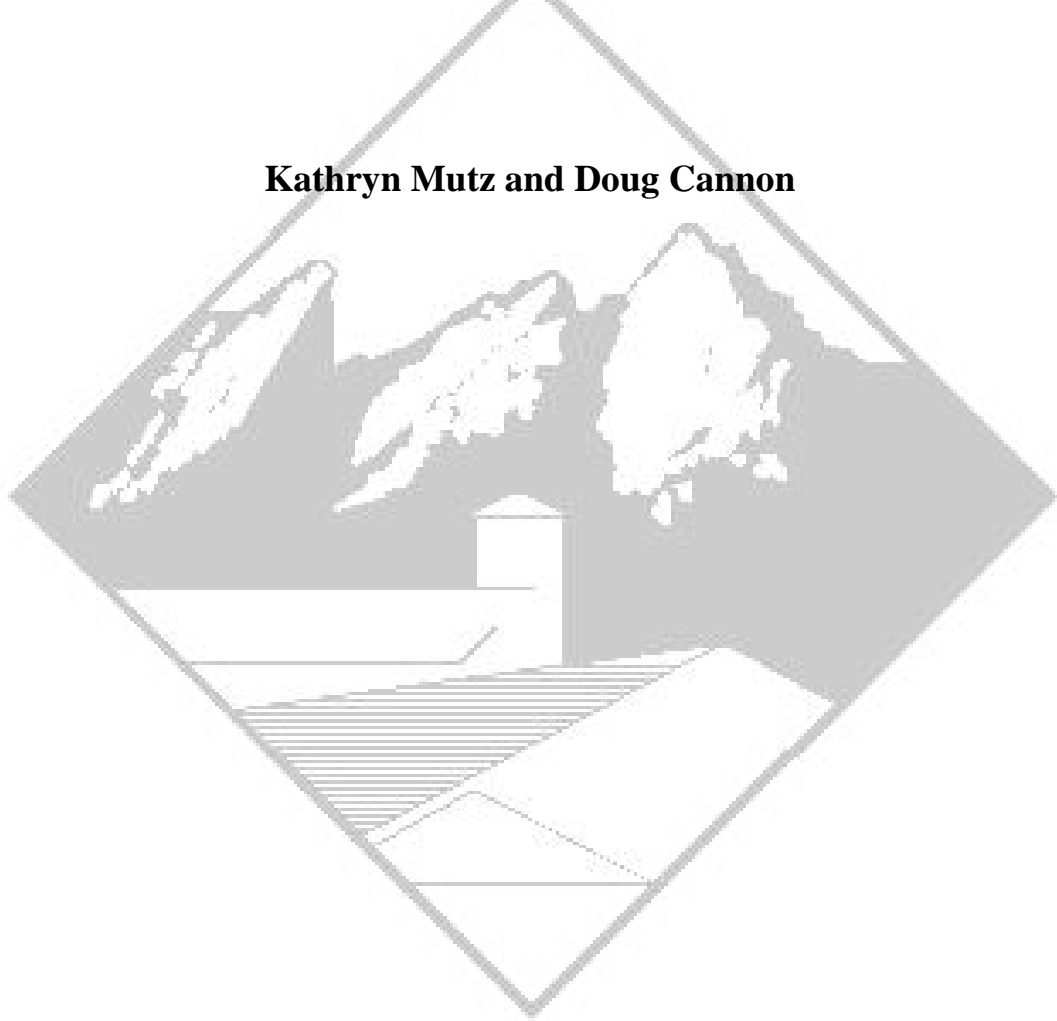


**EL MALPAIS AREA:
NATIONAL MONUMENT,
NATIONAL CONSERVATION AREA
AND THE
WEST MALPAIS AND CEBOLLA WILDERNESS AREAS**

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I. INTRODUCTION

El malpais (“the badlands”), located about twenty miles south of Grants, New Mexico, is an area of extensive volcanic features including lava flows, cinder cones, lava tubes, calderas, and ice caves.¹ The elevation of the el malpais region varies from about 6,500 feet to about 8,000 feet above sea level. The vegetation ranges from pinyon-juniper in the lower elevations to ponderosa forests in the highlands. The area provides habitat for numerous amphibians, reptiles, mammals, and bird species. Because of its unique features and long history, the area is also rich in cultural and historical resources. For all of these reasons, Congress has designated most of el malpais for varying degrees of protection. See Maps 1a and 1b.

In 1987 Congress passed Public Law 100-225 (the Act), which created three land designations in order to protect and administer the el malpais region. The first is the 114,277-acre El Malpais National Monument, administered by the National Park Service (NPS). Adjacent to and nearly surrounding the National Monument is the El Malpais National Conservation Area (NCA). The approximately 263,000-acre NCA is administered by the Bureau of Land Management (BLM). Included within the NCA are the West Malpais and the Cebolla Wilderness Areas that together comprise about 98,000 acres. The Act also called for a wilderness suitability study for part of the NCA (the Chain of Craters Wilderness Study Area (WSA)), as well as the roadless portions of the National Monument.

This report describes the legislative history of the area, discussing each legal framework (national monument, NCA, and wilderness areas), how they were chosen, and the controversies and constituencies that influenced the selection. The report also compares management prescriptions

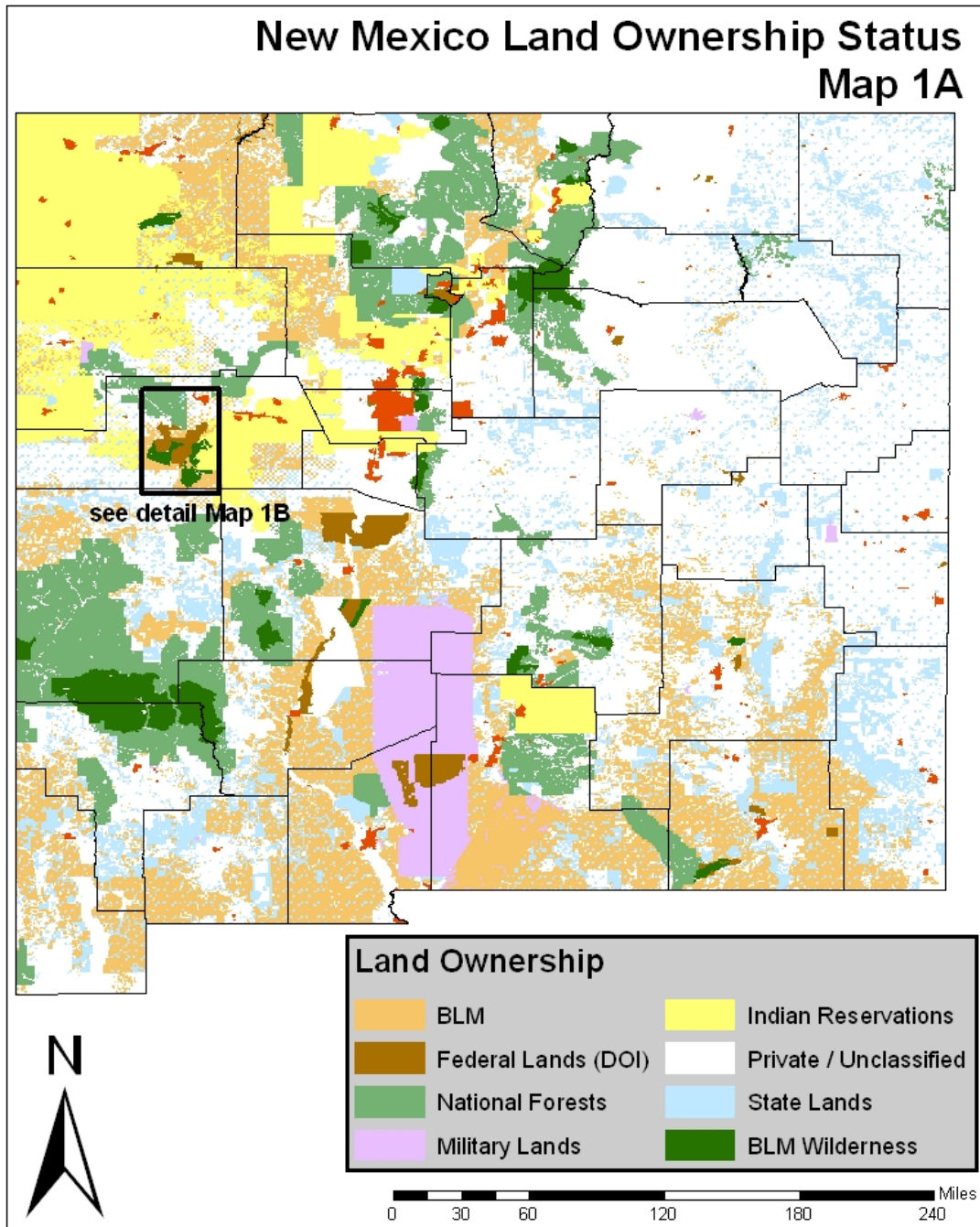
specified in the legislation for each framework and how BLM and NPS have translated these prescriptions into management plans. Finally, the report comments on whether or not different land status designations have made any difference in



management, with particular emphasis on motorized access, grazing, mineral development, and water rights and water development.

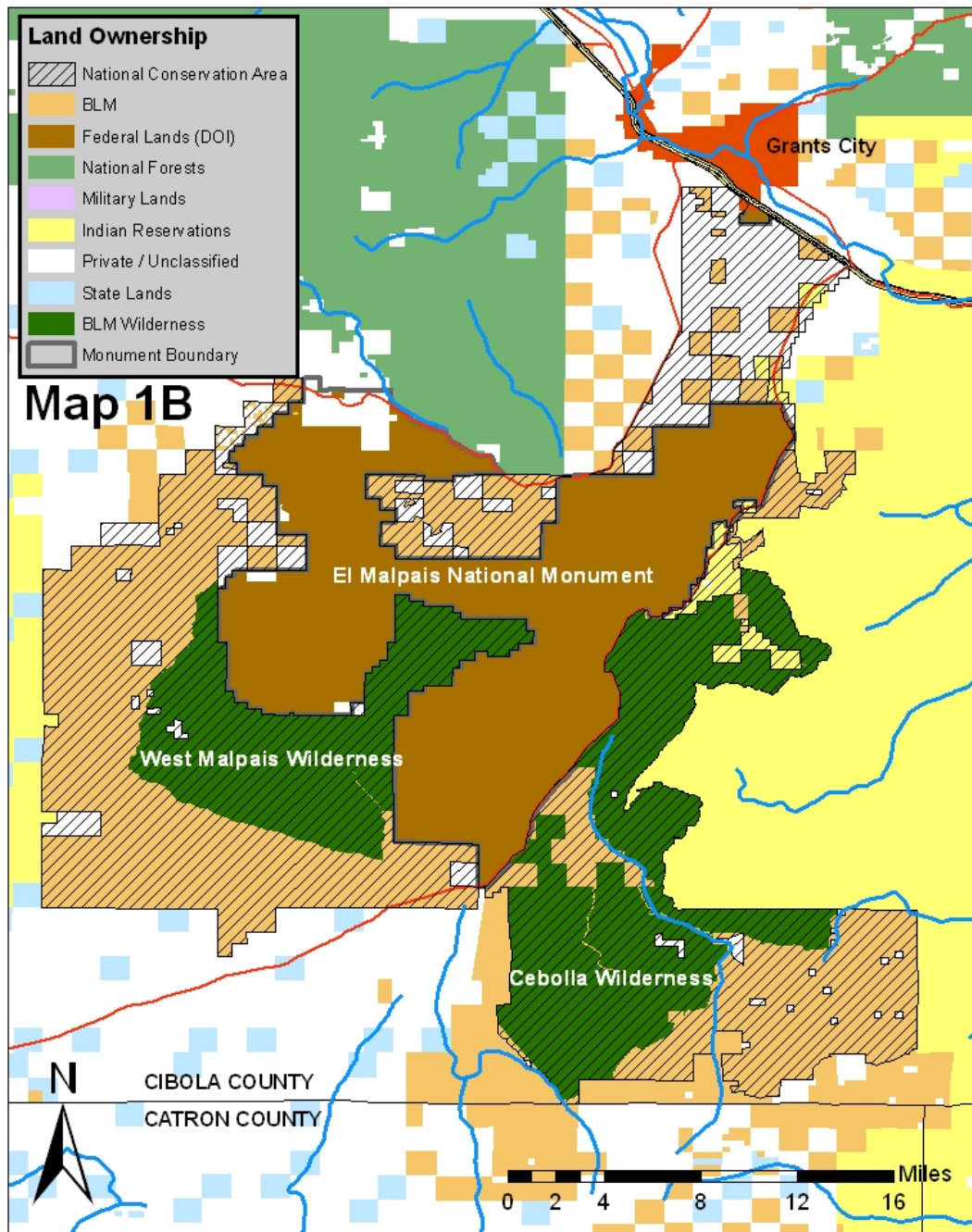
¹ “el malpais” (lower case) is used throughout this report to refer to the general badlands area regardless of land status designation. General descriptions of the area were drawn from the following websites unless otherwise cited. http://www.nm.blm.gov/recreation/albuquerque/el_malpais_nca.htm (February 8, 2005); <http://www.nps.gov/elma/pphtml/facts.html> (February 8, 2005).

Map 1a. New Mexico Location



Map 1b. Detail of National Monument, NCA, Wilderness Areas, and multiple-use lands.

Note: This map is derived from recent BLM and NPS data, but it incorrectly portrays the yellow hatched area (eastern edge) as part of the NCA. This is Acoma Pueblo land excluded from the NCA boundary. Only the hatched orange and green areas are within the NCA.



II. EARLY HISTORY

The original inhabitants of el malpais were the Acoma and Zuni, dating back to 10,000 –5,000 B.C.E.. Spanish colonization and conquest in the 16th and 17th centuries resulted in dwindling Native populations as well as changes in the Acoma and Zuni agrarian lifestyle. By 1800 the largest industry for the Indian and Spanish in the area was sheepherding. Between 1880 and 1925, the sheep industry was at its height. The cattle industry lagged behind, but started making inroads into the region in the late 1880s. Severe drought in 1891 – 1893, the panic of 1893 and depletion of the rangelands from overuse hampered the livestock industry in the area.² By 1939, the era of large-scale sheep ranching in the area came to an end.

In the 1890s, the timber industry developed in the area, mostly in the Zuni Mountains to the north. Homesteading followed logging, and people settled along the perimeter of el malpais, particularly to the east. The Depression brought more homesteaders, most of whom were not self-sufficient, but worked for larger ranchers, timber companies or the Civilian Conservation Corps. Large commercial timber operations ended in the late 1940s.

Mining (fluorspar near the ice caves and pumice mines near Grants and west of el malpais) and commercial agriculture, primarily the carrot industry, followed livestock and timber in the 1940s and 1950s. The carrot industry succumbed to the California producers and the advent of cellophane bags in the late 1950s; the fluorspar mines closed in 1952. Uranium mining was the last of the major extractive industries to develop and fail in the el malpais area. Uranium was discovered in 1950, setting off the area's greatest cycle of boom. A wave of miners and companies flowed into the area. Population escalated, services grew, roads were built and paved. Banks, schools, hospitals, libraries, and a community college were established. The demand for uranium dropped in the 1980s and an economic recession followed.

III. THE PROCESS OF PROTECTION

A. The Early Days

The first formal attempts at protecting the unique features of el malpais came in 1934. The El Morro National Monument was just a short distance north and west of el malpais. The then custodian of the El Morro National Monument, Evon Vogt, took an interest in the el malpais region and wrote a letter to the Director of the NPS expressing his fears over the rate at which ice was being removed from the ice caves in the area and the need to protect the unique resources of the region.³ The ice caves were on private property but the owner of the land had made no attempts to keep the public from visiting the caves and in fact leased the land for tourist development in 1934. Mr. Vogt proposed that the area be included in the El Morro National Monument. In response the director of the NPS sent Roger Toll, then Yellowstone Park Superintendent, to study whether there was anything of sufficient importance in the el malpais

² Neil Mangum, *In the Land of Frozen Fires: A History of Occupation in El Malpais Country*, chapter VII (1990) [hereinafter *Land of Frozen Fires*]. This book provides most of the early historical background included in this report unless otherwise cited.

³ Id. at chapter IX.

region to justify NPS protection. Toll reported back that the ice caves and other features were interesting, but that there was nothing there to warrant inclusion in the national park system. Toll's basis was that the volcanic features and the ice caves could already be found at three other national parks and more did not need to be preserved. In 1936 the NPS reconsidered el malpais as a national monument, but this study concluded that the area was "to[o] inaccessible and perhaps to[o] small an area to be considered as a park or monument."⁴

In 1938, Vincent Colby, an Albuquerque resident and cave-preservationist, asked Harold Ickes, then Secretary of the Interior, to preserve the caves before they could be further vandalized and to avoid more tourist accidents in the area. In response, Ickes sent a survey crew to el malpais to evaluate the area, particularly the ice caves, as potential national monument material. The survey crew found that the area held "considerable interest" but recommended "that no action be taken toward establishing this area as a national monument until further and more comprehensive investigations are made."⁵ No follow-up was carried out.

The next real attention came to el malpais in 1943 when the Army requested the area for a bombing range. The NPS was asked about the proposal and responded that in light of the current war time conditions they supported the proposed bombing range. Use of the area as a bombing range ceased after World War II because the area was too remote and inaccessible to allow easy access for setting targets and removing ordinance. Nine square miles of the area around McCarty's crater (in the south part of the eventual monument) was removed from the public domain and then released back to BLM in 1947.⁶

In the 1950-1960s interest in the ice caves and the lava structures continued to increase. During this time the Caldelerias family, which owned the ice caves, took measures to increase the tourist draw to the region.⁷ In addition the family took steps to preserve the unique geological features of the area. Through land and charitable donations, a private museum devoted to pioneer history was set up and featured Indian ruins on the Cebolleta Mesa on the east side of el malpais.⁸ In 1966 the Grants Community Development Committee proposed the area for Congressional protection.⁹

⁴ Id.

⁵ Id. The request followed a near tragedy, in which a group of Kentucky schoolteachers got lost while trying to find the ice caves in the area. Public sentiment rapidly increased for the government to do something with the caves to prevent further accidents in the ever more popular tourist area.

⁶ Id. at chapter VIII.

⁷ Id. at chapter IX. Benito Baca, who homesteaded the area near the caves, may have been the first white person to discover them. Sheep and land tycoon Sylvestre Mirabel purchased the caves from either the Atlantic and Pacific Railroad or from an intermediary timber company owner. Mirabel was great great grandfather to David Candelaria, the current owner of the caves. Id. at chapter VII.

⁸ Id. at chapter IX. The facility was sold to the Acoma Indians in 1980.

⁹ Hearing, Subcommittee on Public Lands, National Parks, and Forests of the Committee on Energy and Natural Resources, U.S. Senate, *S.56: A bill to Establish El Malpais National Monument, the Masau Trail, and the Grants National Conservation Area in the State of New Mexico, and for other purposes and S. 90: A Bill to Establish the Big Cypress National Preserve Addition in the State of Florida, and for other purposes*, (February 19, 1987) [hereinafter *S. 56 Hearing*] at 246.

