

# 30 BY 30, AREAS OF CRITICAL ENVIRONMENTAL CONCERN, AND TRIBAL CULTURAL LANDS

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President Joe Biden's Executive Order No. 14008 of January 2021 called for the Administration to conserve at least 30% of the nation's lands and waters by 2030.<sup>1</sup> To accomplish this ambitious "30 by 30" effort, the Order directed federal agencies to work with tribal governments, among others, to propose lands and waters as qualifying for conservation.<sup>2</sup> Under the Order, an inter-agency working group, including the U.S. Department of the Interior (DOI), which houses the Bureau of Land Management (BLM), proceeded to issue the "America the Beautiful" report in March 2021.<sup>3</sup> The report emphasized honoring tribal sovereignty and supporting tribal priorities among its core principles, and promised to support tribally led conservation efforts.<sup>4</sup>

As of this writing, the Administration had yet to define "conservation lands,"<sup>5</sup> although it has promised an American Conservation and Stewardship Atlas that will collect baseline information on potential conservation lands and

waters to measure the conservation effort.<sup>6</sup> Some experts estimate that only 12% of the nation's lands and waters are presently being conserved.<sup>7</sup>

The Administration released an update of its progress in December 2021 that highlighted some of its efforts to support tribally led conservation.<sup>8</sup> Missing from its efforts, however, is any mention of an often-overlooked provision of the Federal Land Policy and Management Act (FLPMA)<sup>9</sup> that for more than 40 years has directed BLM to prioritize identifying and protecting "areas of critical environmental concern" (ACECs), including cultural values.<sup>10</sup> This Comment argues that given FLPMA's ACEC directives and the Administration's commitments to tribal consultation and collaboration, BLM should promulgate regulations to encourage nominations from tribes to designate and protect tribal cultural lands as ACECs. Those lands, which should include management structures erected with tribal collaboration, would likely qualify for inclusion in the Administration's 30 by 30 initiative.

The Comment examines ACECs and their potential role in the 30 by 30 program, particularly their potential to enlist tribal governments in helping to manage lands of tribal cultural significance. Part I provides background on ACECs, explaining the relevant portion of FLPMA's legislative history, and describes the purpose of ACECs, BLM's outdated planning regulations, and the agency's guidance on ACECs. Part I also chronicles BLM's 2016 attempt to rewrite its planning regulations that the U.S. Congress vetoed. Part II explains BLM's current, uncoordinated, and largely ineffective management of ACECs, as well as

1. Exec. Order No. 14008, 86 Fed. Reg. 7619, 7627 (Jan. 27, 2021). The 30 by 30 initiative is tied to international promises. *Id.* at 7619.

2. *Id.* at 7629.

3. DOI ET AL., CONSERVING AND RESTORING AMERICA THE BEAUTIFUL (2021), <https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf>.

4. *Id.* at 14, 19 ("Efforts to conserve and restore America's lands and waters must involve regular, meaningful, and robust consultation with Tribal Nations.");

Federal agencies should take steps to improve engagement with [tribes] on the care and management of public lands and waters, particularly regarding sacred and ceremonial sites, and trust and treaty rights. The . . . administration has committed to engaging in regular, meaningful, and robust consultation with Tribal Nations; this must include land management planning.

See also *infra* notes 80-84 and accompanying text.

5. The National Wildlife Federation suggested a definition for "conservation" based on the scientific principles of biodiversity, climate adaptation, and climate mitigation. See David Willms, Principles for Achieving the America the Beautiful Initiative, American Bar Association Webinar, at 30:47 (Jan. 20, 2022), [https://players.brightcove.net/1866680404001/default\\_default/index.html?videoId=6292793998001](https://players.brightcove.net/1866680404001/default_default/index.html?videoId=6292793998001) (suggesting that 30 by 30 conservation lands and waters should consist of a "well-connected and effectively managed network of lands and waters where conservation and restoration would be most effective at reversing declines in biodiversity and stabilizing our rapidly changing climate"). See also generally NATIONAL WILDLIFE FEDERATION, CLIMATE-SMART CONSERVATION: PUTTING ADAPTATION PRINCIPLES INTO PRACTICE (Bruce A. Stein et al. eds., 2014), [https://www.nwf.org/-/media/PDFs/Global-Warming/2014/Climate-Smart-Conservation-Final\\_06-06-2014.pdf](https://www.nwf.org/-/media/PDFs/Global-Warming/2014/Climate-Smart-Conservation-Final_06-06-2014.pdf) (offering guidance for climate-smart conservation efforts).

6. See Request for Information to Inform Interagency Efforts to Develop the American Conservation and Stewardship Atlas, 87 Fed. Reg. 235 (Jan. 4, 2022). The 60-day comment period for what lands should be included in the Atlas closed on March 7, 2022. *Id.* The Administration hopes to release a beta version of the Atlas by the end of 2022. Press Release, DOI, Biden-Harris Administration Invites Public Comment on Development of New Conservation and Stewardship Tool (Feb. 15, 2022), <https://www.doi.gov/pressreleases/biden-harris-administration-invites-public-comment-development-new-conservation-stewardship-tool>.

7. See DOI, U.S. GEOLOGICAL SURVEY GAP ANALYSIS PROJECT, PROTECTED AREAS DATABASE OF THE UNITED STATES (PAD-US) 2.1 (2020), <https://doi.org/10.5066/P92QM3NT>.

8. DOI ET AL., YEAR ONE REPORT: AMERICA THE BEAUTIFUL 9-13 (2021), [https://www.whitehouse.gov/wp-content/uploads/2021/12/AtB-Year-One-Report\\_.pdf](https://www.whitehouse.gov/wp-content/uploads/2021/12/AtB-Year-One-Report_.pdf).

9. 43 U.S.C. §§1701-1785, ELR STAT. FLPMA §§102-603.

10. *Id.* §1702(a).

tribes' recent failed efforts to use ACECs to protect their cultural resources.

