

Editor's note: Petition for reconsideration denied by decision [166 IBLA 65](#).

DONA JEANETTE ONG
CARIE L. NASH

IBLA 2000-163
IBLA 2000-164

Decided April 28, 2005

Appeals from decisions of the Cascade Field Manager, Cascade Field Office, Bureau of Land Management, rejecting applications for desert land entry. IDI-31674 and IDI-31676.

Affirmed.

1. Desert Land Entry: Applications--Desert Land Entry:
Lands Subject To--Federal Land Policy and Management
Act of 1976: Land-Use Planning

A desert land entry application is properly rejected by BLM when the land sought has been designated for retention in Federal ownership in the applicable resource management plan.

2. Desert Land Entry: Applications--Desert Land Entry:
Lands Subject To--Federal Land Policy and Management
Act of 1976: Land-Use Planning

When BLM rejects a desert land entry application because the land sought has been included in an area of environmental concern (ACEC) as part of the resource management planning process and one of the management guidelines for that area is to retain it in Federal ownership, the applicant may not challenge the basis for the establishment of the ACEC in an appeal of the decision rejecting the desert land entry application. The establishment of an ACEC is a land use planning decision subject to review only by the Director, BLM,

pursuant to 43 CFR 1610.5-2. This Board has no authority to overturn or modify an ACEC determination.

Dona Jeanette Ong, 149 IBLA 281 (1999), overruled to the extent inconsistent.

APPEARANCES: Dona Jeanette Ong, Nampa, Idaho, pro se, and Carie L. Nash, Melba, Idaho, pro se; Kenneth M. Sebby, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

In separate decisions dated February 3, 2000, the Cascade Field Manager, Cascade Field Office, Bureau of Land Management (BLM), rejected the desert land entry (DLE) applications of Dona Jeanette Ong (IDI-31674) and Carie L. Nash (IDI-31676) for public lands situated in western Idaho. Those same applications had been the subject of earlier May 1, 1996, BLM decisions rejecting them. Ong and Nash appealed the May 1, 1996, decisions to this Board and in a June 24, 1999, decision (Dona Jeanette Ong, 149 IBLA 281 (1999)) the Board set aside those May 1, 1996, decisions and remanded the cases to BLM. BLM issued the February 3, 2000, decisions following our remand.

On April 23, 1996, Ong and Nash filed their DLE applications pursuant to section 1 of the Act of March 3, 1877 (Desert Land Act), as amended, 43 U.S.C. § 321 (2000). They sought adjoining tracts of land in secs. 29 and 30, T. 6 N., R. 2 W., Boise Meridian, Gem County. Nash applied for 320 acres of public land described as the W $\frac{1}{2}$ sec. 29, while Ong sought 316.30 acres of public land in sec. 30 described as all of the SE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, and SE $\frac{1}{4}$, and parts of the NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, and NE $\frac{1}{4}$ SW $\frac{1}{4}$. They each stated that they intended to grow alfalfa hay on the lands.

In the May 1, 1996, decisions, BLM rejected the applications because the lands sought had been determined in BLM's Cascade Resource Management Plan (RMP), which had been adopted in a Record of Decision (ROD), signed by the Idaho State Director, BLM, on July 1, 1988, to be "not available for transfer out of public ownership."^{1/} (Decision (Nash), dated May 1, 1996, at 1.) It also noted that the

^{1/} In the ROD, the State Director decided "to implement Alternative E, as described in the Cascade Proposed RMP/Final EIS [Environmental Impact Statement]. This alternative is the approved Resource Management Plan for the Cascade Resource

(continued...)

RMP had not only identified the lands for retention, but had designated them as part of an Area of Critical Environmental Concern (ACEC). In our June 24, 1999, decision, we offered two grounds for setting aside BLM's May 1, 1996, decisions. First, the Board held that the record submitted to the Board by BLM was inadequate to determine whether the specific lands applied for had been designated for retention or whether they were included within the boundaries of any of the three areas identified for management in the RMP as ACECs. While this ground was sufficient to support our decision, we propounded a second ground for doing so--that "the Ong and Nash applications have not been reviewed under procedures established by Departmental regulations." 149 IBLA at 284. We explained that "[t]he case files now before us do not show that * * * the Ong and Nash classification petitions have been reviewed by the State Director following the [petition-application classification] procedures in 43 C.F.R. Part 2450."^{2/} Id. at 285-86.

On February 3, 2000, BLM again rejected the applications, holding in each case that the lands sought had been designated in the RMP for retention in Federal ownership. BLM added that the lands sought had been included in the Long-Billed Curlew ACEC, "which also precludes disposal." (Decisions at 3.) It stated that "Management Guideline Number five for this ACEC specifies that all lands within the ACEC be retained in Federal ownership."^{3/} Id. In order to document its decisions, BLM appended thereto copies of relevant pages from the ROD and Proposed RMP, as well as maps showing the location of the lands sought. Finally, BLM noted that because the lands were "unavailable" for DLE, it did not have to determine whether to classify them as "suitable for desert land entry," citing our second ground in Dona Jeanette Ong for setting aside and remanding its earlier decisions. Id. at 3 n.1.

Ong and Nash have appealed from and petitioned for stays of those February 3, 2000, decisions.^{4/} Ong's appeal has been docketed as IBLA 2000-164 and Nash's as IBLA 2000-163. For the reasons stated below, we affirm BLM and

^{1/} (...continued)
Area." (ROD at 1.)

^{2/} Item 16 of each desert land entry application in this case states: "If the lands described in this application have not been classified as suitable for desert entry * * *, please consider the application as a petition for such classification."

^{3/} Under 43 CFR 1610.7-2(b), "[t]he approval of a resource management plan * * * constitutes formal designation of any ACEC involved."

^{4/} The Board took no action on the petitions for stay. Therefore, in accordance with 43 CFR 4.21(a)(3), BLM's decisions became effective upon the expiration of the time set forth in 43 CFR 4.21(b) for the Board to act on those petitions.

overrule Dona Jeanette Ong, 149 IBLA 281 (1999), to the extent that it indicated that the Idaho State Director had a duty to review “the Ong and Nash classification petitions * * * following the procedures in 43 C.F.R. Part 2450.” 149 IBLA at 285-86.

In identical notices of appeal and attached statements of reasons for appeal, appellants contend that BLM improperly rejected their DLE applications because they sought public lands within the Long-Billed Curlew ACEC, arguing that the ACEC designation does not support rejection because curlews are not adversely affected by cultivation and related agricultural activity any more than they are by the current cattle grazing. Appellants do not address the fact that, aside from the ACEC designation, the lands in question were designated for retention in the RMP.

