Submitted via www.regulations.gov

July 5, 2023

Tracy Stone-Manning
U.S. Department of the Interior, Director (630)
Bureau of Land Management
Attention: 1004-AE79
1849 C St., NW, Room 5646
Washington, DC 20240

Re: Comments on BLM's Proposed Rulemaking on Conservation and Landscape Health, 88 Fed. Reg. 19583 (April 3, 2023); RIN 1004-AE92

Dear Director Stone-Manning:

BLM's proposed rulemaking on Conservation and Landscape Health (Proposed Rule) codifying conservation as a multiple use under the Federal Land and Policy Management Act (FLPMA) unlawfully expands the original intent of FLPMA and revises the priorities and focus of land use management. While FLPMA calls for protection of the environment, water, and cultural resources, it does not identify conservation as a use. Certainly, conservation is a goal and land use action that we as an industry fully support. Our members are committed to environmentally responsible operations, but we are concerned that the Proposed Rule impermissibly exceeds BLM's directive to manage multiple uses of public lands. The authority to add conservation as a use under FLPMA is reserved for Congress, thereby rendering BLM unable to fully implement the Proposed Rule unless and until such time as FLPMA is amended by Congress. As such, BLM must withdraw this Proposed Rule.

The Proposed Rule is outside the bounds of FLPMA and contrary to congressional intent. Under FLPMA, Congress tasked BLM with managing public lands for the "multiple use and sustained yield" of resources. FLPMA specifically defines "principal or major uses" as limited to mineral exploration and production, livestock grazing, rights-of-way, fish and wildlife development, recreation, and timber. Further, FLPMA mandates public lands are to "be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber". By adding conservation as a multiple use, BLM prioritizes ecological resilience and intact landscapes in land use management over productive uses which expands the intent of FLPMA and provides BLM an avenue to preclude FLPMA-defined uses on public lands. This is only emphasized by the lack of explanation for how FLPMA or the other cited sources specifically authorize BLM to undertake this rulemaking. The statutory authority section of the preamble simply says the law authorizes BLM to promulgate regulations to carry out the purpose of FLPMA, but the

elements of this rulemaking described in the preamble are not consistent with the statutory text, purpose, or legislative history.

BLM's Proposed Rule would impose unduly restrictive measures that violate the multiple-use and sustained yield mandate by closing or restricting unnecessarily large amounts of land to productive uses. Not only would the rule change the face of FLPMA, but it attempts to enable BLM to sidestep its statutory mandates in the Mineral Leasing Act (MLA), the Taylor Grazing Act and the 1872 Mining Law. If finalized, the rule would likely make it more difficult to develop in energy-rich basins across the West, decrease investment in energy-related projects, prevent job creation, and reduce revenue for federal and state programs.

Additionally, the Proposed Rule elevates conservation to an equal basis with other multiple uses under FLPMA. If the Proposed Rule is finalized as written conservation would be in direct conflict with productive uses and would be given priority over those uses. BLM does not have the authority to make this prioritization.

Not only does BLM not have the authority to codify conservation as a multiple use, but the Proposed Rule is unnecessary. As stated in the Proposed Rule, FLPMA "provides BLM with ample authority and direction to conserve ecosystems and other resources and values across the public lands."[1] BLM has several mechanisms at its disposal to address conservation, such as Areas of Critical Environmental Concern (ACECs), conservation agreements, habitat evaluation areas, wildlife stipulations, National Monuments, wild and scenic rivers, national historic trails and Wilderness Study Areas. In fact, tens of millions of acres are already conserved through these and other designations.[2] [3] The acreage of public lands protected by restrictive designations is twenty times the amount of BLM acreage being used for oil and natural gas production. Quite frankly, if conservation is not occurring on public lands, it is because BLM is not effectively using the tools that are already in place to manage those lands.

This is not the first time BLM has attempted to elevate preservation of public lands. Through the Proposed Rule's prioritization of intact landscape and ecological resilience, it essentially has the same goals of Planning 2.0, which were to elevate preservation and non-use, and initiate landscape-scale planning. We urge BLM to keep in mind that this Proposed Rule goes far beyond the Planning 2.0 rule which was overturned by Congress in 2017 under the Congressional Review Act. This is just another reason why BLM must withdraw the Proposed Rule.

Western Energy Alliance represents 200 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

The Petroleum Alliance of Oklahoma represents more than 1,400 individuals and member companies and their tens of thousands of employees in the upstream, midstream, and downstream sectors and ventures ranging from small, family-owned businesses to large, publicly traded corporations. Our

[1] *Conservation and Landscape Health*, 88 Fed. Reg. 19583 April 3, 2023, p. 19585.
[2] National Conservation Lands, Bureau of Land Management, accessed June 29, 2023.
[3] Areas of Critical Environmental Concern, Bureau of Land Management, accessed June 29, 2023.

members produce, transport, process and refine the bulk of Oklahoma's crude oil and natural gas. Our members have a direct interest in how BLM plans to manage public lands, and the Proposed Rule will directly impact our members' development on Federal lands in Oklahoma and in many other states where they operate.

The Permian Basin Petroleum Association (PBPA) is the largest regional oil and gas association in the United States. Since 1961, the PBPA has been the voice of the Permian Basin oil and gas industry. The PBPA's mission is to promote the safe and responsible development of our oil and gas resources while providing legislative, regulatory, and educational support services for the petroleum industry. The PBPA membership includes the smallest exploration and services companies as well as some of the largest companies with world-wide operations. The Permian Basin is the largest inland oil and gas reservoir and the most prolific oil and gas producing region in the world.

West Slope Colorado Oil & Gas Association (WSCOGA) provides a unified political and regulatory voice for the oil and natural gas industry in the Piceance Basin and Western Colorado. WSCOGA's represents over 90 member companies and its mission is to promote the development of Western Colorado natural gas and petroleum products for the benefit of society. WSCOGA is an affiliated chapter of the Colorado Oil & Gas Association – a nationally recognized trade association that promotes the expansion of Rocky Mountain natural gas markets, supply, and transportation infrastructure through its growing and diverse membership. WSCOGA strives to educate stakeholders, encourage technology enhancements and foster environmental stewardship throughout oil and gas operations and supply chains.