Part III argues that the Administration's commitment to tribal involvement in land management presents an opportunity for BLM to promulgate new regulations that use ACECs to establish co-management governing structures that will protect tribal cultural resources, pointing to the Bears Ears Commission as a model for a successful co-management structure. We conclude that ceded tribal lands with protective ACEC designation and tribal co-management would help the Administration more swiftly achieve the goals of its 30 by 30 initiative.

## I. Background on ACECs

FLPMA's four ACEC provisions call for BLM to prioritize ACECs during planning and to pay special attention to protecting them.<sup>11</sup> FLPMA defines "ACECs" 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, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.<sup>12</sup>

FLPMA's policy is that "regulations and plans for the protection of public land areas of critical environmental concern [must] be promptly developed."<sup>13</sup> Consequently, the statute directs the Secretary to "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values, . . . giving priority to areas of critical environmental concern."<sup>14</sup> FLPMA also requires the Secretary to "give priority to the designation and protection of areas of critical environmental concern" in developing and revising land use plans.<sup>15</sup>

This section traces the origin of ACECs in FLPMA's legislative history, describes BLM's current regulations and guidance on ACECs, and explains BLM's recently thwarted attempt to rewrite its planning regulations.

### A. The FLPMA Legislative History

Congress began to call for BLM multiple use land management in 1964, when it established the Public Land Law Review Commission (PLLRC) to study public land management and make recommendations to Congress.<sup>16</sup> That

same year, Congress enacted the Classification and Multiple Use Act, which directed BLM to classify its public lands and establish a system of land use planning.<sup>17</sup> Under that statute, BLM established what would become the predecessor of the ACEC program when it promulgated 1970 regulations calling for the preservation and protection of natural and cultural resources as an agency priority.<sup>18</sup>

The PLLRC report also introduced what would eventually become part of the ACEC provisions of FLPMA, by recommending that BLM identify and protect lands with special resources and values.<sup>19</sup> The report recommended designation of particular lands for dominant fish and wildlife use protection, classification of lands to protect environmental quality, and identification of unique areas of national significance.<sup>20</sup>

The term "areas of critical environmental concern" first appeared in two never-enacted precursors to FLPMA in 1971: the National Land Use Policy Act and the National Resource Land Management Act.<sup>21</sup> The National Land Use Policy Act would have declared that "important ecological, cultural, historic and aesthetic values in areas of critical environmental concern which are essential to the well-being of all citizens are being irretrievably damaged or lost," defining "ACECs" as "areas where uncontrolled development could result in irreversible damage to important historic, cultural, or aesthetic values, or natural systems or processes, which are of more than local significance; or [which threaten] life or safety as a result of natural hazards of more than local significance."<sup>22</sup>

The National Resource Land Management Act's ACEC-like provisions, which Congress mostly incorporated into FLPMA, defined "ACECs" as "areas where uncontrolled use or development could result in irreversible damage to: important historic, cultural, or aesthetic values, or natural systems or processes, or life or safety as a result of natural hazards," recommending that BLM prioritize ACEC designation and protection in the congressional directive to inventory national resource lands.<sup>23</sup>

11. See Karin P. Sheldon & Pamela Baldwin, *Areas of Critical Environmental Concern: FLPMA's Unfulfilled Conservation Mandate*, 28 COLO. NAT. RES. ENERGY & ENV'T L. REV. 1, 8 (2017) (discussing their study of 111 ACECs, KARIN P. SHELDON ET AL., AREAS OF CRITICAL ENVIRONMENTAL CONCERN: UNFULFILLED POTENTIAL FOR PUBLIC LAND CONSERVATION: A REPORT TO THE PEW CHARITABLE TRUSTS (2015)).

12. 43 U.S.C. §1702(a).

13. *Id.* §1701(a)(11).

14. *Id.* §1711.

15. *Id.* §1712(c)(3).

16. Pub. L. No. 88-606, 78 Stat. 982 (1964).

17. Pub. L. No. 88-607, 78 Stat. 986 (1964).

18. 35 Fed. Reg. 9239, 9793-94 (June 13, 1970).

19. See Sheldon & Baldwin, *supra* note 11, at 18.

20. See PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 10, 13, 73-74, 168, 198-99 (1970). Even though Congress adopted a multiple use paradigm in FLPMA, as opposed to the dominant use land management strategy recommended by the PLLRC, the definition of "multiple use" includes the admonition that some land uses will take precedence over others and restrict certain activities so as not to impair the productivity of the land. See 43 U.S.C. §1702(c) ("[M]ultiple use means . . . the use of some land for less than all of the resources . . . and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment."). Courts, however, have generally given wide discretion to agencies like BLM and the U.S. Forest Service in implementing multiple use. See also Perkins v. Bergland, 608 F.2d 803, 806, 10 ELR 20070 (9th Cir. 1979) ("[Multiple use] breathes discretion at every pore.").

21. See CHARLES H. CALLISON, AREAS OF CRITICAL ENVIRONMENTAL CONCERN ON THE PUBLIC LANDS pt. I, at 3 (1984).

22. *Id.* at 4.

23. S. 2401, National Resource Land Management Act of 1971, 92d Cong. §§2(e), 5, 6(b)(2) (1971).

BLM's potential organic statute and its ACEC provisions continued to go through changes over the next five years. The 1975 U.S. Senate version of the bill defined "ACECs" as "areas within the national resource lands where special management attention is required to protect important historic, cultural, or scenic values, or natural systems or processes, or life and safety as a result of natural hazards."<sup>24</sup> The report of the Senate Committee on Interior and Insular Affairs emphasized that BLM should prioritize identifying and protecting ACECs.<sup>25</sup> The U.S. House of Representatives version of the bill, renamed FLPMA, defined "ACECs" as

areas within the national resource lands where special management attention is required when such areas are developed or used to protect, or where no development is required to prevent irreparable damage to important historic, cultural, or scenic values, or natural systems or processes, or life and safety as a result of natural hazards.<sup>26</sup>

The final version of what became FLPMA made only minor changes from the language of the House bill.<sup>27</sup>

