Notes & Comments

The Conflicting Mandate: Agency Paralysis Through the Congressional Review Act's Resubmit Provision

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Table of Contents

INTRODUCTION 115
I. REGULATORY REFORM 118
II. THE CONGRESSIONAL REVIEW ACT 121
A. The Review Mechanism 122
B. The Ergonomics Rule: The CRA's First Victim 123
III. THE BLM AND "PLANNING 2.0" 125
A. The Historical Perspective: The Genesis of FLPMA 126
B. The Planning Process 128
C. The Interim Period and Land Planning Woes 130
D. "Planning 2.0" 132
IV. THE EFFECT ON BLM'S ABILITY TO UPDATE ITS LAND PLANNING PROCESS 135
V. PROPOSED ALTERNATIVE 137
CONCLUSION 140

INTRODUCTION

In March 2017, Congress invoked a twenty-one-year-old law—previously used only once—to invalidate a broad swath of late Obama-era regulations. The Congressional Review Act ("CRA" or "Act"), is a once

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obscure law that now features prominently in the national spotlight.[1] It seems apparent that until recently, few realized exactly how powerful the CRA could be.[2]

Before this recent wave, the CRA was viewed as an unduly burdensome and largely useless procedural hoop.[3] Critics of the Act opine that it has little use because it requires a specific condition: administration transition periods when one party has obtained a supermajority.[4] However, when the CRA is invoked, it has the potential to completely paralyze an affected agency in perpetuity.

There is danger in the Act's perplexingly vague language mandating that agencies may not promulgate rules "substantially similar"[5] to those killed under the Act. Because the Act provides no guidance as to what "substantially similar" means, agencies are left in the dark as to what they can do moving forward once a rule has been "CRA'd."

This Note will focus on the conflicting mandate that arises when one Congress, through its delegation of authority in an organic act, tells an agency to use its expertise to promulgate rules, but a later Congress, through the CRA, tells the same agency that it is not allowed to do so. The CRA, in some respect, plans for this conflict. It allows agencies to re-promulgate similar rules but only if Congress specifically authorizes it by a law which is "enacted after the date of the joint resolution of disapproval."[6] For the purposes of this Note, this mechanism is referred to as the "resubmit provision."

The resubmit provision is insufficient because it adds a significant burden to the rulemaking process without a guarantee of success. It requires agencies to go through the entire rulemaking process a second time with an added step: convincing Congress to specifically enact their new rule. In reality, agencies have a strong disincentive to engage in the

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[1] *See generally* Stephen Dinan, *GOP Rolled Back 14 of 15 Obama Rules Using Congressional Review Act*, WASHINGTON TIMES (May 15, 2017), https://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congres; and Michael Grunwald, Trump's Secret Weapon Against Obama's Legacy, Politico (Apr. 10, 2017), https://www.politico.com/magazine/story/2017/04/donald-trump-obama-legacy-215009.

[2] Phillip A. Wallach and Nicholas W. Zeppos, *How Powerful is the Congressional Review Act?,* BROOKINGS (Apr. 4, 2017), https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act.

[3] MORTON ROSENBERG, CONGRESSIONAL REVIEW SERVICE, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 1 (2008).

[4] *Id.*

[5] 5 U.S.C. § 801(b)(2) (2012).

[6] *Id.*

Sisyphean task of re-promulgating rules on the off chance that Congress agrees with their re-write. This is especially risky because the CRA does not require Congress to specify what part of the rule it disapproves of.

The rulemaking procedure is costly and lengthy, and there are other, less formal means to make change internally so as to avoid the CRA's resubmit provision. If agencies choose to remedy the death of the rule through informal rulemaking and internal procedure, the public will lose its important role in the rulemaking process and the administrative state will lose the transparency the CRA was intended to bolster and protect.

As a case study, this Note will look at "Planning 2.0," a Bureau of Land Management ("BLM") land planning regulation that was passed in December 2016 after more than two years of formal rulemaking—including multiple rounds of public comment and revisions. Congress struck it down in March 2017 via a one-paragraph joint resolution of disapproval under the CRA.[7] The BLM is now faced with deciding whether or not to dive back into the formal rulemaking process to attempt revising its unwieldy land planning process,[8] or make small internal changes "relating to management or personnel"[9] such that a similar effect is realized, but without being subject to the CRA.

Ultimately, this Note will argue that the CRA paralyzes affected agencies by effectively mandating inaction. While Congress undoubtedly has a strong interest in regulatory oversight, it should give agencies clear guidance when it disapproves of a rule. Congress continually attempts to re-assert control over the regulatory process through creative mechanisms designed to give itself the power to keep agency action in check. But Congress has always had the power to oversee the administrative state through legislation, which requires transparency and specificity.

When Congress utilizes the CRA, it should specify why it is doing so and give the affected agency guidance as to how to change a rule when it is re-submitted. Agencies would benefit from having a clear path forward, and the rulemaking process would retain its transparency and avenues for public input.

To that end, the CRA should be amended to at least require Congress to specify which part of a targeted regulation it disapproves of. Further, the process could be even more improved by requiring Congress to propose alternatives to disapproved of provisions. By doing so, the CRA would retain its power to oversee, but would lose its power to paralyze.

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[7] Act of Mar. 27, 2017, Pub. L. No. 115-12, 131 Stat. 76.

[8] *See* GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW, SECOND ED. § 16:18.

[9] 5 U.S.C. § 804(3)(B) (2012).

First, this Note will discuss the CRA in the context of the history of regulatory reform. Second, it will discuss the only time the CRA was used prior to 2017 as an example of the real implications it presents to affected agencies. Third, it will address the BLM, its need to update the planning process, and the death of "Planning 2.0." Finally, it will conclude by demonstrating how the BLM's situation would be far better had Congress been clearer by expressing the reasons *why* it disapproved of "Planning 2.0" through specificity rather than invoking the currently vague power of the CRA.

I. REGULATORY REFORM

The CRA grew out of Congress's long struggle to keep a burgeoning administrative state in check. Striking a balance between administrative efficiency and regulatory oversight has always been a difficult task for the legislature. On one hand, an increasingly complex society requires the weaving of an ever more complex tapestry of regulation. On the other hand, the larger the regulatory sphere grows, the less able Congress and the Article III judiciary are to keep it in check.[10] Congress has periodically attempted to address the issue of run-away regulation through creative oversight mechanisms designed to swiftly do away with undesirable rules.

Congress's treatment of regulatory oversight exists on a spectrum. On one end, agencies are continually afforded generous leeway to create and implement important policy decisions. Agencies are policed by the Administrative Procedure Act ("APA"), which provides courts some level of judicial review,[11] and provides private parties a cause of action for agency action that causes a "legal harm, or [adverse] effect."[12] Agencies are afforded substantial deference to make decisions consistent with their expertise, so long as a reasonable reading of the relevant statute is proffered to a reviewing court.[13]

On the other end of the spectrum, Congress periodically enacts legislation aimed at severely limiting the amount of leeway that agencies are accustomed to.[14] Proponents of this kind of legislation typically appeal

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[10] *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

[11] 5 U.S.C. §§ 701–06 (2012).

[12] *Id.* § 702.

[13] *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984).