The Colorado Oil & Gas Association is a non-profit trade organization that represents over 200 companies throughout the state of Colorado. For Nearly 40 years, COGA has sought to create a thriving, innovative and respected oil and natural gas industry in Colorado that embodies the values of our communities, prioritizes the protection of our environment, and provides the natural resources that advance our society. COGA provides a positive, unified, and proactive voice for the oil and natural gas industry in Colorado.

Due to the extensive acreage of federal lands across the states where our members operate, they will be directly affected by the Proposed Rule. We, collectively referred to as the Trades, provide the following comments should BLM decide to proceed with finalization of this rule.

Conservation is Not a Permissible Use Under FLPMA

While the Trades recognize BLM's role in appropriately managing public lands, the Proposed Rule improperly classifies conservation as "a **land use** within the multiple use framework." *See* Proposed Rule § 6101.5(c)(1) (emphasis added); *see also* Proposed Rule § 6101.1 ("The purpose of this part is to promote the **use of conservation** . . . ." (emphasis added)). The Proposed Rule's preamble expressly recognizes BLM's intent to "clarif[y]" that "conservation is a use on par with other uses of the public lands under FLPMA's multiple-use and sustained-yield frameworks." 88 Fed. Reg. at 19584. BLM, however, cannot properly designate "conservation," as defined in the Proposed Rule, as a use of the public lands under FLPMA for multiple reasons.

FLPMA Exclusively Defines the Uses of Public Lands.

In FLPMA, Congress defined the "principal or major uses" of the public lands as "domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production." 43 U.S.C. § 1702(l). Further, Congress expressly stated that the "principal or major uses" of the public lands are "**limited to**" these uses. *Id.* (emphasis added). BLM cannot establish by rule an additional use of the public lands that is "on par" with those statutorily defined uses. *See, e.g.*, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984) (holding that "when Congress has directly spoken to the precise question at issue," an agency "must give effect to the unambiguously expressed intent of Congress").

Conservation, as Defined in the Proposed Rule, is Not a Land Use.

The Proposed Rule's attempt to classify conservation as a "land use" conflates the distinct concepts of management requirements and land uses under FLPMA. The Proposed Rule defines "conservation" as "maintaining resilient, functioning ecosystems by protecting or restoring natural habitats and ecological functions." Proposed Rule § 6101.4. Close examination of this definition, however, reveals that "conservation" consists of both a land management goal and land management action, and is not a use of public lands.

The proposed definition describes conservation as (a) "maintaining resilient, functioning ecosystems" by (b) "protecting or restoring natural habitats and ecological functions." The first component of this definition—"maintaining resilient, functioning ecosystems"—constitutes a land management goal. BLM's Land Use Planning Handbook defines "goals" as "broad statements of desired outcomes . . . that usually are not quantifiable."[4] BLM H-1601-1 – Land Use Planning Handbook § II.B.1, at 12; *accord id.* at Glossary-4 (defining "goal" as "a broad statement of a desired outcome; usually not quantifiable and may not have established timeframes for achievement"). The very first example of a goal that BLM provided in its handbook is a restated definition of conservation—"maintain ecosystem health and productivity." *Id.* § II.B.1, at 12. Similarly, the second component of this definition—"protecting or restoring natural habitats and ecological functions"—constitutes a management action. BLM's Land Use Planning Handbook defines "management actions" as "actions anticipated to achieve desired outcomes." *Id.* § II.B.2.b, at 13. BLM's handbook recognizes that management actions can include protection and restoration opportunities. *See id.*

By contrast, BLM's Land Use Planning Handbook characterizes a use as a "land use allocation." BLM H-1601-1 – Land Use Planning Handbook § II.B.2, at 13. Land uses are activities that can be "allow[ed], restricted, or prohibited." *Id.* For example, resource uses that BLM has identified include forestry, livestock grazing, recreation and visitor services, comprehensive trails and travel management, lands and realty, coal, oil shale, fluid and locatable minerals, mineral materials, and non-energy leasable

[4] Resource Management Planning, 81 Fed. Reg. 89580, 89663 (Dec. 12, 2016) ("A goal is a broad statement of desired outcomes addressing resource, environmental, ecological, social, or economic characteristics within the planning area, or a portion of the planning area, toward which management of the land and resources should be directed.").

minerals. *See id.* app. C at 13–26. Land uses are identified in a land use plan based on site-specific conditions, *see id.* § II.B.2, at 13, rather than in a blanket rule that indiscriminately applies nationwide.

Land management goals (or "desired outcomes") are different than land uses. *See* BLM H-1601-1 – Land Use Planning Handbook § II.B.1, at 12. In its land use plans, BLM makes decisions related to land management goals separately from decisions related to land uses. Particularly, BLM has recognized that "[l]and use plan decisions for public lands fall into two categories: desired outcomes (goals and objectives) and allowable . . . uses and actions anticipated to achieve desired outcomes." *Id.* The Proposed Rule incorrectly casts a land management goal—conservation—as a land use. For this reason, BLM cannot finalize the proposal to make conservation a use of the public lands as described in proposed sections 6101.5(c)(1) and 6101.1.

The Proposed Rule's Conservation Goal Conflicts with FLPMA's Multiple Use Mandate.

The Proposed Rule's establishment of a "conservation" goal conflicts with FLPMA's multiple use mandate. The Proposed Rule defines "conservation" as "maintaining resilient, functioning ecosystems by protecting or restoring natural habitats and ecological functions." Proposed Rule § 6101.4. The Proposed Rule further defines "protection" as "preserving the existence of resources while keeping resources safe from degradation, damage, or destruction." The Proposed Rule's "conservation" goal is incompatible with the "principal or major uses" of the public lands, which include "mineral exploration and production." *See* 43 U.S.C. § 1702(l). In other words, BLM's conservation efforts can neither interfere with valid existing rights, nor can conservation preclude future multiple uses of lands that are appropriately managed.

