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## Potshards and Sun Calendars: BLM Management of Cultural Resources on the Colorado Plateau

Stephen P. Kelly

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**POTSHARDS AND SUN CALENDARS:  
BLM MANAGEMENT OF CULTURAL RESOURCES ON  
THE COLORADO PLATEAU**

**Stephen P. Kelly\***

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## I. INTRODUCTION

Cultural resources are the remains of past human cultures. Like timber and rangelands, cultural resources are one of the many types of resources the federal government manages on public lands. A byzantine maze of statutes and regulations have been enacted in an attempt to protect cultural resources and integrate them into a common management system.

One geographic region which contains both vast quantities of federal land and cultural resources is the Colorado Plateau.<sup>1</sup> The Colorado Plateau is filled with millions of cultural remains, ranging from dwellings and pottery to roads and rock art.<sup>2</sup> Numerous National Parks and National Monuments have been created in part to protect cultural resources. There are also vast amounts of cultural resources managed by the Bureau of Land Management (BLM) and the United States Forest Service, as well as by state, local and tribal governments. In particular, BLM manages a large portion of the Colorado Plateau, encompassing fifty-seven million acres in the Four Corners region of Arizona, Colorado, New Mexico and Utah.<sup>3</sup> Cultural resources on public lands are subject to a variety of human impacts, both intentional and unwitting. The purpose of this article is to describe the statutory and regulatory framework by which those impacts are managed on BLM lands, and to suggest reforms to BLM's cultural resource management.

Native peoples have inhabited the Colorado Plateau at least since 8500 B.C. The lives of various cultures, including the Anasazi, Hohokam, Mogollon and Fremont peoples, have waxed and waned. Cultures represented on the Colorado Plateau also include the relatively more recent arrivals of Spanish and Mormon settlers. Archaeologists have distinguished a series of cultural periods by analyzing pottery types, architectur-

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1. The Colorado Plateau is an area of about 80 million acres within the southwestern United States. It roughly comprises the area around the Four Corners region, where Colorado, Arizona, New Mexico, and Utah join at a common point. It has been described as "high plateau country stretching in all directions across a broken and rolling landscape that rises with abrupt sandstone mesas jaggedly carved by the deep-cutting Colorado, Little Colorado, and San Juan rivers." DONALD G. PIKE & DAVID MUENCH, *ANASAZI, ANCIENT PEOPLE OF THE ROCK* 16-17 (1974).

2. There are an estimated 2 million archaeological sites in the Four Corners region. 1.3 million of such sites are estimated to be on BLM land. Only about 136,000 of the total number of sites have been identified and recorded. UNITED STATES GENERAL ACCOUNTING OFFICE, *CULTURAL RESOURCES: PROBLEMS PROTECTING AND PRESERVING FEDERAL ARCHAEOLOGICAL RESOURCES* 16 (1987).

3. *Id.* at 15.

al styles, living habits, and rock art. The time periods of the heaviest archaeological impact occurred when cultures, such as the Anasazi or Fremont, lived on the Colorado Plateau, as early as 8500 B.C., through the Pueblo Anasazi culture.<sup>4</sup> The vast amount of research on ancient Americans has provided us some understanding; however, archaeologists will be the first to admit that they are still largely ignorant of these cultures.<sup>5</sup> Though attempts to describe ancient life on the Colorado Plateau are best described as educated guesses, there is no doubt that the Colorado Plateau is one of the richest archaeological areas on earth.

One of the most studied ancient cultures is the Anasazi. Archaeologists universally acknowledge the Anasazi impact on native southwestern culture and history. This impact is identified by their contributions to architecture, pottery, and rock art styles. Physical evidence of Anasazi culture is usually in the form of ruins, rock art, and bits and pieces of everyday life such as potshards and corncobs. Architecture is one of the Anasazi culture's greatest achievements. Examples of Anasazi architecture cover the Colorado Plateau. One scholar described the building of Pueblo Bonito in Chaco Canyon:

More than one million dressed stones went into Pueblo Bonito's building. This number represents up to one hundred million pounds of stone veneer to be quarried, carried, dressed, and put in place. In addition, there were thousands of ponderosa pines to be felled and trimmed in distant highlands and carried to Chaco Canyon. Many times more ceiling poles were needed—and remember, the Chacoans had no case-hardened tools to shape and smooth their stones and saw their logs. Finally, consider that Pueblo Bonito is only one of more than a dozen towns in the canyon. How was all this work organized and carried out?<sup>6</sup>

Anasazi architectural developments included several other construction accomplishments. For example, a wagon-wheel shaped road system

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4. The Anasazi culture waned after a peak in the early part of the second millennia. By the 1600s only a few small enclaves were left. Several explanations have been given for the dramatic change: climatic changes which affected water supplies, erosion, productivity of farmlands, increasing numbers of people in areas of depleted resources, and breakdowns in social, economic and religious customs. Researchers believe that the Anasazi moved south to the Rio Grande Valley, where their present-day descendants (the Pueblo) live. See BUREAU OF LAND MANAGEMENT, CHRONOLOGY, GREATER FOUR CORNERS AREA (1993); Michelle Strutin, *Ancient Metropolis*, NAT'L PARKS, March 1992, at 40, 42-43.

5. One writer describing archaeology said: "The beginnings of the story can be seen in only the fuzziest outlines—faded glimpses of actors fleeting across a stage kept dim by eons of time and the circumstances of their lives—but enough can be seen to whet the imagination to an edge sufficiently keen to hew deeper for answers." See PIKE & MUENCH, *supra* note 1, at 16-17.

6. William Lumpkins, *Reflections on Chacoan Architecture*, in NEW LIGHT ON CHACO CANYON 19, 20 (David Grant Noble, ed., 1984).

spreading from Chaco Canyon in New Mexico connected a system of arteries totaling approximately 1,500 miles, and may have spread as far as 200 miles.<sup>7</sup> The Chaco roads suggest that a widespread, interconnected civilization existed hundreds of years before western settlers appeared in the Southwest.

Clues left in the ancient ruins of the Colorado Plateau offer fascinating views into the daily life of ancient peoples. Because of the harsh climate of the Southwest, native peoples were forced to develop sophisticated and flexible survival strategies.<sup>8</sup> For example, one researcher offered a hypothesis of how the inhabitants of Chaco Canyon used passive solar heating and cooling:

We know from historical observations of Pueblo life that rooftops were ideal and much-used work places. At Bonito, they were sheltered on the north, warmed from the south. In summer, the solar system could have been used in reverse, with workers following shaded areas from the east wing in the morning to the west wing in the afternoon.<sup>9</sup>

One of the most striking cultural testaments that the Anasazi left behind is the rock art that covers the Southwest.<sup>10</sup> Petroglyphs (carved into rock) and pictographs (painted onto rock) offer us insight into the experiences and beliefs of this ancient people.<sup>11</sup>

The value of the Colorado Plateau's cultural resources does not come solely from archaeological significance, but also from the effect that contact with ancient remains has on modern humans. Many writers have theorized that modern society has alienated its inhabitants, and that humans living in industrialized countries today must seek fulfillment in ac-

7. John Stein, *The Chaco Roads—Clues to an Ancient Riddle?*, EL PALACIO, Spring 1989, at 4.

8. One writer stated that "[t]he secret to survival was flexibility, so Southwestern societies were in a constant state of cultural change, switching from a mobile lifeway to a more sedentary one when circumstances permitted and fostered more concentrated population densities." BRIAN M. FAGAN, *ANCIENT NORTH AMERICA: THE ARCHAEOLOGY OF A CONTINENT* 286 (2d ed. 1995).

9. William Lumpkins, *supra* note 6, at 19.

10. According to one researcher there are approximately 7,500 rock art sites known to exist in Utah alone. ALEX PATTERSON, *THE FIELD GUIDE TO ROCK ART SYMBOLS OF THE GREATER SOUTHWEST* ix (1992).

11. One ubiquitous character in rock art scenes is Kokopelli, the flute player. Two authors interpreted Kokopelli in the following way:

He has many roles and various attributes. He creates warmth by imitating the sound of locusts which are associated with summer. He has a vague connection with fire. He can cure wounds with 'locust medicine.' Some say he IS the locust. He is the patron of music, his flute brings flowers into bloom and calls the butterflies. He brings success with hunting and planting, and makes it rain—if people believe in him. He carries seeds and presents and 'many babies' in his hump or in a bag. In short, he brings about fertility and abundance from the earth, and fecundity of game and humans.

GAR & MAGGY PACKARD, *SUNS AND SERPENTS: THE SYMBOLISM OF INDIAN ROCK ART* 23 (1974).

tivities such as hunting, fishing, and back-country camping.<sup>12</sup> This view is reflected in the philosophies underlying the conservation movement's greatest legislative successes, such as the Wilderness Act.<sup>13</sup> I suggest that contact with ancient remains fulfills a very similar need.<sup>14</sup> One writer, Charles Wilkinson, described his experience of searching for petroglyphs in a little-used canyon:

Of course, I was not engaged in original exploration for these old inscriptions. Yet in my own mind I felt like an explorer, for there were no trail signs, no explanatory exhibits. The experience rekindled the emotions of hiking into and fishing a backcountry stream; not virgin country, but still rarely visited.<sup>15</sup>

I believe Wilkinson is actually describing the modern need to connect with the ancient, primeval world. For example, an archaeologist may be able to tell you that ancient people were adept at constructing sun calendars to keep track of time. Hearing that fact does not carry the same feeling as actually standing in a shallow cave next to a carving, which, on the summer solstice, lights by sunlight at a particular hour just as it has for a thousand years. The experience of actually sitting in the cave breathes life into history and touches a modern person's life in a way that a description cannot.

Many writers have expressed their appreciation of the precious, non-renewable nature of the Colorado Plateau's cultural resources. One of the most eloquent writers on the subject is Terry Tempest Williams. In her story, *A Potshard and Some Corn Pollen*, she reflects on the discovery of artifacts, and the effect of disturbing them:

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12. See TED KERASOTE, *BLOODTIES: NATURE, CULTURE AND THE HUNT* (1993), for a fine example the role of hunting in modern life.

13. The importance of primitive life to modern people is reflected in the Wilderness Act's definition of wilderness: "[A]n area of undeveloped Federal land retaining its primeval character and influence . . . which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; and (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation . . ." 16 U.S.C. § 1131(c) (1994).

14. As one writer explains, the joy of witnessing cultural remains is quite fragile:

I don't even go to my own favorite ruin anymore. It's sad. Last time I was there, ten years ago, I huffed up the side of the mesa, past the caves, past the fortifications—among the few ancient battlements erected in the Southwest—finally reaching the top only to find another visitor. He had two packframes—lashed onto them were two plastic garbage cans. He was digging as fast as he could, hoping to fill them.

John Neary, *Letter from New Mexico (Chaco Canyon Under Siege)*, *ARCHAEOLOGY*, May 1991, at 50, 68.

15. Charles F. Wilkinson, *Land of Fire, Land of Conquest: The Colorado Plateau and Some Questions for its Future*, 13 *J. ENERGY, NAT. RESOURCES & ENVTL. L.* 337, 342 (1993).

If these artifacts are lifted from their birthplace they cease to speak. Like a piece of coral broken from the reef, they lose their color, becoming pale and brittle. Somehow we need to acquaint ourselves with the art of letting go, for to own a piece of the past is to destroy it.

But it's a difficult thing to do. I know because I have pocketed a piece of pottery. In the context of all the desert's loveliness it became numinous. I had to possess it. Somewhere deep inside me I hoped this potshard might become a talisman, an amulet. I was wrong. What once glistened in those pastel sands collected dust on my dressing table. Its loss of dignity haunted me.<sup>16</sup>

Beyond fulfilling our need to connect with ancient times, there are several other reasons why cultural resources are important. For example, the Colorado Plateau's cultural resources are important in what they teach us about our own history. As one archaeologist stated, "their [Anasazi] history is a microcosm of cultural change found all over the world because most cultures progressed from small farming to long-term sustainable social organizations."<sup>17</sup> These resources also present a clearer picture of our past, a picture which may be obscured in other parts of the country. With its dry climate and less developed landscape, the Colorado Plateau offers a relatively unspoiled and legible tablet for archaeologists to read. Perhaps the most obvious reason for cultural resource protection is that it is the will of our citizens; the United States has enacted many laws requiring federal agencies to protect cultural resources.

There is no doubt that the Colorado Plateau's cultural riches are disappearing. The effects of oil and gas drilling, mineral and water development, grazing, timber cutting, recreation, industrial and urban expansion, road building, and both sound and unsound archaeological practices are accelerating the pace of the destruction of both discovered and undiscovered cultural resources. For example, the many reservoirs built on the Colorado Plateau, most importantly Lake Powell, have flooded what is estimated to be tens of thousands of archaeological sites. To counter this, federal managers often conduct "salvage archaeology," removing cultural resources to make way for development projects. This results in a loss of the resource's unique aesthetic value, and potentially its archaeological significance. Simply put, a fragile, nonrenewable resource is being increasingly threatened on the Colorado Plateau.

The thesis of this article is that the laws which have been enacted are insufficient to ensure the protection of cultural resources found on the

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16. TERRY TEMPEST WILLIAMS, *PIECES OF WHITE SHELL: A JOURNEY TO NAVAJOLAND* 125 (1984).

17. Strutin, *supra* note 4, at 42.

Colorado Plateau. Many of the statutes and regulations designed to address cultural resource protection are by nature procedural rather than substantive, and therefore have insufficient impact on the ground. Further, many of the statutes, even those which are substantive, require land managers to apply liberal balancing standards. When a loose balancing standard is applied, in many cases the most fragile and less economically beneficial resource loses. As nonrenewable resources, cultural resources should be given greater protection than they are now afforded under federal law.

This article addresses BLM's cultural resource management practices and policies on the Colorado Plateau. The article will focus upon how BLM manages conflicts which arise as competing demands are made upon cultural resources and other resources under BLM's multiple-use system. The article will describe the statutory framework under which BLM operates, the regulations which apply, and then will describe the management policies themselves. By using case studies, the article will focus on the conflict between cultural resource protection and other uses of BLM lands. The article concludes with reform proposals intended to increase cultural resource protection.

## II. FEDERAL STATUTORY PROTECTION OF CULTURAL RESOURCES

Federal statutes which address cultural resource protection can be divided into two categories: 1) statutes which are specifically designed to protect cultural resources; and 2) statutes which address cultural resource protection along with other interests.

### A. *Cultural Resource Protection Statutes*<sup>18</sup>

Several statutes have been enacted for the express purpose of protecting cultural resources. These statutes contain two general faults: 1) the protections provide for a liberal balancing of interests, which allows cultural resource protection to be superseded or impacted by other interests; or 2) the protections are procedural rather than substantive in nature, mandating compliance rather than preservation, and therefore ultimately do not protect the resource.

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18. There are other statutes which concern cultural resource protection, but they are not relevant to this article. For a complete survey of cultural resource laws, see Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63 (1993), or SHERRY HUTT ET AL., *ARCHAEOLOGICAL RESOURCE PROTECTION* (1992).



## 1. *Antiquities Act*

The first step in federal cultural resource protection came with the enactment of the Antiquities Act of 1906.<sup>19</sup> The Antiquities Act requires the federal government to protect "any object of antiquity" on federal lands.<sup>20</sup> The executive branch was given power to set aside certain federal lands which possessed particular historic, scientific, or archaeological significance.<sup>21</sup> The Antiquities Act established a permit system for allowing scientific research on federal lands, allowing those who were "properly qualified" to request a permit.<sup>22</sup> The Antiquities Act also imposed criminal penalties for unauthorized destruction of archaeological remains.<sup>23</sup> Despite these provisions, the Antiquities Act failed to have any substantial effect upon the growing threats to American cultural resources, as evidenced by the continuing destruction of the resources through pothunting, vandalism, and development.

## 2. *National Historic Preservation Act*

The National Historic Preservation Act<sup>24</sup> (NHPA) was enacted in 1966. The NHPA created the National Register of Historic Places, a system for listing historic properties.<sup>25</sup> The NHPA also created the Advisory Council on Historic Preservation (Advisory Council) to coordinate matters related to historic preservation, and requires federal agencies to consult with the Advisory Council prior to allowing an "undertaking" within the agencies' jurisdiction which would effect properties on the National Register.<sup>26</sup> The NHPA was amended to include properties *eligible* for listing on the National Register in 1976.<sup>27</sup>

19. Pub. L. No. 59-209, 34 Stat. 225 (1906) (codified at 16 U.S.C. §§ 431-433 (1994)).

20. See 16 U.S.C. § 433.

21. § 431.