In 1969 the Secretary of the Interior declared the BLM-managed el malpais region eligible for natural landmark status.¹⁰ In response the NPS carried out a “Study of Alternatives-El Malpais,” which was published in 1971. This study presented two alternatives. First, the area could continue to be managed by the BLM as an Outstanding Natural Area. Or, second, the area could be managed by the NPS as a national monument.¹¹ The report concluded that el malpais resources were “high enough quality to be considered for inclusion in the national park system,” but that the best option was probably to have the BLM continue to manage the area due to the long standing and cemented relationship that existed between the agency and the locals.¹² New Mexico BLM officials agreed with the NPS report and reiterated their position that “protection, preservation, and management of the malpais area can be accomplished under the Classification and Multiple Use Act of September 19, 1964.”¹³ The NPS study concluded that the national monument status would only work if the ice caves and Bandera Crater, both privately owned, were included in the monument to assist in interpretation of the volcanic history of el malpais.¹⁴

Despite these recommendations, Congress proposed to establish the El Malpais National Monument under the NPS the following year.¹⁵ This attempt failed, however, and the State of New Mexico proposed to make the el malpais region a state park. When the state legislature rejected that idea, the State supported continued BLM management of the area as an Outstanding Natural Area with natural landmark status.¹⁶

In 1974, BLM took the recommendation of the 1971 study and designated about 84,000 acres of the el malpais region as an Outstanding Natural Area (64,500 acres) and as a National Environment Area (19,500 acres).¹⁷ With passage of the Federal Land Policy and Management Act (FLPMA) in 1976, the Outstanding Natural Area and National Environment Area became an instant wilderness study area.

In 1981, BLM recommended the area that was to become a national monument plus part of the National Environment Area as suitable for wilderness in a draft report. In 1986, BLM designated the area that was to become a national monument and most of the surrounding areas as the El Malpais Special Management Area in its Rio Puerco Resource Management Plan (RMP).¹⁸

¹⁰ S. 56 Hearing at 246; El Malpais Proposed Wilderness Area: Draft Environmental Impact Statement and Wilderness Study Report, Bureau of Land Management Socorro District, September 1, 1981 [*hereinafter* Draft Wilderness Study Report] at 1-1 (Recommended as a Natural Landmark by the Bureau of Outdoor Recreation).

¹¹ S. 56 Hearing at 246.

¹² *Id.*

¹³ Land of Frozen Fires, chapter IX.

¹⁴ As it turned out, the Candelarias were not included in some of the discussions and they did not want to sell the caves and craters.

¹⁵ S. 3426, *A Bill To Establish the El Malpais National Monument in the State of New Mexico* (March 28, 1972) [*hereinafter* S. 3426]; and H.R. 14151, *A Bill To Establish the El Malpais National Monument in the State of New Mexico* (March 28, 1972) [*hereinafter* H.R. 14151].

¹⁶ Land of Frozen Fires, chapter IX.

¹⁷ 39 F.R. 17451 (1974); Draft Wilderness Study Report at 1-1 and Map A-1.

¹⁸ Bureau of Land Management, Albuquerque District Office, Rio Puerco Resource Area, *Land Protection Plan: El Malpais National Conservation Area* (September 1989), BLM-NM-PT 89-025-3110 [*hereinafter* Land Protection Plan] at 9. The RMP consolidated a number of overlapping special designations – Wilderness Study Area, Wilderness Instant Study Area, Outstanding Natural Area, Natural Environment Area, National Natural Landmark,

B. Legislative History

1972

The legislative history begins in 1972 when New Mexico Congressman Runnels and Senator Anderson introduced identical bills in the House (H.R. 14151) and the Senate (S. 3426) to establish the El Malpais National Monument under the NPS. The bills called for the creation of the El Malpais National Monument in order to preserve not more than 120,000 acres of “one of the most important volcanic areas in the United States, ... containing historic resources associated with early Indian uses of the area.”¹⁹ The only language relating to management required that the area be managed in accordance with the NPS organic act of 1916.²⁰ Both of these bills were referred to the respective Committee’s on Interior and Insular Affairs (Interior Committee).²¹ Neither bill ever made it out of committee, perhaps failing when the Caldelarias family refused to sell their land which would have become a private inholding within the proposed national monument.²²

1985

The next national attention paid to el malpais was in 1985 when Congressman Bill Richardson of New Mexico introduced H.R. 3684. The bill was referred to the Committee on Interior and Insular Affairs. The bill called for the creation of a 351,000-acre national monument to be administered by the BLM and for the designation of 193,000 acres of wilderness within the national monument.²³ The bill included provisions for the withdrawal of the area from mining and mineral leasing, subject to valid existing rights,²⁴ the continued ability to hunt²⁵ and graze in the area, with grazing continuing in the wilderness where the use pre-dated the bill.²⁶ Grazing in the wilderness area could include maintenance of range improvements and the use of motorized equipment where reasonably needed.²⁷

This bill received much more attention than did the previous bills. The Subcommittee on Public Lands (the Committee) held hearings on March 26, 1986 in Grants, New Mexico and again on May 6, 1986 in Washington D.C.²⁸ Local governments, the state government, ranchers, local

and Chaco Archeological Protection Site. See Map 42 in the U.S. Department of the Interior, Bureau of Land Management, Rio Puerco Resource Area, Albuquerque District, *Rio Puerco Resource Management Plan* (November 1986) [hereinafter Rio Puerco RMP].

¹⁹ S. 3426 at 1, lines 4-8; and H.R. 14151 at 1, lines 4-9.

²⁰ Id. at 3, lines 6-9; The NPS Organic Act is found at 16 U.S.C.A. 1, 2-4 (West 2004).

²¹ 118 Cong. Rec. 10399, 10741 (1972).

²² Land of Frozen Fires, chapter IX.

²³ Hearings, Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, 99th Congress 2nd Session, *H.R. 3684: To Designate the El Malpais Lava Flow and Adjacent Public Lands as a National Monument to be Managed by the Bureau of Land Management*, (March 26, 1986 [hereinafter Grants H.R. 3684 Hearing] and May 6, 1986 [hereinafter Washington DC H.R. 3684 Hearing]) at 5.

²⁴ Id. at 7

²⁵ Id.

²⁶ Id. at 12-13.

²⁷ H. Rept. 99-708, *Designating the El Malpais Lava Flow and Adjacent Public Lands as a National Monument to be Managed by the Bureau of Land Management*, (July 23, 1986) [hereinafter H. Rept. 99-708] at 8. This is the same provision as in the Colorado Wilderness Bill P.L. 96-560.

²⁸ Land of Frozen Fires, chapter IX; Grants HR 3684 Hearing at 1; Washington, D.C. H.R. 3684 Hearing at 61.

land owners (the Candelarias), conservation groups, and the tribes supported protection of the area, and to a slightly lesser extent, wilderness designation, because of its economic value to the area.²⁹

When the bill was referred out of committee to the House, it was amended in a number of ways.³⁰ First, the size of the national monument was nominally increased to 373,000 acres, but the wilderness area was decreased to 179,000 acres, excluding the area that would later become Cebolla Wilderness Area.³¹ In addition the bill included a specific provision to forbid wood gathering in the monument.³² More specific provisions were included to deal with the issue of acquiring in-holdings, including mineral rights³³ and exchanging state lands.³⁴ The committee report noted that the boundaries of the monument were drawn to exclude Acoma Pueblo lands and those of several individual Navajos, but that these and other private lands could be sold or exchanged to the BLM.³⁵ The bill reached the floor of the House and the rules were suspended, so the bill was passed without any dispute.³⁶ The bill was then referred to the Senate Committee on Energy and Natural Resources where it received no action and died at the end of that session of the 99th Congress.³⁷

At the time, BLM opposed H.R. 3684, arguing that having BLM administer a national monument could create confusion among the users, especially since the legislation would allow hunting and some other uses that were not permissible in most national monuments.³⁸ The BLM suggested that the area be designated something else, perhaps a NCA, to avoid confusion.³⁹ Similarly, the National Parks and Conservation Association wanted the area protected, but not as a national monument managed by the BLM. The group felt the BLM could not be trusted to manage an area that did not have the primary objective of being multiple-use lands, that there would be public confusion, and that there would be erosion of NPS high standards for national monuments. Instead, the lands should either be managed by the NPS or be designated something else like a “national public land reserve.”⁴⁰

In contrast, the town of Grants was strongly behind the plan for protecting el malpais as long as it was designated a national monument.⁴¹ The town felt that monument status would maximize

²⁹ See e.g., Washington D.C. H.R. 3684 Hearing at 61-62.

³⁰ Washington D.C. H.R. 3684 Hearing at 66-68.

³¹ Id. at 1-3. The “increase” in size appears to have been merely a correction in calculation of acreage of the originally proposed area, but the new Wilderness Area proposal did not include the four eastern WSAs which were included in the state-wide wilderness evaluation and which would continue to be managed to protect their wilderness character. Id. at 10.

³² Id. at 2.

³³ Id. at 3 (section 5); additional committee discussion at 10.

³⁴ Id. at 4 (section 8); additional committee discussion at 10.

³⁵ Id. at 10-11.

³⁶ 132 Cong. Rec. 17795 (1986).

³⁷ 132 Cong. Rec. 18107 (1986).

³⁸ Washington D.C. H.R. 3684 Hearing at 65-66. In later testimony, a local criticized the National Monument designation because it would not allow hunting, caving, night use, etc. Congressman Seiberling suggested that a change in name might be necessary to avoid confusion. Grants H.R. 3684 Hearing at 39.

³⁹ Washington D.C. Hearing at 65-66.

⁴⁰ Grants H.R. 3684 Hearing at 53-54 and 128-134.

⁴¹ Id. at 24.

the economic benefits to the region through tourism by protecting the el malpais lands and giving the area national recognition.⁴² Several conservation groups believed that monument status would give el malpais the proper level of management with an increase in BLM staff presence and monitoring.⁴³

The Wilderness Society testified that monument status would give BLM the mandate and opportunity to really manage and protect the resource rather than continuing its emphasis on grazing, mining and other development activities.⁴⁴ Apparently, the conservation groups compared several protective designations before recommending that the national monument designation as their preference.⁴⁵

This controversy prompted the House Committee to discuss the possibility of taking the entire area away from the BLM and giving it the NPS.⁴⁶ Congressman Richardson regretted that the National Parks Conservation Association was as entrenched as agencies and Congress about the designations; Seiberling was willing to give the National Monument to BLM as an experiment with the option of taking it away if the agency did not manage properly.⁴⁷ In the end, the Committee continued to support BLM management of the National Monument, but stated that BLM should follow as nearly as possible protocols for other monuments. Their hope was that BLM would learn from its experience and would grow into the “rounded, multiple-use agency envisioned in FLPMA – an agency that can preserve and protect resources as well as sell and use them.”⁴⁸

DOI consistently opposed any wilderness designation in legislation, asserting that it should be allowed to complete its wilderness evaluations for the whole state before designation. At the time of the H.R. 3684 hearings, BLM had completed a draft wilderness study, but it covered an area only half the size of the proposed National Monument.⁴⁹ BLM’s draft report recommended that 98,824 acres (the core lava flow area) be designated wilderness and that 39,824 contiguous State, Forest Service and private land be obtained by trade to include in a WA with an additional

⁴² Id. at 22-24.

⁴³ Id. at 34.

⁴⁴ Id. at 49-49 (“Under current laws, BLM does not appear to be willing to provide priority management attention to resource protection on lands it administers expect in wilderness areas. Because some land that does not qualify for wilderness because of roads or other human impacts still has important resource values, there must be another category of Congressional protection. The National Monument approach embodied in HR3684 would achieve this goal where other attempts have failed.”) Id. at 125. The groups saw this as particularly important in New Mexico as BLM lands in the state included a tremendous amount of outstanding natural areas. Id. at 126.

⁴⁵ Id. at 126 (“...it appears that the BLM has interpreted the NCA designation to mean business as usual when it comes to incompatible development activities.”) According to the groups, Kings Canyon, California Desert CA and Steese NCA in Alaska did not provide the strong protection needed in Malpais – e.g., all three were open to mining and mineral leasing; also timber harvesting (King Range) and ORV problems.

⁴⁶ Washington D.C. Hearing at 100-101. Seiberling and Richardson were also annoyed with BLM’s opposition to any designation of wilderness before completing their wilderness suitability study.

⁴⁷ Id. at 95-97.

⁴⁸ H. Rept. 99-708 at 7.

⁴⁹ Draft Wilderness Study Report . The WSAs included in the draft study included the area of the eventual National Monument plus the West Malpais WA, and small areas of non-wilderness conservation unit, e.g., the Neck conservation unit and part of the Continental Divide conservation unit.

6,828 acres of BLM land.⁵⁰ While Congress proposed this “suitable” area as wilderness in H.R. 3684, it eventually designated a different area as wilderness in P.L. 100-225 the following year.

New Mexico Governor Anaya, locals, and the New Mexico BLM Wilderness Coalition recommended amending H.R. 3684 to prohibit OHV use in the entire proposed national monument (including all areas that are now both monument and the entire NCA).⁵¹ Other congressional witnesses voiced their support for maintaining more vehicle access by expressing their opposition to wilderness designations.⁵²

Despite language in the bills and congressional and other witnesses’ assurances, both area ranchers and the Acoma Pueblo expressed concern that access to their private and reservation lands and grazing allotments on public lands would be compromised. In testimony on H.R. 3684 in 1986, a rancher by the name of King, supported the bill but opposed creating the Cebolla Wilderness Area because of difficulty of maintaining livestock wells and fences without motorized access. King did not want any roads in the southeast el malpais area closed. He was also concerned, as were the Acoma, about the effect of wilderness designation on adjacent private land. Congressman Seiberling assured King that motorized access to grazing improvements would be permitted.⁵³ While the southeast WSAs eventually became the Cebolla Wilderness Area in 1987, the House Interior Committee removed the southeast WSAs from H.R. 3684 in 1986 before it went to the House floor.⁵⁴

1986-1987

Following adjournment of the 99th Congress, the Congressional delegation worked out a compromise bill including splitting the management of the area between the NPS and BLM.⁵⁵ At the beginning of the 100th Congress New Mexico Senator Domenici sponsored S. 56⁵⁶ and Representative Richardson sponsored H.R. 403.⁵⁷ Both bills included most of the provisions included in the version eventually signed into law. Senator Domenici’s bill was referred to the Committee on Energy and Natural Resources where it received one hearing,⁵⁸ but subsequently died in committee.⁵⁹ Representative Richardson’s bill fared much better. Richardson’s bill went to the floor of the House where the rules were suspended and the bill passed without debate.⁶⁰ The House forwarded the bill to the Senate Committee on Energy and Natural Resources.⁶¹

⁵⁰ S. 56 Hearing at 246. BLM did not issue a final report, but the agency initiated land acquisition in the area. S. 56 Hearing at 431-2.

⁵¹ Grants H.R. 3684 Hearing at 15-17, 37, 55-56.

⁵² Id. at 37-39 (wilderness designation).

⁵³ Id. at 41-47.

⁵⁴ H. Rept. 99-708 for HR 3684. H.R. 3684 was introduced with the four eastern WSAs included as wilderness. When it went to the House floor, the wilderness designation was reduced by 15,000 acres and the four eastern areas were excluded. The discrepancy in acreage appears to be related to the overall discrepancy in acreage noted by DOI for the entire area.

⁵⁵ S. 56 Hearing at 246.

⁵⁶ 133 Cong. Rec. 342 (1987).

⁵⁷ 133 Cong. Rec. 864 (1987).

⁵⁸ S. 56 Hearing.

⁵⁹ 133 Cong. Rec. Index 3167.

⁶⁰ 133 Cong. Rec. Index 3283 (1987).

⁶¹ Id.

The Senate Committee made very few changes (see discussion of Native American access and water rights, below), then passed the bill as amended. Subsequently the House approved amendments to the bill, the president signed it, and it became Public Law 100-225.⁶²

The Sierra Club supported NCA status because the designation would allow BLM to pull together multiple management plans for various features surrounding the National Monument.⁶³ Ironically, a letter from the Department of the Interior (DOI) commenting on the new proposals stated that “[m]ultiple bureau involvement will increase the costs without commensurate public benefits” suggesting that the DOI had reconsidered its position that the BLM should not have authority over the monument.⁶⁴ Neither the Senate nor the House committee commented on the DOI letter and eventually both houses passed bills with management of the el malpais split between BLM and NPS.

P.L. 100-225 included very specific provisions to provide for land exchanges with the State, the Acoma Pueblo, and subsurface mineral estate holders.⁶⁵ In discussing their proposed land exchange provisions, the Senate was also careful to indicate its solicitude for private land owners.⁶⁶

Vehicle access for Native Americans was also a particular concern early in the legislative process. For example, in his remarks in 1986, the Governor of Acoma Pueblo expressed concern about both the National Monument and wilderness designations, including the impacts of designations on future development on Acoma lands adjacent to the area and impacts on the Pueblo’s ability to access their lands and improve their roads and rights-of-way over BLM land in the el malpais region.⁶⁷ When the final bill came up for debate on the floor of the Senate, the only points of controversy were the impact of the bill on the Acoma Pueblo and reserved water rights.⁶⁸ Regarding the Acoma Pueblo, Senator Domenici moved for and included in the bill an amendment that further clarified the rights of the Acoma regarding the National Monument and NCA.⁶⁹ The amendment assured the Acoma nonexclusive access to the National Monument and NCA for traditional cultural and religious purposes consistent with the Indian Religious Freedom Act and the Wilderness Act.⁷⁰

⁶² 133 Cong. Rec. Index 3283.

⁶³ S. 56 Hearing at 254, 259.

⁶⁴ S. Rept. 100-100 at 19-23.

⁶⁵ H. Rept. 100-116 at 5-7 and 14-16; P.L. 100-225 § 504 would expedite exchange of mineral rights normally subject to provisions of FLPMA. H. Rept. 100-116 at 14.

⁶⁶ S. Rept. 100-100, *El Malpais National Monument* (July 6, 1987) [hereinafter S. Rept. 100-100] at 16. P.L. 100-225 § 506(d)(1).

⁶⁷ Grants H.R. 3684 Hearing at 19. While testimony of the Acoma Governor expressed concern, it did not seem to be major opposition to the bill. Later testimony by the Governor on the 1987 bill indicated that the Acoma had always opposed the monument designation.

⁶⁸ 133 Cong. Rec. 35962-35965.

⁶⁹ Id.; see additional discussion of Acoma comments in section V.C.1.a.

⁷⁰ Id. at 35963, eventually P.L. 100-225 § 507. The amendment also gave the Pueblo of Acoma and other appropriate tribes an advisory role in National Monument and NCA management planning and allowed for temporary closures of the National Monument and NCA to the public to accommodate traditional cultural and religious practices. Acoma testimony noted that changes made from H.R. 3684 to H.R. 403 and S. 56 removed tribal lands from the NATIONAL MONUMENT, but they viewed this as an insignificant gesture of appeasement because private rights would have been protected on the included lands. Grants H.R. 3684 Hearing at 137-38 (July 1986 letter).

Both 1986 and 1987 House and Senate bills provided for grazing and congressional testimony is clear that existing grazing uses could continue and vehicle access to range improvements would be permitted.⁷¹ There was a noticeable lack of any criticism of grazing in both live and written testimony. Several witnesses commented on the importance of maintaining grazing.⁷² Conservation groups even explicitly acknowledged allowing grazing to continue in wilderness areas⁷³ and had discussed the issue with area ranchers (the King family) to allay their fears about the effect of wilderness designation on ranching.⁷⁴ It was, however, explicitly clear that grazing levels would be adjusted based on the health of the range in the entire NCA, including wilderness, so there was no need for special bill language to facilitate this.⁷⁵

When the final bill came up for debate on the floor of the Senate, there were two points of controversy regarding water. First was the impact of the bill on the Acoma, who were concerned, in part, about maintaining their aboriginal rights to water.⁷⁶ The bill eventually changed the size of both wilderness areas, including slightly decreasing the Cebolla Wilderness Area to exclude a spring of religious significance to the Acoma.⁷⁷ Second was whether to include express federal reserve water rights in the legislation. In this regard, both the Senate and House committee reports included a letter from Assistant Secretary of the Interior Horn recommending that the bill include specific water rights language.⁷⁸ The New Mexico Wilderness Study Committee did not want to include explicit reserve water rights language; Governor Carruthers of New Mexico recommended that the law include specific denial of federal reserve water rights.⁷⁹

The Senate also briefly discussed reserved water rights language.⁸⁰ Senator Bingaman supported the language of the bill with a brief history of reserved water rights litigation and criticized the McClure/Wallop views expressed in S. Rept. 100-100.⁸¹ Senator Domenici also addressed the language, assuring the Senate that the water rights language was particular to the wilderness areas established in the bill and did not reflect the intent or will of Congress regarding other areas.⁸² This was the first time that reserved water rights language had been included in wilderness related legislation.⁸³

⁷¹ E.g., Congressman Bill Richardson, Grants H.R. 3684 Hearing at 104 ; grazing allowed in National Monument and Wilderness Area managed by BLM. Id. at 39.

