# **51 Rocky Mt. Min. L. Inst. 11-1 2005**

***The Foundation for Natural Resources and Energy Law Annual and Special Institutes (formerly Rocky Mountain Mineral Law Foundation Annual and Special Institutes)*  > *Annual Institutes* > *(2005) Volume 51* > *Chapter 11 (THE GROWING PHENOMENON OF CHALLENGES TO FEDERAL LAND USE PLANS IN NATURAL RESOURCES DEVELOPMENT LITIGATION)***

**THE GROWING PHENOMENON OF CHALLENGES TO FEDERAL LAND USE PLANS IN NATURAL RESOURCES DEVELOPMENT LITIGATION**

Ezekiel J. Williams

Faegre & Benson LLP

Denver, Colorado

Faegre & Benson LLP

Patton Boggs LLP

Denver, Colorado

Carolyn L. McIntosh

Faegre & Benson LLP

Patton Boggs LLP

Denver, Colorado

**§ 11.01 Introduction**

**Ý1¨ Importance of Federal Lands to Domestic Mineral Development**

Federal land use planning is a topic of wide scope given the vast public land holdings in the United States. The federal government owns about 29% of the 2.27 billion acres that make up the United States. Those 654 million federal acres are administered primarily by two agencies: the Department of Agriculture and the Department of the Interior. Within Agriculture, the Forest Service administers nearly 193 million acres of National Forest System lands, and within Interior, the Bureau of Land Management (BLM) administers another 262 million acres. The BLM administers a total of 700 million acres of subsurface mineral resources, which include minerals under public lands administered by other federal agencies and, on split estate lands, about 57 million acres of federal minerals under fee surface. [[1]](#footnote-2)1

Federal land use planning is a natural resources development issue because, as shown in Table 1, public lands provide significant supplies of natural gas, ***oil***, coal, and other mineral resources. In 2003, federal minerals accounted for about 32% of all fossil fuels produced in the United States. That production yielded more than $1 billion in onshore federal royalty payments to 36 states, including $503 million to Wyoming and $318 million to New Mexico. [[2]](#footnote-3)2

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Table 1. Fossil Fuel Production on Federal Lands, Percent of Total U.S. Production%[[3]](#footnote-4)3%n |  |  |  |  |  |
| Year | Crude ***Oil*** and Lease Condensate | Natural Gas Liquids | Natural Gas | Coal | Total Fossil Fuels |
| 1970 | 17.2 | 6.7 | 16.9 | 2.0 | 12.9 |
| 1980 | 16.2 | 1.8 | 30.2 | 11.2 | 18.8 |
| 1990 | 19.2 | 8.9 | 36.8 | 27.3 | 27.4 |
| 2003 | 18.6 | 16.1 | 32.2 | 41.2 | 32.1 |

The United States expects to meet a significant portion of its future demand for natural gas and coal from federal lands. Over the next 20 years, the Rocky Mountain region is projected to supply the largest increase in lower 48 onshore natural gas production, mostly from unconventional sources (tight gas, shale, coalbed methane). Rocky Mountain natural gas production is expected to increase from 3.7 trillion cubic feet in 2003 to 5.6 trillion cubic feet in 2025, an increase from 27% to 38% of total onshore production. [[4]](#footnote-5)4 And western coal production, which has grown steadily since 1970, is projected to grow during the same period. As a result of vast coal reserves in the Rocky Mountain region, slower growth in Appalachian production, the low sulfur content of western coals, and demand from new power plants, the federal government expects western states to produce fully 900 million (about 60%) of the 1,487 million tons of coal projected to be mined in 2025. [[5]](#footnote-6)5

Much of the natural gas, coal, and other energy resources produced over the next 20 years in western states will likely come from federal lands given the sizeable public land holdings in the region. The United States owns significant amounts of the minerals in Rocky Mountain states, including about 50%, 34%, 36%, 64%, and 28%, respectively, of the land and minerals in Wyoming, New Mexico, Colorado, Utah, and Montana. [[6]](#footnote-7)6

**Ý2¨ Federal Land Use Plans in Litigation Challenging Federal Mineral Development**

Federal land use plans will play a significant role in meeting the future demand for energy from public lands because natural resources development on federal lands is subject to land use planning. Under the Federal Land Policy and Management Act [[7]](#footnote-8)7 (FLPMA) and the National Forest Management Act [[8]](#footnote-9)8 (NFMA), the BLM and the Forest Service prepare programmatic land use plans to govern all site-specific actions on lands under their jurisdiction. The plans are intended to apply for a decade or more, until they are amended or revised. Once the BLM or Forest Service prepares a plan, the agencies use them to authorize later site-specific actions, such as ***oil*** and gas leasing or development. In fact, all activities authorized on BLM or Forest Service lands, including natural resources development projects, must comply with the applicable land use plan, including the land management designations, mitigation measures, and other conditions of approval prescribed in the plan for site-specific development. [[9]](#footnote-10)9

Federal land use planning is in its third decade. Many plans were prepared to apply for only 10 to 15 years, and some are near or past the end of their useful lives. Long-range forecasts are prone to error, particularly predictions of future production of coal, ***oil*** and gas, and other natural resources. [[10]](#footnote-11)10 Long-range predictions, however, are what federal land use plans seek to accomplish. It is a difficult exercise. Some federal land use plans prepared a decade or longer ago describe a future world that, in various degrees, never came to pass, or unfolded in unforeseen ways. Existing plans may fail to contemplate current resource development objectives such as coalbed methane and other unconventional gas resources; anticipate the environmental effects associated with development of those resources; [[11]](#footnote-12)11 foresee new uses of federal lands, such as for wind power; [[12]](#footnote-13)12 or identify geographic areas of heightened interest for ***oil*** and gas development.

The significance of federal land use plans will continue to rise as the nation looks to its federal lands to meet demands for energy. The successes and failures of federal land use plans in predicting future conditions have highlighted their role in natural resource development on public lands. Out-of-date plans may pose obstacles to development, or may not provide appropriate conditions of approval for site-specific development. The plans themselves have emerged as targets of litigation seeking to delay or prevent the use of federal lands for ***oil*** and gas development. [[13]](#footnote-14)13 And the BLM and Forest Service have stated that they intend to revise a majority of their plans over the next five years. [[14]](#footnote-15)14 Those plans (and the development conditions that they impose) will govern natural resource development projects for years to come and, if federal court challenges to recent plans are any guide, litigation over them is virtually certain. Like their predecessors, new plans may grow stale with the passage of time. And the land use plan revision process itself is expensive and time-consuming and may trigger litigation. Those controversies will likely continue.

**§ 11.02 Summary of Federal Land Use Planning**[[15]](#footnote-16)15

**Ý1¨ BLM Land Use Planning**

**Ýa¨ Federal Land Policy and Management Act**

Section 202(a) of FLPMA directs the Secretary of the Interior to "develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands . . . regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses." [[16]](#footnote-17)16 In developing and revising resource management plans (RMPs), the agency "shall" adhere to nine statutory criteria, including principles of "multiple use." [[17]](#footnote-18)17

**Ýb¨ Resource Management Plan Preparation**

The BLM promulgated extensive land use planning regulations in 1983. [[18]](#footnote-19)18 Pursuant to those regulations, the appropriate BLM field manager inventories resources within a field office area and, based upon issues and planning criteria identified in a public process, proposes a preferred RMP, and reasonable alternatives, for public review and comment in a draft environmental impact statement (EIS). The RMP alternatives: identify areas of critical environmental concern; allocate identified lands to various specific exclusive uses (e.g., wildlife habitat preservation); and allocate lands to multiple compatible non-exclusive uses (such as ***oil*** and gas leasing, off-road vehicle areas, timber production, developed and undeveloped recreation, and sensitive species recovery). [[19]](#footnote-20)19 The alternatives also propose site-specific conditions of approval, mitigation measures, stipulations, and other conditions that will apply to future individual actions, and specify development conditions that provide for compliance with state and federal environmental and pollution control laws. [[20]](#footnote-21)20

After evaluating public comments on the plan alternatives, the BLM field manager recommends a proposed RMP and final EIS to the state director who conducts "supervisory review" of the proposed plan. [[21]](#footnote-22)21 Once that review is complete, the state director either publishes the proposed plan and final EIS or returns it to the district manager for additional work. The state director's actual approval of the RMP in the form of a "concise public record of the decision" may not issue until 30 days after publication of the proposed plan and final EIS. [[22]](#footnote-23)22

The BLM follows essentially the same planning process to revise existing RMPs or to make significant amendments to them. [[23]](#footnote-24)23 The process to implement a non-significant amendment to an RMP is much simpler. [[24]](#footnote-25)24

**Ýc¨ Programmatic Nature of BLM Land Use Plans**

BLM RMPs are programmatic rather than site-specific. They describe present and future allowable uses and activities at a landscape level, identify agency goals and objectives, and seek to balance multiple uses. The RMP itself, however, does not typically authorize site-specific development. [[25]](#footnote-26)25 When development is proposed, the BLM reviews whether the proposal conforms to the applicable RMP, and ensures that such development complies with applicable plan provisions.

**Ýd¨ NEPA in BLM Land Use Planning**

By regulation, [[26]](#footnote-27)26 the BLM has determined that approval of an RMP requires preparation of an EIS under the National Environmental Policy Act [[27]](#footnote-28)27 (NEPA). The entire process is subject to extensive public notice, comment, and participation. [[28]](#footnote-29)28 An EIS for an RMP is also necessarily programmatic (rather than site-specific) because the RMP itself addresses activities and uses at the landscape level for an entire BLM field office area. The BLM reviews the site-specific effects of development not in the RMP EIS, but in a NEPA document prepared to consider proposed development (and alternatives). [[29]](#footnote-30)29 The environmental analysis in the development-stage NEPA document may be tiered to the analysis in the RMP EIS. [[30]](#footnote-31)29.1

**Ýe¨ Effect of BLM Land Use Plans**

Once an RMP is finalized, the BLM must adhere to it in making site-specific decisions. FLPMA provides that the BLM "shall manage the public lands . . . in accordance with the land use plans . . . when they are available. . . ." [[31]](#footnote-32)30 And the BLM land use planning regulations require that, following approval of an RMP, "Ýa¨ll future resource management authorizations and actions . . . shall conform to the approved plan." [[32]](#footnote-33)31

**Ýf¨ Protests of BLM Land Use Plans**

The state director's approval of an RMP (including a revised or amended RMP) is subject to protest to the Director of the BLM by "Ýa¨ny person who participated in the planning process" with an interest that may be "adversely affected." [[33]](#footnote-34)32 The written protest is due within 30 days of the Environmental Protection Agency's publication in the *Federal Register* of notice of receipt of the final EIS for the RMP. [[34]](#footnote-35)33 The BLM Director must "promptly" render a written decision on the protest which constitutes the "final decision of the Department of the Interior." [[35]](#footnote-36)34

**Ýg¨ Role of the Interior Board of Land Appeals**

The Interior Board of Land Appeals (IBLA) does not have authority to review a BLM decision to adopt or amend an RMP, or a protest of an RMP. [[36]](#footnote-37)35 The IBLA, however, has authority to review the BLM's implementation of an RMP, including, for example, whether the agency has complied with the applicable plan in authorizing site-specific action. [[37]](#footnote-38)36 The IBLA also may review whether the BLM satisfies its obligations under NEPA when it relies upon the RMP EIS to disclose the environmental effects of subsequent actions. [[38]](#footnote-39)37

**Ý2¨ Forest Service Land Use Planning**

**Ýa¨ National Forest Management Act**

Section 6 of NFMA, enacted in 1976, directs the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies." [[39]](#footnote-40)38 Forest Service land and resource management plans (LRMPs or Forest Plans) must provide for the "multiple use and sustained yield" of natural resources using a "systematic interdisciplinary approach" of the "physical, biological, economic, and other sciences" that takes environmental and commercial goals into account. [[40]](#footnote-41)39 Forest Plans identify lands that are not suitable for timber production, and must provide for compliance with statutory timber harvest and silvicultural guidelines. [[41]](#footnote-42)40 NFMA also requires Forest Plans to "provide for diversity of plant and animal communities. . . ." [[42]](#footnote-43)41 The Forest Service must revise Forest Plans "at least every fifteen years." [[43]](#footnote-44)42

**Ýb¨ Programmatic Nature of Forest Plans**

Like RMPs prepared by the BLM, Forest Plans are programmatic: they guide and control future management actions; identify desired conditions, goals, and objectives; and set forth specific standards and guidelines that must be complied with at the project level. Forest Plans, however, do not typically authorize site-specific action. [[44]](#footnote-45)43

**Ýc¨ 1982 Forest Service Planning Regulations**

Land use planning on National Forest System lands is in transition. The Forest Service promulgated initial regulations in 1979 and then extensive rules in 1982. [[45]](#footnote-46)44 The agency prepared over 150 Forest Plans under the 1982 regulations. [[46]](#footnote-47)45 Those LRMPs generated a substantial body of caselaw. [[47]](#footnote-48)46 Although the agency issued new regulations in 2005, the 1982 regulations will remain relevant during the lengthy transition period to the 2005 regulations. [[48]](#footnote-49)47

**Ýd¨ 2000 Forest Service Planning Regulations**

In late 2000, the Forest Service replaced the 1982 regulations with rules that identified "ecological sustainability" as the "first priority" of National Forest planning. [[49]](#footnote-50)48 The 2000 regulations were not embraced by the agency. Between 2000 and 2005, no unit of the National Forest System elected to use the 2000 planning rules to amend or revise a Forest Plan. [[50]](#footnote-51)49

**Ýe¨ 2005 Forest Service Planning Regulations**

On January 5, 2005, the agency withdrew the 2000 regulations and issued the current planning regulations. [[51]](#footnote-52)50 The 2005 regulations embody a "paradigm shift" under which the Forest Service aims "to think differently" about National Forest System land management based on its 25 years of experience. [[52]](#footnote-53)51 The agency intends Forest Plans to "be more strategic and less prescriptive in nature than under the 1982 planning rule," and easily adaptable to changing circumstances during the life of the plan. [[53]](#footnote-54)52 Forest Plans under the 1982 regulations set forth binding standards; new plans will include "more detailed descriptions of desired conditions, rather than long lists of prohibitive standards or guidelines or absolute suitability determinations" for future projects. [[54]](#footnote-55)53

The 2005 planning rules provide that the "overall goal of managing the National Forest System is to sustain the multiple uses of its renewable resources in perpetuity while maintaining the long-term productivity of the land." [[55]](#footnote-56)54 Sustainability includes three "interdependent elements: social, economic, and ecological." [[56]](#footnote-57)55 Forest Plans under the 2005 rules have five components: desired conditions, objectives, guidelines, land suitability identifications, and special areas. [[57]](#footnote-58)56

The preamble to the 2005 rules emphasizes that, in accord with NFMA, Forest Plans are programmatic and strategic, but typically do not approve or execute projects and activities. [[58]](#footnote-59)57 Projects and activities must be consistent with the Forest Plan and, to ensure plan consistency, the agency may modify the project or activity, reject the proposal, or amend the plan (including through an amendment limited to the project at issue). [[59]](#footnote-60)58

The 2005 rules are subject to litigation asserting that the Department of Agriculture adopted the rules in violation of the Administrative Procedure Act and NFMA. [[60]](#footnote-61)59

**Ýi¨ Adaptive Management**

The 2005 rules interject the concept of adaptive management into federal land use planning. [[61]](#footnote-62)60 This is intended to give the agency the ability to react swiftly to new information and unforeseen circumstances by amending the plan "at any time," [[62]](#footnote-63)61 or by making simple "administrative corrections" to plan projections or monitoring programs. [[63]](#footnote-64)62 Each National Forest unit is also required to develop and implement an environmental management system (EMS) that specifies procedures for identifying environmental conditions within the planning area, updating that information, and continually monitoring and measuring those conditions. [[64]](#footnote-65)63 The EMS must be based on the international consensus standard known as ISO 14001: Environmental Management Systems--Specification With Guidance for Use. [[65]](#footnote-66)64 The monitoring data that the EMS system generates are intended to be used to continually adapt a Forest Plan during the life of the plan.