In the ROD, the State Director stated that, under the RMP for the approximately 487,466 acres of public land in BLM’s Cascade Resource Area, 17,604 acres would be made available for transfer from Federal ownership. “Of this, 560 acres will be available for potential agricultural development under the Desert Land Act, 563 acres will be for sale, 10,107 acres will be for sale or exchange, and 6,374 acres will be available for exchange only.” (ROD at 2.)

At page 22 of the Proposed RMP, BLM explained that the purpose of designating “transfer class” lands (including those declared eligible for transfer in order to meet specific demands or needs for agricultural development) was to “delineate public lands available for transfer out of [F]ederal ownership,” and, further, that this class was “the only class in which public lands may be transferred out of [F]ederal ownership under this plan.” The remainder of the public lands in the Resource Area was designated for retention in Federal ownership: “All public lands not identified in a transfer category will be retained in public ownership * * *.” Id. at 23.^{5/}

[1] It is clear that applications for the transfer of lands that are designated for retention in Federal ownership in the applicable RMP must be rejected. Jane Delorme, 158 IBLA 260, 264 (2003) (Indian allotment application); Lehman Perkaquanard, 136 IBLA 182, 184-85 (1996) (Indian allotment application); see Max Wilson, 131 IBLA 306, 310 (1994) (DLE); David R. Hinkson, 131 IBLA 251, 252-53 (DLE). This accords with the general policy of the United States, set forth in section 102(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701(a) (2000), that “public lands be retained in Federal ownership,

^{5/} BLM adopted five transfer categories: Sale Only (T-1), Sale or Exchange (T-2), Exchange Only (T-3), Desert Land Entry (T-4), and Commercial Forest Lands (T-5). (Proposed RMP at 22–23.)

unless as a result of the land use planning procedures provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest.”

In section 202(a) of FLPMA, 43 U.S.C. § 1712(a) (2000), Congress directed the Secretary to develop land use plans for the public lands, regardless of whether such lands previously had “been classified, withdrawn, set aside, or otherwise designated for one or more uses.” It also required the Secretary to manage the public lands “in accordance with” such land use plans. 43 U.S.C. § 1732(a) (2000). Moreover, BLM regulations provide that, following approval of an RMP, “all future resource management authorizations and actions * * * shall conform to the approved plan.” 43 CFR 1610.5-3(a).

The Supreme Court recently stated in Norton v. Southern Utah Wilderness Alliance, 542 U.S. ___, 124 S. Ct. 2373, 2382 (2004), that the statutory directive of 43 U.S.C. § 1732(a) to manage lands “in accordance with” land use plans and the regulatory requirement of 43 CFR 1610.5-3(a) that actions “conform to” such plans “prevent BLM from taking actions inconsistent with the provisions of a land use plan.” Thus, it is clear in this case that the RMP determination that the lands be retained in Federal ownership precluded favorable action on appellants’ DLE applications and justified BLM’s rejection of the applications.

[2] In addition, the ROD stated that three areas in the Cascade Resource Area would be managed as ACECs, including “[t]he Long-billed Curlew Habitat Area, encompassing 61,000 acres * * *.” (ROD at 3.) BLM relied on that designation as an additional basis for rejecting the applications. The ACEC designation equally supports BLM’s rejection of the applications. While on appeal appellants challenge the basis for that designation, such a land use planning decision, which establishes (rather than implements) general land use management policy, is plainly not subject to review by the Board. Max Wilson, 131 IBLA at 308-09; David R. Hinkson, 131 IBLA at 255 n.4; Joe Trow, 119 IBLA 388, 393 (1991). Instead, such a decision is reviewable only by the Director, BLM, pursuant to 43 CFR 1610.5-2. Jane Delorme, 158 IBLA at 263-64; Max Wilson, 131 IBLA at 309. As the Supreme Court stated in Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. at 2383: “Plans also receive a different agency review process from implementation decisions. * * * Plans are protested to the BLM director, not appealed [to the Board of Land Appeals].” Thus, regardless of the merits of appellants’ challenge to the ACEC designation, this Board has no authority to overturn or modify such a determination. Petroleum Association of Wyoming, 133 IBLA 337, 344 n.5 (1995); see Southern Utah Wilderness Alliance, 122 IBLA 165, 173 n.8 (1992).

In our prior decision remanding this case, we erred in indicating that the State Director had a duty to review appellants' applications following the procedures of 43 CFR Part 2450.^{6/} No such duty exists where the lands have been designated for retention in the relevant RMP, as in this case, because, as we noted above, that fact alone precluded favorable action on appellants' applications. That portion of our prior decision is overruled.^{7/}

^{6/} Even prior to the enactment of FLPMA, the United States Court of Appeals for the Ninth Circuit rejected an argument by applicants seeking transfer of lands under the Enlarged Homestead Act that the Secretary had a mandatory duty to classify lands in response to their application. Bleamaster v. Morton, 448 F.2d 1289 (9th Cir. 1971). The court stated that "[n]o purpose would be served by requiring the Secretary to go through the formalities of a classification that leads nowhere," because an investigation of the lands by BLM determined that they were more valuable for other purposes. Id. at 1292.

^{7/} We recognize that it is unclear how and to what extent the remnant classification regulations contained in 43 CFR Group 2400 are intended to relate to the newer land use planning regulations in 43 CFR Part 1600. In fact, in Information Bulletin No. 97-21, dated Nov. 14, 1996, BLM stated:

When FLPMA land use planning regulations at 43 CFR Part 1610 emerged in 1983, evidently no consideration was given to reconciling the planning regulations with BLM's pre-FLPMA classification responsibility, notwithstanding the expiration or repeal before 1983 of the Classification and Multiple Use Act of 1964 and several other earlier classification authorities. * * * The Bureau is currently proposing * * * to remove in its entirety, 43 CFR 2400. This would eliminate all of the BLM classification regulations, including those applicable to section 7 of the TGA [Taylor Grazing Act][, as amended, 43 U.S.C. § 315f (2000)]. Limited, but by no means conclusive, support for this approach is found in Lehman Perkaquanard * * *. To resolve any inconsistencies, consideration is being given to integrating the classification procedures applicable to section 7 into the BLM's planning regulations at 43 CFR 1600.

Obviously, BLM has not proceeded as described in the Information Bulletin. While it may want to revisit the issue, the interworkings of those regulations are not critical to resolution of these appeals because the land designation precludes approval of the applications.