⁷² Grants H.R. 3684 Hearing at 15-17 (Griego for Anaya); S. 56 Hearing at 458 (Governor Carruthers and New Mexico Natural Resources Director)

⁷³ S. 56 Hearing at 254, 259 (Sierra Club - adjust boundary of National Monument to Highway 117 to permit grazing in wilderness areas to the east (and presumably prevent grazing in the National Monument to the west); Grants H.R. 3684 Hearing at 126 (Norton of The Wilderness Society - grazing acceptable in El Malpais if managed by BLM)

⁷⁴ Washington D.C. H.R. 3684 Hearing at 84 (Norton, The Wilderness Society).

⁷⁵ S. 56 Hearing at 411 – 415.

⁷⁶ 133 Cong. Rec. 35962-35965.

⁷⁷ Id. at 35966.

⁷⁸ H. Rept. 100-116. at 19-23.

⁷⁹ S. 56 Hearing at 251; Id. at 458-459(Carruthers).

⁸⁰ 133 Cong. Rec. at 35964-35967.

⁸¹ In later testimony, Senator Domenici indicated that the water rights language in the bill was actually suggested by McClure and Wallop. Id. at 35967.

⁸² Id.

⁸³ 133 Cong. Rec. 35965 (1987).

The final committee bill (and P.L. 100-225) explicitly reserved the minimum amount of water required to carry out the purposes of the National Monument, NCA and wilderness areas, protected valid existing water rights and pending applications, and set the priority date of reserved rights to the date of enactment of the law.⁸⁴ The Committee was clear to point out, however, that the limited water in the region was fully appropriated and that this bill would not in any way conflict with or take precedence over any valid existing or pending application for water rights in the region.⁸⁵ The Senate report included additional views of Senators McClure and Wallop on the need for explicit water reservation language in bills to preclude the courts from interpreting implied water rights too broadly.⁸⁶ With these changes, the bill passed the Committee with a unanimous vote and went to the floor of the Senate.⁸⁷

Congress recognized the importance of the rich cultural heritage of the area by authorizing designation of the Masau Trail, and requiring NPS and BLM to develop cultural resources management plans for the National Monument and the NCA.⁸⁸ Cultural resource protection was also paramount in wilderness areas, particularly in the culturally rich Cebolla Wilderness Area. Congressional witnesses expressed support for the Cebolla wilderness designation to protect the rich cultural resources from vandalism and concern that wilderness areas not be closed to archeological research.⁸⁹ The House Committee commented that the wilderness designation was not intended to exclude the area from the cultural resource management plan required by the bill. Indeed, the BLM management plan should include active identification, management and protection of wilderness area cultural resources and this was not inconsistent with the Wilderness Act.⁹⁰ In its report, the Committee reiterated its belief that active management of cultural resources in the wilderness areas was important and compatible with the Wilderness Act.⁹¹

IV. LEGAL FRAMEWORKS

A. Legislative Provisions

P.L. 100-225 established four special land status areas and required BLM and the NPS to make recommendations about two others.⁹² The Act established a 114,277-acre National Monument to be managed by the NPS⁹³ and a 262,690-acre NCA to be managed by the BLM.⁹⁴ The Act also designated 98,210 acres within the BLM NCA as the West Malpais and Cebolla Wilderness

⁸⁴ 133 Cong. Rec. 35962; P.L. 100-225, § 509

⁸⁵ 133 Cong. Rec. 35964-35965.

⁸⁶ S. Rpt. 100-100 at 24-26.

⁸⁷ S. 56 Hearing at 9.

⁸⁸ Id. at § 201 (Masau trail) and § 501(a)(3) (management plan).

⁸⁹ e.g., Wood, Grants H.R. 3684 Hearing at 29-30, 117-19.

⁹⁰ Washington D.C. H.R. 3684 Hearing at 6.

⁹¹ H. Rept. 100-116, *Establishing the El Malpais National Monument, the Masau Trail, and the Grants National Conservation Area in the State of New Mexico, and for Other Purposes* (1987) at 11 [hereinafter H. Rept. 100-116].

⁹² The Act also provided for NPS to cooperate with other agencies to designate the route of the Masau Trail, a vehicular trail route connecting nationally significant antiquity sites in New Mexico and eastern Arizona. This route does not convey any particular land status and is not discussed further in this report. H. Rept. 100-116 at 2. P.L. 100-225 §§ 201-204.

⁹³ H. Rept. 100-116 at 1-2; see also P.L. 100-225, §§ 101, 102, 103.

⁹⁴ H. Rept. 100-116. at 3; P.L. 100-225 § 302.

Areas.⁹⁵ Further, the Act required BLM to study the Chain of Craters WSA for wilderness suitability and required NPS to evaluate its roadless area for wilderness suitability.⁹⁶

The differences among the National Monument, NCA and wilderness areas begin with their legislative purposes and management authority. P.L. 100-225 established El Malpais National Monument to “*preserve* for the benefit and enjoyment of future generations ...the nationally significant Grants Lava Flow, the LaVentanas Chacoan Archeological Site, and other significant natural and cultural resources.”⁹⁷ The Act required that NPS manage the National Monument under the NPS organic act,⁹⁸ and “other provisions of law applicable to the National Park System.”⁹⁹ The Act established El Malpais NCA to “*protect* for the benefit and enjoyment of future generations...the La Ventana Natural Arch and other unique and nationally important geological, archeological, ecological, cultural, scenic, scientific, and wilderness resources of the public lands surrounding the Grants Lava Flows.”¹⁰⁰ The Act required that BLM manage the NCA in accord with FLPMA and “other applicable provisions of law, including those provisions relating to grazing on the public lands.”¹⁰¹ The Act established the wilderness areas within the NCA to further the purposes of the Wilderness Act. BLM must manage it in accord with the Act’s provisions, including specific provisions on grazing.¹⁰²

In addition to these general legal authorities, P.L. 100-225 includes specific prescriptions for management under the various legal frameworks. The legislation treated all three of the special land status designations the same regarding:

- Withdrawal from mining and mineral leasing (including geothermal leasing), with additional withdrawals from entry, appropriation and disposal under the public land laws;¹⁰³
- Grant of express federal reserve water rights;¹⁰⁴
- Guarantee of nonexclusive access for Native Americans;¹⁰⁵
- Rules for acquisition of in-holdings and exclusion of disposal of lands, and provisions for land exchanges with the state, the Acoma Pueblo, and subsurface mineral estate holders;¹⁰⁶
- Requirements for preparation of management plans;¹⁰⁷ and
- Requirements for evaluation of roadless areas for wilderness suitability.¹⁰⁸

⁹⁵ The Cebolla Wilderness Area generally included the four eastern WSAs debated in previous versions of the bill. H. Rept. 100-116 at 3-4; P.L. 100-225 §§ 401, 402.

⁹⁶ Rept. 100-116 at 4-5; P.L. 100-225 § 501(b) and (c).

⁹⁷ P.L. 100-225, § 103; 16 U.S.C.A. 460uu(a) (West 2004) (emphasis added).

⁹⁸ Act of August 25, 1916 (39 Stat. 535; 16 USC 1 et seq.).

⁹⁹ P.L. 100-225, § 103.

¹⁰⁰ 16 U.S.C.A. 460uu-21(a) (West 2004) (emphasis added).

¹⁰¹ P.L. 100-225, § 302(a).

¹⁰² Id. at §§ 401, 402

¹⁰³ Id. at § 506(d)(2).

¹⁰⁴ Id. at § 509.

¹⁰⁵ H. Rept. 100-116 at 7. P.L. 100-225 § 507(a).

¹⁰⁶ H. Rept. 100-116 at 5-7 and 14-16; P.L. 100-225 § 504 would expedite exchange of mineral rights normally subject to provisions of FLPMA. H. Rept. 100-116 at 14.

¹⁰⁷ P.L. 100-225, § 501.

¹⁰⁸ Id. at §§ 501(b) and (c).

The Act distinguished the National Monument from the NCA and wilderness areas in terms of grazing, hunting, and wood gathering. The Act:

- Excluded grazing from the National Monument after ten years.¹⁰⁹
- Required that grazing be permitted to continue within the NCA, subject to FLPMA, other federal law and reasonable regulation.¹¹⁰
- Required that grazing be permitted to continue within the wilderness areas, subject to reasonable regulation and Forest Service guidelines on grazing in wilderness.¹¹¹

The Act was silent on hunting and commercial wood gathering in the National Monument, but presumably NPS would prohibit both without controversy. Hunting was specifically allowed in the NCA subject to closures for public safety and enjoyment and administrative purposes.¹¹² Wood gathering for commercial purposes was prohibited in the NCA.

B. Drawing the Boundaries

As the proposed land status and managing agency fluctuated over the years, so did the specific boundaries of the special areas. Congress and the agencies have made both major and minor changes between and during legislative sessions addressing rancher, Acoma Pueblo, state and local government, and environmental group concerns. With the current combination of national monument and NCA designations, Congress has placed nearly all of the el malpais area originally under BLM management into special management status. Today only about 40,000 acres of relatively contiguous public land in the area remains under traditional multiple-use management and BLM has recommended most of that for inclusion in a wilderness area and/or NCA.¹¹³

1. National Monument

The El Malpais National Monument (114, 277 acres designated) is currently the core area of the el malpais region, consisting primarily of the Grants Lava Flow. The largest area proposed for a national monument extended from the Acoma Pueblo on the east to the Ramah Navajo Reservation on the West and from the Cibola National Forest in the Zuni Mountains on the north¹¹⁴ to the county line in the south.¹¹⁵ Within this larger area, the final boundaries of the El Malpais National Monument generally follow the much smaller outline of the Grants Lava Flow. See Map 2.

¹⁰⁹ H. Rept. 100-116 at 2; P.L. 100-225 § 104.

¹¹⁰ S 56 Hearing at 126; P.L. 100-225 § 302(d).

¹¹¹ H. Rept. 100-116 at 4; P.L. 100-225 § 402(b), citing § 108 of P.L. 96-560.

¹¹² Presumably, hunting in the NCA included hunting in the wilderness areas. P.L. 100-225 § 302(b).

¹¹³ This report calls the non-NCA BLM lands “multiple-use lands” for simplicity even though the NCA is also technically in the multiple-use category. The 40,000 acre figure is estimated from relatively current BLM land status maps of the area. See recommendations for boundary adjustments in section IV.C.

¹¹⁴ P.L. 100-225 included transfer of a small area of the national forest land to the BLM to form a logical northern boundary.

¹¹⁵ The southern boundary of the area is not quite clear as NRLC has not yet located the original maps. The extent of the area is inferred from various statements in the legislative history and early BLM management documents.

Following national monument designation, NPS and BLM made a minor administrative boundary change to accommodate the multi-agency visitor center near Grants with the smallest reasonable size.¹¹⁶

El Malpais National Monument includes most of the Grants Lava Flow and significant cultural resources in the vicinity of the lava flow, but the NPS has called the National Monument boundaries “irrational.” The National Monument excluded non-lava islands within the lava flow (kipukas) and most of the grassland adjacent to the lava flows. While Congress did not comment on its rationale for excluding these areas from the National Monument, the principle legislative distinction between the National Monument and NCA was continuation of grazing in the NCA. Small areas of lava flow excluded from the National Monument provided grazing and grazing access in the Big and Little Hole-in-the-Walls, Cerritos de Jaspe, and West Malpais Wilderness Area.¹¹⁷ These exclusions, coupled with the “stairstep” boundaries following quarter sections have made enforcement of grazing prohibitions in the monument difficult.¹¹⁸

Congress did not gerrymander the National Monument boundary to exclude:

- Subsurface mineral estates – The subsurface mineral estate within the monument was significant in extent, but not thought to be high quality nor with high potential for development. These lands were included in the monument, but the act provided for exchange of mineral interests for interests outside the area.¹¹⁹
- Non-federal in-holdings – Congress drew the exterior boundary of the National Monument to include about 18,500 acres of non-federal in-holdings.¹²⁰ Some of the lands were expected to be acquired (e.g., the Candelarias property, including Bandera Crater and the ice caves), but all acquisitions were to be voluntary.¹²¹
- An area used as a bombing range (near McCarty’s crater) and still littered with munitions.¹²²

¹¹⁶ U.S. Department of the Interior, National Park Service. *General Management Plan and Environmental Assessment Wilderness Suitability Study for El Malpais National Monument*, New Mexico (January 1990) (*hereinafter* NPS GMP/EA & WSS) at 82-84.

¹¹⁷ U.S. Dept. of Interior, National Park Service, *El Malpais National Monument Statement for Management* (March 31, 1993) [*hereinafter* Statement for National Monument Management] at 12-13 (“The boundaries were not developed on the basis of natural resource preservation requirements or visitor use needs. A major influence on park boundary placement was whether the land could or could not be grazed by domestic livestock. This is an important reason Big-Hole-in-the-Wall, Cerritos de Jaspe, and Little-Hole-in-the-Wall were excluded from the park, even though these omissions created serious management conflicts in terms of issues such as bighorn sheep reintroduction, exotic wildlife (bison) introduction; ecosystem management; visitor use; grazing management; fire management; access to private lands; rights-of-way placement; subdivision and commercial development; and the implementation of hunting closures on park lands. These conflicts are expected to seriously compromise park management in the future if park boundaries remain unaltered.”)

¹¹⁸ Personal communication with Herschel Schultz, Chief Ranger, U.S. Park Service, El Malpais National Monument, February 18, 2005.

¹¹⁹ P.L. 100-225, § 504.

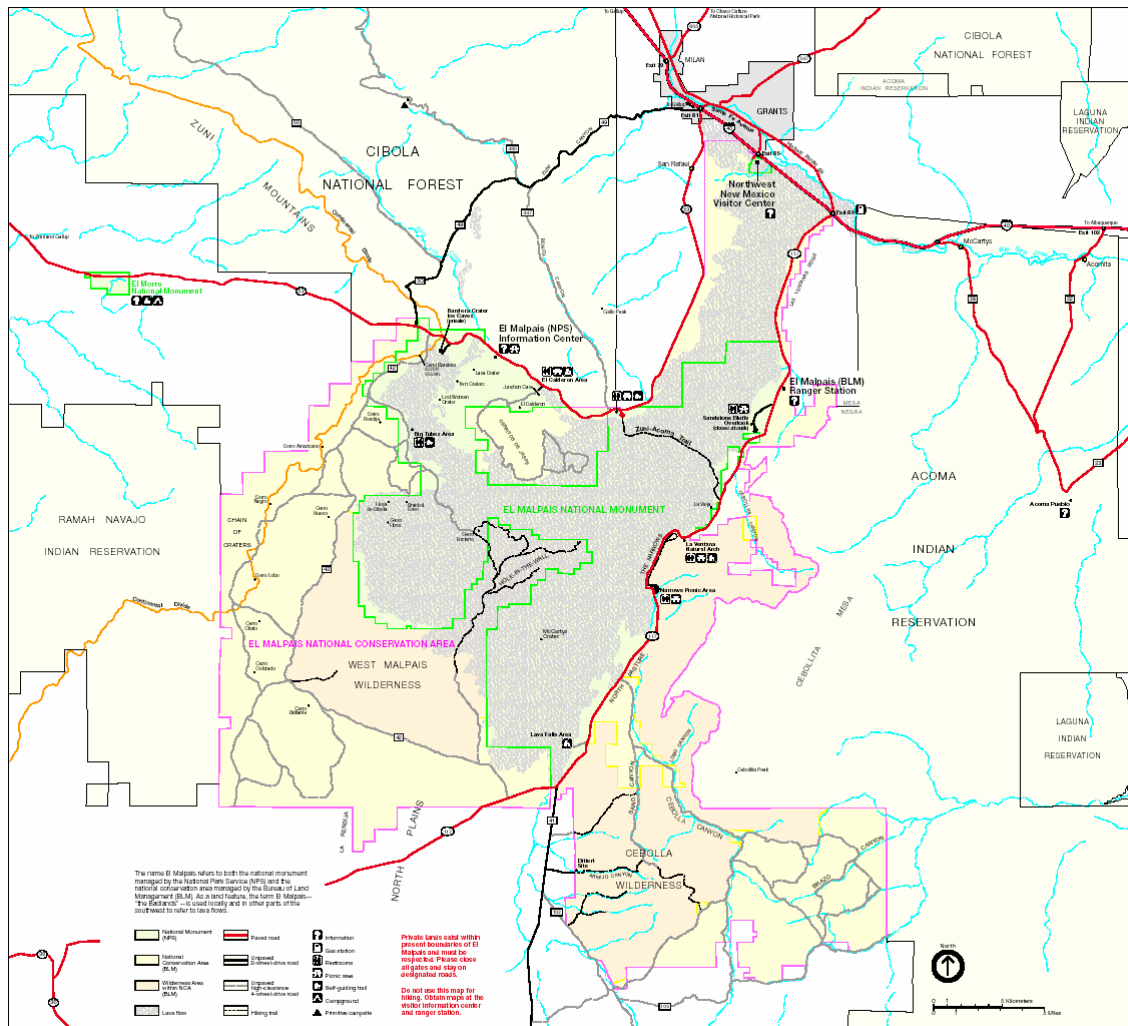
¹²⁰ NPS GMP/EA & WSS at 8.

¹²¹ Grants H.R. 3684 Hearing, Governor Anaya testimony at 81-82; P.L. 100-225, § 502.

¹²² S. Rept. 100-100 at 13 (Congress suggests a cooperative agreement between DOI and Department of Defense to find and clear ordinance in the NATIONAL MONUMENT and NCA areas).

Map 2. El Malpais NM with lava flow.

Source: El Malpais National Monument Map, <http://www.nps.gov/elma/pphtml/maps.html>



Congress also excluded:

- Small areas of Acoma Pueblo land on the eastern edge of the NM – at the request of the Acoma;
- Specific small areas of developed private land along the exterior boundary (e.g., ranches in the Cerritos de Jaspe area) – although many acres of private in-holdings were included in the National Monument; and
- The valley bottom east of New Mexico Highway 117 – to facilitate management and so as not to confuse the public.¹²³

¹²³ S. 56 Hearing at 247, 255, 258.

2. National Conservation Area

In P.L. 100-225, Congress designated most of the remainder of the el malpais area (262,690 acres) as the El Malpais NCA with about one-third of this designated as wilderness. Non-wilderness areas of the NCA, called “conservation units,” are illustrated in Map 3. The rationale for the boundaries of the NCA is not as clear as the rationale for the National Monument boundaries. Where the boundary is not shared with the National Monument, the boundary is based, in large part, on land ownership – following the Acoma Reservation to the east; the Ramah Navajo Reservation to the west; and the extent of public land to the southwest. Some Acoma Pueblo lands were excluded from the NCA as it was thought that their development could affect the character of the NCA. Other Acoma lands were included in the NCA with authorization for a trade at Acoma instigation.¹²⁴ Both the northeast and the southeast boundaries of the NCA are difficult to explain. The northeast boundary incorporated the Neck conservation unit into the NCA over the objections of the DOI that the area included too much private land.¹²⁵ The Neck area is generally bounded by New Mexico Highways 53 and 117 and includes the northern extent of the Grants Lava Flow.