**Ýii¨ Categorical Exclusion From NEPA for Forest Plans**

Under the 1982 planning regulations, the Forest Service prepared an EIS for every Forest Plan or significant amendment of a plan. [[66]](#footnote-67)65 At the site-specific level, the agency prepared a NEPA document that tiered to the environmental analysis in the Forest Plan EIS. [[67]](#footnote-68)66

In a sea change in federal land management, the Forest Service has discarded the two-stage NEPA compliance process that it (and the BLM) have followed for over 20 years in preparing land use plan EISs and site-specific project EISs or environmental assessments. Forest Plans are now categorically excluded from NEPA provided that the plan does not authorize site-specific action. [[68]](#footnote-69)67 The Forest Service will prepare a NEPA document at the project level, but will no longer prepare a programmatic EIS at the Forest Plan level. [[69]](#footnote-70)68 The 2005 rules, however, commit the Forest Service to considerable public involvement in preparing or revising a Forest Plan. [[70]](#footnote-71)69 And rather than require the development of multiple Forest Plan alternatives in a NEPA process, the 2005 rules direct the agency to use an "iterative approach" to develop and narrow plan options outside a NEPA process. [[71]](#footnote-72)70

**Ýiii¨ Objections to Forest Plans**

The 2005 rules replace the Forest Plan administrative appeal process under the 1982 regulations [[72]](#footnote-73)71 with a written notice and "objection" process. Prior to the agency's approval of a proposed Forest Plan, any person who submitted written comments during the planning process has 30 days to submit a written objection to the proposed plan. [[73]](#footnote-74)72 Federal agencies may not object. [[74]](#footnote-75)73 The Forest Service reviewing officer "must promptly render a written response to the objection" which amounts to final agency action by the Department of Agriculture. [[75]](#footnote-76)74

**Ýiv¨ Transition to the 2005 Regulations**

The 1982 regulations may be relevant for some time due to the gradual transition period under the new rules. National forests that initiated Forest Plan amendments or revisions prior to January 5, 2005, may elect to proceed under the 1982 regulations or the 2005 regulations. [[76]](#footnote-77)75 Starting January 5, 2005, a transition period began which, for each unit of the National Forest System, runs until the unit establishes an environmental management system under the new regulations, or January 7, 2008, whichever comes first. [[77]](#footnote-78)76 During that transition period, each National Forest System unit may elect to amend or revise its plan under the 1982 regulations or the 2005 regulations. Plan revisions and amendments initiated after the transition period must conform to the 2005 regulations. [[78]](#footnote-79)77

**§ 11.03 Status of Federal Land Use Planning**

**Ý1¨ Bureau of Land Management**

The BLM has prepared 162 RMPs nationwide. Those plans cover about 262 million acres of surface lands and 700 million acres of federal mineral estate. [[79]](#footnote-80)78 Some first-generation RMPs may be nearing the end of their useful lives. Many are over 15 years old. In response, Congress appropriated $19 million in 2001 and $7 million in 2002 for the BLM to update and amend its RMPs. [[80]](#footnote-81)79

The BLM projects that it will revise all 162 plans by 2013. In 2004, 80 RMPs were at some stage of the revision process. The agency projects that it will complete approximately 70 land use plan revisions between 2005 and 2008. [[81]](#footnote-82)80

**Ýa¨ Time Sensitive Plan Initiative**

In February 2002, the BLM identified 21 "time sensitive plans" (TSPs) as a top administrative priority for amendment. The BLM assembled a National Planning Support Team to shepherd those plans through the revision and amendment process. The TSPs were selected because they are critical to the development of energy resources on public lands, are responsive to litigation, or are subject to statutory deadlines. [[82]](#footnote-83)81 As of May 20, 2005, BLM had completed 14 of the 21 TSPs. [[83]](#footnote-84)82

**Ýb¨ Current RMPs Under Revision or Subject to Litigation**

Table 2 identifies significant BLM land use plans under revision or subject to litigation.

|  |  |  |
| --- | --- | --- |
| Table 2. BLM Resource Management Plans Under Revision or Subject to Litigation |  |  |
| BLM Field Office & State | Status | Major Issues%[[84]](#footnote-85)83%n |
| Roan Plateau, Colorado | Draft EIS & proposed RMP amendments released November 2004 | ***oil*** & gas leasing |
| Powder River/Billings, Montana | Final EIS & RMP amendments released April 2003; challenged in the District of Montana; subject to 9th Circuit injunction entered May 31, 2005 | ***oil*** & gas, coalbed methane |
| Farmington, New Mexico | Final EIS & RMP released October 2003; subject to litigation in the District of New Mexico | ***oil*** & gas, T&E species, other uses |
| Otero Mesa, New Mexico | Final EIS & RMP amendments released January 2005; subject to lawsuits filed by the State of New Mexico and by environmental groups in the District of New Mexico | ***oil*** & gas leasing, state opposition |
| Price, Utah | Draft EIS & proposed RMP released July 2004 | ***oil*** & gas, coalbed methane, recreation, wilderness |
| Vernal, Utah | Draft EIS & proposed RMP released January 2005 | ***oil*** & gas, T&E species, recreation |
| Pinedale, Wyoming | Draft EIS & proposed RMP due 2005 | ***oil*** & gas, T&E species |
| Buffalo, Wyoming | Final EIS & RMP released April 2003; subject to litigation in the Districts of Wyoming and Montana | ***oil*** & gas, coaled methane, sensitive species |
| Jack Morrow Hills, Wyoming | Final EIS & proposed RMP amendments released July 2004; BLM has not resolved protests as of July 2005 | ***oil*** & gas, wildlife |
| Rawlins/Great Divide, Wyoming | Draft EIS & proposed RMP released December 2004 | ***oil*** & gas, coaled methane, wildlife |

**Ý2¨ Forest Service**

The Forest Service has prepared 126 Forest Plans for 155 National Forests and 20 National Grasslands. [[85]](#footnote-86)84 As of August 2005, the Forest Service was revising 43 Forest Plans. [[86]](#footnote-87)85 Between 2005 and 2010, the Forest Service projects that it will initiate revisions on an additional 51 Forest Plans. By 2015, the Forest Service anticipates that it will complete more than 100 Forest Plans or revisions. [[87]](#footnote-88)87

**§ 11.04 Case Law**

Nearly four decades of litigation have generated a substantial body of land use planning case law, including decisions that address federal court jurisdictional issues, the standards that courts apply in reviewing agency compliance with NEPA, FLPMA, NFMA, the Wild and Scenic Rivers Act [[88]](#footnote-89)88 (WSRA), and the Endangered Species Act [[89]](#footnote-90)89 (ESA), and the enforceability of the plans themselves. With this developing body of law, the authors have identified a number of principles that have been established by the courts.

**Ý1¨ NEPA Review of Land Use Plans**

NEPA was signed into law on January 1, 1970, by President Richard M. Nixon. The law is concise (particularly relative to subsequently adopted environmental laws), merely three pages long. It has been characterized as "our basic national charter for protection of the environment." [[90]](#footnote-91)90 Yet, NEPA has been the subject of increasing criticism [[91]](#footnote-92)91 and has been the foundation for an estimated 1,500 lawsuits. Indeed, on the occasion of NEPA's 35th anniversary, the Environmental Law Institute (ELI) examined current trends in NEPA caselaw and found, *inter alia*, that the rate of new NEPA litigation has increased significantly in the last several years, [[92]](#footnote-93)92 with a large number of those cases challenging federal agency land use plans.

The ELI report evaluated all NEPA cases and found "Ýt¨here had been a general declining trend in the number of NEPA lawsuits filed annually, with a historical average of 108 filings per year between 1974 and 1997. However, the number of filed NEPA cases spiked to 137 in 2001 and 150 in 2002." [[93]](#footnote-94)93 Based upon data reported by the Council on Environmental Quality, the ELI report presented the following table: [[94]](#footnote-95)94

Against this increase in cases, the authors examined a number of holdings rendered in the context of challenges to federal agency land use planning documents and/or procedures and also found, qualitatively, that the speed of filing litigation following a decision, the number of issues raised, and the complexity of the cases all appear to be increasing. [[95]](#footnote-96)95 Several of the significant holdings are presented in this section.

In contrast to traditional NEPA challenges, when the authors compared the land use development cases, we found both qualitative and quantitative differences. First, we noted that the land use challenge cases are filed quickly after the initial decision, the issues raised are more numerous and more complex, procedurally and substantively. For example, in the instance of *NPRC* and the associated challenges to the Montana and Wyoming Powder River Basin RMPs, four cases were filed in Montana federal district court within days of the ROD being issued; NEPA, FLPMA, National Historic Preservation Act, and fiduciary responsibility issues were raised, and the case concerned challenges to the Wyoming ROD as well as the Montana ROD, resulting in a change of venue motion being granted and seven related cases proceeding in parallel, four in Montana and three in Wyoming federal district courts.

In addition, in view of the two-step programmatic land planning and site-specific project approval processes, the courts have upheld broader, less detailed NEPA analyses at the programmatic stage and have found generally that programmatic challenges to substantive (as opposed to procedural) statutory obligations are not ripe for review, particularly when the challenge invites the court to decide a matter of policy, which the courts routinely leave to the land planning agencies. For land planning, the required scope of alternatives analyses is defined by the "Purpose and Need" description of why the plan or plan amendment is being considered. Typically, the requirements for cumulative impacts analysis will be satisfied by including review of past, present, and reasonably foreseeable site-specific projects. At the site-specific stage, tiering to programmatic review documents is very common. Lastly, land planning agencies have broad discretion in deciding the geographic scope of their NEPA review.

The courts have uniformly accepted that there are "twin aims" of NEPA: (1) to ensure that federal agencies consider "every significant aspect of the environmental impact of a proposed action"; [[96]](#footnote-97)96 and (2) to "inform the public that Ýthe agency¨ has indeed considered environmental concerns in its decisionmaking process." [[97]](#footnote-98)97 In the context of developing or amending a land management plan, the federal agency must comply with NEPA. [[98]](#footnote-99)98 Under BLM regulations, "Ýb¨y definition, preparation of a ÝBLM land management plan¨ is a 'major Federal action significantly affecting the quality of the human environment,' and so categorically requires preparation of an EIS." [[99]](#footnote-100)99 If an agency's regulations do not categorically require preparation of an Environmental Impact Statement (EIS), the agency may first prepare an Environmental Assessment (EA) to make a preliminary determination whether the proposed action will have a significant environmental effect. [[100]](#footnote-101)100 If the EA establishes that the agency's action "may have a significant effect upon the human environment, an EIS must be prepared." [[101]](#footnote-102)101 "ÝA¨n EIS must be prepared if substantial questions are raised as to whether a project . . . may cause significant degradation to some human environmental factor. To trigger this requirement, a plaintiff need not show that significant effects *will in fact* occur. . . ." [[102]](#footnote-103)102

In evaluating the adequacy of an EIS, the courts employ a "rule of reason" to determine whether "the EIS contains a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences."' [[103]](#footnote-104)103 The court need not flyspeck the document [[104]](#footnote-105)104 and may not substitute its judgment for that of the agency. [[105]](#footnote-106)105

The Ninth Circuit explained the two-step NEPA process for developing and implementing a Forest Plan in *Idaho Conservation League v. Mumma*. [[106]](#footnote-107)106 At the initial stage, the federal agency proposes the land management plan, accompanied by appropriate draft and final EISs, including a detailed discussion of alternatives. If the plan is approved by the agency, the plan and final EIS are supplemented by the agency's record of decision (ROD). The direct implementation of the plan occurs at the second stage, when individual site-specific projects are proposed; the projects must be consistent with the adopted land management plan and must be evaluated in compliance with NEPA. [[107]](#footnote-108)107

Two bases on which courts have invalidated the NEPA process in the context of federal land planning are the agency's failure to consider a reasonable range of alternatives or its failure to adequately consider cumulative impacts. Under NEPA § 102(C), [[108]](#footnote-109)108 the EIS is a fundamental requirement and the courts have identified the alternatives analysis as the "heart" of the EIS. [[109]](#footnote-110)109

**Ýa¨ Alternatives**

In *Mumma*, plaintiffs challenged the adequacy of the alternatives analysis for Forest Plan amendments and the EIS for the Idaho Panhandle National Forest Plan. There, the Forest Service considered 12 alternative proposals and adopted a plan that included recommendation of four of 47 inventoried roadless areas for wilderness designation, rather than all 47, as desired by plaintiffs. The court determined that the Forest Service considered an alternative similar to that suggested by the plaintiffs, the plaintiffs had supported one of the proposed alternatives, and the computer program used by the Forest Service was designed to eliminate alternatives that would result in unacceptable environmental damage. Accordingly, the court rejected the challenge, holding that the Forest Service "was entitled to identify *some* parameters and criteria--related to Plan standards--for generating alternatives to which it would devote serious consideration." [[110]](#footnote-111)110

This principle--that the agency can set parameters for the alternatives analysis--has evolved to holdings that the purpose and need statement of the EIS will govern the adequacy of the alternatives analysis. The "purpose and need statement" is that portion of the EIS that defines "the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." [[111]](#footnote-112)111 Thus, the purpose and need define the range of alternatives to be considered by the agency. [[112]](#footnote-113)112 The agency must then look at reasonable alternatives that would achieve the EIS's statement of purpose and need. "The existence of reasonable but unexamined alternatives renders an EIS inadequate." [[113]](#footnote-114)113 However, the EIS "need not consider an infinite range of alternatives, only reasonable or feasible ones" [[114]](#footnote-115)114 that would accomplish the stated purpose and need. [[115]](#footnote-116)115 "Alternatives that are remote, speculative, ineffective, or inconsistent with basic policy objectives need not be considered. 'When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved."' [[116]](#footnote-117)116

The adequacy of the NEPA review in the final EIS for amendments to the Resource Management Plans in the Powder River and Billings Resource Areas of Montana was overturned in *Northern Plains Resource Council v. BLM*, [[117]](#footnote-118)116.1 based on the court's finding that an omitted phased development alternative (proposed by the state and the U.S. Environmental Protection Agency (EPA)) met the objectives of the purpose and needs statement, but was not considered. BLM stated the purpose of the EIS was "to analyze options for managing the environmental effects of CBM Ýcoal-bed methane¨ exploration, production, development, and reclamation" in Montana. Despite comments by EPA and the Montana Department of Fish, Wildlife & Parks that BLM consider phased development, BLM did not consider phased development of CBM resources as a full alternative. Rather, every alternative (other than the no-action alternative) considered only full-field development. The court concluded that "a phased development alternative is consistent with the purpose of the EIS . . . Ýand¨ BLM's failure to analyze a phased development alternative renders the EIS inadequate." [[118]](#footnote-119)117

**Ýb¨ Cumulative Impacts**

NEPA requires that "an environmental analysis for a single project consider the *cumulative impacts* of that project together with all past, present and reasonably foreseeable future actions." [[119]](#footnote-120)118 "Cumulative impact" is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." [[120]](#footnote-121)119

In ***Kern*** *v. U.S. Bureau of Land Management*, [[121]](#footnote-122)120 plaintiffs, Oregon Natural Resources Council (ONRC), challenged the Coos Bay Resource Management Plan, the adequacy of the accompanying EIS, and the adequacy of an EA for several proposed timber sales in the Sandy-Remote Area of the Coos Bay District. The plaintiffs were concerned that the BLM had not adequately reviewed the impact of a pathogenic root fungus on the Port Orford Cedar in the RMP or the site-specific timber sales. The Ninth Circuit found BLM's cumulative impacts review inadequate in both the EIS for the RMP and the timber sale-specific EA. The court held that "Ýc¨onsideration of cumulative impacts requires 'some quantified or detailed information;' . . . Ýit¨ must be more than perfunctory; . . . Ýand it¨ must be timely." [[122]](#footnote-123)121 Further, the court found that analysis of cumulative impacts is required for both an EIS and an EA, unless the EA is tiered to an EIS that has conducted an adequate cumulative impacts analysis.

The importance of analyzing cumulative impacts in EAs is apparent when we consider the number of EAs that are prepared. The Council on Environmental Quality noted in a recent report that "in a typical year, 45,000 EAs are prepared compared to 450 EISs. . . . Given that so many more EAs are prepared than EISs, *adequate consideration of cumulative effects requires that EAs address them fully*." [[123]](#footnote-124)122

The court noted that where there is no cumulative impacts analyis in an EIS, "the scope of the required analysis in the EA is correspondingly increased." [[124]](#footnote-125)123 Finding that BLM failed to analyze the effects of the proposed timber sales on spread of the fungus outside of the Sandy-Remote Area or the cumulative impacts of the Sandy-Remote timber sales when combined with sales outside of the area in the EIS for Coos Bay RMP (or the EA for the timber sales), the court found the EA for the Sandy-Remote Area timber sales deficient.

Discussing the "past" component of a cumulative impacts review, the courts have held that it may not be "conclusory" or provide "only generalized statement of impacts." [[125]](#footnote-126)124 Rather, consideration of past projects must adequately catalogue the past activities, any differences among the past projects and the proposed project, and how the past projects harmed the environment. [[126]](#footnote-127)125 For example, when considering a challenged timber sale under the 1995 Mendocino Forest Plan (governed in turn by the 1994 Northwest Forest Plan), the court in *Environmental Protection Information Center v. Blackwell*[[127]](#footnote-128)125.1 required a cumulative impacts analysis for the timber sale EA and found that the Forest Service's sole focus on how much old growth forest remained after past sales was not enough. The court also required analysis of how the past sales harmed the environment and the impact on areas of past harvesting outside of, but overlapping with, the proposed harvest area.