22. § 432.

23. § 433. The criminal provisions were declared unconstitutional by the Ninth Circuit on grounds of vagueness in *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974). The *Diaz* court ruled that the Antiquities Act's criminal provisions were unenforceable because no definition was provided for certain terms, specifically "ruin," "monument" and "object of antiquity." *Id.* at 114-15. The holding of *Diaz* is not universal in the federal courts. In *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979), the Tenth Circuit rejected the argument that the criminal penalties of the Antiquities Act were unconstitutional. Further, in *United States v. Jones*, 607 F.2d 269 (9th Cir. 1979), the Ninth Circuit ruled that archaeological looting or vandalism could be prosecuted under statutes prohibiting theft or desecration of government property. For a complete discussion of cases interpreting the Antiquities Act, see Kristine Olson Rogers, *Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals*, 2 ENVTL. L. & LITIG. 47 (1987).

24. Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified at 16 U.S.C. §§ 470a-470mm (1994)).

25. 16 U.S.C. § 470a.

26. § 470f.

27. For a more complete explanation of the NHPA and other cultural resource statutes, see

The most important NHPA provision for federal land managers is section 106. Section 106 requires federal agencies which have jurisdiction over an "undertaking" to take into account properties included under, or eligible for, the National Register, and allows the Advisory Council to comment on such federal undertakings.<sup>28</sup> The NHPA states the purpose of section 106 as follows: "[T]o accommodate historic preservation concerns with the needs of Federal undertakings. It is designed to identify potential conflicts between the two and to help resolve such conflicts in the public interest."<sup>29</sup>

Compliance with section 106 is an integral part of every federal agency's cultural resource management practices. Violations of section 106 by federal agencies may result in an injunction to halt particular federal projects.<sup>30</sup> Courts have granted such injunctions for various reasons, including a federal manager's reliance on state determinations,<sup>31</sup> and the failure to request comments from the Advisory Council.<sup>32</sup> However, such procedural requirements do not necessarily protect cultural resources threatened by a development project. The NHPA merely requires federal agencies to comply with section 106 before allowing development.

The 1992 amendments to NHPA made significant changes to the statute.<sup>33</sup> First, the definition of "undertaking," the section 106 operative term, was more comprehensively redefined. Under the new definition, "undertaking" means:

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Ronald H. Rosenberg, *Federal Protection For Archaeological Resources*, 22 ARIZ. L. REV. 701 (1980).

28. The statute allows:

[The] head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, 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. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under . . . this title a reasonable opportunity to comment with regard to such undertaking.

§ 470f.

29. 36 C.F.R. § 800.1(b) (1996).

30. See, e.g., *Vieux Carre Property Owners, Residents & Ass'n, Inc. v. Brown*, 948 F.2d 1436 (5th Cir. 1991) (holding that NHPA review is required as long as a federal agency has the ability to require changes to a federal license authorizing a project).

31. See *Hall County Historical Soc'y, Inc. v. Georgia Dep't of Transp.*, 447 F. Supp. 741 (S.D. Ga. 1978).

32. *Evans v. Train*, 460 F. Supp. 237 (S.D. Ohio 1978).

33. The purpose of these amendments were "to clarify, strengthen and streamline numerous provisions of [the NHPA] to help facilitate the preservation of historic resources." H. Rep. No. 1016, 102nd Cong., 2d Sess. 193 (1992), reprinted in 1992 U.S.C.C.A.N. 4041, 4051.

A project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—

- (A) those carried out by or on behalf of the agency;
- (B) those carried out with Federal financial assistance;
- (C) those requiring a Federal permit, license, or approval; and
- (D) those subject to state or local regulation administered pursuant to a delegation or approval by a Federal agency.<sup>34</sup>

Official BLM commentary on the NHPA amendments observed that the re-definition of undertaking potentially removed the opportunity to exempt activities from section 106 compliance “based on their inherent lack of capability to result in an effect.”<sup>35</sup> BLM is concerned that it will now lose its discretion, and that section 106 has become more cumbersome, depending on how the amendment is interpreted by regulation.<sup>36</sup> The Advisory Council has yet to promulgate final regulations.<sup>37</sup>

Section 110 of the NHPA was amended by significantly changing federal manager responsibilities for day-to-day cultural resource management. The amendment states that federal agencies must establish preservation programs “for the identification, evaluation, and nomination to the . . . [National Register] . . . and [for] protection of historic properties.”<sup>38</sup> The programs must ensure, in part:

[T]hat such properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 470f of this title . . . and *gives special consideration to the preservation of such values in the case of properties designated as having National significance.*<sup>39</sup>

This amendment is significant because for the first time, local managers

34. 16 U.S.C. § 470w(7). Prior to the 1992 amendments, courts ruled that there were limits to what a federal undertaking was, and ruled against section 106 challenges accordingly. *See, e.g.,* Paulina Lake Historic Cabin Owners Ass’n v. U.S.D.A. Forest Service, 577 F. Supp. 1188 (D. Or. 1983) (a Forest Service claim of ownership of historic buildings built during the operation of a special use permit did not constitute an “undertaking” under NHPA).

35. Information Bulletin No. 93-75 from Director of BLM to All Field Officials 1 (November 12, 1992) [hereinafter BLM Bulletin].

36. *Id.*

37. Public reaction to the proposed regulations published on October 3, 1994 in the Federal Register was so negative that the Advisory Council decided to reconsider revising the proposed regulations. Telephone Interview with Alan Stanfill, Counsel, Advisory Council on Historic Preservation (September, 1995). The Advisory Council published a new notice of proposed rulemaking on September 13, 1996. *See* Fed. Reg. 48,580 (1996).

38. 16 U.S.C. § 470h-2(a)(2).

39. § 470h-2(a)(2)(B) (emphasis added).

may attach "special consideration" to a particular site on their own initiative, and potentially without inclusion in or eligibility for the National Register as a basis for their protective actions.<sup>40</sup>

Section 110 was also amended to ensure "that the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning."<sup>41</sup> This is especially relevant to the Colorado Plateau where the public lands form a patchwork of federal, state, local and tribal lands, and the delicate nature of cultural resources leads to the danger that nearby development projects will have a wide impact potential.

Finally, the 1992 amendments require the agencies to provide a more significant role for Indian tribes. Under section 101, the definition of "Indian tribe" is broadened to include not only those tribes recognized by the Bureau of Indian Affairs, but also those tribes as the term is defined the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>42</sup> Further, the NHPA now allows tribes to establish historic preservation programs for "preserving their particular historic properties."<sup>43</sup> The NHPA provides that properties which are of traditional religious and cultural importance to a tribe may be eligible for inclusion in the National Register.<sup>44</sup> BLM has stated: "This provision is of deep concern to BLM if it should come to be interpreted as diminishing the essential parts that historic character, definite location, and the National Register criteria must play in identifying and evaluating historic places."<sup>45</sup>

Even given these recent amendments, the NHPA is essentially a procedural statute with section 106 compliance as its focal point. Section 106 regulations require agencies to: 1) identify historic properties and potential effects of undertakings; 2) make a reasonable and good faith effort to identify historic properties that may be affected by undertaking; and 3) evaluate their historical significance by using the National Register criteria.<sup>46</sup> The regulations also contain other provisions, such as consulta-

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40. BLM Bulletin, *supra* note 35, at 2. The Bulletin states that "(i)n the past, the only important distinction in terms of how properties are treated under the Act has been whether they are included in or eligible for the National Register. This new 'special consideration' tied to national significance is potentially a more consequential change than may have been recognized by the amendments' drafters." *Id.*

41. § 470h-2(a)(2)(C).

42. § 470w(4). Under NAGPRA, "Indian tribe" is defined as "any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 3001(7) (1994).

43. 16 U.S.C. § 470a(d).

44. § 470a(d)(6)(A).

45. BLM Bulletin, *supra* note 35, at 3.

46. 36 C.F.R. § 800.4 (1996).

tion<sup>47</sup> and comment requirements, but the essence of section 106 compliance is the identification and evaluation procedure. The regulations leave it up to the agency, after application of the Criteria of Effect and Criteria of Adverse Effect, to determine whether an adverse effect upon historic properties will occur under the proposed undertaking.<sup>48</sup> Even if the agency determines that an effect *is* adverse, the solution is not to halt development, or to re-evaluate the property, but "to seek ways to avoid or reduce the effects on historic properties."<sup>49</sup>

The protections afforded cultural remains under the NHPA are inadequate. Under the section 106 regulatory scheme, cultural resources are rarely identified prior to the commencement of an undertaking.<sup>50</sup> Any archaeologist will tell you that essential information is potentially lost if cultural resources are moved, even if those resources are "salvaged." Thus, mitigation techniques designed to remove cultural resources do not solve the greater problems of preserving the precious information the cultural resources represent or leaving the remains *in situ*. Further, a primary technique used by BLM for cultural resource protection is "site avoidance."<sup>51</sup> Although avoidance can be helpful in mitigating damage, cultural resources are still susceptible to impacts. For example, projects may not be moved a far enough distance away to prevent all damage. Also, development near the cultural resource makes the resource more accessible via newly-created roads, thereby increasing the chances of site visitation, vandalism and pothunting. Finally, federal agencies incompletely monitor compliance to ensure statutory and contractual requirements are met.

Another significant problem with section 106 is BLM's compliance backlog. Although the requirements of section 106 must be fulfilled prior to the start of a federal undertaking, the enormous amount of actions proposed on the Colorado Plateau make a quality evaluation of the impact of potential development very difficult. The result is that BLM staff are forced to spend a great deal of their time on paperwork generated by section 106 requirements, and less time either developing strategies for specific cultural resource management problems, or simply out in the field. Further, section 106 compliance relies heavily on BLM's ability to inventory or identify cultural resources prior to development. If BLM staff are

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47. For example, historic property evaluations must occur in consultation with a State Historic Preservation Officer. § 800.4(c).

48. § 800.5(c).

49. § 800.5(e).

50. Some of these criticisms are based on evaluations made in a recent study of historic preservation on the Colorado Plateau. See THE GRAND CANYON TRUST, PRESERVING TRACES OF THE PAST: PROTECTING THE COLORADO PLATEAU'S ARCHAEOLOGICAL HERITAGE (1994).

51. Telephone Interview with Kristie Arrington, Area Archaeologist, San Juan Resource Area, BLM (Sept. 15, 1996).

limited by time and resources to properly evaluate a site, many cultural resources may be left unrecorded prior to section 106 compliance. As a result, more unrecorded sites will be threatened by development.

Lastly, the information gleaned from section 106 compliance is not necessarily helpful in evaluating cultural resources. Quoting a BLM archaeologist, the Grand Canyon Trust argues that the compliance-driven information is not helpful for implementing good cultural resource management:

In this resource area we have seen thousands of miles of transect surveys done for linear projects in the past 15 years. Those surveys have focused on sites directly in the path of the transects and do not provide any information on association with other sites. Therefore, we have a record of 20,000 sites, but we don't know several important things about what has been recorded. First, we do not know if what is recorded is a complete site, or part of something larger. Second, even if we are recording sites, we do not know anything about how they are associated with other sites in their vicinity.<sup>52</sup>

Most of the problems described above are partially a result of funding. If Congress appropriated enough funding for these programs, BLM would be able to allocate more resources to section 106 compliance, and the evaluations made during compliance would be more complete. However, section 106 is not the solution to better cultural resource protection. All of the above arguments point to the need for substantive guidelines for protection of cultural properties designated as potentially effected by development, as well as properly-funded, scientifically sound evaluations of cultural properties.

### 3. *Archaeological Resources Protection Act*

The Archaeological Resources Protection Act (ARPA) was enacted in 1979.<sup>53</sup> ARPA is a comprehensive statute designed to protect cultural resources, and includes both a permitting scheme allowing the disturbance of cultural resources, and a penalty scheme for the damage or removal of cultural resources. Under ARPA, any person may apply for a permit allowing the excavation and removal of cultural resources on federal lands.<sup>54</sup> A permit is only required for action taken on an "archaeological

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52. *Id.* at 83.

53. Pub. L. No. 96-95, 93 Stat. 721 (1979) (codified at 16 U.S.C. §§ 470aa-470mm (1994)). For a more comprehensive history and analysis of ARPA, see Rogers, *supra* note 23.

54. § 470cc(a). The statute states that a "person" is "an individual, corporation, partnership, trust, institution, association, or any other private entity or any officer, employer, agent, department, or instrumentality of the United States, of any Indian tribe, or of any State or political subdivision there-

resource," a broadly-defined term.<sup>55</sup> Although an ARPA permit does not require compliance with section 106 of NHPA,<sup>56</sup> in many circumstances, agencies must enforce or comply with both NHPA and ARPA simultaneously.

ARPA allows agencies to promulgate regulations to enforce and enhance the statute. Permits are managed under regulations promulgated by the federal agency which manages the federal land subject to disturbance.<sup>57</sup> Interior regulations lay out the complex procedure by which a permit is obtained.<sup>58</sup> These permits allow qualified researchers to conduct studies on cultural resources.

Under the wide definitions of "archaeological resource" and "archaeological interest," disturbance of virtually all valuable cultural resources requires a permit. However, there are exceptions. Federal land managers have the discretion to decide that certain remains are no longer of archaeological interest.<sup>59</sup> Mining development and other uses are exempted from the permitting process.<sup>60</sup> There are also exemptions for: 1) paleontological specimens not found in an archaeological context;<sup>61</sup> 2) surface collection of arrowheads;<sup>62</sup> and 3) collection for private purposes of "any rock, coin, bullet, or mineral which is not an archaeological re-

of." § 470bb(6).

55. An archaeological resource is:

[A]ny material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be 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. Nonfossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

§ 470bb(1).

56. § 470cc(i).

57. 43 C.F.R. § 7.1 (1996).

58. The "[f]ederal land manager may issue a permit for a specified period of time appropriate to the work to be conducted," through an evaluation of the applicant based on a list of criteria. § 7.3.

59. § 7.33. Federal land managers may make such a determination if "he/she finds that the material remains are not capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics." § 7.33(b). Before doing so, the manager must conduct several procedures: 1) a professional archaeological evaluation of remains; 2) the principal BLM archaeologist or consulting archaeologist in absence of a BLM archaeologist must make a determination that the remains fulfill the § 7.33(b) standard; and 3) public notice is given so that interested parties may comment on the change. § 7.33(c),(e).

60. See 16 U.S.C. § 470kk(a) ("Nothing in this chapter shall be construed to repeal, modify, or impose additional restrictions on . . . mining mineral leasing, reclamation, and other multiple uses of the public lands").

61. § 470bb(1).

62. § 470ec(g).

source . . . .”<sup>63</sup> Notwithstanding these exceptions, most disturbances of cultural resources without an ARPA permit are criminal.

One of the major purposes behind ARPA is to stem the tide of vandalism and the looting of cultural resources on federal lands. The Colorado Plateau has a long history of looting, and the extent to which such lands have been looted is difficult to determine. In 1987, the federal government estimated that approximately sixty-seven percent of recorded sites (29,000 sites) on BLM land in the Four Corners region had been looted.<sup>64</sup> It is unknown how many unrecorded and unidentified sites have been looted. Because of the vast area BLM is responsible for, agency staff rarely visit most sites after their initial recording, if at all.

ARPA contains a criminal penalty provision against damaging, selling, transporting, excavating, or engaging in other harmful activities on any “archaeological resource” on public or Indian lands without a permit.<sup>65</sup> “Archaeological resource” is defined in part as “any material remains of human life or activities which are of archaeological interest.”<sup>66</sup> “Archaeological interest” is also defined quite broadly: “capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation.”<sup>67</sup> By re-defining these standards, ARPA drafters hoped to avoid the vagueness problems associated with the Antiquities Act of 1906.<sup>68</sup>

Despite ARPA’s wide area of protection and criminal sanctions, few ARPA violations are prosecuted, and even fewer lead to a conviction.<sup>69</sup> The failure lies both in the statute and in federal public lands management. The statute provides neither gradations of cultural resource importance nor gradations of protection standards. As a result, although the par-

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63. § 470kk(b).

