



B-329065

November 15, 2017

The Honorable Lisa Murkowski
United States Senate

Subject: *Eastern Interior Resource Management Plan*

This is a response to your letter requesting our opinion whether the Eastern Interior Resource Management Plan (Eastern Interior Plan), issued on December 30, 2016 by the Bureau of Land Management (BLM) of the Department of the Interior, is a rule under the Congressional Review Act (CRA). The Eastern Interior Plan is comprised of the Resource Management Plans (RMP) for four areas in Alaska: the Draanjik Planning Area, the Fortymile Planning Area, the Steese Planning Area, and the White Mountains Planning Area. You also asked us to decide whether these four underlying RMPs are rules for CRA purposes. For the reasons discussed below, we conclude that the Eastern Interior Plan and the four RMP's are rules under CRA.¹

BACKGROUND

The Resource Management Plan Process

The Eastern Interior Plan was prepared in accordance with the Federal Land Policy and Management Act of 1976 (FLPMA).² The FLPMA, as amended, requires the Bureau of Land Management (BLM) to “develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public

¹ Our practice when rendering opinions is to contact the relevant agency to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006) available at <http://www.gao.gov/products/GAO-06-1064SP>. We contacted the Department of the Interior but it informed us that it could not provide us with their views due to “the absence of a more complete leadership team.” Letter from Interior to Assistant General Counsel, GAO, July 14, 2017.

² Pub. L. No. 94-579, 90 Stat. 2743 (Oct. 21, 1976), *codified at* 43 U.S.C. §§ 1701 *et seq.* (2012).

lands”³ Plans are to “use and observe the principles of multiple use and sustained yield[.]”⁴ FLPMA defines “multiple use” to encompass uses such as “recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values[.]”⁵ Multiple use management requires balancing various competing uses of land.⁶

All future resource management authorizations and actions, and subsequent more detailed or specific planning, must conform to the approved resource management plan.⁷ BLM may amend or revise plans to account for, among other things, new information or changes in circumstances.⁸ FLPMA requires BLM to promulgate and follow certain procedures set forth in regulation for the development, amendment, and revision of forest plans.⁹ The decision to adopt a land use plan and the rationale for making that decision are made public in a Record of Decision issued pursuant to the National Environmental Policy Act (NEPA).¹⁰

Below is a brief description of some of the land use and other decisions discussed in each of the four Resource Management Plans (RMP) contained in the Eastern Interior Plan:

White Mountains Planning Area

The White Mountains National Recreation Area comprises over 1 million acres, and had an earlier RMP established in 1986. After analyzing five different alternatives,

³ 43 U.S.C. § 1712(a).

⁴ 43 U.S.C. § 1712(c)(1).

⁵ 43 U.S.C. § 1702(c).

⁶ *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 504 (D.C. Cir. 2010).

⁷ 43 C.F.R. § 1610.6(a).

⁸ 43 C.F.R. § 1610.6-6 (amendment); § 1610.6-7 (revision).

⁹ 43 U.S.C. § 1712(f).

¹⁰ Pub. L. No. 91-190, 83 Stat. 852 (Jan. 1, 1970), *codified at* 42 U.S.C. §§ 4321 *et seq.* (2012). NEPA regulations provide that a Record of Decision must state what the decision is, identify all alternatives considered by the agency in reaching its decision, and state whether all practical means to avoid or minimize environmental harms from the alternative selected have been adopted. 40 C.F.R. § 1505.2.

BLM chose a plan that recommends opening 4,000 acres to new locatable mineral entry and mineral leasing by revocation of public land orders, and identifies lands that are suitable for acquisition, disposal, or retention.¹¹ The entire area is limited to off-highway vehicles, with snowmobiles permitted in winter months. The plan defers travel management planning to a future rulemaking process to be completed within 5 years.