Should appellants desire to pursue DLEs for the lands in question, they would need to seek an amendment of the RMP, pursuant to section 202(a) of FLPMA, 43 U.S.C. § 1712(a) (2000), and 43 CFR 1610.5-5. See David R. Hinkson, 131 IBLA at 253. At this time, the lands are unavailable for consideration for DLEs because during the land use planning process they were designated for retention.^{8/}

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge

^{8/} We note that the record shows that more than half of the lands applied for by Ong were the subject of an earlier DLE application (I-3736) filed on Sept. 25, 1970. In 1976, prior to the passage of FLPMA, BLM classified those lands as unsuitable for agricultural development.

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

I.

I will begin with BLM's decision. Actually, it is not BLM's decision. It is a quotation from a Board decision. BLM quoted it as a convenient way to dispose of these applications. BLM knows better, as we shall see in a minute. So does the Solicitor's Office. It has written memoranda on the issues involved in this case. But not in this case. In this case it was convenient to quote the Board's decisions.

In the decisions on appeal, BLM rejected appellants' applications for the same reasons the Board reviewed in Dona Jeanette Ong, Carie L. Nash, 149 IBLA 281 (1999), i.e., because

the lands described in your application for Desert Land Entry and petition to classify lands were not identified for transfer out of Federal ownership under the Cascade RMP [Resource Management Plan]. Rather, the lands were classified for retention by the United States. In addition, the lands described in your application/petition were also located within the Long-Billed Curlew Area of Critical Environmental Concern (ACEC), which also precludes disposal.

In its decisions, BLM noted that Congress passed the Desert Land Act in 1877. "However," BLM continued,

* * * since that time, the statutory framework of public land management has changed substantially. In 1934, all vacant, unreserved, and unappropriated public lands in several western states including Idaho were withdrawn for classification "pending determination of the most useful purpose to which such land may be put." Exec. Order No. 6910, 54 I.D. 539 (1934). Section 7 of the Taylor Grazing Act authorized the Secretary of the Interior, in his discretion, to examine and classify any lands withdrawn by Exec. Order No. 6910 and subsequent Executive orders which were more valuable or suitable for uses other than grazing and to open such lands to entry and disposal under the public land laws in accordance with such classification. 43 U.S.C. § 315f (1994). In addition, Section 7 further provided that the "lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." 43 U.S.C. § 315f (1994); see 43 CFR 2400.0-3(a).

The foregoing land classification provisions of the Taylor Grazing Act have been further modified by land management mandates articulated

and enacted by Congress in the Federal Land Policy and Management Act of October 21, 1976 (FLPMA). 43 U.S.C. § 1701 *et seq.* (1994). In section 102(a)(1), Congress declared that it is the policy of the United States that “the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest.” 43 U.S.C. § 1701(a)(1) (1994). Section 202(a) of FLPMA provides that “[l]and use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.” 43 U.S.C. § 1712(a) (1994).

(Decisions at 1-2.)

This language in BLM’s decisions is taken from the Board’s decision in Lehman Perkaquanard, 136 IBLA 182, 184-85 (1996), a case in which BLM rejected petitions for classification and applications under the Indian General Allotment Act of 1887 because the lands identified in the applications “had been designated for retention by BLM under the Resource Management Plan (RMP) Update (October 1992) for the Rio Puerco Resource Area.” 136 IBLA at 182.

II.

Shortly after the Board issued its decision in Perkaquanard, BLM acknowledged that “questions have arisen concerning classification procedures for [BLM] land disposal actions under [FLPMA].” In a November 14, 1996, instruction memorandum to BLM State Directors and Assistant Directors (IB 97-21, Taylor Grazing Act Land Classification Issues), the Director of BLM explained:

Today, there still are a variety of disposal laws that require classification actions, not the least of which is the Recreation and Public Purposes Act of 1926, as amended. The most important classification statute, however, is the Taylor Grazing Act (TGA) of 1934, as amended, 43 U.S.C. 315 *et seq.* Section 7 of the TGA, as amended, 43 U.S.C. 315f, authorized the Secretary of the Interior (Secretary) “to examine and classify” on a tract-by-tract basis any public lands, outside of Alaska, withdrawn or covered by Executive Order 6910, as amended, or Executive Order 6964, or that are located within a grazing district. * * *

When it enacted the FLPMA in 1976, Congress introduced mandatory land use planning for the BLM managed public lands, but it did not repeal section 7 of the TGA, although a proposal was made to do so. When FLPMA land use planning regulations at 43 CFR Part 1610

emerged in 1983, evidently no consideration was given to reconciling the planning regulations with BLM's pre-FLPMA classification responsibility, notwithstanding the expiration or repeal before 1983 of the Classification and Multiple Use Act of 1964 and several other earlier classification authorities.

Procedures for the classification of lands for recreation and public purposes, agricultural entries, and state selection currently are followed under 43 CFR 2400, but rightly or wrongly, since the advent of mandatory land use planning, separate classification or suitability determinations for disposals for exchanges or sales often are not specifically identified in the relevant decisions or records.

The BLM is currently proposing, as part of the regulatory reform effort, to remove in its entirety, 43 CFR 2400. This would eliminate all of the BLM classification regulations, including those applicable to section 7 of the TGA. Limited, but by no means conclusive, support for this approach will be found in Lehman Perkaquanard * * * .

To resolve any inconsistencies, consideration is being given to integrating the classification procedures applicable to section 7 into the BLM's planning regulations at 43 CFR 1600.

It was candid of BLM to acknowledge that Perkaquanard offered "by no means conclusive" support for the idea of eliminating the classification regulations in 43 CFR Part 2400. Perkaquanard was at the time the most recent Board decision stating that the planning provisions of FLPMA and the regulations in 43 CFR Part 1600 had "superseded" the classification provisions of section 7 of the Taylor Grazing Act and the regulations in 43 CFR Part 2400.

But BLM knew that Board decisions could not and cannot abrogate existing provisions of law and regulations, however inconvenient they may be.

III.

David R. Hinkson, 131 IBLA 251 (1994), was the first of two appeals the Board decided from companion decisions issued in January 1992 by the California State Office, BLM, that returned Desert Land Act applications to the applicants without taking action on them. BLM stated it

could not allow the entry because the "1985 California Desert [Conservation Area] Plan, Amendment Two, shows that the lands * * * are in a Multiple-Use Class L [(Limited Use)] classification which does

not allow agricultural uses.” BLM stated the plan only permits agricultural uses on “unclassified” land. Thus, it advised Hinkson that he would first have to seek an amendment of the plan changing the land classification to “unclassified,” before BLM could allow the entry.

131 IBLA at 252 (emphasis added). The Board noted that a BLM decision amending the CDCA stated:

If public land is found which may be potentially suitable for agricultural development, the applicant must first apply for a plan amendment to change the land to ‘unclassified’ before entry would be allowed or considered further. This would insure a consideration of both its agricultural potential as well as the public values associated with its retention in its current undeveloped state.