The southern boundary of the NCA is from one to five miles north of the furthest extent of contiguous public lands in the area and a mile or two to the north of the current southern boundary of the Rio Puerco Resource Area (currently part of the Albuquerque Field Office.) Most of the area south of the NCA was apparently in the Socorro Resource Area and slated for disposal because it was not contiguous with other Socorro Resource Area lands and difficult to manage.¹²⁶ Consequently, only about 40,000 acres remained as non-NCA, multiple-use lands (see Map 1b). Most of these lands, plus some acreage acquired by BLM since designation, are proposed in the El Malpais NCA Management Plan for addition to the NCA (Map 3). This addition would consolidate the BLM lands into the NCA, managed by one Field Office.¹²⁷

3. Wilderness Areas

Over the objections of the DOI,¹²⁸ Congress designated two wilderness areas in P.L. 100-225: the West Malpais Wilderness Area and the Cebolla Wilderness Area. In addition, P.L. 100-225 required the NPS to evaluate all roadless areas within the National Monument for suitability for wilderness designation. Similarly, the law required BLM to evaluate the Chain of Craters WSA for wilderness suitability.¹²⁹

¹²⁴ Land Protection Plan at 20; P.L. 100-225 § 505.

¹²⁵ Grants H.R. 3684 Hearing at 154. The area is currently only 22 percent public land. 2001 El Malpais Plan at 1-7.

¹²⁶ Personal Communication with Gene Tatum, Riparian Resources Coordinator, Albuquerque Field Office, February 11, 2005.

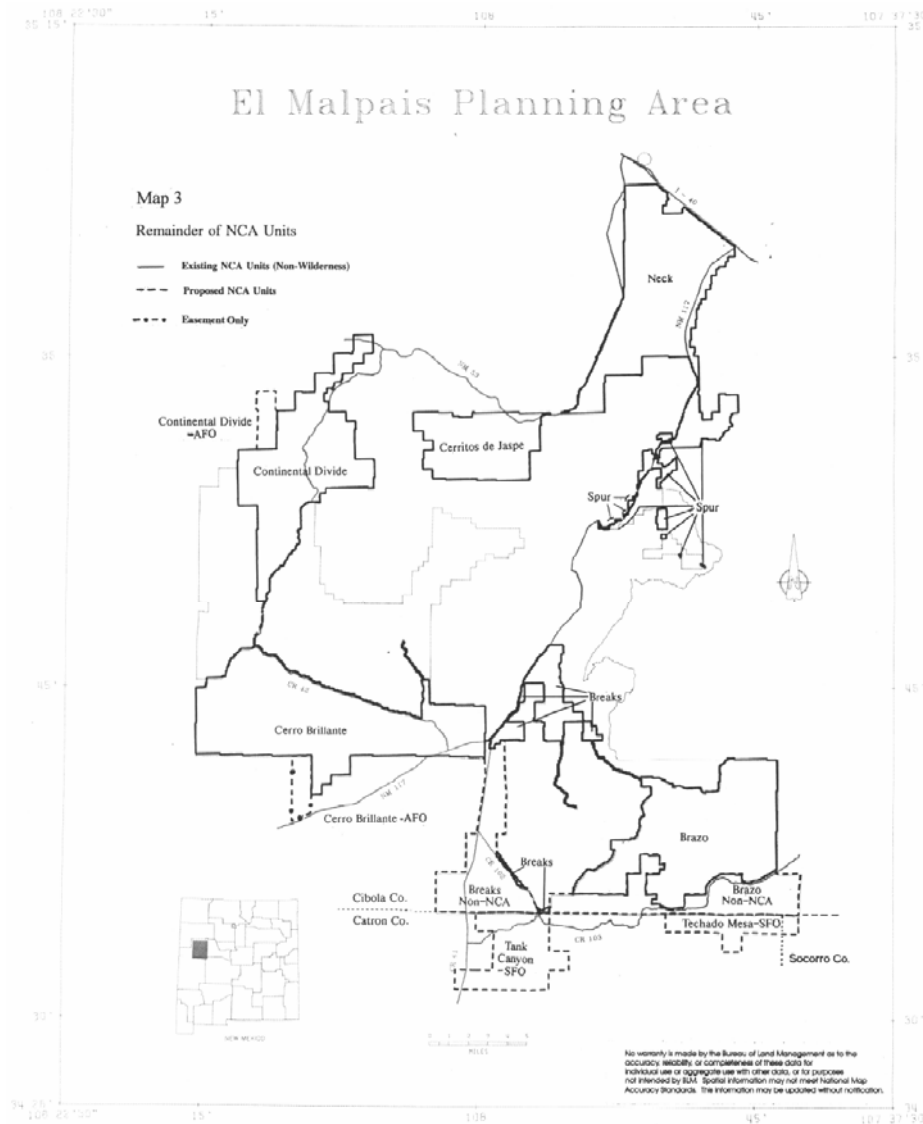
¹²⁷ Personal Communication with Gene Tatum, Riparian Resources Coordinator, Albuquerque Field Office, February 11, 2005

¹²⁸ H. Rept. 100-116. at 19-23 (letter from DOI objecting to establishing WAs before DOI finished its wilderness survey and recommendations).

¹²⁹ P.L. 100-225 § 501 (b)(1) and (c)(1).

Map 3. El Malpais NCA with Conservation Units (CUs) and proposed land additions.

Source: Map 3 in U.S. Department of the Interior, Bureau of Land Management Albuquerque Field Office. Proposed El Malpais Plan and Final Environmental Impact Statement Volume II. (September 2000).



a. West Malpais Wilderness Area

BLM first evaluated the West Malpais area for wilderness suitability as parts of two instant study area units – NM 020-001A and NM 020-001B.¹³⁰ The area became an instant study area because of inclusions in it of small areas of the Outstanding Natural Area and National

¹³⁰ Draft Wilderness Study Report, map A-1.

Environment Area.¹³¹ In its 1981 draft report, BLM proposed most of what became the West Malpais Wilderness Area (i.e., NM 020-001B), as unsuitable for wilderness because it lacked outstanding opportunities for solitude and for primitive and unconfined recreation.¹³² Principally, the area has little topographic relief (only about 600 feet) and the primarily open grassland vegetation offers little vegetation screening.¹³³ The BLM report also indicated the presence of a vehicle way and rangeland development structures, although the report appears to be inconsistent on this point, indicating in their detailed analysis that the area was virtually free of intrusions and met the naturalness criterion. BLM also identified a resource conflict between “intensive range management and wilderness designation” for the area.¹³⁴ The remainder of what became the West Malpais Wilderness Area (i.e., the Big Hole-in-the-Wall area), was studied for wilderness as a small part of the El Malpais unit (NM 020-001A). BLM included this area in its recommendation for wilderness designation in its draft 1981 report.¹³⁵

In general, the boundaries set for the West Malpais Wilderness Area appear to be primarily a road to the west and south. The edge of the Grants Lava Flow forms the boundary to the north and east as this topographic feature generally marks the western boundary of El Malpais National Monument. The wilderness area includes the Big Hole-in-the-Wall area that appears to have been excluded from the monument because of its grazing use. A graded road is cherry-stemmed into the southeastern part of the wilderness area. This road provides access to a trail into the Big Hole-in-the-Wall area.

b. Cebolla Wilderness Area

The Cebolla Wilderness Area, a composite of four WSAs (Pinyon, Rimrock, Little Rimrock and Sand Canyon), is on the east side of the NCA, east of New Mexico Highway 117. The WSAs were not instant study areas, but rather roadless areas included in the statewide wilderness inventory.¹³⁶ Congressional hearings and discussions included a full range of opinions on wilderness designation. Several comments advocated for wilderness designation of the eastside WSAs (New Mexico Governor Anaya, The Wilderness Society, New Mexico Wilderness Study Committee, Sierra Club), recommended deferral of judgment until BLM completed its statewide inventory (DOI), and recommended non-wilderness (local rancher King, Acoma Pueblo).¹³⁷

The boundaries of the Cebolla Wilderness Area are defined primarily by roads and land ownership (see Map 2). The western boundary generally follows NM Highway 117, County Road 41 and Tank Canyon Road. The southeastern boundary is a primitive road. The eastern boundary is generally defined by the top of Cebollita Mesa, which is the boundary of the Acoma Reservation. Several sections of private and Acoma Indian land were excluded from the boundary of the wilderness area (e.g., along the roads into Sand, Cebolla, and Cebollita Canyons) or both the wilderness area and the NCA (e.g., along County Road 41). Even cultural

¹³¹ Only public lands were designated as Outstanding Natural Area or National Environment Areas, but adjacent private, including large areas of Ramah Navajo lands, were included in the study units. *Id.* at A-1.

¹³² *Id.* at A-5 and A-52 – A-55.

¹³³ *Id.* at A-54

¹³⁴ *Id.* at A-5.

¹³⁵ The majority of the El Malpais unit was designated National Monument in P.L. 100-225 and is discussed below.

¹³⁶ Rio Puerco RMP, Map 18.

¹³⁷ Grants H.R. 3684 Hearing at 109, 159 (Governor Anaya), 114 (Acoma), 121 (Local Rancher King), 127 (The Wilderness Society), 141, (N.M. Wilderness Study Committee), 155 (DOI), 171 (Sierra Club).

sites were split by NCA/wilderness area boundaries based on land ownership – for example, part of a large pueblo ruin is included in the Cebolla Wilderness Area; the privately owned portion of the pueblo complex is in the NCA.¹³⁸

Congress modified the boundaries of the Cebolla Wilderness Area for the final version of P.L. 100-225 by excluding Cebollita Spring – to maintain access for the Acoma to this sacred site¹³⁹ and to reduce conflicts with grazing (Cebolla/Sand Canyon areas). Including Acoma private land and grazing allotments used by the Acoma was controversial, but both were included in both the Cebolla Wilderness Area and in the NCA. The Acoma subsequently purchased land in Cebollita Canyon in the Cebolla Wilderness Area; BLM subsequently recommended excluding that area from the NCA and wilderness at the Acoma's request.¹⁴⁰ BLM has recently recommended adding about 4,000 acres to the Cebolla Wilderness Area.¹⁴¹ These areas are currently part of the Breaks and Brazo non-wilderness areas of the NCA and the Brazo area outside of the NCA (see Map 3).¹⁴²

c. Chain of Craters WSA

Over the years, the BLM has consistently recommended against designating the Chain of Craters area as wilderness (see Map 2, west side of the NCA). BLM first formally considered the area for wilderness suitability as a unit of the El Malpais instant study area – NM 020-001C – because of the presence of a series of fifteen large cinder cones, several of which were designated National Environment Areas. BLM's inventory judged three subunits, totaling about 11,000 acres, to have the requisite naturalness, opportunities for solitude and unconfined recreation and other values necessary for wilderness designation.¹⁴³ Yet, in its 1981 draft report, BLM recommended non-wilderness for the area because the study unit was broken into five areas by vehicle routes, included OHV scars, and would conflict with intensive forestry management.¹⁴⁴

In congressional testimony, in 1987, the DOI argued that its draft suitability study was correct and that Congress should remove the Chain of Craters area from interim wilderness management.¹⁴⁵ Testimony and comments provided in the years leading up to P.L. 100-225 were primarily supportive of wilderness designation (e.g., New Mexico Wilderness Study Committee, Sierra Club, New Mexico BLM Wilderness Coalition, and National Parks and Conservation Association).¹⁴⁶ P.L. 100-225 did not designate the area as wilderness, but required BLM to analyze the area for wilderness suitability during its NCA planning process.

Public sentiments on wilderness status for Chain of Craters was mixed during BLM's planning process. In comments on the draft NCA management plan, an area rancher generally opposed

¹³⁸ Land Protection Plan at 12.

¹³⁹ *Id.* at 17.

¹⁴⁰ 2001 El Malpais Plan at 2-14, 2-77, 2-101, 2-163, 2-167.

¹⁴¹ U.S. Dept. of Interior, Bureau of Land Management Albuquerque Field Office, Proposed El Malpais Plan and Final Environmental Impact Statement (September 2000) [*hereinafter* 2000 Proposed Plan and FEIS], Map 27.

¹⁴² 2001 El Malpais Plan at 1-9.

¹⁴³ Draft Wilderness Study Report at A-56 – A58.

¹⁴⁴ *Id.* at A-6. The area is mature Ponderosa pine forest. Personal Communication with Gene Tatum, Riparian Resources Coordinator, Albuquerque Field Office, February 11, 2005.

¹⁴⁵ S. 56 Hearing at 416-8.

¹⁴⁶ *Id.* at 254, 259, 247-250, and 251.

wilderness designation and the Ramah Navajo opposed wilderness designation unless vehicle access would be allowed for Indian religious purposes.¹⁴⁷ Others (e.g. New Mexico BLM Wilderness Coalition and Public Lands Action Network) still supported wilderness designation.¹⁴⁸ One commenter objected to BLM basing its “non-suitable” recommendation, even in part, on the fact that a large portion of the NCA had already been designated as wilderness.¹⁴⁹

BLM’s management plan analysis of the Chain of Craters area focused on a smaller area than the original instant study unit – including most of the craters, but eliminating two sections of private and one of state land.¹⁵⁰ This smaller Chain of Craters WSA is primarily defined physiographically, by land ownership and by the presence of roads. The western boundary of the area is the eastern border of the Ramah Navajo Indian Reservation despite the fact that the chain of craters continues into the reservation. The south and southeastern boundaries follow roads. The eastern boundary follows County Road 42 and then seems to jog to avoid inclusion of private land that would add only one additional crater to the chain.¹⁵¹

BLM’s non-wilderness recommendation notes that the area meets the minimum criteria for wilderness, but that it would be difficult to manage without serious resource conflicts.¹⁵² In addition, BLM argues that the “NCA designation also provides a high level of protection and conservation for the natural and cultural resources within the unit. Most of these resources can be maintained if the unit is managed as conservation land.”¹⁵³

As an alternative to a wilderness designation, BLM proposed designating the Chain of Craters as an Area of Critical Environmental Concern to preserve its unique geological features and status as a sacred ceremonial area for Navajos. BLM decided against further consideration of this designation because NCA designation, regulations and existing management policies were sufficient to protect its values and prevent irreparable harm.¹⁵⁴ BLM also considered designation

¹⁴⁷ U.S. Dept. of the Interior, Bureau of Land Management, Albuquerque District Office, Rio Puerco Resource Area, *El Malpais National Conservation Area: General Management Plan (Final)* (January 1991) [hereinafter NCA GMP], letter 6 at 5-15 – 5-19. BLM noted that motor vehicle access for tribes was an issue regarding access to sacred places, hunting, pinon nut picking, and gathering of traditional plants, and that the frequency of need for access would vary by tribe – presumably making it difficult to manage access on a case-by-case basis. 2000 Proposed Plan and FEIS at 2-78.

¹⁴⁸ NCA GMP, letter 10 at 5-29 – 32.

¹⁴⁹ NCA GMP Hearing Comment 20-1 at 5-48. BLM included in its planning criteria for the WSA “proximity to existing wilderness” and “contribution to the diversity in the NWPS,” as well as wilderness act criteria, special features, Ramah Navajo concerns and manageability. 2001 El Malpais Plan at 1-11.

¹⁵⁰ U. S. Dept. of the Interior, Bureau of Land Management, Albuquerque District Office, Rio Puerco Resource Area, *El Malpais National Conservation Area: General Management Plan (Draft)* (April 1990) [hereinafter Draft NCA GMP] at 6-3, Map 6-2. The acreage indicated in the NCA GMP is actually larger than that indicated in the Draft Wilderness Study Report.

¹⁵¹ Draft NCA GMP at 6-3, Map 6-2.

¹⁵² NCA GMP at 4-1. (Because of access by adjacent owners, historical ties and uses of the area by local American Indians, and the nature of Navajo religious practices, the BLM cannot effectively administer the Chain of Craters as wilderness area without serious resource conflicts.)

¹⁵³ Draft NCA GMP at 6-4.

¹⁵⁴ 2000 Proposed Plan and FEIS at 2-78.

of the area as an American Indian Wilderness to allow unrestricted vehicle access to tribes, but did not analyze this option in detail in its EIS.¹⁵⁵

d. El Malpais National Monument Roadless Area

P.L. 100-225 designated the core area of the el malpais area as the National Monument. While it did not designate this area as wilderness, it required NPS to consider wilderness designation in its management plan.¹⁵⁶ In previous studies, BLM had consistently identified the area as having outstanding wilderness, natural and cultural resource values and high scenic qualities.¹⁵⁷ This core area was the main area of the El Malpais instant study area, NM 020-001A, designated as such because of its previous designation as Outstanding Natural Area and National Environment Area. The 1981 BLM study recommended the area that would become the national monument, and some additional acreage, as suitable for wilderness. In their 1990 draft suitability study, the NPS recommended 83 percent of the National Monument (95,811 acres) as suitable for wilderness, with and additional 10, 925 acres of private land as suitable if the acreage could be acquired.¹⁵⁸

The boundaries of the area that the NPS considered suitable is primarily based on physiographic features – following very closely the boundary of the Grants Lava Flow within the National Monument. This area is slightly smaller than the area BLM recommended as suitable in 1981.¹⁵⁹ The 1981 instant study unit included additional acreage along the margins of the lava flow. This acreage, considered unsuitable by NPS, primarily includes proposed visitor development sites and motorized access roads for monument administration (including search and rescue and fire protection), American Indian subsistence and religious purposes, and ranching (that was discontinued in 1998).¹⁶⁰

e. Other WSAs Considered for Wilderness Designation

BLM had also identified and studied several very small units (ranging from 12 to 3,781 acres) for wilderness suitability. These areas were instant study areas because they included small sections of Outstanding Natural Area or National Environment Area designations. These small areas were separated from larger instant study area units by significant roads (e.g., NM Highway 53, and NM Highway 117). BLM judged them unsuitable primarily because of their small size.¹⁶¹

¹⁵⁵ Id.

¹⁵⁶ P.L. 100-225, § 501(c).

¹⁵⁷ Draft Wilderness Study Report at A-4 citing the Cebolleta (1969) and El Malpais (1978-79) Unit Resource Analyses and Management Framework Plans.

¹⁵⁸ NPS GMP/EA & WSS at 183-4.

¹⁵⁹ The 1981 instant study unit also included three relatively large grassland areas that were excluded from the National Monument designation. Two of these are kipukas – windblown sand deposits in depressions in the lava – named Big and Little Hole-in-the-Rock. The other is a grassland area – Cerritos de Jaspe – at the northern edge of the National Monument. All were excluded from the National Monument because of their value for grazing.

¹⁶⁰ NPS GMP/EA & WSS at 183.

¹⁶¹ Draft Wilderness Study Report at A-3 and Map A-1.

V. MANAGEMENT

In addition to legislative prescriptions, the “on-the-ground condition” of the el malpais area depends on how those prescriptions are interpreted in management plans, the agency’s mission and self image, and by individual agency employees. In the following sections, this report provides a sense of each of these – to varying degrees for different resources.

