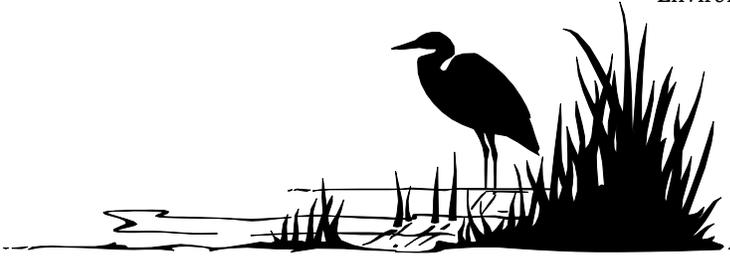


APPLICATION OF ENVIRONMENTAL LAW

September 95

BLM & the
Environment



The intent of this guidebook is to help make the reader more aware of the Bureau of Land Management's responsibilities toward the environment and environmental issues. Briefly described are several key laws and executive orders and their effects on BLM. We hope this guidebook will serve as a useful reference and provide a better understanding of the relationship between BLM and the environment.

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I. INTRODUCTION

This guidebook examines the laws and regulations governing BLM activities that affect the environment. To help the user understand laws and where they fit in the big picture, this guide first discusses the structure and hierarchy of the legal system. It then discusses the laws that most significantly influence BLM's environmental protection or conservation management responsibilities.

Many laws, rules, regulations, orders, ordinances, and memorandum directives affect BLM employees. Fortunately these laws and rules have some order. Knowing this order and how each part of the legal environment fits is essential to understanding how laws affect BLM.

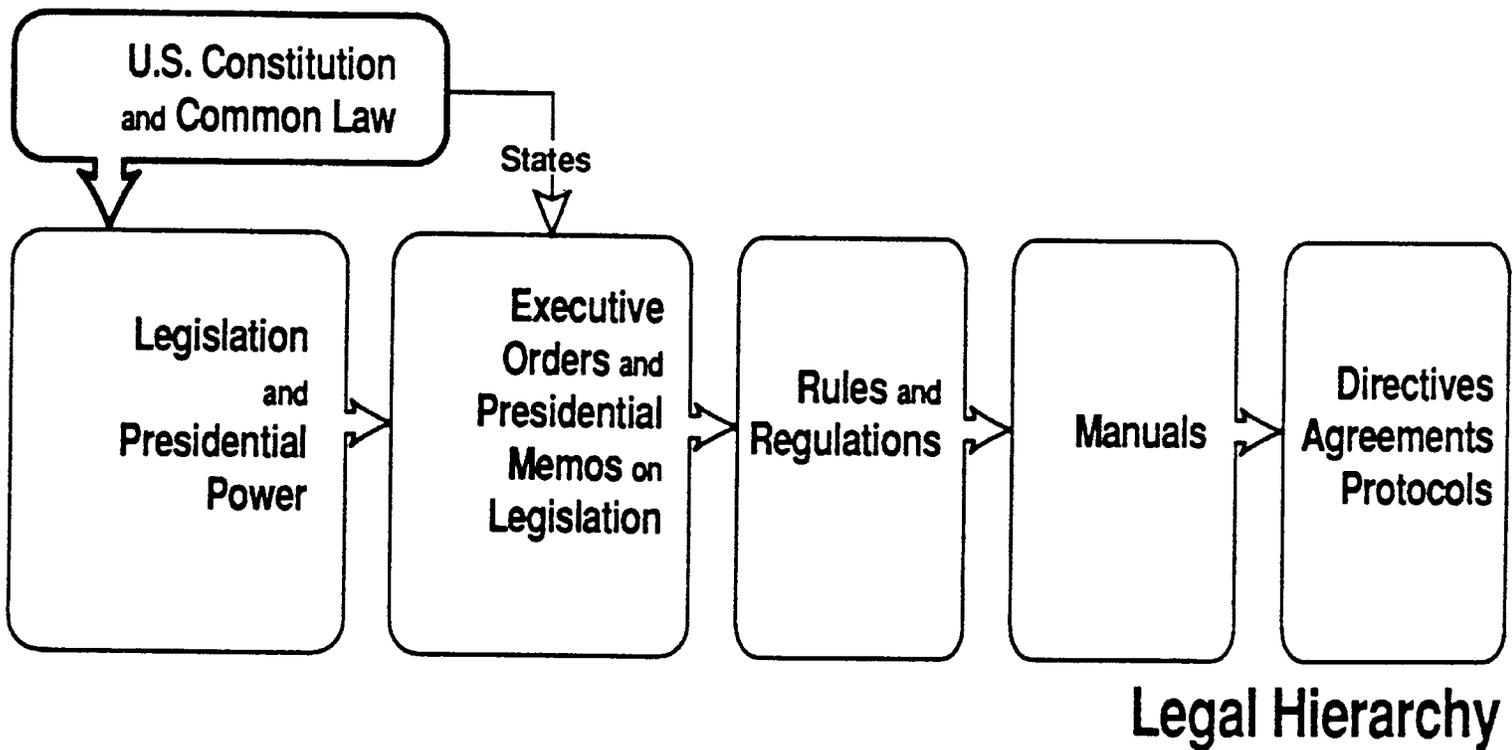
The American legal system is organized into a hierarchy in which everything below a certain level is governed by everything above it. This relationship is shown in the following diagram.

At the top of the legal system is the United States Constitution, the supreme law of the land. No law, regulation, state, or person is above the Constitution. The United States Supreme Court interprets the Constitution and how it applies to all our activities under the law. A most important clause of the Constitution for BLM is the Property Clause, Article IV, Section 3, Clause 2: "The Congress shall have power to dispose of and make all needful rules and regulation respecting territory or other property belonging to the United States." This enabling clause allows Congress to enact laws to manage the federal lands.

In addition to the Constitution, an informal body of principles of law known as common law guides the courts in their decisions. Examples of common law

include the composition of private property rights and control of nuisances.

Below the U.S. Constitution and the common law are two sets of hierarchy, the federal and the state legal systems. The federal system has jurisdiction over



everything of national interest or concern, and the Tenth Amendment to the Constitution allows states to establish their own legal systems to govern their interests and concerns. The division between the federal and state systems is often cloudy and controversial. The courts continue to grapple with where the federal and state jurisdictions lie for many areas of concern.¹ We must keep in mind, however, that when a federal and state law conflict, the federal law will generally prevail under the Supremacy Clause of the Constitution,² and one can look to the federal system for guidance.³

The next steps down from the Constitution in the federal hierarchy are laws passed by Congress. Governed by the Constitution and the principles of common law, these laws are subject to review by the courts for constitutionality. The most important law for BLM is the Federal Land Policy and Management Act (FLPMA),⁴ whose main constitutional basis is the Property Clause of the Constitution.

Because of the extreme comprehensiveness and complexity of most laws, Congress gives an executive agency the administrative responsibility of the law, usually the power to issue regulations to carry out the law's intent. FLPMA gave the Secretary of the Interior this rulemaking authority to implement all sections of the act. These regulations are below the law in hierarchy and must conform to and be allowed by laws that apply.

Often Congress gives the President power to issue executive orders to clarify the roles of agencies under the law. In addition, the President may independently issue an executive order on some matter not covered by a law.⁵ These executive orders have hierarchical power over regulations in areas covered by the order and not conflicting with a law. The procedures for issuing rules and regulations are governed by the Administrative Procedures Act,⁶ which requires either a formal hearing or publication of the proposed rule in the Federal Register for review before being issued. Once approved and issued, these regulations are codified in the Code of

Federal Regulations (CFR). These regulations must be constitutional, authorized, and compatible and consistent with laws and executive orders.

Beneath regulations in the legal hierarchy are manualizations, used by most agencies to detail procedures for complementing regulations and mandates from laws. The length, detail, and understandability of manualizations greatly vary. As the source of guidance for an agency's nitty gritty work, manuals must be carefully reviewed if one is to understand how they fit within the legal system. As legally binding documents, manuals must conform to the Constitution, executive orders, and regulations.

Below all these levels are an agency's informal or semiformal operating procedures. For BLM, examples include interoffice memorandums, district organizational structures, and cooperative agreements with other federal or state agencies.

II. THE ENVIRONMENTAL LEGAL SYSTEM

For each law discussed in this guidebook three citations are included to enable one to look it up for its exact language as passed by Congress. The first citation represents the public law number. Each law is assigned a number that notes the Congress that passed it and the order in which it was passed. For example, Public Law (P.L.) 91-190 (NEPA) was the 190th law passed by the 91st Congress. The second citation, e.g. 80 STAT 250, refers to the document called Statutes at Large, which also prints laws in chronological order. The first number refers to the volume and the last number to the page in that volume. The last citation, e.g. 42 USC, 4321, is the most commonly used. USC refers to the United States Code in which all federal laws are officially organized or codified. The first number refers to the title and the last number to the section. If possible, use the United States Code Annotated,

which gives references to history, other related laws, and litigation summaries.

Many BLM offices and most county seats have copies of the *United States Code*. Another possible source is the local office of an attorney involved in federal litigation.

A citation included in the discussion of some laws is the *U.S. Code Congressional and Administrative News*, a collection of the legislative history of each act, including committee or conference reports on bills. Difficult to find but kept in most law school libraries, this reference is a good source of information on how a law was passed by Congress.

Another essential source is the *Federal Register*. Published almost daily by the Federal Government, the *Federal Register* is the official public notice document for proposed and issued regulations, hearing notices, and other official business. The *Federal Register* publishes daily, monthly, quarterly, and yearly indexes. Once officially adopted, all regulations of all federal agencies are published in the *Code of Federal Regulations* (CFR).

III. COMPREHENSIVE POLICY GUIDANCE

This category includes laws that give an overview or framework of broad and specific policy directions. As the starting point for guidance, these laws generally apply to all agency actions. The courts extensively rely on these laws to infer congressional intent when a question arises about an agency activity complying with law. Usually by the time a field-level employee acts under these laws, these laws have been administratively interpreted by regulation and manual procedures. Employees should therefore look to these interpretations as guidance. Knowing the genesis or initial creator of these regulations and manuals can also help one

interpret regulations and manuals and understand the reasons for BLM actions.

Freedom of Information Act (FOIA)

CITATIONS: P.L. 89-487 as amended, 80 Stat 250, 5 USC 552.

REGULATIONS: See Department of the Interior regulations pertaining to the act: 43 CFR pt.2, subpt. B.FOIA was amended in 1974 and 1976.

PURPOSE AND GOALS: FOIA provides that any person has the right of access to federal agency records unless such records are protected from disclosure by one of nine exemptions.

National Environmental Policy Act (NEPA)

CITATIONS: Environmental Quality Improvement Act of 1970, as amended (42 USC 4372 et seq.); Sec 309 of the Clean Air Act, as amended (42 USC 7609); E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977); P.L. 91-190; 83 Stat 852; 42 USC 4321, 1970 USC Cong. and Ad. News 2751.

MANAGING AGENCIES: NEPA⁷ established the Council on Environmental Quality (CEQ) and gave it general managerial responsibility for the act, including the environmental impact statement (EIS) process. This responsibility was detailed in E.O. 11514 and later amended in 1977 to give CEQ the power to issue regulations for NEPA procedures. This 1977 E.O. amendment also changed the procedures to require all agencies to file their EISs with the Environmental Protection Agency.

Each department or agency is responsible for issuing guidance in the form of procedural rules for implementing NEPA.

REGULATIONS: CEQ has taken a number of actions since the 1500-1508 regulations were issued. Some of the more important actions are summarized below:

of guidance on the scoping process.

*40 CFR 1500-1508

Regulations and Procedural Provisions of NEPA.

*40 Most Asked Questions on NEPA

Regulations (3/23/81).

*40 CFR Part II, Appendixes I, II, and III.

Appx I: Federal and Federal-State Agency NEPA Contacts

Addresses questions on a wide variety of issues relating to implementing the regulations. Comments concerning agency compliance with NEPA and the 1500 regulations on a wide range of topics and issues, including EIS content, records of decision, scoping, and checklist for EIS review.

Appx II: Contacts with Jurisdiction by Law or Special Expertise on Environmental Quality Issues.

Appx III: Contacts for Receiving and Commenting on Other Agencies' Environmental Documents.

*Prime and Unique Farmland (43 CFR 030, 1/31/80)

Guidelines for identifying and protecting important farmlands.

*"Worst Case" revision (40 CFR 1502.22, 5/27/86)

Revises 1502.22 and rescinds Forty Most Asked Questions (No. 20).

*Prime and Unique Agricultural Lands (8/11/80)

Guidelines for identifying and protecting important agricultural lands.

*Guidance Regarding NEPA Regulations (48 FR34263, 7/28/83).

*Mitigate Adverse Effects on Rivers (8/10/80)

Interagency consultation to avoid or mitigate adverse effects on rivers in the nationwide inventory.

*Guidance on agency implementation of NEPA Regulations.

Topics covered: Scoping, Categorical Exclusions, Adoption, Contracting, Selecting Alternatives, and Tiering.

*Safe Drinking Water Quality Act of 1974 (11/19/76).

Guidance concerning Sec. 12424(e) of the Safe Drinking Water Act of 1974 and relationship to NEPA.

*Scoping Guidance (46 CFR 25461, 4/30/81) 21 pages

Complete guidance for implementing the NEPA process within BLM can be found in BLM Manual

and Handbook 1790-1. These handbooks were published on 10/25/88 under release No. 1-1547.

Because of the many lawsuits filed under NEPA, this guidebook cannot summarize NEPA as seen by the courts. Below are landmark cases relating to BLM and a synopsis of decisions. For more detail see *NEPA in the Courts* by Fred Anderson and the chapter on NEPA in *Federal Environmental Law*.

Although an environmental full-disclosure law, NEPA is also a procedural law that was intended to substantively change federal decisionmaking. NEPA's intent is not just to require the filing of detailed EISs, which will fill government archives [*Environmental Defense Fund v. Corps of Engineers* 470 F2d 289 certde 412U5931]. The intent of the NEPA process is to ensure that before making decisions, agency decisionmakers have a description of alternatives and environmental impacts so they can consider all possible approaches to a proposal. [*Calvert Cliffs Coordinating Committee v. Atomic Energy Commission* 449F2d 1109 (1971)]. (This case is the landmark decision and should be read in full.)

Following are cases that dealt with EIS adequacy.

The duty to consider alternatives is subject to the rule of reason. Not every alternative that could be dreamed up must be given full treatment [*Natural Resources Defense Council v. Calloway* 389 F Supp 1263].

The purpose of the EIS requirement is not to obtain an objection-free or flawless document but to produce a timely and useful decisionmaking tool [*Minnesota Public Interest Research Group v. Butz* 541F2d1292 (1976)].

A major purpose of the EIS is to give the public information on environmental impacts and to encourage public participation in developing that information [*Trout Unlimited v. Morton* 509F2d1276 (1975)].

EISs are not merely to be rationalizations of decisions already fully made but are meant to ensure meaningful consideration of environmental factors at all stages of agency decisionmaking.

EISs should be prepared before irretrievable commitments are made or options precluded by agency actions [*Sierra Club v. Morton* 514F2d856 (1975)].

Although often desirable, EISs don't have to include maps, background data, or documentation supporting agency views [*Environmental Defense Fund v. Corps of Engineers* 348 F Supp 916].

NEPA coincides with expanded ability to sue agencies.

1. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). (Case established judicial review standards under the Administrative Procedures Act and gave citizens harmed by government decisions standing to challenge these decisions where there is law for the court to apply. NEPA gave the courts a law to apply in almost every case.)

2. NEPA provides a ready-made administrative record for the courts to review.

NEPA is mainly procedural; the court cannot substitute its judgment for the agency's.

1. *Vermont Yankee Nuclear Power Corp v. Natural Resources Defense Council, Inc.* 435 U.S. 519 (1978) ("NEPA does set forth significant goals for the Nation, but its mandate to the agencies is essentially procedural.")

2. *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980) ("Once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to ensure that the agency has considered the environmental consequences; it [the court] cannot interject itself

within the area of discretion of the executive as to the choice of the action to be taken.")

3. Kleppe v. Sierra Club 427 U.S. 390 (1976) (NEPA requires agencies to take a hard look at environmental issues.)

Failure to follow NEPA procedures is taken seriously by courts.

Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d1109 (D.C. Cir. 1971) (AEC rule limiting hearing board review to exclude environmental factors violates NEPA.)

CEQ's role of providing guidance on NEPA compliance is given great deference by courts.

1. Sierra Club v Hardin, 325 F. Supp. 99 (D. Alaska 1971).

2. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

3. Robertson v. Methow Valley Citizens Council, ___ U.S. ___, (1989)(CEQ can change its worst-case analysis regulation.)

NEPA must give way to clear and unavoidable conflict with other statutory authority.

Flint Ridge Development Co. v. Scenic Rivers Association, et al., 426 U.S. 776 (1976). Environmentalists claimed NEPA required EIS to approve land development project where HUD had only 30 days to review documents for sufficiency or the documents would get automatic approval under the Interstate Land Sales Full Disclosure Act.

United States v. Students Challenging Regulatory Agency Procedures (SCRAP I), 412 U.S. 669 (1973) (NEPA was not intended to repeal other laws by implication.)

Courts are willing to issue injunctions to force compliance.

1. Save the Yaak Committee v. Block F.2d, (9th Cir. 1988). (Irreparable damage is presumed when an agency fails to follow NEPA. Only rarely will a court refuse to issue an injunction when it finds a NEPA violation. The policies underlying NEPA weight the scales in favor of those seeking the suspension of all action until the act's requirements are met.)

2. AMOCO Production Co. v. Village of Gambell, 480 U.S. 531 (1987) (Even under NEPA, an injunction is an equitable remedy that does not issue as a matter of course.)

Conner v. Burford established the point of irreversible commitment of resources at the oil and gas leasing stage if leases are issued without a "no surface occupancy" stipulation. This decision defined the commitment as ultimate oil and gas development and determined that such development would have significant impact, therefore requiring the preparing of an EIS before allowing the lease to be issued. This case resulted in BLM's removing all fluid mineral categorical exclusions from the 1983 list and issuing other standard program guidance affecting the NEPA process as it relates to the fluid mineral leasing program.

