



# **Introduction to the Legal Foundation of Federal Land Management**

December 1-3, 2004  
Natural Resources Law Center  
University of Colorado School of Law

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# I. Introduction

## Ia. Purpose

This course is organized around key federal land management decisions and processes that participants have to engage in, in their everyday work. This course encourages discussion of various laws, policy, and regulations, but in a context that is applied to the real-world. Three in-depth case studies will be discussed as a way of introducing the implications of federal laws, regulations and agency guidance on agency decision making and the opportunity to influence agency outcomes. All participants must read the case studies in depth prior to the training.

Participants should come away from this training with the following:

- A general understanding of the basic land management statutes guiding the U.S. Forest Service and the Bureau of Land Management (BLM).
- Familiarity with key policies and regulations related to managing off-road vehicles, oil and gas development and logging/vegetation treatment on public lands.
- A general understanding of the National Environmental Policy Act and its relationship to decisions under the Federal Land Policy and Management Act and the National Forest Management Act.
- A practical understanding of how other laws, such as the Endangered Species Act, the Clean Water Act, National Historic Preservation Act, and others can affect public land management decisions.
- A resource guide on how to find relevant legal information on the internet.

Please note: The schedule is very tight, we will send the case study materials out in advance and *participants will need to have read them* by the time they arrive for the training. Participants will be encouraged to eat lunch in the cafeteria and not leave NCAR to go into Boulder to eat lunch.

## **Ib. Instructors**

### **Charles Wilkinson**

Charles Wilkinson graduated from Stanford Law School in 1966, practiced with private firms in Phoenix and San Francisco and with the Native American Rights Fund, and is now the Moses Lasky Professor of Law at the University of Colorado. He has received numerous awards including; Distinguished University Professor, 2002 Hazel Barnes Prize, the Earle A. Chiles Award and the National Wildlife Federation presented him with its National Conservation Award. He has served on the boards of The Wilderness Society, Northern Lights Institute, and the Western Environmental Law Center, and is currently Board Chair of the Grand Canyon Trust.

Over the years, Professor Wilkinson has taken on many special assignments for the Departments of Interior, Agriculture, and Justice. He served as special counsel to the Interior Department for the drafting of the Presidential Proclamation, establishing the Grand Staircase-Escalante National Monument in Utah. He was appointed as a member of the Committee of Scientists, which resulted in the 2000 Forest Service planning regulations. Professor Wilkinson acted as facilitator in negotiations between the National Park Service and the Timbisha Shoshone Tribe concerning a tribal land base in Death Valley National Park. He is currently serving as mediator in two sets of negotiations, between the City of Seattle and the Muckleshoot Indian Tribe and the Oglala Sioux Tribe and the National Park Service.

Professor Wilkinson has written broadly on law, history, and society in the American West. His twelve books include the standard law texts on federal public land law and Indian law.

### **Sarah Krakoff**

Sarah Krakoff is the Acting Director of the Natural Resources Law Center and an Associate Professor at the Law School. Professor Krakoff came to CU in 1996 as Director of the Indian Law Clinic and joined the tenure track faculty in 1999. Before coming to the University of Colorado, Professor Krakoff worked on the Navajo Nation for DNA-People's Legal Services as Director of DNA's Youth Law Project, where she litigated cases about educational equality for Native American children. Prior to that, she clerked on the 9th Circuit Court of Appeals for Judge Warren Ferguson. Professor Krakoff's law degree is from Boalt Hall, University of California at Berkeley and her undergraduate degree is from Yale.

Professor Krakoff has published law review articles and book chapters on federal Indian law, environmental justice, outdoor recreation and environmental ethics, and public lands.

### **Kathryn Mutz**

Kathryn Mutz is a Staff Attorney with the Natural Resources Law Center. She has a background in both law and natural resources management. For the twelve years prior to entering law school, she worked throughout the West for government and private industry on a variety of public policy and scientific issues, including work on wetlands, endangered species, and reclamation of disturbed lands. Kathryn holds a Bachelor's degree in Geography from the University of Chicago, a Master's degree in Biology/Ecology from Utah State University, and a J.D. from the University of Colorado, concentrating in natural resources and environmental law. Most

recently, her legal research has focused on environmental justice, forestry and mineral development

#### **Ann Morgan**

Ann Morgan has been an Adjoint Professor at the University of Colorado School of Law since 2002. She received her BS in natural resources management from the University of California at Berkeley and her MBA at Golden Gate University. Previous to her position at the law school, she served as the Colorado State Director for the Bureau of Land Management, U.S. Department of the Interior. She has also served as the BLM state director in Nevada. Prior to joining the federal government Ann worked for the Washington State Department of Natural Resources as Division Manager for Aquatic Lands and as an engineering and construction project manager for an investor-owned utility company.

#### **Maggie Fox**

Maggie Fox currently serves as Deputy Executive Director of the Sierra Club, where she has worked for over 20 years in a number of positions including Director of the Southwest Regional Office and the Western Public Lands and Resources Specialist. Maggie worked extensively on issues as varied as western public lands and water resources, growth and sprawl, global warming and energy policy. She has worked on and led numerous national political and environmental campaigns in the last 20 years.

Prior to her Sierra Club career, Maggie lived and worked on the Navajo and Hopi Reservations as a tribal school teacher and community organizer. For over a decade, Maggie worked for the National Outward Bound Schools as an instructor, course director, program director and consultant. During her tenure as a wilderness educator, Maggie traveled and led high altitude mountaineering expeditions throughout the United States, Canada, South America, and Asia.

She earned her B.A. from the University of North Carolina, a Masters in Education from the University of Colorado, a teaching certificate and graduate work in teaching English as a second language from Northern Arizona University, and received a law degree with an emphasis in Indian and Environmental Law in 1982 from Lewis and Clark, Northwestern School of Law.

## II. Agenda

### Wednesday December 1<sup>st</sup>

- Before 5pm Hike/explore NCAR trails
- 5:00-5:30 Mixer with wine and beer
- 5:30-6:30 Dinner catered by NCAR in the Damon Room
- 6:30-9:00 Evening talk by Professor Charles Wilkinson

### Thursday December 2<sup>nd</sup>

- 8:00-12:00 Professor Sarah Krakoff gives an overview of major laws
- 12:00-1:30 Lunch on your own (cafeteria downstairs); walk the trails
- 1:30-5:00 Travel Management Case Study
- 1:30-1:45 Go over case study (previously read by participants)
  - 1:45-2:15 Break into small groups and discuss assigned questions
  - 2:15-4:00 Each group takes 20 minutes to report back and discuss
  - 4:00-5:00 Add special use permit for 2-day ATV event in citizen proposed wilderness; full group discussion and Q&A's

### Friday December 3<sup>rd</sup>

- 8:00-8:30 Agency cultures and how to work with agency officials
- 8:30-12:00 Oil and Gas Development Case Study
- 8:30-8:45 Go over case study (previously read by participants)
  - 8:45-9:15 Break into small groups & discuss assigned questions
  - 9:15-9:45 Break
  - 9:45-11:30 Each group takes 20 minutes to report back
  - 11:30-12:00 Group discussion and Q&A's
- 12:00-1:00 Lunch on your own (cafeteria downstairs); walk the trails
- 1:00-4:00 Timber/Fuels Reduction Case Study
- 1:00-1:15 Go over case study (previously read by participants)
  - 1:15-1:45 Break into small groups & discuss assigned questions
  - 1:45-3:30 Each group takes 20 minutes to report back & discuss
  - 3:30-4:00 Group discussion and Q&A's
- 4:00-4:15 Break
- 4:15-4:45 Inspirational wrap up by Maggie Fox
- 4:45-5:15 Wrap up and feedback on course

# Summaries of Laws Applicable to the Training Case Studies<sup>1</sup>

## Archeological Resources Protection Act of 1979

### 16 USC §470aa-470mm

The Archeological Resources Protection Act (ARPA) was passed in recognition that the archeological resources on public lands and Indian lands are an irreplaceable part of the Nation's heritage and that the resources are increasingly endangered because of their easy accessibility and commercial attractiveness. Up until ARPA there were not adequate Federal laws to provide protection to prevent the loss and destruction of these resources that resulted from uncontrolled excavations, pillage and pot hunting. ARPA is also designed to foster increased cooperation and the exchange of information between governmental authorities, the professional archeological community, and private individuals having collections of archeological resources. Importantly, ARPA also provides for enforcement and for civil and felony criminal penalties.

Archeological resources are broadly defined by the Act to include "any material remains of past human life or activities which are of archeological interest" and includes, but is not limited to, "pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items".

ARPA outlines provisions for issuing permits for excavations and for the removal of archeological resources, for the custody of archeological resources found on public or Indian lands, civil and felony level criminal penalties, maintaining confidentiality concerning the location or archeological resources, and for coordination between agencies and cooperation with private parties.

## The Clean Air Act

### 42 USC §7401 et seq

The Clean Air Act (CAA) is the core law that establishes a comprehensive national program for reducing emissions from factories, cars, and other sources in order to protect human health and the environment. The law directs the federal Environmental Protection Agency (EPA) to establish national clean air standards, but then gives the states and tribes an opportunity to take a lead role in meeting those standards. The law also gives EPA the responsibility for setting emissions limits for many sources of pollution, including cars and trucks (mobile sources) as well as factories and power plants (stationary sources). Both EPA and the states can go to court to enforce air quality laws; in addition, citizens and businesses can challenge many EPA decisions in court.

EPA has identified six criteria pollutants, but they are ubiquitous in our society: sulfur dioxide, particulate matter, nitrogen oxide, carbon monoxide, ozone and lead. EPA sets nationally applicable limits for these pollutants to protect our health. These are called "primary standards."

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<sup>1</sup> For full texts of the laws and additional reference materials, please see the links to public land laws provided separately. Many of these summaries are condensed from the Red Lodge Clearinghouse site.

EPA also sets "secondary standards" -- limits on these pollutants to protect visibility and prevent damage to crops, buildings, and so on.

Once EPA sets nationally applicable air quality standards, it then examines monitoring data to determine which areas meet those nationally applicable standards, and which do not. Those areas that meet the nationally applicable standards are called "attainment" areas, while those that do not are called "nonattainment" areas.

In major amendments to the CAA in 1977, the Congress took note of the fact that many areas of the country -- especially in the West -- have clean air. In response, the Congress added several provisions that are designed to keep air quality in these areas from deteriorating. In the amendments, the Congress decided to classify all those areas that meet or exceed the nationally applicable air quality standards as either class 1, class 2, or class 3. Based on the area's classification, EPA and states can permit certain amounts of increased pollution. The Congress decided that most national parks and wilderness areas that were already in existence at the time of the 1977 amendments would be designated as class 1 areas, where only a small increase in pollution levels could be permitted. The legislation designated the rest of the clean air areas as class 2, where some additional pollution could occur.

When a major new factory or other pollution source is proposed to be constructed, the state air quality agency must assess whether that new source's pollution would cause a degradation of air quality in a class 1 area, or cause the added pollution to exceed the increment allowed for the designated class. If the state agency concludes that a new source would adversely affect air quality related values in a national park or wilderness area, or exceed the allowable "increment," then the agency will require the new source to install more efficient emissions control equipment.

In the 1977 amendments, the Congress also established a program to reduce visibility impairment that was being observed in national parks and wilderness areas. The Congress asked EPA to address both "plumes" that could relatively easily be traced from one or a few sources to a national park or wilderness area as well as the soup of pollutants that came from many, many sources and is transported over long distances (known as regional haze).

## **Clean Water Act and Safe Drinking Water Act**

33 USC §1251 et seq and 42 USC 300f et seq

The Clean Water Act (CWA) is the common name for the 1977 amendments to the Federal Water Pollution Control Act of 1972 (FWPCA). The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The 1977 law continued the FWPCA requirements to set water quality standards for all surface waters. It also established the basic structure for regulating discharges of pollutants into the waters of the United States and for addressing problems of nonpoint source pollution. The CWA gave the Environmental Protection Agency (EPA) authority to implement pollution control programs and to delegate those programs to states and tribes.

Pollutants controlled by the CWA include garbage, sewage, dredged spoil, incinerator residue, chemical waste, biological materials, heat, radioactive materials, sand, rock, and industrial, municipal and agricultural waste. Because "pollutant" is so broadly defined, most activities that directly discharge materials into water bodies are regulated by the CWA. Whether or not the CWA regulates a particular discharge depends, however, on whether it is from a point or nonpoint source and what type of water body is affected.

Section 401 of the CWA requires that federal agencies issuing licenses or permits for construction or other activities get a written certification that the activity will not cause or contribute to a violation of the state or tribe's water quality standards. After receiving the certification, the federal agency issuing the permit must also condition that permit to prevent the project from degrading water quality of a downstream state or tribe.

The CWA protects U.S. waters in large part through the National Pollutant Discharge Elimination System (NPDES) permit program. This program controls discharge of pollutants from point sources into surface waters. NPDES permits set limits on the amount of various pollutants that a point source can discharge into a water body in a specific time period.