FLPMA's multiple-use mandate does not allow BLM to manage entire landscapes to exclude principal or major uses of the public lands. *See Utah v. U.S. Dep't of the Interior*, 535 F.3d 1184, 1187 (10th Cir. 2008) (characterizing FLPMA as having a multiple use "requirement"). In FLPMA, Congress directed that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands[.]" 43 U.S.C. § 1701a)(12). FLPMA's multiple-use mandate requires BLM to manage "the public lands and their various resource values so that they are utilized **in the combination** that will best meet the present and future needs of the American people . . . ." 43 U.S.C. § 1702(c) (emphasis added). In other words, FLPMA requires BLM to balance multiple uses rather than elevate one use to the exclusion of others. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004) ("'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put . . . ."). Courts have expressly recognized that one use that BLM must balance with others includes "the nation's immediate and long-term need for energy resources." *Theodore Roosevelt Conservation P'ship v. Salazar*, 744 F. Supp. 2d 151, 157 (D.D.C. 2010).

Moreover, FLPMA contemplates some impacts to the public lands, so long as these impacts do not result in unnecessary or undue degradation. *See id.* § 1732(b); *see also Biodiversity Conservation Alliance*, 174 IBLA 1, 5–6 (2008). Perhaps most telling, FLPMA expressly recognizes that all public lands will not be preserved or protected in their natural condition. Specifically, Congress directed BLM to manage the public lands "in a manner . . . that, **where appropriate**, will preserve and protect **certain** public lands in

their natural condition." *See* 43 U.S.C. § 1701(a)(8) (emphasis added). Therefore, by establishing a "conservation" goal, the Proposed Rule impermissibly narrows FLPMA's multiple-use mandate.

Finally, the Proposed Rule's establishment of a "conservation" goal for the public lands appears to effectuate a withdrawal under FLPMA. FLPMA defines a "withdrawal" as "withholding an area of Federal land from . . . sale, location, or entry, under some or all of the general land laws, **for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program**." 43 U.S.C. § 1702(j) (emphasis added). Here, the conservation goal in the Proposed Rule would deny certain land use authorizations for the purpose of maintaining other public values. Nowhere in the Proposed Rule, however, does BLM suggest it will comply with the statutory procedures required to effectuate a withdrawal, such as notice to Congress. *See* 43 U.S.C. § 1714. Similarly, the Proposed Rule will not comply with FLPMA's procedures required to exclude one or more of the principal or major uses of the public lands for two or more years. *See id.* § 1712(e)(2). For all of these reasons, the conservation goal in the Proposed Rule exceeds BLM's authority under FLPMA.

The Definition of "Conservation" Is Inconsistent with "Sustained Yield."

The Proposed Rule's definition of "conservation" is inconsistent with FLPMA's goal that BLM manage for "sustained yield." *See* 43 U.S.C. § 1701(a)(7); *S. Utah Wilderness All. v. Norton*, 542 U.S. 55, 58 (2004) (characterizing "sustained yield" as a "goal"). The preamble to the Proposed Rule suggests that the definition of "conservation" is necessary to manage for sustained yield:

- "Here, 'conservation' is a shorthand in FLPMA's multiple-use and sustained-yield mandates to manage public lands for resilience and future productivity." 88 Fed. Reg. 19587.

- "Preventing permanent impairment means that renewable resources are not depleted, and that desired future conditions are met for future generations." *Id.* at 19599.

- "The BLM must conserve renewable natural resources at a level that maintains or improves future resource availability and ecosystem resilience." *Id.*

This language presumes that FLPMA's sustainable-yield goal allows BLM to preserve resources in perpetuity. In fact, the sustainable yield goal prescribes management for future **uses** of the public lands—including consumptive uses. The Supreme Court has recognized that the sustainable yield goal "requires BLM to control depleting **uses** over time, so as to ensure a high level of valuable **uses** in the future." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004) (emphasis added); *Theodore Roosevelt Conservation P'ship v. Salazar*, 744 F. Supp. 2d 151, 157 (D.D.C. 2010) (stating that sustainable yield "requires BLM to control depleting uses over time, so as to ensure a high level of valuable uses in the future" (quoting *SUWA*)).

The Proposed Rule, however, seeks to transform FLPMA's sustained yield goal to a preservation mandate, in a manner wholly inconsistent with both FLPMA and its judicial interpretations. Accordingly, BLM cannot adopt the proposed definition of "conservation."

Additional Comments on Subpart 6102

Section 6102.1 is Inconsistent with FLPMA's Multiple-Use Mandate.

Proposed section 6102.1(a)'s requirement that BLM "must manage certain landscapes to protect their intactness" is inconsistent with BLM's multiple-use mandate to the extent managing to "protect" landscape intactness requires BLM to preclude surface occupancy or disturbance. *See* Proposed Rule § 6101.4 (definitions of "intact landscape" and "protection"). FLPMA, however, does not allow BLM to deny surface occupancy or surface disturbance across "landscapes." Rather, in FLPMA, Congress provided a mechanism to preserve areas "without permanent improvement or human habitation" through Wilderness Study Areas. *See* 16 U.S.C. § 1131(c) (defining "wilderness"); 43 U.S.C. § 1782 (requiring the Secretary to inventory the public lands for Wilderness Study Areas before October 21, 1991). Similarly, FLPMA provides BLM with mechanisms to withdraw lands from entry under the general land laws and to exclude one or more of the principal or major uses of public lands. *See* 43 U.S.C. §§ 1712(g), 1714; 43 C.F.R. pt. 2300. Therefore, BLM must revise proposed section 6102.1(a) to eliminate the requirement that BLM manage landscapes to protect their intactness.

Furthermore, BLM must eliminate proposed section 6102.1(a)(2)'s direction that BLM manage lands only for "compatible uses." FLPMA requires BLM to manage lands for multiple use and, specifically, the principal or major uses identified by Congress. *See* 43 U.S.C. §§ 1701(a)(7), 1702(c) and (l), 1712(c)(1). The direction in proposed section 6102.1(a)(2) that BLM only manage entire landscapes for "compatible uses" is inconsistent with FLPMA's multiple use mandate and must be eliminated.[5]

Additionally, BLM must eliminate the direction in proposed section 6102.1(b) that BLM "prioritize actions that conserve and protect intact landscapes." BLM is prohibited by law from prioritizing these actions above the principal or major uses of the public lands identified by Congress. *See* 43 U.S.C. § 1702(l). Therefore, BLM must revise proposed section 6102.1(b).

BLM Must Revise Section 6102.2.