In Methow Valley Citizens Council v. Robertson, the Supreme Court decided that the Forest Service had to consider off-site impacts of a proposed ski resort and consider mitigation but did not have to prepare a formal mitigation plan for such impacts. Such a plan would be out of their control. The decision also upheld CEQ's revision of the regulations to remove the requirement for conducting a worst case analysis for incomplete information. The Supreme Court, however, did not overturn the Ninth Circuit Court's decision that the Forest Service had to consider alternative recreation or resort sites. This decision was based on the general nature of the stated purpose and need for the action. To prevent having to consider alternative sites worldwide, the Forest

Service issued an EIS supplement narrowing the purpose (or scope) to the Seattle metropolitan area.

PURPOSE AND GOALS: The ultimate goal of NEPA is to improve the quality of the human environment by requiring all federal agencies to give equal and complete consideration to environmental values in all their decisionmaking.

More specifically, NEPA first lays down a national environmental policy, "Which will encourage productive and enjoyable harmony between man and his environment."⁸ This goal is followed by a series of guidelines or criteria for all federal agencies to use in planning and decisionmaking.⁹ Though these are not absolutely legally specific mandates, they do carry weight in legal arguments, forcing agencies to be more environmentally sensitive.

The NEPA section most directly affecting agencies is the "action forcing section," 102(2)(C), from which the EIS process has evolved.

EFFECT ON BLM AND LEGAL INTERPRETATIONS:

Perhaps more than any other law, NEPA has significantly altered BLM's overall management by requiring 1) more public involvement/ disclosure and 2) interdisciplinary analysis (led to BLM's growth during the late 1970s). Under NEPA all agency actions (except categorical exclusions or congressionally exempted actions) or activities at all levels must be assessed and documented. And if the action is expected to significantly affect the human environment, an EIS is prepared.

RELATIONSHIP TO OTHER LAWS

General: As an omnibus act, NEPA applies to all other laws and agency policies unless the other laws explicitly and clearly exempt aspects from compliance with NEPA¹⁰.

ADDITIONAL READING: The following are only samples of a vast amount of literature on this topic:

- a) *NEPA in the Courts*, by Fred Anderson, Resources for the Future, 1973 (paperback).
- b) "The National Environmental Policy Act" by Fred Anderson in *Federal Environmental Law*, West Publishing Company, 1975, Dolgin and Guilbert, eds.
- c) "Making NEPA Work: Recommendations for Improving the EIS Process in Decision Making" by Lee Kapaloski, *Journal of Contemporary Law*, Vol 2, No. 2 (1975).
- d) The current annotation of 42 USC 4321 in the *United States Code Annotated*.
- e) "NEPA at 19: A Primer on an 'Old' Law with Solutions to New Problems" by Dinah Bear (CEQ) in *Environmental Law Reporter*, Volume Year XIX, Feb. 1989.
- f) "A Constitutional Law for the Environment: 20 years with NEPA Indicates the Need" by Lynten K. Caldwell in *Environment*, Vol. 31, No. 10, December 1989.

Federal Land Policy and Management Act of 1976 (FLPMA)

CITATIONS: P.L. 94-579, 90 Stat 2743, 43 USC 1701.

MANAGING AGENCIES: Through the Secretary of the Interior, BLM has overall responsibility for carrying out this law.

Some aspects of FLPMA, (for example, allotment management plans in national forests, Sec. 103K; "grazing permit and lease" Sec. 103p; coordination of land use plans, Sec. 202b; acquisitions, Sec. 205a, c, d; and exchanges, Sec. 206a, b, c; and other sections) also apply to the Secretary of Agriculture, the Forest Service. While FLPMA serves as an organic act for BLM, it does not for the Forest Service.

REGULATIONS: Many of BLM's pre-FLPMA rules had to be changed after the passage of FLPMA. Key areas of special importance to the environment are the land use planning (1600), rights-of-way (2800), and wilderness study procedures, Titles II, V, and VI of FLPMA, respectively. FLPMA has also required many other regulation and manual revisions.

PURPOSE AND GOALS: FLPMA is an organic law in that it defines BLM's organization and provides the basic policy guidance for BLM's management of public lands. Because of this basic intent, FLPMA should be viewed as the guiding law for all BLM activities. When other laws are involved, BLM should use them so that they conform to FLPMA and its overall intent.

FLPMA is divided into seven general titles¹¹, but certain titles are more important to BLM's environmental responsibilities than others. Title I gives overall guidance and policy and therefore should be a main reference for use along with all other titles of FLPMA. Many times, employees become so preoccupied with their own activities that they forget to refer to basic policy or guidance. But from a legal standpoint this key section of a law is often used as a starting point to challenge all activities under the policy. The policy title emphasizes environmental values, making it clear that BLM has a major responsibility to integrate environmental values into all of its activities and decisionmaking.

Title I states the policy of the United States for managing the public lands. The important statement on environmental values is clause 8, which reads,

"(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide

for outdoor recreation and human occupancy and use;"

Protection of environmental values is a major criterion for all management activities. Since this section has no qualifying words or limitations, it must be read to apply universally to BLM's total program. Alongside this goal is the co-equal mandate to base management on the principle of multiple use and sustained yield. The FLPMA definition of multiple use stresses environmental values¹².

Following is the FLPMA definition of "multiple use" for BLM lands with the changes from pre-FLPMA definitions underlined.

"The term '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 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 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 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 output¹³."

The following are other key provisions of FLPMA:

1. Land Use Planning

a. Mandated periodic inventories and planning efforts for the public lands using a systematic, interdisciplinary approach and observing the principles of multiple use and sustained yield.

b. Integrated NEPA into the planning process.

c. Required opportunities for public involvement in formulating plans.

d. Mandated coordination of land use planning with other federal, state, and local government agencies and Indian tribes.

e. Required consistency between BLM land use plans and non-Federal Government plans and non-Federal Government plans to the greatest extent practical.

f. Gave priority to designating and protecting areas of critical environmental concern (ACECs).

g. Specified that plans consider present and potential uses of the public lands and weigh long-term benefits to the public against short-term benefits.

h. Specified consideration of the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realizing those values.

i. Required compliance with pollution control laws, including state and federal air, water, noise, and other pollution standards or implementation plans.

2. Congressional Review of Land Withdrawal

a. Subjected all classifications and withdrawals under the Classification and Multiple Use Act to BLM review when preparing new land use plans.

b. Required congressional review of all land sales exceeding 2,500 acres or withdrawals of tracts exceeding 5,000 acres, as well as decisions to restrict any main uses for 2 or more years in areas larger than 100,000 acres.

3. Land Exchanges and Acquisitions

a. Provided for cash payments from the government to equalize values of exchanged lands.

b. Gave BLM authority for acquisitions under its land use plans.

c. Allowed use of Land and Water Conservation funds to acquire public recreation lands.

4. Multiple Use Advisory Council

Established councils to furnish advice for land use planning, classification, retention, management, and disposal of public lands.

5. Livestock Grazing

a. Authorized a study of grazing fees.

b. Authorized 10-year grazing permits.

c. Required 2-year notices of permit cancellation.

6. Wilderness

Directed BLM to review the public lands for wilderness potential as defined in the 1964 Wilderness Act, which previously limited such authorities to the National Park Service, Forest Service, and Fish and Wildlife Service.

7. Wild Horses and Burros

Amended the Wild Free-Roaming Horses and Burros Act to allow the use of helicopters in roundups.

8. Minerals Management

a. Required development of regulations to prevent unneeded or undue degradation of the land.

b. Required the recording of mining claims with BLM within 10 years.

c. Modified formulas for distributing funds collected under the Mineral Leasing Act of 1920 and the Geothermal Steam Act of 1970.

9. Law Enforcement

Authorized the hiring of uniformed rangers and special agents.

10. Other Provisions:

a. Repealed the Homestead Act and other settlement acts.

b. Established the status of BLM's Director as a political appointee.

c. Established the California Desert Conservation Area and required completion of a California Desert Plan by 1980.

EFFECT ON BLM AND LEGAL INTERPRETATIONS:

More than anything in the past, FLPMA directly governs all BLM activities, just as the organic acts of the Forest Service and National Park Service govern the activities of those agencies. FLPMA serves as an overall policy guide for BLM, and every BLM activity is legally bound to generally comply with FLPMA. As regulations are issued, every BLM employee is governed by FLPMA's official interpretations.

RELATIONSHIP TO OTHER LAWS: Wherever they apply, sections of FLPMA will be discussed along with legislation throughout this guidebook.

ADDITIONAL READING: "The Federal Land Policy and Management Act: An Interim Report", October 21, 1977 to June 30, 1977, by USDI Bureau of Land Management, USBPO No. 1977-244-379:6538. This is a general but easy-to-read summary of the law.

"The Federal Land Policy and Management Act of 1976." All BLM employees should read at least the policy and land use planning titles several times to get a firsthand view of FLPMA.

The History and Development of Public Land Law by Gates and Swenson, PLLRC Publication. This is a thorough review of the history and background leading up to FLPMA for those desiring more comprehensive knowledge.

Opportunity and Challenge: The Story of BLM, by James Muhn and Hanson R. Stuart, USDI, BLM September 1988. Chapter 4, "An Agency With A Mission: The 1970s," includes a discussion and personal accounts of the passage of FLPMA.

Water Resources Planning Act

CITATIONS: P.L. 89-90, 79 stat 244, 42 USC 1962.

MANAGING AGENCIES: The Water Resources Council has general responsibility for implementation, but every federal agency involved in water- and land-related resource planning is subject to this law. The Water Resources Council consists of cabinet secretaries (or designates) of the Interior, Agriculture, Army, Commerce, Health and Human Services, Transportation, Administrator of the Environmental Protection Agency, and the Chairman of the Federal Power Commission.

PURPOSE AND GOALS: The main intent of this law is to promote comprehensive water planning, especially for interstate waters, to "encourage the conservation, development and utilization of water and/or related resources...on a comprehensive and coordinated basis¹⁴."

This goal can be met by two summary means. One is to create interstate river basin commissions to prepare comprehensive plans or, more realistically, inventories of river basins.¹⁵ The work of these commissions should be looked to as a reference and overview in the planning process.

The other means is to authorize the Water Resources Council to develop and issue principles and standards for water- and land-related resource projects involving federal participation.¹⁶

Though highly detailed, the principles and standards issued have helped agencies engaged in comprehensive planning.¹⁷ The principles and standards require a double accounting procedure in which an economic development procedure and an environmental quality procedure for projects are used to compare project costs and benefits. From an environmental viewpoint, the criterion used to assess environmental qualities is useful for any agency's planning.

EFFECT ON BLM AND LEGAL INTERPRETATIONS: Most directly affected would be public lands or waters proposed for major water resource developments by other federal agencies (usually the Bureau of Reclamation) or as cooperative federal water projects. The planning for such projects is guided by the principles and standards, and the Bureau of Reclamation conducts multiple-objective planning, an EIS-type alternatives assessment. Involved as an affected agency, BLM would assess and review such a project's impact on BLM resources. Each planning area should be alert to such proposed water projects to ensure early involvement and coordination with the multiple-objective planning.

Because few legal actions have been brought under this law,¹⁸ little exists to base a judgement on how courts will interpret its application. Litigants, however, to date appear generally to view this law as a support document for more specific or pointed laws used for the suit.

RELATIONSHIP TO OTHER LAWS: The most important related law is the National Environmental Policy Act, requiring concurrently prepared EISs for most projects. This relationship carries over into the EIS/environmental assessment (EA) process when proposed projects would affect BLM resources and BLM planning and environmental staffs would have to coordinate efforts. Another direct impact would result when such a project requires a right-of-way grant from BLM. In this case the new environmental requirements on rights-of-way under FLPMA can be at least partly satisfied by using the analysis of the multiple-objective planning for the project as part of the right-of-way environmental analysis.

Oregon and California Railroad and Coos Bay Wagon Road Lands Act ("OCLA")

CITATIONS: P.L. 75-405, 50 Stat 874, 43 USC 1181a-1181j.

MANAGING AGENCIES: BLM manages 2,072,174 acres of O&C lands and the Forest Service manages 491,342 acres of O&C lands within the National Forests.¹⁹

PURPOSE AND GOALS: The O&C Lands Act requires the Secretary of the Interior to manage O&C lands for permanent forest production, but such management must also be in accord with sustained-yield principles.²⁰ Further, that act requires that management of O&C lands protect watersheds, regulate streamflow, provide for recreational facilities, and contribute to the economic stability of local communities and industries.²¹ The act does not

require the Secretary to harvest all old growth or all commercial timber as rapidly as possible or according to any particular schedule. The Secretary has discretion to determine how to manage the forest on a sustained-yield basis that provides for permanency of timber production over a long-term period. The Secretary must necessarily make judgments, informed by as much information as possible, about what kind of management will lead to permanent forest production that satisfies the principle of sustained yield.

Historically, receipts from O&C lands were divided between the U.S. Treasury and the O&C counties on a 50-50 basis. Because of resource conflicts, harvest levels have dropped significantly from historical levels, significantly affecting local economies. To stabilize O&C county revenues, appropriation language for 1991, 1992, and 1993 provides for a floor payment to the O&C counties to ensure that total payments would equal the annual average of the 5-year period between 1986-1990. (The payment could not exceed total receipts collected.)

The payment formulas were further modified in the Omnibus Budget Reconciliation Act of 1993. The act gives O&C counties a special payment amount based on an annually decreasing percentage of a 5-year average (1986-1990), replacing the old O&C payment. But for each year from 1999 through 2003, payments to counties will be the greater of either the special payment amount or 50 percent of total receipts.

The timber market will need time to stabilize in western Oregon. Until the market condition becomes clearer, the Special Payment Provision is critical to maintaining operational thresholds of the O&C counties.

EFFECT ON BLM: Much litigation has involved the status and management of O&C lands. BLM's broad authority to manage these lands has been affirmed. BLM is steward of these lands, not merely a regulator. The agency's shaping of the laws it administers has been accorded considerable weight.

BLM's management of the O&C lands is coordinated and consistent with management of adjacent national forest lands within the framework of the Northwest Forest Plan (Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl). The Northwest Forest Plan strategy has been incorporated into resource management plans for the western Oregon districts that manage O&C lands.

RELATIONSHIP TO OTHER LAWS: Court decisions have held that O&C Lands Act does not allow BLM to avoid its conservation duties imposed by other statutes. BLM must manage O&C lands according to environmental laws such as the Endangered Species Act (ESA) and the Clean Water Act. Some provisions of these laws take precedence over the O&C Lands Act. For instance, the Endangered Species act requires the Secretary to ensure that management of O&C lands will not likely jeopardize listed species or destroy or adversely modify critical habitat. A forward-looking land management policy would require that federal lands be managed to minimize the need to list species under the ESA. More listings could further limit the O&C Lands Act goal of achieving and maintaining permanent forest production, contributing to the economic instability of local communities and industries, in contravention of a primary objective of Congress in enacting the O&C Lands Act.²²

Taylor Grazing Act (TGA) of 1934

CITATIONS: P.L. 73-865

Until the passage of FLPMA in 1976, the Taylor Grazing Act was BLM's main authority for managing the public lands. The TGA ended previously free and unregulated livestock grazing on the public lands and recognized the Federal Government's dual responsibility to care for the land and consider the people dependent upon its use. The TGA's basic objectives were to prevent overgrazing through

livestock control, improve the condition of the land, and help stabilize the livestock industry dependent on the range.

Administrative Dispute Resolution (ADR) Act of 1990

CITATION: P.L. 101-552, 104 Stat. 2736, 5 USC 581.

MANAGING AGENCIES: Each agency is responsible for implementing this act, and each agency is advised to consult with the Administrative Conference of the United States and the Federal Mediation and Conciliation Service in developing ADR plans and policy. The Department of the Interior announced the establishing of its ADR plan in the Federal Register on June 13, 1994. The USDI plan requires BLM to develop an ADR plan.

PURPOSE AND GOALS: The intent of this law is to explicitly authorize the use of alternative dispute resolution (ADR) means such as mediation, arbitration, and other techniques for the prompt and informal resolving of disputes. Agencies are encouraged to develop ADR strategies in virtually every phase of their operations.

RELATIONSHIP TO OTHER LAWS: The ADR Act complements other laws such as FLPMA. The intent of the act is to clearly state that BLM managers are authorized to use ADR processes to prevent or resolve any administrative dispute that may arise within or from outside the agency.

Executive Order 12898 "Federal Actions To Address Environmental Justice In Minority Populations and Low-Income Populations"

MANAGING AGENCIES: The Department of the Interior has an Environmental Justice Strategy (1995). Because EPA led the initiative for preventing environmental racism or unfairness to minority and low-income communities, most of the background for

environmental justice is associated with EPA. Guidance for BLM is being developed and will be included in the revised NEPA Handbook.

PURPOSE AND GOALS: (1) To focus attention of federal agencies on the human health and environmental conditions in minority and low-income communities with the goal of achieving environmental justice. (2) To foster nondiscrimination in federal programs that substantially affect human health or the environment. (3) To give minority and low-income communities more opportunities for public participation in and access to public information on matters relating to human health and the environment.

Portions of the Department's strategy deal with efforts to maintain epidemiological data on minority and low-income communities.

IV. BASIC RESOURCE POLLUTION CONTROL

Laws in this category are aimed at controlling levels of pollutants produced by human activities. Passed since 1970, each law concerns areas of pollution and develops guidance and standards for each pollutant. All these laws generally apply to both public and private lands and actions. All federal agencies must comply with these laws and should therefore be consulted whenever an agency action or decision may increase pollution. This category of laws provides policy guidance for protecting environmental values from all pollutants.

Where BLM is required to consider environmental values, these pollution standards should be viewed as the starting point or minimum criteria and not as the total required environmental considerations under FLPMA or NEPA. Many environmental values recognized by FLPMA and NEPA are not included in these pollution control laws.

A significant interrelationship exists between a pollutant being controlled (e.g. sulfur dioxide in the air) and resource uses (e.g. coal leasing). This close interrelationship occurs throughout the natural environment, and the ecological adage that "everything is connected to everything else" greatly applies to antipollution laws. These laws should be considered together, as they are here, as a complete package of environmental concerns.

