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Comment
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***1081 COLORING OUTSIDE THE LINES: CHRISTO'S "OVER THE RIVER" AND THE BLM'S VISUAL RESOURCE CONTRAST RATING SYSTEM**

Assessing a work of art using in-depth technical analysis sounds a bit like writing a scholarly treatise about a joke. If you peer inside too deeply, armed with numbers and equations, does "Mona Lisa" still dazzle? And is "A man walks into a bar ..." still funny?¹

INTRODUCTION

The above analogy, from a July 2010 article in *The New York Times*, expressed concern that an Environmental Impact Statement (EIS) was perhaps ill-suited to the task of analyzing a proposed art installation.² Could a method of review developed to gauge the likely effects of cattle grazing, timber harvests, and mineral extraction possibly preserve the essence of an artwork? The answer appears to be "yes"--for now. On November 7, 2011,³ after three years of analysis, the U.S. Bureau of Land Management (BLM) approved a land use authorization permit for "Over the River," a massive, fleeting, and controversial public art installation conceived by world-renowned environmental artists Christo and Jeanne-Claude.⁴ Over the River is the first art project to survive the rigors of an EIS,⁵ the *1082 highly technical review process required by the National Environmental Policy Act of 1969 (NEPA) for any proposed federal action that poses potentially significant impacts to the environment.⁶ The EIS for Over the River ran to 1,686 pages, analyzed six action alternatives, recommended more than 100 mitigation measures, and attracted 4,558 official public comments.⁷ By approving a three-year permit for Over the River, the BLM accepted the EIS's conclusions that the art project was "broadly consistent" with resource management objectives for the affected area, and that proposed mitigation measures would result in "the elimination of any significant, adverse long-term impacts to all resources."⁸ Construction was scheduled to begin in July 2012, and the vision of twenty years finally realized in August 2014.⁹

However, beauty is in the eye of the beholder. Take, for instance, the opinion of Ellen Bauder, a leading member of Rags Over the Arkansas River, the grassroots organization intent on stopping Over the River: "I don't particularly consider it an art project. This is a construction project in my view."¹⁰ On February 1, 2012, with assistance from students in the Environmental Law Clinic at the University of Denver's Sturm College of Law, Rags Over the Arkansas River filed a lawsuit in federal court seeking to set aside the BLM's approval.¹¹ The Petition for Review of Agency Action alleges that the proposal does not conform to the Royal Gorge Resource Management Plan (RMP), a 150-page document that governs land use decisions in the area that would host the art project.¹² The plaintiff advances several supporting arguments ranging from, inter alia, degradation of bighorn sheep habitat, displacement of anglers, and traffic snarls.¹³ In the context of an art project, though, the proposal's impacts to visual resources may be the most telling.¹⁴ Thus, this Comment focuses on application of the "Visual Resource Contrast Rating System," the BLM's homegrown methodology for evaluating a proposed action's impact on scenic

*1083 values.¹⁵ On this basis alone, there is at least a chance that Over the River may be doomed to twist in the wind.

I. ARTWORK AT A LANDSCAPE LEVEL

As with every work by Christo and Jeanne-Claude, “Over the River” is difficult to put into words. There is the technical description: 5.9 miles of translucent polypropylene fabric panels, staggered in eight sections of varying length across forty-two miles of the Arkansas River, held aloft above the river’s surface by cables anchored to the riverbanks by more than 9000 industrial bolts.¹⁶ Or there is the temporal description: twenty-eight months for installation, including several periods of inactivity to mitigate impacts to sensitive wildlife; two weeks for exhibition; and three months for removal of all aboveground hardware and restoration of the corridor.¹⁷ For others, the best-fitting description is the name of the organization suing to stop the project: Rags Over the Arkansas River, whose supporters view the project as unreasonably dangerous, destructive, and disruptive.¹⁸ Perhaps two of the artists’ own renderings can best convey the intended vision of Over the River.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Figures 1 & 2. Artists’ renderings of the proposed project as viewed from above (left) and below (right) the polypropylene panels.¹⁹ Photos: Wolfgang Volz, © Christo 2007.