64. GENERAL ACCOUNTING OFFICE, *supra* note 2, at 22-23.

65. § 470ee(a). ARPA remains the primary tool for cultural resource protection, but it has jurisdictional limits. ARPA does not apply to a great deal of land on the Colorado Plateau which is owned by states and private individuals. Indian lands are included, but consent must be given by the tribe before a permit is issued. § 470cc(g)(2).

66. § 470bb(1).

67. 43 C.F.R. § 7.3(a)(1) (1996).

68. ARPA was drafted in major part to replace the Antiquities Act. The House Report on ARPA stated “The commercial value of illegally obtained artifacts has substantially increased and the existing penalties under [the] 1906 Act have proven to be an inadequate deterrent to theft of archaeological resources from public lands.” H.R. Rep. No. 96-311, at 7 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1709, 1710.

69. Between 1985 and 1987 there were 1,720 documented violations of statutes which protect cultural resources, but there were only 17 (1 %) felony convictions and 57 (3.3 %) misdemeanor convictions under ARPA. GENERAL ACCOUNTING OFFICE, *supra* note 2 at 53-54.



ticular agency which manages the federal land is given broad enforcement power, it is also given broad discretion on *when*, *where* and *how* to enforce. Factors such as lack of resources or lack of direction from Congress and high-ranking executive officials also limit enforcement initiative.

Perhaps most importantly, ARPA enforcement on the Colorado Plateau suffers from a lack of resources. A small number of agency personnel must oversee a vast area of land. In 1987, BLM had only twelve law enforcement officers in the Four Corners region, or about one officer per 4.75 million acres.<sup>70</sup> Enforcement is made even more difficult by the numerous roads on BLM lands which are created for development use. A right of way to an oil and gas pipeline creates a handy access route to quiet, remote looting spots.<sup>71</sup> Further, in some cases officers must investigate all federal violations on BLM land, and ARPA crimes often take a back seat to crimes considered more important.<sup>72</sup> The low priority of ARPA investigations results in limited ARPA enforcement and a correspondingly limited deterrence of ARPA violations.

Finally, ARPA offenses are often seen by the local public as harmless. BLM managers say that looters believe the public has a right to artifacts on public land and they do not view themselves as criminals, and may even view the activity as a family tradition.<sup>73</sup> One survey found that a high percentage of locals in one sample engaged in collection of artifacts, ranging from casual collection of surface pieces to digging for historic artifacts.<sup>74</sup> Much of this stems from the general public's perception that archaeological resources are abundant. The public does not understand the significance of individual sites or the need for site preservation. As one casual collector stated: "We don't specifically hunt for anything, but we keep the things we find. If we didn't[,], somebody else would pick them up."<sup>75</sup> This is especially true for non-National Park lands, which lack a National Park's perceived orientation towards preservation, its better

70. *Id.* at 57. Although the agency manages the most acres and most recorded archaeological sites in the Southwest, it has the fewest law enforcement personnel of the federal land agencies. *Id.*

71. Based on one federal study, sites located over 20 miles from the nearest town and within 100 meters of a road were found to be the most vulnerable to vandalism. PAUL R. NICKENS, ET AL., BUREAU OF LAND MANAGEMENT, A SURVEY OF VANDALISM TO ARCHAEOLOGICAL RESOURCES IN SOUTHWESTERN COLORADO 59 (1981).

72. One BLM office stated that its one law enforcement agent had other priority duties, "and is not available to respond quickly to incident[s] in the resource area." GENERAL ACCOUNTING OFFICE, *supra* note 2 at 58. One exception is the San Juan Resource Area in Utah, which at the time one report was published, had two officers whose primary duty was protecting cultural resources. *Id.*

73. One report cites the appearance of T-shirts recently which state "I Dig San Juan County" or "Get Your Pot in San Juan County," as evidence of this attitude. *Id.* at 24.

74. In this survey, 70% of those surveyed participated in surface collection and 40% engaged in digging. NICKENS, ET AL., *supra* note 71, at 88.

75. *Id.* at 90.

protection, visibility of staff and better defined boundaries.<sup>76</sup> The local public's perception towards cultural resources results in limited motivation to prosecute violations in rural counties with sympathetic juries predisposed towards leniency.<sup>77</sup> According to federal prosecutors, they will generally accept a looting case for prosecution only if it has "jury appeal," meaning "the defendants clearly knew they were on federal lands and intentionally looted a site, they knew they were violating a federal law, and site damage was substantial or large personal profits were realized."<sup>78</sup> Agencies continue to struggle against these perceptions.

Due to lack of funding, public perception, statutory inadequacy and other factors, there has been an almost ineffectual application of ARPA's protections on BLM lands. Although ARPA has had some success, more often than not an ARPA violation results in acquittal, dismissed charges, or a small penalty. The need for increased vigilance, through statutory amendment, education, and increased spending of resources, is clear.

#### 4. *Native American Graves Protection Repatriation Act*

In 1990, the Native American Graves Protection Repatriation Act (NAGPRA) was enacted.<sup>79</sup> The purpose of NAGPRA was to repatriate Native American remains to Native Americans with cultural patrimony to the remains.<sup>80</sup> According to one source, the "(b)asic inequities between the treatment of buried remains of European settlers and the remains of Native Americans were a primary motivation behind the passage of NAGPRA."<sup>81</sup> Although the idea of repatriation has existed for some time, NAGPRA is important because for the first time the ownership of archaeological remains are not considered public property, but are instead the property of the appropriate Native American group or individual from which they originated.<sup>82</sup> NAGPRA enforcement has become an important consideration in BLM cultural resource management because many of the remains which will be potentially repatriated are on BLM lands.<sup>83</sup>

NAGPRA provides protection for unearthed Native American remains and objects. It has both a graves protection and repatriation component. Under NAGPRA's graves protection scheme, intentional removal of "cul-

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76. GENERAL ACCOUNTING OFFICE, *supra* note 2, at 26.

77. *Id.* at 27.

78. *Id.*

79. Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-3013 (1994)).

80. H.R. Rep. No. 877, 101st Cong., 2d Sess. 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367.

81. THE GRAND CANYON TRUST, *supra* note 50, at 119.

82. *Id.* at 120.

83. See Gary D. Stumpf, *A Federal Land Management Perspective on Repatriation*, 24 ARIZ. ST. L.J. 303, 304.

tural items" after November 16, 1990 is permitted only if: 1) ARPA's permitting scheme is followed; 2) there is consultation (and proof of consultation) with the appropriate owners of the remains from the appropriate tribe; and 3) ownership and the right of control of the disposition of the remains is determined.<sup>84</sup> "Cultural items" includes a wide variety of cultural resources associated with Native American cultures.<sup>85</sup>

NAGPRA has the power to halt development. Any inadvertent discovery of culturally affiliated remains requires the person conducting the activity in which the remains were discovered to immediately cease activity.<sup>86</sup> Such persons must then make a reasonable effort to protect the items discovered.<sup>87</sup> Upon discovery, the person must provide immediate telephone notification of an inadvertent find, with written confirmation, to the appropriate federal agency.<sup>88</sup> The agency is then required to notify the Indian tribes likely to be culturally affiliated with the discovered remains within three days of the agency's written notification.<sup>89</sup> Work may resume thirty days following official notification from the agency.<sup>90</sup> The

84. § 3002(c).

85. As defined by NAGPRA, "cultural items" means human remains and—

(A) "associated funerary objects" which shall mean objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects[.]

(B) "unassociated funerary objects" which shall mean objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

(C) "sacred objects" which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) "cultural patrimony" which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

§ 3001(3).

86. See § 3002(d).

87. *Id.*

88. 43 C.F.R. § 10.4(b) (1996).

89. § 10.4(d)(1)(iii).

90. § 10.4(d)(2) (1996). Such resumption is allowed if it is "otherwise lawful." Agency commentary to this phrase states that it is used "to acknowledge that provisions of other statutes, such as section 106 of NHPA, may also apply to a particular inadvertent discovery and the resumption of

issue as to which party will bear the costs incurred by work cessation "will depend upon the nature of the contract drawn between the Federal agency and the appropriate contractor."<sup>91</sup>

Under NAGPRA's repatriation process, if the cultural affiliation of human remains is established, then the federal agency or museum in possession of the remains must "expeditiously" return them.<sup>92</sup> The statute reads:

If the lineal descendent, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items, unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.<sup>93</sup>

Even if the cultural affiliation is not demonstrated with absolute certainty, the remains may still be repatriated if it can be proven by a preponderance of the evidence that the remains belong to a particular tribe or organization.<sup>94</sup> Proof of cultural affiliation is based on geographical, anthropological, linguistic and other factors.<sup>95</sup> The return must be made in consultation with the appropriate tribe, lineal descendent, or organization to determine the place and manner of delivery of the remains.<sup>96</sup>

An example of repatriation occurred at Bandelier National Monument in 1995. There, National Park Service archaeologists conducted legal excavations at the Rainbow House site between 1948 and 1955. An assortment of artifacts were removed, including pendants, figurines, a bowl, a flute, and bone whistles. Based on "provenience" data from original field notes, other anthropological data on the site and the surrounding area, and in consultation with representatives from local Pueblo communities (especially traditional religious leaders), the Park Service was able to determine that the artifacts were specific ceremonial objects "which are needed by Pueblo religious leaders for the practice of traditional Pueblo religion by

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activities in the area of the inadvertent discovery must comply with other legal requirements as well as those of these regulations." 60 Fed. Reg. 62,144 (1995).

91. 60 Fed. Reg. 62,144 (1995).

92. 25 U.S.C. § 3005(a)(1) (1994).

93. § 3005(b).

94. Uncertainty results when the remains are: 1) not established in an inventory; 2) not established through a NAGPRA "summary" under 25 U.S.C. § 3004; or 3) not included on an inventory. § 3005(a)(4).

95. See § 3005(a)(4).

96. See § 3005(a)(3).

their present-day adherents.”<sup>97</sup> In this case, the Park Service determined that there was evidence of cultural affiliation and “shared group identity” between the objects and certain Pueblo Indian groups.<sup>98</sup> Once that was determined, the Park Service issued its Notice of Intent to Repatriate in the Federal Register. Barring any other claims of affiliation with these objects, the objects were to be repatriated and returned to various identified Pueblo communities.<sup>99</sup>

Since NAGPRA is a relatively new law, it is difficult to say what role it will play in cultural resource protection and management. NAGPRA could become a sophisticated method of returning cultural remains to tribes, and giving Native Americans a greater role in cultural resource management. At the very least, it could lead to increased cooperation between tribes and federal agencies, and may lead to discoveries of new methods of cooperative management. However, NAGPRA also brings practical difficulties. NAGPRA adds another layer of regulatory compliance that federal managers must wade through. Further, the repatriation process leaves cultural remains susceptible to further looting if repatriated remains are returned to the ground by a tribe. Also, NAGPRA’s scope is still undetermined. It is too early to know the extent of cultural remains which will be identified by cultural affiliation and actually repatriated. Whatever its long-term effect, NAGPRA is now part of the cultural resources management farrago.

### *B. Other Federal Statutes Relevant to Cultural Resource Protection*

There are other statutes which federal land managers are required to follow when making decisions regarding public land use. The statutes require land managers to consider cultural resource protection alongside other interests when making resource management decisions. In particular, BLM must comply with the National Environmental Policy Act and the Federal Land Policy and Management Act. These statutes are procedural in nature, requiring the disclosure of impacts to cultural resources, but not protection. As a result, compliance does not ensure protection of cultural resources.

#### *1. National Environmental Policy Act*

The National Environmental Policy Act<sup>100</sup> (NEPA) requires the preparation of a “detailed statement” (either an environmental assessment

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97. 60 Fed. Reg. 55,046 (1995).

98. *Id.*

99. *Id.*

100. 42 U.S.C. §§ 4331-4335 (1994).

or environmental impact statement) for any "major federal actions significantly affecting the quality of the human environment."<sup>101</sup> This statement must also include any reasonable alternatives to the proposed action,<sup>102</sup> and "any irreversible and irretrievable commitments of resources which would be involved in the proposed actions should it be implemented."<sup>103</sup> Cultural resources are included as resources whose impact the federal land manager must assess for NEPA compliance.<sup>104</sup>

NEPA compliance comes in the form of either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). Under NEPA, most proposals require the drafting of an EA. An EA is required for actions which do not obviously or normally require the more extensive EIS.<sup>105</sup> An EA is designed to be a concise public document which: 1) provides sufficient evidence and analysis for determining whether to prepare an EIS; 2) aids an agency's compliance with NEPA when no EIS is necessary; or 3) facilitates preparation of an EIS if one is necessary.<sup>106</sup> If a Finding of No Significant Impact (FONSI) is made, the federal agency allows the proposed action to continue.<sup>107</sup> However, if the agency decides that the proposed action could significantly affect the environment, then the agency must prepare an EIS before allowing development.<sup>108</sup> An EIS is a more detailed, costly, and time-consuming study than an EA. The EIS is an "action-forcing" device which is to be used by agencies to plan actions and make decisions, and to ensure that NEPA's policies are applied to the federal agencies' management of public lands.<sup>109</sup>

Through a process called "tiering" federal land managers may be required to follow a broad EIS with a more site-specific EIS.<sup>110</sup> Tiering is used when the analysis for the proposed action will be a site-specific or project-specific refinement of existing analysis, and decisions associated with the existing environmental document will not be changed as a result

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101. § 4332(2)(C).

102. § 4332(2)(C)(iii).

103. § 4332(2)(C)(v).

104. § 4331(b)(4).

105. BUREAU OF LAND MANAGEMENT, NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK § IV-1 (1988); see also 40 C.F.R. §§ 1501.3-1501.4 (1996).

106. See Dinah Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENVTL. L. REP. 10060 (1989). Under NEPA regulations, agencies may use "categorical exclusions" to avoid unnecessary paperwork on actions without significant environmental impacts. "Categorical exclusions" are acts which fall within a predesignated category of actions that "do not individually or cumulatively have a significant effect on the human environment." Under such exclusions, neither an EA nor an EIS is required. 40 C.F.R. § 1508.4 (1996).

107. See 40 C.F.R. §§ 1500.4(q), 1500.5(l).

108. §§ 1501.4, 1502.4, 1506.1(a).

109. See §§ 1500.1, 1502.1.

110. §§ 1502.20, 1508.28.

of the tiering.<sup>111</sup> Prior to major programs or plans with significant environmental impacts, agencies may draft a broad "programmatic" EIS—an EIS drafted before the implementation of a resource management plan for a resource area.<sup>112</sup> Afterwards, BLM may have to draft an EIS for a site-specific federal action, e.g., an oil and gas drilling permit at one site in a larger resource area. Tiering is helpful because it requires BLM to conduct a more detailed analysis after a resource-area EIS has been produced. In many areas on the Colorado Plateau, BLM has not conducted a complete analysis of cultural resource impacts within its wider resource management plans.

The practical effect of NEPA on cultural resource protection is that it requires an EIS or EA before allowing development on federal land.<sup>113</sup> Pursuant to NEPA's goal to preserve historic cultural properties,<sup>114</sup> the EIS or EA must include a description of any significant impacts of development on cultural resources.<sup>115</sup> However, this requirement only requires the federal land manager and the developer to account for the potential impacts which may arise from a proposed development. As the Supreme Court stated: "If the adverse environmental effects of the proposed actions are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."<sup>116</sup> Ultimately, the protection on the ground is left to the land manager's discretion.<sup>117</sup> Courts usually defer to such decisions under the judicial review standards of the Administrative Procedure Act.<sup>118</sup> Because of this, identifying impacts to cultural resources during NEPA compliance does not necessarily halt or even alter development.

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

BLM manages its lands under the Federal Land Policy and Management Act (FLPMA).<sup>119</sup> FLPMA directs BLM to manage in a multiple-use<sup>120</sup> system which "recognizes the Nation's need for domestic sources

111. BUREAU OF LAND MANAGEMENT, NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK § III-3 (1988).

112. 40 C.F.R. §§ 1502.4(b), 1502.20.

113. See 42 U.S.C. § 4332(2)(C).

114. See § 4331(b)(4).

115. 40 C.F.R. §§ 1502.16(g), 1508.8(b).

116. *Robertson v. Methow Valley Citizens Council*, 109 S. Ct 1835, 1846 (1989).