Furthermore, an adequate cumulative impacts analysis also requires a "hard look" at reasonably foreseeable future projects. Generally, this would encompass only projects that have been proposed. [[128]](#footnote-129)126 For future projects, the court acknowledged that the agency might not have complete information, but it must consider all of the information that it has. [[129]](#footnote-130)127 Moreover, it is likely that the analysis of reasonably foreseeable future projects will not be deemed sufficient when a project is identified and considered in one NEPA document, but not considered in another contemporaneous NEPA document for the same geographic area, prepared by the same agency. [[130]](#footnote-131)128

**Ý2¨ Supplemental NEPA Review**

In some circumstances, the EIS for a land management plan must be supplemented. Indeed, Council on Environmental Quality regulations require supplementation when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." [[131]](#footnote-132)129 While not every change requires a supplemental EIS, the agency must take a "'hard look' at the new information to assess whether supplementation might be necessary." [[132]](#footnote-133)130

"NEPA cases generally require supplemental statements when 'remaining government action would be environmentally significant."' [[133]](#footnote-134)131 Supplementation is only necessary if "there remains 'major Federal action' to occur, as that term is used in § 4332(2)(C)." [[134]](#footnote-135)132 An agency's decision to not supplement an existing EIS "should only be reversed when it is arbitrary and capricious." [[135]](#footnote-136)133 However, NEPA does not require public participation in the agency's decision whether to prepare a supplemental EIS. [[136]](#footnote-137)134

Several examples illustrate when NEPA supplementation has (and has not) been required in the federal land use planning context. In *Norton v. Southern Utah Wilderness Alliance* (*SUWA*), [[137]](#footnote-138)134.1 the Supreme Court considered the BLM's management of wilderness study areas (WSAs), balanced against the increase in use of off-road vehicles (ORVs). SUWA contended that BLM's failure to conduct an intensive ORV monitoring program violated the Henry Mountains RMP, which stated "the Factory Butte area 'will be monitored and closed if warranted."' [[138]](#footnote-139)135 Further, SUWA argued that evidence of increased ORV use constituted a significant new circumstance or information requiring preparation of a supplemental EIS. Rejecting that contention, the Supreme Court found there was no "major Federal action" remaining to occur because "approval of a land use plan is a 'major Federal action' requiring an EIS Ýbut¨, that action is completed when the plan is approved." After adoption of the RMP, "Ýt¨here is no ongoing 'major Federal action' that could require supplementation." [[139]](#footnote-140)136

By comparison, in *Portland Audubon Society v. Babbitt*, [[140]](#footnote-141)137 BLM's decision not to supplement timber management plans (TMPs) adopted between 1979 and 1983 with new information concerning the effect of those plans on the northern spotted owl was found to violate NEPA. The TMPs governed BLM's course of action over a 10-year period. BLM admitted that "experts believe that *any* further loss of habitat could severely compromise the ability of the owl to survive as a species." [[141]](#footnote-142)138 The court held that BLM's decision not to supplement the TMPs' EISs with new information relative to the effects of logging on the northern spotted owl was final agency action that could be challenged. Accordingly, the district court's injunction against further logging on BLM land with owl habitat pending preparation of a supplemental EIS was affirmed.

Similarly, the court in *Pennaco Energy, Inc. v. U.S. Department of the Interior*[[142]](#footnote-143)139 would have required BLM to supplement the NEPA review under the Buffalo RMP in connection with auctioning ***oil*** and gas leases in the Powder River Basin of Wyoming. There, BLM relied on the EIS for the Buffalo RMP and the Wyodak Draft EIS (DEIS) to auction three ***oil*** and gas leases for coalbed methane (CBM) development. The Buffalo RMP EIS did not analyze the impact of CBM development. The Wyodak DEIS addressed the potential environmental impact of CBM development, but was a *post*-leasing project level study. Stating that the required environmental impact analysis must be done before the agency makes an irreversible commitment of resources, which, in the fluid minerals program occurs at the point of lease issuance, the court remanded to the BLM to consider new information about the impacts of CBM development in connection with its leasing decision. [[143]](#footnote-144)140

**Ý3¨ Standing**

The Supreme Court's decision in *Lujan v. National Wildlife Federation (NWF)*[[144]](#footnote-145)141 addressed prudential standing to challenge public lands decisions under the Administrative Procedure Act (APA). [[145]](#footnote-146)142 There, the National Wildlife Federation (NWF) alleged that the BLM violated FLPMA and NEPA in its administration of the BLM's "land withdrawal review program." [[146]](#footnote-147)143 Because neither FLPMA nor NEPA provides a private right of action for violations, actions under both statutes are justiciable only under the APA, which contains two separate requirements, described by the Supreme Court as follows:

First, the person claiming a right to sue must identify some "agency action" that affects him . . . under the general review provisions of the APA, the "agency action" in question must be "final agency action." . . . Second, the party seeking review under § 702 must show that he has "suffered legal wrong" . . . or is "adversely affected or aggrieved" by that action . . . Ýand¨ the plaintiff must establish that the injury he complains of . . . falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. [[147]](#footnote-148)144

The Court noted that under a motion for summary judgment, the nonmoving party (in this case, NWF) has the burden of proving, with specific facts, that there is a genuine issue for trial. NWF sought to establish standing through affidavits from two of its members: Peterson and Erman. Since the Peterson affidavit said only that she used lands "in the vicinity" of the land affected by a BLM decision and the Erman affidavit was characterized by the Court as stating that he used "unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the ÝBLM's¨ action," [[148]](#footnote-149)145 the affidavits were not sufficient to establish standing. [[149]](#footnote-150)146

Moreover, the Court stated

the flaws in the entire "program"--consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well--cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members. [[150]](#footnote-151)147

The Ninth Circuit has taken a more liberal view of standing in challenges to federal land use plans. The decision in *Idaho Conservation League v. Mumma*[[151]](#footnote-152)148 includes a detailed review of standing requirements, but preceded the Supreme Court's ruling in *Lujan v. NWF*. In *Mumma*, the Ninth Circuit did not reference prudential standing under the APA, but rather addressed constitutional standing under the "case and controversy" requirement of Article III of the Constitution to impose three requirements: (1) injury in fact; (2) fairly traceable to the defendant's allegedly unlawful conduct; and (3) likely to be redressed by the requested relief. [[152]](#footnote-153)149

In *Mumma*, the plaintiffs alleged that the Forest Service violated NFMA and NEPA in recommending against wilderness designation in the Idaho Panhandle Forest Plan. The Ninth Circuit described the right claimed by the plaintiffs as the "right to have agencies consider all reasonable alternatives before making a decision affecting the environment, as required by NEPA." [[153]](#footnote-154)150 That the injury (the agency's failure to consider all alternatives) is threatened rather than actual was deemed sufficient, even if the impact could be mitigated at the site-specific, project level. "To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never." [[154]](#footnote-155)151 The plaintiffs also filed a number of affidavits of members naming specific areas visited, satisfying the requirement to show injury in fact.

To establish the second prong, the court held that "failure to make wilderness recommendations, purportedly as a result of statutory violations-- would not have occurred *but for* the Secretary's decision." [[155]](#footnote-156)152 Without examination of the third prong, the Ninth Circuit found that the plaintiffs had standing.

The plaintiffs' standing was challenged in *Resources Ltd., Inc. v. Robertson*. [[156]](#footnote-157)153 There, plaintiffs challenged the Flathead Forest Plan and associated forest-wide EIS, alleging violations of NEPA, NFMA, and the ESA, disputing the adequacy of the EIS review of a number of threatened or endangered species and the Forest Service's conclusion that implementation of the Forest Plan would not jeopardize the survival of listed species. The Forest Service contested plaintiffs' standing. The Ninth Circuit "rejected the Forest Service's argument that the two Supreme Court cases Ý*Lujan v. Defenders of Wildlife* and *Lujan v. NWF*¨ 'establish a new, stricter burden on plaintiffs to establish with specificity an injury-in-fact caused by a challenged government action."' [[157]](#footnote-158)154 Under the "zone of interest" test, the Ninth Circuit has also specifically found that because "Ýt¨he purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. . . . Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." [[158]](#footnote-159)155

**Ý4¨ Programmatic Challenges and Ripeness**

As discussed in § 11.04Ý3¨, *Lujan v. NWF* involved challenges to BLM's administration of its "land withdrawal review program." [[159]](#footnote-160)156 Fundamentally, the Supreme Court rejected the notion that the so-called "land withdrawal review program" could constitute an "agency action" within the meaning of the APA, much less a "final agency action." Equating the alleged action to a "weapons procurement program" of the Department of Defense or a "drug interdiction program" of the Drug Enforcement Administration, the Court held "respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." [[160]](#footnote-161)157 Therefore, the Court held that a programmatic level challenge would not ordinarily be "considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." [[161]](#footnote-162)158

The Ninth Circuit was slow to adopt this restrictive reading of ripeness requirements. In *Mumma*, the court found *Lujan v. NWF* "inapposite," noting a fundamental difference that plaintiff is "not challenging an entire program, or 'rules of general applicability,' but rather their implementation in a particular instance, the IPNF ÝIdaho Panhandle National Forest¨ roadless areas. The decision complained of--the asserted violation of NEPA and NFMA--was 'clear and final."' [[162]](#footnote-163)159 Similarly, in *Resources Ltd., Inc. v. Robertson*, [[163]](#footnote-164)160 the Ninth Circuit found the challenge to the Flathead Forest Plan and accompanying forest-wide EIS to be ripe for review, citing several other cases where it found programmatic or plan level challenges to be ripe.

In 1998, the Supreme Court again indicated a reluctance to entertain programmatic challenges to land use plans. In *Ohio Forestry Ass'n, Inc. v. Sierra Club*, [[164]](#footnote-165)161 the Sierra Club challenged a Forest Plan on the ground that it permitted too much logging and clearcutting in violation of NFMA. The Supreme Court remanded with instructions to dismiss. It explained the purpose of a ripeness requirement: "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way. . . ." [[165]](#footnote-166)162

Concluding that the Sierra Club challenge was not ripe, the Court stated that it considered "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." [[166]](#footnote-167)163 The Court found that the Forest Plan set logging goals but did not authorize the cutting of any trees, thus there was no hardship. Moreover, the Court rejected the Sierra Club's contention that the fact that one challenge to the Forest Plan would be cheaper and easier was "sufficient by itself to justify review in a case that would otherwise be unripe." [[167]](#footnote-168)163.1 In conclusion, the Court found that the requested review "threatens the kind of 'abstract disagreements over administrative policies' . . . that the ripeness doctrine seeks to avoid." [[168]](#footnote-169)164

The Court also distinguished between review of plans under NFMA and review of EISs under NEPA:

Congress has not provided for preimplementation judicial review of forest plans. . . . Nor does the Plan . . . resemble an environmental impact statement prepared pursuant to NEPA. That is because in this respect NEPA, unlike NFMA, simply guarantees a particular procedure, not a particular result. . . . Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper. [[169]](#footnote-170)165

This observation by the Court has been relied upon by subsequent courts to hold that substantive (as opposed to procedural) NFMA and FLPMA claims are not ripe in a programmatic challenge to a Forest Plan or RMP unless the Plan authorizes site-specific action. Procedural claims under NEPA (and other statutes), however, are generally ripe for judicial review in challenges to a Forest Plan or RMP.

The Ninth Circuit necessarily adopted the Supreme Court's reasoning, and by 1999 had applied it in *Wilderness Society v. Thomas*. [[170]](#footnote-171)166 There, the plaintiff alleged that the Forest Service violated NFMA in preparing a Forest Plan for the Prescott National Forest because the Plan identified aggregate acreage not "capable" of being used for grazing, rather than determining specific lands that were both "capable" and "suitable" for such use as purportedly required by NFMA. Finding that *Ohio Forestry* held that "a generic challenge to a forest plan untethered to any specific or concrete harm was not ripe for adjudication," [[171]](#footnote-172)167 the Ninth Circuit applied the three factors identified in *Ohio Forestry* and determined that the general challenge to the Forest Plan in count one of the complaint was not ripe, but that two other claims alleging injury from two grazing allotments were ripe because the Forest Plan authorized site-specific action.

In ***Kern*** *v. U.S. Bureau of Land Management*, [[172]](#footnote-173)168 though, the Ninth Circuit found plaintiffs' claim ripe for review. It based its holding on the distinction made by the Supreme Court in *Ohio Forestry*, comparing "ripeness" determinations where the challenge is raised under NEPA versus NFMA and FLPMA.

Defendants urge that *Ohio Forestry* forecloses our review of ONRC's NEPA challenge to the Coos Bay EIS because, like the plan in *Ohio Forestry*, the challenged plan in this case is an RMP. . . . However, this case differs from *Ohio Forestry* in a critical respect. The plaintiffs in *Ohio Forestry* alleged that the RMP violated NFMA. . . . They did not allege that the RMP violated NEPA. . . . Because the plaintiffs here bring a NEPA challenge to an EIS, rather than a NFMA (or a FLPMA) challenge to an RMP, they are able to show an imminence of harm to the plaintiffs and a completeness of action by the agency. . . .

A NEPA challenge to an EIS is fundamentally unlike a NFMA (or FLPMA) challenge to an RMP. As the court explained in *Ohio Forestry*, "NEPA, unlike the NFMA, simply guarantees a particular procedure. . . . ÝA¨ person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." [[173]](#footnote-174)169

*Norton v. Southern Utah Wilderness Alliance (SUWA)*[[174]](#footnote-175)169.1 provides an additional basis upon which certain programmatic federal land planning decisions may not be ripe for review. In *SUWA*, as described above in § 11.04 Ý2¨, SUWA sought declaratory and injunctive relief for BLM's failure to prevent damage to public lands in Utah caused by off-road vehicles (ORVs). The Court evaluated whether SUWA's claims challenged final agency action under the APA. The Court found that the federal agency action complained of must not only be "final agency action," but must also be discrete or specific action that the agency is legally required to perform. [[175]](#footnote-176)170 Concluding that the "limitation to discrete agency action precludes the kind of broad programmatic attack we rejected in *Lujan v. National Wildlife Federation*. . . . Ýt¨he limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law." [[176]](#footnote-177)171 Applying these principles, the Court determined that SUWA's first claim--that BLM violated FLPMA's requirement to manage wilderness study areas to avoid impairing their suitability for wilderness by failing to preclude ORVs--would not support judicial action under the APA. Though the requirement was mandatory, it allowed BLM a great deal of discretion in selecting methods to achieve the requirement and, therefore, lacked the specificity requisite for judicial review of agency action. "The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA." [[177]](#footnote-178)172

It appears settled that Forest Plans and RMPs are not justiciable under FLPMA, NFMA, and the APA at the programmatic level. [[178]](#footnote-179)173 NFMA and FLPMA claims are ripe for judicial review when the agency authorizes site-specific action because that is the first point that harm is tangible rather than theoretical, as theoretical harm cannot be assessed. [[179]](#footnote-180)174

**Ý5¨ Tiering**

As noted above in § 11.02, development of RMPs under FLMPA, or Forest Plans under the 1982 NFMA regulations, is a two stage process: a programmatic effort, including NEPA review, with site-specific project implementation, also accompanied by appropriate NEPA review. Council on Environmental Quality (CEQ) regulations allow "tiering" to avoid duplicating discussion of environmental impacts already addressed in another document, by incorporating that discussion by reference. [[180]](#footnote-181)175 Challenges to federal land use planning may focus on whether an EIS or EA properly relied on a particular document, analytical methodology, [[181]](#footnote-182)176 or previously completed NEPA review.

***Kern*** *v. U.S. Bureau of Land Management*[[182]](#footnote-183)177 addressed whether the EIS prepared for the Coos Bay RMP and the EA for several timber sales adequately evaluated the impacts of a fungus on Port Orford Cedar. The EIS and EA each only referenced BLM's Port Orford Cedar Management Guidelines, stating that if the Guidelines were followed, the spread of the fungus would be reduced and the impact to the cedar would not be significant. The Guidelines had never been subject to NEPA review and independent challenge of the Guidelines, alone, was rejected by the Ninth Circuit because their preparation and use did not constitute "final agency action" or "major federal action." [[183]](#footnote-184)178

The ***Kern*** court held that "tiering to a document that has not itself been subject to NEPA review is not permitted. . . ." [[184]](#footnote-185)179 The Ninth Circuit then evaluated the adequacy of the analysis in the Coos Bay District RMP EIS and the Sandy-Remote Area EA, without consideration of the Guidelines, and found both deficient. Moreover, although the EA was tiered to the EIS, a document that had undergone NEPA review, since the EIS was inadequate, the Ninth Circuit also determined that tiering to the EIS was impermissible. [[185]](#footnote-186)180

Several cases have challenged the adequacy of plans adopted to allow coalbed methane development, in part, based upon the alleged inadequacy of the underlying RMP EIS. In *Pennaco Energy, Inc. v. U.S. Department of the Interior*, [[186]](#footnote-187)181 Pennaco challenged the decision of the IBLA that additional NEPA review was required for BLM to auction three ***oil*** and gas leases where CBM development was likely. There, the BLM Buffalo Field Office prepared "Documentation of Land Use Conformance and NEPA Adequacy Worksheets (DNAs)" to memorialize that the RMP EIS had considered the environmental effects of leasing, rather than undertaking any additional NEPA review. The DNAs referenced two existing NEPA documents: the Buffalo RMP EIS and the Wyodak Coal Bed Methane Project Draft EIS. The IBLA found each to be deficient in considering the foreseeable effects of CBM development at the leasing stage. Specifically, the Buffalo RMP EIS did not evaluate CBM development and, although the Wyodak DEIS considered CBM development, it was prepared post-leasing and, therefore, did not consider alternatives to leasing.