[14] *See* 8 U.S.C. § 1254(c)(2) (1982) (giving Congress the power of a unicameral "legislative veto" over deportation proceedings).

to deregulation as a means of stimulating business interests and rebalancing the separation of powers.[15]

The 1994 mid-term elections—in which the Republican Party made significant gains in the House and Senate—were marked by exactly that kind of deregulatory sentiment.[16] Riding high on a party platform of deregulation and government transparency, a Republican-led Congress sought to find a way to increase control over the administrative state.[17]

A decade earlier, the Court had invalidated Congress's favorite method of asserting control over the administrative state. In *INS v. Chadha,*[18] the Court struck down a unicameral "legislative veto" provision in the Immigration and Nationality Act because it lacked essential elements of bicameralism and presentment.[19] The statute at issue in *Chadha* allowed the Attorney General, at his or her discretion, to suspend the deportation of any alien otherwise deportable under any law, so long as the Attorney General found that the alien was of "good moral character" and that deportation would cause "extreme hardship."[20] If those conditions existed, the Attorney General was required to submit a detailed report to Congress stating why the deportation was suspended.[21] A single house of Congress could then pass a "resolution . . . in substance" disfavoring the suspension of deportation, which would either reverse or uphold the suspension.[22] The "resolution in substance" would not have to pass through the other house, or be presented to the President.[23]

Holding that the legislative veto was a legislative action, the Court invalidated the unicameral veto provision as a violation of basic bicameralism and presentment requirements.[24] While it noted that the

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[15] *See* Jared Meyer, *How to Fight the Fourth Branch of Government*, FORBES (Jul. 12, 2016, 8:31 AM), https://www.forbes.com/sites/jaredmeyer/2016/07/12/how-to-fight-the-fourth-branch-of-government/#38290b3911c0.

[16] The theme of the election was "the Contract with America," which detailed specific proposals for federal legislative and regulatory reform. G. Terry Madonna and Michael Young, *A Tale of Two Elections*, REAL CLEAR POLITICS (Oct. 20, 2006) https://www.realclearpolitics.com/articles/2006/10/a_tale_of_two_elections.html.

[17] *See id.*

[18] 462 U.S. 919 (1983).

[19] *Id.* at 959. The House passed a resolution dismissing the deportation proceedings of Chadha and five others. The resolution was not submitted to the Senate, or presented to the President. *Id.* at 927–28.

[20] 8 U.S.C. § 1254 (a)(1) (1982).

[21] *Id.* § 1254 (c)(1).

[22] *Id.* § 1254 (c)(2).

[23] *See id.*

[24] *Chadha*, 462 U.S. at 945–46, 952.

provision might be "a useful political invention,"[25] the Court emphasized that "explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process."[26] Accordingly, the Court held that any Congressional action with respect to regulatory oversight must adhere to the "explicit and unambiguous" requirement that it pass through both houses and gain the signature of the President.[27]

Chadha was vast in effect. The death of the unicameral legislative veto affected 196 statutes, spanning over fifty years of legislation.[28] Some members of Congress were worried the decision would cause "conflict and chaos on Capitol Hill."[29] In many ways, both Congress and the Executive relied on the mechanism to maintain balance between the Executive's need for broad delegation of power to agencies and the Legislature's desire to remain in control of the lawmaking process.[30] The aftermath of *Chadha* presented Congress with the problem of figuring out how to retain its ability to check the executive while also adhering to its constitutional mandate, as articulated by the *Chadha* Court.

Congress addressed that problem in two ways: (1) through the use of "joint resolution vetoes" in individual statutes; and (2) informal agreements with agencies that, in effect, kept the legislative veto intact.[31] The joint resolution veto directly addressed the problems identified in *Chadha* by allowing Congress to veto agency actions, but only after passing through both houses and gaining the signature of the President.[32] Informal vetoes generally took the form of appropriations caps, compelling compromise between the two branches.[33]

However different the individual mechanisms were, the common thread linking the majority of post-*Chadha* regulatory oversight was specificity. For the most part, oversight was directed at particular functions

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[25] *Id.* at 945 (internal citations omitted).

[26] *Id.*

[27] *Id.* at 946–47.

[28] *See id.* at 945 (internal citations omitted).

[29] Linda Greenhouse, *Supreme Court, 7-2, Restricts Congress's Right to Overrule Actions by Executive Branch*, N.Y. TIMES (June 24, 1983), *available at* http://www.nytimes.com/1983/06/24/us/supreme-court-7-2-restricts-congress-s-right-overrule-actions-executive-branch.html?pagewanted=all.

[30] Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW AND CONTEMPORARY PROBLEMS 4, 273 (1993).

[31] *See id.* at 276.

[32] *Id.* at 286.

[33] *See id.* at 289–90.

within organic legislation already guiding the agencies.[34] For ten years, Congress continued to address the issue of regulatory oversight through these individual veto mechanisms, resulting in more than 200 new legislative veto provisions by 1993.[35] But Congress still had not found a way to assert broad control in the manner it had in the pre-*Chadha* era.

II. THE CONGRESSIONAL REVIEW ACT

Riding on the coattails of the successful deregulation movement in the 1994 mid-term elections, the 104th Congress proposed a broader approach to regulatory oversight aimed at reasserting control over the administrative state as a whole.[36] Its proposition was the Congressional Review Act.[37] The Act was pitched by conservative members of Congress as an attempt to reel in burgeoning costs associated with agency regulation.[38] The attitude that inspired the CRA was one of general discontent over the extent to which Congress had allowed agency rulemaking to go unchecked, and how expensive agency rulemaking had become.[39]

The CRA was attractive in concept because, for the first time, Congress would have the power to review administrative rulemaking as a whole rather than attacking the issue piecemeal through individualized veto provisions or informal appropriations arrangements.[40] Further, its mechanism allowed for Congressional review without violating Article I by providing for a joint resolution of disapproval presented to the President.[41]

For Congress, it seemed like the solution that it had been waiting for since *Chadha*, and it passed the CRA on March 29, 1996 under the "Contract with America Advancement Act of 1996."[42]

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[34] *See* LOUIS FISHER, CONG. RES. SERV., RS22132, LEGISLATIVE VETOES AFTER CHADHA 2 (2005).

[35] Fisher, *supra* note 30, at 288.

[36] *See* Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2165 (2009).

[37] Julie A. Parks, *Lessons IN Politics: Initial Use of the Congressional Review Act*, 55 Admin. L. Rev. 187, 188 (2003).

[38] S. Rep. No. 104-88, at 6 (1995).

[39] 148 CONG. REC. S2161 (daily ed. Mar. 15, 1996) (statement of Sen. Nickles).

[40] Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1052 (1999).

[41] 5 U.S.C. § 801(b)(1) (2012).

[42] Act of Mar. 29, 1996, Pub. L. No. 104-121, 110 Stat. 847.

A. The Review Mechanism

The CRA's mechanism for oversight is fairly simple. After an agency goes through its rulemaking procedure as required by the APA, it must submit to both Houses and the Comptroller General ("CG") a report containing: (1) a copy of the rule; (2) a "concise general statement relating to it, including whether it is a major rule"; and (3) the proposed effective date.[43] Then, Congress has time to review the rule. The Senate may review for sixty session-days, and the House may review for sixty legislative-days.[44] During that period, Congress can pass a joint resolution of disapproval—which must be signed by the President—the purpose of which is to render the rule ineffectual.[45] If a rule is submitted and Congress takes no action, it takes effect after the end of the "review" period.[46]

Of particular interest to this Note, once the President signs a joint resolution of disapproval, the agency is barred from reissuing the same rule in "substantially the same form," or issuing a new rule "substantially the same," unless Congress specifically authorizes such a rule by law, which is "enacted after the date of the joint resolution disapproving the original rule."[47]

The CRA acts more like a butcher's knife than a scalpel. It dismantles the entire rule and does not define "substantially the same," or require Congress to specify which part of the rule it disapproves of.[48] Consequently, if an affected agency wants to pass another rule addressing the same problem, it must overcome one of two hurdles.