Steese Planning Area

This planning area comprises about 1.3 million acres, and its RMP replaces an earlier plan approved in 1986. The BLM again considered five alternative plans, and the selected option would designate that 98 percent of the planning area remain closed to mineral leasing and mineral location. A limited off-highway vehicles area designation would be in place for the entire planning area, and a more detailed transportation management plan would be developed within the next 5 years. The Steese Special Recreation Management Area is designated under the Plan, and two Research Natural Areas remain in place.

Fortymile Planning Area

The Fortymile Planning Area comprises nearly 1.9 million acres of land, and the RMP replaces an earlier planning effort approved in 1980. The area includes a Wild and Scenic River designated by statute.¹² Five alternative plans were considered by

¹¹ The Mining Law of 1872 authorizes and governs prospecting and mining for locatable minerals, such as gold, silver, copper, and uranium, on federal lands. Chap. 152, 17. Stat. 91 (May 10, 1872), *codified at* 30 U.S.C. §§ 21-54. The Mineral Leasing Act of 1920 authorizes and governs leasing on federal lands for development of deposits of fossil fuels, fertilizer minerals, and chemical minerals on federal lands. Pub. L. No. 66-146, 41 Stat. 435 (Feb. 25, 1920). New mining claims in the White Mountain Planning Area are precluded by withdrawal under Alaska National Interest Lands Conservation Act (Pub. L. No. 96-487, 94 Stat. 2371 (Dec. 2, 1980)) public land orders issued by the Secretary of Interior under Section 17(d)(1) of the Alaska Native Claims Settlement Act (Pub. L. No. 92-263, 85 Stat. 688 (Dec. 18, 1971)) and the Wild and Scenic Rivers Act (Pub. L. No. 90-542, 82 Stat. 906 (Oct. 2, 1968)). Mineral leasing in the planning area is precluded by public land orders.

¹² Alaska National Lands Interest Conservation Act, Pub. L. No. 96-487, § 603, *codified at* 16 U.S.C. § 1274(a)(48) (2012). The National Wild and Scenic Rivers System was created in 1968 to preserve certain rivers with outstanding natural, cultural, and recreational values in a free-flowing condition for the enjoyment of present and future generations. Public Law 90-542, *codified at* 16 U.S.C. § 1271 *et seq.*

BLM, and the plan chosen would recommend that 40 percent of the area remain closed to mineral leasing and mineral location, and recommends a new Area of Critical Environmental Concern.¹³ A limited off-highway vehicles designation would apply to the entire planning area.

Draanjik Planning Area

This planning area, formerly known as the Upper Black River Area, comprises about 2.4 million acres. There was no prior planning document for this region. After studying five alternative plans, BLM decided, among other things, to designate the Salmon Fork River as an Area of Critical Environmental Concern to protect anadromous fish habitat, bald eagle nesting, and rare plant habitats. The RMP also recommended that 77 percent of the land be closed to mineral leasing and mineral location (previously no mineral leasing or mining claims were allowed). Certain lands near the town of Circle, Alaska, would be available for disposal through exchange and would have limited access to off-highway vehicles; no off-highway vehicles access was designated prior to this planning process.

Congressional Review Act

The CRA, codified at 5 U.S.C. §§ 801- 808 (2012), establishes a process for congressional review of agency rules and special expedited procedures whereby the Congress may pass a joint resolution of disapproval to overturn a rule. Congressional review is assisted by the Act's requirement that all federal agencies submit each rule to both Houses of Congress and to the Comptroller General before it can take effect.¹⁴ The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date.¹⁵ In addition, the agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency's actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process.¹⁶ The agencies (Interior and

¹³ Areas of Critical Environmental Concern are areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems or processes, or to protect life and safety from natural hazards. 43 C.F.R. § 1601.0-5.

¹⁴ 5 U.S.C. § 801(a)(1)(A)

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 801(a)(1)(B).

BLM) did not send a report on the Eastern Interior Plan to Congress or the Comptroller General.