Another important aspect of these laws is the role played by the states in planning and administering standards, including enforcement. The states manage these laws, with the federal system being more an overseeing guidance or framework administrator, at least for intrastate pollution control.

Clean Air Act, as amended

CITATIONS: P.L. 84-159 (Air Pollution Control Act; July 14, 1955), 42 USC 7401 et seq., as amended by P.L. 101-549, 104 Stat 2399.

MANAGING AGENCIES: The Environmental Protection Agency (EPA) has responsibility for developing standards, rules, guidance, and program oversight. The states have the main responsibility for enforcing these standards and may establish more stringent standards. Tribal governments have the main responsibility for enforcing standards on their lands. BLM is responsible for assuring that all of its activities (either directly or through use authorizations) comply with local, state, and federal air quality laws, regulations, and standards.

REGULATIONS: Under Section 118, the Bureau "(1) having jurisdiction over any property or facility, or (2) engaged in any activity ... which may result in the discharge of air pollutants," and each employee "shall be subject to, and comply with, all Federal, State, interstate, and local [air quality] requirements." These regulations apply to any action (whether substantive or procedural), to requirements to pay fees, to the exercise of any administrative

authority, and to any process or sanction. In addition, these requirements apply "notwithstanding any immunity of such agencies, officers, agents, or employees under any rule of law."

Under Section 176, BLM shall not "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan..." In addition, "The assurance of conformity to such an implementation plan shall be the affirmative responsibility of the head of such department, agency, or instrumentality." In essence, BLM must demonstrate that every decision or action it takes will comply with air quality requirements.

PURPOSE AND GOALS: As defined in Section 101 of the act, its purposes are:

- 1) to protect and enhance the quality of the Nation's air resources so as to promote the public health, welfare, and productive capacity of its people;
- 2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution:
- 3) to provide technical and financial assistance to state and local governments in connection with the development and execution of their air pollution prevention and control programs; and
- 4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

The Clean Air Act was the first modern environmental law to be enacted in the United States. Enacted in July 1955, the "Air Pollution Control Act" authorized federal research, training, and assistance to state and local authorities. Compared to the

extensive requirements of the current Clean Air Act, the original version was limited in scope. But its basic tenet that state and local authorities have the main legal responsibility to protect and improve air quality remains today.

The growing impact of automobiles on air quality was recognized in the 1960 Motor Vehicle Exhaust Study Act (requiring a report on "Motor Vehicles, Air Pollution and Health") and the 1962 Air Pollution Control Act Extension to study automobile air pollutant emissions.

In 1963 the Act was amended to allow the creation of interstate compacts to provide cooperative grants to develop and improve state programs, to develop air quality criteria (establishing pollution/health cause-and-effect relationships and requiring emission permits for federal facilities), and to allow air pollution abatement through litigation.

In 1965 the Motor Vehicle Air Pollution Control Act allowed national regulation of air pollution from new motor vehicles, setting 1967 model federal standards equal to the California requirements. Minor amendments were also passed in 1966 to continue funding existing state and local air quality programs.

In November 1967 Congress passed a comprehensive Air Quality Act, forming the foundation for much of the current federal air pollution control efforts. This act created air quality control regions, the air quality criteria needed for states to establish air quality standards and implementation plans, and federal preemption of auto emissions standards (except in California).

The Clean Air Act Amendments of 1970 greatly modified the federal air pollution control program. The amendments designated oversight authority in EPA, requiring that agency to set national emission limits for significant new pollution sources and for all facilities emitting hazardous pollutants, and establishing National Ambient Air Quality Standards

(although state standards could be more stringent). With the intent to "protect and enhance the quality in the Nation's air resources," EPA established two maximum air pollution levels based on criteria needed to protect public health (primary) and public welfare (secondary) from any known or expected harm.

These amendments also established a framework for states to set emission standards (through a state implementation plan or SIP) for existing sources to achieve national standards by 1975. The SIPs were subject to federal approval, and if unacceptable, EPA was empowered to issue its own plan, which would take precedence. The 1970 act also provided for more effective federal enforcement, called for a 90 percent reduction in auto emissions by 1975, and allowed enforcement through citizen suits. Under these provisions, any person may begin a civil action on one's own behalf against any person, the United States, or the EPA Administrator without regard to the amount of controversy or citizenship of the parties. If legal action has begun, a third party can also intervene. The court may award the costs of litigation, including attorney and expert witness fees, to any party if the court finds that such award is suitable.

But the SIP regulations failed to consider preventing significant deterioration of existing air quality (i.e. all of the Nation's air could deteriorate up to the maximum standards). This issue was litigated in Sierra Club v. Ruckelshaus, where the court granted an injunction against the EPA Administrator from approving any SIP that permitted presently clean air to be degraded. In response to the decision, EPA established a regulatory scheme for prevention of significant deterioration (or PSD) of air quality in 1974. These PSD regulations were incorporated into the Clean Air Act Amendments of 1977.

The PSD program established three classes in which differing amounts of additional air pollution above background (or baseline) conditions would be

considered significant. Class I areas were those where practically any more air pollution would be considered significant (existing large national parks and wilderness areas). Class II applies to areas where deterioration normally accompanying moderate well-controlled growth would be considered insignificant (most of the country, outside of non-attainment areas). Class III areas could be designated by the state where more deterioration would be allowed (no Class III areas have been designated). Under no circumstances were air pollution levels to violate the National Ambient Air Quality Standards. The 1977 amendments also established protection of visibility (and other air quality related values, or AQRVs) in PSD Class I areas, and established a list of best available control technologies (or BACT) for specific polluting industries.

The Clean Air Act was amended again in 1990. The amendments allowed free-market acid rain emissions credit trading, again set federal auto emissions standards to existing California levels, required reformulated and alternative auto fuels, extending compliance deadlines for urban nonattainment areas, reduced allowable toxic air emissions and provided incentives for early compliance, phased out ozone-depleting chemicals; established a comprehensive state and local emission permit system; allowed EPA to issue field citations with increased fines; and called for monitoring and improving air quality along the US-Mexico border.

The Clean Air Act will certainly be amended again. The original 1955 act was 1.5 pages long; the amendments of 1990 consisted of 314 pages.

Clean Water Act, as amended (formerly Federal Water Pollution Control Act)

CITATIONS: P.L. 92-500 as amended, 33 U.S.C. 1251 et seq.

MANAGING AGENCIES: EPA has the overall responsibility for enforcing this law. The Army Corps of Engineers (ACE) administers the Section 404 Permit system. And states are given the authority to establish and enforce water quality standards.

PURPOSE AND GOALS: The objective of the Clean Water Act (CWA) "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²³ The CWA established goals for (1) eliminating discharge of pollutants into the navigable waters;²⁴ (2) wherever attainable, providing water quality for propagating fish, shellfish, and wildlife, and for recreation in and on the water; (3) banning discharge of toxic pollutants in toxic amounts; (4) providing federal assistance for publicly owned waste treatment facilities; (5) preparing and implementing an areawide treatment management plan to assure control of the pollution source; (6) making a research and demonstration effort to develop technology for eliminating the discharge of pollutants; and (7) developing programs to control nonpoint sources of pollution. The CWA established two types of pollution, point and nonpoint sources. Point source pollution is discharged at a single point, such as a pipe. Nonpoint sources of pollution are discharged from large dispersed areas such as agriculture, timber operations, urban runoff, road building, and mining activities.

Point Source Pollution

The National Pollutant Discharge Elimination System (NPDES) was established to control and eliminate point source pollution. Although CWA requires federal agencies to comply, the Supreme Court determined that federal agencies do not need state-issued permits.²⁵

Areawide Waste Treatment Management

Section 208 of the CWA provides a process to identify, if suitable, agriculture-related sources

(includes livestock grazing), mine-related sources (includes new, current, and abandoned), construction-related sources, and silviculture-related nonpoint sources of pollution. A plan (commonly referred to as a 208 Plan) is to be developed to control nonpoint source pollution to the extent feasible. The states took the lead on these plans. Section 208 allows governors to select federal agencies as "designated management agencies" responsible for implementing the plan on lands within their jurisdiction.

Water Quality Standards

Section 303 gives states the authority and responsibility to develop, publish, and review water quality standards and determine water quality limited segments (WQLS) and total maximum daily loads (TMDL).

CWA sets regulatory requirements for control of pollutants, point and nonpoint sources, in WQLS through the TMDL process.

Water Quality Inventory

Section 305(b) requires states to report biennially to EPA. The report is to contain (1) a description of the quality of all waters within the state in relation to the CWA goals; (2) an analysis of navigable water for protecting and propagating a balanced population of shell fish, fish, and wildlife; (3) an analysis of quality that would allow recreation in and on the water; (4) an estimate of environmental impacts; (5) an estimate of the economic and social costs and benefits needed to achieve the goals and an estimated date for achieving these goals; (6) a description of the nature and extent of nonpoint sources of pollutants; and (7) recommendations and estimated costs for controlling each category.

Federal Facilities Pollution Control

Section 313 requires federal agencies to comply with all federal, state, interstate, and local requirements, administrative authority, and process and sanctions for controlling and abating water pollution. It must be to the same extent as any non-government entity. This section gives states the authority to enforce provisions of water quality standards on federal agencies, including fines, injunctions, and other sanctions that could be imposed on any nonfederal entity.

Executive Order 12088 requires federal agencies to comply with all federal, state, and local pollution control standards, making agencies responsible for pollution control. EPA gives technical assistance and conducts reviews and inspections for compliance when requested by the states. The President of the United States may grant exemptions for national security and in the paramount interest to the United States.

Nonpoint Source Management Programs

Section 319 requires states to develop a nonpoint source management program that (1) determines which waters cannot reasonably be expected to meet or maintain applicable water quality standards, (2) finds nonpoint sources of pollution, (3) defines a process for determining best management practices (BMP), (4) provides measures to control identified sources and reduce those levels of pollution to the greatest extent practicable, and (5) describes state and local programs for controlling nonpoint sources.

CWA requires all federal agencies to conform to state plans.

Executive Order 12372 requires all federal agencies to allow the states to review plans for consistency. Federal agencies must accommodate states to the extent permitted by law. If unable to accommodate a state's concern, a federal agency must explain why not in writing.

Permits for Dredged or Fill Material

Section 404 gives authority to establish permits for dredging or filling in navigable waters. The Army Corps of Engineers administers the permits and must obtain a certification from the state that the activity will not degrade water to below water quality standards. EPA may prohibit activities that have an unacceptable adverse impact on water quality.²⁶

Antidegradation

EPA established regulations requiring states to develop an antidegradation policy that would restore and maintain water quality as required by the CWA. The policy must (1) maintain water quality to protect existing uses; (2) maintain current water quality when it exceeds a level needed to support existing beneficial uses (except that degradation is allowed when existing uses are protected, all reasonable cost-effective best management practices (BMPs) for nonpoint sources are employed, and the public is involved in the decisionmaking); and (3) provides for protecting and maintaining (no degradation) the highest quality waters as outstanding national resource waters.

EFFECTS ON BLM AND RELATIONSHIP TO OTHER LAWS: The Federal Land Policy and Management Act (FLPMA)²⁷ requires all BLM planning to comply with state and federal water pollution control laws. All resource management plans (RMPs) must ensure that planned activities comply with properly developed water quality standards. The CWA requires that all RMPs be consistent with state water quality standards and that BLM provide for state review of BLM plans and activities. BLM must accommodate the state's concerns to the extent allowed by law or explain in writing when it cannot do so.

The CWA allows governors to specify BLM as a designated management agency. BLM thus becomes responsible for implementing state developed water quality management plans (under sections 208 and/or 319) on public lands it administers.

BLM is required to comply with the Section 404 permit process. All activities authorized by FLPMA must be evaluated and, when needed, a permit obtained from the Corps of Engineers.

The relationship of FLPMA and the CWA makes it imperative that all activities on public land maintain or improve water quality. Such activities involve livestock grazing; rangeland improvements; wildlife habitat improvements; rights-of-way grants; recreation use permits; timber practices; road, trail, and recreation site maintenance and construction; water control; mining; and energy extraction.

Colorado River Basin Salinity Control Act of 1974.

CITATIONS: P.L. 93-320, June 24, 1974, 88 Stat. 266.

MANAGING AGENCIES: The Secretary of the Interior, through the Commissioner of the Bureau of Reclamation (BOR), has the main federal responsibility over this program. EPA's regulatory responsibility is to approve or disapprove (at the regional administrator level) the Colorado River water quality standards for salinity, as reaffirmed and proposed triennially by the seven basin states, based on consistency with Section 303 Clean Water Act requirements.

PURPOSE AND GOALS: The Colorado River Basin Salinity Control Act of 1974 provides a way for the United States to meet its water quality obligations to the Republic of Mexico, as specified in Minute 242 (the "Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River"). P.L. 93-320 also addressed water quality improvement in the United States. Title I of this law instructed BOR to build a desalting plant and brine discharge canal to meet the Mexican salinity requirements. Title II authorized construction of four salinity control units and the expedited planning of 12 other salinity control projects above Imperial Dam as part of the basinwide salinity control plan.

In brief, the goal of the Colorado River Salinity Control Act is to maintain the flow-weighted average annual salinity at or below the numeric criteria of the salinity standards.

EFFECT ON BLM: This act established policy for the Department of the Interior, which assigned the federal lead role to BOR. It is the parent act for the 1984 amendments to the act, which explicitly brought BLM into the salinity control program. Under the authorities of P.L. 93-320, the Colorado River Basin Salinity Control Advisory Council evaluates BLM annual accomplishment reports, provides feedback, and recommends program and funding changes to the Secretary of the Interior.

RELATIONSHIP TO OTHER LAWS AND

AGREEMENTS: Title I of P.L. 93-320 is the federal legislation that implements Minute 242 of the International Boundary and Waters Commission, the treaty with Mexico.

As discussed above, following adoption of the salinity standards by each basin state, EPA must approve or disapprove the standards on the basis of consistency with requirements of the CWA, Section 303.

CWA Section 319 funds have been appropriated since FY 1990 for the states to implement nonpoint source pollution control programs. EPA encourages the basin states to consider salinity control benefits in setting priorities for Section 319 funding.

Colorado River Basin Salinity Control Act Amendments of 1984.

CITATIONS: P.L. 98-569. October 30, 1984. 98 Stat. 2933.

MANAGING AGENCIES: The Secretary of the Interior, through the Commissioner of BOR has the main federal responsibility over this program. The Chief, Natural Resources Conservation Service

(NRCS) is responsible for managing the portion of the program that falls within the Department of Agriculture (USDA). The Director, USDI Bureau of Land Management is responsible for the portion of the program under BLM's jurisdiction. EPA has the same regulatory responsibility as it does under the 1974 Colorado River Basin Salinity Control Act.

PURPOSE AND GOALS: P.L. 98-569 amends P.L. 320, to authorize the entire USDA salinity control program. These amendments directed the secretaries of the Interior and Agriculture to give preference to the salinity control units (projects) with the least cost per unit of salinity reduction, i.e. the lowest dollar/ton cost (whether or not costs outweigh benefits). The Lower Gunnison Basin Stage I and the McElmo Creek Units (both in Colorado) were authorized.

P.L. 98-569 also authorized a voluntary on-farm salinity control program administered by USDA. As part of this program, the Secretary of Agriculture may allow for the voluntary replacement of incidental fish and wildlife values forgone as salinity reduction practices are implemented. The amendment allows the Federal Government to pay replacement costs of operation and maintenance of works to replace affected fish and wildlife values and increases the nonfederal cost share for USDI and USDA salinity control units to 30 percent.

The 1984 amendments directed the Secretary of the Interior for the first time to develop a comprehensive program for minimizing salt contributions to the Colorado River from BLM-managed lands.

EFFECT ON BLM: For the first time, BLM was directed to become involved as one of three action agencies in planning, implementing, and evaluating salinity control actions. BLM administers about 40 percent (48 million acres) of the lands in the Colorado River basin above Imperial Dam through its Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming state directors. BLM is

concerned with point source discharges and diffuse sources of dissolved solids. Our ability to reduce accelerated diffuse sources of salt yield from rangelands is directly related to vegetation management and ecosystem health.

RELATIONSHIP TO OTHER LAWS AND AGREEMENTS: See P.L. 93-320.

Colorado River Basin Salinity Control Act Amendments of 1995.

CITATIONS: P.L. 104-20, July 28, 1995, 109 Stat. 255.

MANAGING AGENCIES: Same as above amendments and act.

PURPOSE AND GOALS: P.L. 104-20 amends P.L. 93-320 to establish a new \$75 million salinity control construction ceiling for the BOR. By adopting a more flexible basinwide program, the amendments remove the requirement that BOR pursue congressional authorization for each salinity control unit. The BOR program is reformatted to allow the agency to react to and pursue cost-effective projects wherever the opportunity arises. Innovative partnerships, fund sharing, and requests for proposals would be used.

EFFECT ON BLM: To be determined.

RELATIONSHIP TO OTHER LAWS AND AGREEMENTS: See P.L. 93-320.

Safe Drinking Water Act of 1974

CITATIONS: P.L. 93-523, Dec. 16, 1974; 88 Stat 1660, 42 USC 300f et seq; Amended by P.L. 94-317, June 23, 1976; P.L. 94-484, Oct. 12, 1976; P.L. 95-190, Nov. 16, 1977; P.L. 96-63, Sept. 6, 1979; P.L. 96-502, Dec. 5, 1980; P.L. 98-620, Nov. 11, 1984; P.L. 99-339, June 19, 1986; P.L. 100-572, Oct. 31, 1988.

Regulations: 40 CFR 141-149

MANAGING AGENCIES: The Safe Drinking Water Act is administered by EPA although it is mostly enforced through state governments.