Section 404 of the CWA created a special permitting program to regulate discharge of dredged and fill material into wetlands and other "waters of the United States." The Army Corps of Engineers is principally responsible for issuing permits under this program. Wetlands generally include swamps, marshes, bogs and similar areas.

If monitoring indicates that a water body is exceeding its water quality standards for one or more parameters, then that water is considered "impaired" and the state must put the water body on its 303(d) list named for the section of the CWA that requires states and tribes to create such lists and then to develop strategies to improve the quality of these waters to meet their standards. After a water body is listed, the water quality agency must create a or "pollutant budget" for each specific pollutant exceeding the water quality standards in a particular water body. The agency determines the "allowable load" or "pollutant cap" for each pollutant. The agency then allocates the total pollutant load among various sources of the pollutant.

Like many environmental statutes, the CWA also gives the public an opportunity to participate through the court system. Citizen suits have been used to enforce NPDES permits, storm water discharge permits, water quality standards, and various permit conditions. "Citizen" is very broadly defined as anyone who has an interest that may be adversely affected. So just about anyone that can claim an injury can bring a suit in federal court against EPA, state agencies, corporations, and individuals to force agencies to enforce the law or to stop pollution. "Injury" can include hurting someone's aesthetic or recreational interests in a certain water body. Citizens can also sue EPA for failure to do something that it has a duty to do.

The Safe Drinking Water Act establishes specific regulations to assure the safety of public drinking water. Public water systems are tested for more than 80 contaminants and if the level of any contaminant exceeds federally-mandated drinking water standards, the water system operator must notify the public. The federal drinking water program was designed to be delegated, usually to the states. The underground injection control program was established



under the Safe Drinking Water Act; this program regulates every injection of fluid into the subsurface. An injection is the emplacement of fluids regardless of whether the injection requires the application of pressure or not, and fluid is defined as any liquid, gas or semisolid which can be made to flow. The program classifies five types of injection and Class II injections include deep disposal of wastewater produced in conjunction with the production of oil and gas. Permits are issued by the state when produced water from coalbed methane production needs to be re-injected as a method of managing or disposing of the produced water. Hydraulic fracturing, another injection technique frequently used in the production of coalbed methane, is not yet regulated under the Safe Drinking Water Act despite a 1997 U.S. 11<sup>th</sup> Circuit Court of Appeals ruling that it should be.

### Endangered Species Act of 1973

#### 16 USC §1531 et seq

The Endangered Species Act, passed in 1973, is one of the most powerful of this nation's environmental laws. The act's purpose is to both conserve and restore species that have been listed by the federal government as either endangered or threatened. The act broadly prohibits anyone from doing anything that would kill, harm, or harass an endangered species. Those prohibitions even apply when listed animal species are on private lands. Federal agencies have a special obligation to ensure that they do nothing that would harm a listed species. That obligation significantly affects activities on federal lands, like grazing, logging, and mining. But it also means that a federal agency has to assess whether its actions could affect a listed species before the agency signs off on a new highway or approves a dam on non-federal land. In addition, the act tells federal agencies to develop plans that show how the listed species could be restored -- or "recovered" -- so that it no longer needs the act's protections.

If an animal or plant species is listed as "endangered," the highest level of protection the act provides, the species is considered to be in danger of extinction throughout a large part of its range. The U.S. Fish and Wildlife Service (USFWS) maintains a list of species that have been listed as endangered. For a species to be listed as "threatened," there must be a significant risk that the species is going to become endangered. Threatened species have a lower risk of extinction than do "endangered" species. As a result, state and federal agencies may have some greater flexibility in how they manage a threatened species than an endangered species. The USFWS maintains a list of species that have been listed as threatened.

The ESA has broad provisions to prevent extinction of plant and animal species. The act prohibits anyone from "taking" a species that has been listed as threatened or endangered. "Take" can be as simple as hunting, shooting or killing a listed animal species. It can also include "harming" a listed species by activities that cause major changes to habitat and leave an animal unable to feed, breed, or find shelter.

When the federal government lists a species as endangered, it is also supposed to identify that species' critical habitat. Critical habitat includes those areas that are important for the species' survival or recovery and which need special management. While a designated critical habitat area is not intended to include all of the potential habitat of the species, it can include habitat that is not currently occupied by the species. Only about 12 percent of listed species have a

designated critical habitat area. According to the USFWS, a critical habitat designation affords little extra protection to most listed species. The agency has, therefore, used its limited staff and funding to list more species rather than spending resources on designating critical habitat. Having a critical habitat designation only gives extra protection to a species if there is a federal agency involved, and then only under certain circumstances. If a federal agency is involved a critical habitat designation may make a difference during the Section 7 consultation process.

Once a species is listed, a recovery plan is developed. The plan outlines how it will ensure the species' survival and restore it to the point where it no longer needs the act's protections and can be "delisted" or removed from the list of threatened or endangered species.

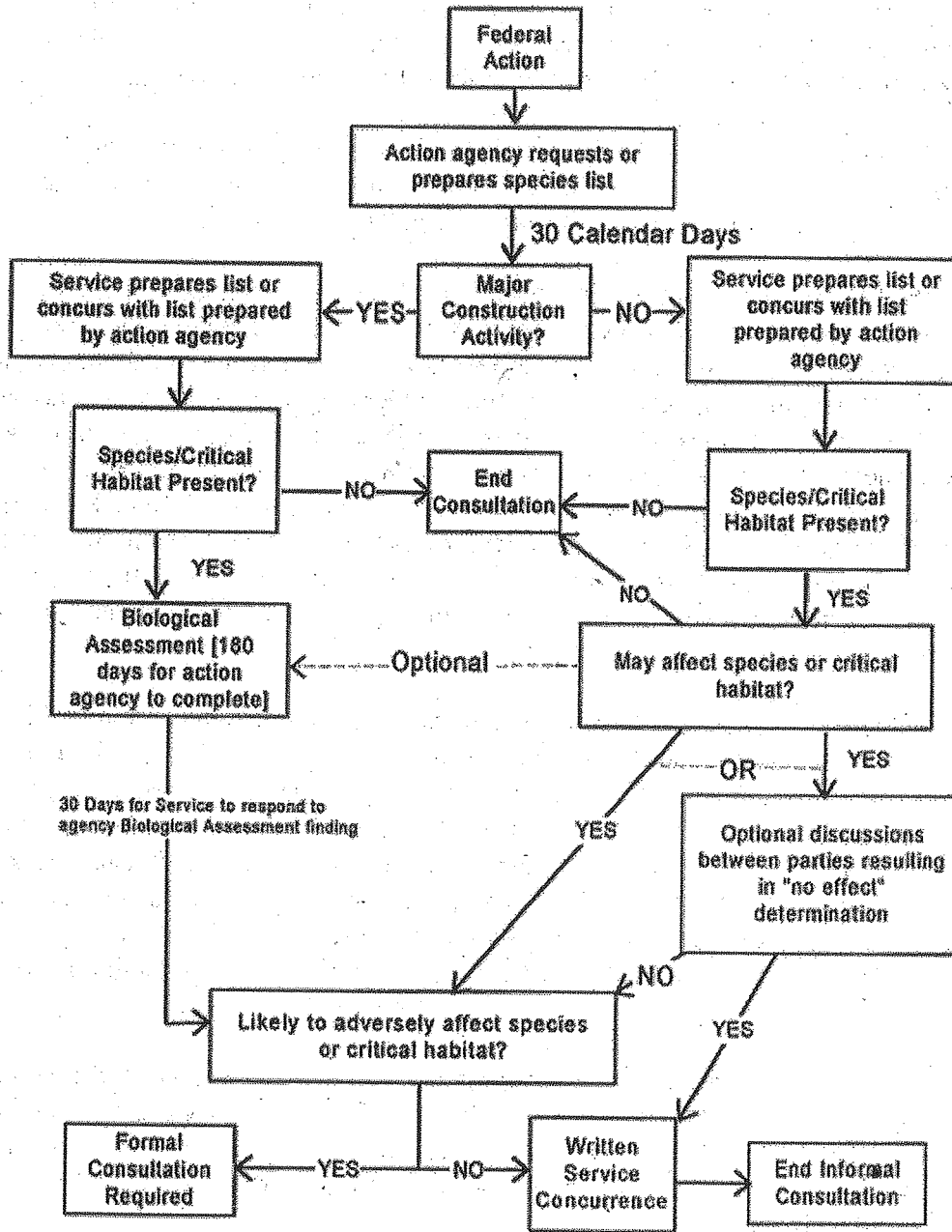
Section 7 of the ESA has been at the center of much of the debate over endangered species protection. Section 7 says that federal agencies must make sure that none of their actions, or any action they authorize or fund, is likely either to jeopardize the existence of a listed species or to damage its critical habitat. To meet this requirement, federal agencies considering taking some action -- from selling timber to re-issuing a grazing permit or permitting a new dam -- must "consult" with the U.S. Fish and Wildlife Service (USFWS), for land-based species, or the National Marine Fisheries Service (NMFS), in the case of sea life or salmon and steelhead. The agencies usually use an informal process to determine whether formal consultation is necessary. In December 2003 several land management agencies, U. S. Fish and Wildlife Service and the National Marine Fisheries Service adopted new regulations that exempt National Fire Plan projects from the informal consultation process.

When informal consultation is still used, the agency that wants to take an action will informally consult with USFWS or NMFS, asking whether there are any proposed or listed threatened or endangered species or critical habitat in the project area. If the answer is "yes", then the consulting agency (also know as the "action agency") must do a biological assessment to assess what impact its action might have on the species or habitat. The assessment usually contains the results of an on-site inspection of the affected area; the views of recognized experts on the species at issue; a review of the literature and other information; an analysis of the effects of the action on the species and habitat; and an analysis of alternate actions considered by the action agency.

If the assessment indicates that there will be no impact, and the USFWS or NFMS agrees, then informal consultation is over and the project can go forward. If the BA indicates that the action is likely to have an effect, then "formal consultation" begins. During the informal consultation, the USFWS or NMFS may suggest project modifications that the action agency could take to avoid the likelihood of adverse impacts.

If a federal agency informs the USFWS or NMFS that a proposed action might affect any proposed or listed threatened or endangered species or critical habitat (typically done as part of a BA), the agencies begin a formal consultation process. In this process, the USFWS or NMFS prepares a biological opinion (BO), is a detailed evaluation of the impacts on the species and critical habitat. The BO thoroughly explains the current status of the species and describes how the proposed action would affect the species. The USFWS (or NMFS) can come to one of three conclusions: jeopardy with reasonable and prudent alternatives; jeopardy without such

alternative; or no jeopardy. If the BO concludes the action could harm the species, the USFWS or NMFS typically proposes a set of mitigation measures ("reasonable and prudent" alternatives) that would allow the activity to proceed.



Flowchart courtesy of the U.S. Fish and Wildlife Service

## **Federal Advisory Committee Act of 1972**

### 5 USC Appendix 2

Congress passed the Federal Advisory Committee Act (FACA) to open up the process through which non-government groups give advice to federal agencies, Congress, and the president. The law and its regulations provide detailed rules for creating and operating official committees that can advise the federal government. These rules include special requirements for balanced membership on committees, conducting open meetings, and keeping detailed records designed to help limit the influence (at least the secret influence) of special interest groups on federal agencies and the president. FACA does not apply to individuals and many groups -- including most collaborative groups -- giving advice. FACA does not apply to individuals giving advice and many groups -- including most collaborative groups -- are exempt from FACA.

Advisory groups must be specially chartered and must follow FACA rules if a federal agency creates, manages or controls the group. In the words of FACA, these are committees "established by" or "utilized by" the federal government. FACA applies to committees, boards, commissions, councils, conferences, panels, task forces, or other similar groups.

Federal agencies can establish or create official advisory committees. For example, the Federal Land Policy and Management Act (FLPMA) requires the Secretary of the Interior to create FACA advisory committees, called Resource Advisory Committees or RACs, to advise her and the Bureau of Land Management on public land management issues.

A group established or managed by an agency -- for example a group at a town hall meeting or NEPA scoping meeting -- does not have to follow FACA rules if the purpose of the meeting is only to exchange information, or if the agency is asking for advice from individuals at the meeting and not from the group as a whole.

## **Federal Land Policy and Management Act**

### 43 USC §1701 et seq

The Federal Land Policy Management Act of 1976 (FLPMA) is the principal law governing how the Bureau of Land Management (BLM) manages public lands. It requires the agency to manage for multiple use and sustained yield of the resources for both present and future generations.

FLPMA guides BLM management of the public lands with several statements of general policy. First, FLPMA established a policy that for the most part, the public lands would be retained in federal ownership. FLPMA still allows for land exchanges and even for the sale of discreet tracts of land, but the overarching policy is to retain lands in federal ownership.

Second, FLPMA directed the BLM to establish a planning process that resembles that used by other federal agencies. Under FLPMA, BLM must periodically inventory public lands and their resources and develop management plans. Resources must be used in a combination that will best meet the needs of the American people, taking into account the long-term needs of future

generations. In managing its lands, BLM must consider the relative value of resources without necessarily promoting the uses with the greatest economic return or greatest unit output, and must not permanently impair the productivity of the land.