This examination of FLPMA's legislative history on the development of the ACEC concept reveals that Congress always intended ACECs to be an important aspect of BLM's land planning and management. From the beginning of FLPMA's drafting and continuing over the course of the ensuing decade leading up to the enactment of the statute, Congress directed BLM to prioritize the designation and protection of ACECs and their important resources and values in the planning process.<sup>28</sup> As discussed below, over the past four-and-a-half decades, BLM has fallen well short of meeting the congressional intent.<sup>29</sup> Nevertheless, BLM could invigorate ACECs with new regulations that would enable the Administration to both meet the conservation goals of 30 by 30 as well as honor its express commitments of collaborative co-management to tribes.<sup>30</sup>

## B. Current Regulations and Guidance

The current BLM regulations, dating to the Ronald Reagan Administration, give scant attention to ACECs.<sup>31</sup> Ignoring the congressional intent expressed in FLPMA's legislative history and the statute's clear language, the BLM

regulations neither attempt to explain how the agency would prioritize ACEC designation nor how BLM will protect ACECs with special management. Instead, they merely instruct BLM field managers to "consider" ACECs throughout the planning process.<sup>32</sup>

To qualify for such consideration, a potential ACEC must be both "relevan[t]" and "importan[t]," but the regulations supply little explanation of these criteria.<sup>33</sup> And while the regulations require the BLM state director to publish potential ACECs in the *Federal Register* and solicit public comments, the regulations require the director to consider only a designation's effect on "resource limitations," not the significance of the values being considered for protection.<sup>34</sup> As discussed below, this failure of BLM's regulations either to provide a definition of "priority" or to supply any uniform processes for designating and protecting ACECs has led to widespread disparity across BLM field offices, with field managers often "considering" ACEC values—under the discretionary multiple use framework—as less valuable than other uses.<sup>35</sup>

Section 1613 of the BLM Manual, issued 34 years ago in 1988, gives BLM nonbinding ACEC guidance. The manual generally treats ACECs more favorably than do the regulations, calling on managers to discuss in detail potential ACECs and their values in resource management plans (RMPs) and to submit annual ACEC reports to the BLM director.<sup>36</sup> The manual offers the public an opportunity to nominate areas for consideration as ACECs, although without suggesting any formal procedures for doing so.<sup>37</sup> It declares that ACEC designation "is the principal . . . designation for public lands where special management is required to protect important natural, cultural, and scenic resources or to identify natural hazards. . . . [M]anagers will give precedence to the identification, evaluation, and designation of areas which require special management attention during resource management planning."<sup>38</sup> The manual also suggests that actions near ACECs should accommodate the ACECs' significant values and resources, and recommends that BLM prioritize the monitoring and implementing of ACECs to protect their values and resources.<sup>39</sup>

24. SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, NATIONAL RESOURCE LANDS MANAGEMENT ACT OF 1975, S. REP. NO. 94-583, at 2 (1975).

25. *Id.* at 43 ("This directive insures that the most environmentally important and fragile lands will be given special, early attention and protection.").

26. HOUSE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, H.R. REP. NO. 94-1163, at 6 (1976).

27. The only difference between the House definition and the one the president signed into law was adding "fish and wildlife resources" after "values," inserting "protect and" before "prevent irreparable harm," and parenthesizing "when such areas are developed or used to protect, or where no development is required." *See supra* note 12.

28. *See Sheldon & Baldwin, supra* note 11, at 29.

29. *See infra* notes 52-69 and accompanying text.

30. *See infra* notes 83-84 and accompanying text.

31. *See Sheldon & Baldwin, supra* note 11, at 32.

32. 43 C.F.R. §1610.7-2 (2022).

33. *Id.* §1610.7-2(a). The regulations define "relevance" as "a significant historic, cultural, or scenic value; a fish or wildlife resource or other natural system or process; or natural hazard," and "importance" as "substantial significance and values [requiring] qualities of more than local significance and special worth, consequence, meaning, distinctiveness, or cause for concern. A natural hazard can be important if it is a significant threat to human life or property." *Id.*

34. *Id.* §1610.7-2(a)(2).

35. *See Sheldon & Baldwin, supra* note 11, at 31, 40. *See also infra* notes 61-66 and accompanying text.

36. BLM, DOI, BLM MANUAL: 1613—AREAS OF CRITICAL ENVIRONMENTAL CONCERN §§1613.22, 1613.3, 1613.65 (1988) [hereinafter BLM MANUAL].

37. *Id.* §§1613.21, 1613.41. The manual recommends nominations be made "early in the process" of planning, but allows nominations to be "submitted at any time." *Id.*

38. *Id.* §1613.06.

39. *Id.* §§1613.02, 1613.12, 1613.6 ("[S]ignificant value(s) or resource(s) exist which must be accommodated when future management actions and land use proposals are considered near or within an ACEC"; "Management prescriptions providing special management attention should include more detail than prescriptions for other areas and should establish priority for

The guidance is confusing, however, because it also asks managers to weigh the protection of ACEC values against the values of other resources, that is, to give ACECs no special priority in multiple use consideration.<sup>40</sup> This guidance is a questionable interpretation of FLPMA's directives that ACEC designation and management must be an agency priority.<sup>41</sup>

### C. Planning 2.0 and the Congressional Review Act

In 2014, BLM began to revise its planning regulations, including new regulations for ACECs; the agency eventually issued its "Planning 2.0" regulations in December 2016 at the end of the Barack Obama Administration.<sup>42</sup> In March 2017, however, the Republican Congress thwarted this effort to reform BLM's 1983 regulations with a veto under the Congressional Review Act (CRA),<sup>43</sup> which enables Congress to overturn federal rules within 60 legislative days of their promulgation.<sup>44</sup> Once rules are vetoed, the CRA prevents agencies from issuing new rules that are "substantially the same" as the vetoed ones.<sup>45</sup> The CRA does not define "substantially the same," and because the statute eliminates judicial review,<sup>46</sup> the only guidance for agencies as to how to successfully reissue rules is to respond to any expressed reasons for congressional disapproval, explaining why the new regulations are not substantially similar.<sup>47</sup>