First, it could try to change the rule, such that it is no longer "substantially the same." Under the text of the Act, if the agency changes the rule "substantially," it does not need to resubmit it to Congress before it goes into effect.[49] But an agency would have no way of knowing where the line between "different, but not *substantially* different" and "permissibly different" might lie. Overhauling the rule in an attempt to find that line might undermine the very purposes it had for passing the rule in the first place.[50]

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43 5 U.S.C. § 801 (a)(i)–(iii) (2012).

44 *Id.* § 801 (d)(1)(A)–(B).

45 *Id.* § 801 (b)(1)–(2).

46 *Id.* § 801 (a)(iii)(C)(3).

47 *Id.* § 801 (b)(2).

48 *See id.* § 801 (b)(1)–(2).

49 *See id.* § 801 (b)(2).

50 For this reason, it is entirely possible that an agency's decision to completely overhaul its regulation would be "arbitrary and capricious" under the APA—unless it went through an entirely new notice and comment period and so forth. Because that idea falls

Second, if an agency wants to try a more surgical approach and get Congress to authorize an updated yet substantially similar rule, the agency could try to identify the part of the rule Congress most strongly disapproved of. Presumably, if it removes or updates certain provisions within the rule to reflect Congress's preferences, Congress would "authorize it by law."[51] But without guidance from Congress as to which part of the rule it wants changed, this approach feels more like a game of Marco Polo than reasoned rulemaking.

Rulemaking is costly, lengthy, and burdensome on the agency. Because there is no guidance as to what Congress wants to see in a rewrite—and no guarantee that it will pass one *even if* it reflects Congress's most earnest policy preferences—this is a highly risky path forward. Agencies could be forgiven for declining to attempt the CRA's resubmit mechanism.

Illustratively, this exact calculus proved paralytic to the Occupational Safety and Health Administration ("OSHA") after Congress used the CRA for the first time to kill its "Ergonomics Rule" in 2001. Prior to 2017, the Ergonomics Rule was the only example of the CRA being successfully invoked to kill a rule. What happened to OSHA afterward exemplifies the problems inherent with the Act.

B. The Ergonomics Rule: The CRA's First Victim

While the CRA garnered initial excitement, it quickly faded into the background, resulting in little tangible effect.[52] Agencies began complying with the CRA's submission requirements, but during the Act's first five years, Congress only introduced resolutions of disapproval for forty-seven rules, or approximately one out of every 1,000 of the rules subject to review.[53] Of those forty-seven joint resolutions, only one passed.[54]

That rule—the first rule to be struck down via the CRA—was OSHA's 2001 "Ergonomics Rule."[55] As the moniker suggests, that rule was designed to create better standards for workplace ergonomics.[56] The agency first issued an Advance Notice of Proposed Rulemaking in 1992,

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outside of the scope of this Note, the rest of the Note will proceed on the assumption that such an overhaul would survive an "arbitrary and capricious" challenge.

51 Though, Congress would not *have* to. *See* 5 U.S.C. § 801 (b)(2).

52 Rosenberg, *supra* note 40, at 1052.

53 ROSENBERG, *supra* note 3.

54 *Id.*

55 Julie A. Parks, Note, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187 (2003).

56 *Id.*

four years before the CRA was enacted.[57] The proposed rule was unpopular with industry; consequently, there was a lengthy fight between OSHA and a Republican-led Congress.[58] The proposed rule was of such import to Congress, it was mentioned on the Senate floor by one of the CRA's sponsors as one of the reasons the Act should be enacted.[59]

However, even after the CRA's successful passage in 1996, Congress attacked OSHA's Ergonomics Rule via appropriations rather than through the CRA.[60] A legislative compromise in 2000 allowed the rule to finally go into effect. At that point, the CRA was a last resort for Republican legislators who had been fighting the proposed rule for almost a decade.[61]

On March 20, 2001, Congress passed a joint resolution of disapproval under the CRA for the Ergonomics Rule.[62] The Rule's repeal left interested parties guessing as to how OSHA would react.[63] Legal commentators remarked that the use of the CRA left the future of ergonomics in an uncertain state, given the CRA's vague effect on an agency's ability to move forward.[64] Ultimately, OSHA never attempted to re-promulgate an extensive ergonomics rule.[65] Rather, it dealt with the uncertainty by issuing "ergonomics standards" and enforcing them by invoking the Occupational Safety and Health Act's ("OSH Act") "General Duty" clause.[66]

President Obama hinted that he would "reinstate" the ergonomics rule during his 2008 campaign,[67] however, that never happened. In 2010, Assistant Secretary of Labor for OSHA, David Michaels, said at the ABA Occupational Safety and Health Law Committee Meeting that "[OSHA has] not decided yet the best way to confront this problem, given the

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57 *See id.*

58 *See id.*

59 36 CONG. REC. S2161 (daily ed. Mar. 15, 1996) (statement of Sen. Nickles).

60 *See* Parks, *supra* note 55 at 187.

61 *See id.* Notably, it was Senator Nickles, who spearheaded the CRA in 1995, who introduced the joint resolution.

62 Act of Mar. 20, 2001, Pub. L. No. 107-5, 115 Stat. 7.

63 Milton Zall, *Ergonomics Regulation Still in Limbo*, TODAY'S CHEMIST AT WORK, AMERICAN CHEMICAL SOCIETY (Oct. 2002) *available at* https://pubs.acs.org/subscribe/archive/tcaw/11/i10/pdf/1002work.pdf.

64 Vercruysse, Metz & Murray, *OSHA Ergonomics Rule: Never Mind*, 12 No. 3 Mich. Employment L. Letter 7 (May 2001).

65 *See* Denlinger, Rosenthal, Greenberg, a Legal Professional Ass'n, *Ergonomics Won't Die*, 13 No. 10 Ohio Emp. L. Letter 5 (Oct. 2002).

66 *Id.*

67 Rob Hotakainen, *Labor's Revival Could Reignite Fight Over Ergonomics*, LEDGER-ENQUIRER (Columbus, Ga.), Feb. 22, 2009, https://www.ledger-enquirer.com/living/article29034814.html.

regulatory process and the complicated political issues surrounding ergonomics."[68] At that point in time, OSHA cited the CRA as the reason it was not "doing another rule."[69]

The Ergonomics Rule example presents an informative view into the CRA's long-term effects. In the sixteen years between the initial use of the CRA and the writing of this Note, OSHA has refused to go back into the rulemaking process to try its hand at the CRA's "re-submit" mechanism. Rather, it has relied on the "General Duty" clause in the OSH Act to enforce some of the ergonomics standards it had wanted to include in the original rule.[70] The OSH Act's "General Duty" clause is a broad catch-all provision that requires each employer to "furnish . . . a place of employment free from recognized hazards causing or [] likely to cause death or serious physical harm . . . ."[71] Employees may issue grievances to OSHA based on this clause—the success of which is guided by a four-prong test under agency case law.[72]

The General Duty clause provides OSHA with a way to enforce its policy preference for ergonomic standards in the workplace. While a clear rule would be preferable—and more transparent—OSHA's ability to rely on the clause has somewhat softened the blow.