117. See *id.*

118. See 5 U.S.C. § 706 (1994); see also *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989).

119. 43 U.S.C. §§ 1701-1784 (1994).

120. "Multiple use" is defined as:

[T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American

of minerals, food, timber, and fiber from the public lands," along with the need to protect "historic" and "archaeological" values.<sup>121</sup> Management of cultural resources must coincide and harmonize with BLM management of other uses. Significantly, BLM is to take into account "the long term needs of future generations for both renewable and *non-renewable resources*."<sup>122</sup> Cultural resources are one of the few true non-renewable resource types. Further, FLPMA's multiple-use mandate does not require that federal land managers base their decision on the degree of economic return in making resource management decisions. Because grazing, mineral, oil and gas development, and recreation all pose significant dangers to cultural resources, these uses often conflict.

FLPMA requires BLM to develop and maintain land use plans for resource management.<sup>123</sup> BLM regulations provide the agency with a detailed process through which to manage multiple uses.<sup>124</sup> District or area BLM managers, with the approval of state BLM Directors, are directed to prepare a resource management plan (RMP), a broad-based, regional plan for agency resource management.<sup>125</sup> When developing a RMP, BLM managers must employ an interdisciplinary approach "appropriate to the values involved and the issues identified" during the "scoping" stage of the planning process.<sup>126</sup> BLM managers can consider a number of factors, including applicable laws, cost-benefit standards of resources, harmony with state, local, or tribal plans and policies, and the "(d)egree of local

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people; making the most judicious use of the lands for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some lands for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific *and historical values*; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the lands and the quality of the environment *with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output*.

43 C.F.R. § 1601.0-5(f) (1996) (emphasis added).

121. 43 U.S.C. § 1701(a)(8),(12).

122. 43 C.F.R. § 1601.0-5(f) (emphasis added).

123. 43 U.S.C. § 1712.

124. BLM regulations state that:

The objective of resource management planning by the Bureau . . . is to maximize resource values for the public through a rational, consistently applied set of regulations and procedures which promote the concept of multiple use management and ensure participation by the public, state and local governments, Indian tribes and appropriate Federal agencies.

43 C.F.R. § 1601.0-2.

125. § 1601.0-4(c).

126. § 1610.1(c).



dependence on resources from public lands."<sup>127</sup> Such plans must follow the same public participation, monitoring and review processes as NEPA requires.<sup>128</sup> In essence, a RMP gives BLM managers resource management objectives and parameters to follow.

Under FLPMA, BLM must balance the management of cultural resources with other uses. The land use plans and inventories which BLM must produce are procedural requirements and do not prohibit impacts to archaeological sites. The value of the cultural resources found are balanced against the value of other uses. If BLM managers consider a development proposal important enough, cultural resources will likely be impacted. For these reasons, FLPMA's statutory mandates often fail to protect cultural resources.

### III. BLM CULTURAL RESOURCE MANAGEMENT

An understanding of how BLM conducts cultural resource management in the field, and under what authorities it operates, is critical. Because BLM is subject to all of the aforementioned statutes, and subject to its own enabling legislation and regulations (including its own written and unwritten policies), the picture gets very complicated. Therefore, a review of the policy framework under which BLM manages cultural resources is important.

#### A. Cultural Resource Planning

According to BLM management policy,<sup>129</sup> the objective of cultural resource planning is to "provide sequential decision and implementation steps following the establishment of management objectives in" approved resource management plans (or RMPs).<sup>130</sup> BLM must make long-term management decisions based on the mandates of FLPMA. BLM has two types of plans designed to facilitate decision processes: 1) "cultural resource management plans" (CRMPs) which record management decisions

127. § 1610.4-4.

128. §§ 1601.0-6, 1610.2, 1610.4-1, 1610.4-9.

129. A BLM manual directs BLM's management policies. Recently, however, the agency is moving away from compliance with many provisions of its manual. For example, many of the provisions regarding cultural resource inventories are not currently followed. The agency has recently abrogated many of its policies in the interest of streamlining decision-making. According to one BLM manager, the purpose of not following established BLM policy is to avoid the red tape of having local decisions approved through BLM bureaucratic pyramid. In an attempt to streamline, the agency is now giving local managers authority for resource management decisions. Telephone Interview with Kristie Arrington, Area Archaeologist, San Juan Resource Area, BLM (Sept. 15, 1996). Because I cite BLM as partial authority for its policies, these changes should be kept in mind. However, most of BLM's cultural resource planning procedures continue despite these changes. *Id.*

130. BUREAU OF LAND MANAGEMENT, MANUAL § 8130.02 (1988 & supp. 1989) [hereinafter BLM MANUAL].

and establish priorities for management actions; and 2) "cultural resource project plans" (CRPPs) which "serve as detailed job plans for funding and carrying out priority management actions."<sup>131</sup> BLM is moving away from the use of CRMPs, and towards the use of CRPPs and interdisciplinary resource management plans,<sup>132</sup> but a discussion of CRMPs is necessary for a complete picture.

### 1. Cultural Resource Management Plans

Pursuant to FLPMA's requirement that BLM develop land use plans,<sup>133</sup> the agency may draft CRMPs for its management of cultural resources.<sup>134</sup> A CRMP is written after the development of a RMP. A RMP is designed to discuss resource uses in a given BLM region.<sup>135</sup> In essence, the CRMP must conform with the RMP.<sup>136</sup> Therefore, much of the management planning necessary to create a CRMP has already been produced through the RMP process.

A RMP may include a smaller area within its given area of study that is designated as an Area of Critical Environmental Concern (ACEC). An ACEC is designed to provide special, intensive management for an area of particular concern.<sup>137</sup> BLM policy states the following: "[T]he ACEC

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131. *Id.* BLM also has plans for special circumstances. BLM may design "recreational use management plans" (RAMPs) when recreational development of cultural resources "assigned to and being protected for public use" necessitates such plans. Also, "special management area plans" may have sections which address cultural resources, e.g. when such areas have Areas of Critical Environmental Concern (ACEC). Both of these plans may be substituted for CRPPs. BLM MANUAL, *supra* note 130, § 8132.07.

132. Telephone Interview with Kristie Arrington, Area Archaeologist, San Juan Resource Area, BLM (April 7, 1997).

133. 43 U.S.C. § 1712 (1994). BLM is required to consider certain criteria when developing land use plans, including: (A) giving special consideration to ACECs; (B) considering "the relative scarcity of the values involved and the availability of alternative means . . . and sites for realization of those values;" and (C) weighing "long-term benefits to the public against short-term benefits . . . ." § 1712(c).

134. A CRMP is defined in the BLM Manual as "a brief activity plan in which the broad determination (management objectives) made in a resource management plan (RMP) are developed into specific management decisions. Cultural resource management development has two decision products: (1) the allocation of all of the planning area's cultural resource to use categories . . . and (2) the establishment of related protection and information gathering priorities." BLM MANUAL, *supra* note 130, § 8100.

135. For example, a RMP significant to the Colorado Plateau is the San Juan RMP. BLM policy states that "the objective of the management plan element of the cultural resource planning component is to provide specific resource decisions needed to respond to the management objectives (determinations) established in resource management plans (RMP), through concise, streamlined decision documents that clarify and refine the broad RMP management objectives." BLM MANUAL, *supra* note 130, § 8131.02.

136. *Id.* at § 8131.06(A).

137. See BUREAU OF LAND MANAGEMENT, CULTURAL RESOURCE MANAGEMENT PLAN, MOCK-

process is to be used to provide whatever special management is required to protect those environmental resources that are most important, i.e., those resources that make certain specific places, endowed by nature or man with characteristics that set them apart."<sup>138</sup>

For example, in the San Juan RMP, 156,000 acres were designated through the RMP-development process as the Anasazi Culture Multiple Use ACEC.<sup>139</sup> The CRMP for this ACEC details plan objectives for the ACEC: "[T]o identify, evaluate, preserve, develop, interpret and utilize the 20,000 cultural properties in the ACEC unit; and *to integrate cultural resource management with other resource uses in a multiple use scheme.*"<sup>140</sup>

The San Juan RMP also designated 50,000 acres for special management as cultural emphasis areas.<sup>141</sup> "Cultural emphasis areas" are areas inside the ACEC given further special management designation. Management of cultural emphasis areas is intended to "emphasize the preservation, management, and use of the cultural resource properties found within the area."<sup>142</sup> As one CRMP stated: "Emphasis will be on protecting the soil, vegetation, and wildlife resources to enhance the natural environment of the area and hence the cultural resource setting. *Mineral resources will be developed while constrained by existing laws, policy and regulations pertaining to cultural resources.*"<sup>143</sup>

Therefore, management in "cultural emphasis areas" is intended to emphasize cultural resource protection over other types of uses. However, ACECs are still designed to fit into BLM's overall multiple-use model. BLM policy states that ACEC management is to be conducted "without unnecessarily or unreasonably restricting users of these lands from uses that are compatible with that protection."<sup>144</sup> Further, BLM policy quotes FLPMA's legislative history as stating that ACEC designation does not prohibit development in ACECs.<sup>145</sup> Therefore, BLM managers are re-

INGBIRD MESA 14 (1986) for a discussion of RMP and ACEC objectives.

138. BUREAU OF LAND MANAGEMENT, AREAS OF CRITICAL ENVIRONMENTAL CONCERN, POLICY AND PROCEDURES GUIDELINES 2 (1980).

139. BUREAU OF LAND MANAGEMENT, CULTURAL RESOURCE MANAGEMENT PLAN, SAND AND EAST ROCK CANYONS 19 (1986).

140. *Id.* (emphasis added).

141. BUREAU OF LAND MANAGEMENT, CULTURAL RESOURCE MANAGEMENT PLAN, MOCKINGBIRD MESA 14 (1986).

142. *Id.*

143. *Id.* (emphasis added).

144. BUREAU OF LAND MANAGEMENT, AREAS OF CRITICAL ENVIRONMENTAL CONCERN, POLICY AND PROCEDURES GUIDELINES 2 (1980).

145. *Id.* at 3. The Senate report on FLPMA states: "Unlike wilderness areas, . . . [ACEC's] are not necessarily areas in which no development can occur. Quite often, limited development, when wisely planned and properly managed, can take place in these areas without unduly risking . . . permanent damage to historic, cultural or scenic values . . ." *Id.*

quired to allow other uses inside either ACECs or cultural emphasis areas as long as they find that such uses are "compatible."

BLM requires that all cultural resources known and "projected to occur" within a planning area be classified for particular uses.<sup>146</sup> Uses are managed according to one or more of the following objectives: 1) information potential; 2) public values; or 3) conservation.<sup>147</sup> The allowable uses to achieve these objectives are: 1) scientific; 2) management; 3) sociocultural use; 4) public use; 5) discharged from use,<sup>148</sup> or 6) conservation for future use. A CRMP use allocation may be revised if certain changes occur, such as a newly identified resource type.<sup>149</sup> Use allocation is determined by classification according to shared characteristics, and are not ordinarily "allocated to uses individually unless they stand out because of prior recognition, public attention, etc., to indicate clearly their specific public or scientific importance and use potential."<sup>150</sup> The CRMP then sets forth the uses and objectives that have been assigned to the cultural properties.<sup>151</sup>

If BLM determines that a particular cultural resource is no longer worth managing (e.g., due to damage), it may categorize the resource in a use allocation known as "discharged from management." BLM is given the power to decide what cultural resources will be removed from further management consideration. According to BLM, assignment of a use in this category means:

[E]ither that a cultural resource that was previously qualified for assignment to any of the categories defined above no longer possesses the qualifying characteristics for that use or for assignment to an alternative use; or that a cultural property's scientific use potential was so slight that it was exhausted at the time the property was recorded, and no alternative use is deemed appropriate. Where a cultural property is involved, allocation to discharged use also means that records pertaining to the property represent its only remaining importance, and that its location no

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146. BLM MANUAL, *supra* note 130, § 8131.06(B).

147. BUREAU OF LAND MANAGEMENT, CULTURAL RESOURCE MANAGEMENT PLAN, MOCKINGBIRD MESA, 53.

148. BLM MANUAL, *supra* note 130, § 8131.22; see *infra* note 152 and accompanying text for an explanation of "discharged use."

149. § 8131.14. The possibility of revision can be anticipated in the CRMP. The Sand and East Rock Canyons CRMP states that "due to the lack of standardized inventory data for the . . . unit," significant revision may occur. This CRMP therefore requires a monitoring and updating of itself every two years, to be documented in a brief report "to the Area Manager," with "changes in the plan made by management decision." BUREAU OF LAND MANAGEMENT, CULTURAL RESOURCE MANAGEMENT PLAN, SAND AND EAST ROCK CANYONS 43 (1986).

150. BLM MANUAL, *supra* note 130, § 8131.06(C).

151. See, e.g., BUREAU OF LAND MANAGEMENT, CULTURAL RESOURCE MANAGEMENT PLAN, SAND AND EAST ROCK CANYONS 67 (1986).

longer presents a management constraint for competing land uses.<sup>152</sup>

If a cultural resource allocated as "discharged from management" falls under the ARPA definition of "archaeological resource," BLM is required to make a determination under ARPA regulations that certain remains "are no longer of archaeological interest and are not to be considered archaeological resources under this part."<sup>153</sup> If that determination is made, BLM must meet the consultation, publication, and documentation requirements under ARPA regulations.<sup>154</sup>

BLM managers are required in CRMPs to discuss the protection implications of designated use allocations. To do so, BLM must identify "protection objectives."<sup>155</sup> Protection measures are divided into two categories: threats to allocated uses, and threat reduction. First, managers must describe presently ongoing deterioration, and "feasible or reasonably foreseeable events that would pose a threat to attainment of allocated uses."<sup>156</sup> Second, the CRMP must discuss means to reduce or remove threats, including the "kind and level of protection measures (including law enforcement), data recovery, or other mitigation actions judged to be the minimum needed where deterioration is ongoing or reasonably anticipated."<sup>157</sup> BLM must include an estimated cost of implementing threat reduction measures.<sup>158</sup>

Despite the large amount of information required for the creation of a CRMP, there is doubt as to any positive effect such planning has on cultural resource protection. BLM use categories do not ultimately protect the majority of cultural remains. The only cultural resources which are segregated from other land or resource uses are those designated "conservation for future use." Most other uses will have impacts on ancient remains, as acknowledged in BLM's own policies.<sup>159</sup> Therefore, only those remains which are considered "unusual . . . which, because of scarcity, [possess] a research potential that surpasses the current state of the art, [have] singular historic importance, cultural importance, or architectural interest, or com-

152. BLM MANUAL, *supra* note 130, § 8111.21(F). Certain considerations are used to determine whether the source is "discharged from management:" (1) whether the property having traditional lifeway value assigned to sociocultural use; (2) whether the property has the qualifying characteristics for scientific use; (3) whether a property has an immediate potential of scientific use realization; or (4) whether the property has been recorded. *Id.*

153. 43 C.F.R. § 7.3(a)(5) (1996).

154. § 7.33(c).

155. BLM MANUAL, *supra* note 130, § 8131.23.

156. *Id.* at § 8131.23(A).

157. *Id.* at § 8131.23(B).

158. *Id.*

159. *Id.* at § 8131.22.

parable [values],” are protected absolutely.<sup>160</sup> Further, even these remains are only designated as “not currently” open to “scientific or historical study that would result in its physical alteration.”<sup>161</sup> Such language does not require BLM to prioritize the protection of cultural remains impacted by other uses in the future. Thus, BLM planning guidelines leave the majority of cultural remains open to some degree of physical alteration.

## 2. Cultural Resource Project Plans

Cultural Resource Project Plans (CRPPs) are designed “to develop detailed job plans for implementing decisions made in CRMPs.”<sup>162</sup> Such plans are the link between management decisions and the everyday requirements which BLM agents must perform on site to fulfill the agency’s cultural resource management objectives. BLM policy requires CRMPs to establish timetables, orders of priority and the geographic boundaries of CRPPs.<sup>163</sup> CRPPs include details such as estimates on work force, scheduling, equipment, and supply needs.<sup>164</sup> Along with the nuts-and-bolts implementation information, CRPPs must describe how implementation of the project complies with various statutes and was coordinated with appropriate tribes or individuals. For example, an EA or an ARPA permit may be required prior to implementing a CRPP.<sup>165</sup>

CRPPs must also include an implementation schedule for development projects. Such schedules must include work requirements and cost estimates.<sup>166</sup> BLM managers must also submit a “proposed annual work plan process,” including schedule and cost information.<sup>167</sup> The work plan must include “both the level of implementation that can be funded within the proposed cost target and also the specific actions that will require additional funding for full implementation.”<sup>168</sup> The approved work plan explains how a CRPP is implemented based on “statewide assessment of

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160. *Id.* at § 8111.21(B).

