

May 24, 2016

Mr. Neil Kornze
Director (630)
Bureau of Land Management
U.S. Department of the Interior
1849 C Street NW.
Room 2134LM
Washington, DC 20240

Attention: 1004-AE39.

RE: RIN: 1004-AE39, CFR: 43 CFR Part 1600, Federal Register Number: 2016-03232

Comments on the BLM's Proposed Planning Rules

Dear Director Kornze:

We appreciate this opportunity to provide comments on the Bureau of Land Management's proposal to amend existing regulations governing the procedures used to prepare, revise, or amend land use plans pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA). As professors who have taught a variety of public lands and natural resources law courses, we support the goal of modernizing public land planning to encompass planning at appropriate scales and across jurisdictional boundaries. But we urge the BLM to consider significant changes that will improve the rule and better reflect FLPMA's goals as the BLM largely does in the preamble to the proposed rule. We think it is especially important that the final rule better implements FLPMA's requirement that the BLM give priority to the identification and protection of Areas of Critical Environmental Concern (ACECs).

On June 30, 2015, we sent you a letter encouraging the BLM to issue modern guidance that would make ACEC management more consistent and expand the ACEC concept to encompass landscape conservation more explicitly. That letter observed that despite the priority status granted to ACECs in FLPMA, ACECs are not in fact given priority in the BLM planning process, are haphazardly and inconsistently managed, and poorly monitored.

In these comments we highlight several particular concerns over how the proposed rules treat ACECs, and we also offer comments about the BLM's approach to planning more generally. In our view, the proposed rules need substantial improvements, and we make some specific suggestions as to how BLM can improve them.

Although we appreciate the BLM's commitment to modernize its planning program, as currently proposed, the "Planning 2.0" effort is a missed opportunity to rethink in fundamental ways land use planning on BLM lands. For too long, the BLM has been stuck in a box of

managing public lands in planning units that primarily reflect political boundaries rather than ecosystems and other relevant geographical features. The preamble to the proposed rule recognizes this problem, repeatedly describing the importance of “landscape-scale planning.” In fact, the preamble used some permutation of that phrase 52 times. Yet the phrase never appears even once in the proposed rule itself. Moreover, the proposal would not even require BLM to adopt a planning model that looks beyond political boundaries. The BLM’s failure to incorporate landscape-level planning into the proposed rule explicitly is especially disappointing in light of Secretarial Order 3330, which established a Department-wide mitigation strategy directing agencies like BLM to use a landscape-scale approach to resource management.

One simple way the BLM might begin to address this problem would be to require the new “planning assessment” process (proposed 43 CFR §1610.4) to be carried out at the landscape level. BLM has made good progress doing landscape-level inventories through its rapid ecological assessments (REAs). The BLM could build on that work done by requiring or at least experimenting with landscape-level planning assessments. (The preamble mentions REAs only once.) Among many other benefits, this change would facilitate identification of potential ACECs that cross jurisdictional boundaries by the public and BLM. Cross-jurisdictional ACECs can only be identified effectively through some form of regional assessment.

The proposed rule fails to tackle planning issues that arise after an RMP is completed. In particular, the proposed rule fails even to mention resource-level planning (such as Master Leasing Plans) and activity planning (such as assessing individual applications for permits to drill for oil and gas). Addressing these different levels of planning in a substantive way, and committing the agency to a robust and integrated process at these different planning levels would likely require that the RMP process itself be streamlined. Such a commitment would better accommodate adaptive management, as described in more detail below. In the end, a better, more layered planning process, will enhance decision making and save administrative resources.

We see at least four planning layers that the BLM should highlight for the public: (1) the landscape, ecosystem, or watershed layer; (2) a management unit layer; (3) a resource layer; and (4) a project layer. While at first blush, a layered approach might appear to impose more work on the agency, it could actually streamline the planning process by focusing the agency’s attention on the narrower suite of issues that present themselves at each level. A layered process might also make it easier to identify, manage, and, if necessary, adapt ACECs to achieve the protections that Congress intended they provide.