Section 6102.2 suffers from the same flaws as other components of the Proposed Rule. Specifically, proposed section 6102.2(a) directs BLM to identify intact landscapes "that will be protected from activities that would permanently or significantly disrupt, impair, or degrade the structure or functionality of intact landscapes." Not only is this standard highly subjective, it would also require BLM to prohibit activities that will not lead to unnecessary or undue degradation—i.e., activities otherwise permissible under FLPMA. *See* 43 U.S.C. § 1732(b). This directive also would not allow BLM to authorize the exercise of valid existing rights within subjectively defined intact landscapes. This direction is therefore inconsistent with FLPMA.

[5] Furthermore, the directive in section 6102.1(a(2) that BLM manage lands for "compatible uses" is impermissibly vague. "Compatible" is a subjective term that will lead to inconsistent interpretation among BLM offices. Further, this term presents due process concerns because, conceivably, BLM could deny one type of land use while allowing another type of land use, even if they two land uses have comparable impacts.

Additionally, section 6102.2(b) is flawed because it directs BLM to determine during the planning process which public lands should be put to "conservation use." Given that conservation is not a proper use under FLPMA, for the reasons explained above, this direction exceeds BLM's authority and should be removed.

BLM May Not Preclude the Exercise of Valid Existing Rights on Lands Prioritized for Restoration Under Proposed Sections 6102.3-1 and 6102.3-2.

Proposed sections 6102.3-1(a) and 6102.3-2(a)(5) direct BLM to prioritize lands or landscapes for restoration. BLM's identification of lands for prioritization cannot preclude the exercise of valid existing rights on these lands. *See* 43 U.S.C. § 1701 n.(h). Any final rule should expressly recognize this limitation.

Proposed Section 6102.5 Circumvents the RMP Planning Process and Interferes with Exercise of Valid Existing Rights.

Proposed section 6102.5 similarly suffers from the same flaws as other components of the Proposed Rule. Proposed section 6102.5(a) directs BLM to "[i]dentify priority watersheds, landscapes, and ecosystems that require protection and restoration efforts[.]" Any final rule must expressly recognize that identification of these areas must occur in accordance with BLM's planning process. *See generally* 43 U.S.C. § 1712; 43 C.F.R. pt. 1600, subpart 1601.

Additionally, proposed section 6102.5(b)(1) is inconsistent with FLPMA. It directs BLM to "avoid authorizing uses of the public lands that permanently impair ecosystem resilience[.]" This directive would require BLM to avoid authorizing activities that will not lead to unnecessary or undue degradation—i.e., activities that are permissible under FLPMA. *See* 43 U.S.C. § 1732(b). For this reason, proposed section 6102.5(b)(1) is inconsistent with FLPMA. Moreover, this standard fails to acknowledge or account for valid existing rights. Accordingly, any final rule must remove this directive.

BLM Must Explain the Qualifier "To the Maximum Extent Possible" in Proposed Section 6102.5-1(b).

In proposed section 6102.5-1(b), BLM attempts to evade complex issues regarding valid existing rights with the qualifier that BLM will require mitigation only "to the maximum extent possible." This qualifier is fatally vague; it provides no guidance to either BLM staff or the public regarding when BLM may require mitigation or the type of mitigation that BLM can require, nor does it appear to account for feasibility or economics of mitigation.

The Proposed Rule Will Have Significant Impacts and May Negatively Affect Energy Supply and/or Distribution

The Trades disagree with BLM's determination that the rule is not a major rule and firmly disagree with BLM's assertion that "the proposed rule does not affect energy supply or distribution."[6] BLM makes

[6] Fed. Reg., April 3, 2023, p. 19596.

that claim baldly without providing any analysis of the potential consequences for the federal onshore oil and natural gas program. Geology determines which federal lands contain oil and natural gas, and hence for leasing and development. Significant federal acreage is already off limits to development because it has been withdrawn or designated for conservation. The Trades are concerned BLM will further restrict leasing by displacing federal lands with oil and natural gas potential with conservation leases.

As drafted, the Proposed Rule appears to reduce opportunities for oil and natural gas development on federal lands, thereby compromising an essential domestic energy source. The COVID-19 pandemic and the Russian invasion of Ukraine caused significant supply and price volatility in international and domestic oil and natural gas markets. These stresses underscored the importance of domestic oil and natural gas production and supply to Americans at an affordable price. The consequences of the Proposed Rule include job loss and reduced revenue to federal and state governments, yet BLM has failed to produce an environmental impact statement (EIS) to evaluate the full impact.

BLM must develop an EIS to assess the impact of the Proposed Rule on the federal onshore program and the effect of new restrictions on domestic supplies and price. The EIS of course should analyze the impacts on all multiple uses such as timber, grazing, and mining and the full socioeconomic impacts resulting therefrom.

More particularly, the EIS must evaluate economic impacts resulting from federal acreage removed from productive uses by conservation leasing and expanding ACEC designations. The EIS should also analyze how federal and state governments would be affected by and compensated for the loss of mineral and grazing revenues resulting from the Proposed Rule. To illustrate how momentous the impacts of the proposed rule could be, we note that in the case of oil and natural gas alone, federal onshore producing acreage in FY 2022 was 12.4 million acres, just 5% of BLM's 244 million total surface acres, and generated $7.15 billion in revenue that is distributed between the federal government and states. [7] [8]

Had BLM taken the time to do an advanced notice of proposed rulemaking or a request for information, it would have received important information from stakeholders for use in development of the Proposed Rule. Instead, BLM effectively published a combination rulemaking and information seeking document, which will result in a legally vulnerable final rule upon which stakeholders will have not had the opportunity to comment. Any final rule must be guided by an EIS that revises the Proposed Rule to make it fair, reasonable, and within the bounds of BLM's authority under FLPMA.

