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Bureau of Land Management National Conservation Areas: Legitimate Conservation or Satan's Spawn?

by Andy Kerr and Mark Salvo***

In the last third of the twentieth century, Congress saw fit to designate ten Bureau of Land Management (“BLM”) national conservation areas (“NCAs”) in eight western states. Unlike Wilderness or national parks or national wildlife refuges, Congress has never enacted general, uniform guidance to direct the creation and management of NCAs. There is no “National Conservation Area System.”¹ Although there are similarities in the legislation establishing NCAs, each is the result of local politics and Congressional compromise.

Congress cites a multitude of reasons for creating NCAs, but two unstated motives almost always bear on the decision to designate a new area. The first has been to elevate the status of environmentally significant BLM lands (and sometimes their protection) to avoid transferring them to another, more conservation-oriented federal agency. A second unspoken reason Con-

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1. In 2000, former Interior Secretary Bruce Babbitt drew together the NCAs and other BLM reservations, including Wilderness, Wild and Scenic rivers, national monuments, the Steens Mountain Cooperative Management and Protection Area and the California Desert Conservation Area into a “National Landscape Conservation System” (“NLCS”). An associate director was promoted to manage a small NLCS office in Washington, D.C., to develop guidance and policy for the NLCS, but the agency promised that no new legal protections or restrictions would be imposed on BLM reservations in the new system. It remains to be seen whether the new Bush Administration will abolish the NLCS.

gress creates NCAs is that they are considered a political alternative to Wilderness designation.²

The enabling legislation designating each NCA establishes the management scheme and lists the permissible uses for that particular area. Table 1 depicts the NCAs Congress has designated to date. By analyzing the columns from left to right one can see the differences between NCAs. Analyzing the rows yields trends in both the levels and types of protection legislated for each area.

Congress addresses resource protection, or the lack thereof, in the purposes for which each NCA was designated, the values each area is intended to conserve, the statutory uses that are permitted in each area, or with specific provisions regarding particular uses. Only a few generalities can be made for NCAs. These areas are usually withdrawn from location, leasing and sale under federal mining and geothermal development laws; motorized vehicles are generally limited to designated roads and trails; and as public lands grazing has become more controversial, where grazing privileges have predated NCA designation Congress has acted to specifically preserve them in the enabling legislation.³ In most cases Congress has authorized acquisition of inheld or adjacent state or private lands through purchase, donation or exchange to consolidate or expand NCAs. Which political party

2. Some NCAs overlap existing Wilderness, while others are designated in conjunction with new Wilderness areas. But in every case NCAs are larger than the Wilderness areas within them to allow for otherwise incompatible uses to continue in the non-Wilderness parts of each NCA.

3. In three of the last four NCAs established, livestock grazing has been listed as a statutory value as well as a statutory use of the area. *See* National Parks, Military Parks, Monuments, and Seashores: Snake River Birds of Prey National Conservation Area, 16 U.S.C. § 460iii-3(f) (2001); Colorado Canyons National Conservation Area and Black Ridge Canyons Wilderness Act, Pub. L. No. 106-353, § 6(g), 114 Stat. 1374 (2000); Black Rock Desert-High Rock Canyon Emigrant Trails, H.R. REP. NO. 106-1033, 106th Cong., at 638 (2000). For two NCAs, Snake River Birds of Prey National Conservation Area and Black Rock Desert-High Rock Canyon Emigrant Trails, Congress stated that grazing is important to local communities and that livestock have not been proven to be harmful to the environment. 16 U.S.C. § 460iii (11); H.R. REP. NO. 106-1033, 106th Cong., at 636-37. For three NCAs, grazing was specifically reserved in Wilderness designated within the NCA. *See* Colorado Canyons National Conservation Area and Black Ridge Canyons Wilderness Act, Pub. L. No. 106-353, § 6(g)(1)-(2), 114 Stat. 1374 (2000); Black Rock Desert-High Rock Canyon Emigrant Trails, H.R. REP. NO. 106-1033, 106th Cong. at 640 (2000); National Parks, Military Parks, Monuments, and Seashores: El Malpais National Monument and National Conservation Area, 16 U.S.C. § 460uu-32(b) (2001).

controls what branch of government appears to have little effect on the form or substance of NCA designation.⁴

NCAs are potentially helpful in the conservation, protection and restoration of BLM lands. Since there is no underlying statutory basis (including minimum protections) for NCAs, each area Congress creates is essentially concocted to meet the political opportunities or realities of the moment. For example, the Clinton Administration was so bold as to develop a list of minimum protections for NCAs proposed during its tenure; Congressional sponsors of NCA legislation were advised to meet the standards or suffer the President's veto.⁵ Similarly if conservationists have a strong political hand, they can help craft good NCAs. If they do not, they will not.