Id. at 253. The Board discussed the status of the land prior to enactment of FLPMA, noting it had been withdrawn in aid of classification in accordance with section 7 of the Taylor Grazing Act by Executive Order 6910, 54 I.D. 539 (1934). Then it concluded:

The land classification provisions of the Taylor Grazing Act have now been superseded by the land-use planning provisions of section 202 of FLPMA under which the CDCA Plan was promulgated.

Id. at 253-254.

In its decision in the appeal from the companion BLM decision, the Board stated:

Since [1934], no entry under any of the public land laws is allowable unless the land has first been affirmatively classified as suitable to such entry. * * * Thus, even lands meeting the Desert Land Act’s definition of desert lands are not subject to entry under that Act if they have been classified as unavailable for agricultural entry in accordance with BLM’s land use planning authority. * * * Since the CDCA plan classified the lands sought by Wilson as unavailable for agricultural entry, a determination which we have no authority to review, BLM properly rejected Wilson’s application for those lands.

Max Wilson, 131 IBLA 306, 310 (1994) (emphasis added).

The Board has followed Perkaquanard in Jane Delorme, 158 IBLA 260 (2003) (“[T]he lands * * * subject to appellants’ Indian Allotment applications * * * are

classified as most suitable for retention * * * ,” 158 IBLA at 264), and has iterated the assertion in Hinkson that FLPMA’s planning provisions have “superseded” the classification provisions of section 7 of the Taylor Grazing Act. Virgil E. Mercer and Michael J. Mercer v. BLM, 159 IBLA 17, 27 n. 16 (2003).

As indicated in the emphasized language in the excerpts from Hinkson and the other cases, the Board’s decisions quote language from the CDCA Plan referring to the “classification” of lands in the plan or state that lands were “classified” for retention in the CDCA Plan and other land use plans.

Chapter 2 of the CDCA Plan, entitled “Multiple-Use Classes,” begins:

All of the public lands in the CDCA under BLM management, except for a few small and scattered parcels * * * , have been designated geographically into four multiple-use classes. The classification was based on the sensitivity of resources and kinds of uses for each geographic area. A map depicting the use classification assigned to each location * * * can be found in the back cover pocket of this document.

Four multiple-use classes are used in the Plan. Each describes a different type and level or degree of use which is permitted within that particular geographic area.

CDCA Plan at 13 (emphasis supplied). The Plan provides the approximate acreage of lands in each class and a description of the four classes, then states: “Scattered and isolated parcels of public land in the CDCA which have not been placed within multiple-use classes are unclassified land.” Id. at 14. Table 1 follows. It sets out multiple-use class guidelines for 19 land-use and resource-management activities – e.g., agriculture, electrical generation facilities, cultural and paleontological resources, recreation – in each of the four classes. Id. at 15-20.

IV.

In my view, the Board has misinterpreted BLM’s usage in the plans. The word “classification” is used in several different senses, as Professor Carl McFarland of the University of Virginia explained in a report prepared for the Public Land Law Review Commission in 1969:

The statutes now use the term classification in at least four senses: (1) It may be used as a statement of purpose or as a basis for withdrawals, segregations, or restorations. (2) Or as a synonym or substitute for withdrawals or segregations. (3) Or for land management purposes.

(4) Or as a condition precedent for particular dispositions on application by states, localities, or persons. For present purposes classification in the latter sense in the course of determining a particular disposition on application, that is, on an ad hoc basis, is of primary importance throughout this study. But no doubt because of the various statutory uses of the term, official literature is confusing not only because it stresses one or another of these conflicting usages but also in attempting to distinguish them from general withdrawals, segregations, and restorations. Thus not only the statutes but the regulations, too, blur the distinction between classification in this latter sense and its more generalized use as a tool of general land management or planning[.] including that for multiple uses and sustained yield needs. Indeed, they read as though general land use planning – rather than classification for spot disposition on application therefor – is the sole function of the classification process.

Administrative Procedures and the Public Lands, The University of Virginia, Charlottesville, Virginia (1969), at 12-13 (emphasis supplied, footnotes omitted). ^{1/}

Professor McFarland summarized the provisions of the regulations applicable to classification for land management purposes (i.e., category 3 above) and those applicable “in connection with specific dispositions on application therefor” (i.e., category 4, “classification in the latter sense”). “For cases other than those large-acreage and general classifications, now conducted mainly under the 1964 statute [the Classification and Multiple Use of 1964, formerly codified at 43 U.S.C. §§ 1411-1418], the regulations provide a ‘petition-application system’ applicable where classification is a prerequisite to approval of a requested disposal.” *Id.* at 15. He added that “[t]here are many special provisions for such classifications (and sometimes criteria or procedures) in connection with particular types of disposals,” *id.*, and lists several such provisions, including those under 43 CFR 2226.0-7(a) and 2226.1-1(a) (1965) for desert land entries. *Id.* note 84, at 26-27.

It is evident that in the CDCA Plan BLM was employing the term “classification” in the category 3 “general land management or planning” sense identified by Professor McFarland. The CDCA Plan did not, however, classify the lands in the category 4 sense identified by Professor McFarland – that is, it did not classify them under section 7 of the Taylor Grazing Act and 43 CFR Subpart 2400.0-3 as “a condition precedent for particular dispositions on application by states, localities, or persons,” and did not purport to do so. That is not the function of land-use plans. A land use plan “is not a final implementation decision on actions which

^{1/} This report is available from the National Technical Information Service, under order number PB 187 205.

require further specific plans, process steps, or decisions under specific provisions of law and regulations.” 43 CFR 1601.0-5(k).

As noted above, the CDCA Plan states that “[a]ll of the public lands in the CDCA under BLM management * * * have been designated geographically into four multiple-use classes.” (Emphasis supplied). The Board’s decision in Perkaquanard also stated that the lands involved had been “designated for retention by BLM under the * * * RMP.” 136 IBLA at 182. “Designation” of lands in a plan is not a “classification” of the lands, however.

The current BLM Manual and Handbook define “land use allocation” as “the identification in a land use plan of the activities and foreseeable development that are allowed, restricted, or excluded for all or part of the planning area, based on desired future conditions.”^{2/} If “classification” is used in land-use planning documents, it is properly understood in the sense of “its more generalized use as a tool of general land management or planning,” i.e., as “land use allocation” or as a “designation,” rather than in the sense of “a condition precedent for particular dispositions on application by states, localities, or persons,” e.g., under 43 CFR Subpart 2450.^{3/}

V.