Extensive Conservation and Restoration Activities Already Occurring on Federal Lands

Nearly 300 million acres are already being conserved across the federal landscape rendering the Proposed Rule unnecessary. BLM and other federal agencies are conserving lands through the application of several mechanisms available to them (see Attachment A). Furthermore, according to a recent letter from congressional democrats to BLM on June 12, 2023, 85% of BLM lands are in their

[7] Oil and Gas Statistics, Bureau of Land Management, accessed June 29, 2023.
[8] Natural Resources Revenue Data, Office of Natural Resources Revenue, accessed June 29, 2023.

natural state, clearly indicating that the vast majority of BLM lands have not been impacted by multiple use activities.[9]

In the same letter, members of Congress urge BLM to conduct an inventory of intact natural landscapes, and we vigorously agree this needs to occur. The Trades find it difficult to understand why BLM has not already maintained an inventory of the impacts on the landscape they manage. At the very least, BLM should have done such an inventory as part of its analysis to support the Proposed Rule. Without it, BLM appears to be proposing a regulatory solution to a problem that it has not adequately defined or provided evidence that it exists.

Not only is conservation occurring on federal lands, but BLM also has a significant amount of funding to address restoration needs. BLM has received over $200 million for landscape ecosystem restoration and resilience projects.[10] In addition, the oil and natural gas industry has generated $248.7 million in royalty revenue that has gone to BLM through the National Parks and Public Land Legacy Restoration Fund since the Great American Outdoors Act was passed in 2020.[11] The same press release touts largescale funding and restoration activities on federal lands, stating:

> "The Department is implementing more than $2 billion in investments to restore our nation's lands and waters, which in turn is helping to meet the conservation goals set through the *America the Beautiful* Initiative."[12]
>
> "As the nation's largest public lands manager, the BLM has restored millions of acres of public lands. Focusing on Restoration Landscapes allows the BLM to concentrate the new and historic funding provided by these laws to engage in partnerships more efficiently, clearly articulate the agency's vision for public lands, and multiply the return on restoration investments on behalf the American people."[13]

In summary, it appears BLM is rushing this combination request for information and rulemaking. In doing so, the Proposed Rule is based on a paucity of analysis. BLM fails to provide any: 1) scientific evidence that its current conservation tools are inadequate or that BLM-managed land is under duress; 2) analytical rationale for a new conservation tool given that 85% of its managed lands are in their natural state; and 3) information on the scale at which conservation leasing might be applied such as the number of acres per lease or number of acres that might eventually be under conservation leasing. If BLM truly sees the rule as justified and necessary, there should have been no difficulty in providing the missing information, particularly the scale at which a new leasing program might be applied. Further, without any analysis to show otherwise, BLM's conclusions that the Proposed Rule is not major in terms of economic impact is brought squarely into question. Each mentioned concern is further detailed herein.

---

[9] Letter to Interior Secretary Debra Haaland, Sen. Martin Heinrich, et al., June 12, 2023.
[10] "Biden-Harris Administration Announces $161 Million for Landscape Restoration", Department of the Interior, May 31, 2023.
[11] GAOA LRF Project Data, U.S. Department of the Interior, accessed July 5, 2023.
[12] *Ibid*.
[13] *Ibid*.

Areas of Critical Environmental Concern

Section 1610.7-2 of the Proposed Rule lowers the standards for designating ACECs while heightening the management required for them and further limiting BLM's flexibility to manage for other uses should future circumstances demand such management. The Proposed Rule emphasizes designating new and expanded ACECs to maintain large areas of intact landscape for ecological resilience. The Trades support targeted and justified ACECs in certain circumstances. We do not support BLM exponentially expanding ACEC designation in order to preclude productive uses on large swaths of land.

While BLM already has the ability to designate ACECs for the protection and preservation of important lands and cultural resources, the Proposed Rule significantly broadens the application of ACECs to include consideration of their use across all BLM-managed public lands and programs. The Proposed Rule states, "BLM protects intact landscapes using various tools, including designation of ACECs. The Proposed Rule uses the term "conservation" in a broader sense, however, to encompass both protection and restoration actions. Thus, it is not limited to lands allocated to preservation, but applies to all BLM-managed public lands and programs."[14] This expanded application of ACECs goes far beyond the intended use in FLPMA, which was a targeted and thoughtful approach for areas and resources to be set aside for preservation through the land use planning process. This new prescribed use of ACECs exceeds what Congress intended through FLPMA, which was a mosaic of multiple use lands. The Proposed Rule would allow BLM to designate large-scale ACECs on lands currently made available for productive uses, including oil and natural gas leasing and permitting.

Not only does BLM expand the lands that will be considered for ACEC designation, but it also adds to the environmental factors that will be considered. The Proposed Rule states, "BLM proposes establishing procedures that require consideration of ecosystem resilience, landscape-level needs, and rapidly changing landscape conditions in designating and managing ACECs."[15] This raises consideration for ACECs beyond targeted areas of importance and further allows for large-scale areas to be designated. That was not the intent of ACEC designation in FLPMA.

BLM should not move forward with the revisions to the ACEC designation process. In what appears to be an attempt by BLM to expedite the designation of ACECs, the Proposed Rule would remove the requirement for proposed designations to be noticed separately from land use planning documents. ACEC designations have historically been used to block productive uses in order to preserve important lands and cultural resources and warrant serious consideration prior to approval. As such, the current notice requirements for ACEC designation need to remain unchanged.

BLM should not move forward with provisions to allow interim management for ACEC nominations that have not yet gone through the required designation process. The Proposed Rule states, "[i]f nominations are received outside the planning process, interim management may be evaluated, considered, and implemented to protect relevant and important values until the BLM completes a planning process to determine whether to designate the area as an ACEC, in conformance with the current Resource

[14] Fed. Reg., April 3, 2023, p. 19585.
[15] *Id*., p. 19587.

Management Plan."[16] This would bestow BLM with unchecked authority to manage an area simply nominated as an ACEC, regardless if the area would actually qualify as one on a resource value basis, potentially resulting in the preclusion of multiple-use activities in that area. This would dramatically undermine National Environmental Policy Act (NEPA) analyses of such nominations that occur during resource management plan (RMP) amendments and needlessly conflict with other resource uses, particularly if an area is nominated, managed as an ACEC in the interim, but ultimately found to not qualify for formal designation. With respect to oil and natural gas development in an area potentially subject to future ACEC designation, relevant resource values are protected via stipulations developed under the RMP and attached to individual leases. If an area were to be nominated as an ACEC and managed as such pending the completion of a future planning process, existing lease rights would be impacted, and future leases may be unjustifiably deferred due to the interim-managed ACEC overlapping the nominated acreage. Given its negative potential impact on valid existing lease rights and multiple-use activities, BLM must remove this provision.