The history of NCAs teaches us that they should be considered when it is determined that transfer of the environmentally significant (usually threatened) landscapes to another federal agency is not preferred or politically practical. However, there are standards that conservationists should enforce when Congress seeks to designate a new area. NCAs should not be a substitute for

4. Sometimes the politics of what an area will be called result in the most dramatic and contentious discussions regarding the area's designation. For example, although the pride of the Oregon Congressional delegation, the recently established Steens Mountain Cooperative Management and Protection Area ("SMCMPA") is a political bastard. Pub. L. 106-399, 114 Stat. 1655 (2000). As the delegation deliberated the future for the area managed by the BLM in southeastern Oregon, local resource users warned that they would not tolerate Steens Mountain being legislated as a "national conservation area" due to the land use restrictions implied by such a designation. The delegation therefore dutifully avoided any reference to NCAs in naming the area. Nevertheless, despite its unusual name, the SMCMPA affords strong protections for the Steens, including our country's first legislated livestock-free wilderness area. *See id.*; *see also* Mark Salvo & Andy Kerr, *Congress Designates First Livestock-free Wilderness Area*, WILD EARTH 10, 55 (2000).

5. Testifying in favor of the Colorado Canyons National Conservation Area and Black Ridge Canyons Wilderness Act of 2000, former Bureau of Land Management Director Tom Fry recounted the Clinton Administration's minimum standards for NCAs.

The Administration has testified before Congress several times this year on special protective legislation for public lands managed by the Bureau of Land Management (BLM). While each NCA or BLM-managed National Monument is unique, there are certain common elements, and we have set a standard for what these special areas must include. Critical components of a Monument or NCA include: a land, mining and mineral withdrawal; off-highway vehicle (OHV) use limitations; and language which charges the Secretary to allow 'only such uses' as further the purposes for which the monument or NCA is established. In addition, we cannot consent to any language that represents a step backward from current management.

Colorado Canyons National Conservation Area and Black Ridge Canyons Wilderness Act of 2000, S. REP. NO. 106-460, 106th Cong, at 6.

Wilderness designation, rather they should encompass larger landscapes with important natural and other public values and include Wilderness and Wild and Scenic River designations for all qualifying rivers within them. Also, conservationists should reject any NCA that, at a minimum: does not declare environmental conservation as its primary purpose, to which all other exploitative or recreational uses are subordinate; fails to withdraw the entire area from all forms of mineral and geothermal development; does not prohibit off-road vehicle use; or “releases” wilderness study areas from further consideration as BLM wilderness.⁶ Where livestock grazing is an issue, conservationists should also advocate for voluntary or compulsory grazing permit retirement.⁷ If, as NCA legislation winds its way through the political process, it takes a turn for the worse, then conservationists may need to kill it, fight harder to win the necessary protections, or strategically withdraw and regroup so that stronger protection can be obtained for the area in the future.

6. Pursuant to the Federal Land Policy and Management Act of 1976, Congress will eventually “release” all wilderness study areas not designated as Wilderness. See 43 U.S.C. § 1782(a), (c). Wilderness study areas were released in the Snake River Birds of Prey and Gunnison Gorge National Conservation Areas. See National Parks, Military Parks, Monuments, and Seashores: Snake River Birds of Prey National Conservation Area 16 U.S.C. § 460iii-5(b) (2001); Black Canyon on the Gunnison National Park and Gunnison Gorge National Conservation Area Act of 1999, Pub. L. 106-76 § 8(a)(2), 113 Stat. 1126.

7. For a discussion of federal grazing permit retirement, and how it could rid our national parks and Wilderness areas of domestic livestock, see Andy Kerr & Mark Salvo, *Livestock Grazing in the National Park and Wilderness Systems*, WILD EARTH 10, 45-52 (2000).