**Ý6¨ Geographic Scope of Land Use Plan EISs**

It is not permissible for the agency to dissect a project into multiple segments in order to avoid preparing an EIS (when individual segments do not constitute a "major federal action" that would significantly affect the quality of the human environment) or an EA (when individual segments do not exceed a finding of no significant impact). Specifically, the implementing regulations require that two or more agency actions must be discussed in the same impact statement when they are "connected" or "cumulative" actions. [[187]](#footnote-188)182 When the proposed actions are "similar," the agency "may wish" to assess them in the same document and "should do so" when a single document provides the "best way to assess adequately the combined impacts of similar actions. . . ." [[188]](#footnote-189)183

The CEQ regulations summarized in the preceding paragraph give federal land planning agencies considerable discretion in deciding the scope of NEPA review. Nevertheless, it has become a basis for challenging land planning and site-specific implementation decisions that the scope of the NEPA review was not sufficient, and that the federal agency should combine one EIS or EA with another for a basin-wide or geographically-based EIS. In *Kleppe v. Sierra Club*, [[189]](#footnote-190)184 the Supreme Court rejected the argument that the Department of the Interior was required to prepare a programmatic, regionwide EIS to address coal leasing. Recent cases have also addressed the issue.

*Earth Island Institute v. U.S. Forest Service*[[190]](#footnote-191)185 arose from a challenge to the Forest Service's decision to prepare two separate EISs for timber sales and restoration projects in two adjacent forests that had been burned by wildfire. The August 2001 "Star Fire" burned thousands of acres in the Eldorado National Forest and the Tahoe National Forest. In response, the Forest Service proposed separate restoration projects in each National Forest, and prepared two separate EISs for those projects. Earth Island Institute sued, and argued that NEPA required a single EIS for the two forests and the two projects.

The Ninth Circuit analyzed the issue by examining whether the restoration projects were connected, cumulative, or similar actions under the CEQ regulations. The court applied an "independent utility" test to determine whether actions are "connected," under the first prong of 40 C.F.R. § 1508.25. [[191]](#footnote-192)186 "Where each of two projects would have taken place with or without the other, each has 'independent utility' and the two are not considered connected actions." [[192]](#footnote-193)187 Finding that the two projects each generate revenue, implement distinct forest conservation measures, and would go forward independently, the Ninth Circuit held that the restoration projects were not connected.

The court then examined whether the cumulative impact of the two projects on the spotted owl necessitated a single EIS. The Ninth Circuit identified the "cumulative impact" criteria it applied to hold that multiple timber sales must be addressed in a single EIS, to include: a single project, "announced simultaneously," where the multiple projects are "reasonably foreseeable," and are "located in the same watershed." [[193]](#footnote-194)188 In determining that the two restoration projects were not "cumulative," the court found that the boundary between the sale areas predated the decision, the sales and analyses proceeded on different schedules, and nothing in the record suggested that the Forest Service intended to segment its review.

The court then turned to plaintiffs' argument that the two projects were "similar." The Ninth Circuit agreed that they were, but held that "the regulations actually accord the agency more deference for 'similar actions' than the other two categories Ýconnected or cumulative actions¨." [[194]](#footnote-195)189 The Ninth Circuit cited differences in prior administrative boundaries, patterns of ownership, patterns of destruction, schedules for EIS development, and supervisory personnel as warranting two EISs. [[195]](#footnote-196)190

*Northern Plains Resource Council v. BLM*[[196]](#footnote-197)190.1 addressed whether BLM was required to prepare a single EIS for RMP amendments in two states. There, plaintiffs contended that the BLM should have prepared a single, basin-wide EIS for RMP amendments in Montana and Wyoming for CBM development, rather than a separate EIS for each state. NPRC argued that "CBM development will have cumulative impacts on air quality, surface water quality, groundwater resources, and wildlife that will cut across the state lines dividing the Powder River Basin." [[197]](#footnote-198)191 The court did not find this contention persuasive, stating that "agencies may consider factors in addition to geographic area." [[198]](#footnote-199)192 Quoting *Kleppe v. Sierra Club*, [[199]](#footnote-200)192.1 the court found that there may be other appropriate reasons not to prepare a single EIS. "Even if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements." [[200]](#footnote-201)193 Citing *Earth Island*, the court stated that the "key question" is "whether 'the record suggests that the agency *intended* to segment review to minimize cumulative impact analysis."' [[201]](#footnote-202)194 Finding no such evidence, and in light of practical considerations that made separate EISs reasonable, the court upheld the BLM's decisions to prepare separate, coordinated EISs. [[202]](#footnote-203)195

Agency discretion, however, is not unbounded. When multiple timber sales were announced together, were in the same watershed, and the agency intended to segment the projects to avoid NEPA review, or the cumulative impacts analysis was inadequate, courts have set aside agency decisions to prepare multiple NEPA documents. [[203]](#footnote-204)196

**Ý7¨ "Stale" Land Use Plans, EISs, or Data Upon Which They Rely**

Federal land plans or land planning decisions that rely on outdated information may be subject to challenge and overturned for failure to incorporate new information or failure to prepare supplemental NEPA review.

In *Portland Audubon Society v. Babbitt*, [[204]](#footnote-205)197 the Ninth Circuit held that the Forest Service's decision not to prepare a supplemental EIS was arbitrary and capricious and invalidated the site-specific timber sale decisions at issue. Portland Audubon Society sought declaratory judgment that BLM's continued timber sales from spotted owl habitat without a new EIS that analyzed the effects of logging on the owl violated NEPA, and requested an injunction preventing future sales until the EIS was completed. BLM raised two arguments: (1) that the timber management plans (TMPs) prepared between 1979 and 1983 met NEPA requirements and were sufficient; and (2) that legal developments after 1987 relieved BLM from any obligation to prepare a new EIS. The TMPs governed the course of BLM's action for a 10-year period. The court found that the scientific evidence available to the Secretary by 1987 "raised significant new information relevant to environmental concerns" and that "BLM admits that experts believe that any further loss of habitat could severely compromise the ability of the owl to survive as a species." [[205]](#footnote-206)198 Although Congress had temporarily relieved the BLM from compliance with environmental laws through enactment of section 314 of the Department of Interior and Related Agencies Appropriations Act of 1989, the court found that relief had expired and, in any event, required BLM to proceed with new plans. [[206]](#footnote-207)199

*Pennaco Energy, Inc. v. U.S. Department of the Interior*[[207]](#footnote-208)200 also stands for the proposition that a federal agency cannot continue to make decisions based upon outdated (and incomplete) information. There, the Tenth Circuit upheld IBLA's conclusion that BLM could not rely upon the Buffalo RMP EIS to satisfy its NEPA obligation at the ***oil*** and gas leasing stage when the administrative record established that CBM development was producing significant environmental effects beyond those considered in the EIS.

The courts have also identified outdated data as a valid basis for challenging the adequacy of a cumulative impacts review or, fundamentally, the adequacy of the NEPA determination of environmental impacts. For example, in *Lands Council v. Powell*[[208]](#footnote-209)200.1 in connection with NEPA review for a timber sale proposal, the Forest Service relied on a survey of Westslope Cutthroat Trout habitat that was 13 years old. Although the Forest Service had conducted fish count surveys within the last six years, the habitat information was deemed "stale." As such, the court concluded that the Forest Service could not make an accurate cumulative impact assessment of the project's impacts on the habitat and population of the trout. [[209]](#footnote-210)201 The Forest Service was further found in violation of NFMA for using an old growth stand management database that was 15 years old, resulting in a flawed analysis of impacts on old growth dependent species. [[210]](#footnote-211)202

**Ý8¨ Land Use Plan Implementation and Amendment**

Under FLPMA, once a RMP has been adopted, BLM follows the same planning process to revise or significantly amend the RMP. [[211]](#footnote-212)203 However, FLPMA "does not . . . establish a clear duty of when to revise the plans, nor does it create a duty to cease actions during such revisions." [[212]](#footnote-213)204 Such a requirement "would seriously impair BLM's ability to perform its management responsibilities." [[213]](#footnote-214)205 Similarly, under NFMA, Forest Plans must be revised once every 15 years and can be amended at the regional forester's discretion. [[214]](#footnote-215)206

Plan amendments can (and do) occur concurrently with the governing agency's consideration of site-specific project proposals. When a site-specific action is being challenged and the agency is concurrently engaged in amendment of the relevant land use plan, plaintiffs often cite the land plan amendment process as a basis to stop the site-specific action. Except in those cases where the land plan is "stale," as discussed in the preceding section, the courts generally hold that the site-specific action may proceed; a moratorium on site-specific action is not warranted. A few illustrative examples follow.

In *Sierra Club Legal Defense Fund, Inc.*, [[215]](#footnote-216)207 the IBLA examined a challenge to a Decision Record and Finding of No Significant Impact (DR/FONSI) on the ground, *inter alia*, that it was based on an outdated management framework plan and should not have proceeded until the Management Framework Plan (MFP) was amended. There, BLM approved a sale of over 7,500 acres of undeveloped public land to the City of North Las Vegas, Nevada (CNLV). The BLM's 1983 MFP categorized the property for disposal. The EA that BLM prepared in connection with the proposed sale acknowledged that the MFP was inadequate. Consequently, BLM had begun preparing a new RMP and EIS (Stateline RMP/EIS). The IBLA found BLM's DR/FONSI unreasonable because of BLM's failure to incorporate mitigation measures upon which its analysis of environmental impacts relied. However, the IBLA rejected Sierra Club's contention that BLM could not proceed until the MFP was amended.

There is no dispute that the proposed sale partially implements the goals and objectives of the 1983 Clark County MFP. That MFP is the currently applicable land use plan for the area and will remain so until it is superceded upon completion of the Stateline RMP/EIS. Acceptance of appellants' position that once BLM has decided to prepare a new land use plan for an area, it must suspend action in conformance with the prevailing plan would seriously impair BLM's ability to perform its management responsibilities. We therefore reject this challenge to BLM's decision. [[216]](#footnote-217)208

Similarly, in *ONRC Action v. Bureau of Land Management*, [[217]](#footnote-218)209 the Ninth Circuit rejected plaintiffs' contention that when RMP revisions are underway, the CEQ regulations prohibit an agency from taking any actions that would significantly impact the environment. There, ONRC claimed that BLM violated NEPA and FLPMA by failing to halt various land transactions, logging permits, and juniper extraction pending completion of an EIS for a land use plan. ONRC argued that when an EIS is pending, NEPA imposes a duty to stop actions that adversely impact the environment and that FLPMA requires BLM to base its land management on up-to-date land use plans. [[218]](#footnote-219)210 The Ninth Circuit found that FLPMA does not "provide a clear duty to update land management plans or cease actions during the updating process." [[219]](#footnote-220)211 Moreover, the court upheld the existing RMPs as sufficient under NEPA. [[220]](#footnote-221)212

A corollary question arises as to the extent of NEPA review required in view of an amendment to a plan or a site-specific action. For example, in *Hammond v. Norton*, [[221]](#footnote-222)213 the Forest Plan for the Manti-La Sal National Forest allowed for construction, operation, and maintenance of ***oil*** and gas pipelines. Nevertheless, plaintiffs challenged the Forest Service's amendment of the plan to re-route the existing pipeline utility corridor to avoid a landslide-prone area and thereby minimize expected impacts. The Forest Service determined the re-routing amendment to be "non-significant" and approved it, without further NEPA review. The court upheld the Forest Service's determination. [[222]](#footnote-223)213.1

**Ý9¨ Standard of Judicial Review of Policy Decisions in a Land Use Plan**

Courts review an agency's compliance with NEPA, FLPMA, and NFMA under the APA. [[223]](#footnote-224)214 Agency action is only to be set aside if the agency's actions, findings, and conclusions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [[224]](#footnote-225)215 Federal land use plans often reflect policy decisions by federal agencies. Courts are deferential to those decisions, and hesitate to disturb them.

For example, in *Wilderness Society v. Thomas*, [[225]](#footnote-226)216 plaintiffs challenged the Forest Service's failure to determine that lands "capable" of being used for grazing were also "suitable" for grazing in connection with the Forest Service's adoption of a Forest Plan. Applying the APA standard of review, the court found that the Forest Plan properly balanced multiple uses. [[226]](#footnote-227)217 "Reasonable minds may differ in selecting the best alternative. However, the agency's assessment is not one we will judicially disturb . . . the Forest Service complied with the NFMA in adopting the Plan. . . ." [[227]](#footnote-228)218

**Ý10¨ Enforcement of Land Use Plans, Judicial Remedies, and Injunctive Relief**

*Norton v. SUWA* establishes limits on the ability of the judiciary to interfere with, or enforce a federal land use plan. Citing FLPMA and its implementing regulations, the Court described federal land use plans as being "designed to guide and control future management actions." [[228]](#footnote-229)219 Affirming the requirement that "Ýa¨ll future resource management authorizations and actions . . . and subsequent more detailed or specific planning, shall conform to the approved Ýland use plan¨," [[229]](#footnote-230)220 the Court nevertheless rejected SUWA's claim that BLM failed to comply with its land use plans. The RMP at issue stated that a geographic area "will be monitored and closed if warranted." [[230]](#footnote-231)221 Noting that informal monitoring had occurred, the Court found that FLPMA and its implementing regulations "prevent BLM from taking actions inconsistent with the provisions of a land-use plan" but declined to find that a plan statement about future action was a binding commitment that could be compelled under the APA. [[231]](#footnote-232)222 Rather, the Court held that "a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them. . . . We therefore hold that the Henry Mountains plan's statements to the effect that BLM will conduct 'use supervision and monitoring' . . . like other 'will do' projections of agency action set forth in land use plans--are not a legally binding commitment enforceable under § 706(1)." [[232]](#footnote-233)223

*Norton v. SUWA* appears to set aside existing precedent ruling that "will do" commitments in land use plans are judicially enforceable. In *Sierra Club v. Martin*, [[233]](#footnote-234)224 a portion of the dispute centered on whether the applicable Forest Plan required the Forest Service to obtain specific population data concerning certain species prior to authorizing a timber sale. The relevant Forest Plan explicitly imposed such a monitoring requirement. Accordingly, the court ruled that the agency violated the Forest Plan and reversed the district court's grant of summary judgment for the Forest Service.

In federal land planning cases where a violation is found, the question arises as to whether the illegal action of the federal agency can be enjoined and, if so, the scope of the injunction. [[234]](#footnote-235)225 The court in *Environmental Protection Information Center v. Blackwell (*EPIC) examined in detail the court's authority to order injunctive relief under NEPA and NFMA. It concluded "unless a statute restricts a court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized." [[235]](#footnote-236)226 The Ninth Circuit has specifically determined that "there is nothing in NEPA to indicate that Congress intended to limit Ýa¨ court's equitable jurisdiction." [[236]](#footnote-237)227 Noting that the Ninth Circuit has not squarely addressed the equitable powers of the court under NFMA, "it has proceeded under the assumption that claims under the statute encompass injunctive relief." [[237]](#footnote-238)228

The *EPIC* court articulated the "well-established principles" governing awards of injunctive relief:

&bull; The basis for such relief is irreparable injury and inadequacy of legal remedies.

&bull; The court must balance the competing claims of injury and must consider the effect on each party of granting or withholding the requested relief.

&bull; In the context of environmental claims, absent "unusual circumstance," injunctive relief is the appropriate remedy for a violation of either NEPA or NFMA. [[238]](#footnote-239)229

In federal land use planning cases, however, the balance may tip in favor of injunction when environmental harm is alleged. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. . . . If environmental injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." [[239]](#footnote-240)230

For example, in balancing the harms, even when the Forest Service raised issues about heightened risk of disease and fire if the court were to grant the injunction, the court in *EPIC* did not consider that risk to constitute "unusual circumstances" or warrant denying the injunction, in view of the Forest Service's failure to comply with NEPA. [[240]](#footnote-241)231 Often serious environmental concerns are arrayed against substantial commercial interests. [[241]](#footnote-242)232 In these circumstances, the courts will generally "craft . . . a fair and balanced injunction . . . Ýto provide¨ for interim relief for the environment pending compliance with NEPA Ýor NFMA¨." [[242]](#footnote-243)233 In some cases, the court has allowed the parties to negotiate and provide recommendations concerning the scope of the injunction to avoid undue economic harm. [[243]](#footnote-244)234

**Ý11¨ Endangered Species Act Issues**[[244]](#footnote-245)235

Land use plan challenges that include alleged violations of the ESA can be "show stoppers" and, as such, ESA claims are frequently used in conjunction with challenges to the adequacy of the environmental review of a plan, plan amendment, or approval of a site-specific project. The requirements for ESA compliance are complex for federal agencies. Section 7 of the ESA requires each federal agency, in consultation with the Secretary of the Interior, to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." [[245]](#footnote-246)236 If the federal agency that is evaluating a proposed site-specific project identifies a potential impact on a threatened or endangered species, it must engage in formal consultation with the Fish and Wildlife Service (FWS).