Third, FLPMA requires BLM to take any actions that are necessary to prevent unnecessary or undue degradation of the lands. Fourth, FLPMA requires BLM to manage some lands in a more restrictive way when Congress dedicates those public lands to specific uses in other laws. For example, BLM must manage its wilderness areas and wilderness study areas so that uses do not impair the wilderness characteristics of these lands.

In managing for multiple uses, the BLM manages the public lands for three major categories of use: commercial, recreation, and conservation. Grazing and minerals are the principle commercial uses, although BLM issues permits for everything from bee hives to major utility transmission lines. Public lands also provide a wide range of recreation opportunities including fishing, boating, hunting, hiking, biking, and OHV travel. Conservation of biological, archaeological, historical and cultural resources is the third important use of the public lands.

BLM uses its land use planning process to designate uses of the public lands and plan for development of some resources while protecting others. FLPMA planning documents are called Resource Management Plans (RMPs). The planning process is critical to ensuring a coordinated, consistent approach to managing the land. In developing and revising plans, FLPMA requires BLM to do many things, including these:

- apply principles of multiple use and sustained yield management;
- give priority to the designation and protection of areas of critical environmental concern;
- develop and use an inventory of the public lands, their resources, and other values;
- consider present and potential uses of the public lands;
- weigh long-term benefits to the public against short-term benefits; and
- provide for compliance with state and federal pollution control law.

In particular, FLPMA requires BLM to give state and local governments and the public opportunities to participate in planning. Requirements for planning are outlined in FLPMA, detailed in BLM's planning regulations (43 CFR 1600), and guided by the BLM's manual and handbook.

FLPMA says almost nothing about appeals of agency decisions, but the Department of the Interior (DOI) has detailed rules for appealing a wide array of agency decisions. There are several possible steps to an appeal depending on the issue being appealed. Some appeals, like grazing appeals, start in the agency office that made the decision and are forwarded to Interior's Office of Hearings and Appeals (OH&A) which represents the Secretary of the Interior in most appeals. A few appeals, for example for oil and gas projects, are reviewed by the state director before going to the OH&A. When BLM sends an appeal to the OH&A, it can request that OH&A immediately dismiss the appeal, but if it doesn't, an administrative law judge typically holds a hearing. The decision of this judge can then be appealed to one of several boards of administrative law judges who conduct hearings of appeals of various agency decisions. The best known of these boards is the Interior Board of Land Appeals (IBLA) which hears appeals

related to the use and disposition of public lands and their resources. Certain decisions, for example those related to mining, can be appealed directly to the IBLA.

IBLA decisions are considered "final agency actions" unless the Secretary of the Interior wants to become directly involved. IBLA decisions are not binding on the Secretary, and she has the authority to take over the decision function of cases that have not yet been decided or to review final decisions of the IBLA. The Secretary's final decision is ordinarily binding on her successors and ordinarily cannot be reversed or reopened by the department. But regardless of whether the "final" decision is made by the IBLA or the Secretary, a dissatisfied party can still take the issue to federal court for judicial review.

## General Mining Law of 1872

### 30 USC §22-47

The General Mining Law was signed by President Ulysses S. Grant in 1872. The law allows citizens of the U.S. free and open access to mine for minerals on land managed by the U.S. that have not been withdrawn from entry. While the law has no environmental protections built in, and historic use of the law has led to thousands of contaminated, abandoned mines, other environmental laws such as NEPA and the Clean Water Act do apply to mining operations. In addition, the law is affected by FLPMA and the Surface Resources Act of 1955.

Section 314 of FLPMA established the mining claim recordation and annual maintenance fee program to administer claims under the General Mining Law. The program concerns the location and recording of mining claims and sites, recording of title transfers to mining claims and sites, payment of annual fees and filings of annual assessment work documents necessary to keep the claims valid. This program also covers the adjudication of the filings, fees and transfers and the issuance of decisions voiding out claims and sites that fail to comply with requirements (see 43 CFR 3833).

The General Mining Law provides the successful mining claimant the right to patent (acquire title to the land) mining claims or sites if they meet certain requirements. For mining claims the claimant must demonstrate a physical exposure of a commercially valuable mineral deposit as defined by the "prudent man rule" and the marketability test. The prudent man rule, established in 1894 in Castle v. Womble, is where "...minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met." The marketability test, first defined in a Solicitor's Opinion in 1933, states "...a mineral locator or applicant, to justify his possession must show by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit."

Further requirements include claimants must have a clear title to the mining claim and have assessment work and/or maintenance fees current and perform at least \$500 worth of improvements for each claim each year. Finally, they must pay the required processing and

purchasing fees for the land applied for. For mill sites, the claimant must show proper use or occupancy for uses to support a mining operation and they must be located on non-mineral land.

Section 302(b) of FLPMA govern all operations of any nature that disturb the surface of the mining claim or require site authorization. Three levels of authorization exist including casual use, "notice level" and plans of operation. Casual use involves minor activity with hand tools, no explosives, and no mechanized earth moving equipment. Notice level activities involve use of explosives and/or earth moving equipment and the total annual un-reclaimed surface disturbance must not exceed five acres per calendar year. A plan of operation is required for all other surface disturbance activities and a full environmental assessment and reclamation bonding are required.

### Healthy Forest Restoration Act of 2003

#### 16 USC §6501 et seq

The main title of the Healthy Forests Restoration Act of 2003 (HFRA) establishes rules for hazardous fuels reduction projects on federal lands for the Forest Service and Bureau of Land Management. Less controversial parts of the new law promote use of biomass and small diameter materials; create a forest reserve program and provide technical assistance for private landowners; and address insect infestations and other environmental threats to healthy forests.

Title I of the HFRA calls for:

- fuel reduction projects on up to 20 million acres;
- requires that at least 50% of appropriated funds be spent on projects in the urban-wildlands interface where the risk to life and property from a major fire is greatest;
- allows the Forest Service and BLM to focus on urban watersheds as well as areas that provide important habitat for threatened and endangered species;
- directs the agencies to avoid old-growth forests (though the exceptions provided in the bill are broad and a source of continuing concern to conservationists);
- ★ expedites the NEPA process by limiting the number of alternatives that must be studied as part of environmental reviews and requiring consideration of only one alternative for projects that would take place in the urban-wildland interface;
- establishes an entirely new "predecisional" administrative review process in which all requests for review have to be made to the agency after it completes the EA or EIS but before it issues its final decision approving the project;
- allows only those who have submitted specific written comments that relate to the proposed action during the NEPA scoping process or public comment period to object to the project;
- precludes anyone from litigating over a fuels reduction project unless they participated in this new administrative process;
- encourages courts to expedite their review of lawsuits and requires them to balance the effects of doing the project against the risks of not doing it before putting the project on hold through an injunction or a stay; and
- authorizes Congress to take the next step by providing as much as \$760 million each year to the Forest Service and BLM to carry out these fuels reduction projects. *not automatic!*

*Urban-wildlands interface = adjacent to at-risk community w fire plan*

*also = area 1/2 mile from at risk community 1/2 mile limit w certain conditions, like steep*

at risk community - defined by a State in a document;  
group of homes or other structures adjacent to fed  
lands, conditions conducive to a large scale wildland  
fire, and people or property

Title II, the biomass title of HFRA, amends existing laws to:

- improve existing biomass use research;
- accelerate adoption of technologies using biomass and small-diameter materials;
- create community-based enterprises through marketing activities and demonstration projects; and
- establish small-scale business enterprises to make use of biomass and small-diameter materials.

This title also authorizes the Department of Agriculture to make grants to help offset the costs of using biomass.

Title III, watershed assistance, allows the Department of Agriculture to provide technical, financial, and related assistance to states to expand state forest stewardship programs to address watershed issues on non-federal forested land and potentially forested land.

Title IV, the insect and disease title of HFRA, requires the Forest Service to develop and carry out an "applied silvicultural assessment program," to combat infestations by forest-damaging insects and associated diseases. "Applied silvicultural assessments" are any vegetative or other treatment carried out for information gathering and research purposes, and include timber harvesting, thinning, prescribed burning, pruning, and any combination of those activities. The bill does not permit these assessments in wilderness areas or wilderness study areas or on federal lands where the removal of vegetation is explicitly restricted or prohibited.

The Forest Service must provide public notice and allow for public comment before conducting assessments, but assessments of 1,000 acres or less, and up to 250,000 total acres, are categorically excluded from NEPA analysis. The Forest Service is not required to evaluate whether silvicultural assessment projects will significantly effect the environment before conducting them, but the agency is required to set up a multi-party monitoring effort to evaluate projects if there is significant local interest in doing so.

Title V of HFRA authorizes creation of a reserve program to:

- help restore and enhance forest ecosystems;
- improve biodiversity, and
- promote the recovery of species under the Endangered Species Act.

Private landowners can enroll their property through a 10-year cost-share agreements or easements of up to 99 years. This title also provides for technical assistance to the landowner and a "safe harbor" agreement under the Endangered Species Act.

The final title of HFRA authorizes the Department of Agriculture to carry out a comprehensive assessment program and develop an early warning system for environmental threats (including insects, diseases, invasive species, fire, and weather-related risks and other episodic events) for certain forest lands and private lands.

One of the most controversial parts of HFRA changed the way in which people can object to specific fuels reduction projects. The law requires the Forest Service to create a "predecisional administrative review process." This process allows people to object to projects earlier than they used to, but it means that objections can only be made after the agency completes the EA or EIS



and before it issues the final decision approving the project. Only those who have submitted specific written comments during the NEPA scoping process or public comment period can object to the project. Someone can challenge a project in federal district court only if that person has already objected to a specific aspect of a project through the Forest Service's predecisional process or the comparable BLM process.

## **Mineral Leasing Act of 1920 and the Federal Onshore Oil & Gas Leasing Reform Act of 1987**

### 30 USC §181 et seq

Oil, gas (including coalbed methane), and coal are the nation's principal non-renewable energy resources. Leasing of federal resources is regulated primarily under the Mineral Leasing Act of 1920 (MLA) as amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA). State and local laws and regulations also regulate oil and gas development on federal, state and privately-owned lands. State laws and regulations can control the location of exploration and production facilities and the environmental impacts of development. The role of local ordinances varies from state to state.

Federally owned oil, gas, coal, coalbed methane, and oil shale are all "leaseable" minerals. The BLM has discretion whether or not to lease these minerals, generating revenue for the states, tribes and federal government.

A "split estate" exists when the owner of the surface of the land does not own the underlying minerals. Under traditional common law, the owner of land controlled "from the heavens to the center of the earth." Congress has changed this so that land ownership can be horizontally divided into surface and subsurface estates. The subsurface or mineral estate can be further divided for ownership of different minerals -- for example, the oil, gas and coal owners can all be different. There are two types of federal/private split estates -- the federal government can own either the surface or the mineral estate. Many private landowners acquired their split estate surface rights through the Stock Raising Homestead Act of 1916. This law granted surface rights to the homesteader and reserved the minerals for the federal government. The federal government has ended up with surface rights without the mineral rights mostly by reacquiring land from private landowners. Some lands were reacquired in order to consolidate checkerboard patterns of ownership (for example, from railroad grants), to eliminate in-holdings of various kinds, or for reforestation or to protect watersheds.

If the private landowner owns only the surface, she does not have the right to develop the oil, gas, coal or other minerals and, in most cases, does not have the right to prevent development of those minerals. The federal government can lease the oil, gas, or coal-bed methane to a private developer. This developer can occupy as much of the surface as is reasonably necessary to develop the minerals. This might include putting in a well, reservoir, powerline, pipeline or other surface facility. Before developing oil and gas, the mineral owner or lessee must either get written consent or a waiver from the landowner (a surface use agreement) or pay an agreed-upon amount for damages. If the landowner does not consent to development or agree to a damage amount, the developer can still operate after posting an approved bond. In contrast, for most coal mine development, the Surface Mining Control and Reclamation Act (SMCRA) requires express

consent of the surface owner before the Office of Surface Mining will approve a permit to develop a surface (strip) mine.

The process for developing oil and gas (including coalbed methane) on federal land with federal minerals is a three or four step process:

1. Most federal oil and gas development is on BLM or Forest Service managed lands and begins with land use plans prepared under FLPMA or the National Forest Management Act. In their planning processes, the agencies discuss the impacts of development and decide which lands should be open for what kind of development.
2. Depending on decisions made in the planning process, BLM offers leases for the mineral estate. A lease gives an operator the right to explore and develop the mineral in accord with stipulations in the lease. Standard lease stipulations include compliance with federal environmental laws such as the Clean Water Act and Endangered Species Act. Special lease stipulations can be added to restrict specific uses of the lease area or the timing of certain activities. Special stipulations might be added to protect wildlife breeding areas. The most stringent stipulations ("no surface occupancy") exclude all exploration and development facilities from the lease area. BLM holds competitive, oral auctions for oil and gas leases at least quarterly. While BLM actually issues the leases, the Forest Service has to authorize them for the lands they manage.
3. If the operator intends to develop a field rather than just a single well, the operator submits a Plan of Development (POD) to BLM. The POD can be used to consolidate infrastructure -- roads, pipelines, waste disposal facilities -- used to develop a whole well field.
4. Finally, the operator files an application for a permit to drill (APD) with BLM. The APD -- for a well or group of wells -- includes a drilling plan and a surface use plan and includes plans for reclamation. BLM or Forest Service may conduct an on-site visit to adjust the development plans or add mitigation measures. Before BLM can approve the APD, the operator must post a performance bond.