The rules could facilitate streamlining by establishing a Planning Dashboard along the lines of the Permitting Dashboard mandated by Title XLI of the Fixing America’s Surface Transportation Act (FAST Act). See <https://www.permits.performance.gov/>. Although the Permitting Dashboard required under the FAST Act applies only to large infrastructure projects its basic requirement that federal agencies maintain an on-line system for tracking projects, with specific timetables, projected dates for completing stages of the review process, and issuance of decisions, could be readily adapted to the planning context.

Another significant problem with the proposed rules concerns their weak provisions for monitoring, evaluation, and adaptive management. Like landscape-level management, the preamble mentions adaptive management often—20 times, in fact—but there’s no mention at all in the proposed rule. The proposed language relating to “monitoring and evaluation” in a single paragraph offers nothing specific about how those vital tasks will be conducted (proposed rule,

43 CFR §1610.6-4). Although the proposed rules require plans to include “goals” and “objectives” (proposed 43 CFR §1610.1-2(a)), nothing in the proposal ties these goals and objectives to the monitoring program.

The BLM made substantial progress in developing a framework for monitoring and adaptive management with its various recent sage grouse management plans. We urge the agency to use that experience to inform its final planning rules. This is particularly critical for these rules because the BLM has a weak track record when it comes to robust monitoring, evaluation, and assessment of monitoring data, to say nothing about its inability to adapt its management strategies to reflect new information. The BLM’s new planning rules offer the agency an opportunity to improve on its record for monitoring, evaluation, and adaptation but vague language that afford field personnel little guidance is not adequate. We offer specific language below that we think would improve prospects of establishing an effective monitoring, evaluation, and adaptive management program for BLM land use plans.

Turning to provisions in the proposed rule that relate specifically to ACECs, we are pleased with several improvements to the way the BLM plans would identify ACECs. For example, the proposal quotes FLPMA in defining ACECs (proposed 43 CFR §1601.0-5) and would require the BLM to look for potential ACECs during the agency’s initial planning assessment activities preparatory to initiating a plan revision (proposed 43 CFR §§1610.4(a)(1) and (c)(5)(vii). We welcome those changes and BLM’s other efforts to increase opportunities for public participation and comment.

We remain puzzled, however, by the proposed rule’s failure to reiterate the statutory responsibility to give priority to the designation and protection of ACECs, as required by §202(c)(3) of FLPMA. We note that the proposal’s Principles statement (proposed 43 CFR §1601.0-8) directs plans to “be consistent with the principles described in Section 202 of FLPMA,” and the preamble does expressly acknowledge FLPMA’s mandate that the BLM give priority to ACECs. But the failure to include similar language in the rule itself raises questions about the BLM’s commitment to ACECs. This failure is particularly notable because the proposed rule adds a new provision explicitly quoting FLPMA’s definition of sustained yield (proposed 43 CFR §1601.0-5), and it also restates the statutory language regarding consistency with the land use plans of other federal agencies, state and local governments, and tribes (proposed 43 CFR §1610.3-2).

As you know, FLPMA’s authority to designate and manage ACECs was a deliberate decision by Congress, one preceded by substantial congressional, executive, and Public Land Law Review Commission deliberations for much of the decade prior to enactment of the law. ACECs are the only conservation designation other than wilderness expressly named and given priority in FLPMA. The language requiring BLM to give priority to the inventory, designation, and protection of ACECs in public land planning and management is a unique directive in multiple use land management law. To fulfill the statutory directive, BLM must aggressively embrace ACECs in this rule.

The proposed rule would grant functional priority to ACECs in the planning assessment phase (proposed 43 CFR §1610.4(a)(1)), as would the provision concerning designating ACECs (proposed 43 CFR §1610.8-2). We are concerned, however, that the failure to explicitly restate FLPMA’s priority status for ACECs could undermine the priority that Congress intended. The

statement that all planning activity must be consistent with §202 of FLPMA is not sufficient to overcome this concern.

We also suggest that you clarify the public's opportunity to nominate new ACECs between planning cycles if – as is increasingly likely with accelerating climate change – new information indicates an immediate need for special management attention to protect the resources and values eligible for ACEC protection. FLPMA's requirement that BLM maintain an ongoing inventory of lands, resources, and values suggests that BLM has a duty to consider such nominations. We urge you to add language to proposed 43 CFR §1610.8-2 clarifying the procedures available in such a situation.