*1084 Finally, one more description is warranted: in their permit application for Over the River, the artists describe their core vision as “the temporary horizontal suspension of luminous fabric in a summertime river environment that offers a range of lighting conditions and a variety of landscapes so as to create contrasting *lines, forms, colors, and textures.*”²⁰ While this description is perhaps poetic, it is equal parts problematic.

II. ASSESSING THE VISUAL LANDSCAPE

The problem stems from the fact that 80 percent of the panels in the proposed project area fall within the Arkansas Canyonlands Area of Critical Environmental Concern (ACEC).²¹ The ACEC designation is reserved for BLM lands requiring intensive management “to protect and prevent irreparable damage to important historic, cultural or scenic values, fish and wildlife resources, or other natural systems or processes.”²² To achieve this end, the Royal Gorge RMP counsels that land use decisions for the Arkansas Canyonlands ACEC should be guided by Visual Resource Management (VRM) Class II objectives.²³

VRM class objectives form the backbone of the BLM’s Visual Resource Contrast Rating System, which provides a step-by-step guide for assessing a proposed action’s impact on scenic values.²⁴ Under the rating system, regions within a resource management area are inventoried to identify their relative scenic value, and then are assigned a VRM class rating that allows varying degrees of contrast in form, line, color, and texture.²⁵ Class I is reserved for areas to be maintained in a natural state, whereas Classes II, III, and IV permit increasing levels of visual interruptions in order to accomplish other important land use objectives.²⁶ For example, the objective of VRM Class II

is to retain the existing character of the landscape. The level of change to the characteristic landscape should be low. Management activities may be seen, but should not attract the attention of the casual observer. Any changes must repeat the basic elements of *form, line, color, and texture* found in the predominant natural features of the characteristic landscape.²⁷

*1085 *Form. Line. Color. Texture.* These four key words, notably absent from the other three VRM class objectives, also feature prominently in the artists’ permit application. In fact, successful realization of the project hinges on achieving a high degree of contrast in all four elements. Even if the word choice was unintentional, the coincidence is apt for a pair of artists known for their ability to spawn controversy while negotiating complex permitting processes.²⁸

VRM class objectives are then brought to life in Resource Management Plans. In RMPs, land managers reframe the overarching goals of a VRM class into management directives tailored to protecting the visual resources of a specific region.²⁹ The Royal Gorge RMP defines the following visual resource management decisions for the Arkansas Canyonlands

VALUE MANAGED	DECISION NUMBER	DECISION
ACECs	1-67	ACECs will receive special management [including] VRM class II avoided for major rights-of-way .
Visual Resources	1-77	Visual Resource Management class criteria will be used as a guide for other resource management actions.
	1-78	Visual Resource Management class II areas will be protected by a controlled surface use stipulation for fluid minerals leasing.
	1-79	Visual Resource Management class II areas within ACECs will be protected by:
		-closed to mineral entry;
		-closed to mineral materials development;
		-avoided by major rights-of-way;
		-off-highway vehicle use limited to designated roads and trails;
		-retained in public ownership.
	1-80	Visual ratings in ACECs will be reevaluated to ensure rating is appropriate to protect outstanding qualities.

TABLE 1. SUMMARY OF VISUAL RESOURCE DECISIONS FROM ROYAL GORGE RMP FOR ECOLOGICAL SUBREGION #1, WHICH ENCOMPASSES THE ARKANSAS CANYONLANDS ACEC, WHERE 80 PERCENT OF THE PROPOSED PANELS ARE SITED.

In sum, the Royal Gorge RMP identifies general ends and specific means. To achieve visual resources that meet VRM class II criteria, resource managers are bound by a recommendation to follow the general guidance of the VRM class rating, and activities that would hamper achievement of the end are expressly forbidden. VRM class designations in *1086 RMPs are binding; however, in the uncommon situation where the RMP identifies management objectives that are impossibly at-odds with each other, the specific controls.³¹ For instance, if an area is designated VRM Class II, but the RMP expressly allows visually jarring mining activities, mineral leases could be approved even though visual resources would be degraded.