TABLE 1. COMPARISON OF BUREAU OF LAND MANAGEMENT NATIONAL CONSERVATION AREAS

NATIONAL CONSERVATION AREA	King Range	Steese	El Malpais	San Pedro Riparian	Red Rock Canyon	Gila Box Riparian	Snake River Brds of Prey	Gunnison Gorge	Colorado Canyons	Black Rock Desert-High Rock Canyon Emigrant Trails	
ESTABLISHED	Oct. 21, 1970	Dec. 2, 1980	Dec. 31, 1987	Nov. 18, 1988	Nov. 16, 1990	Nov. 28, 1990	Aug. 4, 1993	Oct. 21, 1999	Oct. 24, 2000	Dec. 21, 2000	
PUBLIC LAW	91-476	96-487	100-225	100-696	101-621	101-628	103-64	106-76	106-353	106-554	
AREA (ACRES)	60,000	1,220,000	262,690	56,431	195,780	20,767	484,873	57,725	122,300	797,100	
STATE	California	Alaska	New Mexico	Arizona	Nevada	Arizona	Idaho	Colorado	Colo./Utah	Nevada	
WHITE HOUSE	Republican	Democrat	Republican	Republican	Republican	Republican	Democrat	Democrat	Democrat	Democrat	
CONGRESS	Democrat	Democrat	Democrat	Democrat	Democrat	Democrat	Democrat	Republican	Republican	Democrat	
STATUTORY PURPOSES	<p>"[C]onserving and developing, for the use and benefit of the people of the United States, the lands and other resources therein under a program of multiple usage and sustained yield."</p>	<p>"[P]rovide for the immediate and future protection of the lands in Federal ownership within the framework of a program of multiple use and sustained yield and for the maintenance of environmental quality..."</p>	<p>"[P]rotect for the benefit and enjoyment of future generations (this area containing the Lava Natu-ral Arch and the other unique and nationally important resources of the public lands surrounding Grants Lava Flows..."</p>	<p>"[P]rotect the riparian area ... of the public lands surrounding the San Pedro River..."</p>	<p>"[C]onserve, protect and enhance for the benefit and enjoyment of present and future generations ... the area ... containing and surrounding the Red Rock Canyon..."</p>	<p>"[C]onserve, protect and enhance the riparian and associated areas..."</p>	<p>"[C]onserve, protect and enhance the riparian and associated areas..."</p>	<p>"[C]onservation, protection and enhancement of raptor populations and habitats and the natural and environmental resources and values ... [and the] scientific, cultural, and educational resources and values..."</p>	<p>"[P]rotect the resources of the Conservation Area in accordance with (1) this Act; (2) the Federal Lands Policy and Management Act of 1976 ...; and (3) other applicable provisions of law."</p>	<p>"[C]onserve, protect, and enhance for the benefit of present and future generations the unique and nationally important valuing geological, cultural, paleontological, scenic, scientific, recreational, environmental, biological, educational, wilderness, wild-ern, wilder-ness, education and scenic resources..."</p>	<p>"[C]onserve, protect, and enhance for the benefit of present and future generations the unique and nationally important his-torical, cul-tural, paleontologi-cal, scenic, sci-entific, biological, educational, wild-life, ripa-rian, wilder-ness, endan-gered species, and recreational values and</p>

TABLE 1. CON'T

NATIONAL CONSERVATION AREA	King Range	Steese	El Malpais	San Pedro Riparian	Red Rock Canyon	Gila Box Riparian	Snake River Birds of Prey	Gunnison Gorge	Colorado Canyons	Black Rock Desert-High Rock Canyon Emigrant Trails
STATUTORY VALUES	<p>"[N]atural resources including but not limited to the soils, bodies of water including the shorelines thereof, forest growth including timber, vegetative cover including forage, fish, and other wildlife, and geological resources including minerals."</p>	<p>"[C]aribou range and Birch Creek" (Wild and Scenic River (designated as wild)).</p>	<p>"[U]nique and nationally important geological, archeological, cultural scenic, wilderness resources . . ."</p>	<p>"[A]quatic, wildlife, archaeological, paleontological, scientific, educational, scenic, and other resources and values . . ."</p>	<p>"[U]nique and nationally important geological, archeological, cultural scenic, scientific, wild- life, riparian, wilderness, and endangered species, and recreation resources . . ."</p>	<p>"[A]quatic, wildlife, archaeological, paleontological, scientific, cultural, educational, scenic, and other resources and values . . ."</p>	<p>Densest known nesting populations of raptors in North America; historical, cultural and archaeological resources; military training area; World Center for Birds of Prey; Raptor Research and Technical Assistance Center; domestic live-stock grazing; hydro-electric facilities.</p>	<p>"[R]ecognized for offering exceptional multiple use opportunities . . . natural, cultural, scenic, wilderness, and recreational resources . . ."</p>	<p>"The areas . . . contain unique and valuable scenic, recreational, multiple use opportunities (including grazing), paleontological, natural, and wildlife components enhanced by the rural western setting . . ."</p>	<p>resources associated with the Applegate-Lassen and Nobles Trails corridors . . ."</p> <p>Segments of historic California emigrant Trails; wilderness landscape; absence of development; Great Basin plant and animal species; cultural, archaeological, paleontological, and geographical resources; domestic live-stock grazing.</p>

