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§ 22.01 Introduction[12]

This chapter reviews the Bureau of Land Management's (BLM) obligations to maintain an updated inventory of the lands and resources that it manages, the BLM's land management planning obligations, the reasons for amending the BLM's planning regulations, the concerns raised by opponents of the revised rule known as "Planning 2.0," application of the Congressional Review Act (CRA) and the demise of Planning 2.0, and the implications for future BLM land management planning.

§ 22.02 Why We Plan

[1] Planning Context

The United States totals approximately 2.27 billion acres of land, roughly 640 million acres (28%) of which are owned or managed by the federal government.[3] The BLM is the nation's largest landlord,[4] managing more land surface than any other federal agency. Almost all (99.2%) of the 248.2 million surface acres that are managed by the BLM are located in Alaska and 10 of the 11 contiguous western states.[5] The BLM also manages the federal government's onshore mineral estate when the surface estate is controlled by another federal agency or by a non-federal entity.[6] As with BLM-managed surface resources, the 700.4 million-acre mineral estate managed by the BLM is also mostly in the West, with 89.9% of federal onshore minerals being found in these same 11 states.[7]

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[1] Cite as John C. Ruple, "The Rise and Fall of Planning 2.0 and Other Developments in BLM Land Management Planning," 63 *Rocky Mt. Min. L. Inst.* 22-1 (2017).

[2] The author would like to thank Nada Culver, Phil Hanceford, Robert Keiter, Laura Lindley, and Neil Westesen for their thoughtful comments on early drafts of this chapter.

[3] Carol Hardy Vincent, Laura A. Hanson & Carla N. Argueta, Cong. Research Serv. (CRS), "Federal Land Ownership: Overview and Data," at 6 (CRS Report R42346 Mar. 3, 2017).

[4] This phrase is borrowed from James R. Skillen, *The Nation's Largest Landlord: The Bureau of Land Management in the American West* (2009) (chronicling the history of the BLM).

[5] BLM, *Public Land Statistics 2015,* at 7 tbl.1-3 (May 2016). These states are Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Wyoming.

[6] George Cameron Coggins & Robert L. Glicksman, 4 *Pub. Nat. Resources L.* § 39.22 (2d ed. 2017).

[7] *Public Land Statistics 2015, supra* note 3, at 7 tbl.1-3.

The federal public lands managed by the BLM are subject to multiple competing uses. During 2015, BLM-managed lands supported an authorized grazing use of over 8.6 million animal unit months,[8] and produced 243 million board-feet of timber.[9] BLM-managed lands were also home to 94,484 producing oil and natural gas wells,[10] and federal onshore wells produced 174.6 million barrels of oil and 3.4 trillion cubic feet of natural gas.[11] Across the BLM-managed landscape, 8.8 million acres are also protected as wilderness,[12] and another 12.6 million acres are managed as wilderness study areas, pending congressional action on proposed wilderness designations.[13] BLM-managed lands also supported 61.8 million visitor days of recreational activity.[14]

Balancing the competing demands placed on BLM-managed lands poses significant challenges, and these challenges are complicated by, among other things, shifting demographics. The 11 states that are home to most of the BLM-managed lands are also some of the fastest growing states in the nation, with all of these 11 states growing at a faster rate than the nation as a whole between 2000 and 2015.[15] Nevada, Arizona, and Utah stand out as the three fastest growing states in the nation over that time period, and Nevada and Utah rank behind only Alaska in terms of size of the surface estate managed by the BLM.[16] BLM management must account for this growing population and the demands that come with it.

The BLM must also adapt to a changing climate and the ecological impacts it brings. The western states of Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, and Washington (the National Weather Service's West Region) have experienced a roughly 4°F increase in average February temperature since 1895-a greater increase than the lower 48 states as a whole.[17] Western states are projected to experience significant climate related increases in temperature as well as reductions in snowpack and streamflow over the coming decades. These changes are likely to result in increased wildfires, threaten agricultural production, and impact vegetative communities and the wildlife habitat that they provide.[18] Climate change and the disruptions that it brings force the BLM to make decisions in an atmosphere of uncertainty regarding future ecological conditions, and all too often, under the shadow of likely legal challenges to whatever course of action the agency adopts. These factors and more weigh on the BLM as it undertakes its land management planning efforts.

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[8] *Id.* at 87 tbl.3-8c. An animal unit month is "the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month." *43 C.F.R. § 4100.0-5*.

[9] *Public Land Statistics 2015, supra note 3, at 95* tbl.3-12.

[10] BLM, "Oil and Gas Statistics," tbl.9 (Producible Well Bores), *https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics*.

[11] Office of Natural Res. Revenue, "Production Data," *https://www.onrr.gov/About/production-data.htm*.

[12] *Public Land Statistics 2015, supra note 3, at 212* tbl.5-4.

[13] *Id. at 214* tbl.5-5; *see 43 U.S.C. § 1782* (regarding wilderness study area management).

[14] *Public Land Statistics 2015, supra note 3, at 186* tbl.4-1.

[15] U.S. Census Bureau, "Intercensal Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2010," at tbl.1 (ST-EST00INT-01 Sept. 2011); U.S. Census Bureau, "Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016," at tbl.1 (NST-EST2016-01 Dec. 2016).

[16] *Public Land Statistics 2015, supra* note 3, at 7 tbl.1-3.

[17] *See* Nat'l Ctrs. for Envtl. Info., Nat'l Oceanic & Atmospheric Admin., "Climate at a Glance," *https://www.ncdc.noaa.gov/cag/*.

[18] *See generally* U.S. Global Change Research Program, "Climate Change Impacts in the United States: The Third National Climate Assessment" (Jerry M. Melillo, Terese (T.C.) Richmond & Gary W. Yohe eds., 2014).

In 2016, the BLM issued revised planning regulations, known as "Planning 2.0," that, according to the proposed rule, would (1) "enable the BLM to more readily address landscape-scale resource issues, such as wildfire, habitat connectivity, or the demand for renewable and non-renewable energy sources and to respond more effectively to environmental and social changes"; (2) "further emphasize the role of science in the planning process and the importance of evaluating the resource, environmental, ecological, social, and economic conditions at the onset of planning"; (3) "affirm the important role of other Federal agencies, State and local governments, Indian tribes, and the public during the planning process"; and (4) "enhance opportunities for public involvement and transparency during the preparation of resource management plans."[19]

The final Planning 2.0 regulations were filed on December 9, 2016, and published in the *Federal Register* three days later.[20] Planning 2.0, however, lived a very short life. Less than two months later, the House of Representatives, in accordance with the CRA,[21] passed a resolution disapproving of the regulation.[22] That resolution was approved by the Senate on March 7, 2017, and signed into law by President Trump on March 27, 2017.[23] Significantly, the CRA not only did away with the Planning 2.0 rule, but barred the BLM from reissuing a new planning rule that is "substantially the same" as Planning 2.0 absent express congressional authorization.[24] As discussed below, that prohibition may prove to be problematic.