43 CFR Subpart 2450 sets forth the petition-application procedures included as part of the land classification regulations adopted to specify the criteria and procedures the Secretary would employ in exercising the authority provided in the “statutes cited in § 2400.0-3 [that] authorize the Secretary to classify or otherwise take appropriate steps looking to the disposition of public lands, and on an interim basis, to classify public lands for retention and management.”^{4/} 43 CFR 2450.2 provides:

Upon the filing of a petition-application, the authorized officer shall make a preliminary determination as to whether it is regular upon its

^{2/} Land Use Planning Handbook, BLM Handbook H-1601-1 (BLM Manual Release 1-1667, 11/22/00), “Land Use Allocation” in BLM Manual 1601.08 Glossary, and Handbook, Glossary of Terms and Acronyms.

^{3/} “Resource management plans are the major means for coordinating among the multiple uses of public land. * * * Resource management plans contain allocations of resources between uses and/or levels of use and indicate the direction of any change needed in resource use or management.” 43 FR 58764, 58766 (Dec. 15, 1978).

^{4/} 43 CFR 2400.0-2. These regulations were most recently reorganized and renumbered in 1970, 35 FR 9502, 9563 (June 13, 1970). Earlier they were codified in 43 CFR Part 2410 (1965); see 29 FR 4302, 4505 (Mar. 31, 1964).

face and, where there is no apparent defect, shall proceed to investigate and classify the land for which it has been filed. No further consideration will be given to the merits of an application or the qualifications of an applicant unless or until the land has been classified for the purposes for which the petition-application has been filed.

This regulation applies “[w]hen (1) land must be classified or designated pursuant to the authorities cited in § 2400.0-3 before an application may be approved and (2) the filing of applications is permitted prior to classification.”^{5/} When this is so, “the application together with a petition for classification on a form approved by the Director (hereinafter referred to collectively as a *petition-application*) must be filed in accordance with the provisions of §1821.2 of this chapter.”^{6/}

The State Director is to issue a proposed classification decision. 43 CFR 2450.3(a). Protests of the proposed decision may be filed with the State Director, who then issues an initial classification decision. 43 CFR 2450.4. That decision is subject to review by the Secretary, upon his own motion or as a result of a motion by a party, and if the Secretary does not take action, the State Director’s initial decision becomes final for the Department. 43 CFR 2450.5.

VI.

Classification and land-use planning are distinct but related processes. When BLM goes through the process of preparing a land-use plan under FLPMA and identifies lands as possibly suitable for disposal under the Desert Land Entry Act or

^{5/} 43 CFR 2450.1(a). 43 CFR 2400.0-3(a) provides that classification under section 7 of the Taylor Grazing Act “is a prerequisite to the approval of all entries, selections, or locations under the following subparts of this chapter * * * : Original, Additional, Second, and Adjoining Farm Homesteads – subparts 2511, 2512, and 2513; Enlarged Homestead – subpart 2514; Indian Allotments – part 2530; Desert Land Entries – part 2520; Recreation and Public Purposes Act – part 2740 and subpart 2912; State Grants for Educational, Institutional, and Park Purposes – part 2620; Scrip Selections – part 2610 and Exchanges for the Consolidation or Extension of National Forests, Indian Reservations or Indian Holdings – Group 2200.”

^{6/} 43 CFR 2450.1(a) (italics in original). Accordingly, the desert land entry application form, Form 2520-1 (September 1993), provides: “If the lands described in this application have not been classified as suitable for desert entry pursuant to the provisions of section 7 of the Taylor Grazing Act of June 28, 1934, as amended * * * and the requirements of the regulations in 43 CFR 2400, please consider the application as a petition for such classification.”

other authorities, BLM employs the classification regulations in 43 CFR Part 2400 ^{z/} for those lands – although, as the BLM Director noted in his November 1996 instruction memorandum, separate classification determinations are not specifically identified in the decisions or records.

Land tenure decisions are those decisions that identify lands for retention (see 43 CFR 2400), proposed disposal, or acquisition (based on acquisition criteria). Section 102(a)(1) of FLPMA requires that BLM-managed lands be retained in Federal ownership unless BLM determines through the land use planning process that disposal of a particular parcel will serve the national interest (43 U.S.C. 1701).

* * * * *

In addition to identifying land suitable for disposal through sale or exchange [under sections 203(a) and 206(a) of FLPMA], the land use plan may identify lands as possibly suitable for disposal under other authorities, including State indemnity selections, agricultural entries, and conveyance under the Recreation and Public Purposes Act. Whether a specific tract of land will be found suitable for disposal or retention is determined through a classification decision rendered pursuant to Section 7 of the Taylor Grazing Act * * * and in accordance with the applicable regulations in 43 CFR 2400. During land use planning, the classification process under 43 CFR 2400 should be applied.

Land Use Planning Handbook, BLM Handbook H-1601-1 (BLM Manual Release 1-1667, 11/22/00), II.B.2.c., “Land tenure decisions,” pages II-4 and II-5. “To the extent that the land use planning procedures pursuant to 43 CFR 1600 differ from applicable classification procedures under 43 CFR 2400, the latter procedures shall be followed and applied. The analysis that supports classification decisions is normally the same analysis utilized in the land use planning/NEPA process concerning the disposal or retention of public lands.” Id., Appendix C., page 14.

^{z/} The regulations in 43 CFR Part 2400 set forth criteria for all classifications (Subpart 2410), multiple-use management classifications (Subpart 2420), disposal classifications (Subpart 2430), and for when classifications will segregate the affected lands (Subpart 2440), in addition to the petition-application procedures in Subpart 2450.

After a plan has been approved, BLM employs the classification regulations to lands designated for disposal in the plan, e.g., when a petition-application is filed under 43 CFR Subpart 2450.

VII.

BLM's Handbook states that BLM uses an "ongoing planning process * * * [that] will involve public participation, assessment, decision making, implementation, plan monitoring, and evaluation, as well as adjustment through maintenance, amendment, and revision. * * * This process allows for continuous adjustments to respond to changed circumstances. The BLM will make decisions using the best information available. These decisions may be modified as BLM acquires new information and knowledge of new circumstances relevant to land and resource values, uses, and environmental concerns. Modifying land use plans through maintenance and amendment on a regular basis will reduce the need for major revisions of land use plans." Handbook I. B., pages I-2 through I-3.

