consistent format for BLM state and field office websites and in RMPs would make it easier to find information on ACECs. Instructions on how the public may nominate an area for consideration as an ACEC would be useful as well.

6. Enforce the annual reporting requirement.

BLM cannot effectively manage ACECs without an accurate, up-to-date central database of information on ACECs. State Directors are supposed to provide this information to the Washington office on an annual basis, but generally fail to do so. Enforcement of this basic requirement would assist the national office in successfully supervising ACEC designation and implementation across the public lands.

7.Explore the greater use of ACECs as part of landscape-level or ecosystem planning.

ACECs could play a greater role in landscape level or ecosystem management for wildlife and habitat, water supply protection, the amelioration of impacts of climate change, and other important matters, either as large individual areas protecting important resources and values, or as smaller but crucial areas that could anchor larger areas or corridors. Landscape level and ecosystem planning and management represent the emerging public lands agenda. An expanded role for ACECs could support BLM's efforts to meet the challenges these new approaches demand. It is notable, and regrettable, that in BLM's largest landscape level planning effort to date—relating to the conservation of the greater sage grouse and its sagebrush habitat—ACEC designations were utilized in draft RMP amendments, but dropped from almost all final plans. The explanation for this decision is an open question, but it is consistent with the agency's preference for retaining discretion in management choices and its aversion to taking actions that engender political opposition.

VIII. CONCLUSION

Since its inception, BLM has faced challenges in establishing a conservation mission and agenda to balance its historic commodity development emphasis. The agency has made progress in this effort by designating more than a thousand ACECs on the lands under its care. However, despite strong directives in FLPMA, BLM has failed to accord ACECs their statutory priorities, has allowed ACECs to virtually disappear from agency administrative materials, and to receive inconsistent management on the ground. BLM has hobbled its ability to make effective use of the remarkable ACEC land designation that Congress gave no other land managing agency. By taking the actions necessary to restore a vigorous approach to ACEC management in its regulations and guidance, BLM would honor FLPMA's unique land protection mandate, enhance what the agency has already achieved, and be better prepared for the future.