### **State and Local Oil and Gas Laws**

State permits are required for oil and gas development on federal, state and privately owned lands. State laws vary, but the permitting processes of the state agency -- often called a conservation commission -- generally govern the location of wells and other facilities and the control of pollutants associated with development. State oil and gas regulatory statutes -- called "conservation" statutes -- were originally developed to protect the rights of mineral owners to the resource and to prevent waste. Most western states have expanded the statutes in recent years to:

- regulate location, drilling, plugging and abandonment of wells;
- protect the rights of surface owners (at least to some extent);
- protect the general public, and
- protect the environment.

In addition, states frequently have authority to issue federal Clean Air Act and Clean Water Act permits through their departments of environmental quality.

Some local governments have also begun to regulate oil and gas development. Cities and counties may have zoning ordinances to designate areas open or closed to development. Some local governments also have ordinances to control conditions of use -- controlling noise, location of roads and other operating facilities. Whether or not a local government has the power to regulate development depends on what kind of regulation it is, what power they are given by state law, and whether state or federal law has "preempted" local regulation. For example, cities and counties cannot "zone out" development on federal lands within their boundaries.

The Wyoming Oil and Gas Commission (WOGCC) has the authority to require drilling, casing, and plugging of wells in order to prevent escape of oil or gas, bonding for plugging dry or abandoned wells, and monitoring of well performance. WOGCC has the authority to regulate, for conservation purposes, the drilling, producing and plugging of wells, the shooting and chemical treatment of wells, well spacing, disposal of salt water and drilling fluids and development, and the contamination or waste of underground water. In addition, WOGCC has a duty to prevent the waste of natural gas and to keep it from polluting or damaging crops, vegetation, livestock, and wildlife. WOGCC rules require that, owners and operators not pollute streams, underground water, or unreasonably damage or occupy the surface of the leased premises or other lands.

Like other states, Wyoming cities and counties have zoning and planning authority that can be used to regulate oil and gas development. The authority of Wyoming counties is more restricted than that of its cities and towns. Cities can regulate construction or use of buildings and land for various reasons, including promoting health and general welfare and encouraging the most appropriate use of land throughout the city or town. Counties can also regulate structures and land use, but no county zoning resolution or plan may prevent any use necessary to the extraction or production of mineral resources.

## **National Environmental Policy Act of 1969**

### 42 USC §4321 et seq

The National Environmental Policy Act (NEPA) is considered to be one of the most important environmental laws on the books even though it more procedural than substantive in nature. NEPA provides important procedures for public involvement in agency decision making, ensures agencies look at alternatives to their proposed actions, and requires a full evaluation and disclosure of the potential environmental impacts of proposed actions. The White House Council on Environmental Quality (CEQ) has issued NEPA regulations and each federal agency that implements NEPA has promulgated their own set of regulations that can differ procedurally from agency to agency.

Section 102 of NEPA requires that agencies evaluate and disclose the environmental impacts of their proposed actions. The full NEPA process can be lengthy and complex, and requires the agency to seek public comment at many points in the process. But the federal courts have ruled that NEPA is a purely procedural statute. Even after preparation of an environmental analysis,

NEPA does not require any particular decision. It just requires that the agency do the analysis and reporting required by law.

The environmental assessment (EA) process is much less formal than an Environmental Impact Statement (EIS) process. An EA must include brief discussions of the need for the proposed action, alternatives to the proposed action, and environmental impacts of the proposed action and alternatives. NEPA does not require the agency to involve the public in preparing an EA. But in practice, agencies often circulate draft EAs and solicit comments or hold public meetings.

If an agency determines that the proposal will not have significant impacts, it prepares a document called a "finding of no significant impact" (FONSI), which ends the NEPA process. If the proposed project will have a significant impact, it can either prepare an EIS to evaluate and disclose the impacts or change the proposed project to avoid significant impacts ("mitigate the project") and then prepare a FONSI for the revised project.

An EIS is the often-lengthy document that a federal agency uses to explain the environmental impacts of its proposed major projects. The process begins with "scoping," where the agency seeks public comment on what impacts the EIS should cover and what alternatives should be considered. A team of experts (including experts from other federal and state agencies) prepares a Draft EIS (DEIS) that includes a description of the proposed action and why it is necessary, the environment that would be affected, and a comparison of alternatives to the proposal.

When the agency publishes a DEIS, it requests comments from the public. At the end of that comment period, the agency evaluates the comments and revises the EIS in response to issues raised by the comments. The agency then issues a final EIS (FEIS), followed by a "record of decision" (ROD) in which the agency notifies the public of its decision.

After completing an environmental impact statement, an agency issues a "Record of Decision" (ROD):

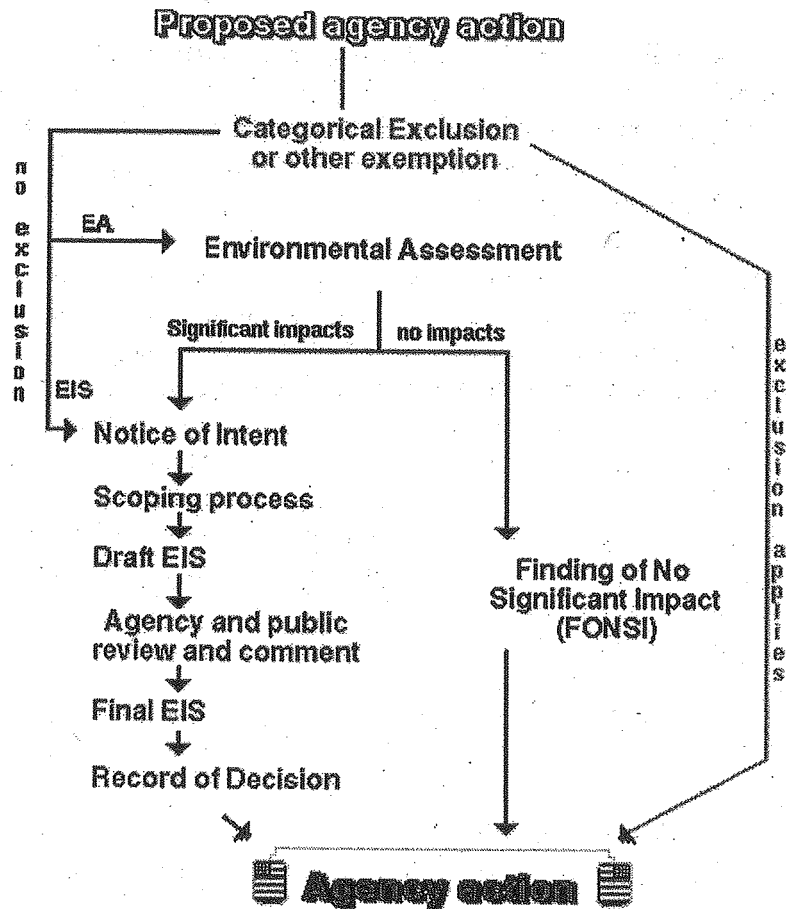
- Stating the decisions it has made;
- Identifying all the alternatives considered in making the decision;
- Identifying which alternative it considers to be "environmentally preferable," even if it has not chosen that particular alternative;
- Discussing the factors it balanced in making its decision; and
- Discussing whether it has adopted all practical mitigation measures -- actions to minimize environmental impacts -- for the alternative that it selected.

In practice, agencies usually will go straight to preparation of a full EIS when they are considering major projects rather than starting with an EA. Agencies also identify whole categories of actions that do not cause significant environmental impacts. For these actions "categorically excluded" from the requirements of NEPA, agencies can skip preparation of either an EIS or an EA.

The Forest Service, the BLM, and several other agencies provide for formal appeals of many of their EIS and EA decisions. In some cases, the agency requires that an objector appeal to the

agency -- pursue an administrative remedy -- before going to court. Federal courts insist on exhaustion of these administrative remedies if statutes or agency rules require them.

The EPA has a special duty, required by section 309 of the Clean Air Act, to review and comment on the possible environmental impact of federal actions. After review, the Administrator of EPA has to make his or her comments public. If he finds the proposal to be environmentally "unsatisfactory," the Administrator has to publish this finding and "refer" the matter to the CEQ for further action.



Flowchart courtesy of the Bureau of Reclamation

## National Forest Management Act of 1976

43 USC § 160 et seq

The National Forest Management Act (NFMA), the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA) and the Multiple Use-Sustained Yield Act of 1960 (MUSYA) combine to make up current Congressional policy direction on the management of our national forests. The MUSYA authorized the Forest Service to manage national forests for the full range of multiple uses and to utilize a sustained yield approach to managing the products and services of the forests. The RPA required the Forest Service to periodically assess the renewable resources of the forests and to develop national-level plans to manage and develop them.

Finally, the NFMA reiterated the basic charges of NUSYA and amended the RPA to require the Forest Service develop management plans for each national forest. NFMA also set the standards and procedures for timber harvesting and sales.

The RPA requires the Forest Service to develop and update renewable resource assessments every 10 years. These assessments must include an analysis of present and anticipated uses, demand for, and supply of the renewable resources; an inventory of the renewable resources; and an evaluation of opportunities for improving their yield and returns to the federal government. These assessments form the basis for a renewable resource program for the National Forest System which describes the program investments, outputs and benefits, priorities, and personnel requirements. NFMA added the requirement to include program recommendations for multiple-use and sustained-yield management, opportunities for private landowners, protection and improvement of soil, water and air quality, and the development of national goals.

*economic &  
environmental  
considerations*

NFMA went beyond the requirements of the RPA to require planning for individual national forests and grasslands through the preparation of Land and Resource Management Plans, also known as LRMPs or forest plans. These plans:

- Establish forest-wide multiple-use goals and objectives;
- Establish forest-wide management requirements called standards and guidelines;
- Establish management direction and designate lands suitable for specific outputs;
- Establish a strategy for monitoring effectiveness; and
- Recommends special designations (i.e. wilderness or wild and scenic rivers) to Congress.

Permits, contracts, plans and other instruments used in managing the national forests, like timber sale contracts, grazing permits, and oil and gas leases, must be consistent with the Land and Resource Management Plans.

The Forest Service has five separate sets of procedures for individuals to use in appealing an agency's decisions. Two are used for appealing decisions related to the agency's planning process. Two others are used for appeals related to the management and use of national forest system lands, including agency projects such as timber sales, as well as private use of the forests such as mining or ski development. The last set of procedures is used only for hazardous fuels reduction projects. For some Forest Service decisions, the appealing party can choose which rules to use, but they cannot appeal under more than one. The agency regulations concerning appeals are in Title 36 of the Code of Federal Regulations.

## National Historic Preservation Act of 1966

### 16 USC 470 et seq

The National Historic Preservation Act aims to preserve the historic and cultural foundations of the Nation in the face of ever-increasing extensions of urban, residential, commercial and industrial developments. The law acknowledges that the major burdens of historic preservation have been borne by the private sector and requires the Federal government to accelerate its historic preservation programs and activities. The act authorizes the Secretary of the Interior to expand and maintain a National Register of Historic Places "composed of districts, sites,

buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.”

Section 106 of the law requires Federal agencies that have direct or indirect jurisdiction or licensing authority over a Federal or federally assisted undertaking to take into account the effect of the undertaking on any district site, building, structure or object that is included in, or eligible for inclusion in, the National Register. Section 110(a) sets inventory, nomination, protection and preservation responsibilities for federally owned cultural properties with the Federal agencies. Complementing this law, Executive Order 11593 (May 13, 1971) directs Federal agencies to inventory cultural properties under their jurisdiction and to nominate qualified properties to the National Register.

Agencies frequently require private parties proposing activities on federal land to do a cultural inventory and report back to the agency prior to issuance of any permission to conduct activities on public lands. Excavation and removal of cultural resources is generally discouraged and projects that might impact cultural resources are often moved, rerouted or otherwise revised to avoid impacting cultural resources.

**Stewardship Contracting (2003)** *2 page law; original proposal just a pilot project*

16 USC §2104 note

Stewardship End Result Contracting (stewardship contracting) is a relatively new tool that Congress gave to the U.S. Forest Service and the Bureau of Land Management (BLM) for managing and restoring federal lands. With stewardship contracting, the agency can more completely address the total ecological needs of an area by using timber sale contracts, service contracts, agreements, and new integrated resource contracts -- or any combination thereof.