TABLE 1. CON'T

NATIONAL CONSERVATION AREA	King Range	Steese	El Malpais	San Pedro Riparian	Red Rock Canyon	Gila Box Riparian	Snake River Birds of Prey	Gunnison Gorge	Colorado Canyons	Black Rock Desert-High Rock Canyon Emigrant Trails
STATUTORY Uses	"[I]ncluding but not limited to . . . scenic enjoyment, hunting, fishing, hiking, camping, picnicking, boating and swimming, all uses of water resources, watershed management, production of timber and other forest products, grazing and other agricultural uses, fish and wildlife management, mining, preservation of ecological balance, scientific study, occupancy and access."	None stated.	Managed to "protect the resources specified (above)" in accordance with FLPMA and "other applicable provisions of law, including those relating to grazing on public lands"; hunting and trapping permitted in accordance with New Mexico state law, except zones established for public safety, administration or public enjoyment.	"The Secretary shall only allow such uses . . . [that] will further the primary purposes for which the conservation area is established."	"The Secretary shall only allow such uses of the conservation area as he finds will further the purposes for which the conservation area is established"; nothing shall preclude the Secretary from taking measures to prevent devastating fire or infestation of insects or disease within the NCA; hunting permitted in accordance with Nevada state law, except zones established for public safety, administration or public enjoyment.	"The Secretary shall allow only such uses . . . [that] will further the purposes for which the conservation area is established."	"[T]he Secretary shall only use such lands in the conservation area as . . . will further the purposes for which the conservation area is established." Area is established, except livestock grazing (see below); "large-scale permitted events in defined, low impact areas of the Black Rock Desert play" (Burning Man); and established for public safety, administration, or public enjoyment.	Motorized vehicles (see below); hunting, trapping and fishing in accordance with Colorado law, except zones established for public safety, administration or public enjoyment.	"[O]nly such uses . . . [that] will further the purposes for which the conservation area is established," including livestock grazing (see below); and hunting, trapping and fishing in accordance with Colorado and Utah law, except zones established for public safety, administration, or public enjoyment.	"[O]nly such uses . . . [that] will further the purposes for which the conservation area is established," except livestock grazing (see below); "large-scale permitted events in defined, low impact areas of the Black Rock Desert play" (Burning Man); and established for public safety, administration, or public enjoyment.

TABLE 1. CON'T

	King Range	Steese	El Malpais	San Pedro Riparian	Red Rock Canyon	Gila Box Riparian	Snake River Birds of Prey	Gunnison Gorge	Colorado Canyons	Black Rock Desert-High Rock Canyon Emigrant Trails
NATIONAL CONSERVATION AREA	No provision.	No provision.	Enough reserved to fulfill purposes of the NCA.	Enough reserved to fulfill purposes of the NCA.	Enough reserved to fulfill purposes of the NCA.	Enough reserved to fulfill purposes of the NCA.	Expressly no reserved water right to fulfill purposes of the NCA.	Expressly no reserved water right to fulfill purposes of the NCA.	Expressly no reserved water right. Allows for establishing new water right under Colorado law. Adjacent segment of Colorado River specifically excluded as part of the NCA.	No provision.
WATER RIGHTS PROVISION	No provision.	No provision.	Enough reserved to fulfill purposes of the NCA.	Enough reserved to fulfill purposes of the NCA.	Enough reserved to fulfill purposes of the NCA.	Enough reserved to fulfill purposes of the NCA.	Expressly no reserved water right to fulfill purposes of the NCA.	Expressly no reserved water right to fulfill purposes of the NCA.	Expressly no reserved water right. Allows for establishing new water right under Colorado law. Adjacent segment of Colorado River specifically excluded as part of the NCA.	No provision.
LAW ENFORCEMENT PROVISION	No provision.	No provision.	No provision.	Fines and imprisonment authorized.	No provision.	Fines and imprisonment authorized.	No provision.	No provision.	No provision.	No provision.
HYDROELECTRIC DEVELOPMENT PROVISION	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	Expressly allowed.	No provision.	Prohibits federal government from developing new "water resource facilities" in the NCA, including "hydropower projects."	No provision.