More common, though, is the situation where a proposed action is not expressly permitted or prohibited, but its impacts to visual resources would not be consistent with the VRM class identified in the RMP. In that case, the BLM has three options: reject the action; approve the action subject to mitigation measures that will ensure compliance with the RMP; or amend the RMP to lower the VRM class, a complicated process requiring environmental review, public participation, and agency coordination.³² Amending the Royal Gorge RMP is exactly what Rags Over the Arkansas River insists the BLM should have

done based on nonconformance of Over the River with multiple sections of the RMP, including the sections addressing management of visual resources. An administrative decision from the Interior Board of Land Appeals speaks directly to the situation posed by Over the River:

VRM objectives properly designated in the RMP process are as binding ... as are any of the other resource allocation decisions made in the RMP Obviously, the Class II objectives allow for some minimal level of impact to be apparent from management activities. But, where that level of impact which may result from management activities can no longer be said to be “low,” where it “attracts the attention of the casual observer,” such discretionary management activities are prohibited until the RMP VRM classification can be changed.³³

Over the River not only attracts the attention of the casual observer; it demands it.

III. THE LEGAL LANDSCAPE

As one would expect, the Royal Gorge RMP contains no outright bans on large environmental artworks, nor does it grant express permission for a recreation project on the scale of Over the River.³⁴ Therefore, the EIS for Over the River evaluated whether the proposal was “clearly consistent with the terms, conditions, and decisions of the approved [resource management] plan,” as required by the BLM’s governing legislation.³⁵ After *1087 extensive review, the EIS adopted the conclusion that, in the longer term, the project was “broadly consistent” with the Royal Gorge RMP’s management objectives.³⁶ However, this conclusion raises many more questions than it purports to answer. For example, is “broadly consistent” the same as “clearly consistent”? And are clear inconsistencies, such as the contrast goals of the art project and those of the VRM Class II designation, permissible, provided the inconsistency vanishes with the dismantling of the art installation? These are the tangled questions that Rags Over the Arkansas River has posed to the U.S. District Court for the District of Colorado.

In order to set aside the BLM’s permitting decision, the reviewing court must find that the agency’s decision rose to the level of “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³⁷ NEPA raises the bar somewhat, requiring that agencies use the EIS process to give a “hard look” at proposed projects that are likely to cause significant environmental impacts; in other words, the agency must have articulated a rational connection between the facts found and the conclusion made.³⁸ Still, the NEPA process is merely a tool for analysis; it requires agencies to investigate, comprehend, and disclose the possible environmental ripple effects of proposed land use activities, but it does not actually prevent agencies from pursuing any activity, even one that will undoubtedly harm the environment.³⁹

In this case, it does not take an art critic to conclude that Over the River gives an eye-poke to the VRM Class II designation. The EIS confirms this commonsense finding, noting that the art project “would result in a short-term, major modification of the existing character of the landscape that would dominate the view and be the major focus of viewer attention.”⁴⁰ With regard to visual resources, then, it seems Over the River is far from “clearly consistent” with the Royal Gorge RMP. Furthermore, “[t]he objective of resource management planning by the Bureau of Land Management is to maximize resource values for the public through a rational, consistently applied set of regulations and procedures.”⁴¹ Seeing as the Royal Gorge RMP strives to preserve VRM Class II areas by restricting visually intensive activities-- namely, mineral leasing, off-highway vehicle use, and right-of-way development--the BLM’s subsequent approval of an activity that features miles of shimmery fabric and thousands of feet of cable seems rather irrational and inconsistent.