We anticipate that your response to many of the concerns raised in these comments will be that you intend to address these issues in the land use planning manual and handbook. In our view this is entirely inadequate. The rule is mandatory and enforceable. The manual and handbook are not. Likewise, while the preamble contains important explanations of the BLM's goals for these rules, which may influence a reviewing court, a preamble commitment does not by itself establish an enforceable commitment. If the BLM is committed to promoting high quality public land management – if it is committed to landscape-level planning, adaptive management, and giving priority to ACECs – then it must promulgate a rule that reflects that commitment. The public will accept nothing less, and neither should the BLM.

Thank you again for the opportunity to offer our views on BLM's proposed changes to the planning rule. We have included specific proposals for new language for the BLM's final rules below in the hope that you will find some or all of our recommendations persuasive.

Specific suggested changes to the proposed rule

§1601.0–5 Definitions. (*Add suggested language in red.*)

As used in this part, the term:

Areas of Critical Environmental Concern or ACEC means 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. *The BLM will give priority to the identification, designation, and protection of ACECs.*

. . .

Resource management plan means a land use plan as described under section 202 of the Federal Land Policy and Management Act of 1976 (FLPMA), including plan revisions. *The planning area for a resource management plan will be identified as an issue under 43 CFR §1610.5-1 and will be reflected in the formulation of alternatives under 43 CFR §1610.5-2.*

§1610.3-2 Consistency Requirements (*Add suggested language in red.*)

(a) Resource management plans will be consistent with officially approved or adopted land use plans of other Federal agencies, State and local governments and Indian tribes to the

maximum extent the BLM finds practical and consistent with the purposes of FLPMA and other Federal law and regulations applicable to public lands, and the purposes, policies, and programs of such Federal laws and regulations.

§1610.4 Planning assessment. (Add suggested language in red.)

Before initiating the preparation of a resource management plan the BLM will, consistent with the nature, scope, scale, and timing of the planning effort, complete a planning assessment.

(a) Information gathering. The responsible official will:

(1) Arrange for relevant resource, environmental, ecological, social, economic, and institutional data and information to be gathered, or assembled if already available, ~~including~~ giving priority to the identification of potential ACECs....

§1610.8–2 Designation and protection of areas of critical environmental concern. (Add suggested language in red.)

...
(b) The BLM will give priority to the designation of potential ACECs during the preparation or amendment of a resource management plan. The identification of a potential ACEC does not, in of itself, change or prevent change of the management or use of public lands. Potential ACECs require special management attention (when such areas are developed or used or no development is required) to protect and prevent irreparable damage to the important historic, cultural, or scenic values, fish and wildlife resources or other natural system or process, or to protect life and safety from natural hazards. The BLM will ensure that all authorized activities are compatible with the purposes of designated ACECs.

(1) Upon release of a draft resource management plan or plan amendment involving a potential ACEC, the BLM will notify the public of each potential ACEC and any special management attention which would occur if it were formally designated. The design of any such special management attention will reflect the priority protection that FLPMA requires.

(2) The approval of a resource management plan or plan amendment that contains an ACEC constitutes formal designation of an ACEC. The approved plan will include a list of all designated ACECs, and include any special management attention identified to protect the designated ACECs.

§1610.1–2 Plan components. (Add suggested language in red.)

(a) Plan components guide future management actions within the planning area. Resource management plans will include the following plan components:

(1) *Goals*. A goal is a broad statement of desired outcomes addressing resource, environmental, ecological, social, or economic characteristics within a planning area, or a portion of the planning area, toward which management of the land and resources should be directed.

(2) *Objectives*. An objective is a concise statement of desired resource conditions developed to guide progress toward one or more goals. An objective is specific, measurable, and realistic, and plans should include specific time-frames for achieving the objectives. Plans will include a sufficient number and range of objectives as necessary to allow the BLM and interested parties to determine whether these goals are being achieved.

§1610.4 Planning assessment. (Add suggested language in red.)

Before initiating the preparation of a resource management plan the BLM will, consistent with the nature, scope, scale, and timing of the planning effort, complete a planning assessment. To the fullest extent possible, the planning assessment will be carried out over entire watersheds, landscapes, and ecosystems, even when they encompass land and resources not managed or controlled by the BLM.