The law allows the Forest Service and the BLM to enter into stewardship contracting projects with private persons or other public or private entities to perform services to achieve land management goals for the national forests and the public lands that meet local and rural = definitions variable per FS guidelines. The land management goals of a project may include, among other things:

- (1) road and trail maintenance or obliteration to restore or maintain water quality;
- (2) soil productivity, habitat for wildlife and fisheries, or other resource values;
- (3) setting of prescribed fires to improve the composition, structure, condition, and health of stands or to improve wildlife habitat;
- (4) removing vegetation or other activities to promote healthy forest stands, reduce fire hazards, or achieve other land management objectives;
- (5) watershed restoration and maintenance;
- (6) restoration and maintenance of wildlife and fish habitat; and
- (7) control of noxious and exotic weeds and reestablishing native plant species.

The principal new authorities the agencies can use for stewardship projects are:

- Exchange of goods for services: Contractors can be paid in goods -- with the value of any timber or other forest products removed by the contractor used to offset what the agency owes the contractor for services performed.

*Monitoring of projects can be problematic*

- Receipt retention: Excess receipts from the sale of timber or other forest products removed can be kept and used by the agency, rather than being deposited in the U.S. Treasury.
- Best-value contracting: Contracts must be awarded on the basis of achieving best value to the government. A variety of criteria, in addition to price, can be used in making the award determination. *+ don't have to take low bid*
- Less than full and open competitive contracting: Stewardship contracts can be awarded with little or no advertising or bidding.
- End-results contracting: The agency determines the end result desired for the work, but the contractor has flexibility to propose the methods to be used, including, in some instances, which individual trees to cut.
- Multi-year contracts: Service contracts can be let for up to 10 years, instead of the current 5 year maximum, to match the duration of timber contracts.

*NFMA says bid contracts; FS guidelines restrictive*

*only programmatic monitoring w multiple parties, not individual projects*

### Wild Free-Roaming Horses and Burro Act of 1971

#### 16 USC 1331 §et seq

Neither fish nor fowl (wildlife nor livestock) Congress found that “wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene.” There are currently over 37,000 wild horses and burros on the public lands. The law only applies to public lands managed by the Bureau of Land Management and the Forest Service.

The law established the need for protecting wild horses and burros from capture, branding, harassment or death, while at the same time facilitating the removal and disposal of excess wild horses and burros which pose a threat to themselves and their habitat. Animals are removed when their population numbers exceed the carrying capacity of the rangelands or when there are emergency situations such as wild fire or severe drought. The law also authorized the transfer of wild horses and burros, through adoptions, to private individuals and the transfer of title to the animals after one year, provided they have received proper and humane care during that year.

Regulations implementing the law are found in 43 CFR 4700 which provides guidance in inventory, monitoring, incorporating herd management areas into land use plans, interactions between wild horse and burros and livestock, the removal of excess animals, use of motor vehicles and aircraft in managing the herds, and the adoption, maintenance and ownership of wild horses and burros gathered from public lands. Wild horse and burro populations are generally managed with “herd management areas” where the animals were found to be living at the time of the passage of the law.

*as horses wander into non-herd mgmt areas, protective level lessens*

Controversy plagues the Bureau of Land Management’s wild horse and burro program due to occasional reports that animals are being slaughtered for consumption. While the law and regulations allows excess animals for which adoption demand does not exist to be destroyed, annual appropriation riders, as well as public opinion, have prevented federal officials from



doing so. Instead, the excess, un-adopted animals are sent to "sanctuaries" or other long-term holding facilities for the rest of their natural lives.

## Wilderness Act of 1964

### 16 USC §1131 et seq

In 1964, the United States Congress enacted legislation that created a new land classification to preserve wild lands in their natural state. In that legislation establishing the National Wilderness Preservation System, the Congress immediately designated as wilderness a number of areas that the Forest Service previously had established, using its administrative authority. The law also directed the Secretaries of the Interior and Agriculture to survey their lands (but not including Bureau of Land Management Lands) for other areas that could be added to the wilderness system. To protect these lands in a natural state, the Wilderness Act of 1964 prohibits many activities that would impair the areas' wilderness character, but does not limit activities such as hunting and fishing. Both the original and subsequent acts "grandfathered" some activities that pre-dated designation, such as pre-existing irrigation systems and hydroelectric dams.

The Wilderness Act says that wilderness is a place where nature is untrammelled by humans and where people are themselves only visitors. The law also specifies that wilderness lands should be undeveloped lands that retain their primeval character, absent human improvements or human habitation. Generally, wilderness areas are roadless tracts of land that are at least 5,000 acres in size, and often they contain ecological, geological, or other features of scientific, historical, scenic, or educational interest.

The 1964 Wilderness Act did not authorize the Bureau of Land Management (BLM) to survey its lands to identify tracts that qualified for wilderness, even though the BLM manages 270 million acres of land. However, FLPMA gave the BLM the ability to propose areas for wilderness designation. FLPMA directed the BLM to identify roadless tracts, and then to evaluate those roadless areas for their suitability for wilderness designation. FLPMA also directed the agency to report its findings to the President, and directed the President to make recommendations to Congress on which areas should be designated as wilderness. In the meantime, the areas that BLM had identified as suitable for wilderness designation were to be managed to protect their wilderness qualities, even if the President had not recommended them for designation. These areas are known as wilderness study areas. However, lands identified as roadless, but which the BLM did not believe had wilderness characteristics, were not afforded these interim protections.

Some activities and uses are prohibited in wilderness areas. Permanent roads and motorized vehicles and motor boats are generally prohibited within wilderness areas. Generally, it is unlawful to land aircraft within a wilderness area. The Wilderness Act did not restrict camping, fishing, and hunting.

Many conservation organizations contend that in conducting its inventory of roadless areas, and evaluating the roadless tracts' wilderness qualities, BLM missed many areas. As a result, they argue vigorously that many more areas should qualify as wilderness study areas than the BLM identified. The controversy is particularly strong in Utah. During the Clinton administration, Secretary of the Interior Babbitt directed the BLM to re-survey its lands in Utah to determine

whether some lands had inadvertently been dropped from the earlier inventory and analysis. In that re-survey, BLM found a number of roadless tracts with wilderness characteristics and decided to use the agency's planning process to protect these lands from development until Congress decides either to designate them as wilderness or release them for multiple use.

The state of Utah disagreed with that decision and sued to stop the Department of the Interior from protecting lands identified as part of that re-survey. In 2003, Secretary of the Interior Gale Norton decided to settle the lawsuit and made several changes to the way in which BLM deals with potential wilderness lands. She concluded that once the BLM completed its initial wilderness survey, the agency's statutory authority to review areas for their wilderness characteristics expired. Therefore, the Secretary concluded that the agency could not identify WSAs as part of the on-going land management planning process. Several conservation organizations are now challenging the Secretary's decisions in federal court.

## IVa. Travel Management Case Study



# TRAVEL MANAGEMENT PLAN CASE STUDY<sup>1</sup>

## I. Brief Statement of the Issue

Through the travel management planning process BLM proposes to designate individual routes within the Gold Belt plan area that will be open to motorized and mechanized travel and to develop one new motorized connector trail to create a loop trail.

While almost everyone agrees that it is time to designate routes as well as close others, controversies around the endangered Pinyon Piper, RS2477 and the potential for a new mine in the area are overlaid on the travel management issues.

## II. Background

### A. Physical, social and economic setting

Canon City is the county seat for Fremont County, which is 45 miles from Colorado Springs and 100 miles from Denver. These Front Range metropolitan areas consider the Canon City area as part of their backyard when it comes to weekend recreation. The big visitor draws include the community of Cripple Creek with its limited-stakes gaming casinos, the Royal Gorge Bridge and railroad, the Arkansas River, and virtually year-round trail use by hikers, bicyclists, and off road vehicle users. The relatively low elevation of 5,343 and mild winters means trail users can recreate most of the year in the Canon City area. The amenable year-round climate may also be part of the draw to new people moving into the area. Fremont County saw an astounding 43% increase in population between 1990 and 2000 (although some of this is most certainly attributable to the increase in residents at the more than one dozen Federal and State correctional facilities).

The land tenure in the area includes a large component of federal land managed by the BLM Royal Gorge Field Office and the Pike-San Isabel National Forest. However, due to the mining and long history of settlement in the area, there is a patchwork quilt of private, state and federal lands. The BLM and Forest Service have combined many functions, services and offices in a concept called "Service First" that blends the lines between the agencies in order to provide better customer service and manage on a landscape basis across agency administrative boundaries. There are a lot of private parcels including patented mining claims scattered throughout the area. The State has school trust lands in the area managed to earn revenue for Colorado schools. Nearby is the Fort Carson army base and the Florissant Fossil Beds National Monument. The Colorado State Parks Division and the BLM jointly manage the Arkansas Headwaters Recreation Area along a 140-mile stretch of river that sees over 100,000 whitewater rafters each year.

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<sup>1</sup> The case study is fictitious but based on real life. The people and companies are entirely fictitious and the land use plans, project proposals and environmental analysis are based on real documents that have been adjusted to best serve the case study.

The Gold Belt travel management planning area borders Highway 50 on the south (along with the communities of Canon City and Florence) and the northern boundary goes up to and includes the communities of Victor and Cripple Creek. The east boundary follows Highway 115 and the western boundary follows Highway 9. The planning area includes portions of Fremont, Teller and El Paso Counties and encompasses approximately 564,600 acres; including 138,600 acres of public land administered by the BLM.

Included in the planning area are the Gold Belt Tour National Scenic and Historic Byway and the Garden Park Area of Critical Environmental Concern (ACEC). Portions of this ACEC are also designated as a Research Natural Area and a National Natural Landmark for the fossil resources. The planning area also takes in the Shelf Road Recreation Area, the Beaver Creek Wilderness Study Area (WSA), the Beaver Creek ACEC, and the Phantom Canyon ACEC. While not officially recognized as a special designation by the BLM, the Copper Mountain Citizen Proposed Wilderness Area is also in the planning area.

Fremont County has become interested in the RS2477 issue and they have begun to map those roads that they think will qualify for a recordable disclaimer of interest. The County Commissioners know that the County's gold mining history means that many roads will likely qualify even if they are no longer used for anything but recreational driving by four-wheel drive vehicles or all terrain vehicles. Some of the private property owners in the area are concerned that the County may claim RS2477 status for roads that go through their private property.

There is intense conflict over appropriate recreational use of the public's lands. In particular, motorized and non-motorized recreationists clash over access. One side claims that their tax dollars support their right to drive gasoline powered vehicles over the public lands; the other side complains about the forests being overrun with noisy, polluting machines that cause erosion and scare wildlife and hikers. Both sides claim their activities are wholesome family entertainment. The state agencies face the same kind of schizophrenia with the Division of Wildlife wanting to limit motorized uses to protect wildlife and their habitat and the State Parks Division encouraging new trails and OHV use with their OHV licensing revenue.

The BLM Field Office has worked hard to involve all of the interested parties in their efforts but they are worried that the recent Norton v. SUWA Supreme Court case will discourage the conservation communities' participation and might erode their confidence and trust. While the BLM believes they do everything they can to keep OHVs out of the wilderness study areas, budget and resource limits mean they cannot police all of the areas all of the time. Some rogue OHV riders do penetrate into the wilderness study areas despite the carsonite signs the BLM posts around the perimeter.

Recently first term Senator Jo Johnson introduced a statewide Colorado wilderness bill that would put all of Colorado's BLM wilderness study areas into wilderness status along with an additional 560,000 acres of citizen's proposed wilderness areas. These citizen's proposed areas are currently managed under full multiple use and are not being managed to preserve their wilderness characteristics. Travel management plan designations vary

limited to existing trails & roads  
for each of these areas but most are designated as "open" to cross country travel even though their remote and roadless nature means they receive little visitation.

## **B. Players**

### **The Federal Agency Official**

Joe Capricio has been with the BLM since he graduated twenty-five years ago. While Joe received his Bachelors of Science degree in range management, since joining the BLM he has evolved into something of a generalist and manager with everything from range to recreation, hazardous waste to historic preservation, and endangered species to land exchanges under his direction as the Field Office Manager of the Royal Gorge Field Office in Canon City, Colorado. Joe has moved around the BLM system spending time in Oregon, Utah, and Nevada, and he considers himself lucky to have been in the Royal Gorge Field Office as its Manager for the past 15 years. This has given Joe a chance to raise his three children in Canon City and he plans to stay in the community even after he retires in five years.

### **The BLM Recreation Planner**

Terri Chu is the Recreation Planner who has had the lead in developing the plan and taking it through the NEPA process. She has a degree in recreation management and has been with the BLM for three years and was with the National Park Service for twelve years prior to that.

### **Glow Corporation**

The Miller family holds mining claims throughout the Royal Gorge resource area and their history in the area goes back several generations. Under the guise of the Glow Corporation, they have a reputation of working claims that, to others, appear to hold little promise. Mining has been, an avocation and/or a hobby, to nearly every generation of Millers. Currently Spike Miller is both the patriarch of the Miller family and the senior County Commissioner of Fremont County.