Congress also invoked the CRA to veto regulations issued by the U.S. Department of Labor and the U.S. Securities and Exchange Commission around the same time as it vetoed Planning 2.0.<sup>48</sup> Those agencies successfully reissued their rules, explaining how the reissued rules were not "substantially the same."<sup>49</sup> Congress did not challenge their explanations, which should encourage BLM to repromulgate its planning regulations; it is unlikely Congress

would veto them a second time so long as BLM provides an explanation as to why its reissued rules are not substantially similar, at least until there is a change in the political control of Congress. Revised ACEC regulations that encourage tribes to propose designating ceded lands with cultural resources as ACECs would not be "substantially the same" as the 2016 planning rule, which made no explicit mention of using ACECs to protect tribal cultural resources.<sup>50</sup>

## II. Current Problems With ACECs

This section illustrates the inconsistent, and often environmentally harmful, implementation of ACECs across BLM field offices. In addition to the paucity of uniform prescriptions in BLM's regulations and guidance, the fact that BLM manages lands on a state-by-state basis exacerbates the uncoordinated management system, because state borders rarely conform with the features of natural landscapes and state governors can wield considerable political influence over local BLM managers.<sup>51</sup> This section also discusses BLM's recent rejection of tribal ACEC nominations in Alaska.

### A. Uncoordinated Management

BLM's current decentralized model discourages coordination among field offices, sometimes resulting in inconsistent management within the same ACEC.<sup>52</sup> The agency has no up-to-date central database or compilation on ACECs, and its master list of ACECs is incomplete and inaccurate.<sup>53</sup> State BLM websites have varying amounts of information about ACECs, with differing degrees of quality, and individual field office websites inconsistently address information on ACECs.<sup>54</sup> Given the organizational incongruity across the various states and field offices, meaning-

implementation"; "[M]onitoring is . . . essential for ensuring the protection of ACEC values and resources.").

40. *Id.* §1613.22.A.2 (asking managers to consider whether "values of other resources outweigh the need for protection of the important and relevant values"). See Sheldon & Baldwin, *supra* note 11, at 39.

41. See *supra* notes 12-28 and accompanying text.

42. See Sheldon & Baldwin, *supra* note 11, at 31.

43. 5 U.S.C. §§601 et seq.

44. *Id.* §801(d). A "legislative day" is a day that Congress is in session, beginning with the opening of the session and ending with its adjournment. U.S. Senate, *Glossary*, <https://www.senate.gov/about/glossary.htm> (last visited Mar. 6, 2022).

45. 5 U.S.C. §802(c).

46. *Id.* §805 ("No determination, finding, action, or omission under this chapter shall be subject to judicial review.").

47. See MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONGRESSIONAL RESEARCH SERVICE, R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 20 (2021) (describing the ambiguity of the phrase "substantially the same" and the lack of authority defining it).

48. See Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49359 (July 27, 2016); Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants, 81 Fed. Reg. 50298 (Aug. 1, 2016).

49. The Department of Labor explained that its new rule had a substantially different scope and a fundamentally different approach than the overturned rule, and both that agency and the Securities and Exchange Commission cited statements from the floor debate on the veto to determine which aspect of the rule needed to change and how that change was effectuated. See CAREY & DAVIS, *supra* note 47, at 21.

50. See 81 Fed. Reg. 89580, 89640-42 (Dec. 12, 2016) (which would have changed the regulatory language to improve ACEC designation and protection priority by (1) identifying potential ACECs in BLM's duty to inventory its lands in the planning process; (2) giving priority to ACEC designation in RMP planning; (3) designating lands of local significance; (4) differentiating between proposed and designated ACECs in terms of management prescriptions; (5) lengthening the period of public comment on ACECs in the planning process; (6) not restricting special management prescriptions to resource use limitations; (7) formally designating ACECs when amending RMPs; and (8) providing means to measure attainment of land plan objectives). BLM might further reduce the chances of a veto by a Republican Congress by considering repromulgating only the ACEC regulation, not all of Planning 2.0. See also John C. Ruple & Devin Stelter, *Charting a "Substantially Different" Approach to Land Management Planning Following a Congressional Review Act Joint Resolution of Disapproval*, 12 ARIZ. J. ENV'T L. & POL'Y 84, 100-03 (2021) (describing how BLM could repromulgate Land Planning 2.0 in a substantially different, more environmentally protective way).

51. See Sheldon & Baldwin, *supra* note 11, at 44. BLM regulations instruct state directors to seek policy advice from state governors on, among other things, "the multiple use opportunities and constraints on public lands." If governors identify inconsistencies between provisions in a proposed RMP and state policies or programs and provide recommendations to resolve them, the state director "shall" accept the recommendations if they reasonably balance national and state interests. See 43 C.F.R. §§1610.3-1(c), 1610.3-2(e) (2022).

52. See Sheldon & Baldwin, *supra* note 11, at 54.

53. See *id.* at 47.

54. See *id.* at 48.

fully comparing national ACEC management is almost impossible.<sup>55</sup> BLM's failure to provide its managers with a uniform approach for discussing ACECs in RMPs makes it difficult for the public to identify even which areas have ACEC designations, let alone what ACEC protection requires of BLM.<sup>56</sup>

Even though the BLM Manual requires the agency to designate and name ACECs based on their resource values warranting special management, the agency has given the majority of ACECs only generic names.<sup>57</sup> This oversight deprives the public of valuable information that could otherwise easily inform them of the protected land's special characteristics. Although the manual requires RMPs to "clearly" describe the special values or resources of each ACEC, many RMPs have little to no information about these values, instead using one or two generic words like "historic."<sup>58</sup> Many RMPs also inconsistently describe the special management prescriptions necessary to protect ACEC values, with some RMPs only containing language like "should" or "will."<sup>59</sup> The agency does not record whether any protective management is in fact taking place, despite guidance to do so from the manual.<sup>60</sup>