[2] Federal Land Policy and Management Act Planning Mandate

Given the size and value of the estate managed by the BLM, it is no wonder that Congress concluded that "the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts."[25] This mandate is included in the Federal Land Policy and Management Act of 1976 (FLPMA).[26] FLMPA was the outgrowth of the Public Land Law Review Commission (PLLRC), which spent six years drafting recommendations to harmonize and modernize the BLM's sprawling mandate.[27] Many of the PLLRC's recommendations were incorporated into FLPMA, and indeed FLPMA repealed hundreds of prior laws, unifying often conflicting management direction into what has become the BLM's organic act.[28]

FLPMA directs that planning stand on a foundation of quality information. Specifically, FLPMA directs:

> The Secretary [of the Interior] shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving

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[19] *Resource Management Planning, 81 Fed. Reg. 9674, 9674* (proposed Feb. 25, 2016) (to be codified at 43 C.F.R. pt. 1600).

[20] *Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016)* (to be codified at 43 C.F.R. pt. 1600).

[21] *5 U.S.C. §§ 801-808*.

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

[23] Pub. L. No. 115-12, ***131 Stat. 76*** (2017).

[24] *5 U.S.C. § 801(b)(2)*.

[25] *43 U.S.C. § 1701(a)(2)*.

[26] Pub. L. No. 94-579, *90 Stat. 2743* (codified as amended at *43 U.S.C. §§ 1701-1787*).

[27] The PLLRC's charter is set forth in Act of Sept. 19, 1964, *Pub. L. No. 88-606*, *78 Stat. 982*, and its findings and recommendations are contained in PLLRC, *One Third of the Nation's Land* (1970).

[28] *See* FLPMA §§ 702-706, 90 Stat. at 2787-94 (uncodified repeal of laws then in effect).

> 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.[29]

Based on the information obtained through the inventory process, "[t]he Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands."[30] In developing and revising resource management plans (RMP), the Secretary of the Interior is directed to:

> (1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;
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> (2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;
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> (3) give priority to the designation and protection of areas of critical environmental concern;
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> (4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;
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> (5) consider present and potential uses of the public lands;
>
> (6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;
>
> (7) weigh long-term benefits to the public against short-term benefits;
>
> (8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and
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> (9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located . . . .[31]

Furthermore, "[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."[32]

At its essence, planning under FLPMA is about striking a balance between competing uses (and non-uses) of our public lands, and doing so in an open and transparent way that gives voice to the multiple stakeholders with an interest in how our public lands are managed. What constitutes an appropriate balance under this ambitious but nebulous mandate is explained in FLPMA's multiple-use and sustained yield mandate. According to FLPMA, multiple use means:

> the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration

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[29] *43 U.S.C. § 1711(a)*.

[30] *Id.* § 1712(a).

[31] *Id.* § 1712(c).

[32] *Id.* § 1732(b).

> being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.[33]

In a similar vein, sustained yield means "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."[34]

While FLPMA endeavors to define the various factors that must be loaded onto the scales as the BLM seeks to strike a balanced approach to public land management, the appropriate balance is eerily reminiscent of Justice Stewart's immortal comments about pornography. Defining pornography, Justice Stewart said, was an effort to "define what may be indefinable."[35] The appropriate balancing in competing uses of our public lands, like pornography, seems to be something that we all presume to know when we see it.[36] Yet we invariably see it through different eyes and define it quite differently-and all too often we react viscerally to competing definitions, taking umbrage with those holding a different view of things.

[3] Coordination

In adopting FLPMA, Congress recognized that BLM-managed lands are often interspersed with lands managed by other entities, and that this patchwork of lands is often managed for potentially very different purposes. Congress also recognized that communities have grown up around the promise (sometimes expressed, and sometimes implied) of ready access to the public lands and the resources they contain. Failure to coordinate across jurisdictions can therefore result in management conflicts, avoidable impacts to local communities, or unnecessary environmental impacts. Accordingly, Congress, in FLPMA, directs that, to the extent consistent with other laws, the Secretary of the Interior must coordinate land use planning and management with similar efforts that are being undertaken by other federal agencies, tribes, and state and local governments.[37] This includes giving careful consideration to the policies of approved state and tribal land resource management programs.[38]

> In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials . . . in the development of land use programs, land use regulations, and land use decisions for public lands . . . . Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.[39]

FLPMA's pre-Planning 2.0 implementing regulations also dictate that prior to RMP approval, the BLM state director must submit the proposed plan or plan amendment to the governor(s) of the state(s) involved, and identify any known inconsistencies with approved state or local plans, policies, or programs.[40] A governor then has 60 days to

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[33] *Id.* § 1702(c).

[34] *Id.* § 1702(h).

[35] *Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)* (Stewart, J., concurring).

[36] *See id.*

[37] *43 U.S.C. § 1712(c)(9)*.

[38] *Id.*

[39] *Id.*

[40] *43 C.F.R. § 1610.3-2(e) (2015)*. Citations to the 2015 edition of the *Code of Federal Regulations* refer to pre-Planning 2.0 regulations. As explained below, these regulations remain in effect following disapproval of the Planning 2.0 rule. Citations to the Planning 2.0 rule are identified as such and undated.

identify inconsistencies and to provide written recommendations to the state director. If the state director does not accept the governor's recommendations, the state director must notify the governor in writing; the governor then has 30 days from receipt of the state director's letter in which to submit a written appeal to the BLM director.[41]

Where the state does not have "officially approved or adopted resource-related plans," the BLM looks to similarly adopted "policies and programs."[42] In the case of such policies and programs,

> consistency will be accomplished so long as the guidance and [RMPs] are consistent with the policies, programs and provisions of Federal laws and regulations applicable to public lands, including, but not limited to, Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise and other pollution standards or implementation plans.[43]

[4] National Environmental Policy Act Integration

Of course, development of an RMP or undertaking an RMP revision is a "major Federal action[] significantly affecting the quality of the human environment" under the National Environmental Policy Act of 1969 (NEPA),[44] and such actions require the BLM to prepare an environmental impact statement (EIS). Under these regulations and to the extent possible, the BLM combines its planning and NEPA analysis such that the analysis of alternatives and environmental impact review are combined into a single document.[45]

Procedurally, this means that the BLM begins by announcing its intention to prepare or revise an RMP by publishing a notice of intent in the *Federal Register*.[46] This begins the "scoping" period under NEPA, where the agency seeks public input in determining the scope of issues to be addressed. The agency also identifies the significant issues related to a proposed action at this time.[47] Early on, the BLM also prepares an "analysis of the management situation," which may be done in collaboration with cooperating agencies.[48] Cooperating agencies are federal agencies, state and local governments, and federally recognized Indian tribes possessing jurisdiction by law or special expertise with respect to the resources or environmental impacts involved in the proposal.[49] The analysis of the management situation essentially frontloads the NEPA process and forms "the basis for formulating reasonable alternatives, including the types of resources for development or protection."[50] To facilitate coordination with the states where BLM-managed lands are located, the BLM state directors are directed to "seek the policy advice of the Governor(s) on the timing, scope and coordination of plan components; definition of planning areas; scheduling of public involvement activities; and the multiple use opportunities and constraints on public lands."[51] When the

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[41] *Id.*

[42] *Id.* § 1610.3-2(b) (2015).