It is then the FWS's responsibility to evaluate the status of the listed species and its critical habitat and to develop a Biological Opinion (BiOp) as to whether the proposed action is likely to jeopardize the continued existence of the listed species. The BiOp must include a summary of the information on which the opinion is based, a detailed discussion of effects of the proposed action, and the FWS's opinion of likely jeopardy. Further, if the FWS determines the proposed project is likely to jeopardize the continued existence of the listed species or its habitat, the FWS must propose reasonable and prudent alternatives to avoid that jeopardy. [[246]](#footnote-247)237

ESA arguments are sometimes combined with the claim that NFMA's requirement to "ensure species diversity and viability" imposes a heavy burden on the Forest Service to collect population data and demonstrate absence of adverse impacts to sensitive species populations. For example, in *Sierra Club v. Martin*[[247]](#footnote-248)238 the Forest Service disputed an alleged obligation to obtain and maintain sensitive species population data. There, the court acknowledged that the regulations "make no such demand," [[248]](#footnote-249)239 but found that the relevant Forest Plan included such a requirement. Similarly, in *Utah Environmental Congress v. Bosworth*, [[249]](#footnote-250)240 the majority provided a detailed evaluation of the population data requirements imposed by the relevant Forest Plan, but noted that the regulations were changed such that, at the time of the ruling, the regulations did not require the Forest Service to obtain population data, but those in force at the time of the agency's decision (which governed) did. [[250]](#footnote-251)241

In view of changes in NFMA implementation regulations between 1982 and 2005, a trend away from detailed population data is anticipated. Until Forest Plans prepared under the 1982 regulations have been amended and superseded, land plan challenges may continue to raise this issue, but in declining numbers.

**§ 11.05 Administrative Developments**

The two principal federal land management agencies have responded differently to the need for current and adaptable land use plans for public lands, and the rising tide in litigation. The BLM has stepped up efforts to revise existing plans on a timely basis and has issued administrative policies to resolve certain issues. Those actions represent incremental adjustments to BLM resource management planning but do not amount to the dramatic changes put into place by the Forest Service.

**Ý1¨ Bureau of Land Management**

The BLM has addressed the need for adaptable and current RMPs by devoting staff and funds to revise and amend existing land use plans through its Time Sensitive Plan initiative. [[251]](#footnote-252)242 That effort has raised the profile of BLM land use planning, and indicates that the agency is attempting to update its plan inventory. Unlike the Forest Service, which has issued new planning regulations, the BLM has made comparatively minor changes to its administrative policies and regulations.

**Ýa¨ Instruction Memoranda**

The BLM has issued a number of Instruction Memoranda (IM) to address issues in amending, revising, and implementing RMPs and to provide common guidance for BLM field offices. Recent IMs address: documenting land use plan conformance and relying on plan EISs in implementing plan decisions; [[252]](#footnote-253)243 continuing ***oil*** and gas leasing while plan revisions are underway; [[253]](#footnote-254)244 considering wilderness characteristics in land use plan revisions and amendments; [[254]](#footnote-255)245 making travel management and off-highway vehicle decisions in land use plans; [[255]](#footnote-256)246 integrating ***oil*** and gas inventory results in land use plans; [[256]](#footnote-257)247 and plan protest procedures. [[257]](#footnote-258)248

**Ýb¨ Land Use Planning Regulation Amendments**

The BLM revised its planning regulations in March 2005 to define the status of cooperating agencies in the planning process, and to require the BLM to invite eligible federal agencies, state and local governments, and federally recognized Indian tribes to participate as cooperating agencies. [[258]](#footnote-259)249 Those amendments seek to involve local interests in the development of RMPs and plan alternatives, and to expedite the process. [[259]](#footnote-260)250

**Ýc¨ Interior Board of Land Appeals Decisions**

The Interior Board of Land Appeals (IBLA or Board) has authority to review the BLM's implementation of its plans, and authority to review the agency's NEPA compliance in administering its plans. The Board does not, however, have authority to review the BLM's preparation or revision of an RMP. [[260]](#footnote-261)251 Subject to that limitation, the Board has issued recent decisions significant to planning and natural resources development on BLM lands.

In *Wyoming Outdoor Council*, [[261]](#footnote-262)252 three environmental groups (collectively, WOC) appealed to the IBLA a BLM state director decision dismissing their protest of an ***oil*** and gas lease sale within the Pinedale Resource Area. WOC argued that the BLM could not issue lease parcels because the number of ***oil*** and gas wells identified in the reasonably foreseeable development (RFD) scenario in the EIS for the applicable RMP had been exceeded. [[262]](#footnote-263)253 WOC asserted that the numerical RFD scenario in the RMP EIS is a substantive land use restriction that, once exhausted, prohibits further leasing and development until it is amended or revised in a land use plan amendment or revision. [[263]](#footnote-264)254

The Board rejected WOC's characterization of the RFD scenario. It explained that the RFD scenario is a NEPA analysis "tool" which "serves as an analytical baseline for identifying and quantifying direct, indirect, and cumulative impacts. . . ." [[264]](#footnote-265)255 The IBLA noted that the "RFD scenario admittedly plays a vital role in land use planning and impacts analysis, but it is not an RMP." [[265]](#footnote-266)256 Because the BLM had already begun revising the RMP at issue, however, the IBLA stopped short of determining whether the RFD scenario poses any restrictions. [[266]](#footnote-267)257

In another appeal brought by the Wyoming Outdoor Council, the IBLA determined in 2002 that the BLM may not rely upon an existing RMP EIS to support an ***oil*** and gas leasing decision if, at the time of leasing, it is foreseeable that development will produce significant environmental effects that were not already disclosed in the EIS. [[267]](#footnote-268)258 The appeal arose from a February 2000 lease sale by the Buffalo Field Office in the Powder River Basin. At the time, CBM development was booming in the area, and the lessee's stated objective was to develop CBM wells. The Wyoming Outdoor Council appealed the lease sale to the IBLA. It argued that the BLM could not rely upon its 1985 Buffalo RMP EIS to fulfill its NEPA obligations because the EIS considered only conventional ***oil*** and gas development but did not consider the environmental effects from CBM development. [[268]](#footnote-269)259

The IBLA made two rulings. First, it determined that the BLM could not rely upon the Buffalo RMP EIS to issue leases where CBM development is likely because, at the time of the lease sale, CBM development within the Wyoming Powder River Basin was associated with a "magnitude of water production" and "critical air quality issues" that were not considered in the EIS. [[269]](#footnote-270)260 Second, the IBLA concluded that the BLM could not rely at the leasing stage upon a NEPA document prepared for site-specific CBM development because a development NEPA document does not consider reasonable alternatives available in a leasing decision. [[270]](#footnote-271)261 The Tenth Circuit upheld the IBLA's decision. [[271]](#footnote-272)262

In two subsequent appeals, the IBLA determined that its 2002 ruling about the Buffalo RMP EIS in *Wyoming Outdoor Council* does not establish a categorical rule that requires the BLM to prepare a NEPA document to evaluate the effects of CBM development within every field office area. In the first appeal, involving a lease sale by the Rawlins, Wyoming, Field Office, the IBLA ruled that even though, like the Buffalo RMP EIS, the Rawlins RMP EIS considered the environmental effects associated with conventional ***oil*** and gas development, the BLM could rely upon it to support a leasing decision where CBM development is likely. [[272]](#footnote-273)263 The Board explained that the RMP EIS contains a sufficient pre-leasing NEPA analysis for CBM development because the "impacts for CBM exploration and development for those parcels would generally not be different from the impacts from conventional gas exploration and development." [[273]](#footnote-274)264 The IBLA based its conclusion on a factual memorandum that the BLM prepared after the lease sale which concluded that the effects associated with CBM development in the Rawlins Field Office area are less than or equivalent to those produced by conventional ***oil*** and gas development.

And in the second appeal, *Western Slope Environmental Resource Council*, [[274]](#footnote-275)265 the IBLA ruled that unless there is "objective proof" that CBM development will produce significant environmental effects beyond those considered in an RMP EIS for conventional ***oil*** and gas development, the BLM can rely upon the EIS to support leasing where CBM development is likely. The IBLA explained that the potential for environmental effects from CBM development in "each basin is different" and that it is erroneous to "attempt to extrapolate impacts associated with CBM development in other basins. . . ." [[275]](#footnote-276)266 The appeal challenged ***oil*** and gas lease sales within the Piceance Basin of Colorado that were conducted under the Uncompahgre Basin RMP and EIS. The BLM and an industry intervenor submitted evidence that the environmental effects of CBM development in Wyoming's Powder River Basin do not characterize Piceance Basin development. The IBLA agreed, and rejected the appeal. [[276]](#footnote-277)267

**Ý2¨ Forest Service**

Rather than make incremental changes to its planning mechanisms, the Forest Service's 2005 regulations aim to fundamentally change forest planning, by eliminating the preparation of a plan-level EIS and making Forest Plans readily adaptable to changing conditions through principles of adaptive management and environmental management systems. [[277]](#footnote-278)268 The Forest Service seeks to reduce the administrative burdens of preparing and revising plans and instead to focus on plans that are flexible at the project level and that allow consideration of evolving scientific information and changing conditions. [[278]](#footnote-279)269 It is too early to assess the success of the 2005 regulations, and the practical effect of the agency's self-described "paradigm shift" in forest planning may be tempered by the gradual transition period under the new regulations. [[279]](#footnote-280)270 It is also uncertain whether the agency has the staff and funds to undertake the forest-wide monitoring required by its adaptive management program and environmental management systems.

**§ 11.06 Legislative Developments**

**Ý1¨ Congressional Review of NEPA**

House Resource Committee Chairman Richard Pombo (R-CA) and Ranking Member Nick Rahall (D-WV) announced in April 2005 that the Committee had created a bipartisan Task Force on Improving the National Environmental Policy Act (NEPA) [[280]](#footnote-281)271 to conduct a series of field hearings around the country, assess the impact of NEPA on affected communities and organizations, report their findings, and propose reforms to modernize NEPA. [[281]](#footnote-282)272 Of the six field hearings scheduled, three have been held. [[282]](#footnote-283)273 Though the Task Force's focus is not strictly on federal land planning, its recommendations may include mandatory time limits, criteria for standing, streamlining procedures for programmatic planning activities, compensation adjustments for unsuccessful site-specific project proposals, and litigation bond requirements, all of which would modify current land planning procedures and could reduce associated litigation.

**Ý2¨ NEPA Streamlining**

Improved NEPA approaches that could reduce land use planning-related NEPA procedures have already been incorporated at some federal agencies. For example, following a successful streamlining project, the Federal Highway Administration (FHWA) has adopted a requirement that all EIS and EA projects include negotiated timeframes for completion of the environmental review process. FHWA issued the directive March 11, 2004, in response to section 1309 of the Transportation Equity Act for the 21st Century, which requires environmental streamlining. FHWA encouraged states with a large number of EISs and EAs to consider establishing general timeframes that would apply to similar types of projects. These streamlining steps could be applied in the federal agency land use planning context. [[283]](#footnote-284)274

**Ý3¨ Endangered Species Act Review**

The House and Senate announced a cooperative effort to modernize the ESA. Senators Mike Crapo (R-ID) (past chairman of the Senate Environment and Public Works Subcommittee on Fisheries, Wildlife and Water (FW&W)) and Lincoln Chafee (R-RI) (current chairman of FW&W) joined Reps. Richard Pombo (R-CA) (chairman of the House Resources Committee) and Greg Walden (R-OR) (chairman of the House Resources Forests and Forest Health Subcommittee) at a February 2005 press conference to pledge their consideration of new ideas in crafting a bipartisan bill to focus on improving habitat conservation and endangered species recovery, through incentives and more state involvement.

The House Resources Committee is also holding field hearings throughout the country to consider reforms to the ESA. The first hearing was held on April 30, 2005, in Jackson, Mississippi. [[284]](#footnote-285)274.1

In addition, House Resources Committee staff have drafted legislation to reform the ESA, which exempts many federal actions that now require consultation and would sunset the law in 2015. The draft bill, named the Threatened Endangered Species Recovery Act of 2005 (TESRA), is likely to be introduced after the August recess. It requires "empirical data" for population counts, narrows the scope of critical habitat designation to areas currently occupied by the species, and provides compensation to a property owner whose land value is decreased by 50%. The bill would eliminate the Endangered Species Committee process, providing an administrative appeal procedure instead. TESRA would prioritize species for recovery and would move all ESA functions to the Department of the Interior (DOI), allowing the Secretary of Interior to require other federal agencies (including EPA) to reconsider ESA decisions that are disputed by DOI. Though not yet introduced, the measure could have federal land planning impacts, including reduced requirements for habitat protection and potentially greater flexibility and speed in resolution of inter-agency disputes in view of the Secretary's proposed authority. However, the legislation could increase the difficulty (and scrutiny) concerning population data development [[285]](#footnote-286)274.2 in connection with federal land planning.

**Ý4¨ The Energy Policy Act of 2005**

The House passed H.R. 6, its version of the Energy Policy Act of 2005 (Act), on April 21, 2005. The Senate followed suit on June 28, 2005. The bill was reported out of Conference Committee on July 29, 2005, and signed into law by President Bush on August 8, 2005. [[286]](#footnote-287)274.3 H.R. 6 contained a number of provisions that would have impacted federal land planning, but that did not survive conference (such as the provision for reimbursement of NEPA costs voluntarily paid by a site-specific project applicant, with reimbursement to come from reduced royalty payments or the requirement that ***oil***, gas, coal, and other resource leases that are sold but not approved for development be bought back by payment of all of lessee's expenses). However, the Act retains a number of important provisions that will exempt some federal land planning from NEPA, result in NEPA streamlining, and require closer coordination of federal land planning agencies. Specifically:

&bull; Section 362 requires expeditious NEPA compliance by the Secretary of Interior for action on leases and permits.

&bull; Section 363 obligates the Secretaries of Interior and Agriculture to enter into a memorandum of understanding, within 180 days of the Act's effective date, to adopt procedures for timely processing of ***oil*** and gas leases, surface use plans, and APDs, and dictating that lease stipulations be only as restrictive as necessary to "protect the resource for which the stipulations are applied."

&bull; Section 365 requires the Secretary of Interior to establish a Federal Permit Streamlining Pilot Project, including an MOU with EPA, the Secretary of Agriculture, and the Army Corps of Engineers (and which could also include the Governors of Colorado, Montana, New Mexico, Utah, and Wyoming where the project will operate), to address NEPA, NFMA, Clean Water Act, Clean Air Act, and ESA approvals; specific BLM offices are designated for the pilot project. [[287]](#footnote-288)275

&bull; Section 366 establishes mandatory deadlines of 10 days after receipt of an APD application to notify the applicant whether it is complete and 30 days after the submittal of a complete APD application to issue the permit--if NEPA requirements have been met.

&bull; Section 390 excludes a number of ***oil*** and gas exploration, development, and production activities from NEPA review requirements, including

# disturbance of less than five acres on a lease where total surface disturbance is not greater than 150 acres and site-specific NEPA review was previously completed;

# drilling an ***oil*** or gas well at a well pad site that has had drilling activity within the five years prior to the new well installation;

# drilling an ***oil*** or gas well within a developed field as long as the NEPA review document for the field included that drilling as reasonably foreseeable and the NEPA review document was approved within the five years prior to spudding the new well;

# placement of a pipeline within an approved right-of-way corridor if the corridor was approved within five years before the new pipeline is installed; and

# minor maintenance activities.

**§ 11.07 Conclusions**

The last decade has seen a resurgence of litigation challenging federal land use and land planning decisions. The litigated issues have been more complex and numerous than observed in the late 1980s and throughout the 1990s. Recent cases have focused on policy and politics as did challenges during the infancy of NEPA and the federal land planning statutes.

In the wake of *Norton v. SUWA* and the Forest Service's categorical exclusion from NEPA of Forest Plans, successful challenges to federal land use plan decisions should decrease. Writing for the unanimous Supreme Court in *SUWA*, Justice Scalia determined that programmatic plans are "will do" projections, subject to change in view of budgets, revised priorities, and policy changes, and are therefore not judicially enforceable. No doubt, courts still may find enforceable certain "will do" projections in plans. Nevertheless, judicial deference to land use plan decisions is memorialized in numerous decisions from the last decade of litigation, resulting in less "judicial interference" with agency planning actions and fewer "wins" by plaintiff challengers. Administrative and congressional developments evidence a concerted effort by the executive and legislative branches of the United States to reduce litigation and streamline land planning procedures. Those actions may set a trend toward practical land use planning and away from policy disputes and litigation.