A few general statements made during the legislative and planning process give an overall sense of how the mission and self image of the agencies distinguish the NPS managed National Monument from the BLM managed NCA and multiple-use lands. For example, in its management plan, NPS notes that the differences in the agencies’ management plans relates to the different missions and functions – the NPS promotes and regulates the use of national parks and monuments to conserve the scenery and resources in such a way that future generations can enjoy them. Thus, the management plan is presented in terms of visitor use areas. In contrast, according to NPS, BLM actively manages to meet the full spectrum of public needs and their plan is organized in terms of resource-based management units.¹⁶² Among agency employees, there is also a clear sense that the missions of the NPS and BLM are “just different” and that management of their areas will consequently differ.¹⁶³ The NPS focuses on research and preservation, while BLM manages all its lands – regardless of status – according to its multiple-use mandate.¹⁶⁴ When asked if wilderness designation would make any difference in management of the roadless national monument area, NPS responded that it would make a significant difference along the margins of the monument where there may be pressure to add roads, trails or other recreational development. But NPS also indicated that without wilderness designation, the agency would likely try to preclude these additional developments through administrative actions.¹⁶⁵

BLM also recognizes differences among its own areas. In its first NCA management plan, BLM notes that in the NCA, resources must be protected, while visitors and land users are allowed to access the resources for appropriate purposes.¹⁶⁶ In its final NCA plan, BLM notes that “Congressional designation as an NCA by the El Malpais Act requires [BLM] to manage the area’s resources with a ‘higher order of protection than that followed on other multiple use lands....’”¹⁶⁷ The first NCA plan also generalizes about the difference between wilderness area and non-wilderness management, noting that in the wilderness areas, the agency must identify changes resulting from human use and then initiate or change their management actions to assure that changes are kept within established limits.¹⁶⁸ For example, in a wilderness, BLM will only control erosion that is attributable to human causes.¹⁶⁹

¹⁶² NPS GMP/EA & WSS at iii.

¹⁶³ Personal communication with Kathy Walter, NLCS System Manager, Rio Puerco Field Office, Albuquerque, February 4, 2005.

¹⁶⁴ Personal Communication with Gene Tatum, Riparian Resources Coordinator, Albuquerque Field Office and Ken Jones, El Malpais NCA Manager, February 11, 2005.

¹⁶⁵ Personal communication with Herschel Schultz, Chief Ranger, U.S. Park Service, El Malpais National Monument, February 18, 2005.

¹⁶⁶ NCA GMP at 2-1. See section V. B for an explanation of the various NCA plans.

¹⁶⁷ 2001 El Malpais Plan at 2-153. Unfortunately, the document does not provide a citation for this quotation.

¹⁶⁸ NCA GMP at 2-1.

¹⁶⁹ NCA GMP at 2-22.

On-the-ground differences may occur, or be obviated in some instances, because of national environmental laws that apply either because of or despite the legal framework. In discussing management of the NCA and its wilderness areas, the 2001 El Malpais NCA Management Plan consistently noted the requirements of specific laws that regulate regardless of the land classification. For example, the Federal Cave Resources Protection Act of 1988 and related BLM policy general governs cave resources regardless of the land status.¹⁷⁰ Similarly, agency-wide policy may determine resource management regardless of land status designations. BLM's protection of riparian areas is an example.¹⁷¹

Even where there is an on-the-ground difference in management, it is difficult to discern whether the cause is land status. The quality or uniqueness of the resource that led it to its placement under the specific legal framework may be just as important as its land status designation. Furthermore, few management decisions are clear-cut. In its first NCA plan, BLM notes that management prescriptions were a balancing act – based on the natural limitations of the land and its capabilities to accommodate natural resource uses along with evaluation of the needs and expectations of the public.¹⁷² BLM later describes this as managing under the principles of multiple-use while protecting the unique resources of the area¹⁷³

In addition, differences in management of the National Monument and NCA may blur because the areas were established in the same legislation. For example, BLM recognizes that the NCA may be used as a buffer area for the monument. One of BLM's land acquisition priorities, although only the sixth of seven priorities, is to protect land and resources of the NCA for the benefit of the monument.¹⁷⁴ In addition, BLM and NPS may have coordinated their activities more than usual in dealing with adjacent parcels of land. The agencies met several times during the planning process to ensure that their plans would not conflict and would serve the overall visitor experiences of both agencies' areas.¹⁷⁵

A. Management Plans

Prior to designation of the National Monument, NCA and wilderness areas, BLM managed most of the el malpais area under the Rio Puerco Resource Management Plan (RMP) that incorporated various decisions of the Divide Management Framework Plan. In the Rio Puerco RMP, BLM designated much of the el malpais area as a Special Management Area.¹⁷⁶ At that time, the U.S. Forest Service managed a small area on the north boundary as part of the Cibola National

¹⁷⁰ 2001 El Malpais Plan at 2-5.

¹⁷¹ Personal Communication with Gene Tatum, Riparian Resources Coordinator, Albuquerque Field Office, February 11, 2005.

¹⁷² Draft NCA GMP at 1-14.

¹⁷³ NCA GMP at 1-1.

¹⁷⁴ 2001 El Malpais Plan at 2-173.

¹⁷⁵ NPS GMP/EA & WSS at 15. BLM also prepared a Land Protection Plan for the NCA – a type of document usually prepared only by the NPS to set land acquisition priorities. Land Protection Plan at 1-3.

¹⁷⁶ Rio Puerco RMP, Map 42; Divide Management Framework Plan, Socorro District, Socorro (1983).

Forest.¹⁷⁷ The BLM Socorro Field Office manages a small area of contiguous public lands at the south end of el malpais.¹⁷⁸

P.L. 100-225 specified that NPS and BLM develop specific management plans for the monument and NCA, respectively, within three years. The law further specified that both agencies' plans at least address:

- (1) interpretation and public education;
- (2) public facilities, including visitors centers;
- (3) natural and cultural resources management, with emphasis on the preservation and long-term scientific use of archeological resources; and
- (4) wildlife resources management.¹⁷⁹

NPS developed a management plan in 1990 which is currently in effect.¹⁸⁰ Between 1988 and 1991, the BLM developed their NCA management plan and environmental assessment (EA) for the NCA.¹⁸¹ The draft plan presented management objectives for each of the major lands designations (wilderness areas, wilderness study areas, and other lands of the NCA, called conservation units).¹⁸² The New Mexico Wilderness Coalition appealed the NCA management plan/EA to the Interior Board of Land Appeals (IBLA) and in 1994 the IBLA decided in favor of the appellants and directed BLM to prepare a resource management plan and environmental impact statement (EIS).¹⁸³ In September 2000, BLM published a Proposed El Malpais Plan and Final Environmental Impact Statement.¹⁸⁴ In 2000, the NCA became a part of BLM's new National Landscape Conservation System, with administrative direction that BLM develop a stand-alone plan for this and other units in the National Landscape Conservation System. The next year, BLM finalized the stand-alone El Malpais NCA Management Plan for the entire NCA, including its two wilderness areas, and some additional multiple-use lands adjacent to it.¹⁸⁵

¹⁷⁷ The Act changed management of this small area – contiguous with the rest of the protected are, but separated from other national forest lands by the major highway – to the NPS. P.L. 100-225, § 102.

¹⁷⁸ The Socorro Field Office lands are south of the county line.

¹⁷⁹ P.L. 100-225 § 501.

¹⁸⁰ NPS GMP/EA & WSS.

¹⁸¹ United States Department of the Interior, Bureau of Land Management, Albuquerque District Office, *Rio Puerco Resource Area. El Malpais National Conservation Area: General Management Plan (Final)*. (January 1991).

¹⁸² Draft NCA GMP at 1-14, 2-2 -31, 3-15. In developing the first draft plan (1989), BLM considered accommodating traditional and projected uses, improving the local and regional economy, and encouraging tourism. Resource management in the NCA was planned using a Biophysical Land Units (BLUs) classification system. A BLU is a piece of land with characteristic soils, vegetation, landform, and drainage patterns. The draft plan also provided management prescriptions and actions to address each of the major plan issues. BLM grouped prescriptions and actions under the headings of facility development, visitor management, public information and education, and resource protection. Within the NCA, lands in the CUs are the only areas available for facilities development. The plan also describes in detail the monitoring regime for specific resources. The NCA GMP also describes in detail the "limits of acceptable change" (LAC) monitoring regime that would be used to set standards, identify.

¹⁸³ New Mexico Wilderness Coalition, IBLA 92-13, 129 IBLA 158 (April 20, 1994).

¹⁸⁴ 2000 Proposed Plan and FEIS.

¹⁸⁵ The 2001 El Malpais Plan is a "stand-alone" plan which consolidates necessary amendments to the existing Rio Puerco Resource Management Plan (RMP), still applicable RMP decisions, and activity level decisions on the NCA area. This plan provides 21 "mini" resource plans on everything from off highway vehicles and mineral resources to cultural resources and interpretation/public education. 2001 El Malpais Plan at 1-1.

In order to compare BLM and NPS treatment of nonconforming uses under different legal regimes, this report discusses general guidance from the applicable BLM administrative area (the Albuquerque Field Office),¹⁸⁶ elements of management plans brought forward from pre-designation documents, elements of the stand-alone El Malpais NCA management plan and its precursors, comments on those precursors, and agency interviews.¹⁸⁷ The El Malpais NCA Management Plan is useful for comparing management of the wilderness areas and non-wilderness areas within the NCA. Decisions carried forward from the Rio Puerco RMP and previous planning documents are useful in identifying elements of management that applied to the area prior to the National Monument, NCA and wilderness designations. While not perfect, these pre-designation management prescriptions are helpful in projecting what the management regime would have been had the area remained multiple-use public land. However, specific prescriptions carried forward from the Rio Puerco RMP relate to the area as a Special Management Area rather than standard multiple-use public land. The difficulty in comparing wilderness area or NCA management to FLPMA multiple-use management is that there is relatively little consolidated public land in the area that is not included in the NCA.

B. Management Issues

The quality of resource protection has been an issue in el malpais for over a century. Early calls for establishing a publicly owned monument were in large part based on fears that resource damage would go unabated in private ownership. In the legislative hearings in 1986-87, resource protection was still a major concern although the main impetus for protective status had changed to promotion of tourism. At that time, BLM's management of the el malpais received mixed reviews. For example, the House Interior Committee explicitly complimented BLM on its management of the area and praised the agency's active pursuit of land acquisitions to consolidate and better manage the public lands.¹⁸⁸ In contrast, The Wilderness Society supported monument designation specifically because the BLM had not adequately protected the area under six management designations (special management area, outstanding natural area, instant study area, wilderness study area, natural environment area, national natural landmark).¹⁸⁹ A couple of groups indirectly blamed poor management on insufficient budget and manpower.¹⁹⁰ The NPS National Monument plan later indicated that several areas in the monument had been damaged from past and present resource exploitation including cinder pits, earth and lava rock borrow areas, and vehicular ways, and that the full effects of the impacts of grazing were not yet known.¹⁹¹

Although there is widespread support for protection of the el malpais area, exactly what constitutes sufficient protection and what constitutes unnecessary interference with legitimate land uses is still contentious. Management planning documents, including their records of public

¹⁸⁶ The Albuquerque Field Office was previously known as the Albuquerque District. The Albuquerque District also previously included the Rio Puerco Resource Area and the Socorro Resource Area.

¹⁸⁷ The Draft NCA GMP is used because it contains the substance of the final plan. The Final NCA GMP is primarily corrections and minor substitutions and additions.

¹⁸⁸ Grants H.R. 3684 Hearing at 27. In the early 1980s, the area was a checkerboard of land status.

¹⁸⁹ Id. at 48-49, 125.

¹⁹⁰ Id. at 55-56; S. 56 Hearing at 254, 259.

¹⁹¹ NPS GMP/EA & WSS at 76, 78; see also Statement for NM Management at 6 (need to rehabilitate severely overgrazed lands on the east side of the park).

comments, suggest that resource issues became more explicitly contentious after passage of P.L. 100-225. These documents and interviews suggest that the principal management controversies relate to vehicle access and grazing.¹⁹² Recreation (including hunting and construction of improvements/facilities) is also controversial, but much of the recreation controversy relates to vehicle access. The need for cultural resources protection has always been a high priority with access for Native Americans to cultural and religious sites the only real controversy during the legislative discussions.

The following section addresses resource issues according to their relevance in the area: vehicle access and grazing are discussed in detail; minerals and water issues are summarized; additional resource issues are briefly discussed. In general, this report provides more detail on BLM management of the NCA, wilderness areas and multiple-use lands than on NPS management of the monument.

1. Vehicle Access

Motorized access in the el malpais is the only issue that has been consistently controversial in both legislative discussions and subsequent management planning. Currently, vehicle access within el malpais is dictated primarily by the legal framework, but is dependent, in part, on other factors (see discussion below). Regardless of land status, all general usage of vehicles (motorized and non-motorized) by the public and tribes is confined to designated travel routes. As would be expected, the major distinction for vehicle access is little if any vehicle access in wilderness and wilderness suitable lands (most of the National Monument) on one hand, and more designated routes on all other lands (the non-wilderness NCA, BLM multiple-use lands, and National Monument travel corridors and developed recreation sites) on the other. There is some difference between NCA lands and multiple-use lands, prompted primarily by the difficulty of enforcing access closures on checkerboard lands. Access is an issue for both grazing and non-grazing activities; access to manage livestock grazing is primarily discussed with grazing. Non-grazing access concerns have focused on recreation and Native Americans, involving both wilderness and non-wilderness areas of the NCA.

a. Recreation

Prior to special status designation, OHV use was a problem in the el malpais area.¹⁹³ BLM's 1986 Rio Puerco Resource Area RMP limited vehicle use in el malpais to existing roads and trails based on the high erosion potential of most of the area soils. This limitation included the El Malpais Special Management Area (including most of the eventual monument and NCA), but also included all adjacent public lands that were not interspersed in a checkerboard with private lands. The Rio Puerco checkerboard areas and nearby Socorro Resource Area public lands remain open to off-road use with the caveat that use is monitored and BLM can change the designation to prevent excessive damage.¹⁹⁴

¹⁹² NCA GMP at 1-1. The Natural Resources Law Center's wilderness survey results in 2004 identified grazing, vehicle use, recreation, hunting, and fire as the top five management issues or conflicts that the public raises about the West Malpais and Cebolla WAs.

¹⁹³ Rio Puerco RMP at 79.

¹⁹⁴ Id. at 78-89.

NPS management of the monument has changed vehicle access in the core el malpais area very little from pre-designation BLM multiple-use management. NPS uses four subzones to designate travel routes and regulate access. The “primitive” subzone, with no roads and few marked routes, constitutes about 95 percent of the area. The “developed,” “rustic” and “semi-primitive” subzones contain the only vehicle accessible roads and make up only about five percent of the National Monument.¹⁹⁵ NPS has recommended most of the primitive subzone as suitable for wilderness, as did BLM in 1981. Most of the roads used today were present before designation; NPS has closed only a few two-tracks and other minor roads since designation.¹⁹⁶ The NPS expects most visitors to exclusively use the two most developed subzones (developed and rustic subzones) where they can easily and quickly access many of the monument’s outstanding features via paved and gravel roads. NPS expects few visitors to use the few designated backcountry roads in the semi-primitive zones for motorized recreation or the primitive subzone for non-motorized recreation.¹⁹⁷ NPS prohibits driving more than 10 feet off a designated Park road or two-track.¹⁹⁸ The NPS management plan provides no explicit exceptions for off road vehicle access.¹⁹⁹ NPS can issue a permit to access private lands within or adjacent to the monument when access is otherwise not available.²⁰⁰ Violation of the NPS prohibition of off-road vehicle use has diminished over the years to a relatively infrequent occurrence due to public education, fencing and signing following boundary surveys, and increased presence of enforcement staff.²⁰¹

The access situation on BLM-managed lands is more complex as the number of designated travel routes varies by legal regime. The El Malpais NCA Management Plan eliminated all designated travel routes from wilderness areas, although some authorized-use-only routes remain.²⁰² Road closures in the non-wilderness areas within the NCA and adjacent multiple-use lands have restricted some vehicle access in these areas, but not to the same extent as in wilderness areas. The distinction between wilderness and non-wilderness is, however, blurred by exceptions. The land status designations constrain vehicle access for the general public and Native Americans more than for others, as the current management plan provides major exceptions to the general constraint on vehicle use for agency personnel, authorized users (e.g., grazing permittees), and emergency responders regardless of the land status designation.

In its planning for the NCA, BLM recognized the intense controversy over vehicle access, and considers the El Malpais NCA Management Plan as a reasonable balance, a “first step in developing a proactive approach to determining and implementing better on-the-ground

¹⁹⁵ NPS GMP/EA & WSS at 18-21.

¹⁹⁶ Personal communication with Herschel Schultz, Chief Ranger, U.S. Park Service, El Malpais National Monument, March 1, 2005.

¹⁹⁷ NPS GMP/EA & WSS at 61.

¹⁹⁸ U.S. Dept. of Interior, National Park Service, *El Malpais National Monument, Compendium of designations, closures, permit requirements, and other restrictions imposed under the discretionary authority of the superintendent* (May 2003) [hereinafter *Compendium of Restrictions*] at 7.

¹⁹⁹ The joint NPS/BLM fire management plan may provide exceptions for emergency vehicles.

²⁰⁰ *Compendium of Restrictions* at 20 (§5.6(a))

²⁰¹ Personal communication with Herschel Schultz, Chief Ranger, U.S. Park Service, El Malpais National Monument, March 1, 2005.

²⁰² 2001 El Malpais Plan, Map 5.

motorized OHV management.”²⁰³ BLM management actions for the NCA and its wilderness areas have substantially reduced motorized vehicle use of the entire area. In the El Malpais NCA Management Plan, BLM had the option of designating areas as “open,” “limited,” or “closed” to off-highway vehicles based on a number of criteria.²⁰⁴ The plan adopted only the “limited” and “closed” categories for the NCA, designating the two wilderness areas (40 percent of public land acreage) as “closed” and all other public land acreage as “limited.” The “limited” designation confines vehicle use to designated travel routes,²⁰⁵ a more restrictive designation than the “limited” designation of the earlier Rio Puerco RMP that confined vehicle use to *existing* roads and trails, which were more plentiful than are the current designated travel routes.²⁰⁶ Non-NCA lands in the vicinity of the NCA also carry the more restrictive “limited” designation. In discussing vehicle use of the area, the NCA manager opined that the area has always been limited and closed, but people drive wherever they want anyway.²⁰⁷

The El Malpais NCA Management Plan reduced the density of vehicle routes throughout the area by closing 83.4 miles of vehicle routes.²⁰⁸ The routes closed include 75 miles within the NCA, both in wilderness and non-wilderness, and 9 miles of multiple-use lands in areas proposed for inclusion in the NCA. In addition to wilderness area roads, BLM chose for closure routes that had been abandoned, did not show signs of regular use when inventoried, duplicated other vehicle routes, were causing resource damage or served no apparent purpose.²⁰⁹ The plan proposed to close them to “increase the isolation in the Plan area for animals and hunters...” The plan proposed to maintain other routes, like the cherry stem road that splits the Cebolla Wilderness Area, more frequently to improve access and reduce erosion.²¹⁰

Under the El Malpais NCA Management Plan, there are, however, a number of exceptions to the road restrictions that eliminate some of the differences between legal regimes. These exceptions allow categories of users to ignore the “closed” or “limited” designations:

- Military, fire, emergency and law enforcement vehicles used in emergency situations;
- Officially approved uses and vehicles in official use;
- OHVs related to mining claim operations; and
- OHV use related to existing permits, leases, rights-of-way stipulations or other land-use authorizations.

BLM created the emergency, military and administrative use exceptions for multiple-use lands in the Rio Puerco RMP and carried them forward into the El Malpais Plan.²¹¹ BLM added the exceptions for mining claims and permitted uses – primarily grazing – in the El Malpais NCA Management Plan. Apparently, fire suppression crews liberally use the exceptions, regardless of

²⁰³ Rio Puerco RMP at 2-41. Management of motorized access to and across New Mexico public lands is directed by a number of executive orders (EO 11644, 11989 and 12608), the BLM manual, the CFR (Titles 8340 and 8364), and BLM New Mexico Roads Policy (IM NM-95-031).

²⁰⁴ 2001 El Malpais Plan at 2-41.

²⁰⁵ Id. at 2-42

²⁰⁶ See 2001 El Malpais Plan for road closures, Map 5.

²⁰⁷ Personal Communication with Ken Jones, El Malpais NCA Manager, February 11, 2005.

²⁰⁸ 2001 El Malpais Plan at 2-6 and 2-34.

²⁰⁹ Id. at 2-70

²¹⁰ Id. at 2-70-71.