PURPOSE AND GOALS: The act was passed to ensure that community water systems, including those serving the public, provide water that is safe to drink. Through the regulations, the act establishes maximum levels for certain groups of compounds, chemicals, and specific characteristics of water.²⁸ Both surface and groundwater are protected as well as the "collection" area, which can be read to include the watershed that could directly affect the water supply. EPA first established national primary standards²⁹ and then national secondary standards³⁰ for the maximum containment level. As under the Clean Air Act, once the standards for the Safe Drinking Water Act are issued, the states must enforce them. Although not yet clear in the regulations, this act could significantly control off-site sources of contaminants.

Amended in 1986 to accelerate EPA's regulation of toxic contaminants, the act included a ban on lead pipe and lead solder in public water systems. It mandated greater protection of groundwater sources and set a 3-year timetable for regulating 83 chemical contaminants known or expected to occur in public water systems and possibly having an adverse health effect.³¹

EFFECT ON BLM: Many BLM lands are public culinary watersheds or important aquifers, and activities that may affect the quality of any culinary water system must not cause the contaminant level to exceed issued standards. The act allows states to establish sole-source aquifers and specially protected watersheds considered to be vitally important to supplying quality drinking water. These areas require special treatment that is generally a high degree of protection. FLPMA requires compliance with all population control laws, including the Safe

Drinking Water Act.³² The section of this law regulating underground injections³³ by permits exempts oil and gas operations. But these activities may be regulated if such requirements are essential to assuring that underground sources of drinking water will not be endangered by such injection.³⁴ Under this provision the grantor of any oil and gas lease or right-of-way expected to discharge harmful contaminants should coordinate with the state permit-issuing agency for such injections.

Specific requirements are established for monitoring water systems. The larger the system, the more often water quality samples must be taken. For example, all water systems BLM manages, such as recreation sites, must be monitored during the year. The frequency of the monitoring depends on the size of the system but is generally at least one sample per month. A potential fine of up to \$25,000 per day is allowable for violations of the act regarding failure to comply with maximum contaminant levels and monitoring requirements.

RELATIONSHIP TO OTHER LAWS: The most closely related law is the Federal Water Pollution Control Act, which protects water quality on watersheds for culinary supply.

In EPA's 309 Review of EISs, the compliance with the Safe Drinking Water Standards would be a criterion of review for the proposed action by EPA.

Comprehensive Environmental Response, Compensation, and Liability Act OF 1980 (CERCLA)

CITATIONS: P.L. 96-510, Dec. 11, 1980, 94 Stat. 2767, 42 U.S.C. 9601 et. Seq., 26 U.S.C. 4611, 4612, 4661, 4662, 4671, 4672; Amended by P.L. 96-561, Dec 22, 1980; P.L. 97-272, Sept. 30, 1982; P.L. 98-45, July 12, 1983; P.L. 98-80, Aug. 23, 1983; P.L. 98-369, July 18, 1984; P.L. 98-371, July 18, 1984; P.L. 98-396, Aug. 22, 1984; P.L. 99-499, Oct. 17, 1986; P.L. 99-509, Oct. 21, 1986; P.L. 100-202, Dec 22, 1987; P.L.

100-647, Nov. 10, 1988; P.L. 100-707, Nov. 23, 1988; P.L. 101-144, Nov. 9, 1989; P.L. 101-221, Dec. 12, 1989; P.L. 101-239, Dec. 19, 1989; P.L. 101-380, Aug. 18, 1990; P.L. 101-508, Nov. 5, 1990; P.L. 101-584, Nov. 15, 1990; P.L. 102-426, Oct. 19, 1992; P.L. 102-484, Oct. 23, 1992; P.L. 102-531, Oct. 27, 1992.

PURPOSE AND GOALS: CERCLA is better known as the Superfund Act because it established the Superfund. CERCLA has been amended many times. The amendments most important to BLM include the Superfund Amendments and Reauthorization Act of 1986 (SARA, P.L. 99-499) and the Community Environmental Response Facilitation Act of 1992 (CERFA, P.L. 102-426). In addition, Executive Order 12580, Superfund Implementation (1987, as amended by E.O. 12777) gives the Department of the Interior significant implementation authority for CERCLA on public land.

The basic purpose of CERCLA is to provide a way to quickly respond to hazardous substance emergencies (through the National Contingency Plan), establishing priority and funding to study and remediate large and long-term problems, assigning liability, seeking and determining compensation, and allowing citizens to sue to stop alleged violations of the act.

CERCLA defines "release" and criteria of when such a release becomes "reportable" to the EPA Administrator through the National Contingency Plan process administered by the Coast Guard. According to regulation, a release of a substance in amounts equal to or exceeding the reportable amount must be immediately reported to the National Response Center (NRC). The NRC was established to be the central contact point for all pollution incident reporting. As defined by CERCLA, "release" includes not only spilled materials but abandoned containers even if unopened. BLM managers can assume any hazardous substance likely to cause a problem to public health or the environment will require reporting to NRC by telephoning (800) 424-8802.

NRC will then contact officials responsible for responding if a response is needed. In many cases where removal or remedial actions are needed, BLM will be considered the lead agency for public land.

Steps in the CERCLA process are as follows:

- Discovery and Notification
- Response—
Removal site evaluation (*removal preliminary assessment*)
(*removal site inspection*)

Removal Action (*first* determine if responsible parties are known and if they are willing or able to promptly take the action)
- Inclusion on federal Agency Hazardous Waste Compliance Docket - "docket"
- Completion of Remedial Site Evaluation Preliminary Assessment (*complete within 1 year after EPA notification*)

Site Inspection (*if needed*) Scoring
through Hazard Ranking System
- Inclusion on National Priorities List
(*These steps are funded through the USDI Central Hazmat fund. Normally the following steps are taken on NPL sites, but, like all steps taken under CERCLA, these steps are not limited to NPL sites.*)

Remedial Investigation/
Feasibility Study

Selection of Remedy

- Seeking Compensation
(ongoing throughout process)
- Investigations and
Remediation
- Natural Resource Damage
Assessment

Important Highlights of CERCLA

Removal actions are short term cleanup and security actions (e.g. fencing) designed to minimize or remove threats to public health and the environment. Removal actions may be taken at any time in the CERCLA process (i.e. as recommended in a removal site evaluation or a remedial site evaluation). A reasonable effort should be made to determine if a party is a responsible and if that party can and will perform the removal.

Removal preliminary assessments are used as the first step in a removal site evaluation to determine the source and nature of the release, to evaluate the public health threat and its magnitude, and to determine if a removal is needed. If more extensive information is needed, a removal site inspection is conducted. The removal site evaluation may also recommend that a remedial site evaluation be conducted. The lead agency can terminate the site evaluation process for several reasons, including when no release is found, when an imminent and substantial danger to public health or welfare is not determined to exist, and when a responsible party is properly responding. If natural resources are or may be injured by a release, BLM, as represented by the Department of Interior, and other trustees may pursue the natural resource damage assessment (NRDA) process.

Remedial site evaluations consist of a process requiring a preliminary assessment (PA) and, if needed, a site inspection (SI). The purposes of the PA include eliminating sites that do not threaten

public health or the environment, determining if a removal action is needed, gathering information to be used in scoring the site through the Hazard Ranking System (HRS), and determining needs for a SI. Any person may petition BLM to perform a PA, but EPA generally requests that BLM perform them.

EPA sets remedial priorities for the National Priorities List (NPL). Federal facilities, which include public land, may be listed on the NPL but cannot be financed from the Superfund. EPA compiles the NPL from the HRS score; state priorities; and requirements (1) that the site has received a health advisory from the Agency for Toxic Substances and Disease Registry (ATSDR), (2) that EPA determines that the release significantly threatens public health, and (3) that EPA believes that using the remedial process will be more cost effective than using the removal process. In recent years EPA has believed that the remedial process is more cost effective than the removal process. But EPA has also opted not to list some sites on the NPL in favor of doing accelerated removals, which can be substantially less costly than following the remedial process. BLM is the lead agency on only a few NPL sites and will likely have the most hazardous waste site actions taken through the removal process.

The remedial process involves intensive site study through the remedial investigation/ feasibility study (RI/FS) and finishes with a remedial design (RD) and remedial action (RA). These actions require a substantial investment and generally take several years to complete. Natural resource damage assessments (NRDAs) are conducted pursuant to CERCLA or the Clean Water Act where injury, destruction, or loss or threat of loss of natural resources has occurred. The process is complex, and BLM has used it only on a limited basis. Such actions are coordinated through the Department of the Interior. The regulations allow a trustee to (1) issue an administrative order or pursue injunctive relief against those responsible for the discharge or release, (2) request that the Attorney General seek

compensation, (3) participate in negotiations with the potentially responsible parties (PRPs), and (4) require any person to comply with the CERCLA requirements for information gathering and access.

Other Important Aspects of CERCLA:

A recent amendment to CERCLA requires substantial documentation on the transfer of property from federal agencies concerning hazardous substances, including a covenant warranting the site. Such a covenant would basically state that all needed remedial actions have been taken or if such actions are needed in the future, the U.S. would take them unless the recipient is a potentially responsible party.

CERCLA requires several reports:

- A. An annual report for sites on the NPL.
- B. A report on progress and cost requirements of inter-agency agreements for NPL sites.
- C. An annual report on the progress in conducting investigations.
- D. An annual report on the progress in conducting remedial actions.
- E. An annual report on the progress of remedial actions that were not included on the NPL.

CERCLA requires that states and local officials be allowed to participate in planning and selecting the remedial action and accessing and reviewing data, studies, reports, and action plans.

- Government employees have a waiver of liability from dealing with response actions similar to that of response contractors.

- CERCLA requirements must be met by all Federal Government agencies.
- State laws on removal and remedial actions apply when not included on the NPL.
- High priority is given to drinking water supplies.
- CERCLA creates a series of \$25,000 administrative penalties by violation or by day, including the following:
 - a. Notification
 - b. Destruction of records
 - c. Failure to comply with orders, etc.

EFFECT ON BLM AND RELATIONSHIP TO OTHER

LAWS: BLM will have relatively few Superfund sites but will perform many studies and assessments under the CERCLA process as it has done in the past. Following the CERCLA process provides the best chance of being compensated by a responsible party. The legislation and regulations are extremely complex and often are intertwined with other laws and regulations such as the Clean Water Act and Resource Conservation and Recovery Act. Although rare among federal employees, noncompliance with CERCLA can lead to severe penalties. Ignorance of the law and ignorance of hazardous conditions are not defensible excuses.

Superfund Amendments and Reauthorization Act of 1986 (SARA)

CITATIONS: P.L. 99-499, 100 Stat 1613, 42 USC 9601.

On October 17, 1986, the Superfund Amendments and Reauthorization Act of 1986 (SARA) was enacted with the following provisions:

- * Reauthorized the program for 5 years.
- * Increased the size of the Superfund to \$8.5 billion.
- * Strengthened and expanded the cleanup program.
- * Focused on the need for emergency preparedness and community right-to-know.
- * Changed the tax structure for financing the fund.

How the Superfund Works: EPA has the main responsibility for managing cleanup and enforcement under the Superfund. A comprehensive regulation known as the National Contingency Plan (NCP) describes the guidelines and procedures for implementing this law.

Because every Superfund site is unique, cleanups must be tailored to the needs of each site or to the release of hazardous substances. From the beginning of the process, EPA encourages those responsible to pay for cleanup. But if an immediate problem threatens human health, welfare, or the environment, EPA will act.

If efforts to ensure responsible party response do not lead to prompt action and EPA determines that action is needed, EPA can initiate the following:

- * Removal actions—short-term actions that stabilize or clean up a hazardous materials site threatening human health or the environment. Typical removal actions include removing tanks or drums of hazardous substances on the surface, installing fencing or other security measures, and providing a temporary alternative source of drinking water for residents.

Or EPA can initiate the following:

- * Remedial actions—the study, design, and construction of longer term and usually more expensive actions aimed at permanent remedies. EPA can respond in this way only at sites on the National Priorities List (NPL)—the Nation's most serious hazardous waste sites. Typical remedial responses include removing buried wastes from the

site, installing clay caps over sites, building underground walls to control groundwater movement, incinerating or solidifying wastes on-site, or providing a permanent alternative source of drinking water.

Removal Actions: Hazardous materials can be removed from any site, including sites on the NPL. Removals may be ordered, for example, to clean up hazardous material spills from an overturned truck or train, to keep the public from being exposed to hazardous substances, or to protect drinking water from contamination.

CERCLA limited each removal to 6 months and a cost of \$1 million, but EPA could grant exemptions to these limits under the following conditions:

- * Continued federal response is needed to prevent, limit, or control an emergency.
- * Human health or welfare or the environment is at immediate risk.
- * Such assistance could not be obtained from another source on a timely basis.

SARA raises the limits on removal actions to 12 months and \$2 million and provides another exemption: the removal can continue if it is consistent with long-term actions to be taken at the site.

Remedial response is a long and complicated process. After learning of a site, EPA's first step is to review all information about it. If this preliminary assessment finds a hazardous waste problem that may pose risks to human health or the environment, EPA orders a site inspection. These inspections include visiting the site; sampling drums, soil, surface water, and groundwater where needed; and documenting the site layout and terrain. By a system designed to rank site hazards, sites to be proposed for the NPL are determined. After a public comment

period, sites meeting the criteria will be placed on the final NPL.

SARA also set the following goals:

- * By January 1988, EPA should have completed preliminary assessments for all facilities listed in the inventory of potentially hazardous waste sites as of October 17, 1986.
- * EPA should complete site inspections at all facilities in the inventory, where needed, by January 1989. Since each NPL site presents a unique set of challenges, no single, all-purpose solution exists. A workable and permanent solution is devised through a four-stage process.
- * The Remedial Investigation/ Feasibility Study (RI/FS) examines the type and extent of contamination and selects possible remedies. SARA set several requirements for this phase of remedial response:
 - Remedies must protect human health and the environment, be cost effective, and emphasize use of permanent solutions that encourage treatment of recycling rather than land disposal.
 - Remedies must meet all federal and state standards for protecting human health and the environment.
 - By December 1988 health assessments must be completed at all sites proposed for the NPL as of October 17, 1986 and at all newly proposed NPL sites within 1 year after the proposal.
 - A record of decision (ROD) documents the action plan for the remedy chosen for a site and provides background on the decision. The ROD also provides the basis for future EPA efforts to recover fund monies spent on cleanup from responsible parties.
 - The remedial design (RD) details design plans and cleanup specifications.

-Remedial action (RA), also known as the construction or implementation phase, follows the completion and approval of the remedial design and includes site cleanup measures. SARA requires EPA to begin 175 new remedial actions by October 1989 and another 200 by October 1991.

State Involvement: States have always been encouraged to participate in the Superfund process. (Under SARA, Indian tribes are generally treated as states.) Now states are more formally involved in selecting, initiating, and developing remedial responses. EPA must formulate state participation regulations that allow opportunities to participate, including review and comment on planning documents, involvement in long-term planning, and participation in negotiations.

Either EPA or the state may take the lead in managing cleanups. When EPA takes the lead, the Army Corps of Engineers manages the remedial design and remedial action phases for EPA. Private contractors conduct the work at a site under federal or state government supervision.

Research, Development, and Training: Whereas CERCLA does not provide for research, development, and training, SARA established a research and development program, including demonstration programs for technologies that offer alternatives to conventional methods of handling site cleanups and favor destruction or recycling of wastes rather than land disposal. SARA also calls for setting up training programs for hazardous substance response and research.

Enforcement Authorities: Based on the principle that "the polluter should pay," CERCLA contains authorities that allow EPA to ensure that those responsible for hazardous waste problems pay for cleanup. Superfund enforcement authorities enable EPA to encourage responsible parties to undertake cleanup and to recover from responsible parties fund monies spent for cleanup.

* Cleanup Action - In case of imminent hazard to human health or the environment, CERCLA authorizes EPA to order the responsible party to undertake actions to control the threat. EPA can either issue an administrative order or bring a civil action against the responsible party. SARA provides procedures for negotiating settlements with responsible parties to conduct response actions. The following actions can be used to encourage voluntary cleanup.

* Criminal Authorities—Criminal penalties have been increased for failing to notify proper authorities of a release. Submitting false information is now a criminal offense.

* Citizen Suits—SARA authorizes a citizen to sue any person, the United States, or a state for any violation of standards and requirements of the law.

* Access to Sites—SARA strengthens EPA's ability to obtain access to sites to investigate them and conduct cleanups.

* Cost Recovery—EPA can recover cleanup costs for Superfund-financed responses from responsible parties. Past and present facility owners and operators and producers or transporters of hazardous substances can all be liable under CERCLA for response costs and for damage to natural resources. EPA may recover federal response costs from responsible parties involved in a cleanup. The dollars recovered go back into the fund for use in future responses.

Community Involvement: Because residents of a community with a Superfund site face the hazardous waste problems of that site, EPA encourages such residents to participate in determining the best way to clean up the site. To ensure effective and substantive two-way communications from the outset at each remedial response site, a community relations program is tailored to local circumstances. EPA or state staff will often interview residents, local

officials, and civic leaders to learn all they can about the site and the community's concerns.

These interviews are conducted before and during field work on the remedial investigation. SARA formalizes EPA community relations policy and public participation requirements outlined in the National Contingency Plan. SARA also requires EPA to do the following:

- * Publish a notice and brief analysis of the proposed remedial action plan;
- * Allow the public to comment on that plan;
- * Conduct public meetings to allow for two-way communication on the remedial action plan;
- * Release a copy of the public meeting transcript to the public; and
- * Respond to each significant comment on the proposed remedial action plan.

Community relations activities somewhat differ during a removal action, where human health and the environment must be protected from an immediate threat. During the first phase of these response actions, EPA's main responsibility is to inform the community of actions being taken and their possible effect on the community.

SARA also requires EPA to develop a grant program to fund technical assistance for those affected by a release. These grants help concerned citizens understand and interpret technical information on the nature of the hazard and on recommended alternatives for cleanup. Each NPL site is limited to one grant not exceeding \$50,000. In addition, the grant recipient must contribute at least 20 percent of the total cost of the grant.