161. *Id.*

162. *Id.* at § 8132.02.

163. *Id.* at § 8131.25. BLM policy states that:

The area covered by the CRMP should be divided into subareas to be treated in CRPPs. These subareas may be defined, as appropriate, according to the geographical area or management unit, the cultural resource or resource type, the use type, the type of protective measure(s) to be applied, or the type of information gathering project to be undertaken.

*Id.* Priority is established for CRPPs “according to the relative urgency of protective action, or the apparent importance of management decisions or action being held up being held up by information needs.” *Id.*

164. *Id.* at § 8132.1.

165. *Id.* at § 8132.12.

166. *Id.* at § 8132.13.

167. *Id.* at § 8132.21.

168. *Id.*

protection or information needs and other program priorities.”<sup>169</sup> Therefore, CRPP implementation decisions must fit into the State BLM office’s planning and budgetary resources. CRPP implementation demonstrates that BLM managers are restricted in their management decisions by their budget and must make on-the-ground management decisions based on that budget.

BLM has been criticized for its funding procedures. According to a private report, “creative coding” allows BLM budget managers to charge funds allocated to cultural resource work as section 106 compliance work.<sup>170</sup> The result is that compliance work performed by cultural resource employees is coded as cultural resource work. The reason is that “(a)s the fiscal year goes by, funds from the core budget of cultural resource programs are often used to pay for the compliance work of other programs that lack funding. Soon there is no money left for cultural resource programs.”<sup>171</sup> Therefore, the problem of underfunding cultural resource management may still be the result of prioritizing other uses by individual BLM offices.

BLM has recently enacted new budget policies which alter how the agency allocates funding. Prior to these changes, BLM’s budget was allocated to approximately forty sub-activities (e.g., range management, cultural resource management). This old system made it administratively impossible to take money from one sub-activity to another. The new budget system uses fewer sub-activities.<sup>172</sup> Having fewer allocation categories gives managers greater flexibility to allocate funds to needed projects. Local BLM offices now have greater opportunities to shift money from project to project. The new system may help BLM implement programs such as CRPPs by allowing managers to revise CRPPs which were hamstrung by budgetary constraints in the past.<sup>173</sup> However, even this would not change the basic problem that BLM spends too much of its funding on procedural requirements, such as section 106 compliance, and less on actual field work protecting cultural resources. Further, it does not solve the basic problem of not having enough funding available.<sup>174</sup>

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169. *Id.*

170. THE GRAND CANYON TRUST, *supra* note 50, at 72.

171. *Id.* at 72-73.

172. Telephone Interview with Bill Stringer, Associate District Manager, Moab District, BLM (June 13, 1997).

173. One BLM manager in Utah claims that these changes have not affected cultural resource management in their district because of a flat budget, inflation, and the need to fund basic requirements such as payroll. Telephone Interview with Bill Stringer, Associate District Manager, Bureau of Land Management (June 13, 1997).

174. *Id.*

### B. Cultural Resource Inventories

Several statutes require BLM to conduct inventories of cultural resources to meet management needs. Under FLPMA, BLM is required to prepare and maintain an inventory "of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving *priority to areas of critical environmental concern*."<sup>175</sup> The inventories also include areas with sensitive cultural resources.<sup>176</sup> The system is designed to ensure sufficient data to facilitate multiple-use management decisions for BLM lands. NHPA requires agencies to conduct cultural resource research before allowing actions in their jurisdictions which might lead to the destruction of cultural resources.<sup>177</sup> The first step in NHPA section 106 compliance requires BLM to identify and evaluate potential effects to significant historic properties affected by a proposed BLM action.<sup>178</sup> Because BLM's evaluation of the potential effects of actions is based upon analysis of known cultural properties, conducting proper inventories is a critical step in cultural resource management.

BLM inventories are broken into three categories.<sup>179</sup> A Class I in-

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175. 43 U.S.C. § 1711(a) (1994) (emphasis added).

176. *Areas of critical environmental concern* are defined as "areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values . . ." § 1702(a) (1994).

177. 16 U.S.C. § 470h-2(a) (1994).

178. BLM MANUAL, *supra* note 130, § 8131.33.

179. The three cultural resource inventory classes are defined by BLM as:

(1) class I - existing data inventory: a professionally prepared study of existing cultural resource data from published and unpublished documents, BLM cultural resource inventory records, institutional site files, State and National registers, informant interviews, and other information sources. Products of the study are a compilation and analysis of all reasonably available data and a comprehensive synthesis of the data. Class I inventories, which should have prehistoric, historic, and ethnological/sociological elements, are in large part chronicles of past land uses, and as such they may have major relevance to current land use decisions. They are periodically updated, in both the compilation and the synthesis, to incorporate new data from class II and class III inventories, histories, oral testimony, and other sources.

(2) class II - sampling field inventory: a professionally conducted, statistically based sample survey, designed to aid in characterizing the probable density, diversity, and distribution of the results of intensive survey conducted in limited and discontinuous portions of the target area. Within individual sample units, survey aims, methods, and intensity are the same as those applied in class III inventory. Class II inventory may be conducted in several phases utilizing differing sample designs to improve statistical reliability.

(3) class III - intensive field inventory: a professionally conducted, continuous, intensive survey of an entire target area (except for any subareas determined very unlikely to contain discoverable cultural properties). Class III inventories are aimed at locating and recording all cultural properties that have surface and exposed-profile indications, through systematic inspection commonly carried out by a crew of trained observers walking series



ventory supplies a broad picture of the cultural resources in a particular geographic area. Class I inventories include "a summary of all previous research, known research values, the potential of the resources for providing insight . . . and an evaluation of resources for public interpretation and other non-scientific aspects of significance."<sup>180</sup> This regional inventory allows land managers to ascertain the potential effects of development beforehand. A Class II inventory provides the land manager with information about the "location, nature and range of occurrence of specific resource types."<sup>181</sup> According to one author, "Class II level data are most frequently collected as a component of project-specific or resource management planning."<sup>182</sup> If a proposed development threatens the disturbance of cultural resource areas, BLM requires that an intensive, or Class III inventory, be done. This inventory provides information about all cultural resources in the area of proposed activity.

Inventories allow land managers to account for cultural resources potentially threatened by multiple-use management. However, there are flaws in this system. Land managers cannot fully tabulate cultural resources, given the large areas which must be inventoried, the physical limits of inspection (e.g., resources which have not even been discovered underground), and the limited time which the agency has to operate.<sup>183</sup> According to the General Accounting Office (GAO), as of 1987, BLM had only recorded 76,598 of the approximately 1,361,586 archaeological sites on BLM land in the Four Corners region.<sup>184</sup> The GAO also found that surveys have been limited primarily to "areas where land development projects have been proposed, rather than for the purpose of developing resource inventories."<sup>185</sup>

The funding of inventories is by far the biggest problem. The cost and time required to survey all BLM lands on the Colorado Plateau may be prohibitive.<sup>186</sup> New survey technologies have been introduced (e.g.,

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of close-interval parallel transects until the area has been thoroughly examined. Class III methods vary considerably from region to region due to environmental circumstances (forest understory and duff, tundra, marsh, extreme slope, etc.), but conform to the prevailing professional survey standards for the region involved. Artificial exposure of the subsurface ('probing,' 'shovel testing,' etc.) is sometimes a necessary part of class III methods and may be included where conditions warrant.

BLM MANUAL, *supra* note 130, § 8100.

180. Robert Laidlaw, *Cultural Resource Planning and Management in a Multiple-Use Agency*, in *ARCHAEOLOGICAL HERITAGE MANAGEMENT IN THE MODERN WORLD* 233 (H.F. Cleere, ed., 1989).

181. *Id.*

182. *Id.*

183. The Department of the Interior reports that only approximately 6% of BLM lands have been inventoried. DEPARTMENT OF THE INTERIOR, RANGELAND REFORM '94, DRAFT ENVIRONMENTAL IMPACT STATEMENT, EXECUTIVE SUMMARY 24 (1994).

184. GENERAL ACCOUNTING OFFICE, *supra* note 2, at 39.

185. *Id.* at 40.

186. The GAO estimates that a Class III survey of all the remaining unsurveyed lands managed

use of satellite data), but these are also very expensive. BLM regulations require BLM to fund inventories.<sup>187</sup> It makes good management sense to require those individuals who benefit from public lands to pay for ensuring that the nonrenewable resources on those public lands are not affected by the use. However, requiring developers to fund the inventories of lands affected by development does not take into account the vast lands subject to recreational use, or the lands not inventoried which are threatened by illegal activity such as pothunting and vandalism. As most of the Colorado Plateau is still not inventoried, the true extent of damage to cultural resources is unknown. Inventory requirements under FLPMA, NHPA and ARPA are insufficient to protect undiscovered remains.

### *C. Trends in BLM Cooperative Management and Consultation Policies*

BLM operates under a host of legislative and regulatory requirements for consultation with various outside interests when making cultural resource management decisions. Virtually all the statutes and regulations mentioned in this article require federal land managers to consult with various interested parties.

Native American consultation has become a critical element to federal cultural resource management. BLM policy requires managers to consider Native American interests when making land-use decisions, and to seek input from local tribes.<sup>188</sup> A likely management scenario for BLM would concern land use or development that is injurious or repugnant to a particular tribe. Cultural resources valuable to the affected Native Americans may or may not be located on the site—the land itself may be sacred. Further, the Native Americans may be unwilling to divulge the location of cultural properties, or may be unsure of their exact location. In such situations, “the BLM manager might be put in the position of having to weigh a proposal for a legally and politically supported use, such as mineral development, in an area regarded as sacred and inviolate.”<sup>189</sup> BLM uses the following standard to determine whether consultation with Indian tribes is required:

Before making decisions or approving actions that could result in changes in land use, physical changes to lands or resources, changes in access, or alienation of lands, BLM managers must determine whether Native

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by all the federal agencies in the Four Corners states could cost from \$392 million to \$1.960 billion, based on an estimated survey cost range of \$4 to \$20 per acre. *Id.* at 42.

187. Under mineral regulations, BLM is responsible for funding and conducting cultural resource inventories. See 43 C.F.R. §§ 3802.3-2(f)(3), 3809.2-2(e)(3) (1996).

188. See generally BUREAU OF LAND MANAGEMENT, GENERAL PROCEDURAL GUIDANCE FOR NATIVE AMERICAN CONSULTATION, BLM MANUAL HANDBOOK (1994).

189. *Id.* at II-2.

American interests would be affected, observe pertinent consultation requirements, and document how this was done. In the face of a legal challenge, the consultation record will be the BLM's basis for demonstrating that the responsible manager has made a reasonable and good faith effort to obtain and consider appropriate Native American input in decision making.<sup>190</sup>

NHPA, FLPMA and ARPA require consultation with Indian tribes.<sup>191</sup> Under ARPA, federal land managers must notify a tribe if issuance of an ARPA permit threatens lands having religious or cultural importance to the tribe.<sup>192</sup> Tribes may also request a meeting with the land manager to discuss their interest in the proposal, "including ways to avoid or mitigate potential harm or destruction such as excluding sites from the permit area."<sup>193</sup> ARPA procedures also require consent of either the tribe or individual Indian landowner.<sup>194</sup>

A second major trend is BLM's participation in cooperative or inter-agency management. Such efforts as the Four Corners Governors' Conference<sup>195</sup> are attempts to coordinate cultural resource protection efforts on the Colorado Plateau, an area with a mixture of federal, state, tribal and local jurisdictions. Cooperative associations address regional and cross-jurisdictional issues, discover alternative opinions on management, and generally gain a wider perspective on the issues. Perhaps most importantly, such cooperative efforts pool agency resources in a time when funding for federal conservation programs is frozen or decreasing.

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190. *Id.* at I-1.

191. *See* 16 U.S.C. § 470cc(g)(2) (1994); 43 C.F.R. § 1610.3 (1996).

192. 43 C.F.R. § 7.7 (1996).

193. § 7.7(a)(3).

194. § 7.35(a).

195. In 1990 the Four Corners Governors' Conference (FCGC) was held, bringing together federal, state, Indian, and private interests to work towards a cooperative agreement for cultural resource management, in order to establish a "collaborative mechanism to coordinate the promotion, preservation, and enhancement of cultural resources in the Four Corners region." U.S. DEP'T OF THE INTERIOR, FOUR CORNERS GOVERNORS' CONFERENCE, PARTNERSHIPS IN TOURISM, RECREATION, PRESERVATION, AND EDUCATION 3 (1990). The FCGC broke into work groups to address particular issues, such as economic development and archeology, interpretation and public involvement. The result of the FCGC was the creation of the Four Corners Heritage Council (FCHC). The FCHC is intended to serve as the regional coordinating committee for all key interest groups involved in Four Corners cultural resource management. *Id.* Projects of mutual interest to the various groups are to be managed through the FCHC. *Id.* Of particular importance was the fostering of cooperation and communication, which, according to BLM officials, had been an impediment in the past. Sally Wisely, Bureau of Land Management, Remarks at a meeting between BLM representatives and representatives of the University of Colorado School of Law (March 18, 1993).

#### D. *BLM Cultural Resource Management in Practice*

BLM follows a different set of procedures for each separate resource, while simultaneously managing under its multiple-use mandate. To develop this point, I have chosen to contrast BLM's management of an extractive resource use with its management of the more recently-arrived recreational use.

##### 1. *Oil and Gas Development on BLM Lands*

As an agent of the Secretary of the Interior, BLM has the responsibility for leasing and managing the oil and gas resources on BLM lands. Under the Mineral Leasing Act, BLM is authorized to lease federal lands for oil and gas development.<sup>196</sup> The Mineral Leasing Act has been amended in recent years by the Federal Onshore Oil and Gas Leasing Reform Act (FOOGLRA).<sup>197</sup> FOOGLRA allows BLM to lease lands that are "known or believed to contain oil or gas deposits . . ." <sup>198</sup> FOOGLRA requires that such leasing be made primarily through a competitive bidding system.<sup>199</sup>

A proposal for a new oil and gas lease on federal land almost certainly triggers NEPA requirements for either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS).<sup>200</sup> In such situations, NEPA requirements most often end with the drafting of an EA. EAs contain standard provisions designed to fulfill NEPA requirements. First, BLM determines whether the proposed action has conformed to the various statutory and regulatory requirements. In particular, an EA may emphasize conformance with BLM's onshore oil and gas regulations.<sup>201</sup> These regulations articulate the rules the operator must follow under an oil and gas lease, including drilling and producing requirements.<sup>202</sup> For example, the regulations allow BLM to produce Onshore Oil and Gas Orders, which detail the requirements that each operator must fulfill.<sup>203</sup>

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196. 30 U.S.C. §§ 181-287 (1994).

197. Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-256 (1987) (codified at 30 U.S.C. § 226 (1994)).

198. § 226(a). There are limits to federal oil and gas leasing. For example, the Department of the Interior is prohibited from granting oil and gas leases in BLM Wilderness Study Areas. § 226-3(a). Further, Interior has discretion to withhold lands from leasing. § 226-3(a). In *Udall v. Tallman*, 380 U.S. 1 (1965), the Supreme Court stated that although the President originally held the withdrawal power under an executive order, "he soon delegated to the Secretary full power to withdraw lands or to modify or revoke any existing withdrawals." *Id.* at 17.

199. See 43 C.F.R. § 3120.1-1 (1996).

200. See *supra* note 101 and accompanying text (describing NEPA triggering events).

201. 43 C.F.R. §§ 3160.0-1 to 3165.

202. See § 3162.2.

203. § 3164.1.