²¹¹ Rio Puerco RMP at 79.

special land designation, and drive off road to the frustration of NCA management. BLM staff respect the general limitations, infrequently using the exceptions.²¹² OHV use for mining has not been an issue.

In addition to the “limited” and “closed” designations, BLM uses “restricted access” designations to control vehicle access. These designations also blur the distinction between management of wilderness and other lands. BLM restricts some specific routes in both the wilderness and non-wilderness to authorized users. 6.3 miles of route in the non-wilderness portion of the NCA (“limited” areas) are restricted to authorized users. In the wilderness areas, 23.3 miles of routes are open to authorized users for access to non-Federal in-holdings and livestock operations (5.5 miles in the Cebolla Wilderness Area and 17.8 miles in the West Malpais Wilderness Area). See the discussion of grazing access in the following section.

The BLM plan also overlays Recreation Opportunity Spectrum categories on the system of “closed” and “limited” road designations. These categories – as overlaid on el malpais – suggest that NCA and wilderness designation has resulted in less motorized access than occurred on multiple-use lands prior to designation.

The El Malpais NCA Management Plan also restricts non-motorized mechanical transport (e.g., bicycles) to designated vehicle routes throughout the area.²¹³ NPS allows bicycles on all designated roads, two tracks and one road that is closed to motor vehicles.²¹⁴ The BLM plan further notes that no motorcycle races or other off-highway competitive events will be allowed as they are incompatible with P.L. 100-225.²¹⁵ As a practical matter, this latter restriction affects wilderness areas, non-wilderness and multiple-use lands similarly as competitive events are not approved anywhere in the el malpais area.

One impact of the various legal frameworks on access has been increased availability of funding to enforce vehicle restrictions. Apparently BLM funding for enforcement has increased with the NCA designation and NPS funding for enforcement in the monument area far exceeds what BLM had available for multiple-use lands prior to the designations.²¹⁶ Even with some increased funding, BLM has difficulty enforcing travel restrictions during hunting season.²¹⁷

b. Access for Tribes

While P.L. 100-225 assured access for traditional cultural practices, exactly what this meant was not clear and resulted in controversy in developing the management plan. The Ramah Navajo Community, that did not participate in the legislative process because they had not heard about it until the legislation was passed, became active participants in development of management plans.²¹⁸ After being consulted on the management plan, the Navajo opposed wilderness

²¹² Personal Communication with Ken Jones, El Malpais NCA Manager, February 11, 2005 and Bud Wilson, BLM Range Technician, February 10, 2005.

²¹³ Id..

²¹⁴ Compendium of Restrictions at 7.

²¹⁵ 2001 El Malpais Plan at 2-5.

²¹⁶ Personal communication with John Bristol, BLM Resources Program Manager, Albuquerque, February 3, 2005.

²¹⁷ Personal Communication with Ken Jones, El Malpais NCA Manager, February 11, 2005.

²¹⁸ The Ramah Navajo Community held over 40,000 acres within the El Malpais area in the early 1980s (Draft Wilderness Study Report, Map A-1).

designation of the Chain of Craters area unless they would be allowed vehicle access for Indian religious purposes.²¹⁹ This interest in vehicle access to a wilderness area was controversial²²⁰ and certainly a factor in BLM's "non-suitable for wilderness" recommendation for the Chain of Craters WSA. While BLM still manages the WSA under the non-impairment standards of FLPMA and has closed many road segments in the WSA, much of the area remains accessible by vehicle along designated travel routes and under "roaded natural" and "semi-primitive motorized" recreation categories.²²¹

In discussing motorized access to wilderness areas for Native Americans in its draft management plan, BLM noted the apparent conflict between the legislative mandates to manage the wilderness to protect and perpetuate wilderness values and to administer the NCA – including its wilderness areas – to ensure nonexclusive access to the wilderness for traditional American Indian cultural and religious practices.²²² BLM concluded that it could allow motor vehicle access for these purposes if it were:

- the only reasonable alternative,
- would not degrade wilderness values,
- were done on the advice of local Indian tribes, and
- were in areas where such activities occurred before the wilderness designation.²²³

The final El Malpais NCA Management Plan makes little distinction between land status designations in allowing vehicle access for tribes. The plan only allows tribes motor vehicle access to the perimeter of each wilderness. Vehicle use inside wilderness areas is prohibited unless the BLM grants prior authorization after consultation and evaluation.²²⁴ Motorized and mechanical access for traditional American Indian cultural practices is restricted to designated routes unless otherwise authorized.²²⁵ When BLM authorizes motorized access, Native Americans must meet stipulations to control impairment of wilderness character. Apparently the Acoma have vehicle access to the Cebolla Wilderness Area on some cherry-stemmed roads and on some gated and un-gated authorized-use-only roads and have also secured ownership of some lands that have made access to specific sites easier for them.²²⁶ The NCA manager has not in 12 years had any requests for access authorization.²²⁷

2. Grazing

The final language of P.L. 100-225 provided for termination of grazing in the National Monument by 1998, but provided for continued grazing in the NCA, including the wilderness

²¹⁹ NCA GMP letter 6 at 5-15 – 5-19

²²⁰ NCA GMP Cummings Letter 9 at 5-23 – 5-28 (criticizing vehicle access for tribes in wilderness areas because it would lead to illegal vehicular use of the areas).

²²¹ See 2001 El Malpais Plan, Maps 2-5g and 2-5n (road designations) and Map 2-1 (Recreation Opportunity Spectrum).

²²² NCA GMP at 4-4

²²³ Id..

²²⁴ 2001 El Malpais Plan at 2-70.

²²⁵ 2001 El Malpais Plan at 2-6

²²⁶ Personal communication with Kathy Walter, NLCS System Manager, Rio Puerco Field Office, Albuquerque, February 4, 2005 and John Bristol, BLM Resources Program Manager, Albuquerque, February 3, 2005.

²²⁷ Personal Communication with Ken Jones, El Malpais NCA Manager, February 11, 2005.

areas.²²⁸ The grazing eliminated in the National Monument was relatively minor – 4,655 AUMS (animal unit months) (only about 10 percent of the total) – compared to that which continued in the NCA (33,067 AUMs). Grazing in the area that became the monument had always been limited by the terrain (broken lava) and minimal available forage. The remaining grazing in el malpais is managed on 16 allotments included in or partially overlapping the NCA. Six of the 16 allotments, representing 92 percent of the area, are classified as “Improve.”²²⁹ All of these 16 allotments overlap the Cebolla and/or West Malpais Wilderness Areas.

In contrast to the general support for grazing during legislative hearings, BLM’s implementation of grazing management has been severely criticized. Public comment on the draft management plan indicated considerable concern that over-grazing had caused deterioration of much of the area and that management should emphasize reduction in grazing to allow the vegetation to recover.²³⁰ Both the Environmental Protection Agency and the Sierra Club criticized the 2000 Plan and EIS for its failure to deal adequately with grazing issues.²³¹ BLM responded with answers to their specific questions, but also noted that it did not see livestock grazing as an issue to be resolved in the management plan and EIS, and, consequently it had not analyzed any grazing alternatives in detail.²³² Apparently, resolution of grazing issues was left to grazing-specific management plans and individual leases/permits.²³³

Several comment letters supported continuing grazing in the area and criticized limits on motorized access to range improvements.²³⁴ Commentors argued that access to the area is an ongoing requirement for water and fence maintenance as well as watching over the well being of the cattle and the range land and that ranching is not an industry that can easily adjust to changes in operating costs when markets are extremely tight with minimal margins.²³⁵ In discussing wilderness designation for Chain of Craters WSA, commentors considered the restrictions on

²²⁸ P.L. 100-225 § 104(b) (National Monument), § 302(d) (NCA), and § 402(b) (WAs); The Act specifically provided that national forest guidelines for grazing in wilderness areas would guide grazing in the WAs. P.L. 100-225 § 402(b) (“Grazing in National Forest Wilderness” in the House Committee Report (H. Rept. 96-617).

²²⁹ Category I (Improve) allotments either (1) have potentially significant resource conflict and current management could be improved, (2) have a high potential for improvement of forage production and a low ecological condition rating, or (3) have a low ecological condition rating and a static or downward vegetative trend. Other designations are M (Maintenance) covering 12,455 or 5% of the NCA and C (Custodial) covering 8,540 acres mostly scattered in small blocks of public land surrounded by private lands, or 3% of the NCA. BLM notes that the category is not easily changed from “I” following improvement, but that this is a benefit, because I allotments receive the most attention. Response 1-R to EPA comment letter #1, 2000 Proposed Plan and FEIS at 5-14.

²³⁰ e.g., Public Lands Action Network, Letter 10, NCA GMP at 5-29 - 5-32.

²³¹ 2000 Proposed Plan and FEIS, EPA comment letter #1, Sierra Club comment letter #34.

²³² Response to EPA comment letter #1, 2000 Proposed Plan and FEIS at 5-16. Answer 1-Q—“BLM land use plans such as the one for this El Malpais NCA are issue driven. Only those resource uses at issue are subject to the NEPA requirements of alternative formulation and impact analysis. Threatened and endangered species assessments have been made, with no determination that livestock is an issue. Wilderness recommendations to the Congress through the BLM’s New Mexico Statewide Wilderness Study (1988) concluded that livestock grazing does not affect these areas’ suitability for designation as wilderness. During the development of the Plan/EIS, no BLM specialist identified the need to consider livestock grazing as an issue requiring resolution in the Planning Area.”

²³³ Personal communication with John Bristol, BLM Resources Program Manager, Albuquerque, February 3, 2005.

²³⁴ 2000 Proposed Plan and FEIS, Nelsen, Letter #4 at 5-26, LCL, duplicate letters 7-10, 15, 26, 27 at 5-30 – 32; Quandt, Letter 23 at 5-43; Pearman, duplicate letters 24, 29 at 5-45 – 46; Catron County, Letter 33 at 5-53; THG Corporation, letter 35 at 5-66 – 68.

²³⁵ 2000 Proposed Plan and FEIS at 22, Letter #6, 11, 14, 16, 20, 21, 22, 25,.

access for ranchers “a bureaucratic nightmare” and just not “practical,” at risk of eliminating all effective ranching in the areas.²³⁶ Comment letters from both rancher and environmentalist noted the incompatibility of grazing with wilderness.²³⁷ In early phases of planning, both sides commented on BLM’s inability to correctly balance between public use and resource protection in the management plan.²³⁸ The New Mexico Wilderness Coalition (formerly the New Mexico BLM Wilderness Coalition) objected to allowing grazing at current levels and noted that in wilderness, it is important to recognize that visitor use and grazing and cultural resource protection and research must be secondary to allowing the natural systems to operate – e.g., cattle grazing cannot be allowed to overwhelm the natural processes. The Coalition accused BLM of having a blind spot to accommodating grazing regardless of environmental costs.²³⁹ During the planning process, the Forest Guardians filed a lawsuit over BLM grazing practices in the El Malpais NCA.²⁴⁰ Forest Guardians claimed that the BLM had violated National Environmental Policy Act (NEPA) procedures when it issued a number of grazing permits in the NCA and it sought to have the permits invalidated.²⁴¹

Regarding grazing, the only on-the-ground difference among legal regimes appears to be the exclusion of grazing in the National Monument. Between 1987 and 1998, NPS phased out grazing in the monument. In some areas, NPS retired grazing early; in others grazing continued until 1998. Where grazing has been excluded, NPS notices improvements in vegetation but recent years of drought have slowed recovery.²⁴²

Grazing in the NCA is managed out of the Albuquerque Field Office with very little involvement of the El Malpais NCA staff,²⁴³ and management plan prescriptions are not specific to land status designations.²⁴⁴ The El Malpais NCA Management Plan provides that the primary goal of the rangeland resources program – for all BLM lands, regardless of land status designation – is to manage for healthy rangelands and ensure that livestock grazing management on each allotment contributes to establishment of plant communities that would exist if natural processes were allowed to be completed. The plan recognizes that proper grazing management is essential to establishing these communities.²⁴⁵ Field Office guidance for the entire area requires that the range program be coordinated with and facilitate other programs (e.g., wildlife, wilderness

²³⁶ 2000 Proposed Plan and FEIS, THG Corporation, Letter #35 at 61; Letter #23, 2000 Proposed Plan and FEIS at 37.

²³⁷ Draft NCA GMP, Cummings Letter 9 5-23 – 5-28 (criticizing grazing); LCL, 2000 Proposed Plan and FEIS, duplicate letters 7-10, 15, 26, 27, 35 at 5-30 – 32 (voicing disapproval of wilderness designation as the death of ranching); Cummings comment letter #2, 2000 Proposed Plan and FEIS at 5-22 (“cutting grazing back toward the vanishing point would also increase the naturalness of this land immensely”).

²³⁸ Pampen, Letter 14, NCA GMP, Letter 14, at 5-39 (pro-wilderness); LCL duplicate letters 7-10, 15, 26, 27, 2000 Proposed Plan and FEIS at 5-30 – 32 (pro-ranching).

²³⁹ NCA GMP Letter 15 at 5-40 – 5-43.

²⁴⁰ *Forest Guardians v. BLM*, 188 F.R.D. 389 (D.N.M. 1999).

²⁴¹ Id. at 389-390. The case resulted in the requirement of preparation of EAs for renewal of grazing permits.

Personal Communications, John Horning, Executive Director, Forest Guardians, February 10, 2005.

²⁴² Personal communication with Herschel Schultz, Chief Ranger, U.S. Park Service, El Malpais National Monument, February 18, 2005.

²⁴³ Personal Communication with Ken Jones, El Malpais NCA Manager, February 11, 2005. During one period of time the range staff tried to work cooperatively with the NCA staff to improve the largest grazing allotment in the area (El Malpais or York allotment) over the objections of the allottee – a Chicago based investment company.

²⁴⁴ Personal communication with John Bristol, BLM Resources Program Manager, Albuquerque, February 3, 2005.

²⁴⁵ 2001 El Malpais Plan at 2-133 and 2-121.

management, etc). Where the land is degraded and potential natural communities do not exist, the range program considers using practices such as prescribed fire, chemical treatment, thinning, and grazing management to establish these communities. The overall Field Office guidance also provides for managing all grazing to protect riparian areas and wildlife. All area agreements with leasees follow guidelines of the Rio Puerco RMP, written before NCA establishment.²⁴⁶ In developing the El Malpais Plan, BLM carried forward some of the decisions of the Rio Puerco RMP designed to improve rangeland health.²⁴⁷

The grazing prescription – AUMs allowed – on area allotments is essentially the same as it was before designation, minus the AUMS retired when grazing ceased in the National Monument. A 1992 evaluation of grazing in the Albuquerque Field Office – independent of any land status designation – included evaluation of the 16 NCA allotments. This study found that 10 allotments were in acceptable condition and no changes were needed (the C and M allotments.) Six (the I allotments) were subsequently monitored resulting in decisions to reduce livestock AUMs on four and increase allotted livestock AUMs on one.²⁴⁸

In 1999, BLM began preparing allotment EAs at the time of lease/permit renewals. The proposed action of these EAs, plus terms and conditions to mitigate adverse effects of livestock grazing, became the management plan for each allotment. Fifteen of the 16 plans were completed as of 2000 and this monitoring and assessment showed a need for management improvements to upgrade ecological conditions on five of the allotments; some range improvements have been developed.²⁴⁹ These EAs were in response to a lawsuit brought by Forest Guardians to compel BLM to continue to rest the largest allotment in the area.²⁵⁰

Also independent of special land status designations, BLM has prepared either a coordinated resource management plan or allotment management plan for the I allotments. The El Malpais NCA Management Plan notes that allotment management plans would be prepared and perhaps revised or livestock use might be reduced if monitoring studies indicate the need, but this is a policy applied to all multiple-use lands, according to the DOI.²⁵¹ Regardless of special designations, BLM monitors allotments on a schedule based on their classification – C and M allotments at permit renewal time; I allotments every five years. If the data indicates a need on

²⁴⁶ Draft NCA GMP at 3-50.

²⁴⁷ 2001 El Malpais Plan at 2-151. These decisions included implementing watershed treatments on a couple of the allotments, developing a management plan for one allotment, and identifying treatments, including grazing rest, for wildlife areas including deer winter ranges and fawning areas.

²⁴⁸ Id. at 2-134-137 and Appendix H. When AUMs allotted wildlife are included, the study resulted in reductions on two and increases on four allotments. Apparently this is a change in the calculation system rather than an increase in the grazing pressure.

²⁴⁹ Id. at 2-136; Response to EPA comment letter #1, 2000 Proposed Plan and FEIS at 5-15.

²⁵⁰ Allotment 203, the El Malpais Allotment, was also known as the York Allotment. This allotment had been “grazed into the ground” by the King Family, then taken over by the bank which worked with BLM to rest it. The bank sold it to a Chicago investment group (FNF Corporation) which was not willing to continue to defer grazing until an EA had been done as BLM had originally agreed to do. Forest Guardians’ original goal of the lawsuit was to force action to protect this large allotment. What they got was an agreement to prepare EAs on all the allotments prior to renewal – essentially a lot of paper, but not much on-the-ground impact. Personal communications with John Horning, Executive Director, Forest Guardians, February 10, 2005; Brett O’Havers, Range Conservationist, Cuba Field Office (not the individual transferred), February 3, 2005.

²⁵¹ 2001 El Malpais Plan at 2-152; Department of the Interior, S. 56 Hearing at 411 – 415.

any allotment, BLM can implement changes in grazing management, including reduction in livestock, through agreements with allottees or through management decisions.²⁵²

The only significant difference in livestock management in the wilderness areas, NCA and multiple-use areas is the degree of access of vehicles for management. The BLM Wilderness Management Policy allows use of motorized and mechanized equipment to maintain range improvements in wilderness. Normally, this policy requires prior approval of motorized access to maintain rangeland improvements; this approval is normally accompanied by an EA. In order to speed up the approval process, BLM prepared Range Improvement Maintenance Plans/EAs for both the Cebolla and West Malpais Wilderness Areas.²⁵³ The Range Improvement Management Plans provide guidance and procedures for using motorized equipment in the wilderness areas for both routine maintenance and emergency situations. Most of the motorized wilderness travel authorized in the Range Improvement Maintenance Plans is along authorized-use-only- routes, but cross-country travel is also permitted. The Range Improvement Maintenance Plans estimate that grazing allottees will use motorized vehicles on these routes to access windmills annually, fences every five years and dirt tanks every ten years, but access is not limited to these frequencies. For routine maintenance, allottees notify BLM prior to their work and receive a letter of authorization; for emergencies, the allottee can notify BLM after the fact. In response to criticism of the limited motorized access to improvements (from both sides), BLM noted that “motorized vehicle access would be based on a rule of practical necessity, reasonableness, the minimum tool, and the effects on wilderness values, not the sole convenience of the operator.”²⁵⁴

The El Malpais NCA Management Plan also indicates that range improvements (fences, spring developments, fire, chemical or mechanical treatment) will continue to be used (regardless of legal framework) to improve livestock management to accomplish the vegetation goal of the program and to support other programs like wildlife. While many range improvements are made in wilderness, non-wilderness and multiple-use lands, BLM evaluates the impact of each project, in light of appropriate laws, regulations and guidance and develops necessary mitigation measures.²⁵⁵ These evaluations can affect the type of improvement and how it is constructed and, consequently, may differ by legal framework.²⁵⁶

While there is little explicit impact of the legal regimes on grazing, some subtle differences may be attributable to them. First, BLM notes that vehicle access for range management is a matter of negotiations, specifically in terms of the number of vehicle trips into the wilderness areas. While the partial closures of wilderness areas to vehicle access are an inconvenience, some of the current allottees are more understanding and cooperative than some in the past. Many of them are hobby ranchers – less dependent on ranching for a living and spending less time and effort on livestock management and willing to protect the NCA and wilderness areas to a different

²⁵² 2001 El Malpais Plan at 2-142.