Federal Facilities: SARA confirms that the Superfund applies to states and federal agencies, which must

comply with its requirements. SARA also defines the remedial response process federal agencies must follow. If the federal agency and EPA disagree, EPA must select the remedy. State and local officials must be allowed to participate in planning and selecting any remedy at a federal facility, including reviewing all data. States are given a formal opportunity to review remedies to ensure that they incorporate state standards. SARA also provides a schedule for response actions at federal facilities, including a schedule for preliminary assessments, listing on the National Priorities List, remedial investigations and feasibility studies, and remedial actions.

New Authorities: In passing SARA, Congress gave EPA significant new authorities. These authorities formalize federal, state, and local cooperation in emergency preparedness and expand EPA's responsibilities to include locating and cleaning up leaking underground petroleum storage tanks through state cooperative agreements.

Emergency Preparedness and Community Right-to-Know: In response to the tragic toxic chemical release in Bhopal, India, and a later serious incident in Institute, West Virginia, Congress established new reporting requirements for facilities that handle hazardous chemicals. Congress also authorized new measures to increase the Nation's focus on emergency preparedness. Title III of SARA establishes a Preparedness and Community Right-to-Know Program, which has four major elements:

- * Emergency Planning requires designating state emergency response commissions and local emergency planning committees that prepare local contingency plans in cooperation with local hazardous chemical handlers.
- * Emergency Notification requires hazardous chemical handlers to immediately notify the local emergency planning committee and state emergency response commission when a hazardous chemical has been released.

* Right-to-Know requires handlers to give the public and local planning committees information on chemicals being produced, used, or stored.

* Emissions Inventory requires chemical handlers each year to report any emissions of hazardous chemicals to EPA, which maintains this information in a public inventory.

Leaking Underground Storage Tank (LUST) Trust Fund: Increasing evidence of groundwater contamination from leaks in underground petroleum storage tanks led Congress to add new response authorities to the Resource Conservation and Recovery Act (RCRA) to regulate underground storage tanks and respond to leaks that threaten the Nation's groundwater. Under these authorities, EPA issues regulations for underground storage tanks. EPA and states that have entered into cooperative agreements with EPA have also been authorized to take corrective action or order a tank owner or operator to take corrective actions to protect human health and the environment.

Resource Recovery Act

CITATIONS: P.L. 91-512, 84 Stat 1227, 42 USC 3251.

MANAGING AGENCIES: EPA has overall authority for administering this law.

PURPOSE AND GOALS: The ultimate aim of this law is as follows:

“Promote the demonstration, construction, and application of solid waste management and resource recovery systems that preserve and enhance the quality of air, water and land resources.”³⁵

While this goal is worthy, the act provides for no real enforcement or standard-setting powers and is therefore mainly a financial aid and research law to

help states and local governments set up solid waste management programs.

The closest thing to any standards are suggested solid waste and resource recovery guidelines that EPA is authorized to develop.

EFFECT ON BLM: The Resource Recovery Act provides for setting up a national system of disposal sites for the following:

“Storage and disposal of hazardous wastes, including radioactive, toxic chemical, biological and other wastes that may endanger public health or welfare.”³⁶

For such sites on public lands, BLM would adjust affected planning and grant rights-of-way and clearances. But BLM could benefit from using the research and guidelines in its own solid waste management programs for a local government agency that has a right-of-way for such disposal on public lands.

Unless a state or local government uses the guidelines developed under this act, the act requires no federal compliance to standards as under FLPMA.³⁷

Resource Conservation And Recovery Act, as amended (RCRA)

CITATION: P.L. 95-580, 90 Stat 2795, 42 USC 6901.

The Resource Conservation and Recovery Act (RCRA), an amendment to the Solid Waste Disposal Act, was passed in 1976 to address an enormous problem—how to safely dispose of huge volumes of municipal and industrial solid waste generated nationwide.

PURPOSE AND GOALS: The goals of this act are to protect human health and the environment, to reduce waste and conserve energy and natural

resources, and to reduce or eliminate the generation of hazardous waste as expeditiously as possible.

To achieve these goals, three distinct yet interrelated programs were developed under RCRA. The first program, outlined under Subtitle D, encourages states to prepare comprehensive plans for managing solid wastes, mainly nonhazardous types such as household waste. The second program, outlined under Subtitle C, establishes a system for controlling hazardous waste from its generation to its ultimate disposal, in effect, from cradle to grave. The last of the three programs, outlined under Subtitle I, regulates underground storage tanks, setting performance standards for new tanks and requiring leak detection, prevention, and correction at underground tank sites.

Although RCRA creates a framework for managing hazardous and nonhazardous solid waste, it does not address the problem of hazardous waste at inactive or abandoned sites or of hazardous waste spills requiring emergency responses. These problems are addressed by the Comprehensive Environmental Response, Compensation, and Liability Act, CERCLA.

RCRA is really an amendment to the first piece of federal solid waste legislation. In 1965 the Solid Waste Disposal Act was passed to improve solid waste disposal methods. It was amended in 1970 by the Resource Recovery Act, and again in 1976 by RCRA. RCRA changes remodeled the Nation's solid waste management system and greatly expanded hazardous waste management provisions.

Continuously evolving to reflect changing needs, RCRA has been amended twice since 1976, once in 1980 and most recently in 1984. The 1984 Hazardous and Solid Waste Amendments (HSWA), significantly expanded RCRA's scope and requirements.

RCRA is divided into nine subtitles, A through I. Subtitles A, B, E, F, G, and H outline, respectively, general provisions; authorities of the EPA

Administrator; duties of the Secretary of Commerce; federal responsibilities; miscellaneous provisions; and research, development, demonstration, and information. Subtitles C, D, and I lay the framework for the three programs that make up RCRA: hazardous waste management, solid waste, and underground storage tanks.

Subtitle D—Solid Waste: Subtitle D establishes a voluntary program through which states receive federal financial and technical support to prepare and implement solid waste management plans. Among other things, these plans are intended to promote recycling of solid wastes, and require the closing or upgrading of all environmentally unsound dumps. EPA's role in the Subtitle D program has been to establish regulations for states to follow in developing and implementing their plans, in approving state plans that comply with such regulations, and in providing grant money for implementing the plans. EPA has also issued minimum technical standards that all solid waste disposal facilities must meet when disposing of solid wastes.

Subtitle C—Hazardous Waste: Subtitle C establishes a program to manage hazardous wastes from cradle to grave. The objective of the Subtitle C program is to assure that hazardous waste is handled in a manner that protects human health and the environment. To this end, Subtitle C regulations deal with the generation; transportation; and treatment, storage, or disposal of hazardous wastes. In practical terms, Subtitle C regulates many hazardous waste handlers.

The Subtitle C program has resulted in perhaps the most comprehensive regulations EPA has ever generated. These regulations first list hazardous solid wastes and then set administrative requirements for the three categories of hazardous waste handlers: generators; transporters; and owners or operators of treatment, storage, and disposal facilities (TSDs). Setting technical standards for the design and safe operation of TSDs to minimize the release of

hazardous waste into the environment, the regulations or TSDs serve as the basis for issuing permits for each facility. Permits are essential to the Subtitle C regulatory program, since through the permitting process EPA and states apply the technical standards to facilities.

One of the prime differences between subtitles C and D is the type of waste they regulate. Subtitle C regulates only hazardous waste, a subset of solid waste, whereas Subtitle D mainly manages nonhazardous solid waste. Subtitle C also differs from Subtitle D in being a regulatory rather than a voluntarily state grant program. Subtitle C was established as a federally run program to be delegated to states. Subtitle D began as a state program.

Subtitle I—Underground Storage Tanks: Subtitle I of RCRA is a new program created by the Hazardous and Solid Waste Amendments to regulate petroleum products and hazardous substances stored in underground tanks. Similar to the hazardous waste program, this regulatory program may also be delegated to states. Under Subtitle I, EPA must establish regulations setting performance standards for new tanks as well as standards covering leak detection and prevention and corrective action for new and existing underground storage tanks. The objective of Subtitle I is to prevent tank leakage that could pollute the environment, especially groundwater.

Toxic Substances Control Act (TSCA)

CITATIONS: P.L. 94-469, Oct. 11, 1976; 90 stat. 2003, 15 U.S.C. 2601, et seq.; Amended at P.L. 97-129, Dec. 29, 1981; P.L. 97-258, Sept. 13, 1982; P.L. 98-80, Aug. 23, 1983; P.L. 98-620, Nov. 11, 1984; P.L. 99-519, Oct. 22, 1986; P.L. 100-368, July 18, 1988; P.L. 100-418, Aug. 23, 1988; P.L. 100-551, Oct. 28, 1988; P.L. 101-637, Nov. 28, 1990; P.L. 101-508, Nov. 5, 1990; P.L. 102-550, Oct. 28, 1992.

MANAGING AGENCIES: As the administrator of the act, EPA is required to ensure that new chemical substances and mixtures do not pose an unreasonable risk to health, safety, and the environment.

PURPOSE AND GOALS: The basic intent of this act is to prevent the discharge into the environment of toxic chemicals that “present an unreasonable risk of injury to health or the environment.”³⁸ To meet this goal, EPA can restrict, limit, or otherwise control the use and distribution of chemicals that present such a risk.³⁹ Among such chemicals are polychlorinated biphenyls (PCBs), which are extremely hazardous to human health.

TSCA established the following policy of the United States:

- (1) Adequate data should be developed regarding the effect of chemical substances and mixtures on health and the environment, and the development of such data should be the responsibility of those who manufacture and process such chemical substances and mixtures.
- (2) Adequate authority should exist to regulate chemical substances and mixtures that present an unreasonable risk of injury to health or the environment and to take action with respect to chemical substances and mixtures that are imminent hazards.
- (3) Authority over chemical substances and mixtures should be exercised so as not to unduly impede or create unneeded economic barriers to technological innovation while fulfilling the main purpose of this act—to assure that such innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment.

Such substances and mixtures are considered as organic or inorganic substances but do not include food, drugs, pesticides (as defined in the Federal Insecticide, Fungicide, and Rodenticide Act), tobacco,

or nuclear materials defined under the Atomic Energy Act.

EFFECT ON BLM: TSCA is only slightly related to BLM's general activities, but in using, distributing, or authorizing the use of such chemicals, BLM must comply with this law and closely monitor such uses or distribution.

TSCA requires that, upon request by EPA, all federal departments and agencies make their services, people, and facilities available to help EPA administer this law, providing data and other information.

Testing of Chemicals: TSCA authorizes EPA to require chemical manufacturers or processors to test the health and environmental effects of chemicals already being distributed in commerce. EPA exercises this authority only when it can make certain statutory findings about the substance involved and when industry fails to develop the needed data on its own. These required findings are (1) that not enough data exists for performing a reasonable risk assessment, (2) that testing is needed to provide such data, (3) that a chemical may present an unreasonable risk to human health or the environment, or (4) that the chemical is produced in large enough amounts to result in significant human exposure or environmental release.

EPA imposes testing requirements only after a rulemaking proceeding that includes opportunities for both written public comments and oral presentations at a hearing.

TSCA establishes a committee that represents health-related agencies and determines if a substance needs further testing on the basis of available data. A list of substances to be tested is maintained and cannot exceed 50 substances or mixtures.

Premanufacture and Significant New Use

Notifications: EPA may designate a chemical use as a significant new use after considering several factors,

including the expected extent and type of human or environmental exposure. Anyone intending to manufacture, import, or process a chemical for a significant new use (even if the chemical is on the inventory or went through premanufacture notification review) must notify EPA 90 days before manufacturing, importing, or processing the chemical for that use.

Chemicals produced in small amounts solely for experimental or research and development purposes are automatically exempt from the premanufacture and significant new use notification requirements. Anyone may apply for an exemption for chemicals used solely for test marketing or for chemicals that EPA determines not to present an unreasonable human health or environmental risk.

EPA determines if a substance presents a reasonable risk and actions needed to make unreasonable risks reasonable. EPA has an option of banning the production of a substance.

TSCA deals with the manufacture and processing of a new substance relating to the safety, health, and environmental effects of the substance; use, exposure, and volumes to be produced; and test data. TSCA requires EPA to regulate a hazardous chemical substance and mixture if it is found to present an unreasonable risk of injury to health or the environment. Regulation may include prohibiting or limiting production, processing, or distribution; marking containers of such substances with warnings and instructions; setting requirements for record keeping, monitoring, and testing; and establishing quality control procedures.

Recordkeeping and Reporting: A major challenge for the TSCA program was to devise a way to determine chemicals likely to damage human health or the environment so that industry or EPA could act. Because information existed for only a handful of chemicals, Congress authorized EPA to inventory

existing chemical substances and to gain more information on these questions.

In 1979 EPA published its first inventory, based on information from chemical manufacturers, importers, and processors. The inventory, to which new chemicals are added when they go into production, shows that nearly 58,000 commercial chemical substances have been manufactured or imported into the United States since January 1, 1975.

TSCA requires EPA to make a public report about the potential health effects, handling requirements, and other information on hazardous substances and requires EPA to develop specific rules about certain substances, particularly disposal methods, warnings, and instructions. In addition, TSCA allows EPA to seize or provide relief for imminent hazards caused by a hazardous chemical substance or mixture or any article containing such a substance.

TSCA addresses the asbestos hazard by establishing regulations requiring the inspecting of asbestos-containing material and the implementing of response actions in the nation's schools. TSCA defines the forms of asbestos in public and commercial buildings. And TSCA implemented the EPA program for indoor radon abatement and lead-based paint abatement.

Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA)

CITATIONS: P.L. 100-532, 102 Stat 2654, 7 USC 136.

On October 25, 1988, the President signed into law the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Amendments of 1988. The 1988 amendments to FIFRA, which is administered by EPA, strengthen EPA's authority in several major areas of pesticide regulation. The amendments require a substantial acceleration of the reregistration process for previously registered (licensed) pesticides

and authorize collecting fees to support reregistration. The amendments also changed EPA's responsibilities and funding requirements for storing and disposing of suspended and canceled pesticides and the indemnifying of holders of remaining stocks of canceled pesticides.

Background on FIFRA: Under FIFRA, all pesticides must be registered with EPA before they are sold or distributed in commerce. FIFRA sets an overall risk-benefit standard for pesticide registration, requiring that pesticides perform their function when used according to labeling directions, without posing unreasonable risks to human health or the environment. In making pesticide registration decisions, EPA must by law consider the economic, social, and environmental costs and benefits of pesticide uses.

Since FIFRA was enacted in 1947, thousands of pesticide products have been registered. But pesticide registration standards have evolved with science and public policy. Test data requirements for pesticides have become increasingly stringent in light of advances in such areas as toxicology and analytical chemistry. Under FIFRA, companies that hold pesticide registrations must provide all test data needed to satisfy EPA requirements.

To ensure that previously registered pesticides measure up to current scientific and regulatory standards, FIFRA requires the review and reregistration of all existing pesticides, a massive undertaking. Of roughly 600 pesticide active ingredients that require reregistration under FIFRA, EPA has issued registration standards for about 185. A registration standard includes a comprehensive review of all available data on a chemical, a list of more data needed for full registration, and EPA's current regulatory position on the pesticide.

FIFRA authorizes EPA to cancel the registration of an existing pesticide if test data show that it unreasonably harms human health or the

environment. In addition, under certain circumstances EPA may suspend a pesticide's registration to prevent an imminent hazard.

Until the 1988 amendments, FIFRA required EPA to accept certain suspended and canceled pesticides for disposal at government expense. In addition, an indemnification provision required EPA to reimburse holders of suspended and canceled pesticides for financial losses suffered up to the cost of the pesticide.

1988 FIFRA Amendments: As the main focus of the 1988 amendments, reregistration provisions establish requirements with tight deadlines. A sequence of deadlines applies to pesticide registrants, who must supply complete test data bases for EPA to decide on pesticide reregistrations. EPA must also meet highly specific deadlines in analyzing data submissions and deciding whether to reregister currently registered pesticides. Reregistration involves the following five phases:

* Phase 1: EPA is required to publish lists of pesticide active ingredients subject to reregistration and to ask registrants of pesticide products containing those active ingredients whether they intend to seek reregistration. These lists were to be published in four installments within 10 months after the effective date of the 1988 amendments.

* Phase 2: Registrants are required to respond to EPA concerning their intention to seek reregistration. For each active ingredient, registrants seeking reregistration must also list missing and inadequate scientific studies needed to satisfy EPA's current data requirements, formally agree to fill these data gaps by prescribed deadlines, and pay the first portion of a reregistration fee. Phase 2 responses are required within 3 months after EPA publishes each chemical list. If a registrant decides not to seek reregistration, the registration is canceled.

* Phase 3: Registrants are required to summarize and reformat key existing studies to facilitate EPA review, to certify that they have access to raw data (such as laboratory records) from studies, to "flag" any studies that show adverse effects, to commit either to generate or share the cost of generating new test data where studies are missing or inadequate, and to pay the final reregistration fee. Registrants must accomplish these Phase 3 requirements within 1.5 to 2 years after passage of the 1988 amendments. Registrants must then fulfill remaining data requirements within designated timeframes.

* Phase 4: EPA is required to complete its review of submissions made by registrants under Phases 2 and 3, to independently find data gaps, and to issue requirements for registrants to fill those gaps. This phase takes place over a period of 2 to 4 years after enactment of the 1988 amendments.

* Phase 5: This phase culminates the reregistration process under FIFRA as amended in 1988. It requires EPA to comprehensively examine all data submitted in support of pesticide reregistration. In response to this review, EPA will either reregister a pesticide or take other regulatory action. This phase occurs over a span of roughly 3 to 9 years after enactment of the 1988 amendments, depending on such variables as the complexity of the studies required for registration and the time needed for registrants to complete and for EPA to review these studies.

Expedited Registration: The 1988 amendments also require EPA to expedite consideration of applications for initial or amended registration of products that are similar to pesticides already registered with EPA. "Similar" products include those identical in composition to currently registered products and those differing from registered products only in ways that would not significantly increase the risk to public health and the environment. In addition, EPA must expedite certain minor amendments to existing product registrations.

Under the expedited review provisions, within 45 days after receiving an application EPA will notify the applicant that the application is or is not complete. Within 90 days after receiving a complete application, EPA will notify the registrant in writing whether the request is granted or denied. If the request is denied, EPA will give the reasons for denial. EPA will use a portion of the fees it collects to expedite the processing of similar applications and minor registration amendments.