One key feature of Christo and Jeanne-Claude’s work may help Over the River stay out of the weeds: its ephemeral lifespan. The most intensive visual disturbances would occur *1088 during “blossoming” (the artists’ term for fabric panel installation), exhibition, and deblossoming--all told, a mere four to six weeks.⁴² Less-obtrusive support cables would be up for fewer than six months.⁴³ While there is nothing in the Royal Gorge RMP that expressly permits temporary nonconformance, the Visual Contrast Rating System instructs practitioners to prepare two different contrast ratings when it is clear that a project will have different visual impacts over the short-term (defined as less than five years) and the long-term.⁴⁴ Applying this bi-phasic analysis, the EIS concluded that, although VRM objectives would not be met during much of the permit’s three-year term, the long-term visual impacts from the art project would be negligible.⁴⁵

CONCLUSION

It remains to be seen whether distinctions such as “short-term” versus “long-term” will help Over the River to stay afloat through judicial review. As it is the first art project to navigate the EIS process, the reviewing court has a chance to paint on a blank canvas regarding the relative importance of the Visual Contrast Rating System in approving a proposed work. Whether those brushstrokes are broad or narrow will have lasting effects, not only on the communities facing the greatest impact from Over the River (including over 400,000 visitors and \$121 million in economic output), but on the viability of the Visual Resource Contrast Rating System to provide a predictable metric for protecting scenic values on our public lands.⁴⁶

Footnotes

- ^{a1} Caylin is a second-year law student at the James E. Rogers College of Law. She graduated from Cornell University in 2003 with a Bachelor of Science in Natural Resources.
- ¹ Kirk Johnson, *Bureaucracy Meets Art, Delighting Christo*, N.Y. TIMES, July 16, 2010, at A8, available at http://www.nytimes.com/2010/07/17/us/17artist.html?_r=1&ref=christo.
- ² *Id.*
- ³ See Press Release, OFFICE OF THE SEC’Y OF THE INTERIOR, U.S. DEP’T OF THE INTERIOR, *Salazar Announces Final Approval for Christo’s Over The River Art Installation in Colorado*, BUREAU OF LAND MGMT. (Nov. 7, 2011), http://www.blm.gov/wo/st/en/info/newsroom/2011/november/NR_11_07_2011.html.
- ⁴ U.S. BUREAU OF LAND MGMT., ROYAL GORGE FIELD OFFICE, OVER THE RIVER FINAL ENVIRONMENTAL IMPACT STATEMENT NO. FES-11-15, Introduction 1-9 (2011) [hereinafter FEIS].
- ⁵ Bruce Finley, *Artist Christo Gets OK for Colo. Project: The Artist Plans to Drape Shiny Canopies Over Part of the Arkansas River*, DENVER POST, at B-04, Nov. 8, 2011, available at http://www.denverpost.com/news/ci_19285982.
- ⁶ National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006).
- ⁷ FEIS, *supra* note 4, at Summary s-4.
- ⁸ *Id.* at Introduction 1-17, 1-19.
- ⁹ See Press Release, *supra* note 3. On February 21, 2012, the project team announced a voluntary one-year delay to August 2015 to ensure a full 28 months for installation and to address public requests for detailed event management plans. Christo and Jeanne-Claude, *Over the River Update*, OVER THE RIVER, <http://www.overtheriverinfo.com/index.php/otr-team-updates/over-the-riverupdate-3/> (last visited Mar. 7, 2012).
- ¹⁰ Megan Verlee, *6 Miles of Silver Ribbon: Locals Protest Christo*, NPR, Feb. 18, 2012, <http://www.npr.org/2012/02/18/147009847/6-miles-of-silver-ribbon-locals-protest-christo>.
- ¹¹ Pet. for Review of Agency Action at 1, 5, *Rags Over the Arkansas River, Inc., v. U.S. Bureau of Land Mgmt.*, No. 1:12CV00265 (D. Colo. Feb. 1, 2012), 2012 WL 301156 [hereinafter Petition].
- ¹² *Id.* at 4; ROYAL GORGE FIELD OFFICE, U.S. BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN (1996), available at http://www.blm.gov/pgdata/etc/medialib/blm/co/programs/land_use_planning/rmp/archives/royal_gorge/rmp_rod.Par.50976.File.dat/Rgrr.pdf [hereinafter Royal Gorge RMP].

13 Petition, *supra* note 11, at 3-4.

14 *See id.* at 4.