²⁵³ Cebolla Wilderness Range Improvement Maintenance Plan/Environmental Assessment, EA No. NM017-89-31. West Malpais Range Improvement Maintenance Plan/Environmental Assessment, EA No. NM017-89-25 [hereinafter RIMs].

²⁵⁴ BLM response to Letter #6 et.al, 2000 Proposed Plan and FEIS at 22.

²⁵⁵ 2001 El Malpais Plan at 2-138.

²⁵⁶ Personal Communication with Gene Tatum, Riparian Resources Coordinator, Albuquerque Field Office, February 11, 2005.

standard.²⁵⁷ This willingness is in contrast to the resistance of current corporate ranchers to protect rangeland resources.²⁵⁸ In addition, the special designations provide more funding for agency personnel to adequately monitor and manage the area, resulting in improving range condition.²⁵⁹

3. Mineral Development

Mineral development in the el malpais area has not been controversial despite the extent of the private subsurface mineral estate. A report submitted in testimony indicated that the mineral resource potential was “low to nil.”²⁶⁰ New Mexico natural resource agency personnel indicated little energy related resources or development in the area, but noted that part of that might be due to the inaccessibility of the area for exploration.²⁶¹ Within the National Monument, there is currently only one cinder mine on a private inholding and no split estate lands. NPS acquired a couple of other cinder mines, a sandstone quarry and a borrow pit (by purchase or from the Forest Service) and have reclaimed one of these. The others have not been reclaimed because of lack of funding.²⁶² There are no active or historic mines within the NCA boundary.²⁶³

Despite the lack of development interest, the Rio Puerco RMP included acquisition of the mineral estate as part of its El Malpais Special Management Area plan.²⁶⁴ The original bill in 1972 did not include explicit language for mineral withdrawal for the area, but Congress included mineral withdrawal language in H.R. 3684 in 1986 and H.R. 403 in 1987. P.L. 100-225 included provisions for mineral rights withdrawal, subject to valid existing rights for the National Monument, NCA and wilderness areas.²⁶⁵ There was some congressional testimony on mineral development, but strictly in terms of allowing for exchanges of mineral rights. Santa Fe Mining, Inc. was specifically interested in exchanging their mineral rights for rights outside the proposed monument.²⁶⁶

As of 2001, BLM had acquired a little over half of the private subsurface mineral interests in the NCA leaving about 65,000 acres in private ownership.²⁶⁷ Acquisition of mineral interests in the entire NCA has been and is still BLM’s top acquisition priority in the el malpais area, but funds

²⁵⁷ Personal communication with Bud Wilson, BLM Range Technician, February 10, 2005 and John Bristol, BLM Resources Program Manager, Albuquerque, February 3, 2005.

²⁵⁸ Personal communications Brett O’Havers, Range Conservationist, Cuba Field Office, February 3, 2005.

²⁵⁹ Personal communication with John Bristol, BLM Resources Program Manager, Albuquerque, February 3, 2005.

²⁶⁰ S. 56 Hearing at 434, Response by Horn DOI, to questions of Dale Bumpers. Testimony included a report by Bureau of Mines and U.S. Geological Survey on the Mineral Resource Potential of the El Malpais Instant Study Area and Adjacent Valencia County, New Mexico (geothermal, fluorspar, uranium and coal). The study did find significant resources of lava rock and volcanic cinders.

²⁶¹ Grants H.R. 3684 Hearing at 28-29 (Biderman).

²⁶² Personal communication with Herschel Schultz, Chief Park Ranger, U.S. Park Service, El Malpais National Monument, March 1, 2005.

²⁶³ Personal communication with David Sitzler, Acting Assistant Field Manager, Albuquerque District Office, March 1, 2005

²⁶⁴ Rio Puerco RMP at 171.

²⁶⁵ P.L. 100-225 § 506(d)(2)

²⁶⁶ See e.g., S. 56 Hearing at 433.

²⁶⁷ 2001 El Malpais Plan at 2-177.

are not available to satisfy the interests of willing sellers.²⁶⁸ Throughout the BLM Field Office, the goal of the mineral resources program is to make mineral resources available for development while minimizing environmental damage and protecting sensitive and special areas. This overall BLM program goal, taken together with the Act's minerals withdrawals, results in *potential* for a substantial difference between development in the special status areas and on multiple-use lands, but very little potential or actual difference between the NCA non-wilderness lands and the wilderness areas. Any distinction between NCA and multiple-use land management is blurred by the management plan prescription that calls for no development of federal minerals in the NCA (as P.L. 100-225 prescribes) and no discretionary development of federal minerals in non-NCA areas proposed for inclusion in the boundaries of the NCA (see Map 3). As BLM adds public lands to the NCA, either through acquisition of in-holdings or boundary adjustments, BLM will withdraw the lands from mineral entry.²⁶⁹

If there were mineral development potential, the El Malpais NCA Management Plan indicates that BLM would provide access to non-federal lands, including non-federal minerals, in a manner adequate to allow the landowner reasonable use and enjoyment. But BLM does not consider "adequate access" for this purpose to mean the highest degree of access in either the wilderness areas or in the non-wilderness areas within the NCA. In addition, within wilderness and WSAs, BLM will "work to provide" access with the briefest impacts on wilderness character and the least impairment of the area's suitability for designation as wilderness.²⁷⁰ Regardless of the land designation, mining claim operations do not, however, have to abide by the "limited" and "closed" travel designations. This exception was carried forward into the present management plan from the multiple-use Rio Puerco RMP.²⁷¹

4. Water

As the New Mexico Wilderness Study Committee stated: "In our nation there are few areas which have as little evident water, and so little demand for what water there is, so it should not be an issue."²⁷² While this might have been a bit of ingenuous hyperbole, water has not been a high profile issue in el malpais and there is no evidence to suggest any distinction among the legal regimes regarding water rights, water developments, or water quality protection.

P.L. 100-225 made no distinction among the land designations when it explicitly reserved the minimum amount of water required to carry out the purposes of the National Monument, NCA

²⁶⁸ Land Protection Plan at 39; Personal communication with David Sitzler, Acting Assistant Field Manager, Albuquerque District Office, March 1, 2005

²⁶⁹ 2001 El Malpais Plan at 2-177 – 178. In-holdings acquired are automatically withdrawn; BLM proposes to withdraw additions through boundary adjustments.

²⁷⁰ In replying to a comment letter, BLM noted that if lands are being studied for wilderness under Section 202 of FLPMA (those lands BLM is proposing for addition to the Cebolla WA), existing and new mining operations under the 1872 Mining Law are regulated under 43 CFR 3802 only to prevent unnecessary or undue degradation of the lands, not to prevent impairment of wilderness suitability as would be required under Section 603 of FLPMA. Although FLPMA does not require Section 202 WSAs to be given interim management protection, the BLM has the authority under Section 302 of FLPMA to manage these lands similarly. BLM response to Letter #30, 2000 Proposed Plan and FEIS at 43.

²⁷¹ Rio Puerco RMP at 79. The el malpais area is covered by oil and gas stipulations in the Rio Puerco RMP, as was much (but not all) of the multiple-use lands in the RA. Id. at 27.

²⁷² S. 56 Hearing at 251

and wilderness areas. It did so explicitly protecting valid existing water rights and pending applications, and setting the priority date of reserved rights to the date of enactment of the law.²⁷³

Both NPS and BLM plans indicate that the agencies were working to acquire water rights to implement this legislative provision,²⁷⁴ but very little has actually been accomplished in adjudication of the federal reserve rights. In 1990, NPS noted that the United States had joined in the general stream adjudication of the Rio San Jose Basin, begun prior to establishment of the monument, to claim appropriative and reserved water rights.²⁷⁵ The original Rio San Jose adjudication was filed in 1983 and includes only a small portion of the National Monument and NCA. After dismissal for lack of activity, the case was reopened on April 28, 2000 and a subproceeding is ongoing to adjudicate part of the Acoma and Laguna water rights.²⁷⁶ This is the only current proceeding in the Rio San Jose adjudication and, according to the New Mexico Office of the State Engineer, it is not timely for the United States to be participating on reserve rights for the monument, NCA or wilderness areas.²⁷⁷ In its management plan, BLM noted that it will participate in both the Rio San Jose and the Zuni Basin adjudications to present claims based on Federal and state water law.²⁷⁸

The Zuni Basin adjudication, which includes only a small portion of the National Monument and NCA, is ongoing as well, but it is moving very slowly. The United States filed the Zuni River adjudication suit in January 2001 with, according to the New Mexico State Engineer, “several serious defects...failure to join proper parties...ambiguity...and as a result the Complain immediately generated a great deal of resistance, misunderstanding, and hostility from area residents.”²⁷⁹ One of the main purposes of the case was to determine current water use in the basin as landowners were not required to get permits prior to 1994.²⁸⁰ The Zuni Basin has been divided into sub-basins and a contractor is preparing a hydrographic survey of the land.²⁸¹ In July of 2002, the Court ordered to stay the proceedings until the geographical scope of the adjudication could be determined, and the stay will remain in effect until the hydrographic survey is complete.²⁸² The Rio Grande Basin adjudication, listed by the New Mexico State Engineer as a “future New Mexico adjudication” covers the remainder of the el malpais area.²⁸³

²⁷³ 133 Cong. Rec. 35962; P.L. 100-225, § 509

²⁷⁴ 2001 El Malpais Plan at 2-145 – 148; NPS GMP/EA & WSS at 78.

²⁷⁵ Id. at 51 (Rio San Jose Basin Adjudication, State of New Mexico v. Kerr-McGee Corp., et al., Nos. CB-83-190-CV and CB-83-220-CV).

²⁷⁶ Personal communication with Jerry Wall, Soil Scientist, Bureau of Land Management, February 18, 2005; New Mexico State Office of the Engineer, Water Information, Active Adjudications and Court Orders, *available at* <http://www.seo.state.nm.us/water-info/legal/San-Jose/San-Jose-menu.html>.

²⁷⁷ Personal Communications with New Mexico Office of the State Engineer, Litigation and Adjudication Program staff, March 1, 2005.

²⁷⁸ 2001 El Malpais Plan at 2-149.

²⁷⁹ New Mexico Office of the State Engineer, Water Information, Status of Active Adjudications, *available at* <http://www.seo.state.nm.us/publications/01-02-annual-report/appendix-a.html>.

²⁸⁰ Bill Donovan, “Landowners get Zuni Basin lawsuit update” Gallup Independent web edition, April 14, 2003.

²⁸¹ Zuni River Adjudication, United States v. A&R Productions, et al., U.S. District Court No. 01cv0072 BDB) filed January 19, 2001; Personal communication with Jerry Wall, Soil Scientist, Bureau of Land Management, February 18, 2005.

²⁸² New Mexico Office of the State Engineer, Water Information, Status of Active Adjudications, *available at* <http://www.seo.state.nm.us/publications/01-02-annual-report/appendix-a.html>.

²⁸³ Id.

Despite lack of any final action on water rights, both agencies are working to protect the limited water resources of their areas. According to the NPS monument management plan, the National Monument has no perennial surface water or wetlands, but water does occur in isolated sinks and caves. Small ephemeral pools occur on the surface of the lava flows and in low areas dammed by the lava.²⁸⁴ Information on ground water resources of the area is very limited, but the Act specified that it did not require NPS to allow drilling of ground water wells within the boundaries of the monument.²⁸⁵ In its management plan, the NPS notes that *preserving* the natural resources of the monument (the explicit goal of establishing the El Malpais National Monument) includes protecting the roles that naturally occurring water plays.

Water resources in the NCA consist of two springs with about 20 acres of wetlands, no perennial streams, a dozen ephemeral channels and several ephemeral playas, and stock tanks and shallow windmills for watering livestock.²⁸⁶ BLM's management goal regarding water is to protect, maintain and enhance, wherever possible, water resources for the benefit of humans and plant and animal ecosystems. The only activity BLM proposed for NCA waters was protecting the springs and wetlands.²⁸⁷ There does not appear to be any difference in management of riparian areas due to special designation. BLM developed a Riparian and Aquatic Habitat Management Plan in 2000 for all categories of BLM land. The plan prescribes different treatments for properly functioning, non-functional and functional-at risk riparian areas, no matter the land status designation. The El Malpais NCA Management Plan identifies the few surface waters in the area for special treatment, including fencing in Cebolla Canyon,²⁸⁸ but the special treatment appears to be more related to the value of the riparian resource than the land status designation. In developing the NCA management plan, there was, however, some controversy over using existing water developments, including those in the Chain of Craters WSA, for livestock.²⁸⁹ Today there is continuing controversy over impacts of cattle on riparian areas,²⁹⁰ but there does not appear to be any distinction between NCA, wilderness and multiple-use lands in this regard.

5. Private Lands Acquisition

The el malpais region was a checkerboard of land ownership in the early 20th century and the problem of protecting natural and cultural resources under this mixed land ownership was well recognized prior to any special land designations.²⁹¹ The earliest federal legislation in 1972 would have authorized the Secretary of the Interior to acquire state and private in-holdings within the National Monument boundaries.²⁹² While that early attempt at protection failed, BLM began significant private land acquisitions, including acquiring private lands within sensitive

²⁸⁴ NPS GMP/EA & WSS at 120-21.

²⁸⁵ Id.; P.L. 100-225 § 509(b).

²⁸⁶ BLM response to Letter #1, 2000 Proposed Plan and FEIS at 14.

²⁸⁷ 2001 El Malpais Plan at 2-149.

²⁸⁸ Id. at 2-145 - 148

²⁸⁹ Nelson, Gregory S., Letter #4, 2000 Proposed Plan and FEIS at 20; Letter #7-10, 2000 Proposed Plan and FEIS at 25.

²⁹⁰ Personal communication with Brett O'Havers, Range Conservationist, Cuba Field Office, February 3, 2005.

²⁹¹ See section II.A.

²⁹² H.R. 14151 at lines 10-19.

areas in the Big Hole-in-the-Wall and Chain of Craters areas.²⁹³ Despite these efforts, private ownership of the area surface and mineral estate concerned the DOI during congressional hearings in 1987 because of the potential budgetary impacts of having to acquire all the private in-holdings if the area were declared a national monument.²⁹⁴ At the time, about 93,000 acres (26 percent of the 351,000-acre proposed National Monument) was state or private land with an additional 230,000 acres (65 percent) of non-federal subsurface rights in the area.²⁹⁵

Following the monument and NCA designations, BLM prepared a land protection plan in 1989 to prioritize acquisitions of non-federal lands within the NCA.²⁹⁶ The basic parameters governing the plan are that:

- Congress did not intend that all in-holding within the NCA be acquired;²⁹⁷
- Without an easement, the federal government has no control over legal uses of private lands with the NCA – even those considered to be incompatible with the NCA;²⁹⁸
- The agency should acquire only those minimum lands in the NCA needed to achieve management purposes and should use cost-effective alternatives to purchase when available;²⁹⁹ and
- Congress authorized acquisition of State lands through exchange, all of which were completed in fiscal year 1988.³⁰⁰

By 1989, there was still substantial private surface (48,200 acres or 18 percent) and private minerals (139,300 acres or 53 percent) in the NCA. The land protection plan identified several main issues regarding acquisition:

- Private lands controlled access to parts of the wilderness areas and the monument;
- Some key natural and cultural resources in the NCA were privately owned (e.g., Cebolla Spring);
- Control of scenic quality of the privately owned lands along the main N-S road was important to the integrity of the NCA;
- About 800 acres of Acoma land was in the NCA and protecting both Acoma interests and integrity of the NCA were important; and
- There were plans for an industrial park in an area near the proposed multi-agency visitor center.

²⁹³ 2001 El Malpais Plan at 2-9 (the 1986 Rio Puerco RMP included decisions carried forward from previous planning documents to protect sensitive areas). See also, Grants H.R. 3684 Hearing, Luscher testimony at 27 (complimenting the on-going effort to secure ownership of much of the private land within the el malpais area).

²⁹⁴ H. Rept. 100-116. at 19-23.

²⁹⁵ Grants H.R. 3684 Hearing at 24-25.

²⁹⁶ Land Protection Plan at 1. The Land Protection Plan will “determine what land or interests in land inside the boundary of the NCA need to be in public ownership, as well as what means of protection other than acquisition are available to achieve NCA purposes. ...It will assist BLM in identifying priorities for making budget requests and allocating available funds to protect public and private resources for which the NCA was designated.”

²⁹⁷ Id. at 3 citing S. Rpt. 100-100, *El Malpais National Monument* (1987).

²⁹⁸ Id. at 11.

²⁹⁹ Land protection planning is guided primarily by the policy statement (1982) guiding use of Land and Water Conservation Funds. Id. at 3.

³⁰⁰ P.L. 100-225 § 503.

The draft plan included proposals for exchange or fee acquisition: (14,500 acres or 30 percent) of private surface, 139,300 acres (100 percent) of private minerals, and scenic and conservation easements on 9,100 acres. By 2001, the BLM had acquired about 5,700 acres of private surface and about 74,000 acres of subsurface mineral interest, leaving about 32,500 acres (12 percent) in private surface and 65,000 acres (25 percent) of private mineral interest within the NCA.³⁰¹ The land protection plan continues to provide the basic framework for new acquisitions, with higher priority given to acquiring lands and minerals within designated wilderness that are undeveloped or those on which mineral development threatens the wilderness character.³⁰² Map 1b portrays the most recent land ownership of the NCA with significant private land in the NCA – particularly in the Neck conservation unit.

The NPS prepared its own land acquisition plan, proposing fee acquisition of all private interests in the National Monument.³⁰³ By 1993, NPS had acquired about 54 percent of the private land in the monument. Mixed ownership in the northwest area of the monument has made management difficult – particularly regarding enforcing hunting prohibitions because NPS had difficulty marking boundaries on the ground.³⁰⁴ NPS has acquired all of the split estate mineral interests and most of the private land within the monument (all but about 11,000 acres), but has not been able to acquire the Candelaria tract with its important ice caves, Bandera crater, and other prominent features (see Map 1b).³⁰⁵

In general, there is a basic hierarchy for land acquisition in the el malpais area. It starts with private land and mineral acquisition in the monument,³⁰⁶ followed by land and mineral acquisition in wilderness areas, followed by land acquisition in the NCA. In acquisition and divestment, BLM gives deference to the Acoma Pueblo regarding their traditional lands.³⁰⁷ Retention of federal lands in the NCA differs from that of non-NCA multiple-use lands in that virtually all public lands in the NCA are to be retained (except for some Acoma lands), but only non-NCA public lands with a certain level of recreation value need to be retained.³⁰⁸ Outside of a specially designated area, retention of existing public lands, much less acquisition of new public lands, depends on the agency's ability to manage the lands effectively. This is illustrated

³⁰¹ 2001 El Malpais Plan, Table 1-1 and 2-161. Not all of the land purchases and exchanges have been without controversy. The owners of the King Brothers Ranch entered into an exchange with the BLM where they exchanged about 21,000 acres of land in and around the National Monument and NCA for about 1,500 acres of land in other parts of New Mexico. After the exchange was complete Mr. Baca, one of the ranch partners, filed a lawsuit seeking to have the exchange invalidated on the basis that the exchange violated provisions of the Federal Land Policy Management Act (FLPMA), the National Environmental Policy Act (NEPA), and the Taylor Grazing Act. The trial court found no statutory violations and dismissed his complaint. The 10th circuit affirmed this decision thereby validating the land exchange. *Baca v. King*, 92 F.3d 1031, 1033-1034 (10th Cir. 1996).

³⁰² 2001 El Malpais Plan at 2-161.

³⁰³ Land Protection Plan at 33.

³⁰⁴ Statement for National Monument Management at 13.

³⁰⁵ Personal communication with Herschel Schultz, Chief Park Ranger, U.S. Park Service, El Malpais National Monument, February 18, 2005 and March 1, 2005.