### **Colorado ATV Mtn. Association**

Helen Wheels is the President of the CAMA, most often its event planner, and most recently a member of the BLM Resource Advisory Council. She is retired and devotes all of her time to CAMA and motorized recreation. She writes a column for the Blue Ribbon Coalition publication and has enjoyed her chances to go back to Washington DC to lobby on behalf of OHVs.

### **Other Stakeholders**

The following stakeholders have been involved with the travel management process: Front Range Resource Advisory Council, U.S. Forest Service, Colorado Division of Wildlife, Rocky Mountain Recreation Initiative, Colorado Mountain Club, Sierra Club, Audubon Society, Backcountry Horsemen of America, local hikers and bicycle users and clubs, Colorado Motorized Trails Association, Rocky Mountain Trails Association, the Colorado Off-Highway Vehicle Coalition, and local ATV and 4WD clubs.

### **III. Proposed Agency Action**

#### **A. Proposed Travel Management Plan**

The preferred alternative in the Gold Belt travel management plan is to go from allowing travel on all roads and trails to only allowing travel on designated individual routes within the Gold Belt planning area and to develop one new motorized connector trail to create a loop trail. The Environmental Assessment will be released for public comment next week. A biological assessment was conducted and it was determined that there would not be an effect on the endangered Pinyon Piper due to the mitigation measures associated with the preferred alternative.

The preferred alternative would designate 82.4 miles of non-motorized trails and 75.4 miles of motorized routes. Under the proposal, mountain bikes would be limited to designated roads and trails and driving vehicles off roads to park, camp, and retrieve game would be limited to a maximum distance of 100 feet.

Areas designated in a land use plan as "open" are areas where off road travel can occur, where there are no compelling resource protection needs, user conflicts, or public safety issues. Currently the only open area is the Torumup Commons area and under the preferred alternative, this would remain open. The Torumup Commons is regularly the site of large gatherings of thousands of ATVs, especially on long holiday weekends when the crowds can get nearly out of hand. Areas designated as "closed" means the areas is closed to vehicle use such as certain designated WSAs. The Beaver Creek WSA is the only closed area in the Gold Belt planning area.

The proposed connector trail would tie in two areas that receive little use currently, but that with the addition of the connector trail and a bridge, would allow an all-day motorized experience that should prove very popular. This connector trail would also serve a second purpose. Glow Corporation has been exploring the Gold Belt area for the past few years looking to take advantage of its heavily mineralized nature. Glow Corporation found a uranium deposit in September of 2002 and has met all of the legal requirements to locate seven unpatented mining claims. Each year since the discovery the company has filed all the papers and taken all the necessary actions to maintain the claims. The company is confident it can prove sufficient value in the deposit to meet the standard for discovery. The company submitted a plan of operations to the BLM in June, 2003 at the same time the BLM was looking at the area for travel management purposes. By building the connector trail and bridge, access could be given to Glow Corporation and two unconnected trails could be tied together to create a long motorized loop trail accessing not only Glow's claims but relatively unutilized backcountry as well.

#### **B. Land Use Planning and Implementation Process**

The Royal Gorge Resource Management Plan (RMP) was approved in 1988. The RMP called for a system of designated routes but it did not identify those routes at the time it was published. Travel management plans are being developed now, a full sixteen years after the RMP was signed, by smaller planning areas. The Gold Belt planning area received priority due to the huge increase in the use of roads and trails by all types of users along with the proliferation of new user-created routes.

When the Gold Belt travel management plan is in place, on-the-ground implementation will occur subject to budget priorities and funding availability. Implementation plans include posting signs along designated routes and in closed areas, printing and distributing maps, reclamation of closed or user-created trails, construction of the new motorized trail connector loop, maintenance of designated trails, maintenance of parking areas and trash pick up, and occasional law enforcement and recreational staff presence to ensure compliance and public understanding of the trail system.

### C. Environmental Analysis

The extensive scoping effort conducted by the BLM revealed in five key concerns. These concerns include providing appropriate and reasonable access and travel opportunities; achieving compliance with the travel management plan; abating the proliferation of user created routes and cumulative impacts of OHV activities; reducing user conflicts between non-compatible motorized and non-motorized recreation users; and avoiding impacts to the endangered Pinyon Piper.

Four alternatives were developed as a result of the scoping and were analyzed in the draft Environmental Analysis (EA). The alternatives are the proposed action, no action (current use alternative), low use alternative, and high use alternative. These can be generally summarized in the table below. When reading the table, note that each travel use category also allows uses by the categories listed above it. For example, routes that ATVs and motorcycles can go on can also accommodate foot, equestrian and bicycle traffic.

Travel Use Category	Proposed Action	Current Use Alternative	Low Use Alternative	High Use Alternative
Foot, Horse & Bicycle	82	92	123	222
ATV & Motorcycle	75	104	37	116
General Vehicle	60	95	36	85

The affected environment section of the draft EA is included in Appendix A.

## IV. Applicable Laws and Guidance

### A. Laws

The primary laws applicable to this situation (see attachment for detail) are the Federal Land Policy and Management Act, the National Environmental Policy Act, the Multiple Use Sustained Yield Act, The 1872 General Mining Act, the National Historic Preservation Act, the Clean Air and Clean Water Act, and the Endangered Species Act.



## B. Regulations

43 CFR Subpart 1600

43 CFR Subpart 1601

43 CFR Subpart 1602

Planning

Resource Management Planning Guidance

Public Participation

43 CFR Subpart 2932

Special Recreation Permits for Commercial Use,  
Competitive Events & Organized Groups

43 CFR Part 3800

43 CFR Part 3810

43 CFR Part 3830

Mining Claims Under the General Mining Law

Lands and Minerals Subject to Location

Locating, Recording & Maintaining Mining Claims or  
Sites, General Provisions

43 CFR Part 3832

Locating Mining Claims or Sites

43 CFR Part 3836

Annual Assessment Work Requirements for Mining Claims

43 CFR Part 3860

Mineral Patent Applications

43 CFR Part 3870

Adverse Claims, Protests and Conflicts

43 CFR Subpart 8340

Off Road Vehicles

43 CFR Subpart 8341

Conditions of Use

43 CFR Subpart 8342

Designation of Areas and Trails

## C. Executive Orders

Executive Order 11644 signed on February 8, 1972 signed by President Richard Nixon (as amended by Executive Order 11989 signed on May 24, 1977) requires the federal land management agencies to designate "areas and trails" for off-road vehicle use or restriction and to develop regulations implementing the order.

## D. Instruction Memorandum

Instruction Memorandum No. 2004-005 states that road and trail access and OHV management guidance will be incorporated into every Resource Management Plan and at a minimum the RMP will identify areas that are open, limited or closed. For all limited areas, a network of roads and trails should be identified. If it is too complex, too controversial or data is too incomplete to identify specific roads and trails, BLM will, to the extent possible, incorporate a map of a preliminary road and trail network and define management guidance for access and activities.

Instruction Memorandum No. 2004-079 clarifies the distinction between land use plan decisions and implementation decisions so that BLM can clearly communicate the appropriate administrative remedies available to the public. This guidance, along with illustrative examples can be found at <http://www.blm.gov/nhp/efoia/wo/fy04/im2004-079attach1.pdf>

Instruction Memorandum No. 2004-150 provides guidance in determining when to issue a special recreation permit for terms up to ten years.

## E. Agency Handbooks and Manuals

Agency handbooks provide guidance to the State and Field Offices while agency manuals are generally more procedural and must be read in conjunction with the relevant regulations.

BLM National Management Strategy for Motorized Off Highway Vehicle Use  
<http://www.blm.gov/ohv>

MS-1601 Land Use Planning Manual  
<http://www.blm.gov/nhp/efoia/wo/manual/1601.pdf>

H-1601-1 Land Use Planning Handbook  
<http://www.blm.gov/nhp/efoia/wo/handbook/h1601-1.pdf>

H-1790-1 National Environmental Policy Act Handbook  
<http://www.blm.gov/nhp/efoia/wo/handbook/h1790-1.pdf>

H-2930-1 Recreation Permit Administration Handbook  
<http://www.blm.gov/nhp/efoia/wo/handbook/h2930-1.pdf>

MS-2930 Recreation Permit Administration-Policy & Program Direction for Reviewing, Issuing, Administering, Evaluating, Monitoring and Management Manual  
<http://www.blm.gov/nhp/efoia/wo/manual/2930.pdf>

MS-6840 Special Status Species Management Manual  
<http://www.blm.gov/nhp/efoia/wo/manual/6840.pdf>

MS-3800 Mining Claims Under the General Mining Laws Manual  
<http://www.blm.gov/nhp/efoia/wo/manual/3800.pdf>

MS-3830 Location, Recording & Maintenance of Mining Claims, Mill and Tunnel Sites Manual  
<http://www.blm.gov/nhp/efoia/wo/manual/3830.pdf>

MS-3870 Adverse Claims, Protests, Contests and Appeals Manual  
<http://www.blm.gov/nhp/efoia/wo/manual/3870.html>

H-3870-1 Adverse Claims, Protests, Contests and Appeals Handbook  
<http://www.blm.gov/nhp/efoia/wo/handbook/h3870-1.html>

## APPENDIX A NEPA ANALYSIS AFFECTED ENVIRONMENT

**Air Quality:** Air quality in the planning area is currently good to excellent. Ambient air quality standards are achieved throughout the planning area.

**Cultural Resources:** The planning area contains cultural resources ranging from very early (Paleo-Indian) aboriginal sites to 50-year-old historic sites. Aboriginal site types include open camps, chipped stone manufacture and processing sites, open and sheltered architectural locales, and isolated artifacts and features. Sites in historic period include mines, vernacular and commercial architectural sites, railroad grades, homesteads, town sites, and ranches.

**Environmental Justice:** There are no minorities or low-income populations in or near the project area.

**Floodplains, Wetlands and Riparian Zones:** The planning area encompasses many watersheds tributary to the Arkansas River, most with significant wetland resources. Fourmile, Eightmile, Beaver and Current Creeks are the large streams.

**Invasive, Non-native Species:** Noxious weeds are more common on the private lands in the project area than they are on the public lands. The higher elevations are susceptible to invasion by yellow toadflax and the lower elevation areas are susceptible to knapweed species invasions if severe soil surface disturbance occurs.

**Native American Religious Concerns:** Three types of culturally significant phenomena may be present: traditional cultural properties where wild foods or medicines are gathered or where landforms exist associated with aboriginal traditions or beliefs; intangible spiritual attributes associated with the land; and contemporary use areas. The following tribes have an interest in the planning area: the Apache, Pawnee Nation, Cheyenne, Arapaho, Camanche, and Kiowa Tribes of Oklahoma as well as the Crow Creek, Lakota, Northern Arapaho, Northern Cheyenne, Northern Ute, Ogalala Lakota, Cheyenne River Lakota, Rosebud Sioux, Shoshone, Southern Ute, and Ute Mountain Ute Tribes.

**Prime and Unique Farmlands:** There are no prime or unique farmlands involved on BLM lands in the planning area.

**Soils:** Travel routes in the Gold Belt planning area cross 85 different soil types with 74 being classified as having a high erosion hazard. The lower elevation areas have shallow soils derived from sedimentary rock parent material while the higher areas have shallow soils with a granitic parent material. Most of these soils are low in nutrients, have a low water holding capacity, and are slow to re-vegetate after disturbance.

**Threatened and Endangered Species:** The Pinyon Piper, a small neo-tropical, migratory songbird migrates through the area during the spring. The Pinyon Piper was listed as an endangered species last year, but very little is actually known about the

species including the extent of its critical habitat. The Mexican spotted owl and the bald eagle, both threatened species, have critical habitat in the planning area. The black-tailed prairie dog is a candidate species found in the planning area. The mountain plover, Gunnison's prairie dog, peregrine falcon, Brandegeee wild buckwheat, dwarf milkweed and golden blazing star are all sensitive species found in the planning area.

**Vegetation:** Assessments for land health indicate that the majority of the area's vegetation is meeting standards with the exceptions being areas with highly dense pinyon/juniper woodlands. The area includes a variety of vegetation communities ranging in elevation from 5,000 feet to 10,500 feet. Annual precipitation varies from 10-20 inches.

**Wastes, Hazardous or Solid:** Easy access to public lands and fees charged at legal disposal sites result in some dumping of wastes and hazardous materials on public lands. Dumping is typically household and construction waste.

**Water Quality-Hydrology:** Eight watersheds are tributary to the Arkansas River and supply water for many downstream users. Among the users is the Park Center Water District taking water directly out of Fourmile Creek on BLM lands. Another major user is the community of Penrose that gets all of its water from Beaver Creek, flowing through BLM most of its length. Waters on the Section 303(d) Clean Water Act list include portions of Cripple Creek and the entire length of Arequa Gulch. These waters are impacted by heavy metals associated with mining. Water quality in Milsap Creek from its headwaters near Victor to its confluence with Fourmile Creek is severely degraded due to sediment.