Second, EAs describe the proposed action and its alternatives.<sup>204</sup> The alternatives range from the complete proposed action of the operator to no action at all. It also states, alternative by alternative, the different impacts that the proposed development may have, including impacts to cultural resources. For example, an EA may state that the area is "in terms of its pristine archaeological preservation, very sensitive to any surface disturbing activities,"<sup>205</sup> and that "(s)pecial measures need to be taken to adequately protect these sensitive resources."<sup>206</sup> EAs must also acknowledge the special effects of cumulative impacts.<sup>207</sup>

As its cornerstone of cultural resource management, BLM uses an "avoidance" policy when resource development conflicts with cultural resource protection. During analysis of a development proposal, BLM completes an archaeological investigation, so that all cultural resources are inventoried.<sup>208</sup> After sites are identified, BLM manages development activities through its avoidance policy. BLM will condition permits to require total avoidance.<sup>209</sup> If total avoidance cannot be achieved, BLM will use: 1) data recording (e.g., collecting artifacts, sampling, total excavation); or 2) mitigation measures (e.g., distance, visual avoidance, protective fencing).<sup>210</sup> At the same time, BLM must monitor compliance—one archaeologist estimates that thirty percent of development sites are monitored for compliance, with about ten percent found out of compliance.<sup>211</sup> The EA details actions which BLM will take through its avoidance policy if drilling is allowed.

Avoidance will include a variety of actions such as re-routing access roads, access restrictions, "padding" or other methods of road construction, barricades and gates, monitoring, and lath-and-flagging identification.<sup>212</sup>

204. See, e.g., BUREAU OF LAND MANAGEMENT, ENVIRONMENTAL ASSESSMENT, WELL NO. 3 RUIN CANYON 13-17 (1992).

205. See *id.* at 24. The EA states that "(c)ultural properties themselves can be impacted directly by surface disturbance including construction, facility maintenance, reclamation, vehicle traffic (especially during wet conditions), devegetation, etc., and by vandalism and illegal use including collection, and looting." *Id.* at 27.

206. *Id.* at 26.

207. See, e.g., *id.* at 28.

208. See, e.g., *id.* at 43. This investigation is separate from BLM's inventory in a cultural resource management plan.

209. Telephone Interview with Kristie Arrington, Area Archaeologist, San Juan Resource Area, BLM (April 7, 1997).

210. *Id.*

211. *Id.*

212. BUREAU OF LAND MANAGEMENT, ENVIRONMENTAL ASSESSMENT, WELL NO. 3 RUIN CANYON 13, 24 (1992). "Padding" is a common avoidance technique used by BLM. The EA provides details of the padding procedure to mitigate surface disturbance. One option for padding was to provide 18 inches of rock over exposed bedrock near a particular ruin. BUREAU OF LAND MANAGEMENT, ENVIRONMENTAL ASSESSMENT, DRILLING PHASE FOR BWAB WELL NO.10-32, HOVENWEEP AREA 2 (1988).

These actions could also include requiring a permitted archaeologist to supervise surface disturbing activities, and requiring the operator to contact the local BLM office two days before any work begins.<sup>213</sup> As a procedural matter, the EA will include a proposed restoration/reclamation statement, under which the developer is required to remove equipment, make access route improvements, and perform reclamation actions such as seeding affected grounds.<sup>214</sup>

A Record of Decision (ROD) is recorded by BLM's Area Manager to publish the FONSI if a FONSI is issued.<sup>215</sup> The ROD briefly explains the reasons for the decision. If it appears that avoidance and mitigation measures are spelled out adequately, then BLM will allow the development. BLM may allow development despite an EA revealing that cultural resources will be impacted if full development is commenced. As BLM stated in one ROD, "the area in which the well has been proposed is designated an oil and gas emphasis area in the RMP/EIS, as amended. Best available data was used in the preparation of the EA. Another EIS for this area would not, in all likelihood, provide any significant new information."<sup>216</sup> The avoidance measures detailed in the EA may be included in the contract or lease between BLM and the developer.<sup>217</sup> BLM's standard oil and gas lease contains a provision which states that the lessee shall conduct its operations in a manner which, among other things, minimizes adverse impacts to cultural resources, and keeps BLM informed of threats to cultural resources.<sup>218</sup> All of these requirements are pursuant to BLM's primary mandate to manage for multiple-uses. However, enforcement of

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213. See, e.g., BUREAU OF LAND MANAGEMENT, ENVIRONMENTAL ASSESSMENT, DRILLING PHASE FOR BWAB WELL No.10-32, HOVENWEEP AREA 1.

214. See, e.g., BUREAU OF LAND MANAGEMENT, ENVIRONMENTAL ASSESSMENT, WELL NO. 3 RUIN CANYON 51 (1992).

215. See *supra* note 107 and accompanying text (regarding FONSIs).

216. BUREAU OF LAND MANAGEMENT, RECORD OF DECISION, ENVIRONMENTAL ASSESSMENT No. CO-030-SJ-92-24, at 2 (1988). The RMP/EIS that the ROD refers to is the San Juan RMP and the San Juan/San Miguel Planning Area Wilderness Environmental Impact Statement.

217. In one case, a right-of-way leased by an oil and gas developer contained stipulations as a condition of the granting of the right-of-way. Such as requiring the developer to put BLM on notice in the event of a discovery of cultural resources. See Southern Utah Wilderness Alliance, 127 IBLA 282, 286 (IBLA 93-70) (1993).

218. BUREAU OF LAND MANAGEMENT, COLORADO OIL AND GAS LEASING, DRAFT ENVIRONMENTAL IMPACT STATEMENT, C-1 (1990). Section 6 of BLM's standard Offer to Lease and Lease for Oil and Gas states that:

Prior to disturbing the surface of the leased lands, lessee shall contact lessor to be apprised of procedures to be followed and modifications or reclamation measures that may be necessary. Areas to be disturbed may require inventories or special studies to determine the extent of impacts to other resources . . . . If in the conduct of operations . . . objects of historic or scientific interest . . . are observed, lessee shall immediately contact lessor. Lessee shall cease any operations that would result in the destruction of such . . . objects.

*Id.* at appendix.

these requirements is dependant upon BLM's limited ability to monitor the development activities.<sup>219</sup>

## 2. *Oil and Gas Case Study: Hovenweep National Monument*

The Hovenweep Monument oil and gas drilling controversy provides an example of how BLM manages its lands in view of its multiple-use mandate. The lands around Hovenweep National Monument were the site of one of the most hotly contested BLM development proposals on the Colorado Plateau. Hovenweep National Monument consists of a series of discrete withdrawals around six very well-preserved ancient towers. The entire monument encompasses only 785 acres, but surrounding the monument itself is an abundance of other less spectacular ruins on BLM land. Because these lands are outside the monument, they are susceptible to oil and gas development. The fragile nature of the Hovenweep towers makes them susceptible to damage caused by off-site development.<sup>220</sup>

Originally Hovenweep and the surrounding areas (a total of 6,000 acres) were designated by the National Park Service (NPS) as part of a cultural "resource protection zone" in the NPS' first draft General Management Plan (GMP) for Hovenweep.<sup>221</sup> The resource protection zone was designed to protect the Monument *and* the surrounding areas against impacts from outside the Monument.<sup>222</sup> The NPS considered the areas outside the Monument significant to the Hovenweep archaeological story, stating that "the reason behind the construction of the Hovenweep tower complexes may not lie within these ruins, but in the previous settlement areas that were generally abandoned and that currently surround the national monument."<sup>223</sup> Because of this, NPS recommended that the boundaries of the Monument be extended to include the protection zone.<sup>224</sup>

In 1987, the NPS and BLM produced a management plan entitled "Cooperative Management Strategies" requiring the NPS and BLM to co-manage the area. The plan directed the agencies to "manage oil and gas activities to preserve and protect cultural resource areas, sites, and set-

219. Telephone interview with Kristie Arrington, Area Archaeologist, San Juan Resource Area, BLM (April 7, 1997).

220. Fragile ruins are often impacted by nearby development. National Park Service studies show that traffic on the state roads through Chaco Canyon National Historic Park has damaged nearby ruins by causing vibrations. For a detailed description of the threats to Chaco Canyon, see Tony Davis, *Pressure Builds to Change Remote Park*, HIGH COUNTRY NEWS, Nov. 30, 1992, at 1, 10-13.

221. NATIONAL PARK SERVICE, ROCKY MOUNTAIN REGION, DRAFT GENERAL MANAGEMENT PLAN AND DEVELOPMENT CONCEPT PLAN 4 (1987).

222. *Id.*

223. *Id.* The resource protection zone has been designated as an ACEC in both Utah and Colorado.

224. *Id.*

tings.”<sup>225</sup> To this end, BLM was to “encourage directional drilling from either the outside of [the] protection zone or from directional well pads inside the zone. These pads would be selected where visual, archaeological, and recreational impacts are minimized.”<sup>226</sup>

Under the “cooperative management strategies” plan, mitigation measures included the monitoring of seismic and geophysical activities, inventory actions, and the location of ancillary facilities outside of the resource protection zone.<sup>227</sup> The plan also gave either agency the power to “initiate immediate actions to prohibit or stop potential threats,” such as restraining orders, temporary and permanent injunctions.<sup>228</sup>

Environmentalists criticized the Hovenweep plan. They argued that the cooperative plan only encouraged BLM to protect cultural resources, rather than require cultural resource protection.<sup>229</sup> Further, the plan was criticized because it allegedly failed to take into account the cumulative effects of oil and gas development in the area.<sup>230</sup> The National Parks and Conservation Association (NPCA) believed that the “NPS, restrained by the Reagan Administration and under pressure from the development-oriented BLM,” was disregarding the recommendations for expansion of the Monument.<sup>231</sup> The NPCA reported that the NPS received hundreds of letters criticizing the plan during the comment period of the GMP.<sup>232</sup>

Controversy erupted at Hovenweep when BWAB, Inc. applied to develop oil and gas reserves on BLM land a mile from the Monument’s borders. However, the oil company and BLM followed the correct agency oil and gas leasing procedures. An EA was drafted for the drilling proposal.<sup>233</sup> An EA was also completed for a right-of-way access, as required under FLPMA.<sup>234</sup> A U.S. Geological Survey scientist was brought in to consult on development impacts. This individual recommended that work could be done safely if certain procedures were followed, e.g., blasting in small loads, “dressing” certain parts of the access road, etc.<sup>235</sup> BLM also

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225. NATIONAL PARK SERVICE, ROCKY MOUNTAIN REGION, COOPERATIVE MANAGEMENT STRATEGIES, HOVENWEEP NATIONAL MONUMENT (1987).

226. *Id.* at section entitled “MINERALS-LEASABLE.”

227. *Id.*

228. *Id.* at section entitled “MINERALS-LOCATABLE.”

229. NATIONAL PARKS & CONSERVATION ASSOCIATION, NEWS RELEASE (March 29, 1989).

230. *Id.*

231. See NATIONAL PARKS & CONSERVATION ASSOCIATION, ALERT, (March 1988).

232. See NATIONAL PARKS & CONSERVATION ASSOCIATION, NEWS RELEASE (March 29, 1989).

233. See BUREAU OF LAND MANAGEMENT, ENVIRONMENTAL ASSESSMENT, DRILLING PHASE FOR BWAB WELL NO. 10-32 HOVENWEEP AREA (1988).

234. See BUREAU OF LAND MANAGEMENT, BWAB, INC., APD ACCESS ROAD RIGHT-OF-WAY NO. CO-030-SJ-88-236 (1988).

235. BUREAU OF LAND MANAGEMENT, BRIEFING REPORT, HOVENWEEP MONUMENT AREA 1 (1988).



consulted the Colorado State Historic Preservation Officer, in compliance with NHPA section 106.<sup>236</sup> A FONSI was prepared; the Area Manager approved the drilling permit, and development began.

A coalition of various environmental groups and individuals headed by the Colorado Environmental Coalition (CEC) filed an appeal to the Colorado State Director of BLM to prevent continuing development. The CEC claimed that BLM was ignoring the Cooperative Management Strategies plan agreed upon by the NPS and BLM, by allowing drilling, despite the plan's "specific recognition of the need for comprehensive protection strategies, and the projected development of more detailed plans to implement those strategies."<sup>237</sup> The CEC argued that BLM failed to analyze potential cumulative environmental impacts, so that the total effects upon Hovenweep and the surrounding areas would be revealed, as required by NEPA, based upon the area's "synergistic environmental impact."<sup>238</sup> The CEC also claimed that the EA analysis did not conform to the cooperative management strategies requirements, such as a lack of a Class III cultural resource inventory.<sup>239</sup> Moreover, the CEC argued that the development decision violated NEPA requirements by not considering the "intensity" and "significance" of the action, which would also include nearby cultural resource impacts.<sup>240</sup>

BLM's State Director upheld the San Juan Resource Area Manager's decision. The CEC then appealed to the Interior Board of Land Appeals (IBLA). BLM filed a motion to dismiss on the grounds of mootness, for the permitted well had already been plugged and abandoned. The CEC argued that the claim was not moot because the issues they raised concerned cumulative effects in the protection zone.<sup>241</sup>

The IBLA reversed the State Director's decision, ruling that BLM failed to consider the potential cumulative impacts of such activity in conjunction with other nearby existing and proposed drilling and its associated activities.<sup>242</sup> The court held that the issues were not moot because they could potentially recur: 1) because BLM's management of drilling activity near Hovenweep was likely to recur; and 2) because of "BWAB's demonstrated interest in determining and developing the oil and gas potential" near Hovenweep.<sup>243</sup> The court disagreed with BLM's argument that

236. Colorado Envtl. Coalition, 108 IBLA 10, 12 (No. SDR-CO-88-14) (1989).

237. *Id.* at 12-13.

238. See Brief for Appellant at 4, Colorado Envtl. Coalition 108 IBLA 10 (No. SDR-CO-88-14) (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976)).

239. See Brief for Appellant at 7, Colorado Envtl. Coalition, 108 IBLA 10 (No. SDR-CO-88-14).

240. Colorado Envtl. Coalition, 108 IBLA at 14-15.

241. *Id.* at 19.

242. *Id.* at 18.

243. *Id.* at 16.

cumulative effects should be analyzed only during field-wide development, and held that given the development near Hovenweep, an assessment of cumulative impacts should have been made.<sup>244</sup>

The *Hovenweep* decision was a victory for those who advocate more protection of cultural resources on the public lands. BLM managers must now take into account cumulative effects of development in certain management decisions. However, other NEPA challenges using "cumulative effects arguments" have not been successful. In one IBLA decision, the court rejected the cumulative effects argument used to appeal a FONSI for an oil and gas pipeline in southeastern Utah.<sup>245</sup> In this case the Southern Utah Wilderness Alliance argued that BLM failed to consider the overall impact of the cumulative effects of an assortment of oil and gas exploration activities, or "full field exploration," allowed to occur over the period of a few years.<sup>246</sup> The court reasoned that it must determine whether BLM had considered the cumulative impact (if any) "of the pipelines and related activity and other past, present, and reasonably foreseeable activity in connection with that project and whether, having done so, BLM properly determined that no significant environmental impact will result."<sup>247</sup> The court noted that BLM had required various measures designed to mitigate impact on cultural resources, such as fencing to protect inadvertent damage to identified sites, and notification procedures in the event of unearthing cultural resources.<sup>248</sup> The court further stated that the project would not require the construction of any new roads because it would neither increase access to resources nor increase the threat of theft.<sup>249</sup> This case suggests that the cumulative effects argument has limits.

Other issues regarding BLM management policy were not addressed by the *Hovenweep* case, leaving BLM without a great deal of guidance for future development decisions. For example, many development proposals on BLM land do not have the added pressure of effects on a nearby national monument. Day-to-day agency decisions will not receive the public attention that Hovenweep enjoyed. Also, developers may try to distinguish the *Hovenweep* case from other development proposals by showing how *their* proposals do not require cumulative effects studies. *Hovenweep* is not a complete answer. Courts will likely continue to give federal agencies substantial deference in making resource and multiple-use decisions.

The Hovenweep matter also demonstrates the result of failing to

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244. *Id.* at 18.

245. *See* Southern Utah Wilderness Alliance, 127 IBLA 282, 289-90 (1993).

246. *Id.* at 285.

247. *Id.* at 286.

248. *Id.*

249. *Id.* at 287-88.

include public interest groups in federal land management decisions. A great deal of resources spent in resolving the Hovenweep matter in court may have been saved if BLM and interest groups had found ways to work together during the planning process. Although BLM should not make resource decisions according to public opinion, a more cooperative approach increases the likelihood that development proposals will be accepted by the public and advocacy groups.