* * *

(c) *Assessment.* The responsible official will assess the resource, environmental, ecological, social, and economic conditions of the planning area, giving priority to the identification of potential ACECs.

43 CFR §1610.5-1. Identification of planning issues. *(Add language suggested in red.)*

* * *

(b) The public, other Federal agencies, State and local governments, and Indian tribes will be given an opportunity to suggest concerns, needs, opportunities, conflicts or constraints related to resource management for consideration in the preparation of the resource management plan, including the identification of potential ACECs.

43 CFR §1610.5-5. Selection of the proposed resource management plan and preparation of implementation strategies. *(Add suggested language in red.)*

(a) After publication of the draft resource management plan and draft environmental impact statement, the responsible official will evaluate the comments received and prepare the proposed resource management plan and final environmental impact statement, giving priority to the identification, designation, and protection of ACECs.

We suggest revising 43 CFR § 1610.6–4 entirely as follows:

43 CFR § 1610.6–4 Monitoring, evaluation, mitigation, and adaptation.

(a) The BLM will monitor and evaluate the resource management plan to determine whether the goals and objectives set out in the plan as provided under §1610.1–2(a)(1) and (2) are being achieved.

(b) The BLM will publish the results of its monitoring program for each resource management plan not less than every two years. These results will be made available to the public promptly on the BLM website in a format that will allow interested parties to readily ascertain whether the plan’s goals and objectives are being achieved.

(c) If the BLM finds, based upon the information provided by its monitoring and evaluation program, that the goals and objectives are not being achieved as intended under any resource management plan, the agency will promptly take appropriate action to mitigate any unintended adverse impacts that occurred. In addition, the BLM will take one of the following actions within 180 days from publication of its findings:

(1) Propose amendments to the resource management plan, including the designation of new ACECs, including restrictions on activities previously authorized under the plan, as may be necessary to achieve the goals and objectives set out in the plan.

(2) Propose amendments to the resource management plan to change the goals and objectives in the plan that the BLM believes can be realistically achieved, but only after the BLM determines that different goals and objectives are appropriate for the planning area and that the goals and objectives for the plan are not being revised to accommodate activities that are harmful to public land resources and that could have been restricted to achieve the goals and objectives outlined in the original plan.

(d) If the BLM fails to promptly mitigate any unintended adverse impacts or fails within 180 days from the publication of its findings to take action under subsection (c) of this section, any interested party may petition the BLM to take appropriate action. The BLM will respond in writing to any such petition within 90 days and shall either:

(1) Promptly commence a process for carrying out mitigation and/or amending the plan as provided under subsection (c) of this section, or

(2) Explain why no further action is warranted.

(e) Any proposal to amend the resource management plan as provided under this section will be carried out in compliance with NEPA and will include an opportunity for meaningful public participation.

We suggest adding the following new rule:

43 CFR § 1610.10 Planning Dashboard

(a) The BLM will establish a web-based planning dashboard that sets out specific deadlines for meeting different phases of the planning process, including specifically, the following:

(1) Completion or updating of the inventory required by Section 201 of FLPMA;

(2) Completion of the planning assessment as required by 43 CFR § 1610.4

(3) Identification of planning issues, formulation of resource management alternatives, and an estimate of the effects of the alternatives, as required by 43 CFR §§ 1610.5-1, 1610.5-2, and § 1610.5-3;

(4) Preparation and release of the draft resource management plan and the draft EIS, and the selection of preferred alternatives as required by 43 CFR § 1610.5-4;

(5) Preparation and release of the proposed resource management plan and final EIS, and the selection of preferred alternatives as required by 43 CFR § 1610.5-4;

(6) Approval of the final resource management plan and issuance of the record of decision as provided at 43 CFR § 1610.6-1;

(7) Review and resolution of protests as provided at 43 CFR § 1610.6-2.

(b) Each step of the timeline shall be completed as expeditiously as practical and, to the fullest extent possible, within the time limits set out on the dashboard, with a goal of completing the entire planning process within two years from the date that the inventory is released to the public.