**Wilderness, Areas of Critical Environmental Concern, Wild and Scenic Rivers:** The planning area includes portions of the Beaver Creek WSA, the Beaver Creek ACEC, the Phantom Canyon ACEC, and the Garden Park ACEC. The Copper Mountain citizen's proposed wilderness area is in the planning area; this area was originally inventoried by the BLM in the early 1980's but it was determined to have too many roads and minerals conflicts so it did not make it into wilderness study area designation. There are no designated Wildernesses or Wild and Scenic Rivers within the planning area.

**Aquatic Wildlife:** There are many viable populations of aquatic wildlife species, including important fisheries, within the planning area. Aquatic habitats in the area are primarily impacted by impairment of riparian function due to sediment loading from travel routes, changes to water tables, changes to hydrologic runoff patterns and channel modifications, and to a lesser extent from vehicles driving directly in the waterways.

**Terrestrial Wildlife:** The primary habitat types in the planning area are grassland, mountain shrub, pinyon/juniper, mixed conifer, ponderosa pine, aspen, spruce fir and alpine. The following species or groupings are commonly found in the planning area: bighorn sheep, elk, mule deer, black bear, mountain lion, raptors, Merriam's turkey, and birds.

**Forest Management:** In the past 25 years some harvest of both firewood and sawlogs have occurred in the areas, however, due to depressed markets for both products, the BLM has not conducted any harvest operations within the planning area in the past two years and no active sales exist.

**Geology and Minerals:** The area is an historic mining district and although most of the mining activity today is for industrial material such as sand, gravel, clay and limestone, the large modern day gold mine of the Cripple Creek & Victor Gold Mining Company still operates near Victor. Some increased interest has been shown in the uranium resources scattered throughout the planning area and numerous unpatented mining claims are being maintained.

**Land Status/Realty Authorizations/Access:** Road rights-of-way include authorizations for four-wheel drive "two-track" roads that provide access to electrical transmission lines, small single-lane driveways for individual land owners, more highly developed double-lane access roads for subdivisions and the federal, state and county road systems. Power line rights-of-way range from small kilovolt service lines for residences to large kilovolt double wood-pole transmission lines, to the very large steel structured transmission facility constructed through the middle of the planning area.

**Noise:** The sources of noise are highly variable but tend to be dominated by motorized vehicles. This can vary from many cars and large trucks on paved roads to the occasional transit of a motorcycle on an isolated primitive road.

**Range Management:** The planning area includes approximately 85 domestic livestock grazing allotments. BLM has historically permitted occasional vehicle use off roads to maintain improvements.

**Recreation:** The Gold Belt planning area possesses several distinctive features and attractions that define recreation in the area. The area is internationally known for the Gold Belt Tour National Scenic Byway (auto-touring), sport rock-climbing at the Shelf Road Climbing Area, and dinosaur fossil discoveries and research in the Garden Park Fossil Area. The area is regionally known for the solitude and unconfined recreation within the Beaver Creek WSA, backcountry horseback riding opportunities, and motorized recreation in the Torumup Commons including annual ATV competitions and the popular Independence Extreme OHV Trail.

**Transportation:** The existing BLM road network consists mostly of low standard native surface roads that are linked to county, state and federal highways. With few exceptions, the routes were established to access and serve specific purposes such as mining, grazing, timber, construction and maintenance of utility lines, etc. There are a total of 338 miles of BLM managed routes in the planning area.

**Visual Resources:** Class I areas, most valued for outstanding visual resources include the Beaver Creek WSA. Class II areas, highly valued for visual resources, include the Gold Belt Tour National Scenic Byway, the lands along Highway 9 and along Fremont

County Road 132 which provides access to the Beaver Creek trailhead. Class III areas, moderately valued for visual resources, include lands found in the backcountry away from primary viewing areas such as county roads and campgrounds. Class IV areas, least valued for visual resources, include lands in the vicinity of Cripple Creek and Victor.

**Law Enforcement:** A single law enforcement ranger is responsible for all of the public lands in the Royal Gorge Field Office handling enforcement actions relating to OHV use, mineral, land and realty, grazing, recreation, wild horse and burros, and other program violations.

**Paleontological Resources:** Notable paleontological areas in the planning area include the Garden Park Fossil Area and the Indian Springs trace fossil area.

**Fire and Fuels Management:** Fuels reduction treatments are on-going with the planning area including roller chopping or hydro-axing of pinyon-juniper forests, thinning of ponderosa forests and the selling of firewood as well as prescribed burns. None of the alternatives would affect the fire suppression efforts that normally occur in the area.

**Socio-Economic:** None of the alternatives will cause any major changes to the area's population, income or employment.

1 WS  
being  
special design  
memo

1964 wilderness areas automatically Class I wildlands  
subsequent areas have to be nominated by state  
WSAs not covered

print: pre; write: post

OTHER ISSUES

### V. Discussion Questions

#### Group 1

What would be the process for the agency to approve and construct the connector trail?  
NEPA ~~ES~~ reasonable foreseeable impact  
ET later for mine in backcountry rec  
noise, air, increased use, TSE, increase  
plan area size, soils, impact already  
top Qual, veg, woods designed

What level of NEPA analysis would be required and what issues would be analyzed?

most everything in Appendix A  
EIS? TMP not considering mining plan Don't mix vs. doing cumulative impact TMP w alternative for mine

connector a 2477?  
may country work on  
what of road needs  
2477 not done before TMP  
EPA, ESA, HPA, etc.

#### Group 2

What are the RS2477 issues associated with the travel management planning and implementation process?  
location of roads, impact of possible reopening of closed roads  
WSA issues, priv-prop, route density in future

Who would be the main players associated with RS2477 issues?  
mining claim holders, agency, county, private prop owners, advocates of all kinds  
state

#### Group 3

What are the areas of special designation in the area of the case study? What significance do they have?  
2 ACECA 1 WSA - managed as wilderness 1 historic/scenic byway  
1 CWP 1 Rec Area  
ACEC w 2 other special designations  
stream problem  
what allowed in ACECA?

CNAP  
areas  
overlap  
ACECA

How do the findings in the Supreme Court case Norton v. SUWA affect this scenario?

What status do the lands in Senator Johnson's bill have? Can they still be designated wilderness if some impacts occur on the land before the passage of a wilderness bill?  
only as introduced legislation depends on impacts

#### Group 4

How does the proposed mining Plan of Operation (affectionately called a POO) fit in?  
must provide reasonable access ANILCA

Can the Plan of Operations and the travel plan be analyzed together or separately?  
concurrent and separate cumulative impact - may need EIS

What impacts do the potential mine and travel plan have on each other?  
access

#### Group 5

How does the listing of the Pinyon Piper as an endangered species impact travel management planning and management of the area?  
if an ES designation, big impact

Since little is known about the species or its critical habitat, what options are open to the BLM in authorizing activities?  
not much pending biological assessment

## TRAVEL MANAGEMENT PLAN CASE STUDY PART 2

### Special Use Permit for two-day ATV event on the Independence Trail in the Copper Mountain Citizen's Proposed Wilderness

The Royal Gorge Field Office has received an application for a Special Use Permit for a two-day competitive ATV event. The proposal is to hold the competitions on the Independence Trail, a popular OHV and ATV route that goes up an old mining two-track route to the top of Copper Mountain.

This area is within the Gold Belt Travel Management Plan but the plan will not be signed off on before Joe Capricio needs to make a decision on this application. Joe already knows he is going to hear an ear-full from the conservation community because the Independence Trail goes through the Copper Mountain Citizen's Proposed Wilderness area. It would be considered a "cherry-stemmed" route but he knows that he will likely face opposition to the race.

The Independence Trail goes to a historic mining mill site at the end of the trail. The site contains the foundation and some of the walls from the old mill along with lots of old mining equipment. While the site is not included on the National Historic Register, the local BLM archeologist believes it is probably eligible and the local historical society has been interested in the site for years. Historic resources such as this are managed under FLPMA and the National Historic Preservation Act that says the agency shall "administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations."

The race operators, Colorado ATV Mtn. Association, have held other events on the public lands in the Royal Gorge resource area and Joe's staff considers them to be fairly responsible. They police their participants, clean up the trash after the event and focus on family-oriented competitions. The president of the association is on the Resource Advisory Council for the Royal Gorge Field Office. This event is planned to be the first in a series of annual events and Joe knows that it is important to set the foundation right if he approves this event. *one permit good up to 10 yrs.*

The lower part of the race near the start line is in a pinyon-juniper landscape but the Independence Trail climbs quickly in elevation to a ponderosa and fir mix landscape. It is possible that the first staging area near the starting line is in Pinyon Piper habitat but none of the species has ever been sighted in the area and no critical habitat has been designated.

BLM just received the Plan of Operations from the Colorado ATV Mtn. Association and the staff can now begin to analyze the proposal.



**COLORADO ATV MTN. ASSOCIATION**  
**Copper Mountain ATV Race Event**

**PLAN OF OPERATIONS**

**OVERVIEW:** The race will be held on May 8<sup>th</sup> and 9<sup>th</sup>, 2005 with about 70 participants and an expected 250 spectators. This is planned to be the first of an annual event held every May up the Independence Extreme OHV Trail. Various classes of races will take place representing various classes of all terrain vehicles and levels of expertise and age. There will be two staging areas. The first, and largest, staging area will be at the intersection of the dirt road from Canon City and the two-track road up to Copper Mountain. Six port-a-potties will be placed here where most of the participants and spectators will park. Also at this staging area will be camping and the concession booths. The second staging area will be further up the race course along a particularly challenging rock incline where people will gather to watch the race; four port-a-potties will be placed there.

**CONCESSIONS:** CAMA members will provide a wide variety of concession booths including the sale of food and novelty items such as hats, shirts, bumper stickers and the like.

**PERMITS REQUIRED:** Two permits are required, one from Fremont County, the other from BLM.

**CROWD CONTROL AND LAW ENFORCEMENT:** Crowd control will be handled by CAMA volunteers, with traffic control handled by the Fremont County Sheriffs Department.

**FIRE PREVENTION:** CAMA will have a water pumper located at the lower staging area during the actual racing and trial activities for fire suppression. In addition, CAMA will notify the surrounding area fire departments as well as the BLM fire dispatch of race activities. Each race vehicle will be equipped with an onboard fire extinguisher unit. The safety network location in-between the start line and the finish line will have portable fire extinguishers.

**PARKING:** The main parking locations will be at the staging area near the start line and the second staging area which also acts as a viewing area. CAMA volunteers will direct parking to ensure the safety of participants and spectators.

**SENSITIVE AREAS:** Any areas that the BLM designates as ecologically sensitive and subject to unusual conditions shall be marked off as closed with flagging and signing. The historic mill site and other historic resources at the end of the trail will be monitored by volunteers when participants are in the area.

**EMERGENCY RESPONSE:** During both race days there will be a fully equipped ambulance available for dispatch, usually located as the start line. St. Thomas More

Hospital will be made aware of the event and the Flight for Life helicopter service will also be made aware of the event.

**SANITATION:** CAMA will provide port-a-potties that will be placed at the start line and the second staging area. CAMA will have the toilets serviced as needed.

**GARBAGE DISPOSAL:** CAMA has an agreement with the local trash company for the placement of two disposable dumpsters on the day prior to the start of the race. CAMA will pass out litter-bags at the staging areas and will be responsible for litter clean-up along the roadside and use areas following the event.

**RACE VIEWING:** All race viewing will be done from along the road and at the second staging area.

**COMMUNICATIONS AND SAFETY NETWORK:** A safety network of FM radios will be stationed along the race course. The radios will have separate frequency, and shall be strictly used for starting, stopping and cautioning race vehicles, should another vehicle get into trouble. Radio communications will be in touch with race officials, fire and ambulance equipment.

**INSURANCE:** CAMA carries a complete insurance policy with limits up to \$1 million of coverage to include, but not limited to, participant medical, and spectator liability. Fremont County, City of Canon City, and the BLM will be listed as additional insured.

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT

FORM APPROVED  
OMB NO. 1004-0119  
Expires: October 31, 2001

SPECIAL RECREATION APPLICATION AND PERMIT  
(43 U.S.C 1201; 43 U.S.C. 1701; 16 U.S.C. 460 L-6(a); and 43 CFR Group 8300)

Permit No.  
CO-200-RE-RV-05-01

Instructions: Complete Items 1 through 8, and return to appropriate BLM Office. (Use additional sheets, if necessary.)