The CRA is most dangerous when applied to rules that outline broad agency processes, rather than comparably narrow agency policy objectives, such as the "Ergonomics Rule." The next section explores why.

III. The BLM and "Planning 2.0"

This section examines the CRA's impact on the BLM's land planning regulations. It briefly addresses the historical backdrop and then the death of "Planning 2.0," and looks to the BLM's ability to carry out its statutory mandate under the BLM's organic act—The Federal Land Policy Management Act ("FLPMA")—in the wake of Planning 2.0's death.

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68 David Michaels, Assistant Secretary of Labor for OSHA, ABA Occupational Health Law Committee 2010 Midwinter Meeting (Mar. 10, 2010) *in* OSHA Archives *available at* https://www.osha.gov/news/speeches/03102010.

69 James K. Vines and William Clarkson, *Ergonomics Back in the Game: OSHA's End-Run on Congress*, GC New York (May 13, 2010), http://gcnewyork.com/columns10/051310vines.html.

70 *Id.*

71 29 U.S.C. § 654 (a)(1) (2012).

72 *See* Parks *supra* note 55, at 206.

A. The Historical Perspective: The Genesis of FLPMA

At the turn of the twentieth century, The United States' public domain land—the "excess" land that was not disposed of during westward expansion or reserved by the Tribes—was split in administration between the newly established Forest Service and the General Land Office.[73] The Forest Service's organic act gave it some degree of discretion to withdraw its land, or regulate it, in order to ensure sustained yield and watershed protection.[74] Under the supervision of the Forest Service's first Chief, Gifford Pinchot, the Service passed the nation's first land-use regulations aimed at striking a balance between the competing private and public interests in the management of the public lands.[75]

Meanwhile, the remaining public lands not under the Forest Service's supervision, remained largely unencumbered by federal oversight.[76] Free and open grazing continued on those lands until the passage of the Taylor Grazing Act in 1934.[77] That Act gave the Secretary of the Interior the ability to withdraw public lands and impose permitting and fee requirements similar to those in the Forest Service Organic Act.[78] The Taylor Grazing Act was an attempt to curb the alarming degradation of the public domain due to unmitigated grazing.[79] When the statute took effect, all of the nation's public lands were subject to regulation—thus, its passage marked "the closing of the public domain."[80]

Despite its purpose, the Taylor Grazing Act did little to improve the health of the Western public lands.[81] The Act established the Department of Grazing, later renamed the Grazing Service in 1939, to administer the regulations.[82] But the Grazing Service was substantially underfunded and understaffed, leaving most of the Western rangeland effectively

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73 CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 93 (Island Press, 1992).

74 Act of June 4, 1897, ch.2, § 1, 30 Stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473, 475).

75 *See* Wilkinson, *supra* note 73, at 91–92.

76 *See* Wilkinson, *supra* note 73, at 92.

77 43 U.S.C. § 315b (2012).

78 *Id.*

79 Joseph V.H. Ross, *Managing the Public Rangelands: 50 Years since the Taylor Grazing Act*, RANGELANDS 6(4) (August 1984) *available at* https://journals.uair.arizona.edu/index.php/rangelands/article/viewFile/11882/11155.

80 *See* Wilkinson, *supra* note 73 at 92–93.

81 *Id.* at 93.

82 BLM, NATIONAL TIMELINE, https://www.blm.gov/about/history/timeline (last visited Feb. 18, 2018).

unregulated.[83] In 1946, the General Land Office and the Grazing Service merged, forming the BLM.[84] Despite the merger, the underfunding and understaffing problems persisted.[85]

Congress passed a patchwork of laws in the ensuing decades to address the problem without success. By mid-century, management of the Western public lands was chaotic: there was no succinct statutory guidance on how the lands were to be managed, or outlining the scope of the BLM's authority.[86] Recognizing the problem, Congress established the Public Land Law Review Commission ("the Commission") in 1964 to recommend a path forward for the management of public lands.[87] Six years later, the Commission released its report, titled "One Third of the Nation's Land."[88]

In the report, the Commission noted the extreme degradation of the public lands and recommended multiple updates to the public lands management framework.[89] Of significance here, it noted:

> The Commission is not satisfied with the manner in which land use planning is being carried out for the public lands. We find that many of the individual problems that led to the creation of this Commission and which emerged from our study program have their roots in an inadequate planning process.[90]

Ultimately, Congress heeded the commission's advice. In 1976, it passed FLPMA.[91]

FLPMA's general purpose was to provide a statutory source of authority for the BLM, and outline its duties so that it could address the issues raised by the Public Land Law Review Commission.[92] In its statement of purpose, Congress outlined the goals it set out to achieve through the administration of the Act.[93] Among those goals—and of relevance to this Note—was that responsible present and future use of the

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83 *See* Wilkinson, *supra* note 73 at 93.

84 Reorganization Plan No. 2 of 1946, 11 Fed. Reg. 7876 (July 20, 1946).

85 *See* Wilkinson, *supra* note 73 at 93.

86 Roger Flynn, *Daybreak on the Land: The Coming of Age of the Federal Land Policy Management Act of 1976*, 29 VT. L. REV. 815, 817 (2005).

87 *Id.*

88 PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (June 1970) *available at* https://ia802703.us.archive.org/10/items/onethirdofnation3431unit/onethirdofnation3431unit.pdf.

89 *See generally id.*

90 *Id.* at 41.

91 43 U.S.C. § 1701–33 (2012).

92 *See* Flynn *supra*, note 86, at 817.

93 43 U.S.C. § 1701.

public lands would be best realized through a cooperative planning process,[94] and that the BLM, through the Secretary of the Interior, would be able to make comprehensive regulations and exercise "expeditious decisionmaking."[95]

In furtherance of those goals, FLPMA tasks the BLM with submitting land use plans for all of the public lands at its disposal.[96] It requires the BLM to issue land use plans pursuant to, inter alia, principles of multiple use and sustained yield, and with input from the public, the tribes, and the local government structures.[97] Likely in response to the Public Land Law Review Commission's report outlining the degradation of the public lands, FLPMA also gives the BLM the authority to take any action necessary to "prevent unnecessary or undue degradation of the lands."[98] Congress also identified particular Wilderness Study Areas ("WSAs") and tasked the BLM with managing those areas, so as to keep them viable for future Wilderness Area designation.[99]

Importantly, FLPMA leaves the planning process itself to the Secretary of the Interior's discretion vis-á-vis the BLM.[100] Pursuant to that authority, the BLM issued its first land planning process under FLPMA in 1983.[101]

B. The Planning Process

The 1983 planning process regulation ("process") codified FLPMA's multiple use and sustained yield and consultation mandates and ensured compliance with the National Environmental Policy Act ("NEPA").[102] Land plans under the regulations were called "Resource Management Plans" ("RMPs"), pursuant to FLPMA,[103] and the process for creating plans was outlined at a high level of generality.[104]

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[94] *Id.* § 1701(a)(2).

[95] *Id.* § 1701(a)(5).

[96] *Id.* § 1712(a)(2012).

[97] *Id.* § 1712(c).