After a plan has been approved, it can be revised or amended. BLM's regulations provide that an RMP "shall be revised as necessary, based on monitoring and evaluation findings (§ 1610.4-9), new data, new or revised policy and changes in circumstances affecting the entire plan or major portions of the plan." 43 CFR 1610.5-6.^{8/} A revision must comply with all the requirements for preparing and approving an original plan. Id. See 43 CFR 1610.4, 1610.5-1, 1610.5-2. As a less burdensome alternative, an RMP "may be changed through amendment." 43 CFR 1610.5-5.^{2/}

BLM's regulations provide that after an RMP has been approved "all future resource management authorizations and actions * * * shall conform to the approved plan." 43 CFR 1610.5-3(a). FLPMA requires this: "The Secretary shall manage the public lands * * * in accordance with the land use plans developed by him under

^{8/} Before these regulations were amended in 1983, plans were to be revised "at least every ten years," rather than only "as necessary." See 43 CFR 1601.6-3(c) (1979); 48 FR 20364, 20367 (May 5, 1983).

^{2/} The "adjustment through maintenance" mentioned in the Handbook does not change a plan. "Resource management plans and supporting components shall be maintained as necessary to reflect minor changes in data. Such maintenance is limited to further refining or documenting a previously approved decision incorporated in the plan. Maintenance shall not result in expansion in the scope of resource uses or restrictions or change the terms, conditions, and decisions of the approved plan. Maintenance is not considered a plan amendment * * * ." 43 CFR 1610.5-4.

section 1712 of this title * * * .” 43 U.S.C. § 1732(a) (2000). See Norton v. Southern Utah Wilderness Alliance, 542 U.S. ___, ___, 124 S. Ct. 2373, 2381, 2382 (2004).

BLM’s regulations provide: “If a proposed action is not in conformance [with an RMP], and warrants further consideration before a plan revision is scheduled, such consideration shall be through a plan amendment in accordance with the provisions of § 1610.5-5 * * *.” 43 CFR 1610.5-3 (c).

43 CFR 1610.5-5 provides that an amendment

shall be initiated by the need to consider monitoring and evaluation findings, new data, new or revised policy, a change in circumstances or a proposed action that may result in a change in the scope of resource uses or a change in the terms, conditions, and decisions of the approved plan. An amendment shall be made through an environmental assessment of the proposed change, or an environmental impact statement, if necessary, public involvement as prescribed in § 1610.2 of this title, interagency coordination and consistency determination as prescribed in § 1610.3 * * * and any other data or analysis that may be appropriate. In all cases, the effect of the amendment on the plan shall be evaluated. If the amendment is being considered in response to a specific proposal, the analysis required for the proposal and for the amendment may occur simultaneously. (Emphasis supplied). ^{10/}

^{10/} As to the public involvement prescribed in § 1610.2, see National Parks and Conservation Ass’n v. F.A.A., 998 F.2d 1523, 1529-31 (10th Cir. 1993).

The language of the first sentence in 43 CFR 1610.5-5, adopted in 1983, was a slight revision of the 1979 final rule. The language in the 1979 regulation below that was revised is underlined:

An amendment is [now “shall be”] initiated by the need to consider monitoring and evaluation findings, new data, new or revised policy, a change in circumstances or an applicant’s [now “a”] proposed action, which may result in a significant [now deleted] change in a portion [now “the terms, conditions, and decisions”] of the approved plan.

43 CFR 1601.6-3(b) (1979). The preamble to the 1979 final rule stated that an amendment could “be generated by consideration of a proposal presented in an application.” 44 FR 46386, 46390 (Aug. 7, 1979).

The preamble to the 1978 proposed rule explained how BLM envisioned the amendment process would work in response to a proposed action in an application:

6. USING THE RESOURCE MANAGEMENT PLAN

Upon approval of the plan, several things can happen:

* * * * *

c. *Action on Proposals Made to BLM.* Public land users may propose actions on public lands as the need arises. With the resource management plans available, BLM managers will be able to act decisively on these proposals by either (1) concluding they are in conformance with the plan and proceeding [with] their authorization, (2) concluding they are not in conformance with the plan, and are not in the public interest, or (3) concluding that they appear to have merit and warrant further consideration and possible plan amendment.

7. RESOURCE MANAGEMENT PLAN AMENDMENT AND REVISION

Resource management plans may be amended quite simply. This flexibility is designed to permit timely and efficient response to sound proposals or changes in national legislation or policy that were not foreseen when the plan was prepared, and to permit the plan itself to be a viable and useful management tool for as long a period as possible. The amendment procedure requires an environment assessment of the proposal including public notice, filed as an environmental impact statement if necessary, supplemented by additional data and public comment as are necessary to permit an informed decision.

43 FR 58764, 58766-67 (Dec. 15, 1978).

By 1981, BLM was preparing a “procedural manual implementing the regulations [in 43 CFR Part 1610]” based on experience with six pilot resource management planning projects and with the CDCA. 46 FR 57448 (Nov. 23, 1981). The 1983 amendment of the regulations referred to the “Bureau manual” as containing more detailed provisions than the regulations. 48 FR 20364 at 20365, 20366, 20367 (May 5, 1983). In accordance with the provisions of the BLM Manual then applicable, the proposed Cascade RMP stated:

All public lands not identified in a transfer category will be retained in public ownership and managed under one of the three multiple use

categories. Those lands determined to be unsuitable for disposal, after detailed consideration, will be retained. Requests to consider lands for possible transfer, after plan approval, will be evaluated through the amendment procedure in accordance with the Code of Federal Regulations (43 CFR 1610.5-5 and BLM Manual 1616.22 and 1617.4A or B.)

(RMP at 23). ^{11/}

The current Handbook notes that “[p]lan amendments are most often prompted by the need to: 1) Consider a proposal or action that does not conform to the plan. * * *” Handbook H-1601-1, VII. B. 1., page VII-1. “New proposals can stem from specific BLM implementation actions * * * or from non-BLM initiated proposals such as a right-of-way request for a new power line. A new proposal should provide enough detail to allow BLM to determine whether it conforms with existing land use plan decisions and to facilitate screening for adequate NEPA compliance.” *Id.*, VI. E., page VI-5.

Section VI. C. of the Handbook, entitled “Deciding whether changes in decisions or the supporting NEPA analysis are warranted,” states that a “determination whether to amend or revise an RMP based on new proposals, circumstances, or information depends on 1) the nature of new proposals, 2) the significance of the new information or circumstances, 3) specific wording of the existing land use plan decisions, including any provisions for flexibility, and 4) the level and detail of the NEPA analysis. A ‘yes’ answer to any of the following five questions suggests the need to revisit existing decisions and/or the NEPA analysis:

“1. Does the new information or circumstance provide for new interpretations not known or considered at the time existing decisions were made that could measurably affect ongoing actions? * * *

^{11/} This version of the BLM Manual (Rel. 1-1363, 4/6/84) explained: “There are three categories of plan amendments. These categories provide appropriate variation in procedures for use in considering different kinds of proposals.” 1617.42. 1617.4A described the procedures for Category 1, “proposals [that] * * * do not, based on preliminary analysis, appear to involve significant environmental impact. EIS documentation is not required.” 1617.4B described the procedures for Category 2 for proposals that “are known to have a significant environmental impact and an EIS is required.” 1617.4C described the procedures for Category 3 for proposals that “if implemented, would have significant environmental impact.” 1616.22 set forth the basis for planning criteria.