Copyright 2024 ROCKY MOUNTAIN MINERAL LAW FOUNDATION, All Rights Reserved

**End of Document**

1. 1.U.S. Dep't of the Interior, Public Land Statistics 2004, pt. 1, Table 1-3, *available at* www.blm.gov/natacq/pls04; U.S. Dep't of Agriculture, Land Areas of the National Forest System, Table 1 (2004), *available at* www.fs.fed.us/land/staff/lar. The National Park Service and the U.S. Fish and Wildlife Service, both within the Department of the Interior, respectively administer about 84 million and 93 million acres of federal lands. [↑](#footnote-ref-2)
2. 2.Press Release, Minerals Management Service (Feb. 17, 2004), *available at* www.ocsbbs.com/mms\_states\_receive\_money\_2004.htm. [↑](#footnote-ref-3)
3. 3.Energy Info. Admin., Annual Energy Review, Table 1.14 (2003), *available at* www.eia.doe.gov/emeu/aer/txt/ptb0114.html. [↑](#footnote-ref-4)
4. 4.Energy Info. Admin., Annual Energy Outlook 2005, *available at* www.eia.doe.gov/oiaf/aeo/gas.html. [↑](#footnote-ref-5)
5. 5.Energy Info. Admin., Annual Energy Outlook 2005, *available at* www.eia.doe.gov/oiaf/aeo/coal.html. [↑](#footnote-ref-6)
6. 6.U.S. Dep't of the Interior, Public Land Statistics 1999, Table 1-3, *available at* www.blm.gov/natacq/pls99/Pls99home.html. [↑](#footnote-ref-7)
7. 7.43 U.S.C. §§ 1701-1782 (elec. 2005). [↑](#footnote-ref-8)
8. 8.16 U.S.C. §§ 1600-1614 (elec. 2005). [↑](#footnote-ref-9)
9. 9.16 U.S.C. § 1604(i) (elec. 2005) (Forest Service); 43 U.S.C. § 1732(a) (elec. 2005) (BLM). [↑](#footnote-ref-10)
10. 10.For an example of the difficulty of predicting future economic conditions associated with natural resources development, see Seventh Circuit Judge Posner's opinion in *N.Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 275-78 (7th Cir. 1986). [↑](#footnote-ref-11)
11. 11.*See* Pennaco Energy, Inc. v. U.S. Dep't of the Interior, 377 F.3d 1147 (10th Cir. 2004). [↑](#footnote-ref-12)
12. 12.The BLM published a final programmatic environmental impact statement in June 2005 to evaluate wind energy development on public lands in 11 western states. *See* 70 Fed. Reg. 36,651 (June 24, 2005). The proposed action under review would amend BLM land use plans to provide for wind energy development. *Id*. The environmental impact statement is *available at* windeis.anl.gov/index.cfm. [↑](#footnote-ref-13)
13. 13.*Seeinfra* § 11.03Ý1¨Ýb¨. For example, in 2003, the BLM amended existing land use plans to provide the environmental analysis, conditions of approval, and mitigation measures for coalbed methane development on federal lands in the Powder River Basin of Wyoming and Montana. Those plan amendments have been challenged in five separate lawsuits, all initially filed in the U.S. District Court for the District of Montana. *See* N. Plains Resource Council v. U.S. Bureau of Land Management, CV-03-69-BLG-RWA, Order on Summary Judgment, 2005 U.S. Dist. LEXIS 4678 (D. Mont. Feb. 25, 2005) (describing litigation history); Am. Lands Alliance v. U.S. Bureau of Land Management, No. CV-03-71-BLG-RWA, Order on Summary Judgment at 2 (D. Mont. June 9, 2005) (same). [↑](#footnote-ref-14)
14. 14.*Seeinfra* § 11.03. [↑](#footnote-ref-15)
15. 15.Section 11.02 of this article summarizes federal land use planning, but does not extensively address the preparation, amendment, and revision of federal land use plans. For additional background, see Denise A. Dragoo, "Federal Land Use Planning Primer Under FLPMA and NFMA," 49 *Rocky Mt. Min. L.Inst*. 16-1 (2003); Laura Lindley, "NEPA and Federal Land Use Planning: 'Streamlining' and its Impacts on Resource Management Decisions," *Public Land Law, Regulation, and Management* 2-1 (Rocky Mt. Min. L. Fdn. 2003); Denise A. Dragoo, "Compliance with Land Use Planning and NEPA Prior to Issuance of Federal ***Oil*** and Gas Leases," *Regulation and Development of Coalbed Methane* 15A-1 (Rocky Mt. Min. L. Fdn. 2002); Scott W. Hardt, "Federal Land-Use Planning and its Impact on Resource Management Decisions," *Public Land Law II* 4-1 (Rocky Mt. Min. L. Fdn. 1997); George Cameron Coggins, "The Developing Law of Land Use Planning on the Federal Lands," 61 *U. Colo. L. Rev*. 307 (1990). [↑](#footnote-ref-16)
16. 16.43 U.S.C. § 1712(a) (elec. 2005). [↑](#footnote-ref-17)
17. 17.*Id*. § 1712(c). [↑](#footnote-ref-18)
18. 18.*See* 48 Fed. Reg. 20,364 (May 5, 1983); 43 C.F.R. pt. 1600 (elec. 2005). [↑](#footnote-ref-19)
19. 19.43 C.F.R. §§ 1610.4-1 to 1610.4-9 (elec. 2005). [↑](#footnote-ref-20)
20. 20.43 U.S.C. § 1712(c)(8) (elec. 2005); *see also* Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 587-88 (1987) (relying upon 43 U.S.C. § 1712(c)(8)-(9) to conclude that state environmental law applies to actions on federal lands unless preempted by federal law); 43 C.F.R. § 1610.3-2 (elec. 2005). [↑](#footnote-ref-21)
21. 21.43 C.F.R. §§ 1601.0-4(b), (c), 1610.4-8 (elec. 2005). [↑](#footnote-ref-22)
22. 22.*Id*. § 1610.5-1. [↑](#footnote-ref-23)
23. 23.*Id*. §§ 1610.5-5 (plan amendments), 1610.5-6 (plan revisions). [↑](#footnote-ref-24)
24. 24.*Id*. § 1610.5-5(a). [↑](#footnote-ref-25)
25. 25.*See generally* Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2382-83 (2004) (SUWA); 43 C.F.R. § 1601.0-5(n) (elec. 2005); BLM, Land Use Planning Handbook, H-1601-1, § II-A, *available at* www.blm.gov/nhp/200/wo210/landuse\_hb.pdf. [↑](#footnote-ref-26)
26. 26.43 C.F.R. § 1601.0-6 (elec. 2005). [↑](#footnote-ref-27)
27. 27.42 U.S.C. §§ 4321-4347 (elec. 2005). [↑](#footnote-ref-28)
28. 28.43 C.F.R. §§ 1601.0-8, 1610.2 (elec. 2005). [↑](#footnote-ref-29)
29. 29.*See, e.g.*, ***Kern*** v. U.S. Bureau of Land Management, 284 F.3d 1062, 1072 (9th Cir. 2002) (discussing scope of environmental analysis in RMP EIS and project level environmental assessment tiered to it). [↑](#footnote-ref-30)
30. 29.1.*Seeinfra* § 11.04Ý5¨. [↑](#footnote-ref-31)
31. 30.43 U.S.C. § 1732(a) (elec. 2005). [↑](#footnote-ref-32)
32. 31.43 C.F.R. § 1610.5-3(a) (elec. 2005); *see alsoSUWA*, 124 S. Ct. at 2382-83; S. Utah Wilderness Alliance, 159 IBLA 220, 232-33, GFS(O&G) 9(2003) (ruling that BLM's authorization of ***oil*** and gas well in a particular location conformed to the RMP). [↑](#footnote-ref-33)
33. 32.43 C.F.R. § 1610.5-2(a) (elec. 2005). [↑](#footnote-ref-34)
34. 33.*Id*. § 1610.5-2(a)(1). [↑](#footnote-ref-35)
35. 34.*Id*. § 1610.5-2(a)(3), (b). [↑](#footnote-ref-36)
36. 35.*SeeSUWA*, 124 S. Ct. at 2383; Dona Jeanette Ong, 165 IBLA 274, 278, GFS(MISC) 26(2005). [↑](#footnote-ref-37)
37. 36.*E.g.,Dona Jeanette Ong*, 165 IBLA at 278 (declining to review area of critical environmental concern designated in RMP because "this Board has no authority to overturn or modify such a determination"); Petroleum Ass'n of Wyo., 133 IBLA 337, 342-44, GFS(O&G) 14(1995) (concluding that the Board has authority to review the merits of a wildlife habitat management plan that implements an RMP although "Ýd¨ecisions approving an RMP or amendment of an RMP are subject to review only by the Director" of the BLM). [↑](#footnote-ref-38)
38. 37.*E.g.*, Wyo. Outdoor Council, 160 IBLA 387, 402-03, GFS(O&G) 2(2004) (concluding that an RMP EIS satisfied the BLM's NEPA obligations at the leasing stage to consider the environmental effects associated with coalbed methane development). [↑](#footnote-ref-39)
39. 38.16 U.S.C. § 1604(a) & (e)(2) & (elec. 2005). [↑](#footnote-ref-40)
40. 39.*Id*. § 1604(b); *see generally* Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 728-30 (1998). [↑](#footnote-ref-41)
41. 40.16 U.S.C. § 1604(g)(3)(E), (k), (m) (elec. 2005). [↑](#footnote-ref-42)
42. 41.*Id*. § 1604(g)(3)(B); *see generally* Sierra Club v. Marita, 46 F.3d 606, 619-21 (7th Cir. 1995) (addressing Forest Plan species diversity requirement). [↑](#footnote-ref-43)
43. 42.16 U.S.C. § 1604(f)(5) (elec. 2005); *see generally* Biodiversity Assocs. v. U.S. Forest Serv., 226 F. Supp. 2d 1270, 1304-05 (D. Wyo. 2002) (ordering Forest Service to revise 17-year old Forest Plan but refusing to enjoin implementation of plan during revision process). [↑](#footnote-ref-44)
44. 43.*See generallyOhio Forestry Ass'n, Inc.*, 523 U.S. at 730. [↑](#footnote-ref-45)
45. 44.*See* 36 C.F.R. pt. 219 (2000); 47 Fed. Reg. 43,026, 43,037 (Sept. 30, 1982). [↑](#footnote-ref-46)
46. 45.70 Fed. Reg. 1023, 1024 (Jan. 5, 2005). [↑](#footnote-ref-47)
47. 46.*See* Natural Res. Div., Off. of General Counsel, U.S. Dep't of Agric., Overview of Forest Planning and Project Level Decisionmaking (June 2002) (summary of judicial decisions involving Forest Plans), *available at* www.fs.fed.us/emc/nfma/includes/overview.pdf. [↑](#footnote-ref-48)
48. 47.*Seeinfra* § 11.02Ý2¨Ýe¨Ýiv¨. [↑](#footnote-ref-49)
49. 48.65 Fed. Reg. 67,514, 67,569 (Nov. 9, 2000); 36 C.F.R. § 219.2(a) (2001) ("The first priority for planning to guide management of the National Forest System is to maintain or restore ecological sustainability of national forests and grasslands to provide for a wide variety of uses, values, products, and services."). [↑](#footnote-ref-50)
50. 49.70 Fed. Reg. 1022 (Jan. 5, 2005). [↑](#footnote-ref-51)
51. 50.70 Fed. Reg. 1022 (Jan. 5, 2005); 70 Fed. Reg. 1023 (Jan. 5, 2005) (codified at 36 C.F.R. pt. 219 (elec. 2005)). [↑](#footnote-ref-52)
52. 51.70 Fed. Reg. at 1024. [↑](#footnote-ref-53)
53. 52.*Id*. at 1024-25. [↑](#footnote-ref-54)
54. 53.*Id*. at 1025. [↑](#footnote-ref-55)
55. 54.36 C.F.R. § 219.1(b) (elec. 2005). [↑](#footnote-ref-56)
56. 55.*Id*. § 219.10. [↑](#footnote-ref-57)
57. 56.70 Fed. Reg. at 1024-27, 1057; 36 C.F.R. § 219.7(a)(2) (elec. 2005). [↑](#footnote-ref-58)
58. 57.70 Fed. Reg. at 1056; 36 C.F.R. § 219.3 (elec. 2005); *see also* 16 U.S.C. § 1604(i) (elec. 2005). [↑](#footnote-ref-59)
59. 58.36 C.F.R. § 219.8(e) (elec. 2005). [↑](#footnote-ref-60)
60. 59.Defenders of Wildlife v. Johanns, No. 04-4512 PJH (N.D. Cal. 2005). [↑](#footnote-ref-61)
61. 60."Adaptive management" is defined as an "approach to natural resource management where actions are designed and executed and effects are monitored for the purpose of learning and adjusting future management actions, which improves the efficiency and responsiveness of management." 36 C.F.R. § 219.16 (elec. 2005). [↑](#footnote-ref-62)
62. 61.*Id*. § 219.2(d)(2). [↑](#footnote-ref-63)
63. 62.*Id*. § 219.7(b). [↑](#footnote-ref-64)
64. 63.70 Fed. Reg. at 1033. [↑](#footnote-ref-65)
65. 64.36 C.F.R. § 219.5(b) (elec. 2005). ISO 14001 is *available at* www.iso.org. [↑](#footnote-ref-66)
66. 65.36 C.F.R. § 219.10(b) (2000). [↑](#footnote-ref-67)
67. 66.*E.g.*, Idaho Conservation League v. Mumma, 956 F.2d 1508, 1511-12 (9th Cir. 1992) (describing the Forest Service's "two-stage approach" to NEPA analysis at the Forest Plan and site-specific levels). [↑](#footnote-ref-68)
68. 67.National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion, 70 Fed. Reg. 1062 (Jan. 5, 2005). The agency's rationale is that Forest Plans that do not authorize site-specific action are incapable, either individually or cumulatively, of producing significant effects on the human environment. Such plans, the Forest Service concludes, qualify for a categorical exclusion from NEPA under the Council on Environmental Quality regulations at 40 C.F.R. § 1508.4 (elec. 2005). *See* 70 Fed. Reg. at 1064. [↑](#footnote-ref-69)
69. 68.The Forest Service explained that in promulgating the 1982 rules, it "believed that a NEPA analysis and document prepared for a plan would suffice for making most project-level decisions." The agency decided to abandon the plan-level EIS because it concluded that the two-stage NEPA process was "impractical, inefficient, and frequently inaccurate" given that "environmental effects of projects and activities cannot be meaningfully evaluated without knowledge of the specific timing and location of the projects and activities." 70 Fed. Reg. at 1062. [↑](#footnote-ref-70)
70. 69.36 C.F.R. § 219.9 (elec. 2005). [↑](#footnote-ref-71)
71. 70.70 Fed Reg. 1023, 1057 (Jan. 5, 2005); 36 C.F.R. § 219.7(a)(6) (elec. 2005). [↑](#footnote-ref-72)
72. 71.*See* 36 C.F.R. pt. 217 (1999) (Forest Plan appeal process under 1982 regulations). [↑](#footnote-ref-73)
73. 72.36 C.F.R. § 219.13 (elec. 2005). [↑](#footnote-ref-74)
74. 73.*Id*. § 219.13(a). [↑](#footnote-ref-75)
75. 74.*Id*. § 219.13(c)(1). [↑](#footnote-ref-76)
76. 75.36 C.F.R. § 219.14(e) (elec. 2005). [↑](#footnote-ref-77)
77. 76.*Id*. § 219.14(b). [↑](#footnote-ref-78)
78. 77.*Id*. § 219.14(d). [↑](#footnote-ref-79)
79. 78.General information about BLM RMPs is *available at* www.blm.gov/planning. [↑](#footnote-ref-80)
80. 79.*See* BLM, "Time Sensitive Plans," Instruction Mem. (IM) 2002-081 (Feb. 4, 2002), *available at* www.blm.gov/nhp/efoia/wo/fy02/im2002-081.html. [↑](#footnote-ref-81)
81. 80.Telephone interview with Chuck Otto, Dep'y Group Manager, Planning, Assessment & Community Support, BLM (Apr. 1, 2005). [↑](#footnote-ref-82)
82. 81.IM 2002-081, *supra* note 79. [↑](#footnote-ref-83)
83. 82.Telephone interview with Chuck Otto, Dep'y Group Manager, Planning, Assessment & Community Support, BLM (May 20, 2005). For updates on TSP amendments, see www.blm.gov/planning/handouts/tsp\_news.htm. [↑](#footnote-ref-84)
84. 83.IM 2002-081, *supra* note 79, at att. 1-1. [↑](#footnote-ref-85)
85. 84.Telephone interview with Regis E. Terney, Land Management Planning Specialist, Ecosystem Management Coordination, U.S. Forest Service (May 18, 2005). [↑](#footnote-ref-86)
86. 85.U.S. Forest Service, Schedule of Forest Service Land Management Plan Revisions & New Plans (Aug. 10, 2005), *available at* www.fs.fed.us/emc/nfma/includes/LRMP schedule.pdf. [↑](#footnote-ref-87)
87. 87.70 Fed. Reg. 1023-24 (Jan. 5, 2005). [↑](#footnote-ref-88)
88. 88.16 U.S.C. §§ 1271-1287 (elec. 2005). [↑](#footnote-ref-89)
89. 89.16 U.S.C. §§ 1531-1544 (elec. 2005). [↑](#footnote-ref-90)
90. 90.N. Plains Resource Council v. BLM, CV-03-69-BLG-RWA, 2005 U.S. Dist. LEXIS 4678, &lowast;14 (D. Mont. Feb. 25, 2005) (NPRC) (citing Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 993 (9th Cir. 2004) (quoting 40 C.F.R. § 1500.1(a)). [↑](#footnote-ref-91)