[98] *Id.* § 1732(b) (2012). This is the closest the BLM has to OSHA's "General Duty" clause, though it is not invoked in the same way.

[99] *Id.* § 1782(a)–(c) (2012).

[100] *Id.* § 1712(a).

[101] 43 C.F.R. § 1601.0–3 (1980).

[102] 43 C.F.R. §§ 1725.1, 1781.0–3(b) (1983).

[103] *Id.* § 1610.1 (1983). This is in contrast to the largely informal "Management Framework Plans" that had previously guided the BLM's administration of its lands.

[104] 43 C.F.R. § 1610.1.

Much of the 1983 process was a subdelegation of authority from the Secretary, who was given authority under FLPMA, to District or Area Managers within the BLM.[105] This kind of subdelegation was a holdover from the BLM's long history of giving local land managers large amounts of discretion in the management of public lands. The subdelegation had the effect of continuing the co-existent tradition of unrestricted use.[106] The rule gave District or Area Managers discretion to establish planning criteria—so long as the criteria would "generally be based on applicable law" and consistent with the consultation provisions of the title.[107] Managers were also given discretion to identify reasonable planning alternatives, and ultimately select the RMP at the end of the planning process.[108]

The BLM also outlined a general process that designated when proposed rules or amendments were to be open to public notice and comment.[109] Notice and comment was mandatory: (1) at the outset of the planning process, inviting participation in the identification of issues; (2) during review of the proposed planning criteria; (3) upon publication of the draft RMP and draft EIS; (4) upon publication of the proposed RMP and the *final* EIS statement which triggered the opportunity for the opportunity for protest; and (5) when any significant change was made to the plan as a result of action on a protest.[110] The process also allowed for protest procedures in the event that any person who participated in the planning process was adversely affected by the final plan.[111]

The 1983 planning process was supposed to be flexible. RMPs were to be "maintained as necessary to reflect minor changes in data."[112] The rule dictated that amendments should be made when new data arose or there was a material change in circumstances, which triggered additional NEPA processes.[113] While these provisions did not reference any specific guidance from FLPMA, they seem to echo Congress's preference that the BLM exercise "expeditious decisionmaking."[114] While the rule itself gives

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105 *See id.* §§ 1610.1, 1610.4–2 (1983).

106 Coggins & Glicksman, *supra* note 8, at § 16:18.

107 43 C.F.R. § 1610.4–2.

108 *Id.* § 1610.4-5–8 (1983).

109 *Id.* § 1610.2 (1983).

110 *Id.* § 1610.2 (g)(1)–(5).

111 *Id.* § 1610.5–2 (1983).

112 *Id.* § 1610.5–4 (1983).

113 *Id.* § 1610.5–5 (1983).

114 *See* 43 U.S.C. § 1701 (a)(5) (2012).

general guideposts for the agency, its handbook provides more detail on the suggested process for assembling an RMP.[115]

Despite its lofty goals, the 1983 planning process did little to materially change the existing, informal planning process.[116] The process lacked the specificity and cohesion necessary for an effective planning framework.[117] Accordingly, implementation of the 1983 planning process, and thus FLPMA, yielded few substantive changes to the existing planning framework.[118]

C. The Interim Period and Land Planning Woes

The rule's downfalls have led to the BLM's reputation for being far behind the other major federal land managers in its land planning efforts.[119] Its process has been historically plagued by poorly defined, often impossible to achieve "objectives" that lack binding legal force and the resources to effectively carry them out.[120] By 2007, the BLM had completed only forty-one RMPs, or plan amendments, out of 162 resource planning areas.[121] Large-scale inaction yielded frustration. Some believed that the problems came from a lack of caring within the BLM,[122] while others thought FLPMA itself was to blame.[123] Regardless of the source of the problem, the BLM's inability to effectively plan its land management led to increasing dissatisfaction.

In 1999, the Southern Utah Wilderness Alliance ("SUWA") filed suit in Federal District Court alleging that the BLM had failed to amend its land use plans for various WSAs in response to evidence of heightened off-road vehicle ("ORV") use.[124] The case eventually rose to the Supreme Court in 2004.[125] Suing under Section 706(1) of the APA (to "compel action unlawfully withheld or unreasonably delayed"), SUWA and its co-

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115 BUREAU OF LAND MANAGEMENT, H-1601-1, LAND USE PLANNING HANDBOOK (2005) *available at* https://www.ntc.blm.gov/krc/uploads/360/4_BLM%20Planning%20 Handbook%20H-1601-1.pdf.

116 *See* COGGINS & GLICKSMAN, *supra* note 8, at § 16:18.

117 George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVT'L. L. 1, 97 (1983).

118 *See* COGGINS & GLICKSMAN, *supra* note 8, at § 16:18.

119 Coggins, *supra* note 117, at 78.

120 *Id.* at 96–97.

121 COGGINS & GLICKSMAN, *supra* note 8, at § 16:18.

122 *Id.*

123 Coggins, *supra* note 117, at 98. (noting that some parties were calling for the repeal of FLPMA altogether).

124 *See* SUWA v. Babbitt, 2000 WL 33913094 (D. Utah Dec. 22, 2000).

125 Norton v. SUWA, 542 U.S. 55 (2004).

plaintiffs alleged that the BLM had a duty to limit ORV use on WSAs, and amend its RMPs accordingly.[126] SUWA also argued that "Use Supervision and Monitoring" provisions—what the Court called, "will do" provisions—in certain RMPs compelled detailed study of ORV use.[127]

The Court rejected SUWA's APA claim, holding that the courts may not compel agency action, unless it is a required action that is also discrete and non-discretionary.[128] With respect to SUWA's RMP claim, the court held that the "will do" provisions stating that the BLM would monitor future use of sensitive WSA areas were not legally binding.[129]

The *SUWA* case is a helpful lens through which to view the BLM's unresponsive land planning scheme, and the frustration that it fosters in the broader community.[130] The WSAs identified by Congress in FLPMA are specifically identified areas requiring the Secretary—vis-à-vis the BLM—to monitor vigilantly.[131] However, despite that strong mandate, the WSAs at issue in that case were left subject to vague RMPs with little to no substantive protection in keeping with FLPMA's section 1782(c) requirements.

Central to the Court's decision in deferring to BLM inaction was a determination that the BLM's resources were thin and subject to varying levels of appropriation. Its monitoring plans were aspirational, and it could not be held to statements detailing "what it plans to do, at some point, provided it has the funds."[132] Here, the Court put its finger on the pulse of a serious problem facing the BLM land planning process.

The BLM receives less funding than the Forest Service, its most comparable federal land manager, though it manages more land in total.[133] In 2008, 2.5 percent of the BLM's $1.85 billion budget was dedicated to land planning, which translates to about $47 million.[134] Development of an RMP averages between three and four years from start to finish, and costs between $2.5 million and $4 million apiece.[135] Often times, the BLM

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126 *Id.* at 60–61.

127 *Id.* at 67.

128 *Id.* at 66–67.

129 *Id.* at 72.

130 Some scholars have identified the case as a further complicating factor in the federal land planning problem. Though I agree, I do not broach that issue here. For a discussion of that issue, *see generally* Blumm & Bosse, *Norton v. SUWA and the Unraveling of Federal Public Land Planning*, 18 DUKE ENVTL. L. & POLICY FORUM 105 (2007).

131 *See* 43 U.S.C. § 1782(c).

132 *SUWA*, 542 U.S. at 71.