The Trades question the Proposed Rule's directive to prioritize the "acquisition of inholdings within ACECs and adjacent or connecting lands identified as holding related relevant and important resources, values, systems, processes, or hazards as the designated ACEC."[17] BLM already has authority to acquire inholdings from willing buyers but with the Proposed Rule, BLM indicates the intention of increasing the number of ACECs and expanding existing ones. BLM has not fared well with past land acquisitions which have led to state lawsuits that have revealed deficiencies in the NEPA process and public involvement. An example is the acquisition of the Marton Ranch in Wyoming. It is also unclear if the funding and authorization process to acquire these lands would be initiated through the Land and Water Conservation Fund or other avenues.

Acquisition of ACEC-adjacent lands could lead to increased isolation of state and private lands, which leads to issues of accessibility. For instance, in southeast New Mexico most of the spacing units for 1.5-to-2-mile horizontal wells include private and/or state leases. Exclusion of federal tracts via conservation leasing or ACEC expansion can preclude non-federal oil and natural gas development, which does not appear to have been considered in the impacts analysis of the Proposed Rule.

While BLM already has the authority to designate ACECs, the changes to the criteria required for designations and removal of designations as well as the prioritization on acquiring adjacent lands could severely decrease the amount of land available for productive uses in contravention of the multiple-use mandate. The existing ACEC designation and removal processes that allow for ample public input need to remain in place.

The following are comments regarding specific sections of the Proposed Rule related to ACEC designation.

[16] *Id*., p. 19596.
[17] *Id*., p. 19597.

Section 1610.7-2(a) Misstates the Definition of an ACEC.

Proposed section 1610.7-2(a) misstates the definition of an ACEC. It characterizes an ACEC as a designation "where special management is **required to protect** important natural, cultural, and scenic resources, systems, or processes, or to protect life and safety from natural hazards" (emphasis added). This characterization is incorrect. FLPMA defines an ACEC as an area "where special management attention is **required . . . to** protect and **prevent irreparable damage to** important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards." 43 U.S.C. § 1702(a) (emphasis added). BLM's existing planning regulations also adopt the statutory definition of ACECs. *See* 43 C.F.R. § 1601.0-5(a).

BLM's omission of the phrase "and prevent irreparable damage to" from proposed section 1610.7-2(a) is inconsistent with FLPMA. This phrase establishes a second prong for determining whether ACEC designation is appropriate – that is, where special management is required to "protect and prevent irreparable damage." If special management is not required to protect and prevent irreparable damage, designation as an ACEC is not appropriate under 43 U.S.C. § 1702(a). By contrast, the Proposed Rule's characterization of ACECs as areas where special management is necessary only to "protect" certain resources implies that no impacts can occur to an ACEC.

Congress, however, expressly contemplated that development—and its associated impacts—can occur in ACECs. In the promulgation of FLPMA, the Senate Committee on Interior and Insular Affairs specifically stated that it "wish[ed] to emphasize that, unlike wilderness areas . . . , 'areas of critical environmental concern' are not necessarily areas in which no development can occur." S. Rep. No. 94-583, at 43 (1975). Rather, the committee explained that, "[q]uite often, limited development, when wisely planned and properly managed, can take place in these areas without unduly risking life or safety **or permanent damage** to historic, cultural or scenic values or natural systems or processes." *Id.* (emphasis added). Similarly, when finalizing guidelines on ACECs after FLPMA's passage, BLM recognized Congress' intent and observed that "a range of multiple-use activities, including specified kinds and degrees of development and commodity production, may take place within a particular ACEC, provided that the important environmental resources involved, or human property or lives, are not damaged or endangered." 45 Fed. Reg. 57318 (Aug. 27, 1980).

Notably, the Proposed Rule is unclear whether the definition of "protection" in proposed section 6101.4 would apply to proposed section 1610.7-2, because these two sections are in different subchapters and parts of BLM's regulations. The definition of "protection" in proposed section 6101.4 is wholly inconsistent with the statutory definition of ACECs in FLPMA. The proposed definition of "protection" requires "preserving the existence of resources"—i.e., preventing any impacts to these resources. By contrast, FLPMA authorizes the designation of ACECs to "protect **and prevent irreparable damage to**" resources. To the extent BLM intends that the definition of "protection" in proposed section 6101.4 will apply to proposed section 1610.7-2, proposed section 1610.7-2 is patently inconsistent with FLPMA.

For these reasons, BLM must revise the definition of an ACEC at section 1610.7-2(a) to recognize that ACECs are areas where special management attention is required to protect **and prevent irreparable**

damage to certain resources. Additionally, any final rule must expressly recognize that an ACEC designation does not prevent BLM from authorizing land uses within the ACEC.

ACECs Must Have National, and Not Local or Regional, Importance.

While the Proposed Rule recognizes that areas of local and regional significance exist, BLM's authority is clearly limited to management of areas of national significance. BLM should eliminate the references to local and regional importance in proposed section 1610.7-2(d)(2). ACECs should only be designated when resources, values, systems, or processes have national importance. Since FLPMA's passage, BLM has consistently found local or regional significance to be inadequate to satisfy the "importance" criterion, absent extraordinary circumstances. *See* 45 Fed. Reg. 57324 (requiring "more-than-local significance" absent "compelling reason"); BLM Manual 1613 – Areas of Critical Environmental Concern § .11.B.1 (Rel. 1-1541 Sept. 29, 1988) (requiring "more than locally significant qualities"). BLM's prior interpretation is consistent with FLPMA's legislative history, in which Congress cited the Public Land Law Review Commission's recommendation calling for "an immediate effort . . . to identify and protect those unique areas of national significance that exist on public lands." H.R. Rep. No. 94-583, at 43 (quoting *One Third of the Nation's Land: Report of the Public Land Law Review Commission*, Recommendation No. 78) (alterations in original). Although BLM superficially states that "requiring something more than 'local significance' is unnecessarily restrictive," 88 Fed. Reg. 19593, BLM offers no example of how, or explanation why, this requirement has been unnecessarily restrictive or any basis for BLM's purported authority to alter this established criterion. *See Fed. Commc'n Comm'n v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 – 16 (2009) (holding that, for an agency to depart from a prior policy, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy"). Rather, any value that warrants the heightened management afforded by ACECs requires national, rather than local, significance.