[43] *Id.*

[44] *42 U.S.C. § 4332(2)(C)*; *see also* *43 C.F.R. § 1601.0-6 (2015)* (declaring that RMP approval "is considered a major Federal action significantly affecting the quality of the human environment" and therefore necessitates EIS preparation).

[45] *43 C.F.R. § 1601.0-6 (2015)*.

[46] 40 C.F.R. § 1508.22.

[47] *Id.* § 1501.7.

[48] *43 C.F.R. § 1610.4-4 (2015)*.

[49] 40 C.F.R. § 1508.5.

[50] *43 C.F.R. § 1610.4-4 (2015)*.

[51] *Id.* § 1610.3-1(c) (2015).

planning area includes areas of potential surface mining for coal, and the surface is privately owned, the BLM must consult with all surface owners.[52]

The BLM then proceeds to prepare a combined draft RMP and EIS. The draft is made available for public comment for at least 90 days,[53] comments are reviewed by the BLM, and comments are addressed through revisions to the draft or in a separate response to comments.[54] The BLM then issues a proposed RMP and final EIS reflecting these changes and any other new information or analysis.[55] Approval of the final RMP/EIS can occur no sooner than 30 days from the date upon which the U.S. Environmental Protection Agency publishes a notice of availability of the final EIS.[56] That decision is then subject to a 30-day protest period that is open to any member of the public who participated in the planning process and who has an interest that may be adversely affected by the approval.[57] The decision is also subject to the governor(s) consistency review, discussed in § 22.02[3], above.[58] If an inconsistency is identified by a governor, then the BLM can either revise the RMP in accordance with the governor's recommendations (potentially requiring an additional public comment period on revisions), or reject the proposed revisions and provide a written explanation for the acceptance or rejection of the governor's recommendations.[59] Finally, the U.S. Department of the Interior (DOI) issues a record of decision (ROD), which is then subject to judicial review.[60]

RMP development or revision is a lengthy process. A review of RMP revisions completed in Colorado, Montana, Utah, and Wyoming from 2004 through 2014 found that it takes, on average, 6.2 years to go from a notice of intent to a ROD (range 4.5 to 7.3 years).[61] While there is little doubt that the lengthy process is expensive and can frustrate stakeholders on all sides, it is clear that the BLM considers carefully the comments received during the RMP revision process. During the RMP revisions for the above-mentioned plans, the BLM reduced the land area open to unrestricted off-trail ?use of off-road vehicles by an average of 67%.[62] The BLM also reduced the area subject to "standard lease terms and conditions" for oil and gas development by 26% while increasing the area subject to more protective "no surface occupancy" or leasing closures by 71% and 42%, respectively.[63] These changes, while statistically significant, did not appear to negatively impact oil and gas well development, which was projected to increase by 2% despite the more protective approach to resource management.[64] Indeed, oil and gas

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[52] *Id.* § 1610.2(j) (2015).

[53] *Id.* § 1610.2(e) (2015).

[54] *40 C.F.R. § 1503.4*.

[55] *43 C.F.R. § 1610.4-8 (2015)*.

[56] *Id.* § 1610.5-1(b) (2015).

[57] *Id.* § 1610.5-2(a) (2015).

[58] *Id.* § 1610.3-2(e) (2015).

[59] *Id.*

[60] *Id.* § 1610.5-2(b) (2015).

[61] John Ruple & Mark Capone, "NEPA, FLPMA, and Impact Reduction: An Empirical Assessment of BLM Resource Management Planning and NEPA in the Mountain West," *46 Envtl. L. 953, 962 (2016)*.

[62] *Id.* at 970.

[63] *Id.*

[64] *Id.* at 971. Neither of these increases, however, was statistically significant because of the high level of variability between RMPs.

industry job creation was also projected to increase by 8% following plan revisions, despite the more protective management stipulations.[65]

§ 22.03 Bureau of Land Management's Planning Rules

The BLM is charged with the unenviable task of administering a statutory mandate that is simple in its goals, yet impossible to define in objective terms or in terms that are agreeable to all stakeholders. As the late Justice Scalia explains, "'[m]ultiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put . . . ."[66] The BLM attempted to hone this charge through regulation, but it too failed to define what is at its heart a subjective question of balance in terms that satisfied all.

The BLM first issued regulations establishing a land use planning system for BLM-managed public lands in 1979.[67] The BLM revised these regulations in 1983 to clarify the planning process and to "eliminate[] burdensome, outdated and unneeded provisions."[68] The BLM's planning regulations were amended again in 2005 to emphasize the importance of working with federal, state, local, and tribal governments in developing, amending, and revising RMPs, and to clarify the role cooperating agencies play in the land use planning process.[69] The substance of these rules is reflected in the discussion above.

In 2011, the BLM released a report highlighting the proliferating challenges that the BLM faced in managing for multiple use and sustained yield on the public lands.[70] As the BLM explained, population growth and urbanization, increasingly diverse land uses, demand for energy resources, and the proliferation of landscape-scale change agents such as climate change, combined with technological change and improved analytical tools, necessitated a new approach to planning and management.[71] As the BLM also explained, updating their planning regulations would allow it "to incorporate lessons-learned and best practices developed over the last ten to fifteen years of resource management planning and respond to public sentiment that the planning process is, at times, cumbersome and slow to complete."[72]

As part of the regulatory amendment process, the BLM developed three targeted goals to guide what became known as Planning 2.0: First, the BLM sought to improve its ability to nimbly respond to social and environmental change, addressing "the need for land use plans that support effective management when faced with environmental uncertainty, incomplete information, or changing conditions."[73] Second, the BLM sought to provide meaningful opportunities for other federal agencies, state and local governments, Indian tribes, and the public to be involved in RMP development.[74] As the BLM explained:

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[65] *Id.* at 973.

[66] *Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 58 (2004)*.

[67] *See Public Lands and Resources; Planning, Programming, and Budgeting, 44 Fed. Reg. 46,386 (Aug. 7, 1979)* (to be codified at 43 C.F.R. pt. 1600).

[68] *Planning, Programming, Budgeting; Amendments to the Planning Regulations; Elimination of Unneeded Provisions, 48 Fed. Reg. 20,364, 20,364 (May 5, 1983)* (to be codified at 43 C.F.R. pt. 1600).

[69] *Land Use Planning, 70 Fed. Reg. 14,561 (Mar. 23, 2005)* (to be codified at 43 C.F.R. pt. 1600).

[70] BLM, "Winning the Challenges of the Future: A Road Map for Success in 2016" (Oct. 2011).

[71] *Resource Management Planning, 81 Fed. Reg. 9674, 9678* (proposed Feb. 25, 2016) (to be codified at 43 C.F.R. pt. 1600).

[72] *Id. at 9674*.

[73] *Id. at 9679*.