91. 91."What started as a visionary but vague law has grown to 25 pages of regulations, 1,500 court cases, and several hundred pending lawsuits." Rep. Cathy McMorris (R-Wash.), chair of the House Resource Committee's Task Force on Improving the National Environmental Policy Act, remarks during April 23, 2005, hearing on NEPA in Spokane, Washington; *seeinfra* § 11.06. [↑](#footnote-ref-92)
92. 92.Jay E. Austin, John M. Carter II, Bradley D. Klein, Scott E. Schang, Judging NEPA: A "Hard Look" at Judicial Decision Making Under the National Environmental Policy Act (A Report by Environmental Law Institute's Endangered Environmental Laws Program 2004), *available at* www.endangeredlaws.org. [↑](#footnote-ref-93)
93. 93.*Id*. at 6. [↑](#footnote-ref-94)
94. 94.*Id*. [↑](#footnote-ref-95)
95. 95.Corresponding to the locations of federal lands, the majority of the land use planning challenges have been filed in the Ninth Circuit. Lesser numbers of these cases are in the Tenth, Eleventh, and D.C. Circuits, with a much smaller number of cases in other circuits. [↑](#footnote-ref-96)
96. 96.*NPRC*, 2005 U.S. Dist. LEXIS 4678, at &lowast;14. [↑](#footnote-ref-97)
97. 97.*Id. See also* Lands Council v. Powell, 379 F.3d 738, 744 (9th Cir. 2004), *amended & superseded by* 395 F.3d 1019, 1026 (9th Cir. 2005) (citing Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1300 (9th Cir. 2003)). [↑](#footnote-ref-98)
98. 98.Idaho Conservation League v. Mumma, 956 F.2d 1508, 1511 (9th Cir. 1992). [↑](#footnote-ref-99)
99. 99.***Kern*** v. U.S. Bureau of Land Management, 284 F.3d 1062, 1067 (9th Cir. 2002). [↑](#footnote-ref-100)
100. 100.Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001). [↑](#footnote-ref-101)
101. 101.*Id*. (quoting Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric., 681 F.2d 1172, 1178 (9th Cir. 1982)). [↑](#footnote-ref-102)
102. 102.Envtl. Protection Info. Center v. Blackwell, No. C-03-4396 EMC, 2004 WL 2324190, &lowast;23 (N.D. Cal. Oct. 13, 2004) (unpublished) (EPIC) (quoting Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998)). [↑](#footnote-ref-103)
103. 103.*Idaho Sporting Cong.*, 137 F.3d at 1149 (quoting Or. Natural Resources Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997)). [↑](#footnote-ref-104)
104. 104.*NPRC*, 2005 U.S. Dist. LEXIS 4678, at &lowast;16. [↑](#footnote-ref-105)
105. 105.*Id*. at &lowast;13. [↑](#footnote-ref-106)
106. 106.956 F.2d 1508, 1511-12 (9th Cir. 1992). [↑](#footnote-ref-107)
107. 107.*See* Friends of Yosemite Valley v. Norton, 348 F.3d 789, 800 (9th Cir. 2003) (upholding two-step programmatic and site-specific approach to development of a comprehensive management plan under the Wild and Scenic Rivers Act). [↑](#footnote-ref-108)
108. 108.42 U.S.C. § 4332(C) (elec. 2005). [↑](#footnote-ref-109)
109. 109.*See, e.g., NPRC*, 2005 U.S. Dist. LEXIS 4678, at &lowast;16. [↑](#footnote-ref-110)
110. 110.Idaho Conservation League v. Mumma, 956 F.2d 1508, 1522 (9th Cir. 1992). [↑](#footnote-ref-111)
111. 111.City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997) (quoting 40 C.F.R. § 1502.13); *see also* Envtl. Protection Info. Center v. Blackwell, No. C-03-4396 EMC, 2004 WL 2324190, at &lowast;31 (N.D. Cal. Oct. 13, 2004) (citing Westlands Water Dist. v. U.S. Dep't of the Interior, 376 F.3d 853 (9th Cir. 2004)). [↑](#footnote-ref-112)
112. 112.City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997). [↑](#footnote-ref-113)
113. 113.Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1065 (9th Cir. 1998); *see alsoMumma*, 956 F.2d at 1519. [↑](#footnote-ref-114)
114. 114.*City of Carmel*, 123 F.3d at 1155. [↑](#footnote-ref-115)
115. 115.Island Range Chapter of the Mont. Wilderness Ass'n v. U.S. Forest Serv., 45 F. Supp. 2d 1006, 1009 (D. Mont. 1996), *aff'd*, 117 F.3d 1425 (9th Cir. 1997) (table). [↑](#footnote-ref-116)
116. 116.N. Plains Resource Council v. BLM, CV-03-69-BLG-RWA, 2005 U.S. Dist. LEXIS 4678, at &lowast;17-18 (D. Mont. Feb. 25, 2005) (quoting City of Angoon v. Hodel, 803 F.2d 1016, 1021 (9th Cir. 1986)). [↑](#footnote-ref-117)
117. 116.1.*Id.*, 2005 U.S. Dist. LEXIS 4678. [↑](#footnote-ref-118)
118. 117.*Id*. at &lowast;28-29. The court also distinguished *Pit River Tribe v. BLM*, 306 F. Supp. 2d 929 (E.D. Cal. 2004), relied upon by BLM, since the alternative proposed by the Tribe had been fully considered at the programmatic FEIS stage (which was not challenged by the Tribe) and was no longer an issue for project-specific NEPA review. [↑](#footnote-ref-119)
119. 118.Envtl. Protection Info. Center v. Blackwell, No. C-03-4396 EMC, 2004 WL 2324190, at &lowast;5 (N.D. Cal. Oct. 13, 2004) (quoting Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002)). [↑](#footnote-ref-120)
120. 119.40 C.F.R. § 1508.7 (elec. 2005); *see also* Resources Ltd., Inc. v. Robertson, 35 F.3d 1300, 1305-06 (9th Cir. 1993) (requiring analysis of impact that activities on private land may have in the forest); Utah Envtl. Cong. v. Bosworth, 370 F. Supp. 2d 1157, 1164 (D. Utah 2005) (cumulative impacts from adjacent state and private lands required); Sierra Club v. Bosworth, 352 F. Supp. 2d 909, 927 (D. Minn. 2005) (holding failure to consider adjacent private land harvests sufficient to require EIS). [↑](#footnote-ref-121)
121. 120.284 F.3d 1062, 1075-80 (9th Cir. 2002). [↑](#footnote-ref-122)
122. 121.*Id*. at 1075. [↑](#footnote-ref-123)
123. 122.*Id*. at 1076 (quoting the Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* 4 (Jan. 1997)). [↑](#footnote-ref-124)
124. 123.*Id*. at 1078. [↑](#footnote-ref-125)
125. 124.Envtl. Protection Info. Center v. Blackwell, No. C-03-4396 EMC, 2004 WL 2324190, at &lowast;6-7 (N.D. Cal. Oct. 13, 2004) (EPIC); *see also* Habitat Educ. Ctr., Inc. v. Bosworth, 363 F. Supp. 2d 1090, 1101 (E.D. Wis. 2005). [↑](#footnote-ref-126)
126. 125.*EPIC*, 2004 WL 2324190, at &lowast;7 (the limited information about the proposed area of timber harvest and the failure to provide information about past harvests outside of but proximate to the proposed harvest area rendered the cumulative analysis inadequate); see also Lands Council v. Powell, 379 F.3d 738, 744 (9th Cir. 2004). [↑](#footnote-ref-127)
127. 125.1.No. C-03-4396 EMC, 2004 WL 2324190 (N.D. Cal. Oct. 13, 2004). [↑](#footnote-ref-128)
128. 126.*Id*. at &lowast;7. [↑](#footnote-ref-129)
129. 127.*Id*. at &lowast;9 (Forest Service's inclusion in timber sale proposal of only information about the general location of another proposed future timber sale in the Mendocino National Forest, when future project boundaries were known, held to be inadequate). [↑](#footnote-ref-130)
130. 128.*See* N. Plains Resource Council v. BLM, CV-03-69-BLG-RWA, 2005 U.S. Dist. LEXIS 4678, at &lowast;40-41 (D. Mont. Feb. 25, 2005) (holding that on remand BLM should include the Tongue River Railroad project in its cumulative impacts review in light of the availability of a DEIS for the railroad project, and the existence of two other EAs concerning coalbed methane (CBM) development in the Powder River Basin in which BLM included the railroad project for cumulative impacts analysis). [↑](#footnote-ref-131)
131. 129.40 C.F.R. § 1502.9(c)(1)(ii) (elec. 2005). [↑](#footnote-ref-132)
132. 130.Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2384 (2004) (SUWA) (citing Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 385 (1989)). [↑](#footnote-ref-133)
133. 131.Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993) (citing *Marsh*, 490 U.S. at 370-74). [↑](#footnote-ref-134)
134. 132.*SUWA*, 124 S. Ct. at 2385 (quoting *Marsh*, 490 U.S. at 374). [↑](#footnote-ref-135)
135. 133.Pennaco Energy, Inc. v. U.S. Dep't of the Interior, 377 F.3d 1147, 1161 (10th Cir. 2004). [↑](#footnote-ref-136)
136. 134.*See* Northwoods Wilderness Recovery, Inc. v. U.S. Dep't of Agric., No. 2:03-CV-211 (W.D. Mich. 2005) (unpublished) (citing Friends of the Clearwater v. Dombeck, 222 F.3d 552, 559-60 (9th Cir. 2000)). [↑](#footnote-ref-137)
137. 134.1.124 S. Ct. 2373 (2004). [↑](#footnote-ref-138)
138. 135.*Id*. at 2382. [↑](#footnote-ref-139)
139. 136.*Id*. at 2385 (citations omitted); *see also* Hammond v. Norton, 370 F. Supp. 2d 226, 254 (D.D.C. 2005) (where action remaining to the federal agency is purely ministerial or if the agency has no discretion that might usefully be informed by further environmental review, there is no "major Federal action" and supplementation is not required). [↑](#footnote-ref-140)
140. 137.998 F.2d 705, 708 (9th Cir. 1993). [↑](#footnote-ref-141)
141. 138.*Id*. [↑](#footnote-ref-142)
142. 139.377 F.3d 1147 (10th Cir. 2004). [↑](#footnote-ref-143)
143. 140.The court held that agencies may satisfy NEPA through consideration of multiple documents (the Buffalo RMP EIS and the Wyodak DEIS), but that together the documents reviewed were not sufficient. *Id*. at 1159-60. Though the court acknowledged the propriety of using supplemental information reports or "non-NEPA procedures 'for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS,"' it found the BLM did not even use such non-NEPA procedures there. *Id*. at 1151 (quoting Idaho Sporting Congress, Inc. v. Alexander, 222 F.3d 562, 566 (9th Cir. 2000)). [↑](#footnote-ref-144)
144. 141.497 U.S. 871 (1990). [↑](#footnote-ref-145)
145. 142.5 U.S.C. § 702 (elec. 2005). [↑](#footnote-ref-146)
146. 143.As understood and described by the Court, NWF challenged actions taken by the Secretary of the Interior and/or BLM pursuant to FLPMA, including review and recommendations made to the President concerning lands withdrawn from minerals location or leasing, revocation of withdrawals, and classification of public land for multiple-use management, for disposal, or for other uses. *SeeLujan v. NWF*, 497 U.S. at 877-78. [↑](#footnote-ref-147)
147. 144.*Id*. at 882-83. [↑](#footnote-ref-148)
148. 145.*Id*. at 889. [↑](#footnote-ref-149)
149. 146.The requirement that the plaintiff participate in the administrative process and exhaust administrative remedies also applies in the land use planning litigation context, but is not unique to that context. *See, e.g.,Lujan v. NWF*, 497 U.S. 871. [↑](#footnote-ref-150)
150. 147.*Id*. at 893. As discussed in § 11.04Ý4¨, *infra*, this holding has been expanded to preclude standing to challenge federal agency programmatic planning decisions. [↑](#footnote-ref-151)
151. 148.956 F.2d 1508 (9th Cir. 1992). [↑](#footnote-ref-152)
152. 149.*Id*. at 1513; *accord* Lujan v. Defenders of Wildlife, 504 U.S. 555, 590 (1992). [↑](#footnote-ref-153)
153. 150.956 F.2d at 1514. [↑](#footnote-ref-154)
154. 151.*Id*. at 1516. [↑](#footnote-ref-155)
155. 152.*Id*. at 1518. [↑](#footnote-ref-156)
156. 153.35 F.3d 1300, 1302 (9th Cir. 1994). [↑](#footnote-ref-157)
157. 154.*Id*. at 1303 (quoting Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 707 (9th Cir. 1993)). [↑](#footnote-ref-158)
158. 155.Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993). [↑](#footnote-ref-159)
159. 156.497 U.S. at 877-78. [↑](#footnote-ref-160)
160. 157.*Id*. at 891. [↑](#footnote-ref-161)
161. 158.*Id*. [↑](#footnote-ref-162)
162. 159.Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992) (internal citations omitted). [↑](#footnote-ref-163)
163. 160.35 F.3d 1300, 1303-04 (9th Cir. 1994). [↑](#footnote-ref-164)
164. 161.523 U.S. 726, 732-33 (1998). [↑](#footnote-ref-165)
165. 162.*Id*. [↑](#footnote-ref-166)
166. 163.*Id*. at 733. [↑](#footnote-ref-167)
167. 163.1.*Id*. at 735. [↑](#footnote-ref-168)
168. 164.*Id*. at 736 (quoting Abbot Labs. v. Gardner, 387 U.S. 136, 148 (1967)). [↑](#footnote-ref-169)
169. 165.*Id*. at 737. [↑](#footnote-ref-170)
170. 166.188 F.3d 1130, 1133-34 (9th Cir. 1999). [↑](#footnote-ref-171)
171. 167.*Id*. at 1133. [↑](#footnote-ref-172)
172. 168.284 F.3d 1062, 1070-71 (9th Cir. 2002). [↑](#footnote-ref-173)
173. 169.*Id*. (quoting *Ohio Forestry*, 523 U.S. at 737). [↑](#footnote-ref-174)
174. 169.1.124 S. Ct. 2373 (2004). [↑](#footnote-ref-175)
175. 170.*Id*. at 2378-79. [↑](#footnote-ref-176)
176. 171.*Id*. at 2379-80 (internal citations omitted). [↑](#footnote-ref-177)
177. 172.*Id*. at 2381. [↑](#footnote-ref-178)
178. 173.*Id.*; Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726 (1998); N. Plains Resource Council v. BLM, CV-03-69-BLG-RWA, 2005 U.S. Dist. LEXIS 4678, at &lowast;42 (D. Mont. Feb. 25, 2005) (the Tribe's challenge to the RMP under FLPMA was dismissed without prejudice as not ripe, due to its programmatic nature); Wilderness Soc'y v. Thomas, 188 F.3d 1130, 1134 (9th Cir. 1999). [↑](#footnote-ref-179)
179. 174.*Ohio Forestry*, 523 U.S. 726. *NPRC*, 2005 U.S. Dist. LEXIS 4678, at &lowast;42; Lujan v. NWF, 497 U.S. 871, 890-91 (1990) (broad challenge to BLM's land withdrawal review program involving millions of acres of public lands did not identify discrete final agency action subject to judicial review); Hall v. Abbey, No. CV-98-01645-RLH, 2002 WL 506108 (9th Cir. Mar. 28, 2002) (claims alleging that the RMP did not comply with substantive Clean Air Act provisions not ripe until the BLM authorizes site-specific action); Envtl. Protection Info. Center v. Blackwell, No. C-03-4396 EMC, 2004 WL 2324190, at &lowast;31 (N.D. Cal. Oct. 13, 2004) (EPIC) (specifically noting the difference between the claim in *Norton* under 5 U.S.C. § 706(1) and the claim in *EPIC* under 5 U.S.C. § 706(2), court held "Ýt¨he instant case entails not a *failure* to act as in *Norton*; rather, this involves a challenge to an affirmative final agency *action*"); High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 639 (9th Cir. 2004) (claims alleging that the Forest Service violated NEPA, NFMA, and the Wilderness Act in issuing special use permits did not amount to "an impermissible programmatic challenge to the forest management plan"); Neighbors of Cuddy Mt. v. Alexander, 303 F.3d 1059, 1067 (9th Cir. 2002) (finding sufficient connection between forest-wide NFMA claims and proposed timber sale). [↑](#footnote-ref-180)
180. 175.40 C.F.R. § 1502.20 (elec. 2005) provides: "Ýa¨gencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues. . . . Whenever a broad environmental impact statement has been prepared . . . and a subsequent statement . . . is then prepared on an action included within the entire program . . . the subsequent statement or ÝEA¨ need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference. . . ." [↑](#footnote-ref-181)