BLM Should Clarify "Special Management Attention in Proposed Section 1610.7-2(d)(3)(i).

Section 1610.7-2(d)(3)(i) defines "special management attention" as "management prescriptions that . . . [c]onserve, protect, and restore relevant and important resources." Although the Proposed Rule defines the terms "conservation," "protection," and "restoration" in proposed section 6101.4, these definitions are in a different subchapter and part than section 1610.7-2. BLM must clarify whether it intends that "conserve," "protect," and "restore" as used in section 1610.7-2 will have the meanings set forth in proposed section 6101.4.

Proposed Section 1610.7-2(e) Must Expressly Recognize the Role of Valid Existing Rights in ACEC Designations.

Proposed section 1610.7-2(e) sets forth four factors that BLM should consider when evaluating the need for special management attention. In any final rule, BLM must add a fifth factor—valid existing rights that may impact BLM's ability to implement special management attention.

All authority conferred by Congress in FLPMA is expressly made subject to valid existing rights. *See* Pub. L. No. 94–579, § 701(h), 90 Stat. 2743, 2786, reprinted in 43 U.S.C. § 1701, historical note (hereinafter

"43 U.S.C. § 1701 n.(h)"). All management decisions in BLM's RMPs, including designation of ACECs, are therefore subject to valid existing rights. *See, e.g.*, BLM H-1601-1 – Land Use Planning Handbook app. C at 28 (Rel. 1-1693 Mar. 11, 2005).

Federal courts have interpreted the phrase "valid existing rights" to mean that federal agencies cannot impose restrictions that make development on existing leases either uneconomic or unprofitable. *See Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979); *see also Conner v. Burford*, 848 F.2d 1441, 1449-50 (9th Cir. 1988). If BLM issues a federal oil and gas lease without No Surface Occupancy stipulations, then, absent a nondiscretionary statutory prohibition against development, BLM cannot completely deny development on the leasehold. *National Wildlife Federation*, 150 IBLA 385, 403 (1999). Furthermore, BLM may not impose requirements on lessees that are inconsistent with lease rights. *See, e.g.*, 43 C.F.R. § 3101.1-2. BLM cannot, for example, impose conditions that are inconsistent with lessee's existing, contractual lease rights, and BLM cannot restrict operations to the point that economic development on a lease is precluded. *Colorado Environmental Coalition*, 165 IBLA 221, 228 (2005) (determining that a land use plan may not impose restrictions on the exercise of existing oil and gas leases that defeat or materially restrain existing rights); *Colorado Open Space Council*, 73 IBLA 226, 229 (1983) (holding that regulation of existing oil and gas leases cannot "unreasonably interfere" with the rights previously conveyed in such leases).

Thus, if BLM has already leased an area for oil and gas development, BLM would be unable to prohibit development of these leases as part of its management of an ACEC. Nowhere does the Proposed Rule address valid existing rights or acknowledge that BLM must consider them when designating ACECs. *Cf.* BLM H-1601-1 – Land Use Planning Handbook app. C at 28 (Rel. 1-1693 Mar. 11, 2005) ("**Subject to valid existing rights**, avoid approval of proposed actions that could degrade the values of potential special designations." (Emphasis added)). At a minimum, BLM should revise proposed section 1610.7-2(e) to require consideration of valid existing rights as part of evaluating the need for special management attention.

Section 1610.7-2(g) Must Clarify that BLM Need Only Analyze Proposed ACECs that Meet the Relevance and Importance Criteria.

Proposed Section 1610.7-2(g) requires BLM to include in all planning documents "at least one alternative that analyzes in detail all proposed ACECs." BLM should revise this requirement to clarify that BLM need only analyze proposed ACECs that meet the relevance and importance criteria. *See* 43 C.F.R. § 1610.7-2(a). Conceivably, the public may propose an ACEC that does not meet these criteria; however, the Proposed Rule suggests that BLM still must analyze this "proposed" ACEC. Such analysis would not inform the public and would waste BLM's resources.

Proposed Section 1610.7-2(j) Improperly Limits BLM's Discretionary Authority to Manage the Public Lands.

Proposed section 1610.7-2(j) would prevent BLM from removing an ACEC designation unless (a) "another legally enforceable mechanism provides an equal or greater level of protection" or (b) the resources for which the ACEC was designated "are no longer present, cannot be recovered, or have

recovered to the point where special management is not necessary." BLM must revise section 1610.7-2(j) to eliminate these limitations because they inappropriately constrain the discretion that Congress afforded BLM to manage the public lands.

BLM enjoys broad discretion to manage the public lands. *E.g.*, *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999). However, this discretion is still determined, dictated, and limited by Congressional action. As part of the authorized discretion, Congress provided BLM with wide latitude to designate ACECs. *See* 43 U.S.C. §§ 1702(a), 1712(c)(3) (omitting standards for the designation of ACECs). Proposed section 1610.7-2(j) inappropriately limits BLM's ability to consider and provide for different management in an ACEC in the future, if circumstances change. Further, it prevents BLM's ability to respond to changed national priorities and needs.

In FLPMA, "Congress intended the federal lands to be managed in such a way as to maximize their use for many purposes." *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1309 (10th Cir. 1999). Proposed section 1610.7-2(j) thus would tie BLM's future management of ACECs in a manner that Congress did not envision. In fact, in FLPMA, Congress recognized that the fact an area possesses the values of ACEC designation should not demand that BLM manage an area as such. 43 U.S.C. § 1711(a) (stating that the identification of ACECs "shall not, of itself change or prevent change of the management or use of public lands"). This limitation is therefore inconsistent with the broad discretion afforded by FLPMA.

The Regulations Should Not Specify How ACECs Should Be Managed.