Although FLPMA clearly directs BLM to prioritize designating ACECs, field managers rarely actually do so.<sup>61</sup> Managers instead seem to regard ACECs as just another aspect of their multiple use discretion.<sup>62</sup> Many ACECs are open to mineral entry, oil and gas leasing, and grazing.<sup>63</sup> RMPs often fail to discuss whether these other, potentially damaging uses are compatible with the purposes of an ACEC's designation, contrary to the manual's guidance.<sup>64</sup> Other RMPs implicitly allow incompatible uses in ACECs by acknowledging the difficulty of enforcing certain use restrictions like off-highway vehicles.<sup>65</sup> Several RMPs present contradictory values, purporting to both protect ACECs yet simultaneously allowing potentially damaging

uses, thus failing to provide the margin of safety that Congress seemingly contemplated.<sup>66</sup>

BLM's land planning would be better carried out at the landscape level with field office coordination because environmental resources conform to neither administrative nor political boundaries.<sup>67</sup> BLM regulations on ACECs could instruct field managers to name, describe, and implement management strategies for ACECs, and field offices should use a consistent format on their websites to disseminate information about ACECs to the public.<sup>68</sup> ACECs are currently an uncoordinated mess, leaving unprotected many acres of lands to which Congress intended BLM to give special management attention.<sup>69</sup>

## B. BLM's Rejection of Tribally Nominated ACECs in Alaska

The 2021 Bering-Sea Western Interior RMP in Alaska supplies an example of tribes attempting to invoke ACECs to protect their cultural resources, and reveals a missed opportunity for BLM to fulfill its statutory directives. During the RMP planning process, a coalition of tribes recommended that BLM designate more than eight million acres of poten-

66. See *id.* at 54. For example, the Old Town ACEC in Las Cruces, New Mexico, and the Pueblos ACEC in Taos, New Mexico, are closed to all mineral development, their locations are not shown on maps, their boundaries are protected by fences or barriers, and their trails and facilities are out of sight, yet vehicles are still allowed on designated routes. *Id.* See also *id.* at 43:

By creating the ACEC designation, by specifically directing that the important resources and values of ACECs be defended, and by affording ACECs priorities in planning, it is evident that Congress intended that proposed uses in them be carefully reviewed and either barred entirely or restricted through "special management" that secures a margin of safety to avoid unduly risking degradation or permanent damage.

67. See *id.* at 54-56, 62.

68. *Id.* at 56-62.

69. See PEW CHARITABLE TRUSTS, BLM IGNORES OWN FINDINGS IN PROPOSED MANAGEMENT PLANS (2020), [https://www.pewtrusts.org/-/media/assets/2020/01/blm\\_ignores\\_own\\_finding\\_in\\_proposed\\_management\\_plans\\_v4.pdf](https://www.pewtrusts.org/-/media/assets/2020/01/blm_ignores_own_finding_in_proposed_management_plans_v4.pdf) (reporting BLM's reduction of 94% of ACEC acres across seven proposed RMPs, including 100% reduction in the Bering Sea-Western Interior RMP in Alaska, 100% reduction in the Lewistown RMP of Montana, 52% reduction in the Missoula RMP of Montana, 71% reduction in the Four Rivers RMP in Idaho, and protection of only .03% of lands identified with wilderness characteristics).

The Lewistown RMP received no tribal nominations, but ended up choosing to designate 3,600 ACEC acres (down from 22,900 but still more than the zero acres of the draft RMP) for the Acid Shale-Pine Forest and Square Butte ACECs. BLM designated the previously existing Square Butte ACEC in part to protect cultural sites. See BLM, RESOURCE MANAGEMENT PLAN REVISION AND ENVIRONMENTAL IMPACT STATEMENT, AREAS OF CRITICAL ENVIRONMENTAL CONCERN (2015); BLM, RECORD OF DECISION AND APPROVED LEWISTOWN RESOURCE MANAGEMENT PLAN II-50 (2021). The Missoula RMP received no tribal ACEC nominations, and the only ACEC nominated from outside BLM, Chamberlain Meadows, had ecological, not cultural, values and resources. The Missoula RMP removed 585 acres of two previously existing ACECs, Bear Creek Flats and Limestone Cliffs, which had only ecological, not cultural, values and resources. See BLM, PRELIMINARY AREA OF CRITICAL ENVIRONMENTAL CONCERN REPORT, MISSOULA RESOURCE MANAGEMENT PLAN 25 (2018); BLM, RESOURCE MANAGEMENT PLAN, MISSOULA FIELD OFFICE II-44 (2021). The Four Rivers RMP is not yet finalized, but no ACECs were nominated for cultural values or resources during the planning process. None of the existing 64,300 acres of ACECs, of which 18,720 might be removed, are listed as having cultural values. See BLM, FOUR RIVERS DRAFT RESOURCE MANAGEMENT PLAN AND DRAFT ENVIRONMENTAL IMPACT STATEMENT U-3 to U-6 (2019).

55. See *id.*

56. See *id.* at 49.

57. See *id.* at 48. For example, an ACEC named "Deep Creek" offers no clue as to the values and resources it protects. *Id.* See BLM MANUAL, *supra* note 36, §1613.33.A (providing that naming ACECs based on the resource or value determined to warrant special management "will provide consistency and enhance recognition and understanding by the public").

58. See Sheldon & Baldwin, *supra* note 11, at 49, 50; BLM MANUAL, *supra* note 36, §1613.33.B.

59. See Sheldon & Baldwin, *supra* note 11, at 50, 51.

60. BLM MANUAL, *supra* note 36, §1613.02 ("The ACEC designation indicates to the public that the BLM recognizes that an area has significant values and has established special management measures to protect those values."); §1613.33 ("Proposed ACECs and their associated management prescriptions must be identified and fully described in proposed RMPs").