Type or Print Plainly in Ink

WHEN SIGNED BY AUTHORIZED BLM OFFICIAL, THIS PERMIT AUTHORIZES

1. Name of person and/or organization Colorado ATV Mtn. Association Helen Wheels, Race Director	Address (include zip code) 1516 8th St Manitou Springs, CO 80909
---	--

Telephone No. (include area code) Business 719-744-1408 Residence 719-744-8234

2. To use the following public lands (provide name, legal description and/or attach map).  
Independence extreme ATV Trail up to top of Copper Mountain; see map

3. For the following purpose (provide full description of activity or event including number of anticipated participants and spectators).  
ATV hill climb races. Approximately 70 participants & 250 spectators

4. During the following times and dates (specify below):

ARRIVAL			DEPARTURE		
DATE (Mon., Day, Yr.)	TIME		DATE (Mon., Day, Yr.)	DEPARTURE	
	AM	PM		AM	PM
<u>May 8, 2005</u>	<u>7<sup>30</sup> am</u>	<u>5<sup>00</sup> pm</u>	<u>May 9, 2005</u>	<u>9<sup>00</sup> am</u>	<u>4<sup>00</sup> pm</u>

5. Type of permit:  Commercial  Non-Commercial  Other OHV events with 50 or more vehicles  Other (list type)  
 Competitive  Non-Competitive  Individual/ Private

6. Facilities (describe facilities including water and sanitation facilities you intend to provide, attach plans and location maps).  
10 porta potties placed at two staging areas

7a. Previous permits: Have you been issued a permit for a previous event or activity (if "yes," answer the following.) Yes

b. BLM Office issuing permit CO-200-RE-RV-02-15 c. Date of latest permit 5-03

d. Have you, or your organization, forfeited any portion of any previous permit, bond, or surety submitted for use of public lands, or is any investigation or legal action pending against you or your organization for use of public lands?  Yes  No (if "yes," attach details on a separate sheet.)

8. Certification of Information: I CERTIFY That the information given by me in this application is true, complete, and correct to the best of my knowledge and belief and is given in good faith. I acknowledge that I (we) am (are) required to comply with any conditions or stipulations that are required by the authorized officer when the permit is issued.

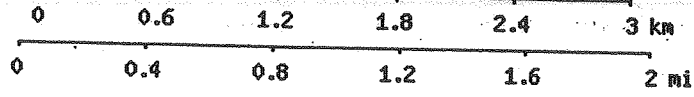
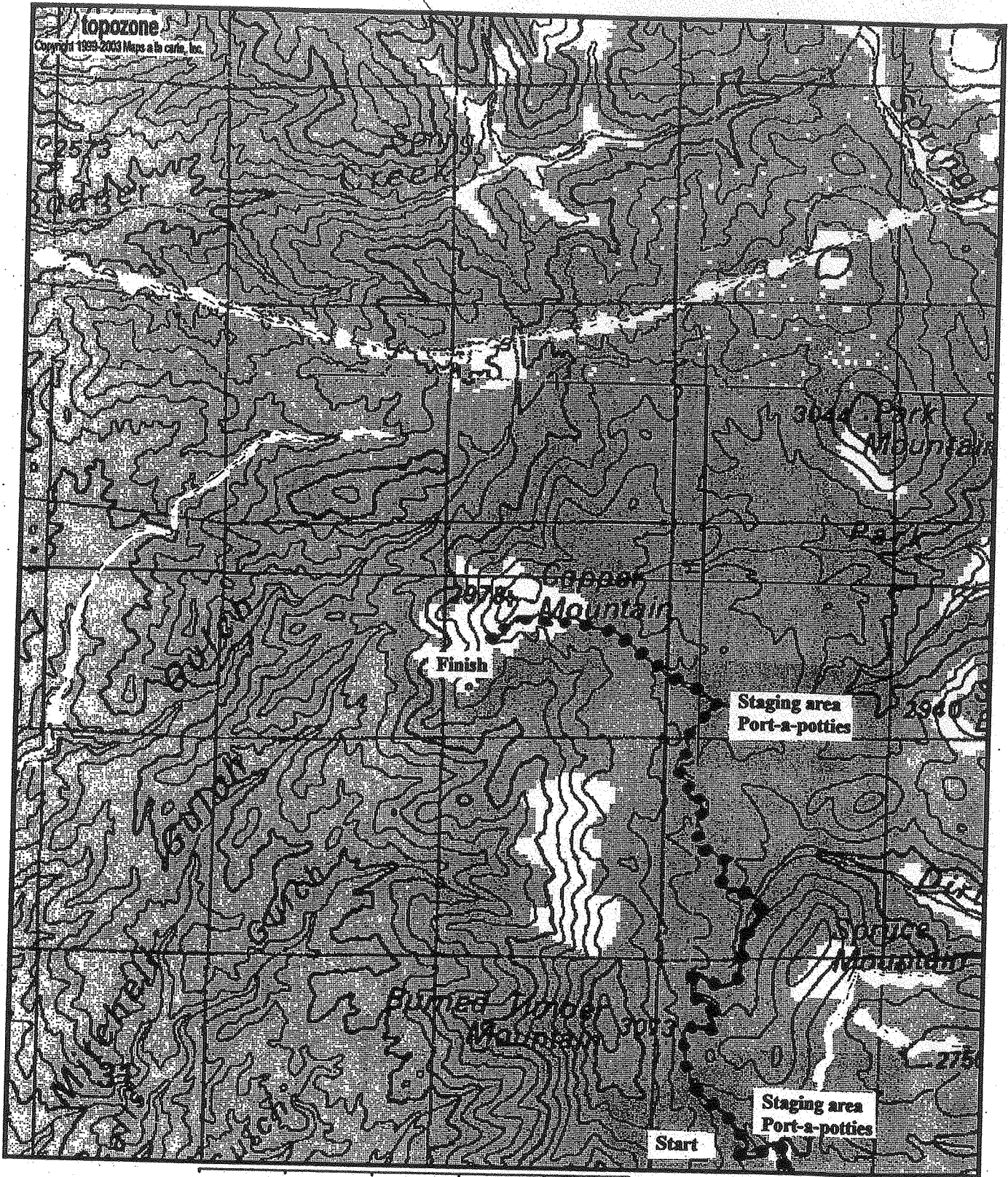
Helen Wheels (Signature of Applicant) 12-01-04 (Date)

Title 18 U.S.C. Section 1001 and Title 43 U.S.C. Section 1212 makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

This application is hereby approved subject to the conditions and special stipulations on reverse and any attachments.

(Signature of Authorized Official) (Date)

PERMITTEE MUST HAVE THIS PERMIT (OR LEGIBLE COPY) IN POSSESSION DURING USE IN PERMITTED AREAS.



**Colorado ATV Mtn. Association  
Special Recreation Permit Proposal  
Race Course and Support Facilities**

M=10.278  
G=-0.477



United States Department of the Interior  
BUREAU OF LAND MANAGEMENT  
ROYAL GORGE FIELD OFFICE  
3170 EAST MAIN STREET  
CAÑON CITY, COLORADO 81212  
SPECIAL RECREATION PERMIT  
ANNUAL OPERATING AUTHORIZATION

Permit Applicant:  
Colorado ATV Mtn. Association  
President of Colorado ATV Mtn. Association  
Helen Wheels, Race Director  
1516 8<sup>th</sup> Street  
Manitou Springs, Co 80909

The proposed commercial recreational use of public lands is described under permit number: CO-309-RG-RU-05-06. Requested authorization is for the time period May 1, 2005 to May 30, 2005. In addition to the standard stipulations (attached), additional special stipulations being considered for this application include:

**Special Stipulations**

- 1) All requirements identified in the Operating Plan submitted by the permittee are considered additional stipulations and requirements attached to this Special Recreation Permit and Annual Operation Authorization.
- 2) A post event inspection will be done by the Bureau of Land Management (BLM). Clean-up as well as mitigation of any damage resulting from this event to natural resources or facilities on BLM lands will be the responsibility of the permittee to repair to the satisfaction of the Field Manager. Clean-up and required mitigation will be done within 36 hours of the post inspection, unless otherwise agreed in writing by the local area manager.
- 3) A legible copy of the Special Recreation Permit, Annual Operating Authorization and the Operating Plan must be in the possession of all authorized representatives of the permittee during the event.
- 4) The permittee will flag the staging/parking area and monitor these areas to assure unsafe incidents/conditions do not occur.
- 5) The permittee has the responsibility to patrol spectator camping to insure the safe use of campfires as well as the proper disposal of grey water and sewage. The permittee is responsible to insure that there are no unattended campfires and that all campfires are extinguished prior to the end of the event.

6) The Permittee is responsible for compliance with the local county burning restrictions/requirements.

7) In order to minimize the possibility of vehicle accidents within the race area and excessive soil disturbance along the margins of the event; extraneous vehicle travel will not be permitted within the race course area. Permittee will insure that the parking of cars along the margins of the race area are located within existing disturbed areas and they are away from the race course, to avoid injury to race participation as well as spectators.

8) Trash cans will be used during the event and all flagging use by the permittee will be removed after the event.

9) During the race event the Colorado ATV Mtn. Association will ensure that the entrance and exits of the race course is physically blocked to insure that spectators and vehicles can not enter the race course during the event.

10) Colorado ATV Mtn. Association will have volunteers posted at the historic mill site at the end of the Independence Trail at the top of Copper Mountain at all times during the event. Volunteers will keep people off of the historic structures and ensure that no artifacts are removed from the site and that the site is kept free from trash and vandalism.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Joe Capricio  
Field Manager, Royal Gorge Field Office

\_\_\_\_\_  
Date

\_\_\_\_\_  
Helen Wheels  
Race Director, Colorado ATV Mtn. Association

# ADDITIONAL STANDARD STIPULATIONS FOR COMPETITIVE AND OFF-HIGHWAY VEHICLE EVENTS

## FOR ALL PERMITS

1. Permittee is responsible for ensuring that participants do not drive off designated use areas and/or course routes; participant and spectator use will be restricted from sensitive resource areas.
2. Permittee is responsible for crowd control, ensuring that the event is orderly, does not endanger bystanders or participants, and is conducted in a peaceable manner to enhance recreation satisfaction and promote the public well being.
3. Permittee agrees to reroute and/or relocate use areas to avoid sensitive use areas identified by BLM before or during the event.
4. All range fence gates opened for the race will be monitored during the race to prevent passage by livestock and closed immediately at the end of the race.
5. Permittee will take all reasonable measures to ensure that entrants, spectators and casual users attracted by the event will not harass wildlife or livestock in the vicinity, including publication of notices discouraging such use in the local news media.
6. Permittee will take all reasonable measures to inform other recreationists in the area of the event and associated temporary road restrictions, including publication of notices to this effect in the local news media.
7. Permittee will mark sensitive areas identified by BLM, routes, staging areas, parking, and pit areas with non-defacing markers and appropriate signs and will ensure that all such materials are immediately removed upon completion of the event.
8. During the event, permittee will provide on-the-ground staff monitoring to ensure that use occurring is confined to areas actually authorized by permit.
9. Permittee is responsible for ensuring that all authorized motorized use conforms to the Conditions of Use set forth in 43 CFR Subpart 8341.1, regulations governing use.
10. Nothing in this permit will be construed as a license for the permittee, employees, or clients to use areas of the public lands which are otherwise restricted or closed (e.g., restrictive off-road vehicle designation areas).
11. Permittee is responsible for ensuring the safety of all spectator, entrant, concessionaire, and/or support personnel, ensuring that all permit actions are in conformance with local, state, and federal health and safety standards.
12. Permittee is responsible for furnishing self-contained chemical sanitation facilities and trash receptacles at locations as necessary, to keep these serviced neat and clean during the event, and to provide for off-site disposal of all refuse and human waste generated from the event, in accordance with all applicable local, state, and federal ordinances, laws, and regulations.
13. State and local laws and ordinances apply to all BLM-administered public land. This includes, but is not limited to, laws and ordinances governing (a) operation and use of motor vehicles, aircraft, and boats; (b) hunting and fishing; (c) use of firearms; (d) injury to persons or destruction of property; (e) air and water pollution; (f) littering; (g) sanitation; and (h) use of fire.
14. Operation and maintenance of all sanitation, food service, and water supplies, systems, and facilities by the permittee or his/her concessionaires shall comply with the standards of the local department of health and the United States Public Health Service.
15. Permittee will provide first-aid/EMT services adequate to meet emergency needs arising from the event, including CPR and medi-vac transportation for hospital care.

Questions for Part 2, Travel Management Case Study

<sup>Yes</sup>  
Will a NEPA analysis be required to approve the special use permit? What level of analysis? Will it tier off of an existing document? Which document?

LEA

Existing RMP

How does this application relate to the Gold Belt Travel Management Plan? Can the background work and analysis from the Gold Belt Travel Management Plan be used? — <sup>Yes</sup>

has to be included as annual event proposed

What impact does the citizen's proposed wilderness have on Joe Capricio's decision making process? What impacts would the competitive event have on the area's chance for wilderness designation? sounds like an existing route cherry stem

What impacts might the Pinyon Piper's recent listing have on this event? Is Section 7 consultation required for this special use permit? BLM can require other mitigation beyond content of permit  
consultation required

how do spectators get up the road; likely not walking  
spring mud  
pre and post event analysis  
can bond, ask for worst case scenario

RMP should dictate how/when/where commercial recreation occurs  
anyone staying overnight? camping fees?