### 3. *Recreation Management on BLM Lands*

For most of its history, BLM has not had to develop sophisticated management techniques for handling recreational use growth. Up until recently, recreational use on BLM lands was limited. Today, recreational use poses one of the greatest dangers to cultural resources on BLM lands.<sup>250</sup> Recreation is the fastest growing use of public lands, particularly BLM lands. Several factors make this especially true: 1) the growth in popularity of backcountry use; 2) the overcrowding of traditionally popular recreation areas such as national parks and monuments; 3) the dissemination of more and more information to the public, urging them to seek out new getaway places;<sup>251</sup> 4) the aggressive promotion of recreation by local economies; and (5) the difficulty of monitoring unpermitted recreational use.

One outcome of the recreational use explosion on BLM lands is the great threat it poses to cultural resources. Damage to cultural resources by recreational visitors can be just as devastating as grazing or timber cutting:

At many popular ruins, random trails zig-zag everywhere and often expose buried artifacts and undermine masonry walls. Frequently, there has been so much foot traffic around a ruin that dust coats the walls. Pottery and other artifacts are moved and put into piles or pocketed as souvenirs. Dates of visits and names of home towns are written on walls.<sup>252</sup>

Much of the damage to cultural resources is caused inadvertently by visi-

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250. Federal lands have often been picked clean by visitors, one potshard at a time. Said one park manager at Chaco Canyon, "in the late 1970s, you could walk through the canyon, all around the ruins, and see metates, pottery and all kinds of artifacts . . . [n]ow, they have virtually disappeared." Tony Davis, *Disturbing the Pieces*, THE DALLAS MORNING NEWS, October 18, 1992, at 43A.

251. Guidebooks and tours which reveal remote sites are becoming common. One BLM report cited how a particular "Trail of the Ancients" brochure was being increasingly used as a guide to scenic stops for motorized recreation on Cedar Mesa in Utah. BUREAU OF LAND MANAGEMENT, GRAND GULCH PLATEAU CULTURAL AND RECREATION AREA MANAGEMENT PLAN 12 (March 18, 1993). As a private report stated, "many of these new sources of information are educational and provide guidance on proper site etiquette. Unfortunately, however, an increasing number of guidebooks and tour operators contribute to the destruction of archaeological sites." THE GRAND CANYON TRUST, *supra* note 50, at 5.

252. *Id.*

tors. Seemingly harmless activity such as touching rock art, climbing on or near ruins, building campfires near rock art, or using chalk to outline rock art to improve photographs, if done repeatedly over time, will destroy sites. As a result, the amount of visitors roughly correlates with the amount of damage.

BLM has begun to develop policies designed to address recreation's impacts on BLM lands, including their effects on cultural resources. BLM has recently drafted a Grand Gulch Plateau Cultural and Recreation Area Management Plan (RAMP or "Recreation Plan") for the Grand Gulch Plateau in Utah.<sup>253</sup> Grand Gulch is an area of great archaeological significance on the Colorado Plateau and one of the most densely visited BLM areas in the West. Recreational use of Grand Gulch is exploding. For example, the "user days" in the Grand Gulch Primitive Area rose from 6,477 in 1977 to 15,809 in 1991.<sup>254</sup> The area of study, the Grand Gulch cultural and recreation management area (CRMA) comprises approximately 400,000 acres of BLM land in southeastern Utah near Natural Bridges National Monument.<sup>255</sup> The CRMA includes several ACECs already designated in the San Juan RMP, as well as the Grand Gulch Primitive Area, and according to the RAMP is "of international, national and regional significance for its cultural resources."<sup>256</sup> The Recreation Plan outlines the management purposes, objectives and constraints designed to meet the growing recreational use in Grand Gulch.<sup>257</sup>

Pursuant to BLM policy, the Recreation Plan assigns known cultural resources to one of six use categories. These use categories are identical to those used in the CRMPs.<sup>258</sup> They represent the various possible management alternatives BLM may implement. The use categories do not preclude uses in other categories, and a resource used in one of the more protective categories may still be used by the public.<sup>259</sup> The use designations applied in Grand Gulch were not perfect. Because of the inadequacy of information, 130 known cultural resources in the Grand Gulch study were not assigned to use categories.<sup>260</sup>

Pursuant to the San Juan RMP, BLM may designate certain areas to be managed as Special Recreation Management Areas (SRMAs) because

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253. BUREAU OF LAND MANAGEMENT, GRAND GULCH PLATEAU CULTURAL AND RECREATION AREA MANAGEMENT PLAN 13 (1993).

254. *Id.* at 13.

255. *See id.* at 12, 19.

256. *Id.* at 5.

257. *Id.* at

258. *See supra* notes 146-151 and accompanying text (discussing use categories in the CRMP process).

259. *Id.* at 18.

260. *Id.* at 27.

of intensive recreational use or special recreational values.<sup>261</sup> BLM designated 385,000 acres in the Grand Gulch CRMA as the Grand Gulch Plateau SRMA.<sup>262</sup> The SRMA designation is designed to preserve primitive recreation areas. BLM designates areas within SRMAs as Recreation Opportunity Spectrum primitive or semi-primitive class areas.<sup>263</sup> These class areas are designed to restrict both recreational and development uses. For example, the "primitive class" Recreation Opportunity Spectrum designation restricts "private and commercial use of woodland products, except for onsite collection of dead wood for campfires."<sup>264</sup> BLM also limits recreation in other ways in order to minimize impacts: group size limitations, pet limitations, campfire prohibitions in certain areas, stock use limitations or prohibitions, etc.<sup>265</sup>

The Grand Gulch Recreation Plan demonstrates BLM's increased use of recreation permitting. Special recreation permits are required for commercial and private non-commercial recreational use in certain situations. The purpose is to: 1) "control recreation . . . impacts;" 2) "gather information on use patterns;" and 3) collect permit fees to "recover the cost of issuance and administration and to allow for enhanced management."<sup>266</sup> One BLM manager in Colorado stated that permitted uses (e.g., oil and gas leasing, grazing) were not a true threat to cultural resources. Rather, she stated that damage was done mostly through unpermitted uses, such as unauthorized recreational use.<sup>267</sup> The rationale is that permitted uses are effectively monitored and controlled. Effects by unpermitted visitors to BLM lands are not accounted for under the agency's recreation management plans.

Although the level of management sophistication has risen, BLM still faces difficult problems that the current system may be incapable of addressing. BLM resources, especially resources designated for recreation management, are strained. As with ARPA enforcement, there are not enough BLM personnel out in the field ensuring that recreation management rules are followed. Further, even though areas of special consideration are given special designations, such as ACECs and SRMAs, these designations do not protect the resource absolutely and may not be enough on their own to ensure that the cultural resources in such areas remain intact. A combination of increasing resource use, lack of funding, and

261. *Id.* at 18.

262. *Id.* at 19.

263. *Id.* at 19.

264. *Id.* at 22.

265. *See id.* at 18-19, 32.

266. *Id.* at 32.

267. Telephone interview with Kristie Arrington, Area Archaeologist, San Juan Resource Area, BLM (April 7, 1997).

less-than-formidable regulatory protection is leading to the perpetual degradation of the resource.

#### 4. *Recreation Management Case Study: Moab and the Canyon Country Partnership*

For growth of recreational use of the Colorado Plateau, no place is hotter than Moab, Utah. Because of the dramatic growth of visitors to the area, the scarcity of management resources, and the inter-jurisdictional nature of the Moab area, BLM and other agencies have bonded together to cooperatively manage the Moab region. Moab is a useful case study because it demonstrates what may happen to other BLM lands which are susceptible to a dramatic surge of popularity and how cooperative management efforts are becoming more important.

Moab has become one of the most densely visited recreation areas in the West. Before the late 1980s, Moab was a sleepy hamlet at the edge of Arches National Park. In the late 1980s, mountain biking exploded in popularity, and Moab became one of the prime off-road biking spots in America, due to its slickrock (sandstone) terrain and beautiful scenery. With this notoriety came a boom in tourism and attendant development.<sup>268</sup> The popular biking areas are located on BLM and Forest Service lands. Under the circumstances, the backcountry facilities and management resources available to BLM managers are sorely tested. During the 1993 Easter holiday, visitors (including students on spring break and jeep and mountain bike enthusiasts) overwhelmed the town's facilities. As one report stated:

The town of Moab was stretched beyond its limits, with sewage overflowing the treatment plant, people camping and driving everywhere, and general chaos that ended in a riot at the Slickrock Bike Trail. Thousands of drunken people threw ancient trees in bonfires, waved guns, fought, and chased off the sheriff's posse. The land at this world famous destination will be hundreds of years recovering from the damage done that weekend.<sup>269</sup>

Following the 1993 Easter weekend, BLM called a meeting for representatives of all public agencies with interests in the Moab region. As Bill Hedden, a local Utah county commissioner, explained, because of the emergency nature of the problems, "[p]eople wanted to deal with concrete

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268. Florence Williams, *A Passive Town in Utah Awaits its Fate*, HIGH COUNTRY NEWS, November 18, 1991, at 1.

269. Bill Hedden, Address Before a Conference presented by the Natural Resources Law Center entitled *Who Governs The Public Lands: Washington? The West? The Community?* (September 30, 1994) in CONFERENCE REPORT at 7.

problems rather than arguing ideology, and they didn't care overmuch about precisely defining 'ecosystem management,' or about the details of procedure, before beginning work."<sup>270</sup> What emerged was called the Canyon Country Partnership ("the Partnership"), a collection of federal, state and local agencies informally agreeing to manage the Moab area cooperatively wherever feasible.<sup>271</sup>

The logistical, political, and jurisdictional difficulties of creating a management partnership in the canyonlands of southeast Utah presented a formidable challenge. The Partnership addressed cooperative management issues covering a region of fifteen million acres. This region crosses many jurisdictional borders, including four different counties, state-owned lands, five units of the NPS, and BLM and National Forest lands. The Partnership's core group, the Partnership Forum, includes representatives from most of these jurisdictions.<sup>272</sup>

County commissioner Bill Hedden cited ways in which the Partnership has been a positive influence. According to Hedden, the Partnership has been successful in: 1) sharing planning resources (recreation planning decisions made by federal managers are shared with county officials to coordinate resources, e.g., how many campgrounds the county should plan for); 2) developing a comprehensive environmental baseline survey (e.g., pilot studies to determine the effects of intensive camping); 3) standardizing and sharing data resources; and 4) coordinating difficult planning decisions of the Partnership (e.g., dealing with controlling the spring break weekend in the future).<sup>273</sup> Hedden also noted that efforts have only gone as far as the authority of individual members. Some controversial topics such as grazing, wilderness designation, and overflights were deliberately left out of discussions.<sup>274</sup> Yet, by limiting its efforts, the Partnership is able to avoid many jurisdictional or political issues which potentially stall cooperative management by altering the usually fragile consensus such

270. *Id.* at 7-8.

271. *Id.* at (author to provide)

272. The Partnership Forum consists of the County Commissions or Councils from Carbon, Emery, Grand, and San Juan Counties; BLM Grand and San Juan District Managers; the Manti-LaSal National Forest Supervisor; the Arches and Canyonlands National Park Superintendents; the Utah Division of Wildlife Resources Supervisor; Director of Utah Division of Oil, Gas, and Mining; the Director of Utah Division of Lands and Forestry; and the Southeast Region Manager, Utah Division of Parks and Recreation. *Id.* at 9.

273. *Id.* at 11-14.

274. *Id.* at 14-15. As Hedden observed, such a loose, consensual organization can go only as far as its members allow:

Several of the County governments in the Partnership are mostly there to observe, still harboring a lot of mistrust of federal agencies. They have perhaps learned what they want to know, but they have not benefitted in any obvious way, and their continued participation is always in doubt. We push only so far as we can.

*Id.* at 15.

efforts build.

One BLM manager believed that the Partnership is helpful, if perhaps not the complete answer to BLM's recreation management demands.<sup>275</sup> Since 1993, the Partnership has lost some of its steam, largely due to a lack of significant, driving issues which require participants to find common ground. Potential key issues for the future include sharing law enforcement capability, roads and wilderness, and the spill-over effect of a Canyonlands National Park backcountry plan. Despite its difficulties, this BLM manager did cite the Partnership's important role in solving land management issues.<sup>276</sup>

The Partnership could serve as a model for how BLM could co-manage its recreation resources. Because of the jumbled jurisdictional puzzle of the Colorado Plateau, such cooperative efforts are very helpful in pooling resources and creating a uniformity of action.<sup>277</sup> Such efforts help BLM enforce existing management decisions, stretch its resources, and gain a greater say in region-wide issues. One agreement between BLM and a county sheriff's department in Colorado required the sheriff's patrol routes to include BLM lands susceptible to vandalism and looting. BLM reported the following:

This kind of agreement has several advantages: 1) it is in keeping with BLM's role as a management rather than a law enforcement agency; 2) it enhances BLM's public image in the area by using local personnel familiar with local attitudes and problems; 3) it taps local knowledge of past law enforcement problems, of families or individuals with a history of digging, and of possibilities for commercial involvement; and 4) with proper orientation, it avoids a heavy-handed approach to law enforcement which has characterized some Federal efforts, and thus avoids alienating the local population, a potential source of help.<sup>278</sup>

Unfortunately, despite their many advantages, such cooperative agreements have limits. BLM must still manage according to its legal mandates and within the limits of the funding it receives. Moreover, the agency is ultimately responsible for the activities which impact solely BLM lands. Associations such as the Partnership help, but are only one part of the

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275. Telephone Interview with Mike O'Donnell, Assistant District Manager, Moab District, BLM (March 3, 1997).

276. *Id.*

277. Another example of this type of management is the Cultural Resource Vandalism Standing Committee in California. This committee, including members of federal, state, county and tribal governments, was convened to address the problem of cultural resource vandalism in California. For a discussion of this cooperative management example, see Michael J. Bushbaum, *Beyond ARPA: Filling the Gaps in Federal and State Cultural Resource Protection Laws*, 23 ENVTL. L. 1353 (1993).

278. NICKENS, ET AL., *supra* note 71, at 140.



solution to a complicated puzzle.

#### IV. REFORM PROPOSALS FOR BLM CULTURAL RESOURCE MANAGEMENT

In this article, I have addressed BLM's cultural resource management system, and have noted flaws I believe exist. The statistical evidence of pothunting, recreational overcrowding, and development demonstrates that the system must be reformed to preserve the resource. There are two basic problems which arise in cultural resource management: 1) the definition of what is to be protected; and 2) BLM's enforcement of protection standards. Both of these broad areas need reform.

##### A. *Adoption of an Inviolate Protection Standard*

A central problem with existing federal cultural resource protection laws is that they provide procedural solutions to issues which require substantive answers. First and foremost, cultural resources are not presently protected by a strict standard that requires protective measures. For example, under the NHPA, persons seeking development on federal land must simply prove that they have followed the statute's procedures. Even after such procedures are followed, cultural resources are still susceptible to harm because the protections afforded are not absolute. This is especially true for ruins which are unearthed during development projects.

I advocate that an inviolate standard be applied to certain cultural resources on all federal lands. An inviolate standard would require developers to prove that the proposed development will not harm cultural resources.<sup>279</sup> Protection standards should be changed either through amendment to existing law or promulgation of regulations under existing law. For example, NHPA could be amended to include a stricter standard that requires protection. An amendment would have the greater force of law, and would allow those concerned about cultural resource protection to use the democratic process to implement change.

A new inviolate standard for cultural resources can be likened to the protection of wildlife under the Endangered Species Act (ESA).<sup>280</sup> Simi-

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279. Inevitably, holding cultural resources inviolate would attract suits against the federal government alleging that limits placed on federal land use, such as the revocation or suspension of grazing permits, constitute illegal takings in violation of the Fifth Amendment to the Constitution. The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend V, cl. 4. However, the Supreme Court recently held that governmental restrictions on land use constitute compensable regulatory takings only when the restrictions deprive the landowner of all economically viable use of his land. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Further, a federal district court recently ruled that the reduction of a grazing allotment in a National Forest, based on a Forest Service study that the allotment had been overgrazed, was not a "taking" of any property rights to that allotment. *See McKinley v. United States*, 828 F. Supp. 888 (D.N.M. 1993).