61. See Sheldon & Baldwin, *supra* note 11, at 51.

62. See *id.*

63. See *id.* at 52 ("Approximately 2/3 of the ACECs reviewed are currently open to mineral entry . . . [at] least 80% of the ACECs included in the sample are currently open to oil and gas exploration and development . . . [and] more than half of the ACECs examined in the study are open to grazing.")

64. See *id.*; BLM MANUAL, *supra* note 36, §1613.33.C ("Management activities and anticipated future uses considered compatible with the purposes of an ACEC designation, and those considered incompatible, must be described as part of the multiple use prescription.")

65. See Sheldon & Baldwin, *supra* note 11, at 53.

tial ACECs to protect tribal cultural resources, but BLM categorically rejected the suggestions in its final RMP.<sup>70</sup> Most of these nominations included river watersheds important for tribal subsistence and tribal ancestral homelands.<sup>71</sup> Despite the important cultural and historical value of these lands and waters to the tribes, BLM decided that those areas lacked sufficient cultural significance to merit ACEC designation.<sup>72</sup>

BLM's final RMP designated no acres of ACECs at all, eliminating nearly two million acres of previously existing ACECs and rejecting the more than eight million acres of tribal nominations.<sup>73</sup> The agency determined that "special management attention is not required to protect the [relevant and important] values, because the remoteness and lack of infrastructure and facilities in Alaska as well as a low present and future potential for development significantly reduces the risk to the [relevant and important] values."<sup>74</sup> BLM cited its manual for the proposition that the agency was not required to designate the proposed ACECs, even when the areas met both the importance and relevance criteria.<sup>75</sup> The result seemed inconsistent with FLPMA's

statutory directives of giving priority to designating and protecting ACECs.<sup>76</sup>

### III. Opportunities for Tribes

In September 2021, the Affiliated Tribes of Northwest Indians (ATNI) adopted a resolution requesting BLM to conduct a rulemaking to ensure that ACECs are a priority in its land management planning process for tribal ceded lands.<sup>77</sup> The tribes pointed to BLM's failure to follow FLPMA's directive to "promptly develop" ACEC regulations, to the inconsistent management of ACECs across the country, and to BLM's duty to collaborate with tribes in its land management process.<sup>78</sup>

BLM should heed the advice of the 2021 resolution. With new regulations, BLM could signal its support of protecting tribal cultural resources by designating ACECs and erecting tribal co-management governing structures. As argued above,<sup>79</sup> Planning 2.0 made no mention of protecting tribal cultural resources in its ACEC provisions, so a rule that emphasizes protecting tribal cultural resources would not be vulnerable to being considered "substantially the same" as the rule Congress overturned through the CRA.

This section maintains that BLM could effectively follow both its FLPMA directives to prioritize ACECs and its directives in various administrative orders to consult with and encourage tribal co-management by promulgating regulations that promote tribal ACEC nominations and form co-management governing structures. We explain some existing examples of tribal co-management, and suggest that the Bears Ears Commission as a useful model for such collaborative protection of cultural and environmental resources.

#### A. Tribal Co-Management

Over the past several decades, presidents and secretaries have issued numerous executive and secretarial orders emphasizing the federal government's commitment to tribal involvement in land management. For example, President William Clinton in 1996 committed federal land managers to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites."<sup>80</sup> In 2000, President Clinton directed federal

70. See BLM, *BERING SEA-WESTERN INTERIOR RESOURCE MANAGEMENT PLAN, AREAS OF CRITICAL ENVIRONMENTAL CONCERN: REPORT ON THE RELEVANCE AND IMPORTANCE CRITERIA AND SPECIAL MANAGEMENT 3* (2018) [hereinafter *BSWI ACEC REPORT*] (listing nominated ACECs). The Georgetown Tribal Council nominated the Sheefish ACEC (698,260 acres); the Grayling IRA Tribal Council nominated the Grayling Area Habitat ACEC (98,682 acres); the Anvik Tribal Council nominated the Anvik River Watershed Area ACEC (249,607 acres), the Bonasila River Watershed ACEC (291,136 acres), the Anvik Traditional Trapping Area ACEC (21,699 acres), and the Old Anvik Village Area ACEC (60,259 acres); the Native Village of Unalakleet nominated the Unalakleet River Watershed ACEC (251,978 acres), the Egavik Creek Watershed ACEC (60,052 acres), the Golsovia River Watershed ACEC (21,771 acres), and the Tenmile River Watershed ACEC (36,278 acres); the Pew Charitable Trusts nominated the Unalakleet ACEC (1,520,015 acres) and Tagagawik River ACEC (301,044 acres) (although these ACECs were not nominated by tribes, BLM determined they contained important and relevant cultural values); the Koyukuk Tribal Council nominated the Honhosa River ACEC (93,492 acres), the Gisasa River ACEC (278,057 acres), and sought to expand the Kateel River ACEC (311,658 acres); the Nulato Tribal Council nominated the Nulato River ACEC (342,824 acres); the Holy Cross Village (a federally recognized tribe) nominated the Holy Cross ACEC (1,720,030 acres); the Ohogamiut Traditional Council nominated the Ohogamiut ACEC (1,634,358 acres); and the Huslia Tribal Council nominated the Huslia ACEC (170,763 acres). *Id.* at 40-186. See also BLM, *BERING SEA-WESTERN INTERIOR DRAFT RESOURCE MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT 2-10, 3-132* (2019) (preferring the alternative with no ACECs); BLM, *BERING SEA-WESTERN INTERIOR RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN I-10* (2021) [hereinafter *BSWI RMP*] (designating no ACECs in the final RMP).

71. *BSWI ACEC REPORT*, *supra* note 70, at 40-186. See also KEN RAIT, PEW CHARITABLE TRUSTS, *BERING SEA-WESTERN INTERIOR RESOURCE MANAGEMENT PLAN COMMENTS ON PRELIMINARY ALTERNATIVE CONCEPTS AND AREAS OF CRITICAL ENVIRONMENTAL CONCERN REVIEW 16* (2015).