133 *See* Blumm & Bosse, *supra* note 130, at 121–22.

134 *Id.* at 122.

135 *Id.*

lacks the budget or capacity to adequately finish a land plan, let alone keep it up to date in response to changing conditions on the ground.[136] Illustratively, between 2009 and 2012, the BLM failed to inspect forty percent of its highest-priority oil and gas wells because it lacked adequate resources to do so.[137]

While *SUWA* demonstrated the common tension between environmentalists and the BLM, the agency also frequently faces equal criticism from oil and gas developers and state governments. Developers criticize the BLM for its long wait time for permitting.[138] For example, in 2012, the average wait time for a permit approval was 228 calendar days.[139] Some western states also criticize the lag in permitting times, facing pressure from oil producers and the communities that welcome them.[140]

To be sure, the BLM has found itself in a difficult spot in the aftermath of FLPMA. Multiple use and sustained yield are virtually synonymous with "rock" and "hard place." Competing interests make planning decisions difficult, and compliance with federal environmental statutes often requires lengthy NEPA processes, slowing an already daunting procedure to a veritable crawl. However, the BLM has been aspirational in its attempts to expedite its planning processes and make them more efficient.[141]

In response to its criticism, and in line with its sometimes-aspirational spirit, the BLM launched an effort at the end of the Obama-era to update its planning procedures wholesale.

D. "Planning 2.0"

Though there had been a few minor amendments to the 1983 planning procedures, the process as a whole in 2014 looked substantially the same as it had for the preceding three decades. The BLM was not oblivious to the problems with its planning process. In 2011, the agency released a strategic plan that outlined a set of goals it hoped to achieve by 2016.[142]

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[136] Mike Lee, *Western States Wary of Enforcement Role in BLM Fracking Rules*, EENEWS (May 20, 2015), https://www.eenews.net/stories/1060018862.

[137] *Id.*

[138] Phil Taylor, *BLM Permitting Times 'Very Long,' Accountability Lacking—IG*, EENEWS (July 1, 2014), https://www.eenews.net/stories/1060002229.

[139] *Id.*

[140] *See* Lee, *supra* note 136.

[141] *See* Blumm & Bosse, *supra* note 130, at 122. ("In 2001, BLM launched an effort to update all of its 162 land plans within a decade.").

[142] Resource Management Planning, 81 Fed. Reg. 89580, 89584 (Dec. 12, 2016).

One of those goals was to "[a]dopt a proactive and nimble approach to planning that allows us to work collaboratively with partners at different scales to produce highly useful decisions that adapt to the rapidly changing environment and conditions."[143] In May 2014, the BLM began work to overhaul its planning process, in furtherance of that goal.[144]

Over the next two years, the BLM engaged in a comprehensive public engagement campaign, aimed at gaining input on how best to improve its planning process.[145] After receiving comments from over 6,000 groups and individuals, the BLM issued a proposed rule in February 2016.[146] After another 3,300 comments, the final rule was published in December 2016, just before President Obama left office.[147] The new rule was similar, in many ways, to the old one, but differed in four key respects.

First, the new rule allowed for increased public involvement early in the planning process.[148] In addition to the periods listed in the 1983 rule, under Planning 2.0, public comment would be elicited in the preparation of the planning assessment and during review of the preliminary statement of purpose and need.[149]

Second, Planning 2.0 added "Plan Components" to the RMP process.[150] Plan Components serve to bifurcate the RMP between "Goals" and "Objectives."[151] A "Goal" is a "broad statement of desired outcomes" affecting the plan as a whole, or a part of the plan, "toward which management of the land and resources should be directed."[152] An "Objective" is narrower. It is "a concise statement of desired resource conditions within the planning area, or a portion of the planning area, developed to *guide progress toward one of more goals*."[153] Objectives also serve to identify mitigation concerns for resource impacts, environmental concerns, and indicators of progress towards achieving the overarching objectives of the RMP.[154]

Additionally, Planning 2.0 further narrows resource determinations into "designations," "resource use determinations," and "monitoring and

143 *Id.*
144 *Id.* at 89,580.
145 *See id.*
146 *Id.*
147 *Id.* at 89,581.
148 *Id.* at 89,664 (codified at 43 C.F.R. § 1610.2 (2016)).
149 *Id.* (codified at 43 C.F.R. § 1610.2-1).
150 *Id.* at 89,663 (codified at 43 C.F.R. § 1610.1-2).
151 *Id.* (codified at 43 C.F.R. § 1610.1-2(a)(1)–(2)).
152 *Id.* (codified at 43 C.F.R. § 1610.1-2(a)(1)).
153 *Id.* (emphasis added) (codified at 43 C.F.R. § 1610.1-2(a)(2)).
154 *Id.* (codified at 43 C.F.R. § 1610.1-2(a)(2)(i)–(iii)).

evaluation standards" designed to increase the resolution of resource determination as the particular areas within any given RMP come into play.[155] This section of Planning 2.0 provides the kind of specificity that commentators noted was lacking in the 1983 planning regulations.[156]

Finally, and most importantly, Planning 2.0 incorporates a kind of "federalist" approach to the planning process that was not present in the old rule. Under Planning 2.0, the Director of the BLM determines both the deciding official and—importantly—the planning area for the preparation of an RMP for projects that cross state boundaries.[157] This change in particular galvanized opposition to the rule—especially at the state level. Commentators branded this move as a federal power grab by effectively removing the state and local governments from the table.[158] This anti-Washington sentiment proved to be Planning 2.0's death knell,[159] and perhaps foreshadowed other major public lands decisions, including the Bears Ears and Grand Staircase-Escalante proclamations to come later in 2017.

But other commentators expressed optimism in Planning 2.0.[160] After all, it was the result of years of thoughtful engagement with the public. It had the benefit of decades of inefficient planning to guide the BLM on what to add to, and remove from, the existing scheme. All of the substantive updates to the planning process were guided at a more holistic and efficient process.[161] So commentators believed there would be a noticeable improvement in the BLM's ability to make and amend RMPs to better reflect ecological boundaries and contour its plans to meet more particularized needs.[162]

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155 *Id.* at 89,663-64 (codified at 43 C.F.R. § 1610.1-2(b)).

156 *See* Coggins, *supra* note 117, at 97.

157 81 Fed. Reg. 89,662 (Dec. 12, 2016) (codified at 43 C.F.R. § 1610.0-4(a)).

158 *See* House Committee on Natural Resources, *BLM Planning 2.0 Rule*, https://naturalresources.house.gov/issues/issue/?IssueID=118696. (scroll to "Committee Activity" to see statements from Caren Cowan and Jim French) (last visited Sept. 12, 2018).

159 *See* Kevin McCarthy, *BLM Planning 2.0 Rule*, majority leader.gov (Feb. 6, 2017), https://www.majorityleader.gov/2017/02/06/blm-planning-2-0-rule.

160 *See* Chamois Andersen, *Congress Should Approve BLM's 'Planning 2.0' Initiative*, The Hill (Mar. 2, 2017, 7:40 AM), http://thehill.com/blogs/pundits-blog/energy-environment/321874-congress-should-approve-blms-planning-20-initiative.

161 *See* 81 Fed. Reg. 89,585 (Dec. 12, 2016) wherein the BLM outlines its three "goals" for Planning 2.0.

162 *See* Andersen, *supra* note 160.