[74] *Id.*

> This goal highlights the importance of strong public involvement in the planning process to reduce conflict and disputes over public lands management and develop durable [RMPs]. Through the Planning 2.0 initiative, the BLM seeks to establish earlier and more frequent opportunities for public involvement in the planning process and to provide for effective coordination and collaboration with other Federal agencies, State and local governments, tribes, and stakeholders.[75]

Third, the BLM sought to improve its ability to address landscape-scale resource issues and to apply landscape-scale management approaches, stating that "the BLM planning process must be able to consider issues and opportunities at multiple scales and across traditional management boundaries."[76]

On February 25, 2016, the BLM issued the draft Planning 2.0 rule, which was intended to "identify the importance of science-based decisionmaking; landscape-scale management approaches; adaptive management techniques to manage for uncertainty; and active coordination and collaboration with partners and stakeholders."[77] The final Planning 2.0 rule was issued on December 12, 2016.[78]

The most significant change under Planning 2.0 was a requirement to prepare a "planning assessment" prior to initiating RMP preparation or amendment. During the planning assessment, the BLM would describe environmental, ecological, social, and economic conditions, as well as current management practices.[79] "The BLM would also identify the role of the public lands in addressing landscape-scale resource issues or in supporting national, regional, or local policies, strategies, or plans. The planning assessment would inform the preparation of the [RMP] or EIS-level amendments."[80] The planning assessment process included coordination and cooperation with other agencies as well as state and local governments, Indian tribes, and the public at large.[81] To the NEPA practitioner, this sounds a lot like the "front-loading" process that has long been a part of NEPA.[82]

The BLM argued that frontloading and other increases in public participation would enable the agency to identify issues earlier in the planning process when it could more efficiently address those issues.[83] Earlier issue identification would ultimately save the BLM time in completing plan revisions and reduce the likelihood of litigation. Adoption of a front-loaded process accorded with guidance from the Office of Management and Budget and the Council on Environmental Quality that stated: "Given possible cost savings through improved outcomes, fewer appeals and less litigation, department and agency leadership should identify and support upfront investments in collaborative processes and conflict resolution . . . ."[84] Accordingly, federal agencies were encouraged to prioritize

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[75] *Id.*

[76] *Id. at 9679-80*.

[77] *Id. at 9679*.

[78] *Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016)* (to be codified at 43 C.F.R. pt. 1600).

[79] *81 Fed. Reg. at 9675*.

[80] *Id.*

[81] *Id.*

[82] *See* James L. Connaughton, "Modernizing the National Environmental Policy Act: Back to the Future," *12 N.Y.U. Envtl. L.J. 1, 6-7 (2003)* (in order to improve NEPA, agencies need to "get back to the vision of NEPA, front-loading the planning process with stakeholder participation and deepening that participation").

[83] *81 Fed. Reg. at 89,588*.

[84] Office of Mgmt. and Budget & Council on Envtl. Quality, "Memorandum on Environmental Collaboration and Conflict Resolution," at § 4(b) (Sept. 7, 2012).

integrating environmental collaboration and conflict resolution objectives and "a focus on up-front collaboration as a key principle in agency mission statements and strategic plans."[85]

[1] Main Criticisms of Planning 2.0

Though the changes brought about by Planning 2.0 appear to be more evolutionary than revolutionary, these changes deserve closer scrutiny, as do the three main criticisms that were proffered against Planning 2.0. While this chapter does not exhaustively review these changes or the merits of rule criticisms, a summary may prove useful because, as explained below, the CRA precludes the BLM from promulgating future regulations that are "substantially the same" without express congressional authorization.[86] An understanding of the Planning 2.0 rule, therefore, helps illuminate the BLM's decision space, if the BLM chooses to promulgate new planning regulations.

[a] Larger Planning Area Dilutes State and Local Voices

Many state and local governments expressed concern about a perceived loss of voice in the BLM planning process under Planning 2.0. Under the prior rule, an RMP "shall be prepared and maintained on a resource or field office area basis, unless the State Director authorizes a more appropriate area."[87] Under Planning 2.0, the BLM defined the planning area based on multiple factors, including management concerns, the relevant landscapes, overlapping plans, and other relevant information.[88] These factors may or may not coincide with field office boundaries. As the BLM explained, it manages "a diverse range of natural resources, which occur at an equally diverse range of geographic scales, and collaborates with a diversity of partners, stakeholders and communities, who work at different scales."[89] The BLM must therefore be able to "consider issues and opportunities at multiple scales and across traditional management boundaries,"[90] and Planning 2.0 would have, in the BLM's estimation, enabled it to do that more effectively.

While this flexible approach appealed to many in the environmental community,[91] the Western Governors' Association expressed concern that the "BLM's emphasis on landscape-scale planning may lead to a resulting emphasis on national objectives over state and local objectives."[92] "Given BLM's increased use of landscape-scale planning, Western Governors expect multiple RMPs to cross state boundaries. Western states are concerned that this could shift key responsibilities away from BLM state directors and obscure state and local priorities in favor of national priorities."[93] Increasing the size of the planning area would have also, in the eyes of the Western Governors' Association, increased the number of stakeholders providing input into BLM decisions, thereby diminishing the voice of any one state or local government entity.

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[85] *Id.* § 5.

[86] *5 U.S.C. § 801(b)(2)*.

[87] *43 C.F.R. § 1610.1(b) (2015)*.

[88] Planning 2.0, *43 C.F.R. § 1610.4(a)(1)*.

[89] *81 Fed. Reg. at 89,585*.

[90] *Id.*

[91] *See* "BLM Planning Rule Supported by Greens, Some Locals," 41 *Public Lands News* no. 14, at 9 (James B. Coffin ed., July 15, 2016).

[92] Letter from Montana Governor Steve Bullock and South Dakota Governor Dennis Daugaard, Chair and Vice-Chair of the Western Governors' Ass'n, to Senate Majority Leader Mitch McConnell, Senate Minority Leader Charles Schumer, Speaker of the House Paul Ryan, and House Minority Leader Nancy Pelosi, at 3 (Feb. 10, 2017) (WGA Letter).

[93] *Id.*

Expanding the planning area and shifting decision-making authority from BLM field office managers to either state directors or DOI staff in Washington, D.C. would also arguably increase the disconnect between the decision maker and the landscape for which decisions were being made. Furthermore, as decisions were shifted farther from the local BLM office, state and local government officials throughout the rural West would need to travel farther to engage with BLM or DOI officials. This would increase the time and expense involved in collaboration while diminishing the importance of relationships that had been developed with local BLM staff. Extensive travel could also prove cost prohibitive for cash-strapped local governments.

Large-scale planning efforts like those undertaken with respect to the greater sage-grouse were held out as examples of state concerns that expansive planning areas would dilute state voices.[94] Programmatic RMP amendments for sage-grouse, however, were completed under the 2005 planning rule that already allowed for landscape-scale planning.[95] Planning 2.0, at least to the BLM, therefore did not "represent a substantive change from the existing regulations, as the BLM currently may determine any planning area boundary."[96] Furthermore, planning area definition could potentially cut in favor of smaller planning areas, if circumstances indicated that a smaller planning area was appropriate. As the BLM explained, Planning 2.0 did not "prescribe any specific planning area boundary or geographic scale for such a boundary. Rather, the final rule provides flexibility to determine the appropriate planning area boundary based on relevant landscapes and management concerns."[97] Those concerns could conceivably dictate a smaller planning area.