Storage and Disposal of Suspended or Canceled

Pesticides: The 1988 amendments expand EPA's authority to regulate the storage, transportation, and disposal of pesticides. In addition to the authority to require data on storage and disposal methods, EPA is authorized to establish labeling requirements for transporting, storing, and disposing of the pesticide and its container. The new law also enables EPA, for the first time, to enforce storage, disposal, and transportation violations.

The 1988 amendments eliminate from FIFRA the requirement that, upon request, EPA must accept suspended and canceled pesticides and dispose of them at government expense. Also under the amendments EPA may require registrants and distributors to recall suspended and canceled pesticide products. EPA is authorized to require registrants to give evidence of their financial ability to conduct such a recall. To facilitate recalls EPA may require all vendors, distributors, and commercial users of pesticides to notify EPA and state and local officials of the amounts and locations of suspended and canceled pesticides in their possession.

A registrant who wishes to become eligible for reimbursement of storage costs resulting from a recall must submit a pesticide storage and disposal plan that meets criteria to be established by EPA. Registrants will be reimbursed for portions of their storage costs attributable to delays in approval of storage plans.

To lessen the problems of pesticide container disposal, the amendments require EPA to study options to encourage or require the following:

- * Return, refill, and reuse of pesticide containers.
- * Development and use of pesticide formulations that facilitate the removal of pesticide residues from containers.
- * Use of bulk storage facilities to reduce the number of pesticide containers requiring disposal.

The 1988 amendments also authorize EPA to regulate procedures for storage, transport, and disposal of containers, rinsates (such as water used to clean a pesticide container), and other materials used to contain or collect excess or spilled pesticides. Additionally, to promote the safe storage and disposal of pesticides, EPA is directed to issue, within 3 years, regulations for the design of pesticide containers. These forthcoming regulations will facilitate the safe use, disposal, and refill and reuse of pesticide containers.

Indemnity Payment: Before the 1988 FIFRA amendments, if it suspended and canceled the registration of a pesticide, EPA was required under FIFRA to indemnify holders of the pesticide for losses suffered up to the cost of the pesticide. But FIFRA was silent about the source of funding for any indemnification (or disposal) payments. Persons previously covered by indemnification included users (such as farmers and commercial pesticide applicators), pesticide formulators, dealers and distributors, and registrants.

Ending automatic entitlement to indemnity payments for all persons other than certain users, the 1988 amendments provide for all indemnity payments to come from the Judgment Fund of the Treasury, not from EPA's operating budget. Users, such as farmers, will continue to be eligible for indemnification through the Judgment Fund.

Indemnification to anyone other than users may be paid under the 1988 amendments only if Congress provides a line-item appropriation. The 1988 amendments also require all pesticide sellers (including registrants and wholesalers) to reimburse buyers for the purchase price of a product whose registration is suspended and canceled, unless at the time of purchase the seller informed the buyer in writing that the seller would not make such refunds. If EPA determines that a business insolvency or bankruptcy makes such reimbursements impossible, dealers and distributors will also be eligible for indemnification from the Judgment Fund.

Soil and Water Resources Conservation Act of 1977

CITATIONS: P.L. 95-192, 91 Stat. 1407.

This law requires the Secretary of Agriculture to access, develop, and periodically update the condition of soil and water resources on private and other nonfederal lands. Assessment includes program policy and direction for a term of roughly 10 years. The next update will be due to Congress in 1998. BLM is not obligated to respond to this law but can benefit through it by cooperating with the Natural Resources Conservation Service (formerly the Soil Conservation Service), conservation districts, and the Forest Service. The law encourages cooperation with other agencies and can help BLM improve the effectiveness of coordinated management activity planning and share resource data use to make the assessments.

V. BIOLOGICAL RESOURCES PROTECTION AND CONSERVATION

These laws are resource specific or aimed only at one aspect of the environment as opposed to the previous two categories, which are comprehensive in coverage. The important difference is that these laws set priorities for protecting or enhancing single

resources, whereas comprehensive laws are generally multiple use oriented and give no priority to a single resource. As each of these laws emphasizing wildlife protection is applied to BLM programs or planning, this difference should be kept in mind. Because FLPMA and NEPA are omnibus laws, covering all BLM activities and programs, both should be generally viewed as superior guidance to the more narrow focus of these laws. Any law stating that it supersedes or is superior to all other laws⁴⁰ is the governing guidance.

Biological resource law has evolved from broad, loosely stated statutes to more species- and habitat-specific protection laws. The earlier, more broad-based laws should be read in conjunction with the newer, more specific laws to get a perspective on the congressional attitude toward wildlife.

The following list of biological resource laws is by no means complete but contains the most important laws relating to BLM's environmental responsibilities.

Fish and Wildlife Coordination Act

CITATIONS: P.L. 85-624, 72 Stat 563, 16 USC 661, 1958 US Code Cong. and Ad. News 3446, 1965 US Code Cong. and Ad. News 1864.

MANAGING AGENCIES: Any federal agency proposing to build a project that will affect waters of the U.S. is responsible for implementing this law and must consult with the U.S. Fish and Wildlife Service (FWS) and the state fish and wildlife agency.

REGULATIONS: 50 CFR 21.1, 25.1, 26.2, 27.1, 28.1, 29.1, 30.1, 31.1, 32.1, 33.1, 70.1, 71.1.

PURPOSE AND GOALS: The goal is best stated in the act itself as

"to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-

resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation."⁴¹

To ensure equal consideration, the law requires that whenever a federal agency is involved in any action that affects waters of the U.S., the agency must do two things. First, it must consult with the FWS and the state fish and wildlife agency on the means and procedures for "preventing loss of or damage to such (wildlife) resources"⁴² and mitigating any anticipated losses. (To aid in preventing such losses, the law requires that all recommendations to Congress for water project appropriations include an in-depth cost-benefit analysis for wildlife impacts). Second, all federal water projects must provide for conservation, maintenance, and management of wildlife and its habitat. Note: Certain land management actions are exempt (i.e. building stockpounds).

LEGAL INTERPRETATIONS: The following are brief key summaries of applicable cases.

The wildlife analysis in an EIS may but does not necessarily satisfy the required analysis of this act [EDE v. Froehlke 473 F 2d 345 (1972)].

The agency in charge of the water project must substantively consider how to mitigate potential harm and ensure the "putting of fish and wildlife on the basis of equality with flood control, irrigation, navigation, and hydroelectric power in our water resource programs." Zabel v. Tabb 430 F 2d 199, cert. denies 401 US 910.

The EIS and accompanying mitigation plan must show that the agency has made an in-depth study of the unmeasured wildlife values that are to be lost [Akers v. Resor 339 F Supp. 1375, 1376 (1972)].

For a discussion of this act and its application, see EDF v. Corps of Engineers [Gillham Dam Case) 325 F Supp. 749 (1971)].

EFFECT ON BLM: Whenever considering authorizing water resource projects involved in writing an EIS for such projects, BLM (and other involved agencies) must consider in both the EIS and the mitigation plan all mitigation and impact analyses requested by the FWS and the state fish and wildlife agency as a result of required consultation. BLM must ensure that wildlife are equally considered along with other values and interests.

RELATIONSHIP TO OTHER LAWS: The courts view the Fish and Wildlife Coordination Act as being closely tied to and compatible with the substance and procedure of NEPA, and all NEPA analyses related to wildlife should keep the goals of this law in mind.

Endangered Species Act of 1973 (ESA)

CITATIONS: P.L. 93-205, 87 Stat 889, 16 USC 1531, 1973 U.S. Code Cong. Ad. News 2989.

MANAGING AGENCIES: Overall responsibility for implementing this law lies with the Secretary of the Interior through the U.S. Fish and Wildlife Service (FWS) and the Secretary of Commerce, through the National Marine Fisheries Service (NMFS). When federal agencies propose actions or projects that may affect federally listed threatened or endangered species, FWS, NMFS, or both must be consulted. In certain instances FWS can enter into cooperative agreements with states for managing programs to protect endangered and threatened species.

REGULATIONS: 50 CFR 17.1, Executive Order 11911 "Preservation of Endangered Species."

PURPOSE AND GOALS: The main goal and purpose of this law is to prevent species from becoming extinct. To accomplish this, the law (1) prohibits importing any international species considered

threatened or endangered, or parts of such species, into the U.S. and (2) establishes measures to protect and conserve domestic plant and animal species that are considered endangered or threatened, including the ecosystems or habitat on which they depend. The protection and conservation measures provided for in the law include listing of threatened and endangered species, critical habitat designation, recovery, prohibited activities, permits, fines, and consultation.

When any federal action might jeopardize the existence of a threatened or endangered species or destroy or modify the habitat of such species, even to the species' benefit, the responsible federal agency must consult with the FWS, NMFS, or both and

"take such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species or result in the destruction or adverse modification of habitat ...determined by the Secretary [of the Interior] to be critical."⁴³

LEGAL INTERPRETATIONS: For a general discussion of the overall law in a court's view, see Sierra Club v. Froehlke, 534 F2d1289 (1975). Decisions in two important cases have held that the Section 7 (16 USC 1536) requirement for protecting habitat is unbending and absolute. The following is language quoting from these cases:

Section 7 imposes on Federal agencies to insure that their actions will not either (i) jeopardize the existence of an endangered species or (ii) destroy or modify critical habitat of an endangered species."

National Wildlife Federation v. Coleman 529 F2d359 (1976). In the next case, which held similar to Coleman, the issue as to whether excessive economic losses can exempt compliance with Section 7 was resolved as follows:

"Whether a dam is 50% or 90% completed is irrelevant in calculating the social and scientific costs attributable to the disappearance of a unique species."

Hill v. Tennessee Valley Authority 549 F2d106A (1977)

EFFECT ON BLM: Before engaging in or allowing any activity that might modify or affect the critical habitat of a federally protected species, BLM must follow three procedures. First, BLM must request from FWS, NMFS, or both a listing of species that may occur in the project area. Second, BLM must consult with FWS or NMFS where suitable. Finally, BLM must conduct an in-depth analysis to ensure that the action will not jeopardize the existence of the species or destroy or modify its habitat even if such habitat exists on private surface (but is affected by a BLM decision on public lands).

RELATIONSHIP TO OTHER LAWS: As with the Fish and Wildlife Coordination Act, the National Environmental Policy Act is viewed as supporting ESA's environmental protection intent. ESA's requirements should be considered in all alternatives to the proposed action in the respective EA or EIS.

In addition, a close correlation exists between the overall intent and framework of the Fish and Wildlife Coordination Act and this act in the FWS's review of water resource projects.

ESA is under consideration for reauthorization by the 104th Congress.

Wild Free-Roaming Horses and Burros Act of 1971

CITATIONS: P.L. 92-195, 85 Stat 649, 16 USC 1331, 1971 US Code Cong. and Ad. News 2149.

MANAGING AGENCIES: BLM, through the Secretary of the Interior, has the responsibility for wild horses

and burros on BLM-administered lands. The Forest Service, through the Secretary of Agriculture, has responsibility for these animals on Forest Service lands. In addition, federal-state cooperative agreements can also be used for managing these animals.⁴⁴

REGULATIONS: 43 CFR 4700.0-1 to 4770.5.

PURPOSE AND GOALS: The aim of the act is to legally protect wild horses and burros and to declare them to be "an integral part of the natural system of the public lands."⁴⁵ To carry out this aim, the departmental secretaries are authorized to write rules to protect wild horses and burros from capture, branding, harassment, or death.⁴⁶ The environmental guidance or criterion for this management is "to achieve and maintain a thriving natural ecological balance on the public lands."⁴⁷ As a part of the management program, the animals can be captured and sold to private parties⁴⁸ or destroyed.⁴⁹ When they stray onto private lands, BLM will arrange to have them removed.⁵⁰

LEGAL INTERPRETATIONS: One of the most significant legal cases involved a management conflict between the State of New Mexico and BLM about controlling these animals. This case, Kleppe v. New Mexico 96 S ct 2285 (1976), went to the Supreme Court, which ruled that Federal laws are supreme and overrule any state laws conflicting with public land management.

Another case questioned whether BLM abused its discretion in authorizing a roundup and whether an EIS is required for such a roundup. The court answered no to each of these assertions in American Horse Protection Association v. Frizzell, 403 F Supp 1206(1975).

EFFECT ON BLM: Where wild horses or burros inhabit public lands, BLM offices must address managing these animals in its planning process.

Proposals for roundups or herd management plans will usually require preparing EAs, and major actions will require EISs.

RELATIONSHIP TO OTHER LAWS: Wild horse and burro protection is to be a part of the overall wildlife management and protection programs under FLPMA.

Bald Eagle Protection Act of 1972

CITATIONS: P.L. 92-535, 86 Stat 1065, 16 USC 668, 1959 USC 668, 1959 Code Cong. and Ad. News 1675, 1972 US Code Cong and Ad. News 4285.

MANAGING AGENCIES: The Department of the Interior, through the U.S. Fish and Wildlife Service (FSW), is the general administering agency.

REGULATIONS: 50 CFR 10.1, 11.1, Executive Order 1164 (1972).

PURPOSE AND GOALS: The Bald Eagle Protection Act applies to both bald and golden eagles. In addition, the bald eagle is designated as endangered on the federal threatened and endangered list and on many state lists. The golden eagle is not listed as a threatened or endangered species but is protected by state and federal laws and regulations.

This law declares that bald and golden eagles are protected species and that no one can "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, or at any time or in any manner... any part, nest, or egg" of these eagles.⁵¹ An exception to this law allows FWS to issue eagle permits for (1) scientific or exhibition purposes, (2) Indian religious purposes, (3) taking of depredating eagles, (4) using golden eagles for falconry, and (5) taking inactive nests of golden eagle.

LEGAL INTERPRETATION: The only significant case referencing this law is United States v Hertzell, 385 F Supp 1311.

EFFECT ON BLM: Beyond general enforcement authority, this law's most significant effect on BLM is its requirement that any lease, license, permit, or other agreement authorizing grazing on federal lands must be immediately canceled if it is held by a convicted violator of this law.⁵²

Migratory Bird Treaty Act of 1918

CITATION: P.L. 65-186, 40 Stat 755, 16 USC 703.

The Migratory Bird Treaty Act of 1918 is an international agreement with Canada, Mexico, Japan, and Russia that prohibits the attempt or actual pursuit, hunt, capture, or kill of any migratory bird, or any part, nest, egg, or products without proper authority, such as a legal hunting license or special permit. While originally aimed at protecting waterfowl from overhunting and exploitation, the act also protects nongame migratory birds.

Any activity (except legal hunting or special permits) violates this law if it deliberately, accidentally, or incidentally results in taking or possessing migratory birds or any part, nest, or egg. Violations also include commercial activities that incidentally or accidentally kill migratory birds, such as spraying pesticides or other toxins, releasing toxic substances into waterways, maintaining oil sludge pits, or building and maintaining powerlines that cause bird strikes or electrocution. This act and its requirements must be considered and incorporated into all BLM environmental assessments and environmental impact statements.

Animal Damage Control Act of 1931 (ADC)

CITATIONS: P.L. 71-776, as amended, 46 Stat. 1468, USC 426-426b.

All animal damage control conducted on public lands must comply with federal and state laws and

regulations, including provisions of the Toxic Substances Control Act of 1976 (as amended), the Federal Insecticide and Rodenticide Act of 1947 (as amended), the Endangered Species Act, and the Environmental Protection Agency use restrictions for M-44 devices.

Congress authorized the ADC program to conduct activities relating to most wildlife damage situations. ADC field activities are conducted under authorizations received from cooperating federal and state regulatory agencies. Under this law, "The Secretary of Agriculture is hereby authorized and directed to conduct investigations, experiments, and tests as he may deem necessary in order to determine, demonstrate, and promulgate the best methods of eradication, suppression, or bringing under control on national forests and other areas of public domain as well as on state, territory, or privately owned lands of mountain lions, wolves, coyotes, bobcats, prairie dogs, gophers, ground squirrels, jackrabbits, and other animals injurious to agriculture, horticulture, forestry, animal husbandry, wild game animals, fur-bearing animals, and birds, and for the protection of stock and other domestic animals through suppression of rabies and tularemia in predatory or other wild animals, and conduct campaigns for the destruction or control of such animals, provided, that in carrying out the provision of this section, the Secretary of Agriculture may cooperate with states, individuals, and public and private agencies, organizations, and institutions."

Public Rangelands Improvement Act of 1978 (PRIA)

CITATIONS: P.L. 95-415, 92 Stat 1803.

This act reemphasized the concepts expressed in FLPMA as they relate to rangeland management. PRIA requires maintenance of the updated range condition and trend inventory; multiple use management; and consultation, cooperation, and

coordination with persons affected by resource management decisions. PRIA established on a trial basis the grazing fee formula still in use today as well as the Experimental Stewardship Program. PRIA also authorized substantial financial investment in rangeland improvements through 1999.

Executive Order 11990, Protection of Wetlands

CITATIONS: VOL. 42 No. 101, FR, 26961, May 25, 1977.

President Jimmy Carter said, "Wetlands are areas of great natural productivity, hydrological utility, and environmental diversity, providing natural flood control, improved water quality, recharge of aquifers, flow stabilization of streams and rivers, and habitat for fish and wildlife resources." On May 24, 1977, the value of wetlands was officially recognized when the President signed Executive Order (E.O.) 11990, Protection of Wetlands. This E.O., still in effect, requires federal agencies to minimize the destruction, loss, or degradation of wetlands while preserving and enhancing their natural and beneficial values on federal property. It restricts most activities that could potentially affect wetlands administered by the Federal Government. Activities mentioned in the E.O. include acquisition, management, and disposal of lands; federally undertaken, financed, or assisted construction and improvements; and federal activities and programs affecting land use, including water and related land resources planning, regulating, and licensing.

Effect on BLM and Relationship to Other Laws

In furtherance of Section 101(b) (3) of the National Environmental Policy Act of 1969 [42 U.S.C. 4331 (b) (3)] to improve and coordinate federal plans, functions, programs, and resources to the end that the Nation may attain the widest range of beneficial uses of the environment without any risk to health or safety, BLM (and other agencies) shall avoid

undertaking or providing assistance for new construction in wetlands unless no practicable alternative to such construction exists and the proposed action includes all practicable means to minimize harm to wetlands that may result from such use.