ANALYSIS

On October 23, 2017, we issued an opinion on whether the 2016 Amendment to the Tongass National Forest Land and Resource Management Plan (2016 Tongass Amendment), approved on December 9, 2016, is a rule under CRA.¹⁷ In our Tongass opinion, we analyzed the 2016 Tongass Amendment in light of CRA's definition of a rule, found that it fit within that definition, and concluded that it was a rule for CRA purposes.¹⁸ As explained below, we reach the same conclusion with regard to the Eastern Interior Plan and each of the four RMPs it contains.

The first step in analyzing whether the Eastern Interior Plan is a rule is to look at how CRA defines a rule.¹⁹ CRA adopts the definition of a rule in section 551 of the Administrative Procedure Act (APA),²⁰ with three exceptions. The APA defines a rule, in relevant part, as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”²¹ Thus a rule has three key components: it must (1) be an agency statement, (2) have future effect, and (3) be designed to either implement, interpret, or prescribe law or policy or describe the agency's organization, procedure, or practice requirements.²²

First, since the Eastern Interior Plan was issued by BLM, a federal agency, the first part of the definition is met. Second, the Eastern Interior Plan clearly states that it “provide[s] overall direction for management of all resources on BLM-managed

¹⁷ B-238859, October 23, 2017, *available at* <http://www.gao.gov/products/B-238859>.

¹⁸ See *also* our earlier decision in 1997 where we held that the Tongass National Forest Land and Resource Management Plan was a rule for CRA purposes. B-275178, July 3, 1997, *available at* www.gao.gov/decisions/cra/tongass.pdf.

¹⁹ Our analysis and conclusions concerning the Eastern Interior Plan apply equally to each of the four underlying RMP's.

²⁰ 5 U.S.C. § 804(3).

²¹ 5 U.S.C. § 551(4).

²² B-238859 at 9.

lands” within the four planning areas it includes.²³ In three of those areas, it replaces plans implemented 30 or more years ago; and in the fourth area it establishes an initial Management Plan for an area that previously had no approved plan. All four RMPs make recommendations and designate future uses of their respective areas. Therefore, the Plan has future effect and the second part of the definition is also met.

Third, the agency statement must be designed to implement, interpret, or prescribe law or policy. Each of the four RMPs prescribes policies for future use of the areas they cover, such as where mining or off-highway vehicles are permitted; and two of the RMPs identify Areas of Critical Environmental Concern. Each of the RMPs implements the provisions of FLPMA and other applicable statutory and regulatory provisions. Implementation required extensive consultation with parties that have interests in that region through notice and public comment; public hearings; and then an opportunity for the Governor of Alaska to provide final comments. Therefore, the third part of the definition is also met.

As noted above, CRA provides that three types of rules are not subject to its requirements. The three exceptions are for: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.²⁴ We conclude that these exceptions do not apply.

First, as we determined in our recent Tongass decision, a resource management plan is a rule of general applicability, since it governs all natural resource management activities, all projects approved to take place, and all persons or entities that engage in uses permitted by those projects.²⁵ Second, the Eastern Regional Plan does not relate to agency management or personnel, since it is concerned with management of uses of the areas it governs by the public rather than management of BLM itself or its personnel. Additionally, as we also concluded in the Tongass decision, when a resource management plan has a substantial effect

²³ See, e.g., Record of Decision for the Eastern Interior Fortymile Planning Area, § 1.1.

²⁴ 5 U.S.C. § 804(3).

²⁵ B-238859 at 11.

on non-agency parties, it cannot be considered to be a rule of agency organization, procedure or practice.²⁶ Because the Eastern Interior Plan designates uses by non-agency parties that may take place in the four areas it governs, it is not a rule of agency organization, procedure or practice.

CONCLUSION

The Eastern Interior Resource Management Plan and the four RMPs it contains are rules subject to the requirements of the CRA.

If you have any questions about this opinion, please contact Robert J. Cramer, Associate General Counsel, at (202) 512-7227.

Sincerely yours,

A handwritten signature in black ink, appearing to read "S. Poling".

Susan A. Poling
General Counsel

²⁶ *Id.* at 13.