[b] Fewer State Documents Considered

FLPMA requires consistency between BLM plans and state and local plans "to the maximum extent [the Secretary] finds consistent with Federal law and the purposes of this Act."[98] The BLM's prior planning regulations advanced this mandate and required that RMPs

> be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian tribes, so long as . . . [RMPs] are also consistent with the purposes, policies, and programs of Federal laws and regulations applicable to public lands . . . .[99]

"In the absence of officially approved or adopted resource-related plans . . . , [RMPs] shall, to the maximum extent practical, be consistent with officially approved and adopted resource related policies and programs of [those entities]."[100]

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[94] *See State Perspectives on BLM'S Draft Planning 2.0 Rule: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Natural Res.*, 114th Cong., H.R. Serial No. 114-48 (July 7, 2016) (answers to questions submitted for the record by Rep. Gohmert to Kathleen Clarke, Dir., Utah Public Lands Policy Coordinating Office).

[95] *See, e.g.*, *Notice of Availability of the ROD and Approved RMP Amendments for the Great Basin Region Greater Sage-Grouse Sub-Regions of Idaho and Southwestern Montana, Nevada and Northeastern California, Oregon, and Utah, 80 Fed. Reg. 57,633 (Sept. 24, 2015)*.

[96] *81 Fed. Reg. at 89,644*.

[97] *Id.*

[98] *43 U.S.C. § 1712(c)(9)*.

[99] *43 C.F.R. § 1610.3-2(a) (2015)*.

[100] *Id.* § 1610.3-2(b) (2015).

Planning 2.0 carried forward the same concept, but narrowed its application by applying only to "officially approved and adopted plans."[101] Governors contended that by no longer requiring consistency with "officially approved and adopted resource related policies and programs," Planning 2.0 narrowed the range of documents considered during the consistency review, and the BLM thereby diminished the voices of state and local governments in the planning process.[102]

While reducing the scope of state and local government planning documents that must be considered during the planning process could reduce state and local governments' voice, the quality of the planning documents submitted to the BLM may be a better indicator of the weight that the BLM will give to local input. A review of county comprehensive plans in Utah found that of Utah's 29 counties,[103] nine county plans and three county sub-area plans had not been updated in at least 15 years, and three counties refused to provide copies of their plans in response to public requests.[104] Furthermore, many of the plans that were obtained included boilerplate language that was likely to have limited practical value to BLM planners.[105] These problems appeared to be most significant in small, rural counties that presumably had limited planning staff and resources.[106] Lack of local government capacity to engage effectively in BLM planning may therefore say at least as much about the ability to influence agency decisions as the number or type of documents that must be considered.

The lack of county resources to engage effectively on cross-jurisdictional planning is a long-standing problem that is not unique to Utah. A 2001 study commissioned by California examined institutional capacity to engage in watershed improvement projects and described the problem well:

> Many rural counties feel they are already put upon by federal agencies, especially in counties with a large portion of their lands under federal management. There is an almost built-in resentment that the federal government plays such a significant role in determining social and economic outcomes in the county. The dependency is exacerbated when counties are asked to participate in federal decision making at a more strategic level. In many cases, counties have been forced to defer to federal planners for lack of adequate local resources. When county and federal interests are aligned, this is not a particularly acute problem. However, when county officials feel their constituents' interests are not adequately represented in federal planning efforts, depending on federal planners to analyze the effects of their decisions on local interests is a risk county officials find uncomfortable.[107]

The "strongest overall recommendation" to come out of the 2001 study was "for state, federal and local agencies to take steps necessary to strengthen county government's capacity to participate in strategic watershed planning and improvement."[108] That recommendation continues to ring true. States and local governments should invest in

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[101] Planning 2.0, *43 C.F.R. § 1610.3-3(a)*.

[102] WGA Letter, *supra* note 90, at 4-5.

[103] All Utah counties are required to "prepare and adopt a comprehensive, long-range general plan." Utah Code Ann. § 17-27A-401(1).

[104] Ashley Scarff, "An Analysis of the State of County Comprehensive Planning in Utah, University of Utah, Department of City & Metropolitan Planning Professional Project" (Dec. 2015) (on file with author).

[105] *Id.*

[106] *Id.; see also State Perspectives on BLM'S Draft Planning 2.0 Rule: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Natural Res.*, 114th Cong., H.R. Serial No. 114-48 (July 7, 2016) (statement of Jeff Fontaine, Exec. Dir., Nev. Ass'n of Cntys.) ("Unfortunately, counties with the most public lands are also those with the least capacity to engage in BLM land use planning because of their limited staffing and resources.").

[107] Report to the Cal. Sec'y for Res. and the Reg'l Council of Rural Cntys., Mark Nechodom & Doug Leisz, U.S. Forest Serv., "Institutional Capacities for Local Watershed Investment and Management in the Sierra Nevada, Report to the California Secretary of Resources and the Regional Council of Rural Counties," at 13 (Sept. 2001).

[108] *Id.* at 5.

developing quality plans that are easily integrated into the federal planning process if they intend to influence those planning processes.

[c] Shortened Time Frame for State and Local Government Input

Under the BLM's 2005 planning regulations, 90 days were provided for review of the draft plan and draft EIS,[109] and 60 days were provided for the governor(s) consistency review.[110] Under Planning 2.0, a new draft RMP requiring an EIS triggered a 100-day comment period,[111] while a plan amendment requiring an EIS triggered a 60-day comment period.[112] The time allowed for the governor(s) consistency review did not change.[113] Since RMPs have already been completed for much of the landscape managed by the BLM, the practical effect of the rule change would be to reduce the comment period on most draft plans from 90 to 60 days.[114] That, critics contended, diminished state and local governments' voice in the planning process. These changes applied to all stakeholders, and all stakeholders could still request that the BLM extend the public comment deadlines. The practical effect of the change, therefore, did not appear to disproportionately impact Planning 2.0's critics.

[2] Additional Claims in Litigation

Displeased over Planning 2.0, a coalition of counties from across the West joined with the Doña Ana Soil and Water Conservation District to challenge Planning 2.0.[115] In their petition for review of final agency action, the petitioners claimed that (1) the BLM failed to coordinate Planning 2.0 rulemaking with the petitioners in violation of FLPMA; (2) Planning 2.0 violated FLPMA by undermining effective coordination and plan consistency review; (3) Planning 2.0 was adopted without the required NEPA analysis; (4) the DOI adopted and is implementing its climate change adaptation program as part of Planning 2.0 and in violation of NEPA, FLPMA, and the Administrative Procedure Act (APA); and (5) the DOI adopted and is implementing its landscape-scale mitigation program in violation of NEPA, FLPMA, and the APA.[116]

On March 30, 2017, prior to the filing of any responsive pleadings on behalf of the United States and three days after the CRA resolution disapproving Planning 2.0 became law, the petitioners filed a notice of voluntary dismissal without prejudice.[117] Claims one through three clearly became moot when Planning 2.0 was struck down. With the change in administrative priorities, climate change adaptation and landscape-scale mitigation were apparently no longer a significant concern to the petitioners, and to the extent that concerns remained, the petitioners presumably believed that they could make sufficient progress on these issues by working with the new administration. The case was dismissed on September 7, 2017.