72. RAIT, *supra* note 71, at 11. See *supra* note 33 (explaining "importance" and "relevance" criteria). See also *BSWI ACEC REPORT*, *supra* note 70, at 40-186 (discussing reasons for tribal nominations and determining whether proposed ACECs' cultural values met relevance and importance criteria); *BSWI RMP*, *supra* note 70, at I-10 (designating no ACECs, even though BLM found relevant and important values).

73. *BSWI RMP*, *supra* note 70, at I-10 to I-11. See also *BSWI ACEC REPORT*, *supra* note 70, at 3 (listing nominated ACECs); BLM, *BERING SEA-WESTERN INTERIOR, PROPOSED RESOURCE MANAGEMENT PLAN AND FINAL ENVIRONMENTAL IMPACT STATEMENT 2-1, 3-167* (2020) (choosing an alternative that designated no ACECs).

74. *BSWI RMP*, *supra* note 70, at I-10.

75. *Id.* (citing BLM MANUAL, *supra* note 36, §1613.23, which states that "[d]esignation is based on whether or not a potential ACEC requires special management attention in the selected plan alternative").

76. See *supra* notes 12-28 and accompanying text.

77. ATNI Resolution #2021-38, Request the U.S. Bureau of Land Management Develop an Area of Critical Environmental Concern Regulation as Required by the Federal Land Policy Management Act 1976, at 3 (Sept. 30, 2021), <https://atnitribes.org/wp-content/uploads/2021/10/Res-2021-38.pdf> ("[T]he Tribes . . . strongly support promulgation of ACEC Regulations that would provide updated guidance and improve how ACECs are established and managed by the agency for the benefit of future generations of Tribal nations with historical connections to traditional land now managed by the Bureau.").

78. *Id.* at 2. See also *infra* notes 80-84 and accompanying text.

79. See *supra* notes 48-50 and accompanying text.

80. Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996). See Michael C. Blumm & Lizzy Pennock, *Tribal Consultation: Toward Meaningful Collaboration With the Federal Government*, 33 *COLO. ENV'T L.J.* 1, 19-23 (2021) (discussing the Clinton Executive Orders).

agencies to carry out their trust obligations by consulting with tribes as sovereign nations when implementing regulations with tribal implications.<sup>81</sup>

In 2016, Interior Secretary Sally Jewell revitalized the Clinton commitment by ordering DOI officials to devise cooperative management partnerships with tribes for historically tribal lands under DOI jurisdiction.<sup>82</sup> Recently, Interior Secretary Deb Haaland and Agriculture Secretary Tom Vilsack issued a joint order on “fulfilling the trust responsibility to Indian tribes in the stewardship of federal lands and waters.”<sup>83</sup> The order instructs agencies within DOI and the U.S. Department of Agriculture to safeguard the interests of tribes, collaborate in the co-stewardship of federal lands and waters, and empower tribal stewardship of tribal homelands.<sup>84</sup> All these directives—along with President Biden’s 30 by 30 initiative—give BLM a clear mandate to coordinate its land management of ceded tribal lands with tribal interests.

### B. *The Bears Ears Commission*

The Bears Ears National Monument serves as an exemplar of tribal co-management of public lands. At the request of five tribes, President Obama proclaimed the Bears Ears National Monument under the Antiquities Act<sup>85</sup> in 2016 to protect the tribes’ ancestral homelands.<sup>86</sup> The Proclamation called for establishing both an advisory committee, to “consist of a fair and balanced representation of interested stakeholders, including state and local governments, tribes, recreational users, local business owners, and private land-

owners,” as well as a Bears Ears Commission, to consist of elected tribal officers representing each of the five tribes, with whom BLM was to “meaningfully engage” for management of the monument.<sup>87</sup>

A year later, however, President Donald Trump reduced the size of the monument by 85%, from approximately 1.35 million acres down to just over 200,000 acres, creating two, much smaller monuments.<sup>88</sup> The Trump Proclamation opened the previously protected lands to mineral extraction and vehicle use, and DOI filled the advisory committee with members opposed to the monument, with only two tribal representatives.<sup>89</sup> President Trump did retain the Bears Ears Commission of tribal representation, but applied it to only one of the reduced monuments, renamed it the Shash Jáa Commission, and added a county official.<sup>90</sup>

In 2021, President Biden restored the monument to the original size in the Obama Proclamation, even enlarging it to retain the small additions added by President Trump’s reconfiguration.<sup>91</sup> President Biden restored the Bears Ears Commission and its tribal representation to the entire area in Obama’s Proclamation, “to ensure that management decisions affecting the monument reflect expertise and traditional and historical knowledge of Tribal Nations” and “to provide guidance and recommendations on the development and implementation of management plans and on management of the entire monument.”<sup>92</sup> The five tribes, collectively the Bears Ears Inter-Tribal Coalition, applauded the monument’s restoration and released a press statement expressing that the coalition

looks forward to the President’s continued leadership in ensuring that a new model of collaborative management between the Tribes, state and federal land agencies is immediately put into action. . . . In this new model, the traditional knowledge and place-based conservation strategies of Tribal communities will play a significant role in shaping efforts to conserve and plan a resilient future for this landscape.<sup>93</sup>

81. Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

82. Secretary of the Interior Order No. 3342, 2016 WL 6307366, at 5 (Oct. 21, 2016) (ordering DOI officials to “identify opportunities for cooperative management arrangements and collaborative partnerships with tribes and undertake efforts, where appropriate, to prepare their respective bureau staffs to partner with tribes in the management of the natural and cultural resources over which the bureaus maintain jurisdiction and responsibility”) (citing FLPMA, 43 U.S.C. §1737, as authority for BLM to enter into cooperative agreements for public land management and protection). Secretary Jewell also listed two examples of cooperative management between BLM and tribes: the Volcanic Tablelands of central California with the Paiute Tribe and the Kasha-Katuwe Tent Rocks National Monument of north-central New Mexico with the Pueblo de Cochiti. *Id.* at 6-7. See DOI, ENVIRONMENTAL JUSTICE ANNUAL IMPLEMENTATION REPORT 16 (2015) (“THE [Paiute] Tribe has . . . a direct interest in ensuring the land be protected from degradation and cultural properties be preserved . . . Tribes are more fully informed about federal projects, help[ ] manage areas that are important to the Tribe, and tribal perspectives are included on BLM interpretive panels.”); DOI, BLM, RECORD OF DECISION FOR KASHA-KATUWE TENT ROCKS NATIONAL MONUMENT RESOURCE MANAGEMENT PLAN ROD-9 (2007) (“BLM seeks the Pueblo’s participation and involvement in public land use planning by personal invitation to agency activities and meetings. The Pueblo has agreed to identify and provide appropriate staff for planning and implementing the initiatives developed under the agreement.”).