TABLE 1. CON'T

NATIONAL CONSERVATION AREA	King Range	Steese	El Malpais	San Pedro Riparian	Red Rock Canyon	Gila Box Riparian	SNAKE RIVER BIRDS OF PREY	Gunnison Gorge	Colorado Canyons	Black Rock Desert-High Rock Canyon Emigrant Trails
	as open to entry, location and patent. All valid claims subject to "reasonable regulations . . . to assure that the maximum extent practicable, be consistent with the scenic, scientific, cultural and other resources . . . Patents for minerals only.	entry and patent under the mining laws; and from dis- position under all laws per- taining to min- eral and geothermal leasing. Also includes provi- sion for ex- changes of mineral inter- ests.	entry and patent under the mining laws; and from dis- position under all laws per- taining to min- eral and geothermal leasing.	entry and patent under the mining laws; and from dis- position under all laws per- taining to min- eral and geothermal leasing.	entry and patent under the mining laws; and from dis- position under all laws per- taining to min- eral and geothermal leasing.	entry and patent under the mining laws; and from dis- position under all laws per- taining to min- eral and geothermal leasing.	entry and patent under the mining laws; and from dis- position under all laws per- taining to min- eral and geothermal leasing; except "sale" (able) minerals from existing sites allowed "to the extent compatible with the pur- poses . . ."	entry and patent under the mining laws; and from dis- position under all laws per- taining to min- eral and geothermal leasing.	entry and patent under the mining laws; and from dis- position under all laws per- taining to min- eral and geothermal leasing.	entry and patent under the mining laws; and from dis- position under all laws per- taining to min- eral and geothermal leasing.
WILDERNESS PROVISION	No provision. NCA overlaps existing Wil- derness.	No provision. Wilderness designated within NCA; new Wilder- ness Study Area desig- nated.	No provision.	No provision.	Wilderness Study Areas expressly unaf- fected.	No provision.	Wilderness Study Areas expressly released.	Wilderness designated within NCA; Wilderness Study Area released.	Wilderness designated within NCA.	Wilderness designated within NCA.

TABLE 1. CONT

NATIONAL CONSERVATION AREA	King Range	Steese	El Malpais	San Pedro Riparian	Red Rock Canyon	Gila Box Riparian	Snake River Birds of Prey	Gunnison Gorge	Colorado Canyons	Black Rock Desert-High Rock Canyon Emigrant Trails
LAND ACQUISITION PROVISION	Donation, purchase, or exchange.	No provision.	Donation, purchase, exchange, transfer from another federal agency.	Donation, purchase or exchange.	Donation, purchase, exchange, transfer from another federal agency, or limited condemnation.	Donation, purchase or exchange.	Donation, purchase, exchange, transfer from another federal agency.	No provision.	Donation, purchase or exchange.	No provision.
LIVESTOCK GRAZING PROVISION	Express use (see "Uses" above).	No provision.	"[S]hall be permitted to continue, pursuant to applicable Federal law, including this subchapter, and subject to such reasonable regulations, policies and practices as the Secretary deems necessary."	No provision.	No provision.	No provision.	"So long as the Secretary determines that domestic livestock grazing is compatible with the purposes for which the conservation area is established, the Secretary shall permit such use of public lands within the conservation area, to the extent such use of such lands is compatible with such purposes." Live-stock grazing is managed according to Taylor Grazing Act and related laws.	No provision.	"[T]he Secretary shall issue and administer any grazing leases or permits in the Conservation Area . . . in accordance with the same laws (including regulations) and Executive orders followed by the Secretary in issuing and administering grazing leases and permits on other land under the jurisdiction of the Bureau of Land Management."	"Where the Secretary of the Interior currently permits livestock grazing in the conservation area, such grazing shall be allowed to continue subject to all applicable laws, regulations, and executive orders."