§ 22.04 Congressional Review Act (CRA)

[1] Background

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[109] *43 C.F.R. § 1610.2(e) (2015)*.

[110] *Id.* § 1610.3-2(e) (2015).

[111] Planning 2.0, *43 C.F.R. § 1610.2-2(c)*.

[112] *Id.* § 1610.2-2(b).

[113] *Id.* § 1610.3-3(b)(1).

[114] *Compare* *43 C.F.R. § 1610.2(e) (2015)*, *and* Planning 2.0, *43 C.F.R. § 1610.2-2(b)*.

[115] *See* Petition for Review of Final Agency Action at 2-4, Kane Cnty. v. United States, No. 2:16-cv-01245 (D. Utah Dec. 12, 2016).

[116] *Id.*

[117] Rule 41(a) Notice of Dismissal, Kane Cnty. v. United States, No. 2:16-cv-01245 (D. Utah Mar. 30, 2017).

Congress enacted the CRA in 1996,[118] as part of its "Contract with America."[119] Under the CRA, before an administrative rule can take effect, an agency must submit that rule to Congress and the Government Accountability Office.[120] Congress then has 60 days to review major rules.[121] For rules promulgated during the final 60 days of the Senate session or final 60 House of Representative legislative days,[122] the rule is treated as though it was issued on the 15th day of the next Senate session or the 15th legislative day of the next session for the House.[123]

From the date of the rule's issuance (or the date treated as the issuing date), the House and Senate have 60 days within which to introduce and pass a disapproval resolution. These 60 days exclude "days either House of Congress is adjourned for more than 3 days during a session of Congress."[124] The disapproval procedure is expedited in the Senate, where debate is limited to 10 hours, effectively preventing a filibuster.[125] The procedure is expedited "to try to provide Congress with an opportunity to act on resolutions of disapproval before regulated parties must invest the significant resources necessary to comply with a major rule."[126]

"[E]nactment of a joint resolution of disapproval is the same as enactment of a law."[127] If both houses pass the disapproval resolution, it is then sent to the president for signature or veto. If the resolution is signed into law by the president, the rule is rescinded and "treated as though such rule had never taken effect."[128] As the offending rule is treated as if it had never existed, rules in existence prior to a disapproved amendment continue to control future agency actions. Little recourse is left to those displeased by application of the CRA or who may seek clarification regarding the CRA's reach. Under the CRA, "[n]o determination, finding, action, or omission . . . shall be subject to judicial review."[129]

Critically,

> [a] rule that does not take effect . . . may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the rule disapproving the original rule.[130]

The CRA, however, does not define "substantially the same" or "substantially the same form." According to the Congressional Research Service, "sameness could be determined by scope, penalty level, textual similarity, or

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[118] CRA, ***Pub. L. No. 104-121***, tit. II, subtit. E, ***110 Stat. 868*** (1996) (codified at *5 U.S.C. §§ 801-808*).

[119] Christopher M. Davis & Richard S. Beth, CRS, "CRS Insight: Agency Final Rules Submitted On or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress," at 1 (Dec. 15, 2016).

[120] *5 U.S.C. § 801(a)(1)(A)*.

[121] *Id.* § 801(a)(3)(A).

[122] *Id.* § 801(d)(1).

[123] *Id.* § 801(d)(2)(A).

[124] *Id.* § 802(a).

[125] *Id.* § 802(d)(2). The process in the House is not expedited.

[126] 142 Cong. Rec. S3683, S3685 (daily ed. Apr. 18, 1996) (joint statement of Sens. Nickles, Reid, and Stevens); *see also* 147 Cong. Rec. S1831, S1833 (daily ed. Mar. 6, 2001) (statement of Sen. Jeffords) (noting that "scarce agency resources are also a concern" that justifies a stay on the enforcement of major rules).

[127] 142 Cong. Rec. S3683, S3683 (daily ed. Apr. 18, 1996) (statement of Sens. Nickles, Reid, and Stevens).

[128] *5 U.S.C. § 801(f)*.

[129] *Id.* § 805.

[130] *Id.* § 801(b)(2).

administrative policy, among other factors."[131] A compelling argument can also be made that sameness can be determined based on changes in the benefit-cost ratio between the disapproved rule and any subsequent replacement.[132] This approach may make sense for a quantitative standard, such as an emission limit for a toxic substance or a vehicle fuel economy standard, where a rule containing a changed quantitative standard could have a dramatically different impact even if no other provision of the rule changed.[133] It does not, however, appear well suited for procedural rules like Planning 2.0.

The CRA also fails to indicate who determines whether a subsequent regulation is "substantially the same." Since the CRA precludes judicial review of any "determination, finding, action, or omission," the Congressional Research Service observes that "one could argue that evaluating whether the 'substantially the same' prohibition has been violated may be a matter for Congress alone to decide."[134]

Independent of the CRA, Congress has the power, under Article I of the U.S. Constitution, to enact legislation rescinding regulations that Congress determines exceed the authority it granted to the administrative agency or department. Prior to 1983, it was common for Congress to include legislative veto provisions in statutes, thereby expediting the repeal of regulations that ran counter to legislative intent.[135] A legislative veto allows Congress to override a regulation without passing legislation and submitting that legislation to the president for his signature or veto. However, in the 1983 case *INS v. Chadha*,[136] the U.S. Supreme Court held that legislative vetoes violate the separation of powers requirement set forth in the U.S. Constitution. As one commentator noted:

> The CRA was conceived as a means to shift power from the executive to Congress in a manner consistent with *Chadha*. But, like the legislative veto, the CRA may be more about signaling to constituents and agencies Congress's intentions to police the bureaucracy, than about creating any new effective power over the agencies.[137]

What once may have been thought of as a signal to constituents now has tremendous practical import, as the 115th Congress has used the CRA to strike down 14 regulations that were finalized during the waning days of the Obama administration.[138]

[2] Application of the CRA

During the first 11 years following enactment of the CRA, federal agencies promulgated more than 46,000 rules, only 32 of which were the subject of a joint resolution of disapproval.[139] Of these, only an ergonomics rule issued by the Occupational Health and Safety Administration (OSHA) was struck down.[140]

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[131] Maeve P. Carey, Alissa M. Dolan & Christopher M. Davis, CRS, "The Congressional Review Act: Frequently Asked Questions," at 17 (CRS Report R43992 Nov. 17, 2016).

[132] *See* Adam M. Finkel & Jason W. Sullivan, "A Cost-Benefit Interpretation of the 'Substantially Similar' Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?" *63 Admin. L. Rev. 707, 740 (2011)*.

[133] *See id. at 761-64*.

[134] Carey, Dolan & Davis, *supra* note 129, at 17.

[135] *See* Note, "The Mysteries of the Congressional Review Act," *122 Harv. L. Rev. 2162, 2164 (2009)* (noting that there are over 200 federal statutes with legislative veto provisions).

[136] *462 U.S. 919 (1983)*.

[137] Note, *supra* note 133, at 2165-66.