280. 16 U.S.C. §§ 1531-1544 (1994). Under ESA, "endangered" species are absolutely protected.

lar to ESA, an inviolate cultural resource standard recognizes that cultural resources are nonrenewable resources which are unique, precious, and belong to a greater whole that will suffer without them.<sup>281</sup>

The comparison with ESA is problematic in one way. Science has already produced a system (species-identification) from which to analyze effects on species and ecology. It is accepted almost universally that the perpetuation of the diversity of species is a crucial element to ecological health. This scientific premise gives ESA weight, and has in a significant way helped the statute weather attacks since its inception. In order for a new cultural resource standard to be created, it is important to be able to "sell" the designation as performing a critical function.

I propose that federal land managers adopt a system of identifying and protecting "critical cultural resources." As with ESA, the designation of cultural resources as "critical" would be based on a standardized evaluation of several factors. I propose the following factors:

1. The resource is a step towards an understanding of ancient cultures.
2. Regardless of whether the resource has been inventoried, a real possibility exists that the resource will be adversely impacted by human activity.
3. The resource's religious, archaeological, cultural or historical value has not been destroyed.

If the resource meets these criteria, it would be designated as "critical." Critical Cultural Resources (CCRs) would be held inviolate. Such resources would be afforded greater protection and therefore would become a priority in funding, study, and federal management attention. As with ESA, this new standard is designed to protect cultural resources which are discovered during development. That is, if a ruin is unearthed during a BLM-sanctioned project, the development is halted until the resource can be examined to determine if it falls under the "critical" designation. If it is so designated, the development would be discontinued.

As the inviolate nature of the standard is designed to protect critical cultural resources absolutely, a component of the new standard would

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ESA requires all agencies to "conserve" species listed as endangered. "Conservation" is defined broadly. § 1532(3). Under section 7 of ESA, federal agencies are prohibited from allowing actions that would likely "jeopardize the continued existence" or "or result in the destruction or adverse modification of habitat of" endangered species. § 1536(a)(2). The statute also provides for designation of critical habitat for threatened or endangered species. § 1533(a)(3). Species are designated as endangered through any of several criteria: threat of habitat destruction, overuse for industrial and recreational purposes, inadequacy of existing regulatory mechanisms, and other factors. *See* § 1533(a)(1)(A)-(E). These factors are similar to factors which threaten cultural resources on the Colorado Plateau.

281. *See, e.g.*, § 1531(a) (congressional findings and declaration of purposes and policy).

prohibit salvage archaeology. Current federal law allows cultural resources to be placed in storage in museums and federal curation repositories. An inviolate standard would ban development near critical cultural resources rather than removing them for storage. If impacts to cultural resources are impossible to avoid, the developer's application should be denied. In other words, rather than moving an ancient village, BLM would require developers to make a "bend in the road" that is broad enough to avoid impacts to sensitive cultural resources, and inconvenient enough to discourage travel to the remains.

Despite being an inviolate standard, the proposed standard must recognize that not every potshard can be protected, and not every development project should be halted. Developers who potentially impact CCR sites would be put on notice that such sites will function under CCR protection until it is determined through survey that the cultural resources on their land are *not* critical. However, as with ESA, an escape clause—a legislative override—should be included to allow exemptions in certain, well-defined circumstances.<sup>282</sup>

The use of public lands by archaeologists should also be more tightly controlled. ARPA permitting should continue for cultural resources identified as "archaeological resources," but access to cultural resources designated as critical should be monitored and archaeological permits should be evaluated at a higher standard. Archeological investigation should take place on cultural resource sites, even sites with critical remains, but this also should be evaluated at a higher standard. I advocate that non-excavated sites remain *in situ*, and protected even from archeology professionals. This would curtail the aging process, which accelerates once a site is identified, cataloged, excavated, poked, prodded, and manhandled. Unearthing ruins leads to rapid erosion in many areas that, prior to excavation, had been protected by the build-up of centuries of sand and dirt. Cultural resources should not be unnecessarily disturbed until technology develops that allows investigation of cultural resources by less harmful means.

To implement this strict management standard, Congress should appropriate increased funding for cultural resource protection. Fees for archaeological investigation, development, and recreation could reflect the funding required to: 1) protect the resources potentially impacted by the activity; 2) fully inventory and evaluate resources potentially affected by the activity; and 3) administer the activity. In general, there is a current trend to increase funding for conservation by channeling fees received for

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282. For a discussion of "God Squad" exemptions under ESA, see Jared des Rosiers, Note, *The Exemption Procedures Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825 (1991).

the use of a resource directly to the agencies. This is more efficient and potentially lucrative for the agencies than the traditional method of allocating funds through the Interior budget.<sup>283</sup> Fees derived from uses associated with cultural resources could be put into a trust to expand agency resources for cultural resource protection, which would supplement government spending on cultural resource management. Allocating funds directly into cultural resource management would compel local managers to emphasize cultural resource protection in their programs.

### B. Reform of ARPA's Penalty Provisions

A major limitation on ARPA's effectiveness in protecting cultural resources is the lack of enforcement of its penalty provisions. Although ARPA provides civil and criminal penalties for violations, the statute has a negligible effect in the field.<sup>284</sup> This stems from a lack of funding and a lack of attention to ARPA enforcement.

BLM does not have the funding to prosecute ARPA violations.<sup>285</sup> There are simply too few BLM employees in the field, either in enforcement or education. BLM staffers I have spoken with are dedicated to protecting the Colorado Plateau's cultural remains. The problem is that they simply cannot do so under the present circumstances. Congress should appropriate enough money to ARPA enforcement so that enforcement no longer operates at the bare minimum level it now does. This funding should go directly to enforcement activities, and to educating the public about the damage caused by pothunting, vandalism, development and recreational overuse. Moreover, monetary penalties collected from ARPA violations should directly fund ARPA enforcement.

Criminal and civil penalties should be brought in line with present-day economic reality. The value that pothunters receive from illegal sales is significant: one report reveals a southwestern polychrome pot was sold in Paris in 1990 for \$250,000.<sup>286</sup> In contrast, ARPA criminal penalties are based on the value of the cultural resource plus restoration or repair costs, but are limited to \$20,000. That is, if the "commercial or ar-

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283. Greg Hanscom, *Strapped Parks Look for Money*, HIGH COUNTRY NEWS, August 19, 1996, at 4.

284. As stated previously, few convictions under ARPA are made. As of 1986, law enforcement efforts of federal agencies in the Four Corners region resulted in only twenty-seven convictions for ARPA violations. Compare this to the 432 looting incidents reported by all federal agencies in 1985 alone. Of these 432, only fifteen percent were discovered in time for an arrest to be made or a citation to be issued. Fewer than half of the arrests and citations resulted in criminal convictions and only about a third of these resulted in felony convictions. GENERAL ACCOUNTING OFFICE, *supra* note 2, at 52-54.

285. See *supra* notes 70-72 and accompanying text.

286. THE GRAND CANYON TRUST, *supra* note 50, at 21.

chaeological value" of the resource and the cost of restoration and repair exceeds \$500, the maximum penalty is a \$20,000 fine, two years imprisonment, or both. If the value or damage is less than \$500, the penalty is \$10,000, one year in imprisonment, or both.<sup>287</sup> Compared with what a pothunter may receive for unearthed properties, these penalties are minimal, and therefore become simply a cost of doing business. If the penalties are to act as a deterrent for ARPA crime, they must be more substantial.

The second component to increasing ARPA's effectiveness is to re-emphasize its substantive protection standards. Today, ARPA's implementation is procedural rather than substantive. BLM must issue permits for the excavation and removal of cultural resources—this procedural requirement of issuing permits has become ARPA's main impact. On the other hand, ARPA does not require BLM to prioritize the enforcement of its penalty provisions, provisions which could become ARPA's primary substantive measure. BLM should issue agency-wide policy guidance aimed at focusing ARPA enforcement, by requiring local managers to emphasize ARPA enforcement. Such guidance would include active participation with the U.S. Attorney General's office, state and local enforcement agencies, and public education programs.

### C. Cultural Resource Protection as an Exception to the Multiple-Use System

BLM has long been criticized for its inability to properly manage public resources through a multiple-use system.<sup>288</sup> Multiple-use means that development uses must be taken into account in cultural resource management decisions. BLM's avoidance policy is part of this multiple-use mandate. While the avoidance policy is a reasonable policy under the multiple-use system,<sup>289</sup> it does not protect cultural remains absolutely. For example, FLPMA has created a system for special management under the ACEC standard. Because the ACEC standard is designed with the multiple-use mandate in mind, development is allowed in ACECs.

Under the multiple-use policy, cultural resources are as valid as other uses. In fact, too often cultural resources are not protected to the same extent that other resources are. FLPMA must be amended to raise cultural resources to a level of protection that is at least equal to that given to

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287. 16 U.S.C. § 470ee(d) (1994).

288. Multiple-use management is required by 43 U.S.C. §§ 1701-1783 (1994). FLPMA requires that Interior not only manage for multiple-use, but also "by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." § 1732.

289. One BLM manager claims that as soon as cultural remains are discovered, such remains are protected and development does not harm them. Telephone Interview with Kristie Arrington, *supra* note 219.

renewable resources. According to one BLM manager, if cultural resource protection was given the same degree of funding as development uses under the multiple-use system, many funding problems associated with cultural resource management would be solved.<sup>290</sup> Local BLM managers must be held responsible for giving cultural resource management an equal priority with other uses.<sup>291</sup> A mandate of holding critical cultural resources inviolate should be integrated into BLM management policy as an exception to its multiple-use policy.

Recent federal land decisions point to a trend of holding federal land managers accountable for impacts on cultural resources under the multiple-use system. One of the more celebrated decisions concerned the Comb Wash grazing allotment in southeastern Utah. Plaintiffs in *National Wildlife Federation v. Bureau of Land Management (Comb Wash)* sued the agency under BLM regulations, NEPA, FLPMA and BLM's proposed RMP and Final EIS for the San Juan Resource Area. The Comb Wash plaintiffs argued that BLM failed to consider the effects of grazing on cultural resources.<sup>292</sup> The administrative law judge (ALJ) noted evidence which stated that the allotment area held thousands of archaeological sites, and noted testimony of grazing's effects upon the area's cultural resources:

The direct impacts include toppling of walls as a result of the cattle's habit of 'wintering up against anything that blocks the wind or scratching themselves on anything that stands . . . ' Trampling is also a problem. '[S]urface trampling results in the continual reduction of surface artifacts in smaller and smaller pieces and the destruction of the surface integrity that tends to hold things relatively in their place and retains patterns.' The harm from trampling is exacerbated when the sediment is saturated with water, because the cattle sink deeply into the mud.<sup>293</sup>

The ALJ ruled that, *inter alia*, BLM: 1) violated NEPA by failing to conduct more detailed analysis before issuing the grazing permit;<sup>294</sup> and 2) violated FLPMA by failing to make a reasoned decision that the benefits of grazing outweighed the costs.<sup>295</sup> Included in the ruling was the court's finding that BLM had not properly considered the impacts of a grazing allotment on cultural resources.<sup>296</sup> The ALJ ordered the agency

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290. *Id.*

291. There is an emerging trend which moves policy decisions from the national office to the local or "field" representative. *Id.*

292. *National Wildlife Federation v. Bureau of Land Management*, (U.S. Department of the Interior, Office of Hearings and Appeals, Hearings Div.) (Dec. 20, 1993).

293. *Id.* at 15.

294. *Id.* at 17-22.

295. *Id.* at 23-25.

296. *Id.* at 24.

to prepare an EIS and to "make a reasoned, informed, and documented decision as to whether grazing in the five Comb Wash canyons is in the public interest."<sup>297</sup> The ALJ ordered grazing suspended until these actions were taken.<sup>298</sup>

The *Comb Wash* ruling may signal a new trend in the courts whereby NEPA and FLPMA compliance is to be examined more critically. However, *Comb Wash* may simply be the result of special circumstances. To ultimately solve the problem, Congress should exempt critical cultural resources from BLM's multiple-use mandate.

#### D. Support for BLM's Focus on Public Education

The relationship between education and its effects on recreation, vandalism and pothunting cannot be overemphasized. For example, as more people flood to BLM lands on the Colorado Plateau, BLM has a unique opportunity to educate a substantial number of people about the effects of recreational use. BLM has already made significant efforts in promoting public education and awareness concerning cultural resources. BLM has initiated a program titled "Adventures in the Past" in order to: "1) increase the public's enjoyment and appreciation of archaeological resources; 2) reduce the destruction of these resources; and 3) demonstrate and encourage good [public] stewardship of these resources . . . ."<sup>299</sup> BLM program "Project Archaeology," which educates teachers, has been highly praised by BLM as a success.<sup>300</sup> Such programs are valuable because they reach those on public lands who are not under permits, and they show people the value of archaeology and cultural resources.<sup>301</sup> Another excellent example of BLM's participation in education programs is the creation of the Anasazi Heritage Center in Colorado. The Center was built alongside the McFee Reservoir, using funds from that water project. The Anasazi Heritage Center serves as both a research center and a public awareness and education center.

Although education programs suffer from the same budgetary drought as all federal resource programs, BLM could utilize more resources for education in order to save resources on enforcement and damage repair in the long run. In one survey, archaeologists and federal land managers picked public school programming as the best method to increase public

297. *Id.* at 30.

298. *Id.* at 36.

299. THE GRAND CANYON TRUST, *supra* note 50, at 96.

300. Telephone Interview with Kristie Arrington, Area Archaeologist, San Juan Resource Area, BLM (April 7, 1997).

301. *Id.*

knowledge of cultural resource protection.<sup>302</sup> BLM is supporting public school cultural resource education through grants, but more could be devoted to such programs. The cost of education comprises only 0.20% of the total budget for federal preservation efforts, in contrast with the 48.40% used for field surveys.<sup>303</sup> Money spent on educating the public will ultimately result in BLM spending less money for monitoring remaining cultural sites, enforcing ARPA, or mitigating the effects on already damaged sites. Use of educational resources, such as volunteer programs and private archaeological institutions, could be increased to stretch BLM's budget for cultural resource education. BLM's education programs must become a wellspring for public stewardship of cultural remains.

#### E. *The Need for BLM Management Accountability*

The present political climate of our nation makes large-scale regulatory, legislative, and fiscal changes difficult or near impossible. If that continues to be true, full enforcement of already-existing statutes and regulations would protect cultural resources more than they do now. It is my experience that most BLM employees are willing to discuss their management decisions, and willing to hear critical reviews of their policies. Further, BLM is required by NEPA to account for all of the significant environmental impacts of its land management decisions. There is a great need for focused, critical review of BLM's cultural resource management practices.

To this end, I advocate the creation of cultural resource watchdog groups willing to bring suit against federal agencies when they fail to act in accordance with legislative and regulatory mandates. Such groups have been very active in protecting other resources such as endangered species, but not as active in protecting cultural resources. The protection of cultural resources needs its own particular champions.

### V. CONCLUSION

I have argued that competition between cultural resource protection and competing resource uses such as grazing, mineral development, water development, and recreation will always lead to the destruction of cultural resources. The fragility of ruins, artifacts, and rock art makes preservation of such remains incompatible with other uses. Cultural remains are nonrenewable resources which cannot be replaced through compensation, alternative allocation, land swaps, or even mitigation. Their unique nature

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302. THE GRAND CANYON TRUST, *supra* note 50, at 97.

303. *Id.* at 101.



creates a right of inviolate protection. Most of the other resources on BLM lands are renewable. Cultural resources exist in the framework of the land in which they lie. Removal or other harmful impacts permanently alter their magic. For these reasons, some cultural remains must be held inviolate.

Reform inside BLM must occur on two levels. First, BLM managers must be given the resources to do their job properly. BLM staff I have spoken with are committed to preserving cultural resources and enforcing federal law. Unfortunately, they often do not have the resources to do so. Congress should appropriate more funds directly for cultural resource protection. At the same time, it is necessary for people to pay the true costs of their use of public lands.

Legislative reform must also occur at the conceptual level. The multiple-use system fails to provide adequate protection to nonrenewable resources in general and cultural resources in particular. If cultural resources are required to compete with other uses, such as recreation, oil and gas development, and grazing, they will always lose. Because of this, preservation of ancient remains is incompatible with the multiple-use system. Exceptions must be made for cultural resources.