181. 176.Not all analytical tools used by the federal land planning agency require NEPA review, only those that will "significantly impact the human environment." The Ecology Center, Inc. v. Russell, 361 F. Supp. 2d 1310, 1314 (D. Utah 2005). [↑](#footnote-ref-182)
182. 177.284 F.3d 1062 (9th Cir. 2002). [↑](#footnote-ref-183)
183. 178.*Id*. at 1069. [↑](#footnote-ref-184)
184. 179.*Id*. at 1073. [↑](#footnote-ref-185)
185. 180.*Id*. at 1074. Although ***Kern*** established that "an EIS cannot be 'tiered' (adopted by reference) to standards that have not run the NEPA gauntlet," there is no requirement that the federal agency rely only on analytical tools that have been processed according to NEPA standards. Ecology Center, Inc. v. Russell, 361 F. Supp. 2d 1310, 1314 (D. Utah 2005) (court rejected plaintiff's contention that Forest Service's "properly functioning condition" assessments needed to undergo NEPA review, holding that "NEPA does not require that all analytical tools used by the ÝForest Service¨ be processed according to its standards--only those decisions which will significantly impact the human environment"). [↑](#footnote-ref-186)
186. 181.377 F.3d 1147, 1152 (10th Cir. 2004); *compare* Western Slope Envtl. Resource Council, 163 IBLA 262, GFS(O&G) 17(2004) (detailed review of BLM's analysis of environmental impacts showed that there was not a substantial difference between impacts of CBM production and conventional production for particular areas under review). [↑](#footnote-ref-187)
187. 182.40 C.F.R. § 1508.25 (elec. 2005). [↑](#footnote-ref-188)
188. 183.40 C.F.R. § 1508.25(a)(3) (elec. 2005). *See* N. Plains Resource Council v. BLM, CV-03-69-BLG-RWA, 2005 U.S. Dist. LEXIS 4678, at &lowast;31-32 (D. Mont. Feb. 25, 2005) (citing Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989 (9th Cir. 2004) (where EISs are "similar," the agency has even greater discretion to determine whether to combine the evaluations into one document); Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1306 (9th Cir. 2003). [↑](#footnote-ref-189)
189. 184.427 U.S. 390, 414 (1976) (identification of the geographic area within which a project's cumulative impacts on the environment may occur held to be "a task assigned to the special competency of the appropriate agencies"). [↑](#footnote-ref-190)
190. 185.351 F.3d 1291 (9th Cir. 2003). [↑](#footnote-ref-191)
191. 186.*Id*. at 1305. *See also* Hammond v. Norton, 370 F. Supp. 2d 226 (D.C. Cir. 2005) (though the single EIS issue was not raised in the context of a challenge to federal land planning, in that case the administrative record demonstrated that the parties deliberately sought to segment the environmental analysis of a pipeline project to circumvent NEPA requirements and, applying an independent utility test, the court determined that the two pipeline segment projects were "connected"). [↑](#footnote-ref-192)
192. 187.351 F.3d at 1305 (quoting Native Ecosystems Council v. Dombeck, 304 F.3d 886, 894 (9th Cir. 2002)). [↑](#footnote-ref-193)
193. 188.351 F.3d at 1305. [↑](#footnote-ref-194)
194. 189.*Id*. at 1306 (comparing 40 C.F.R. § 1508.25(a)(1) and (a)(2) with (a)(3)) ("An agency *may* wish to analyze Ýsimilar¨ actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions is to treat them in a single impact statement."). [↑](#footnote-ref-195)
195. 190.*Id*. [↑](#footnote-ref-196)
196. 190.1.CV-03-69-BLG-RWA, 2005 U.S. Dist. LEXIS 4678 (D. Mont. Feb. 25, 2005). [↑](#footnote-ref-197)
197. 191.*Id*. at &lowast;32. [↑](#footnote-ref-198)
198. 192.*Id*. at &lowast;33. [↑](#footnote-ref-199)
199. 192.1.427 U.S. 390 (1976). [↑](#footnote-ref-200)
200. 193.2005 U.S. Dist. LEXIS 4678, at &lowast;33 (quoting *Kleppe*, 427 U.S. at 414). [↑](#footnote-ref-201)
201. 194.*Id*. (quoting *Earth Island*, 351 F.3d at 1305 (upholding the Forest Service's decision to prepare two related EISs rather than a single regionwide EIS)). [↑](#footnote-ref-202)
202. 195.*Id*. at &lowast;33-36. [↑](#footnote-ref-203)
203. 196.*See* Blue Mts. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214-15 (9th Cir. 1998); Churchill County v. Norton, 276 F.3d 1060, 1079-80 (9th Cir. 2001); The Ecology Center v. Kimbell, CV04-557-C-EJL, 2005 WL 1027203 (D. Idaho 2005). [↑](#footnote-ref-204)
204. 197.998 F.2d 705 (9th Cir. 1993). [↑](#footnote-ref-205)
205. 198.*Id*. at 708. [↑](#footnote-ref-206)
206. 199.*Id*. at 709. [↑](#footnote-ref-207)
207. 200.377 F.3d 1147 (10th Cir. 2004). [↑](#footnote-ref-208)
208. 200.1.395 F.3d 1019 (9th Cir. 2005). [↑](#footnote-ref-209)
209. 201.*Id*. at 1031 (citing Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 704-05 (9th Cir. 1993) (overturning agency decision that relied on "stale scientific data")). [↑](#footnote-ref-210)
210. 202.395 F.3d at 1036. [↑](#footnote-ref-211)
211. 203.43 C.F.R. § 1610.5-5 (plan amendments), § 1610.5-6 (plan revisions) (elec. 2005). *Seesupra* § 11.02Ý1¨Ýb¨. [↑](#footnote-ref-212)
212. 204.ONRC Action v. BLM, 150 F.3d 1132, 1139 (9th Cir. 1998). [↑](#footnote-ref-213)
213. 205.Sierra Club Legal Defense Fund, Inc., 124 IBLA 130, 140, GFS(MISC) 47(1992). [↑](#footnote-ref-214)
214. 206.36 C.F.R. § 219.4(f), (g) (elec. 2005). *Seesupra* § 11.02Ý2¨. [↑](#footnote-ref-215)
215. 207.124 IBLA 130, 137-38, GFS(MISC) 47(1992). [↑](#footnote-ref-216)
216. 208.*Id*. at 140. [↑](#footnote-ref-217)
217. 209.150 F.3d 1132, 1138 (9th Cir. 1998). [↑](#footnote-ref-218)
218. 210.*Id*. at 1137. [↑](#footnote-ref-219)
219. 211.*Id*. at 1139. [↑](#footnote-ref-220)
220. 212.*Id*. at 1140. [↑](#footnote-ref-221)
221. 213.370 F. Supp. 2d 226 (D.C. Cir. 2005). [↑](#footnote-ref-222)
222. 213.1.*Id*. at 262-63. [↑](#footnote-ref-223)
223. 214.5 U.S.C. § 706 (elec. 2005). [↑](#footnote-ref-224)
224. 215.5 U.S.C. § 706(2)(A) (elec. 2005). [↑](#footnote-ref-225)
225. 216.188 F.3d 1130 (9th Cir. 1999). [↑](#footnote-ref-226)
226. 217.*Id*. at 1136. [↑](#footnote-ref-227)
227. 218.*Id. See also* Edwardsen v. Dep't of the Interior, 268 F.3d 781, 791 (9th Cir. 2001). [↑](#footnote-ref-228)
228. 219.124 S. Ct. 2373, 2377 (2004) (citing 43 U.S.C. §§ 1712, 1601.0-2 & 1610.2). [↑](#footnote-ref-229)
229. 220.*Id*. at 2381 (citing 43 U.S.C. §§ 1732(a) & 1610.5-3(a)). [↑](#footnote-ref-230)
230. 221.*Id*. at 2382. [↑](#footnote-ref-231)
231. 222.*Id*. [↑](#footnote-ref-232)
232. 223.*Id*. at 2383-84. [↑](#footnote-ref-233)
233. 224.168 F.3d 1, 4-5 (11th Cir. 1999). [↑](#footnote-ref-234)
234. 225.*See* N. Plains Resource Council v. BLM, CV-03-69-BLG-RWA, 2005 U.S. Dist. LEXIS 4678 (D. Mont. Feb. 25, 2005) (enjoining in part BLM's ability to authorize coalbed methane development while agency prepares a supplemental EIS to consider another alternative for an RMP amendment). [↑](#footnote-ref-235)
235. 226.No. C-03-4396 EMC, 2004 WL 2324190, at &lowast;4 (N.D. Cal. Oct. 13, 2004) (citing Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 542 (1987)). [↑](#footnote-ref-236)
236. 227.*Id*. (quoting Save the Yaak Committee v. Block, 840 F.2d 714, 722 (9th Cir. 1988)). [↑](#footnote-ref-237)
237. 228.*Id*. at &lowast;4. [↑](#footnote-ref-238)
238. 229.*Id*. at &lowast;5 (citing Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1496 (9th Cir. 1995)). [↑](#footnote-ref-239)
239. 230.High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 642-43 (9th Cir. 2004); *see also* Habitat Education Center, Inc. v. Bosworth, 363 F. Supp. 2d 1090, 1114 (E.D. Wis. 2005) (finding that "it is not even arguable that violations by federal agencies of NEPA's provisions as established by Congress harm the public as well as the environment"). [↑](#footnote-ref-240)
240. 231.*EPIC*, 2004 WL 2324190, at &lowast;40. [↑](#footnote-ref-241)
241. 232.*High Sierra Hikers Ass'n*, 390 F.3d at 641. [↑](#footnote-ref-242)
242. 233.*Id*. at 642-43. [↑](#footnote-ref-243)
243. 234.W. Watersheds Project v. Rosenkrance, Civ. 04-443-E-BLW, 2005 WL 1076098, at &lowast;15 (D. Idaho 2005). [↑](#footnote-ref-244)
244. 235.A detailed discussion of the ESA is beyond the scope of this article; however, the ESA is a frequent basis for challenging federal agency land use plans and it is examined here only in that context. [↑](#footnote-ref-245)
245. 236.16 U.S.C § 1536(a)(2) (elec. 2005). [↑](#footnote-ref-246)
246. 237.50 C.F.R. § 402.14(g) & (h) (elec. 2005). See *Hammond v. Norton*, 370 F. Supp. 2d 226, 264 (D.D.C. 2005), for a general discussion of ESA requirements. [↑](#footnote-ref-247)
247. 238.168 F.3d 1, 6 (11th Cir. 1999). [↑](#footnote-ref-248)
248. 239.*Id*. at 5. [↑](#footnote-ref-249)
249. 240.372 F.3d 1219, 1232 & n.1 (10th Cir. 2004). *See also* Judge Baldock's concurring opinion which states that the Fishlake Forest Plan required the collection of quantitative data, therefore interpretation of the regulation that had changed, 36 C.F.R. § 219.19, was not required. [↑](#footnote-ref-250)
250. 241.The concurring opinion in *Utah Envtl. Cong*. also noted a difference among the circuits as to whether habitat data alone is sufficient. 372 F.3d at 1219, n.1. See also *Sierra Club v. Bosworth*, 352 F. Supp. 2d 909, 918 (D. Minn. 2005), in which the court concurred with the Forest Service that population data, while encouraged, is not required, citing opinions in the Ninth and Seventh Circuits. But, the court also noted that the Tenth and Eleventh Circuits have held that habitat data *alone* is not sufficient. [↑](#footnote-ref-251)
251. 242.*Seesupra* § 11.03Ý1¨Ýa¨. [↑](#footnote-ref-252)
252. 243.BLM, IM 2001-062, Documentation of Land Use Plan Conformance and National Environmental Policy Act (NEPA) Adequacy (Dec. 29, 2000), *available at* www.blm.gov/nhp/efoia/wo/fy01/im2001-062.html. [↑](#footnote-ref-253)
253. 244.BLM, IM 2004-110, Fluid Mineral Leasing and Related Planning and National Environmental Policy Act Processes (Feb. 23, 2004), *available at* www.blm.gov/nhp/efoia/wo/fy04/im2004-110.htm; BLM, IM 2004-110 Change 1, *available at* www.blm.gov/nhp/efoia/wo/fy04/im2004-110ch1.htm. [↑](#footnote-ref-254)
254. 245.BLM, IM 2003-275, Consideration of Wilderness Characteristics in Land Use Plans (Excluding Alaska) (Sept. 29, 2003), *available at* www.blm.gov/nhp/efoia/wo/fy03/im2003-275.htm. [↑](#footnote-ref-255)
255. 246.BLM, IM 2004-005, Clarification of OHV Designations and Travel Management in the BLM Land Use Planning Process (Oct. 1, 2003), available at www.blm.gov/nhp/efoia/wo/fy04/im2004-005.htm. [↑](#footnote-ref-256)
256. 247.BLM, IM 2003-233, Integration of the Energy Policy and Conservation Act (EPCA) Inventory Results into the Land Use Planning Process (July 28, 2003), *available at* www.blm.gov/nhp/efoia/wo/fy03/im2003-233.htm. [↑](#footnote-ref-257)
257. 248.BLM, IM 2003-070, Protest Procedures (Jan. 17, 2003), *available at* www.blm.gov/nhp/efoia/wo/fy03/im2003-070.htm. [↑](#footnote-ref-258)
258. 249.70 Fed. Reg. 14,561 (Mar. 23, 2005). [↑](#footnote-ref-259)
259. 250.*Seeid*. [↑](#footnote-ref-260)
260. 251.*Seesupra* § 11.02Ý1¨Ýg¨. [↑](#footnote-ref-261)
261. 252.164 IBLA 84, 86 (2004), GFS(O&G) 3(2005). [↑](#footnote-ref-262)
262. 253.*Id*. at 93. [↑](#footnote-ref-263)
263. 254.*Id*. [↑](#footnote-ref-264)
264. 255.*Id*. at 99. [↑](#footnote-ref-265)
265. 256.*Id*. at 102. [↑](#footnote-ref-266)
266. 257.*Id*. [↑](#footnote-ref-267)
267. 258.Wyo. Outdoor Council, 156 IBLA 347, 358, GFS(O&G) 6(2002). [↑](#footnote-ref-268)
268. 259.*Id*. [↑](#footnote-ref-269)
269. 260.*Id*. at 358-59. [↑](#footnote-ref-270)
270. 261.*Id*. The IBLA reaffirmed its decision on reconsideration. *See* Wyo. Outdoor Council, 157 IBLA 259, GFS(O&G) 13(2002). [↑](#footnote-ref-271)
271. 262.Pennaco Energy, Inc. v. U.S. Dep't of the Interior, 377 F.3d 1147, 1162 (10th Cir. 2004). [↑](#footnote-ref-272)
272. 263.Wyo. Outdoor Council, 160 IBLA 387, 399-400, GFS(O&G) 2(2004). [↑](#footnote-ref-273)
273. 264.*Id*. at 399. [↑](#footnote-ref-274)
274. 265.163 IBLA 262, 286, GFS(O&G) 17(2004). [↑](#footnote-ref-275)
275. 266.*Id*. [↑](#footnote-ref-276)
276. 267.*Id*. at 289-90. [↑](#footnote-ref-277)
277. 268.*Seesupra* § 11.02Ý2¨Ýe¨; 70 Fed. Reg. 1023-25 (Jan. 5, 2005). [↑](#footnote-ref-278)
278. 269.*See* 70 Fed. Reg. at 1033. [↑](#footnote-ref-279)
279. 270.*Seesupra* § 11.02Ý2¨Ýe¨Ýiv¨. [↑](#footnote-ref-280)
280. 271.The House Task Force has 22 members: Reps. Cathy McMorris (R-WA), Chris Cannon (R-UT), Louie Gohmert (R-TX), Jay Inslee (D-WA), Tom Udall (D-NM), Ken Calvery (R-CA), George Miller (D-CA), George Radanovich (R-CA), Ed Markey (D-MA), Frank Pallone (D-NJ), Jim Gibbons (R-NV), Grace Napolitano (D-CA), Greg Walden (R-OR), Steve Pearce (R-NM), Mark Udall (D-CO), Devin Nunes (R-CA), Raul Grijalva (D-AZ), Henry Brown (R-SC), Jim Costa (D-CA), Thelma Drake (R-VA), Nick J. Rahall II (D-WV), and Committee Chairman Richard W. Pombo (R-CA). *See* resourcescommittee.house.gov/nepataskforce.htm. [↑](#footnote-ref-281)
281. 272.The White House Council on Environmental Quality (CEQ) also established a task force to identify ways to improve NEPA analysis and coordination. The CEQ task force released a report in September 2003, Modernizing NEPA Implementation, containing more that 50 recommendations for federal agencies to expedite environmental review. [↑](#footnote-ref-282)
282. 273.For more information, see resourcescommittee.house.gov/nepataskforce/archives/index.htm. [↑](#footnote-ref-283)
283. 274.*See* FHWA memorandum, *available at* nepa.fhwa.dot.gov/ReNepa/ReNepa.nsf/home. [↑](#footnote-ref-284)
284. 274.1.*See* resourcescommittee.house.gov/archives/109/full/043005.htm. [↑](#footnote-ref-285)
285. 274.2.*See* § 11.04Ý11¨, *supra*. [↑](#footnote-ref-286)
286. 274.3.Pub. L. No. 109-58, 119 Stat. 594 (2005). [↑](#footnote-ref-287)
287. 275.The included field offices are: Grand Junction/Glenwood Springs, Colorado; Miles City, Montana; Carlsbad, New Mexico; Farmington, New Mexico; Vernal, Utah; Buffalo, Wyoming; and Rawlins, Wyoming. [↑](#footnote-ref-288)