[138] For a list of repealed rules, see *http://rulesatrisk.org/resolutions/*.

[139] Curtis W. Copeland, CRS, "Congressional Influences on Rulemaking Through Appropriations Provisions," at 1 (2008).

[140] *See* ***Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2000)*** (to be codified at 29 C.F.R. pt. 1910).

The ergonomics rule was developed pursuant to the Occupational Safety and Health Act of 1970,[141] which granted the Secretary of Labor the discretion to promulgate occupational safety or health standards where the Secretary determined that such standards were needed to protect worker health and safety.[142] The ergonomics rule contained an "action trigger" or "screen" to identify "jobs with risk factors of sufficient magnitude, duration, or intensity" to warrant ergonomic interventions.[143] If an employee reported a musculoskeletal disorder, the employer had to determine (1) whether that disorder rose to the level of an "incident" based on the intensity of the effect on the employee; and (2) whether the employee's job had risk factors such as repetition, awkward posture, force, vibration, and contact stress that triggered the rule's action requirements. The employer would be required to implement an ergonomics program for that job only if both factors were met.[144]

Where an ergonomics program was required, that program would have included hazard information and reporting, management leadership and employee participation, job hazard analysis and control, training, musculoskeletal disorder management, and program evaluation. OSHA estimated that the rule would prevent 4.6 million work-related musculoskeletal disorders over the first 10 years, produce $9.1 billion in annual benefits, and impose annual compliance costs of $4.5 billion on employers.[145] "On a per-establishment basis, this equals approximately $700; annual costs per problem job fixed are estimated at $250."[146] Industry countered that the standard could cost up to $123 billion a year.[147] Congress utilized the CRA to strike down the ergonomics rule.[148]

Repeal of the ergonomics rule was not challenged in court, and OSHA did not attempt to issue future ergonomics regulations,[149] leaving us with little insight into how agencies whose regulations are struck down via the CRA should proceed. As others have noted, "[e]ven without a specific standard, OSHA could use its general duty authority to issue citations for ergonomic hazards that it can show are likely to cause serious physical harm, are recognized as such by a reasonable employer, and can be feasibly abated."[150] OSHA, in other words, at least had another mechanism to address the issue, even if it proved reluctant to use it.[151]

The lack of track record for post-CRA regulation is problematic because the 115th Congress introduced over 60 CRA resolutions,[152] 14 of which have been signed into law.[153] Regulations that have been struck down address such diverse issues as gun limits for the mentally ill,[154] teacher preparation standards,[155] disclosure of payments by

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[141] *29 U.S.C. §§ 651-678*.

[142] *Id.* § 655.

[143] ***65 Fed. Reg. at 68,262***.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] Vernon Mogensen, "State or Society? The Rise and Repeal of OSHA's Ergonomics Standard," *in Worker Safety Under Siege* 108, 117 (Vernon Mogensen ed., 2006).

[148] S.J. Res. 6, 107th Cong., ***Pub. L. No. 107-5***, ***115 Stat. 7*** (2001).

[149] OSHA did subsequently issue non-binding ergonomic guidance to four industries. *See* Finkel & Sullivan, *supra* note 130, at 727-28.

[150] *Id. at 728* (footnote omitted).

[151] *Id.*

[152] Some of these resolutions target the same rule, so the total number of rules targeted is lower.

[153] H.R.J. Res. 37-38, 40-44, 57, 58, 66, 67, 69, 83, and S.J. Res. 34, 115th Cong. (2017)

resource extraction issuers,[156] and restrictions on placing mine waste in waterways.[157] With little direction in the statute, no case law, and no effort to proceed with post-CRA regulation, we truly are in "uncharted legal territory."[158]

Notably, the Center for Biological Diversity (CBD) recently filed suit challenging use of the CRA to revoke a rule prohibiting certain forms of predator control on National Wildlife Refuges in Alaska (Refuges Rule).[159] According to CBD, Congress directs that Alaska refuges be managed to "conserve fish and wildlife populations and habitats in their natural diversity,"[160] and Congress statutorily delegated rulemaking authority to accomplish that objective to the DOI.

> By passing the Joint Resolution through the authority of the CRA, Congress has purported to nullify the Refuges Rule and prohibit Interior from promulgating any rule 'substantially the same' as the Refuges Rule. This is the case even though Congress has not amended-pursuant to the constitutionally-mandated safeguards of bicameralism and presentment-any of the underlying statutory mandates that lead to the Refuges Rule.
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> . . . . Now, because of the CRA's prohibition on rules substantially similar to the Refuges Rule, Interior [and the executive branch] has been unconstitutionally impaired from carrying out its statutory mandates to conserve predators on national wildlife refuges in Alaska.[161]

This constraint on future rulemaking, CBD alleges, "violates the separation of powers that must be maintained between the legislative and executive branches under the U.S. Constitution."[162] Whether this novel argument will prevail remains to be seen. This litigation should be watched closely, as a similar argument could presumably be made with respect to other disapproved rules, including Planning 2.0.

§ 22.05 Now What

Unlike the ergonomics rule, where the Secretary of Labor exercised broad discretion in determining whether a concern warranted a new regulatory program, Congress, in enacting FLPMA, gave the BLM a non-discretionary duty to plan for the management of our public lands,[163] and to promulgate regulations implementing FLPMA's planning requirements.[164] Enactment of the disapproval resolution eliminates neither the planning requirement, nor

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[154] Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 91,702 (Dec. 19, 2016) (to be codified at 20 C.F.R. pt. 421), *disapproved by* H.R.J. Res. 40, ***Pub. L. No. 115-8***, ***131 Stat. 15*** (2017).

[155] Teacher Preparation Issues, 81 Fed. Reg. 75,494 (Oct. 31, 2016) (to be codified at 34 C.F.R. pts. 612, 686), *disapproved by* H.R.J. Res. 58, ***Pub. L. No. 115-14***, ***131 Stat. 78*** (2017).

[156] Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,360 (July 27, 2016) (to be codified at 17 C.F.R. pts. 240, 249b), *disapproved by* H.R.J. Res. 41, ***Pub. L. No. 115-4***, ***131 Stat. 9*** (2017).

[157] Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016) (to be codified in scattered sections of 30 C.F.R.), *disapproved by* H.R.J. Res. 38, ***Pub. L. No. 115-5***, ***131 Stat. 10*** (2017).

[158] Finkel & Sullivan, *supra* note 130, at 3 (quoting Kristina Sherry, "'Substantially the Same' Restriction Poses Legal Question Mark for Ergonomics," *Inside OSHA* 1, 8 (Nov. 9, 2009)).

[159] *See* Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska, 81 Fed. Reg. 52,248 (Aug. 5, 2016) (to be codified at 50 C.F.R. pts. 32, 36), *disapproved by* H.R.J. Res. 69, ***Pub. L. No. 115-20***, ***131 Stat. 86*** (2017).

[160] Complaint for Declaratory Relief P 3, Ctr. for Biological Diversity v. Zinke, No. 3:17-cv-00091 (D. Alaska Apr. 20, 2017) (quoting Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, tit. III, §§ 302-303, 94 Stat. 2371 (1980)).

[161] *Id.* PP 40-41 (citation omitted).