³⁰⁶ The famous ice caves and the Bandera crater are still in private ownership. Although the Caldelarias family expressed interest in exchanging or selling the land to the BLM apparently no deal has ever been reached. No information could be found on the record regarding why this exchange has never occurred, especially in light of the fact that this parcel of private land contains some of the most discussed features in the area. See www.icecaves.com (last visited October 22, 2004).

³⁰⁷ 2001 El Malpais Plan at 2-166.

³⁰⁸ *Id.* at 2-166

by the willingness of the Socorro Resource Area to dispose of lands southeast of the NCA – because they could not manage them affectively – despite the fact that the Rio Puerco Field Office sees them as valuable enough to add to the NCA.³⁰⁹

6. Contrasting Other Management Issues

Many other resources in the el malpais area are even less controversial and/or did not receive special recognition in the establishment legislation. This section briefly discusses these resources, emphasizing any differences in management among the legal regimes.

The broad objective of the BLM Field Office wildlife program is to improve and protect aquatic and terrestrial wildlife habitat by coordinating the management of other resources and uses of public land. BLM pursues this objective through habitat manipulations and mitigation of impacts through the NEPA process. The El Malpais NCA Management Plan includes in its management prescriptions maintenance of a number of projects begun well before special designation of the areas as well as undertaking additional wildlife improvement projects. Existing and planned projects include both wilderness and non-wilderness locations, but installation and maintenance of projects differs to some degree based on the land status designation. BLM implements wilderness area projects using the “minimum tool concept” and all wildlife work in wilderness areas is guided by the BLM Wilderness Management Policy. BLM has removed at least one project – an inverted umbrella water catchment – from the West Malpais Wilderness Area, but fencing to protect perennial streams is used both within and outside wilderness.³¹⁰ BLM protects (1) special habitats (e.g., snags, riparian zones, edges) that are renewable resources, (2) unique habitats (e.g., caves, cliffs, lava flows) that are nonrenewable resources, and (3) special status species, regardless of land status designation.³¹¹

Management efforts related to education and interpretation differ among the legal frameworks partly because of the different agencies and partly because of the land designations. There does, however, appear to be more similarity than might be expected in education/interpretation management between the areas because they were created in the same legislation. P.L. 100-225 required NPS and BLM to develop management plans to address interpretation and public education and for BLM and NPS to work cooperatively in developing programs and a visitor center.³¹² Congressional testimony suggested that BLM and the National Parks and Conservation Association were concerned that BLM did not have much experience in the realm of “interpretation” and that coordination with NPS in this would be beneficial.³¹³ NPS and BLM worked together to develop interpretive objectives and to coordinate their implementation.³¹⁴

The NPS plan emphasizes visitor education and resource interpretation in its management of the National Monument, focusing a large portion of its management plan on this issue.³¹⁵ According to BLM, resources the agency dedicates to education/interpretation depends to a large extent on

³⁰⁹ Personal Communication with Ken Jones, El Malpais NCA Manager, February 11, 2005.

³¹⁰ 2001 El Malpais Plan at 2-105 – 2-113.

³¹¹ NCA GMP at 2-19; 2001 El Malpais Plan at 2-115.

³¹² P.L. 100-225 § 508.

³¹³ Washington, D.C. H.R. 3684 Hearings at 98-99.

³¹⁴ NPS GMP/EA & WSS at 15.

³¹⁵ Id. at 52-62.

land status designation. While general multiple-use lands get very little attention in this realm, special designation areas, e.g., an Area of Critical Environmental Concern or Special Management Area, typically get some interpretive signing. Concerted efforts and funding to provide facilities and visitor services and additional participation by “friends” groups, normally follows in areas with more formal special designation status.³¹⁶ BLM interpretive efforts in El Malpais wilderness areas concentrate on signing, preventing unauthorized vehicle intrusions, monitoring for compliance with BLM’S wilderness management policy, and educating the public in both natural/cultural values and wilderness values. Visitor information for wilderness areas is located outside of the wilderness boundaries.³¹⁷ The BLM management plan includes a wide variety of plans for interpretive/education programs and facilities for the NCA.³¹⁸

Within BLM areas, protection of visual resources varies depending on the visual resource management objective which is set in large part based on the land status designation. Currently, the West Malpais and Cebolla Wilderness Areas are protected as class I areas (preserve existing visual character); most of the rest of the area – including the Chain of Craters WSA – is designated class II (retain existing character, allow for a low level of change). Only a small parcel near the ranger station is class III and allows for moderate change.³¹⁹ Under the Rio Puerco RMP, less area (only the core of the monument) was class I, the wilderness study areas (Chain of Craters and what is now the West Malpais and Cebolla Wilderness Areas) were class II and more of the area was class III.³²⁰ Additional multiple-use lands outside the El Malpais Special Management Area were also class III. In the NCA, new construction for roads, pipelines, powerlines, etc. is authorized only if no alternatives exist and if mitigation can protect scenic, natural and cultural values.³²¹

Management of recreation not specifically related to access and education/interpretation appears to be influenced in large part by land status designations. The NPS manages most of the highly concentrated and highly developed recreation in a small portion of the National Monument. BLM manages moderately developed sites in the NCA and minimally developed sites on multiple-use lands. NPS and BLM both manage areas with virtually no development.

During congressional hearings, the New Mexico BLM Director estimated that recreational use of the area would blossom with monument designation increasing in the area from 40,000 (per year at the nearby El Morro National Monument) to 400,000 annually.³²² BLM and NPS indicate that the area has not, however, been the boon to the local economy that proponents originally expected. NPS estimates visitation at nearby El Morro has doubled to about 80,000 annually and that El Malpais National Monument visitation is between 130,000 and 150,000 annually.³²³

³¹⁶ Personal communication with Kathy Walter, NCA Manager, Rio Puerco Field Office, Albuquerque, February 4, 2005.

³¹⁷ 2001 El Malpais Plan at 2-12 – 2-13.

³¹⁸ Id. at 2-11 – 2-16.

³¹⁹ Id. at 2-17- 2-19.

³²⁰ Rio Puerco RMP at 76-77.

³²¹ 2001 El Malpais Plan at 2-18.

³²² Grants H.R. 3684 Hearing at 27 (Luscher). S. 56 Hearings at 426 (There were 54,950 visitors to El Morro in 1986).

³²³ Personal Communication with Herschel Schultz, Chief Ranger, U.S. Park Service, El Malpais National Monument, February, 18, 2005 and March 1, 2005.

While visitor use in the NCA is difficult to estimate since it is only measured in a few locations and there are many access points, annual NCA visitation is only about 30,000.³²⁴

A minor recreation controversy in BLM management of the area involved location of the Continental Divide National Scenic Trail, and the number and placement of facilities such as kiosks, parking lots and trails. Witnesses complained that BLM should not be creating an amusement park atmosphere or competing with the NPS for developed recreation.³²⁵ In response, the El Malpais NCA Management Plan moved the Continental Divide trail to a new corridor which took it out of the Cebolla Wilderness Area and placed it in the Chain of Craters WSA.

Management of forest and woodland resources in the el malpais area differs significantly based on the land status designation. Multiple-use el malpais lands have seen both commercial logging and commercial and home-use firewood gathering.³²⁶ NPS enforces a complete ban on wood gathering in the National Monument.³²⁷ On BLM land, management of forest and woodland resources varies slightly between special designations. Throughout the Field Office, BLM's long-term goal is to manage both pinyon and ponderosa pine for enhancement and protection of stands, rather than for maximum production, but logging and commercial wood gathering is still an option on el malpais multiple-use lands.³²⁸ P.L. 100-225 explicitly prohibits commercial wood cutting in the NCA.³²⁹ The plan authorizes thinning or salvage of wood products outside wilderness areas and WSAs, in order to meet vegetation management objectives.³³⁰ The plan also recognizes that home-use fuelwood sales might be authorized in order to accomplish vegetation objectives, but it is not clear how this "sale" would be compatible with P.L. 100-225.³³¹ The plan does not distinguish between wilderness areas and other parts of the NCA in regard to home-use fuelwood, but wilderness area constraints on use of vehicles and machinery would make significant wood gathering extremely impractical. Regardless of the location of fuelwood removal, the RMP includes several criteria for control of impacts of fuelwood removal.³³² While large scale logging is very unlikely anywhere in el malpais because of the limited resource, the special land status designations protect the area from small scale operations as well. In summary, there is potential for logging on multiple-use lands outside the NCA, thinning and salvage for "forest health" purposes in non-wilderness, and little or no forestry manipulation in wilderness areas and WSAs.

Fire management varies to some extent by legal regime, but differences seem to vary more based on threats to people and structures. Also, while the fire policy for the area has changed over the

³²⁴ Personal Communication with Ken Jones, El Malpais NCA Manager, February 11, 2005.

³²⁵ NCA GMP, Letter 16 at 5-44.

³²⁶ Personal communication with John Bristol, BLM Resources Program Manager, Albuquerque, February 3, 2005; Personal Communication with Gene Tatum, Riparian Resources Coordinator, Albuquerque Field Office, February 11, 2005

³²⁷ Personal communication with Herschel Schultz, Chief Ranger, U.S. Park Service, El Malpais National Monument, February 18, 2005.

³²⁸ 2001 El Malpais Plan at 2-30.

³²⁹ P.L. 100-225 § 302(c); Grants H.R. 3684 Hearing at 17 (Griego for Governor Anaya recommending precluding commercial wood cutting);

³³⁰ 2001 El Malpais Plan at 2-127.

³³¹ Id. at 2-129.

³³² Id. at 2-129 – 130 (e.g., precluding gathering in high erosion areas).

years, it is not clear how much of this is due to the legal regimes and how much is due to evolution of fire policy in general. The Rio Puerco RMP had a complete fire suppression policy for most of the el malpais area public lands with a limited suppression policy in the area eventually designated the national monument.³³³ In 1990, the NPS policy on fire was complete suppression, but the agency planned to use hazardous fuels reduction techniques to help restore a natural balance.³³⁴ Under the El Malpais NCA Management Plan, BLM's goal evolved to both protect people and physical features of the area, and to use fire in support of other BLM resource programs.³³⁵

The activity-level "Joint Fire Management Plan for El Malpais NCA and El Malpais National Monument," developed in 2001, is now the guiding document for fire management in el malpais. Under the new joint plan, there is little distinction between land status designations for fire management. Fire is used in the West Malpais Wilderness and roadless areas of the National Monument to benefit the landscape; fire is suppressed in the most developed areas of both the non-wilderness NCA and the National Monument; and fire is used only conditionally in the Cebolla Wilderness Area, the Chain of Craters WSA and in undeveloped parts of the non-wilderness NCA. Despite these general classifications for use of fire, there is some variation in fire use and suppression between wilderness and non-wilderness areas. For example, BLM will use fire vegetation treatments in wilderness based on a case-by-case evaluation. BLM will control fires in wilderness areas to prevent their spread outside the wilderness and to prevent loss of life and property. Fires suppression techniques in wilderness areas will be those to cause the minimum adverse impacts on wilderness character.³³⁶

The NPS emphasis on cultural resources in the National Monument management plan is to locate and evaluate the significance of cultural resources and to provide resource-sensitive management, scientific study, preservation and interpretation.³³⁷ The objective of BLM's cultural resources program is much less research oriented,³³⁸ and designed to protect archeological, historic, and socio-cultural properties, and to provide for their use as allocated through land-use planning. The El Malpais management plan notes that P.L. 100-225 places special emphasis on preserving cultural resources, so projects within the NCA that could affect these resources are generally held to a higher standard than projects outside the NCA.³³⁹ Differences in management between the special status areas and multiple-use lands can largely be attributed to the land status designation as the resources evidently were not being sufficiently protected prior to the designations. Lack of protection could be attributed, in part, to the difficulty of management with the interspersed of private and public lands. Lack of funding and

³³³ Rio Puerco RMP at 114. The Outstanding Natural Area is a subset of the El Malpais Special Management Area and eventually the core area of the National Monument.

³³⁴ NPS GMP/EA & WSS at 78.

³³⁵ 2001 El Malpais Plan at 2-153.

³³⁶ Id. at 2-140.

³³⁷ NPS GMP/EA & WSS at 62.

³³⁸ Personal Communication with Ken Jones, El Malpais NCA Manager, February 11, 2005.

³³⁹ 2001 El Malpais Plan at 2-93. One example of difference in management between different land status areas is in archeological research. Because the El Malpais Act emphasizes preserving cultural resources for long-term scientific use, BLM restricts archeological research that could result in physical alteration of prehistoric remains, including surface collection. On the assumption that cultural resources within the NCA are generally less threatened than resources outside the NCA, uses that would result in the physical alteration of cultural properties will be supported outside the NCA whenever possible. Id. At 2-95.

other priorities were also a significant factor.³⁴⁰ Differences in management of special status areas probably depends more on the quality of the resource and risk of loss.

VI. CONCLUSION

Unlike some of the other special designation legislation, e.g., Gila Box, the El Malpais legislation split the area between the NPS and BLM, making analysis of the impact of land status designation more complicated. Any comparison of management requirements between the NPS-managed monument and the BLM managed lands (NCA, wilderness areas and multiple-use lands) must first recognize that the Act's mandates of "preservation" for the NPS and "protection" for BLM lands are qualitatively different. Second, the Act required the agencies to develop and implement their plans under different organic acts – NPS to conserve the resources unimpaired for the enjoyment of future generations and BLM to manage on a multiple use/sustained yield basis and/or to protect wilderness values. The Act also included specific provisions, most notably provisions on grazing, that specified different management. With these separate starting points, it is not surprising that the NPS managed monument would differ in some significant ways from the BLM managed areas. Whether differences in management can be attributed more to the land status designation, the managing agency, specific requirements of the Act or actual differences in the resources, however, is difficult to assess. In most cases, it appears to be a combination of these factors.

Following passage of P.L. 100-225, both agencies moved to prepare the management plans required by the Act. The NPS developed a monument management plan within three years of the Act as directed by Congress and the plan and its implementation generally reflect legislative direction. By contrast, due to litigation and changes in BLM planning requirements, it took BLM thirteen years to complete its NCA management plan, although BLM had also developed a draft management plan and environmental assessment within the Act's prescribed three-year timeframe. BLM's final plan also reflects legislative direction. Almost 20 years after designation of the special status areas, there are notable differences regarding two management issues – vehicle access and grazing. The special designation areas are virtually the same regarding two other issues – mineral development and water. In contrast, most of the *potential* differences between multiple-use lands and all the areas of special designation involves water and mineral development. The *actual* differences are, however, minor because in both cases the resources available for development (minerals and water) are scarce to non-existent throughout the area.

The main difference among special designation areas regarding recreational vehicle access is between wilderness areas and the roadless area of the national monument on one hand and all other areas on the other. This difference is mainly in terms of fewer roads in the former as both BLM and NPS try to enforce limitation of motor vehicles to designated travel routes in all special designation areas. NPS enforcement of travel restrictions is better than BLM's primarily because of boundary fencing, the prohibition of hunting, and more funding for law enforcement.

³⁴⁰ Personal communication with Kathy Walter, NLCS System Manager, Rio Puerco Field Office, Albuquerque, February 4, 2005.

Evidently, BLM has actually closed more roads in the NCA (both within and outside the wilderness areas) than NPS has closed in the monument. This is, however, partially an artifact of the limited road development in the core area of the monument before designation. On the other hand, NPS has tried to assure limited vehicle use in its roadless area by recommending 83 percent of the area for wilderness designation – a proposal that includes slightly less of the monument area than BLM originally proposed as wilderness in 1981. This is in contrast to BLM’s “non-suitable” recommendation for the Chain of Craters WSA which will allow continued vehicle access on the area’s designated travel routes. The general access restriction (vehicles confined to designated routes) in all the special designation areas differs from more lenient rules in the pre-designation el malpais area where BLM permitted vehicle access on all existing roads and trails. The general access restrictions are also more stringent than the rules for small areas of multiple-use lands in the Albuquerque area where BLM permits off-road vehicle use.

Differences in grazing among areas is almost exclusively due to legislative prescriptions that eventually eliminated grazing in the National Monument, but allowed grazing to continue in the entire NCA. There appears to be very little on-the-ground difference among BLM areas (NCA, wilderness and multiple-use lands) regarding grazing, except in terms of minor limitations on vehicle access for grazing in wilderness areas. Grazing on special designation areas is managed by the same staff as multiple-use lands and appears to be largely independent of the designations. BLM had made attempts to limit grazing on the area’s largest allotment (including wilderness and non-wilderness NCA and multiple-use lands) to improve land health, but was largely unsuccessful due to pressure from the corporate allottee to maintain previous grazing levels despite any special designation.

Water is extremely limited in el malpais and has been a minor issue regarding the special status designations. Congress treated the special designations identically in terms of water rights, with the minor exception of explicitly addressing ground water drilling on the National Monument (i.e., the Act did not require NPS to permit ground water well drilling on the monument.) Both management documents and interviews with agency staff suggest that both agencies have initiated, but not completed, the slow process of obtaining federal reserve water rights and have tried to protect their minimal surface water resources from degradation.

Regarding mineral development, there is little difference among the special status designations both because all three were withdrawn from mineral development, but also because of the low potential for development throughout the area. Nonetheless, the possibility for development in all three special designations is much lower than on multiple-use lands, even if the likelihood of actual development is low throughout the area. That said, the distinction between special designation areas and multiple-use lands is blurred by BLM’s management plan prescription that calls for no development of federal minerals in the NCA (as prescribed by the Act) and no discretionary development of federal minerals in non-NCA areas proposed for inclusion in the boundaries of the NCA. As BLM adds public lands to the NCA, either through acquisition of in-holdings or boundary adjustments, BLM will withdraw the lands from mineral entry. More on-the-ground difference between BLM and NPS areas might exist if the potential for development were greater. NPS has been able to achieve a more complete buyout of private land and mineral interests for the monument compared to BLM for the NCA and wilderness areas. Obtaining

mineral interests has consistently been a priority for the El Malpais area (pre- and post-designation), but BLM has not been as successful as NPS, despite the availability of willing sellers, due to insufficient funding.

Regarding these and other resources, the overwhelming importance of Congressional direction for management is evident in both the differences and similarities among the designations. For example, the most problematic issue in terms of resource protection – grazing – was not a contentious issue during the Congressional debates. Throughout the legislative discussions, grazing was accepted by all parties as compatible with both NCA and wilderness values, yet subsequent management planning conflicts over grazing indicate that the parties differed on exactly how much grazing they expected to continue. While support for continued grazing in most of the area was apparently necessary to gain passage of the legislation, the Congressional mandate to continue grazing in the BLM managed areas left BLM without the specific legislative backing given to NPS to protect vegetation resources of the area. In contrast, Congressional mandates regarding other issues – mineral development, water, and cultural resource protection – were essentially identical among the legal regimes and have resulted in little apparent difference in management or resource protection.

Besides congressional mandates on specific resource issues, NPS and BLM both noted the importance of special designations for increasing both funding and management priority to support acquisitions, capital improvements (e.g., campgrounds and visitor centers), and personnel, especially enforcement. Special management areas may get some additional attention and funding; formal special designation areas receive more; Congressional designations receive priority over Presidential designations. Both agencies also commented on the funding edge that NPS has over BLM regardless of land status designation. A notable exception to an increase in funding for the NCA, including its wilderness areas, is for grazing which continues to be managed along with multiple-use lands out of the field office despite its special land status.

The El Malpais special designations were born of compromises over boundaries, managing agencies, wilderness designation, and management prescriptions. Whether management would have been significantly different under a different mix is difficult to predict. If, for example, H.R. 3684 had passed and the entire area had been designated a national monument under BLM control – similar, perhaps, to the Grand Staircase-Escalante National Monument – grazing would still have been specifically allowed and, perhaps, similarly controversial.

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