VI. PRESERVATION OF HISTORICAL, CULTURAL, AND NATURAL VALUES

This category of laws is similar to the wildlife category in that instead of being comprehensive it concerns a specific resource. This category is also unique because nonfederal resources must be considered when involved in a federal undertaking. The historic preservation/cultural laws include procedural consideration and legal protection of resources. The procedural laws (National Historic Preservation Act) address all federal undertakings and are thus more like the National Environmental Policy Act than being concerned with a specific resource (even though the law protects only historic properties). In many instances the state takes the lead in recognizing and nominating sites or areas for protection and overseeing the federal agencies and the implementation of the National Historic Preservation Act.

National Historic Preservation Act of 1966

CITATIONS: P.L. 89-665, 80 Stat 915, 16 USC 470, 1966 U.S. Code Cong. and Ad. News 3855; amended: P.L.s 91-243, 93-54, 94-422, 94-458, 96-244 and 96-515.

MANAGING AGENCIES: Each agency is responsible for administering this law, but state review authorities have significant responsibility for federal compliance with its provisions. The Department of the Interior, through the National Park Service and the Advisory Council on Historic Preservation, has responsibility for national oversight.

REGULATIONS: Executive Order 11593 "Protection and Enhancement of the Cultural Environment." 39 *Federal Register* 3366 (1974) "Procedures for Compliance with Section 106 of the National Historic Preservation Act of 1966" *Federal Register* 5388-90 (1973). 36 CFR 800, 36 CFR 60, 36 CFR 63.

PURPOSE AND GOALS: First, this law declares the national policy that our historical heritage "should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."⁵³

This law applies only to federal agency actions and not to private actions. *Ely v. Velde* 451 F2d1130 (1971).

Compliance with NEPA does not necessarily mean compliance with E.O. 11593. *Warm Springs Task Force v. Gribble* 417 US 1301.

An EIS must describe impacts to cultural environments of national, state, or local significance. *Stop 11-3A Association v. Brinegar* 389 F Supp 102, revised on other grounds 533 F 2d 434 (1974).

Proposed federal actions affecting a National Register property must go through the special environmental clearance through the Advisory Council on Historic Preservation separate from or in addition to the NEPA process. *Save the Courthouse Committee v. Lynn* 408 F Supp 1323 (1975).

EFFECT ON BLM AND RELATIONSHIP TO OTHER LAWS: FLPMA's inclusion of historical values as a basic value in managing public lands, coupled with NEPA, makes the preservation procedures an integral part of the BLM system of planning and environmental assessment.

The Advisory Council on Historic Preservation Guidelines (36 CFR 800) detail how all federal agencies must consider historic properties, including survey areas of a proposed action. BLM must closely

follow these guidelines. Where the potential exists for impacts to cultural or historical properties, EAs and EISs should reflect an analysis of suitable scope.

To have enough remaining sites or area of historic significance, the law sets out a strategy of designating significant sites and then requiring federal agencies (and state agencies if federally assisted) to consider actions to avoid damage to the historic value of these sites. The Advisory Council on Historic Preservation regulates federal agency impacts⁵⁴ by administering Section 106 review of federal projects. Under this review every federal agency responsible for a proposed action must consider the effects of the undertaking on any district, site, building, structure, or object listed on the National Register.⁵⁵ Consideration is by undertaking and not by ownership.

LEGAL INTERPRETATIONS: The focus of legal concern has been Section 106, which has been interpreted as follows:

The Advisory Council on Historic Preservation's regulations (36 CFR 800) bind all federal agencies if they have no follow-up regulations. *See Save the Courthouse Committee v. Lynn* 408 F Supp 1323 (1975).

NEPA did not necessarily intend to broaden the scope of Section 106, but the two laws are highly compatible in intent. *St. Joseph Historical Society v. Land Clearance for Redevelopment Authority for St. Joseph* 366 F Supp 605 (1973).

Antiquities Act of 1906

CITATIONS: P.L. 59-209, 34 Stat 225, 16 USC 431.

MANAGING AGENCIES: The National Park Service, through the Secretary of the Interior, has general administrative authority, but all federal agencies have authority to enforce the act.

REGULATIONS: 43 CFR 3.1 - 3.17.

PURPOSE AND GOALS: Authorizes the President to designate national monuments, historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest on federal lands,⁵⁶ this act extends protection to certain cultural resources on federal lands by requiring a permit for removal.⁵⁷

EFFECT ON BLM AND RELATIONSHIP TO OTHER

LAWS: The newer Archeological Resources Protection Act of 1979 is the dominant law in archeological resource preservation, and the use of the Antiquities Act is specialized to areas with potential for national monument designation.

One case held the act to be unusable for enforcement against violators because the terms "ruin," "monument," and "object of antiquity" are too vague to enforce. United States v. Diaz. 499F 2d 113 (1974).

Historic Sites Act of 1935

CITATIONS: P.L. 74-292, 49 Stat. 666; 16 USC 461.

This law declares it national policy to identify and preserve historic sites, buildings, objects, and antiquities of national significance, providing a foundation for the later National Register of Historic Places. The National Historic Landmarks program of the National Park Service derives from this act.

Reservoir Salvage Act of 1960 as amended by the Archeological and Historic Preservation Act of 1974

CITATIONS: P.L. 86-523; 74 Stat 220, 221; 16 USC 469; P.L. 93-291; Stat. 174; 16 USC 469.

This act provides for preserving historical and archaeological data that might otherwise be lost as the result of a federal construction project or a federally licensed or assisted project, activity, or

program. Although amended and broadened after 1966, the act makes no distinction regarding National Register eligibility. The act provides that up to 1 percent of funds authorized by Congress for a project may be spent from project funds to recover, preserve, and protect archaeological and historical data. Because BLM projects are rarely subject to line item authorization and appropriation, this provision generally does not apply to BLM.

American Indian Religious Freedom Act of 1978

CITATIONS: P.L. 95-341, 92 Stat. 469, 42 USC 1996.

This act declares that it is the policy of the United States to protect and preserve for the American Indian, Eskimo, Aleut, and native Hawaiian the inherent right of freedom to believe, express, and exercise traditional religions, including access to religious sites, use and possession of sacred objects, and freedom to worship through ceremonies and traditional rites. The act directs federal agencies to evaluate their policies and procedures to determine if changes are needed to ensure that such rights and freedoms are not disrupted by agency practices. The freedom of religion for all people is an inherent right guaranteed by the First Amendment of the United States Constitution. A U.S. Court of Appeals has determined that this act has a compliance element requiring that (1) the views of Indian leaders be considered when a proposed land use might conflict with traditional Indian religious beliefs or practices and that (2) unneeded interference with Indian religious practices be avoided during project implementation, but specifying that (3) conflict need not necessarily bar federal agencies from adopting proposed land uses in the public interest.

Archeological Resources Protection Act of 1979, as amended

CITATIONS: P.L. 96-95, 93 Stat. 721, USC 470aa et seq. 43 CFR part 7, 36 CFR part 79.

This law establishes definitions, permit requirements, and criminal and civil penalties to correct legal deficiencies in the American Antiquities Act of 1906. It provides felony-level penalties more severe than those of the Antiquities Act for the actual or attempted unauthorized excavation, removal, damage, alteration, or defacement of archaeological resources more than 100 years old found on public or Indian lands. It makes no distinction regarding National Register eligibility. This act also bans the sale, purchase, exchange, transporting, receipt, or offering of any archaeological resource obtained from public or Indian lands in violation of any federal law. This act also requires proper curation of archeological records and materials, identification of archeological resources, and active public awareness efforts.

Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)

CITATIONS: P.L. 101-601, 104 Stat. 3048, 25 USC 3001-3013.

NAGPRA recognizes Indian tribes and native Hawaiian organizations as owners of human remains, funerary and sacred objects, and objects of cultural patrimony, and requires federal agencies and federally funded museums to inventory certain categories of cultural items, summarize other kinds, and notify tribes of the results. Tribes and native Hawaiian organizations may then request the repatriation of cultural items to which they can show reasonable cultural or biological affiliation. NAGPRA provides for civil penalties for the trafficking in human remains and cultural items and establishes a review committee to advise on carrying out the law and resolving ownership disputes.

Federal Cave Resource Protection Act of 1988

CITATIONS: P.L. 100-691, 102 Stat. 4546, 15 USC 4301-4309.

This act requires federal agencies to protect significant caves to the "extent practicable." Its main provisions are Section 4, which directs the Secretary of the Interior to issue regulations requiring the identification of significant caves and Section 5, which authorizes the Secretary to withhold cave location information. This law also provides for permits and penalties for collecting and removing cave materials and contains disclaimers relating to water rights and mining and mineral leasing laws.

Executive Order 11593, Protection and Enhancement of the Cultural Environment, May 13, 1991

This executive order directs federal agencies to inventory cultural properties under their jurisdiction, to nominate to the National Register of Historic Places all federally owned properties that meet the criteria, to use due caution until the inventory and nomination processes are completed, and to assure that federal plans and programs contribute to preserving and enhancing nonfederally owned properties. Some of this executive order's provisions were incorporated into Section 110 of the National Historic Preservation Act by amendment.

National Trails System Act of 1968

CITATIONS: P.L. 90-543, 825 Stat 919, 16 USC 1241, 1968 U.S. Code Cong. and Ad. News 3855.

MANAGING AGENCIES: Both the Departments of the Interior and Agriculture have general administrative authority over national trails, depending on the lands through which they pass. In addition, most major trails have advisory councils.

REGULATIONS: Exchanges of land for trails 43 CFR 2270.3, land use 36 CFR 251.1, public lands 36 CFR 2.1.

PURPOSES AND GOALS: This act's main goal is to establish a national system of recreation trails along routes having national significance,⁵⁸

"so located as to provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural or cultural qualities of the areas through which such trails may pass."⁵⁹

This act established three types of trails: (1) national scenic trails, which are extended trails containing campsites and shelter; (2) national recreation trails, shorter trails near or in urban areas; and (3) connecting or side trails.

In addition to designated trails, the act named 22 other trails for study.⁶⁰

EFFECT ON BLM AND RELATIONSHIP TO OTHER LAWS: Whenever a trail is proposed for designation, it must secure a right-of-way wherein,

"That in selecting the rights-of-way, full consideration shall be given to minimize the adverse effects upon the adjacent landowner or use and his operation."⁶¹

Further, the management of the trails system "shall be designated to harmonize with and complement any established multiple-use plans for that specific area in order to insure continued maximum benefits from the land."⁶²

The trails system is seen as a part of and equal to uses within BLM's multiple use planning, and RMPs should consider trail potentials in their evaluations.

The act authorizes exchange of private land for public lands within the state⁶³ and prohibits

motorized vehicles on national trails unless they are found "necessary to meet emergencies or to enable adjacent landowners or land users to have reasonable access to their lands or timber rights."

LEGAL INTERPRETATIONS: The decision in the only case specific to this act stated that no federal actions were prohibited in areas under study for designation as a national trail.

Peterson v. Froehlke 354 F Supp 45, remanded 494 F 2d 124.

Wilderness Act of 1964

CITATIONS: P.L. 88-577, 78 Stat 890, 16 USC 1131, 1964 US Code Cong. and Ad. News 4476.

MANAGING AGENCIES: The agency managing the land in which the wilderness lies has general administrative authority over the wilderness area.

PURPOSE AND GOALS: The basic intent is to establish areas within the federal land system for protection as wilderness "for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness."⁶⁴

To create these areas, Congress, through Section 603 of FLPMA, specified a study period for the public lands. During this period all roadless areas of 5,000 acres or more (generally) are to be analyzed for their suitability as wilderness. Wilderness is defined in depth by law, and the definition should be carefully studied⁶⁵ as it applies to BLM wilderness studies.

Once agencies determine which areas are suitable for wilderness, their recommendations are forwarded to the Secretary of the Interior and then to the President for review. The President then makes recommendations to Congress. Only Congress can designate such areas as wilderness.⁶⁶

EFFECT ON BLM AND RELATIONSHIP TO FLPMA:

Section 603 of FLPMA requires BLM to conduct wilderness suitability studies on all roadless areas of 5,000 acres or more or roadless islands, using the criteria in the Wilderness Act, "a wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, education, scenic, or historical value."⁶⁷

BLM guidelines for inventory, study, interim management of study areas, and management of designated BLM wilderness areas are included in handbooks, policy guides, and the 8500 series of the BLM manual.

ADDITIONAL READING:

Wilderness Management, by John C. Hendee, George H. Stankey, and Robert C. Lucas, North American Press. Issued under the auspices of the International Wilderness Leadership Foundation in Cooperation with the USDA Forest Service, 1990.

103 Wilderness Laws: Milestones and Management Direction in Wilderness

Legislation, 1964-1987, by James A. Browning, John C. Hendee, and Joe W. Roggenbuck,

Idaho Forest, Wildlife, and Range Experiment Station, University of Idaho, Bulletin Number 51, October 1988.

Wild and Scenic Rivers Act of 1968, as amended (1970)

CITATIONS: P.L. 90-542, 82 Stat. 906, 16 USC 1271, 1968 Code Cong. and Ad. News 3801.

MANAGING AGENCIES: The National Park Service maintains the National Rivers Inventory and may advise other federal agencies on the study and analysis of potential rivers. But the land management agency through whose jurisdiction the river flows will generally play the lead role. States can also request that the Secretary of the Interior directly designate streams within their boundaries for inclusion in the system.

REGULATIONS: Land exchanges 43 CFR 2273.0-3, land use provisions 36 CFR 251.1. Fish and Wildlife Service administration 50 CFR 25.1, 27.1, 32.1, 29.1, 26.1, 28.1, 31.1, 33.1; Forest Service Administration 36 CFR 211.1, 231.1, 292.1, 293.1, 200.1, 261.1, 291.1, 224.1, 221.1, 241.1. National Park Service Administration 36 CFR 1.1, 3.0, 5.1, 10.1, 6.1, 8.1, 25.1, 4.1, 2.1, 7.1, 20.1, 21.1.

PURPOSE AND GOALS: The purpose of this act is to provide a way to protect selected streams "in their free-flowing condition" together with their immediate environments for the benefit of present and future generations, rather than allowing them to be developed by the building of dams and other stream-altering features. This policy is intended to complement the parallel national policy of allowing dams and similar construction on other streams.

WSRA specifies the values that qualify a river for consideration for protection, namely "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values."⁶⁸

Rivers having these values may be considered for inclusion in the National Wild and Scenic Rivers System, which requires an act of Congress. But the simple presence of these factors does not invoke the protection of WSRA. In other words, if a stream has these factors, it might eventually be protected, but no protection is provided to any given stream until Congress says so. Thus, protection under WSRA is a political decision made in the context of competing interests for the water and uses of the land.⁶⁹

The Wild and Scenic Rivers Act does not operate like the Wilderness Act. The Wilderness Act, together with Section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), mandated protection of all areas of at least 5,000 acres that met certain criteria, such as being roadless, until they were released from wilderness consideration by Congress. These are called wilderness study areas. There is no corresponding provision in WSRA. The only rivers protected under WSRA are those that Congress has designated to receive protection. WSRA provides two classifications of protection: permanent protection (by being included in the National Wild and Scenic Rivers System) and limited term protection for streams being actively considered for inclusion in the System, i.e. study rivers). Only Congress can apply either type of protection. WSRA specifies that a study river can be protected for only a limited period but also provides that this protection can be ended whenever the President or secretary of the department with jurisdiction determines not to recommend permanent protection to Congress and releases the stream from further consideration, or if Congress refuses an affirmative recommendation from the secretary and the President.

If Congress requests a recommendation or if a managing agency makes a recommendation on its own, the recommendation should be for one of three types of designations mentioned in WSRA:

1) Wild rivers, which

"are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted."⁷⁰

2) Scenic rivers, which

"are free of impoundments, with shorelines largely undeveloped, but accessible in places by roads."⁷¹

3) Recreational rivers, which

"are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past."⁷²

EFFECT ON BLM: Much of the work involving WSRA that BLM employees might be engaged in will have to do with the land use planning process. The above discussion is important because of frequent misunderstandings concerning the operation of WSRA. In preparing a land use plan, first determine whether Congress has designated any rivers or streams in the area as part of the National Wild and Scenic Rivers System. If so, that designation is binding and should be incorporated into the plan. Management of the stream corridor along a designated stream or stream segment must be compatible with the goals and objectives of WSRA.

Similarly, if Congress has designated a stream as a "study river," you may become involved in studies of the stream corridor pointed toward an eventual possible recommendation to Congress. Be aware of the status of the stream study and that during the study (within the time limits set by WSRA) the protection against stream development prohibits any federal action, such as FERC licenses for dams, powerhouses, or powerlines, or even federal loans,

grants, or licenses to private entities within the designated study corridor, unless and until the BLM/USDI decides against recommending the stream for permanent protection and releases the stream from further protection. Here again, WSRA differs from the Wilderness Act in that for study rivers the studying agency has authority to release the stream from further consideration without further action by Congress. Even if no formal release is made or no formal recommendation is made, this temporary protection lasts only for a specific period set by Congress. [Generally 3-7 years, see 16 U.S.C. § 1278 (i) and (ii).]

Finally, WSRA directs land managing agencies such as BLM to examine all streams in a given planning area for their potential for inclusion in the National Wild and Scenic Rivers System and authorizes the appropriate secretary to make recommendations to Congress for inclusion in the system. In this instance, however, WSRA itself does not protect the stream and stream corridor. Any protection BLM may decide to give is discretionary and must originate in some other authority, such as the planning authority of Section 202 of FLPMA. This is the only protection that BLM can provide under its own authority without congressional action. This protection is not an action under WSRA and is subject to revision in later plans or as the result of an application for a plan amendment. The only requirement WSRA imposes on BLM is to consider and address wild and scenic rivers potential in developing resource management plans. WSRA does not require protecting any streams other than those Congress has so designated. The BLM Manual provisions addressing these issues are being revised to reflect the above factors.