“2. Are the decisions in the current land use plan no longer valid, based on new information or changed circumstances? * * *

“3. Are implementation decisions no longer valid, based on new information or changed circumstances? * * *

“4. Are effects of ongoing actions, in light of new information or circumstances, substantially different from those projected in existing NEPA analyses? * * *

“5. In light of new information or circumstances, are there now inconsistencies between the ongoing action and the resource-related plans of Indian tribes, State and local governments, or other Federal agencies that render earlier consistency findings invalid? * * * ”

BLM Handbook H-1601.1, VI. C., pages VI-2 through VI-4. ^{12/}

Finally, the Handbook states that “[i]n response to an outside application or internal proposal, a decision not to change land use decisions will be documented in the case file and/or in the response to the applicant.” *Id.*, VI. D., page VI-5.

VIII.

An application for a desert land entry provided for under section 7 of the Taylor Grazing Act and 43 CFR 2400.0-3(a) on lands that have been designated for retention in an RMP – or for other form of disposal, *e.g.*, a conveyance under the Recreation and Public Purposes Act, a sale under section 203(a) of FLPMA, or an exchange under section 206(a) – represents a proposed action that is not in conformance with the plan. Therefore, it would require an amendment of the RMP to allow for disposal of the lands if an amendment were found warranted. ^{13/}

^{12/} The Handbook states: “In reaching a decision to amend a land use plan, BLM must not only consider the resource, but also other workload priorities, budgetary constraints, and staff capabilities. In situations where available budgets allow and staff capabilities are restricted, consider third-party contracting for all or portions of the plan amendment’s NEPA analysis, including baseline data acquisition. If the manager decides not to amend, then nonconforming actions cannot be taken.” *Id.*, VII. B., page VII-2. See 43 CFR 1610.5-3(a).

^{13/} The proposed Cascade RMP that was approved in July 1988 recited the language of 43 CFR 1610.5-5 concerning plan amendments and noted as examples of actions that would require an amendment “disposal of land not identified for transfer,

(continued...)

The fact the lands have been designated for retention does not mean they have been found unsuitable for an entry or inappropriate for other disposal. In general, the designation is based on the policy for retention in section 102(a)(1) of FLPMA, so the lands would likely not have been already examined for suitability.

Thus, as the law now stands, one who wishes to make an entry under the Desert Land Act (or request any other form of disposal) on lands designated for retention in a resource management plan – whether because they are part of an ACEC or for other reasons – has a choice: he or she may ask BLM to amend the plan, or may file a petition-application under 43 CFR Subpart 2450, or do both.

Although it might appear more logical, as BLM's California State Office suggested in Hinkson and Wilson, to require a person who seeks entry on lands allocated for retention to first request an amendment to the plan to allow for disposal – and then file a petition-application if the plan is amended – the regulations in 43 CFR Part 2450 provide that a person may file a petition-application.

There may be legal reasons a person would want to file a petition-application first, *e.g.*, to obtain a preference right of entry under 43 CFR 2450.8. And, depending on the particular circumstances, there may be practical reasons why BLM would prefer to deal with a petition-application rather than a request for a plan amendment. It is possible, for example, that its inventory of the lands under 43 CFR 1610.4-3 or a brief field examination would indicate clearly that the lands are not suitable for classification for desert land entry, or that one of the exceptions to 43 CFR 2450.2 applies.^{14/} In the former case, it would be more efficient for BLM to deal with a petition-application and issue a proposed classification decision, in the latter, a decision rejecting the petition-application.

Which route a person chooses should not make a material difference in the analysis BLM undertakes, however. In either event, BLM would consider both the “agricultural potential [of the land] as well as the public values associated with its retention in its current undeveloped state” Hinkson, *supra* at 253, and whether “the proposal appear[s] to have merit and warrant further consideration and possible plan amendment.” 43 FR 58764, 58766 (Dec. 15, 1978). How much investigation and consideration BLM must give to a proposal that would entail amendment of a plan would, of course, depend on the circumstances, including the nature of the proposal and the accompanying information, how complete and current BLM's inventory of the

^{13/} (...continued)

* * * change in management objectives for an area or resource, or changes in special designations.” Proposed RMP at 61.

^{14/} See Dona Jeanette Ong, Carie L. Nash, 149 IBLA at 285.

affected public lands and their resources is, whether on-the-ground changes have occurred since the plan was approved or revised, and how those changes relate to the requested amendment or proposal.

It is, of course, possible that a person would prefer to request that BLM consider amending its plan, *e.g.*, in order to defer the effort and expense required to complete a petition-application until it appears that BLM is willing to amend the plan to allow for disposal of the lands involved.

If, instead, the person prefers to file a petition-application, and there is no apparent defect in it, BLM must “proceed to investigate and classify the land,” 43 CFR 2450.2, and the State Director must “issue a proposed classification decision which shall contain a statement of reasons in support thereof” and serve it, and interested parties may file protests with the State Director. 43 CFR 2450.3(a), 2450.4(a).

A person who seeks entry on lands designated for retention would be well-advised to consult with BLM about what he or she would like to do before going to the time and effort to pursue either avenue. If BLM would prefer to begin by considering whether a plan amendment is warranted, it should inform the person what information it needs in order to evaluate the proposal and explain that a plan amendment entails essentially the same consideration as an investigation under 43 CFR 2450.2 would.

Because, in accordance with 43 CFR 1610.5-3(a), BLM cannot take an action that does not conform to the plan, it cannot grant an application unless and until it has amended the plan to allow for disposal of the lands. If a request to amend the plan is made, then, as indicated in the 1978 preamble to the proposed regulations, BLM would initially either conclude that a proposal for entry on lands allocated for retention was “not in conformance with the plan, and * * * not in the public interest,” or that it “appear[s] to have merit and warrant[s] further consideration and possible plan amendment.” 43 FR at 58766 (Dec. 15, 1978). If, based on the review set forth in Handbook VI.C., BLM concludes that the proposal appears to have merit, then it would follow the procedures set forth in 43 CFR 1610.5-5. 43 CFR 1610.5-3(c). It would presumably also undertake the procedures set forth in 43 CFR Subpart 2450 (or analogous regulations) if the application appeared in order.