[162] *Id.* P 2.

[163] 43 U.S.C. § 1712.

the rulemaking requirement. FLPMA's detailed requirements, including its multiple-use and sustained yield mandate, coordinated planning requirement, and public involvement procedures also remain in effect. Executive orders, such as those requiring use of the "best reasonably obtainable scientific, technical, economic and other information" during rulemaking also continue to apply.[165]

Furthermore, as preparing or revising an RMP is almost certainly a "major Federal action[] significantly affecting the quality of the human environment,"[166] plan preparation or revision will trigger NEPA compliance requirements and necessitate completion of an EIS. NEPA's implementing regulations, which address requirements like public comment periods and cooperating agency status, apply to the BLM and must be integrated into any new planning rule.[167] The BLM's decision space in refining its planning rule is therefore much narrower than the decision space available to OSHA when it considered reissuing an ergonomics rule. This could prove problematic in light of the CRA's prohibition against reissuing rules that are "substantially the same" as the prior rule.[168]

By preventing the BLM from promulgating a substantially similar future rule, Congress may have effectively frozen the status quo. This is deeply ironic because when the BLM was asked why it proposed changes to the planning regulations the BLM responded in part by explaining that "[s]tate and local government officials approached us asking for earlier involvement and a more efficient process."[169] State and local governments are now stuck-they disliked the old rule and succeeded in overturning the amended rule, effectively reimposing the old rule that they disliked. Improving their lot may be difficult, as any new planning rule runs the risk of being substantially the same as the earlier rule because it would grow from the same detailed substantive and procedural inventory and planning requirements contained in FLPMA, and from the same procedural requirements as set forth in NEPA. State and local governments may have, in short, deprived themselves of the tools they need to address the problems they initially identified.

The BLM is left with several options: First, it can seek congressional authorization to promulgate new regulations that might otherwise be challenged as "substantially the same" as the Planning 2.0 rule. But with the current level of congressional dysfunction, the prospect of a legislative fix is questionable. Second, the BLM could begin rulemaking anew, and try to skirt the prohibition against issuing a new rule that is "substantially the same." That could be challenging given the scrutiny that will likely apply to future rulemaking efforts, the constraints placed on rule content by FLPMA and NEPA, and uncertainty regarding what constitutes substantial similarity.[170] Third, and building on the prior option, the BLM could seek to issue either targeted amendments to the existing planning rule, or attempt to issue regulatory guidance that skirts the APA notice-and-comment requirements while streamlining how planning is conducted under the existing rule. Whether the BLM could make enough headway while distinguishing any such amendments or guidance from the Planning 2.0 rule is unclear. Finally, the BLM could continue to apply the 2005 planning rule and not seek to update that rule in response to changed circumstances or stakeholder discontent over the cumbersome nature of the planning process. This, however, leaves unresolved the problems that drove regulatory review in the first place.

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[164] *Id.* § 1740.

[165] Exec. Order No. 12,866, § 1(b)(7), 58 Fed. Reg. 51,735 (Sept. 30, 1993); *see also* Exec. Order No. 13,563, § 1, 76 Fed. Reg. 3821 (Jan. 18, 2011).

[166] *42 U.S.C. § 4332(2)(C)*.

[167] *See* Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 25, 1977).

[168] *5 U.S.C. § 801(b)(2)*.

[169] BLM, "Land Use Planning - Final Rule: Qs & As," at 1 (no date).

[170] Emphasizing changes in the benefit-cost analysis does not appear to help because the BLM determined that Planning 2.0 did not have "a significant or unique effect on State, local or tribal governments or the private sector" and therefore did not require a benefit-cost analysis pursuant to section 202 of the Unfunded Mandates Reform Act of 1995, *2 U.S.C. § 1532*. *Resource Management Planning, 81 Fed Reg. 9674, 9722* (proposed Feb. 25, 2016) (to be codified at 43 C.F.R. pt. 1600).

With little to guide the BLM in its efforts to avoid this amorphous prohibition, it is hard to imagine a rush to rulemaking. Likely reductions to the BLM's budget also make initiation of a lengthy rulemaking process appear less likely. Secretary Zinke, however, appears to be interested in finding a path forward. On the same day that President Trump signed the resolution ending Planning 2.0, Secretary Zinke issued a memorandum directing the Acting Director of the BLM to "go back to the drawing board to define actionable items that will make a measurable impact on improving the Federal planning process."[171] As part of this effort, the BLM was directed to "identify where redundancies and inefficient processes exist and should be eliminated, while ensuring that we fulfill our legal and resource stewardship responsibilities."[172] Seven criteria were identified to guide rule revision:

1. Finding better ways to incorporate and partner with state planning efforts;
2. Reducing duplicative and disproportionate analyses;
3. Considering more user-friendly representation of the planning process so stakeholders can easily determine status;
4. Fostering greater transparency in the NEPA process, including proper accounting of timeframes, delays, and financial cost of NEPA analyses;
5. Seeking opportunities to avoid delays caused by appeals and litigation;
6. Building trust with our neighbors through better integration of the needs of state and local governments, tribal partners, and other stakeholders; and
7. Developing and implementing efforts to "right size" environmental documents instead of defaulting to preparing an [EIS] in circumstances when such a document is not absolutely needed.[173]

The Acting Director of the BLM was instructed to complete this assessment over the next six months, at which time he would provide the Secretary with "recommendations for any regulatory or legislative actions necessary to meet [these] goals."[174] Those recommendations will be watched closely. It is possible that the Acting Director or the Secretary of the Interior may seek to act on these recommendations by issuing guidance documents, likely in the form of *Manuals, Handbooks*, or guidance letters. While such an approach has the advantage of circumventing the lengthy rulemaking process mandated under the APA, stakeholders will be on the watch for substantive rules masquerading as guidance documents, and litigation may follow.

§ 22.06 Conclusion

The BLM has been given the nearly impossible task of striking a balance in public land management that will satisfy an almost limitless list of competing and often mutually exclusive demands. That balance becomes ever more tenuous as the demands placed on our lands increase and climate-driven changes make traditional uses harder to sustain. Complicating matters further, every interest has a vocal stakeholder group behind it, and those groups appear less willing to compromise than ever before. The balance that the BLM is charged with finding is as elusive as a universally acceptable definition of pornography: we all believe that we recognize it when we see it, but because we have no common definition of what "it" is, we are left with no definition at all-and that lack of common definition appears to be at the heart of current conflicts.

A strong case can be made that utilizing the CRA to defeat the Planning 2.0 rule made us worse off than before by freezing in place a rule that had not kept pace with the burdens and demands placed on our public lands. If we are lucky, the rise and fall of Planning 2.0 will serve as a cautionary tale to future legislators and stakeholders alike.

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[171] Memorandum from Ryan Zinke, Sec'y of the Interior, to Acting Dir., BLM, on Improving the BLM's Planning and NEPA Processes, at 1 (Mar. 27, 2017).

[172] *Id.* at 2.

[173] *Id.*

[174] *Id.*

Good governance requires vision, compromise, and a viable path forward. It is not enough to fixate on what we dislike and simply say "NO."

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