The rule officially went into effect on January 11, 2017.[163] Barely two months later, it was gone. Congress used the CRA to pass a joint resolution of disapproval and killed Planning 2.0 on March 27, 2017.[164]

IV. THE EFFECT ON BLM'S ABILITY TO UPDATE ITS LAND PLANNING PROCESS

As discussed above, because Congress elected to dismantle the rule via the CRA, the BLM finds itself in a difficult position. What is certain is that the BLM may not reissue a rule in "substantially the same form," or one that is "substantially the same" as Planning 2.0 without Congressional approval.[165] It is uncertain, however, what either of those phrases mean.

At least two commentators have noted this uncertainty, and suggested that, because the CRA seemed to be aimed at the cost of regulation, the "substantially similar" clause refers to the cost-benefit analysis of the rule.[166] However, because Planning 2.0 was not submitted with a cost-benefit analysis, given the procedural nature of the rule, this interpretation would not resolve the BLM's issue.

As mentioned above, resolving the uncertainty is risky, costly, and often not worth an attempt at resubmitting a new rule. The BLM does not have the benefit of a broad statutory catch-all like OSHA's "General Duty" clause to make the changes it sought to make through the rule. In this case, the CRA serves to undermine the agency's entire purpose. With Planning 2.0's death coming at the hands of the CRA, the BLM is effectively barred from ever substantially updating its planning process.

This is, in part, because the CRA's prohibition on substantially similar regulations applies to the entire rule.[167] Even if Congress disapproves of a single provision within an extensive regulation, its decision to "CRA" the rule does not single out that provision above the rest of the regulation. Accordingly, an agency cannot limit its review or rewrite of an affected rule. In order to confidently update such a rule and hope to have it survive the CRA's "resubmit" provision, an agency would

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163 Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016) (to be codified at 43 C.F.R. pt. 1600).

164 Act of Mar. 27, 2017, Pub. L. No. 115-12, 131 Stat. 76.

165 5 U.S.C. § 801(b)(2) (2012).

166 Adam M. Finkel & Jason W. Sullivan, *A Cost–Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 735 (2011).

167 5 U.S.C. § 801(b)(1) (2012).

have to make sure that *none* of its substantive provisions were substantially the same as before.[168]

In the context of Planning 2.0, even though the evidence points to the "federalist" planning decisions as being the portion of the rule that Congress disliked, the joint resolution of disapproval does not specify—stating only that "Congress disapproves the rule submitted by the [BLM]…relating to 'Resource Management Planning'…and such rule shall have no force or effect."[169] So, if the BLM attempts a "resubmit" strategy, it will have to change not only the part of the rule that allows the Director to make planning area determinations when planning areas cross state lines, but also all of the revised planning components, the updates to the public comment process, and any other updates to the 1983 planning procedures codified in Planning 2.0.

The fact that Planning 2.0 acts as a single, large-scale amendment to a previous rule complicates things further. The provisions in Planning 2.0 that do not differ significantly—or at all—from the 1983 rule would be equally subject to the "substantially similar" clause. Accordingly, the BLM is effectively barred from updating its planning procedure at all, unless it, line-by-line, dismantles the whole process and starts from scratch.[170]

This is a serious problem in the context of the BLM. FLPMA's principle purpose is to subject all of the lands under the BLM's supervision to comprehensive land plans.[171] Where FLPMA is silent as to the process required, the BLM has the responsibility—not merely the ability—to fill in the gaps.[172] Section 1740 of FLPMA requires the Secretary (through the BLM) to promulgate rules and regulations to carry out the purposes of the Act.[173] In line with that requirement, the BLM initiated Planning 2.0 on the understanding that it had to update its procedures to better adhere to that mandate.[174] Now, in light of the March 27, 2017 joint resolution of disapproval, the BLM is essentially bound to its 1983 planning process indefinitely.[175]

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168 Or at least a substantial number of them. So an agency is left to determine when a substantial number of the existing provisions have been changed substantially enough that the rule itself is no longer "substantially the same" as it was before. The ground upon which the agency once stood now has the consistency of cheesecake.

169 Act of Mar. 27, 2017, Pub. L. No. 115-12, 131 Stat. 76.

170 Of course, that hypothetical rule would, too, be subject to the CRA.

171 43 U.S.C. § 1701(a)(5) (2012).

172 *Id.* § 1740 (2012).

173 *Id.*

174 *See* Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016).

175 Ironically, Interior Secretary Zinke ordered the BLM to "take a hard look at all aspects of the planning process . . ." for potential improvements, on the same day that the

It seems probable that Congress did not intend to hamstring agencies in such a way when it passed the CRA. However, the likely unintended consequence of its "substantially similar" clause presents the BLM with no reasonable path forward.

If the BLM wants to update its procedures now, outside of the "resubmit" option, it must do so carefully and informally. It might be possible to take advantage of the APA's language relating to notice and comment rulemaking exceptions: interpretive rules, general statements of policy, or rules of agency organization.[176] Assuming such rules are exempt from the CRA,[177] the BLM might be able to get away with, say, amending its handbook to reflect the changes it wished to include in Planning 2.0. But that would present a host of new problems given there would be inconsistencies between the Code of Federal Regulations, which is available to the public, and the agency's actual process, which is obscured from the public's view. Simply put, it would violate the policy goals of both FLPMA and the APA—that the public remain heavily involved in the planning process and agency processes as a whole.[178]

Against this backdrop, the conflicting mandate becomes apparent. FLPMA requires the BLM to carry out its objectives "expeditiously" and publicly,[179] but the CRA prevents it from doing so. Both are Congressional mandates. Neither is compatible with the other. The next section explores how to solve the problem of the conflicting mandate by balancing Congress's interest in regulatory oversight and the ability for agencies to perform their purpose under organic legislation.

V. PROPOSED ALTERNATIVE

The CRA is a useful tool for regulatory oversight, but its ability to paralyze does more harm than good. As explained above—and exemplified by both the BLM and OSHA—the Act has a real potential to undermine the basic functions agencies were created to serve. If it could be amended, though, to require Congress to give guidance to affected

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joint resolution was passed. Rachel Schadegg, *Zinke Orders BLM to Revise Planning and NEPA Processes*, THE WILDLIFE SOCIETY (May 9, 2017), http://wildlife.org/zinke-orders-blm-to-revise-planning-and-nepa-processes.

[176] 5 U.S.C. § 553(b) (2012).

[177] The CRA does not specifically exempt them, though they seem to fall outside of its purview. This Note does not attempt to analyze the scope of the CRA as it relates to informal rulemaking.

[178] *See* 43 U.S.C. § 1701(a)(5) (2012); 5 U.S.C. § 552 (2012).

[179] 43 U.S.C. § 1701(a)(5); 5 U.S.C. § 552.

agencies, it could serve its purpose without undermining the underlying delegation of authority.

It would require a simple amendment. Because the CRA's principle danger stems from its lack of specificity, it should at a minimum require Congress to inject specificity into a joint resolution of disapproval. This could take two forms.

First, the Act could be amended to require Congress to merely list provisions it dislikes. So, if the "federalist" provision of Planning 2.0 is what spurred Congress to "CRA" Planning 2.0, this model would only require Congress to add a few words to the existing joint resolution of disapproval. Where the current joint resolution states: "Congress disapproves the rule submitted by the [BLM]…relating to 'Resource Management Planning'…and such rule shall have no force or effect,"[180] the same joint resolution under this model would look something like: "Congress disapproves of section 1610.0-4 (a) of the rule submitted by the [BLM]…relating to 'Resource Management Planning'…and such rule shall have no force or effect."