Possible preamble explanation: Almost everyone agrees that the public land use planning process takes too long. An important goal of any new planning rules should therefore be to promote more streamlined planning. Planning might be streamlined, for example, if specific criteria for managing particular resources could be put off to a later phase of planning. So, for example, plans must decide where oil and gas leasing will be allowed and not allowed, but the details of how leasing and development might occur can be decided at a later phase of planning

as is done through a master leasing plan. These details are important, but they do not necessarily need to be decided when land use choices are being made. Streamlining planning in this way could greatly expedite the timeline for planning.

To that end and to encourage efforts to streamline planning, the BLM will establish an online “planning dashboard” that will establish timelines for completing each phase of the planning process. Although not mandated by the FAST Act, the planning dashboard borrows the concept from that law as a way to promote more streamlined planning. The dashboard serves several important purposes. First, it provides interested parties with information about how the planning process will evolve, when the various stages for public engagement are likely to open, and when various stages of the planning process are expected to be completed. This will allow these parties to better schedule their own participation in the planning process. Second, it provides the BLM with a target date for completing each stage of the planning process. Experience with the permitting dashboard under the FAST Act suggests that targets work to move agency decisions along, even if those targets are not strictly enforceable. Finally, strict timelines can assist the BLM in identifying ways to streamline planning so that target dates can be more readily achieved.

We suggest adding the following new rule:

43 CFR § 1610.11 ACEC Databank

(a) The BLM will maintain a complete, searchable record of every ACEC within the BLM system on its website. Information about the location, protected resources, public access, restrictions on use, and the rationale for designating the ACEC will be included in the databank, and will be presented in a user-friendly format established by the Director for this purpose.

(b) The State Director of each BLM State Office will be responsible for reporting information to the Director for inclusion in the ACEC databank. Information regarding ACECs that exist at the time that this rule takes effect will be reported to the Director within 180 days from the effective date of this rule. All ACECs designated subsequent to the effective date of this rule will be reported to the Director within 90 days from the date of their designation.

(c) Upon receipt of ACEC databank information from BLM State Offices, the Director will promptly publish that information on the BLM website.

We suggest adding the following new rule:

43 CFR § 1610.12 Pilot Projects

(a) After public notice and an opportunity for comment, the Director may authorize one or more deciding official to develop and implement a land use plan that meets the general requirements of these rules but that allows for testing different strategies that might prove more effective in streamlining planning, promoting landscape-level management, and/or encouraging adaptive management of planning area resources. Plans authorized under this section will be designated as pilot projects.

(b) Pilot projects may be developed for any unit of planning, including units that are defined for purposes of the pilot project itself.

(c) A pilot project may be authorized under this section only after the Director finds in writing that the project has a significant likelihood of achieving two or more of the following objectives:

- (1) Improving opportunities for meaningful public participation;
- (2) Simplifying the planning process without undermining core planning objectives such as making specific land use choices for every tract within the planning area;
- (3) Promoting opportunities for planning at broader scales, and especially at the landscape, ecosystem, or watershed level;
- (4) Incorporating a robust and mandatory adaptive management program into the plan, with specific timetables for carrying out adaptive measures.

(d) The Director may approve multiple pilot projects that test the same or similar strategies in different environments, over different scales, and in different types of planning areas, as may be necessary to demonstrate the effectiveness of these strategies.

(e) The Director will consider amendments to the planning rules where one or more pilot projects demonstrate superior planning strategies that might be deployed widely across many or all BLM plans.

Possible preamble explanation: Just as the BLM intends that land use plans be adaptive, so too, the process for developing and implementing such plans should adapt as the BLM learns more about how to develop and implement effective planning. Adaptive management is sometimes described by the phrase “learning by doing,” and pilot projects offer the perfect opportunity for the BLM to learn about superior management strategies by actually testing them in planning areas. The intent of this provision is to provide the BLM with the flexibility to experiment with new planning approaches and strategies that may deviate somewhat from the specific requirements of the planning rules while ensuring that the basic goals and principles set forth in those rules are honored. Pilot projects may be approved only where they meet strict criteria and only where they stand a reasonable chance of promoting better and more innovative planning practices.

Respectfully submitted,

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