If, on the other hand, BLM concludes it is not in the public interest to change the land use plan, then that decision will be “documented in the * * * response to the applicant.” Handbook VI.D., page VI-5, *supra*. Any person who requested the amendment or participated in the planning process and has an interest which is or may be adversely affected may protest BLM’s decision to the Director of BLM in

accordance with 43 CFR 1610.5-2. See Joel Stamatakis, 98 IBLA 4, 6-7, 9-12 (1987); Harold E. Carrasco, 90 IBLA 39 (1985).^{15/}

IX.

Whichever avenue the person follows, BLM will need to provide reasons for its decision so that the decision may be upheld on review. In Stamatakis, for example, the proposal to change grazing use from sheep use to cattle/sheep dual use “was the subject of a detailed analysis by BLM set forth in a 33-page staff report * * * . This analysis formed the basis for the conclusion of BLM in the final decision not to amend the plan to authorize a change in the kind of livestock use.” 98 IBLA at 6. This is analogous to the “reasoned and factual explanation” required of a BLM decision that is appealable to the Board so the person can determine whether to appeal and so the Board can determine whether there was a rational basis for the BLM decision, e.g., a decision rejecting a petition-application. The Navajo Nation, 152 IBLA 227, 234-35 (2000); Eddleman Community Property Trust, 106 IBLA 376, 377 (1989); Roger K. Ogden, 77 IBLA 4, 7-8, 90 I.D. 481, 483-84 (1983).

Requiring a reasoned explanation not only reduces the chance BLM will make an arbitrary decision. It also demonstrates that the decision is based on current information. The need for such an explanation is illustrated by this case. The second reason BLM gave for rejecting the petition-applications was that the lands were located within the Long-billed Curlew Habitat Area of Critical Environmental Concern (ACEC), and that also precluded disposal.

When BLM published notice of the availability of the proposed Cascade RMP and accompanying EIS in accordance with 43 CFR 1610.5-1, it stated it was also publishing notice of the proposed designation of three ACEC’s in accordance with § 1610.7-2(b): “The Long-billed curlew habitat area containing 61,000 acres of public land between Emmett, Idaho, and Parma, Idaho would be designated an ACEC under the Proposed Plan. Once designated an ACEC, BLM would restrict vehicle use and seasonally limit mineral leasing activities and rights-of-way construction activities.” 52 FR 30259, 30260 (Aug. 13, 1987).

The August 1987 proposed Cascade RMP set forth the purpose, a description of the area, the resource values, the cause for concern, and the management

^{15/} Consistent with Carrasco, the CDCA Plan, for example, provides that when the Desert District Manager receives a request to consider a plan amendment he is to decide either to consider the amendment or “not to consider the Plan amendment, in which case he shall notify the requestor stating the reasons for his decision. Any decision to consider or not to consider a Plan amendment is subject to protest to the State Director.” CDCA at 121.

guidelines for this ACEC. A study entitled “Behavioral Ecology and Habitat Relationships of Long-Billed Curlews in Western Idaho” was a report of “[r]esearch on the population and habitat relationships * * * conducted in this area from 1977 to 1979 [that] provided the base line information to manage this significant population” that was referred to in the proposed RMP at 37.

The purpose for designating the ACEC was to identify the area as crucial nesting habitat for the Long-billed curlew and the main management objective was to maintain the habitat for the 1,000 pairs that nest and raise their young in the area, described as “the largest nesting population in the western United States.” Id. at 36-37. The cause for concern was that “[a] substantial decline in population and distribution of this species in the United States prompted its classification as a ‘Sensitive Species’ by the BLM and a ‘Candidate Species’ by the U.S. Fish and Wildlife Service. * * * These classifications are an ‘early warning’ that a species may be in trouble and if declines continue that official listing with maximum protection under the Endangered Species Act may be necessary.” Id. at 37.

At the time the RMP was proposed, that was true. In 1985, the Long-billed curlew was included as a Category 2 species in a Fish and Wildlife Service notice of taxa being considered for possible addition to the List of Endangered and Threatened Wildlife. 50 FR 37958, 37963 (Sept. 18, 1985).

Category 2 comprises taxa for which information now in possession of the Service indicates that proposing to list as endangered or threatened is possibly appropriate, but for which conclusive data on biological vulnerability and threat are not currently available to support proposed rules. The Service emphasizes that these taxa are not being proposed for listing by this notice, and that there are no specific plans for such proposals, unless additional information becomes available. Further biological research and field study may be needed to ascertain the status of taxa in this category, and it is likely that many will be found to not warrant listing. The Service hopes that this notice will encourage investigation of the status and vulnerability of these taxa, and consideration of them in the course of environmental planning.

50 FR 37958 (Sept. 18, 1985). See also 54 FR 554, 560 (Jan. 6, 1989), where the Long-billed curlew was again included as a Category 2 species.

The Cascade RMP management guidelines for this ACEC included five resource use limitations and six management emphases. The management emphases included: “Pursue the acquisition of key habitat of state and private lands through land exchange,” “Use controlled burns * * * to maintain and improve curlew habitat,” and “Encourage domestic sheep use on the area.” Proposed RMP at 37-38. The

resource use limitations included: “Rights-of-way construction activities * * * will not be allowed during the nesting and brood-rearing periods” and “All lands within the ACEC will be retained in Federal ownership.” The latter limitation was the basis for rejecting the petition-applications.

However, by 1991 the status of the Long-billed curlew had been upgraded to “3C” in the Fish and Wildlife Service notice. 56 FR 58804, 58811 (Nov. 21, 1991). 3C taxa are those “that have proven to be more abundant or widespread than previously believed and/or those that are not subject to any identifiable threat.” 56 FR at 58805. It is not clear that the boundaries, management emphases, or resource use limitations adopted for this ACEC in the RMP were still necessary when BLM rejected the petition-applications.

X.

If BLM may reject a petition-application without any examination of the current situation and without providing any reason beyond “the land is designated for retention,” then the Handbook claims that BLM engages in an “ongoing planning process” and “make[s] decisions using the best information available” are hollow. An ongoing planning process is essential if a plan is to be “a viable and useful management tool.” 43 FR 58764, 58767 (Dec. 15, 1978). This is especially so when BLM states that it does not intend to revise the plan for 20 years after it is approved, as it did in the proposed Cascade RMP, and the regulations do not require revision of a plan until BLM deems it is “necessary.”

But, in any event, the Board does not have authority to repeal section 7 of the Taylor Grazing Act. That has to be done by the Congress. Nor does it have authority to erase the regulations in 43 CFR Part 2400. That has to be done by the Secretary.

I dissent.

Will A. Irwin
Administrative Judge