That would fundamentally change the BLM's current problem. By adding even a small amount of specificity, the CRA's resubmit provision takes on a completely different meaning. While that provision now effectively requires the BLM to dismantle both Planning 2.0 and its existing 1983 planning rule in order to update its planning process by barring it from promulgating a rule in "substantially the same form,"[181] the addition of a particular provision in the joint resolution would serve to focus the "substantially the same" language. So the BLM would be able to update only that provision—keeping the rest of Planning 2.0 intact—and presumably satisfy the resubmit provision.

Of course, this model could not limit Congress in how many provisions it could list in its joint resolution. So, it would do nothing to prevent Congress from listing the entire rule, thus placing the affected agency in no better position than it would be in now. Still, requiring Congress to be express in doing so would, at the very least, increase transparency. Either way, this model, though preferable to the current version, would still leave agencies guessing as to how to change the specified provisions so as to satisfy Congress.

A more desirable amendment would require Congress to list the provisions it disapproves of *and* propose a suggested alternative for each. This approach would allow the agency to serve its function by using its expertise to create expansive and specialized regulations, but also allow Congress to act as an editor—clipping out provisions it disapproves of and

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[180] Act of Mar. 27, 2017, Pub. L. No. 115-12, 131 Stat. 76.

[181] *See supra* Part IV.

replacing them with its own. This "editor" model would more faithfully adhere to the "review" language embedded in the Congressional Review Act. It would also give clear guidance to agencies on how to move forward. Taken together with the "substantially the same" language, this amendment to the CRA would effectively tell agencies to either add Congress's edits, or rewrite the entire rule. Again, this would be preferable because agencies are currently stuck with the latter, without the option to incorporate the former.

The model is not without its drawbacks, though. Asking Congress to comb through every proposed final rule and come to enough of a consensus to be able to pass a joint resolution both disapproving of particular provisions *and* offering policy alternatives for each is ambitious.[182] According to the Congressional Research Service, federal agencies pass between 2,500 and 4,500 final rules every year.[183] Arguably, asking Congress to earnestly comb through each one renders agencies useless—indeed, what benefit do they serve if they only place more work on Congress's desk and end up being micro-managed in the process? Further, the principle of "legislative compromise" that is often lauded as being the biggest benefit of the bicameral legislature is also often marked by legislation "whose internal logic is less than perfect."[184] In other words, Congress tends to avoid coherent, specific language when legislating in highly contested fields of policy so as to appease representatives on both sides of the aisle. How can we expect Congress to agree on both particular revisions to replace *and* the specific language to replace them?

However, the same argument could be made about the CRA in its current form. Congress specifically asked for the added burden of reviewing each and every federal regulation.[185] As mentioned above, Congress rarely expresses its intent to invoke the CRA to undo agency

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182 Congress offering policy alternatives in regulations might also be seen to fly in the face of the major principles that administrative law rests upon. For example, *Chevron* and *Auer*—the fountainheads of agency deference—each justify their holdings on the idea that agencies' interpretations should be trusted because they are experts in their respective fields. Chevron, U.S.A v. NRDC, 467 U.S. 837, 865 (1984); *see* Auer v. Robbins, 519 U.S. 452, 463 (1997). Congress presumably delegated authority because of that expertise; why, then, should Congress micro-manage in highly specialized areas of policy, such as public land planning process? True, but the CRA in its current form allows Congress to nullify entire regulations, and as this Note hopefully exemplifies, even the very functions that agencies serve. Nullification or micro-management; which is worse?

183 MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS AND PAGES IN THE *FEDERAL REGISTER* 1 (2016) *available at* https://fas.org/sgp/crs/misc/R43056.pdf.

184 *In re* Ondras, 846 F.2d 33, 36 (7th Cir. 1988).

185 *See* 5 U.S.C. § 801(a)(1)(A) (2012).

rulemaking.[186] Thus, while regulatory review is theoretically burdensome, Congress has shown it will only invoke the CRA when it most vehemently disapproves of an agency's final rule. So presumably, under the "editor" model, Congress would only need to do line-by-line edits of agency rulemaking in rare circumstances. On the ground, this kind of amendment would likely make the process look no different than it does today, until Congress decided to invoke the CRA to undo a rule. At that point, the amendment would force Congress to go through its process to come to a legislative compromise on the proposed edits. While perhaps imperfect, that legislative compromise would be politically transparent and subject to the democratic process. Overall, this scheme would increase transparency and public accountability, while decreasing the above described inefficiency that the CRA imposes today. Congress could no longer sweep controversial regulation under the proverbial rug.

Asking Congress to give guidance when it resorts to using the CRA is not unreasonable. It is an added burden, to be sure, but one that would only serve to forward Congress's own policies and increase its control over the administrative state—something it has continually struggled to assert.[187] While agencies may fear Congressional "commandeering" of agency policy, Congress has always had the power to override agency policy and implement its own through legislation. More importantly, increased specificity from Congress would allow agencies to retain *more* of their autonomy to create policy by removing the paralytic conflicting mandate that the CRA now presents.

Conclusion

The CRA's ability to paralyze agency action is a function of vague statutory language. It was enacted to re-assert Congressional control over the administrative state. But that control has repeatedly taken the form of paralysis. If the 104th Congress could have predicted the BLM's current predicament, it likely would have seen the wisdom in adding statutory language requiring Congress to give guidance when invoking the CRA.

Given that the BLM's planning woes have been lamented by environmentalists and natural resource developers alike, its paralysis benefits neither party. It should behoove Congress to allow the BLM to figure out how best to improve a process that most believe to be ineffectual. As it stands now, Congress's use of the CRA to kill Planning 2.0 has effectively legislated a planning process—known to be inadequate by all involved—into binding law. In so doing, it has taken away the

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[186] *See* Rosenberg, *supra* note 40, at 152.

[187] *See supra* Part II, at 4.

discretion given to the BLM under FLPMA to create a speedy planning process with public input.

The BLM's paralysis perfectly exemplifies the flaws imbedded in the CRA. The Act lowers the legislative burden on Congress; allowing for wholesale dismantling of agency policy through a joint resolution lacking guidance to affected agencies. Because of the Act's vague resubmit-clause language, affected agencies are highly unlikely to attempt a new regulation. Thus, agencies are left with two paths forward: (1) informal rulemaking; or (2) wholesale inaction. Neither path is ideal for Congress, the agency, or the public. For that reason, a small amendment to the CRA requiring Congress to include guidance for future agency action in its joint resolution of disapproval would be a significant improvement to the law as it stands now.

Designed to reduce the cost of agency rulemaking and increase Congress's ability to oversee agency action, the CRA has served only to increase agency inefficiency and undermine the underlying delegations of authority that allow them to function. If Congress earnestly wishes to see better, more cost-efficient regulations, the CRA as it is currently written is almost certainly not the best way to bring about that change. On the other hand, if Congress's true intent is to paralyze agency action, it should not be allowed to do so through a vague joint resolution of disapproval. Adding specificity as a requirement to the CRA would increase Congress's burden in the short term but decrease the burden on agencies and the public at large in the long term. It would also give Congress more influence over agency policy and allow for more public accountability in policy making. It would provide a clear mandate.