On September 7, 1982, the Secretaries of Agriculture and of the Interior published in the *Federal Register* joint Guidelines for Eligibility, Classification, and Management of River Areas within the National Wild and Scenic Rivers System. The guidelines provide definitions, procedural

requirements, and principles to be used during eligibility and suitability studies and in post-designation management plans [*Federal Register*, Vol. 47, No. 173, pages 39454-39461].

VII. COASTAL AND FLOODPLAIN MANAGEMENT

These area-specific laws are concerned with the special conditions and environment of the nation's oceans and shorelines.

Coastal Zone Management Act, as amended

CITATIONS : P.L. 89-454, 86 Stat 1280, 16 USC 1451.

MANAGING AGENCIES: The states are the main managers of this program, with federal land managing agencies playing a coordination role.

PURPOSE AND GOALS: This act focuses on encouraging states to establish management programs⁷³ at a regional level and to create or maintain comprehensive land use planning for coastal areas of participating states. If state and federal agencies disagree, the Executive Office of the President resolves the issues of disagreement.

EFFECT ON BLM: Once a coastal management program is implemented, all agency activities that affect the areas must comply with the program's guidance unless some overriding national interest is involved.

RELATIONSHIP TO OTHER LAWS: Authorizing federal-state management agreements, the Estuary Protection Act⁷⁴ closely relates to the management of coastal zones in estuarine areas.

ADDITIONAL READING: Because of the complexity of coastal management and its restriction to a special geographic area, those who work in coastal areas should read the chapter, "Coastal Development" in

Federal Environmental Law, Erica L. Dolgin and Thomas G.P. Guilbert, eds, West Publishing Co., 1974.

Coastal Barrier Improvement Act of 1972

CITATIONS: P.L. 101-591, 104 Stat 2961, 16 :USC 3501.

MANAGING AGENCIES: The states are the main managers of this program in conjunction with the Coastal Zone Management Act of 1972, with the Director, U.S. Fish and Wildlife Service preparing and maintaining maps. Section 6 provides for a Pacific coastal barrier protection study and maps, which could influence BLM-managed lands south of 49° north latitude by being included in the system.

REGULATIONS: (To be developed).

PURPOSE AND GOALS: The purpose of this act is to protect undeveloped coastal barriers and other areas on the United States coast to prevent potential loss of human life; damage to fish, wildlife, and other natural resources; and the potential for the wasteful spending of federal revenues.

EFFECT ON BLM: BLM lands may be designated by the Fish and Wildlife Service, state or local governments, or the public. Designated lands would require BLM to conform to the program unless some overriding national interest is involved.

RELATIONSHIP TO OTHER LAWS: This act is integrated in intent and implementation with the Coastal Zone Management Act of 1972.

ADDITIONAL READING: BLM offices with potential coastal barrier lands should consult state agencies for local publications and approved plans.

Outer Continental Shelf Lands Act

CITATIONS: P.L. 83-212, 675 Stat 462, 43 USC 1331, 1953 US Code Cong. And Ad. News 2177.

MANAGING AGENCIES: The Department of the Interior has jurisdiction over these lands and their leasing.

PURPOSE AND GOALS: An extension of the Submerged Lands Act (discussed below), this law places all submerged lands of the outer continental shelf, including artificial islands and fixed structures used for mineral exploitation, under jurisdiction of U.S. laws and constitutional powers. The coastal state's tax laws do not apply to leasing of minerals by the Secretary of the Interior, and minerals must be leased so as to prevent waste and conserve natural resources.⁷⁵

RELATIONSHIP TO OTHER LAWS: All leasing is covered by NEPA requirements, and the wetland protection sections of the Federal Water Pollution Control Act apply to activities directly affecting these shoreline areas.

Submerged Lands Act

CITATIONS: P.L. 83-31, 67 Stat 29, 43 USC 1301. 1953 US Code Cong. And Ad. News 1385.

MANAGING AGENCIES: The Department of the Interior has general leasing and enforcement oversight for lands covered by this law.

PURPOSE AND GOALS: This law gives the leasing and administrative jurisdiction of lands defined as "beneath navigable waters" to the states, relinquishing any control by the United States. Lands seaward of these submerged lands are under jurisdiction of the United States under the Outer Continental Shelf Lands Act. Land beneath navigable waters includes all areas seaward to a line 3 miles (3

marine leagues for Texas and the Gulf Coast of Florida) from a state's coastline and all lands formally beneath navigable nontidal waters that have been reclaimed by filling.

The term "lands beneath navigable waters" does not include streambeds on public lands if they were not meandered in connection with the public seaway and if the title to the beds of such streams were lawfully patented or conveyed by the United States or any state to any person.

Executive Order 11988, Floodplain Management, May 24, 1977

CITATIONS: Vol. 42, No. 101, FR 26951

E.O. 11988 requires agencies to the extent possible to avoid the long- and short-term adverse impacts associated with the occupancy and modification of floodplains and to avoid the direct or indirect support of floodplain development whenever a practicable alternative exists. Resulting BLM policy directs managers to assess and mitigate floodplain issues through land use planning. According to policy, BLM must manage floodplains to

- *maximize natural hydrologic function;
- *minimize the risk of flood damage to human safety, health, and welfare;
- *retain floodplains in public

ownership;

*avoid floodplain development and where unavoidable, implement mitigating measures to minimize impacts.

BLM draft Manual 7260 provides advice and details to floodplain management. Unavoidable floodplain development should involve the Corps of Engineers and may require a 404 permit.

The term floodplain refers to any land area susceptible to being inundated from any source of flooding.

EFFECT ON BLM AND RELATIONSHIP TO OTHER LAWS

Before taking an action, BLM shall determine whether the proposed action will occur in a floodplain—for major federal actions significantly affecting the quality of the human environment [Section 102 (2)(c)] of NEPA.

Most of the BLM's wetlands are located on floodplains, so the E.O. 11990, Protection of Wetlands also applies if wetlands are affected.

When activities must be carried out in a floodplain or wetland, the work must be done in a manner that, to the extent possible, will reduce the risk of flood loss in a floodplain, minimize the destruction or degradation of wetlands, and preserve and enhance their natural and beneficial fish and wildlife values.

VIII. MINERALS AND ENERGY MANAGEMENT

Mineral and energy management laws are not traditionally considered environmental. Many were passed to authorize and control the exploration and development of minerals on public lands, with only a secondary thought to environmental effects. But over the years the acts were amended and regulations were prepared to consider the environment in removing liquid, solid, and gaseous minerals. These laws are listed here to show how they either require environmental protection or interact with laws that offer some protection from mineral and energy development.

General Mining Law of 1872

CITATIONS: P.L. 42-152, 17 Stat 91, 30 USC 22, et. seq.

REGULATIONS: The 43 CFR 3802 regulations apply to mining conducted under the United States mining laws as it affects the resources and environment of the wilderness suitability of lands under wilderness review. The 43 CFR 3809 regulations establish procedures for preventing unneeded and undue degradation of federal lands, other than wilderness study areas, resulting from mining authorized by the mining laws.

PURPOSE AND GOALS: This is the fundamental legislation that authorizes hard rock mining on public domain lands. Under this law, a person has a statutory right, consistent with other laws and BLM regulations, to go upon the unappropriated and unreserved public lands to prospect for, develop, and extract locatable minerals. Under certain conditions the land may pass from public to private ownership.

EFFECT ON BLM: Laws have generally upheld the rights of a citizen to stake and claim lands for mineral development. Withdrawal provisions, the undue and unnecessary degradation provisions of FLPMA, and the 3800 regulations have provided some protection for the environment, but the conflict between mining rights and the environment is often a problem.

If a claim is valid, the owner has many rights to develop the minerals. A common problem to BLM is establishing the validity of a claim because the determination of validity is generally a lengthy and expensive process.

RELATIONSHIP TO OTHER LAWS: FLPMA requires the Secretary of the Interior to regulate mining to prohibit “undue and unnecessary” environmental degradation. NEPA applies to all operations in wilderness study areas and all other disturbed areas exceeding 5 acres. See 43 CFR 3809.1-4 for list of

special areas that are not exempted from NEPA because they consist of 5 acres or less.

Mineral Leasing Act of 1920, as amended

CITATIONS: P.L. 66-146, 41 Stat. 437, 30 USC 181.

MANAGING AGENCIES: The Secretary of the Interior is charged with the responsibility of managing leasing on federal lands under provisions of this act. This authority has been delegated to the Bureau of Land Management in most cases, with the exception of offshore leasing.

REGULATIONS: This act is implemented by regulations in 43 CFR 3100, 3400, and 3500. As an example, the 3101.1-3 regulations authorize protective stipulations to be attached to leases; “The Authorizing Officer may require stipulations as conditions of lease issuance.”

Section 4 of the 1960 amendment states that leases are “subject to rules and regulations“ and that “nothing in this act shall be construed to amend, repeal, modify, or change NEPA.”

PURPOSE AND GOALS: The purpose of the act is to authorize and provide for the leasing of deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States. Though not strictly an environmental law, this act provides for conditions on right-of-ways and permits for pipelines to control and prevent environmental damage, including soil erosion, and to restore resources and take corrective actions for pipelines that could potentially damage the land.

EFFECT ON BLM AND LEGAL INTERPRETATIONS: Many cases and Interior Board of Land Appeals (IBLA) decisions have concerned the apparent conflict between the environmental and mineral leasing, particularly oil and gas leasing. Understandably, most cases are NEPA related.

RELATIONSHIP TO OTHER LAWS: Probably more NEPA interaction has resulted from oil and gas activities than from any other program.

Federal Coal Leasing Amendments Act of 1976

CITATIONS: P.L. 94-377, 90 Stat. 1083, 30 USC 201.

PURPOSE AND GOALS: Before issuing a coal lease, the managing agency must consider the effects of mining, including environmental impacts and can prescribe conditions for the use and protection of the nonmineral interests on leasable lands. Leases must also comply with the Federal Water Pollution Control Act and the Clean Air Act. Split-estate leases (surface and mineral rights under different ownership) may be subject to conditions prescribed by another surface management agency to protect nonmineral interests.

Surface Mining Control and Reclamation Act of 1977 (SMCRA)

CITATIONS: P.L. 95-87, 91 Stat. 445, 30 USC 226.

MANAGING AGENCIES: Department of the Interior, Agriculture, and others.

PURPOSE AND GOALS: Designed to reduce the harmful environmental effects of surface coal mining, SMCRA contains environmental protection and performance standards for such operations. It authorizes the closing of lands to surface mining where such mining would cause significant harm, such as to certain wildlife species. And it provides for acquiring and reclaiming abandoned surface mines.

Alaska National Interest Lands Conservation Act of 1980

CITATIONS: P.L. 96-487, 94 Stat. 2371, 16 USC 3148, 30 USC 181 note.

PURPOSE AND GOALS: This act provides for the designating, mapping, managing, and conserving certain public lands in Alaska, including the following for BLM: six wild and scenic rivers, nine study rivers, a national conservation area, and a national scenic highway. This law also mandates a review of withdrawals and other types of segregation and establishes a schedule for opening public lands to the operation of the general land laws and mineral leasing and mining laws. This act gives Alaska much broader authority to regulate locatable minerals than did the 1872 Mining Law, which did not cover mining in Alaska. Subjecting certain mining to regulations to protect fish and game, this law also protects wildlife from North Slope oil and gas exploration and development.

Minerals Materials Act of 1947

CITATIONS: P.L. 80-291, 61 Stat. 681, 30 USC 601 et seq.

This law authorizes BLM to sell minerals at fair market value using a competitive and noncompetitive system and to grant free use permits for mineral materials to federal, state, and local government agencies. It also allows BLM to issue free use permits for a limited amount of materials to nonprofit organizations.

Acquired Lands Leasing Act of 1947

CITATIONS: P.L. 80-382, 61 Stat. 913.

This law authorized the issuance of leases and permits for oil, gas, and other mineral resources on lands acquired by the government through the Bankhead-Jones Tenant Act and other methods.

Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA) (an amendment to the Mineral Leasing Act of 1920)

CITATIONS: P.L. 100-203, 101 Stat. 1330-256, 30 USC 226.

MANAGING AGENCIES: Department of the Interior, Agriculture, etc.

REGULATIONS: The regulations that amend this act are contained in 43 CFR 3100.

PURPOSE AND GOALS: FOGLRA provides for an analysis of surface-disturbing activities in plans of operations, a determination of reclamation, other requirements in the interests of surface resource conservation, the posting of a bond to assure reclamation, and a ban against issuing leases to operators who fail to comply with reclamation requirements.

EFFECT ON BLM AND LEGAL INTERPRETATIONS: This act led to several changes in regulations and procedures affecting oil and gas activities. One of the most important changes involves the requirement that the surface use plan of operations for applications for permit to drill on National Forest System land have to be approved by the Secretary of Agriculture or an authorized representative.

Geothermal Steam Act of 1970, as amended

CITATIONS: P.L. 91-581, 84 Stat. 1556; 30 USC 1001-1025.

MANAGING AGENCIES: Departments of the Interior and Agriculture, and the Federal Energy Regulatory Commission.

REGULATIONS: The regulations in 43 CFR 3200 implement this act.

Section 24 of the act states that the Secretary of the Interior will prescribe regulations for carrying out this act. Such regulations may provide for protecting

water quality and other environmental qualities. The act also required the development and maintenance of a list of significant thermal features on lands in the National Park System. Lease applications for adjoining land will be rejected if exploration, development, and use would harm a listed feature.

PURPOSE AND GOALS: The main purpose of this act is to authorize the Secretary of the Interior to lease geothermal steam and related resources.

EFFECT ON BLM AND LEGAL INTERPRETATIONS: In a number of decisions (including Sierra Club, 79 IBLA 240 [1984]), the IBLA held that BLM must complete an EIS before holding lease sales unless it decides to adopt staged leasing. Under this concept leases would have to be issued with a "contingent rights stipulation," allowing the Bureau to deny any activities on the leases after issuance.

ENDNOTES

1. See e.g., Engdahl, Federal and State Jurisdiction.
2. U.S. Constitution, Art. VI, Clause 2.
3. Congress can modify this relationship by granting the states certain additional powers that were originally federal as discussed more fully in Chapter III.
4. P.L. 94-579, 90 Stat. 2743, 43 USC 1701 et. Seq.
5. For example, E.O. 11514 describing the duties of the Council on Environmental Quality under NEPA.
6. 5 USC, Sec. 701.
7. Title II, Sec. 202, 42 USC 4342.
8. Purpose section 42 USC 4321.
9. Section 101(b), 42 USC 4331.
10. See, for example, the exemption from EIS review of the Alaska pipeline.
11. See FLPMA, Title I: short title; policies; definitions; Title II; Land Use Planning; Land Acquisition & Disposition; Title III: Administration; Title IV: Range Management; Title V: Rights-of-Way; Title VI: Designated Management Areas (including the Wilderness Study); Title VII: Effect on existing rights; Repeal of Existing Laws; Servability.
12. Multiple Use and Sustained Yield Act of 1960 46 USC 528.
13. FLPMA, Section 103(c).
14. 42 USC 1962.
15. See e.g., Upper Colorado River Basin Commission and Pacific Northwest River Basins Commissions.
16. 42 USC 1962 (a)(2)
17. 38 Fed. Reg. 24778 (Sept. 10, 1973).
18. 38 Fed. Reg. 24778 (Sept. 10, 1973).
19. O&C denotes land covered by what was known as the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands.
20. 43 USC 1181(a).
21. *ibid.*
22. FLPMA, Section 701(b).
23. FWPCA, Section 101 (a).
24. FWPCA, Section 101 (a)(1).
25. See *Hancock v. Train*, 426 US 167 (1976).
26. FWPCA, Section 404c.
27. FLPMA, Section 505(a)(iii)
28. These systems are defined as any system for human consumption with 15 or more connections or serves at least 25 persons.
29. Safe Drinking Water Act, 42 USC 300g-1.(a).
30. 42 USC 300g-1.(c).
31. See Joseph A. Cotruvo and Marlene Regelski, "Overview of the Current National Primary Drinking Water Regulations and Regulation Development Process," in *Safe Drinking Water Act: Amendments, Regulations, and Standards*, ed. Edward J. Calabrese, Charles E. Gilbert, and Harris Pastides (Chelsea, MI: Lewis Publishers, 1989), 17-28.
32. FLPMA, Section 202(c)(8) and 505(a)(III) and (IV).
33. 42 USC 300(h).
34. 42 USC 300(h)(b)(2)(B).
35. 42 USC 3251(b)(l).
36. FLPMA, Section 101(c)(8) or 505(a)(III) and (IV).
37. FLPMA, Section 101(c)(8) or 505(a)(III) and (IV).
38. 42 USC 300h.
39. 42 USC 300h(b)(2)(B).
40. See e.g., Endangered Species Act.
41. 16 USC 661.
42. 16 USC 662.
43. 16 USC 665.
44. 16 USC 1536 (This is Section 7 of the original Act).
45. 16 USC 1336.
46. 16 USC 1331.
47. *ibid.*
48. 16 USC 1333(a).
49. 16 USC 1333(b).
50. 16 USC 1333(c).
51. 16 USC 1334.
52. 16 USC 668(a).
53. 16 USC 470, Sec. 2(1) through (6).
54. 16 USC 470, Sec. 106.
55. 16 USC 470, Sec. 110(f).

56. 16 USC 431 to 433.
57. 16 USC 433.
58. Examples are the already designated Appalachian Trail and the Pacific Crest Trail.
59. 16 USC 1242(b).
60. 16 USC 1244(c).
61. 16 USC 1246(a).
62. *ibid.*
63. 16 USC 1246(f).
64. 16 USC 1131.
65. 16 USC 1131(c).
66. 16 USC 1132(b).
67. 16 USC 1131(c).
68. 16 USC 1271.
69. *ibid.*
70. 16 USC 1273(b)(1).
71. 16 USC 1273(b)(2).
72. 16 USC 1273(b)(3).
73. 16 USC 1452(d).
74. P.L. 90-454, 82 Stat. 625, 16 USC 1221.
75. 43 USC 1334(a)(1).