83. Secretary of the Interior Order No. 3403, 2021 WL 5441929, at 1 (Nov. 15, 2021).

84. *Id.* at 2.

85. Antiquities Act of 1906, 16 U.S.C. §§431-433.

86. Proclamation No. 9558, 82 Fed. Reg. 1139 (Jan. 5, 2017). See also generally BEARS EARS INTER-TRIBAL COALITION, BEARS EARS: A NATIVE PERSPECTIVE ON AMERICA’S MOST SIGNIFICANT UNPROTECTED CULTURAL LANDSCAPE (2016), [https://www.bearscoalition.org/wp-content/uploads/2016/03/Bears-Ears-bro.sm\\_.pdf](https://www.bearscoalition.org/wp-content/uploads/2016/03/Bears-Ears-bro.sm_.pdf) (explaining the cultural and historical significance of the monument to the five tribes, the Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni peoples).

87. Proclamation No. 9558, *supra* note 86, at 1144.

88. Proclamation No. 9681, 82 Fed. Reg. 58081 (Dec. 8, 2017). President Trump modified the boundaries to add approximately 11,200 acres, but still excluded more than 1.1 million acres. *Id.* This was the first time a president ever used the Antiquities Act to reduce a national monument. See Proclamation No. 10285, *infra* note 91, at 57330. See Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining “the Public” in Public Land Law*, 48 ENV’T L. 316, 324-29 (2018) (suggesting that the Trump reductions were invalid).

89. Proclamation No. 9681, *supra* note 88, at 58085-86; Brian Maffly, *Feds Stack Bears Ears Advisory Group With Critics of Southern Utah Monument*, SALT LAKE TRIB. (Apr. 24, 2019), <https://www.sltrib.com/news/environment/2019/04/23/feds-stack-bears-ears/>.

90. Proclamation No. 9681, *supra* note 88, at 58086. See also BLM, BEARS EARS NATIONAL MONUMENT, RECORD OF DECISION AND APPROVED MONUMENT MANAGEMENT PLANS OF INDIAN CREEK AND SHASH JÁA UNITS 29 (2020) (explaining BLM’s attempts to collaborate with the five tribes after the Trump Proclamation and monument reduction).

91. Proclamation No. 10285, 86 Fed. Reg. 57321 (Oct. 15, 2021).

92. *Id.* at 57332.

93. Press Release, Bears Ears Inter-Tribal Coalition, The Bears Ears Inter-Tribal Coalition Recognizes President Biden’s Decision to Restore Monument as Step Forward (Oct. 7, 2021), <https://www.bearscoalition.org/wp-content/uploads/2021/10/BEITC-Restoration-Press-Release.pdf>. See also

Whether this model of co-management will successfully protect tribal cultural resources indefinitely is not yet clear, but it is currently among the best existing models.<sup>94</sup>

#### IV. Conclusion

Congress gave BLM a clear directive to prioritize designation and protection of ACECs, including cultural values. The Biden Administration gave BLM a specific order to include tribes in land management. Although BLM has to date failed to fulfill these mandates, the 30 by 30 initiative offers BLM an opportunity to rewrite its regulations to finally satisfy FLPMA's priority for ACECs while simultaneously fulfilling its commitments to protect tribal

cultural values and effectuate tribal management of conservation lands.<sup>95</sup>

As the nation's largest public land manager, BLM should adopt ACEC regulations in which the agency invites tribes to nominate ceded and other lands for ACEC designation to protect their cultural resources. The regulations should promise the development and implementation of appropriate governing structures, with the Bears Ears Commission as a model. Tribally nominated ACECs that include collaborative, protective management would certainly qualify as conservation lands, thus helping the Biden Administration more swiftly achieve the goals of its 30 by 30 initiative while honoring its existing commitments to collaborate with tribal governments.

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BEARS EARS INTER-TRIBAL COALITION, PROPOSAL TO PRESIDENT BARACK OBAMA FOR THE CREATION OF BEARS EARS NATIONAL MONUMENT 21-34 (Oct. 2015) (explaining the legal basis and implementation of collaborative management as the tribes initially proposed the monument).

94. See, e.g., *Launch of Sacred Places Project*, NATIVE AM. RTS. FUND (Jan. 21, 2022), <https://www.narf.org/sacred-places-project-update/> (announcing plan to engage in three-year project to “identify failings to protect Native sacred places in existing law and policy and suggest solutions grounded in Indigenous knowledge and developed by Native culture bearers”); Bailey Nickoloff, *Bison, Tribes, and Brucellosis in the Interagency Bison Management Plan*, 22 SUSTAINABLE DEV. L. & POL'Y 18, 19 (2021) (suggesting that tribes be allowed to hunt bison in Yellowstone National Park as a solution to land management disagreements in relation to brucellosis infecting cattle, bison overpopulation, and honoring of tribal treaties).

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95. See Ken Rait, *By Better Protecting Vast Public Lands, U.S. Could Advance Fight Against Climate Change*, PEW CHARITABLE TRUSTS (Dec. 7, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/12/07/by-better-protecting-vast-public-lands-us-could-advance-fight-against-climate-change> (calling on BLM to heed the ATNI resolution and use ACECs to protect the 250 million acres under its management to help achieve the conservation goals of 30 by 30 and mitigate climate change).