15 U.S. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, BLM MANUAL 8431 -- VISUAL RESOURCE CONTRAST RATING (1980), *available at* [http:// www.blm.gov/nstc/VRM/8431.html](http://www.blm.gov/nstc/VRM/8431.html) [hereinafter VRM Manual, referring to "Visual Resource Management"; the BLM refers to the manual as such and this Comment adopts the same terminology].

16 FEIS, *supra* note 4, at Summary s-8.

17 *Id.* at Summary s-9.

18 *See, e.g., Rags Over the Arkansas River: The Issues*, ROAR, <http://www.roarcolorado.org/issues.html> (last visited Mar. 8, 2012).

19 Christo and Jeanne-Claude, *Gallery*, OVER THE RIVER, [http:// www.overtheriverinfo.com/index.php/gallery/](http://www.overtheriverinfo.com/index.php/gallery/) (last visited Mar. 7, 2012).

20 J.F. SATO AND ASSOCIATES, CHRISTO AND JEANNE-CLAUDE OVER THE RIVER DESIGN AND PLANNING REPORT 3-1 (2007) (emphasis added), *available at* [http:// www.blm.gov/pgdata/etc/medialib/blm/co/field_offices/royal_gorge_field/planning0/otr_ddp.Par.19443.File.dat/Over%20The%20River_Volume%201_Chapter3.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/co/field_offices/royal_gorge_field/planning0/otr_ddp.Par.19443.File.dat/Over%20The%20River_Volume%201_Chapter3.pdf).

21 FEIS, *supra* note 4, at Introduction 1-9.

22 *Id.*

23 ROYAL GORGE RMP, *supra* note 12, at 2-1-14 ("Visual Resource Management class criteria will be used as a guide for other resource management actions.").

24 VRM MANUAL, *supra* note 15.

25 *Id.*

26 *Id.*

27 *Id.* (emphasis added).

28 Johnson, *supra* note 1. As Christo told *The New York Times*, "The identity of our project is built in the permitting process. We were banging our heads and asking to have an environmental impact statement for such a long time." In fact, the artists *requested* an EIS in their permit application; *see* ROYAL GORGE FIELD OFFICE, U.S. BUREAU OF LAND MGMT., OVER THE RIVER FREQUENTLY ASKED QUESTIONS 1, http://www.blm.gov/pgdata/etc/medialib/blm/co/field_offices/royal_gorge_field/planning0/otr_eis.Par.77609.File.dat/OTR_EIS_FAQ_2010.pdf (last visited Mar. 8, 2012).

29 VRM MANUAL, *supra* note 15.

30 ROYAL GORGE RMP, *supra* note 12, at 2-1-13 to 2-1-15.

31 *See* Stephen Bloch, *Protecting Spectacular Public Lands: Part of the Bureau of Land Management's Multiple Use Mandate*, 3
RMMLF-INST Paper No. 3A (2009) (citing S. Utah Wilderness Alliance, 144 IBLA 70, 87 (1998)).

32 *See* 43 C.F.R. § 1610.5-5 (2012).

33 S. Utah Wilderness Alliance, 144 IBLA 70, 86 (1998).

34 ROYAL GORGE RMP, *supra* note 12.

35 43 C.F.R. § 1601.0-5(b) (2012) (“Conformity or conformance means that a resource management action shall be specifically
provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the
approved plan or plan amendment.”).

36 FEIS, *supra* note 4, at Summary s-2.

37 5 U.S.C. § 706 (2006).

38 *See* N.M. *ex rel.* Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 713 (10th Cir. 2009).

39 *See, e.g.,* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (“[I]t is now well settled that NEPA itself does
not mandate particular results, but simply prescribes the necessary process”).

40 FEIS, *supra* note 4, at Environmental Consequences 4-316.

41 43 C.F.R. § 1601.0-2 (2012).

42 FEIS, *supra* note 4, at Environmental Consequences 4-279.

43 *Id.* at Environmental Consequences 4-4.

44 VRM MANUAL, *supra* note 15.

45 FEIS, *supra* note 4, at Environmental Consequences 4-316.

46 *See* Press Release, *supra* note 3.