In the preamble to the Proposed Rule, BLM asked, "Should the regulations further specify how ACECs should be managed?" *See* 88 Fed. Reg. at 19594. The regulations should not specify how ACECs should be managed. Site-specific circumstances, including both the values to be protected by the ACEC designation and the uses in the area, should drive a given ACEC's management. As BLM previously recognized, "[s]ince it is unlikely that the resources or hazards within any two ACEC's [sic] will be identical, it is unlikely that all the specifics of the special management requirements of any ACEC's [sic] will be identical." 45 Fed. Reg. 57321. Moreover, nation-wide prescriptions as to how all ACECs should be managed would thwart Congress' requirement that BLM coordinate with states and local governments regarding land management plans and, further, that BLM land management plans be consistent with state and local plans. 43 U.S.C. § 1712(c)(9). Accordingly, any final regulations should not further specify how ACECs should be managed.[18]

Conservation Leasing Program Not Supported by FLPMA

Establishing a conservation leasing program is completely at odds with the concept of leasing under FLPMA. FLPMA addresses leasing for the defined principal uses of mineral exploration and production, livestock grazing, rights-of-way, fish and wildlife development, recreation, and timber, not conservation. As discussed above, the authority to add conservation as a multiple use is reserved for Congress alone.

[18] Should BLM seek to specify management for ACECs, BLM must allow the public an opportunity to review and comment on the proposed management before issuing any final rule.

The Proposed Rule states conservation leases could be used for restoration projects, compensatory mitigation, and noncommercial casual uses, but it provides few details on how the leases would be designated and administered and whether they could be applied to lands already designated for other uses. The Proposed Rule maintains conservation leases "would not override valid existing rights or preclude other, subsequent authorizations so long as those subsequent authorizations are compatible with the conservation use."[19] (Emphasis added). There is no description of what would be considered a use compatible with conservation, only that casual use will be allowed. BLM would assess compatibility of subsequent authorization requests on a case-by-case basis through science, data, indigenous knowledge and local knowledge. The revised definition of casual use which specifies it as a "noncommercial" use would preclude mineral entry, grazing, and guided hunting and recreation on conservation leases.

BLM appears to be implying that conservation leasing is necessary for restoration projects to take place on federal lands, yet there are many restoration projects that have taken place throughout the West without a conservation leasing program. Oil and natural gas producers have been conducting restoration projects for many years. For example, working with the New Mexico BLM, industry reclosed dozens of historical drill pits and helped remove invasive plants which resulted in restoration of over 2 million acres of grassland in Eddy and Lea counties. In Wyoming, industry has participated in restoration efforts such as sediment cleanout in wetland and stream banks to enhance ecosystems; seeding native sagebrush and other species to enhance songbird, sage-grouse and other small mammal habitat; and conducting annual wildlife studies to monitor nesting and breeding habitat for raptor and other Migratory Bird Treaty Act species in coordination with BLM and U.S. Fish and Wildlife Service.

Furthermore, the idea that restoration projects cannot take place within the same area as productive uses is a fallacy. For instance, in Wyoming, industry has partnered with the Rawlins, Casper, and Buffalo BLM Offices as well as the Office of State Lands and Investments and the U.S. Forest Service Thunder Basin National Grasslands to complete restoration projects. Past projects have included removal of encroaching juniper into sagebrush stands within sage-grouse core area, removal of encroaching pine into mountain mahogany stands in critical elk and mule deer winter range, and fence removal and rebuilding projects to convert to wildlife-friendly standards. Industry has also completed trash cleanups in public recreation areas, trail-building projects, and weed pulling efforts. These are important restoration activities that can all take place in proximity to productive uses.

Further, between 2014 and 2020 the lesser prairie chicken (LPC) population doubled across the range as industry has contributed over $65 million and implemented millions of acres of beneficial conservation practices. As of December 31, 2020, there were 111 active agreements in the Range-wide Oil and Gas Candidate Conservation Agreement with Assurances (CCAA), with total enrolled acreage of 6,228,136 acres across the LPC's range.[20] As of December 31, 2022, 46 oil and gas companies had enrolled in the New Mexico Candidate Conservation Agreement (CCA) and CCAA with total enrollment, including the

[19] Fed. Reg., April 3, 2023, p. 19586.
[20] *2020 Annual Report for the Range-wide Oil and Gas Candidate Conservation Agreement with Assurances for the Lesser Prairie-Chicken*, Western Association of Fish and Wildlife Agencies, March 31, 2021, p. 4.

New Mexico State Land Office, of 2,230,066 acres.[21] Dozens of reclamation and conservation projects have been funded through these efforts resulting in a net acreage conservation gain. Further, in addition to other ongoing projects, planned mesquite eradication projects will lead to a minimum of 6,000 more restored acres of LPC habitat.[22]

As with ACEC designations, conservation leasing would remove lands from mineral exploration and production to the extent BLM determines they are not compatible uses. We are particularly concerned that the Proposed Rule would not protect mineral-rich lands from being used exclusively for conservation leasing. Not only that, but BLM has failed to take into consideration how federal and state governments would be compensated for the loss of revenues when lands designated for productive use are used for conservation leasing. These losses include bonuses paid for oil and natural gas leases, which can be significant such as from the September 2018 New Mexico lease sale that generated just under $1 billion in bonuses; and production royalties, such as the typical $500 million that Wyoming receives annually.

Additionally, the Trades believe that productive use of lands, including mineral exploration and production, can and does co-exist with landscape health and resilience. The Proposed Rule impermissibly expands on existing legal frameworks, and BLM should not categorically presume that productive uses are incompatible with conservation or resilience objectives.

The following are comments on specific provisions regarding conservation leasing in the Proposed Rule.

BLM Lacks Authority to Issue Leases for "Conservation Use" to the Exclusion of Other Land Uses.

FLPMA does not permit BLM to issue leases for "conservation use" as in proposed section 6102.4. For the reasons detailed above, "conservation" is neither a use of the public lands under FLPMA nor a "use" at all.

Moreover, FLPMA does not permit BLM to issue leases that prevent it from "authoriz[ing] any other uses of the leased lands that are inconsistent with the authorized conservation use." *See* Proposed § 6102.4(a)(4). This directive allows single land users to lock up federal lands—in limitless amounts—from any productive use. This directive contradicts FLPMA's requirement that Congress manage the public lands "in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands," 43 U.S.C. § 1701(a)(12), and to balance multiple uses, *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004).[23] BLM cannot categorically preclude "incompatible" uses from areas covered by a conservation lease.

---

[21] *2022 Annual Report, Candidate Conservation Agreements for the Lesser Prairie-Chicken and the Dunes Sagebrush Lizard in New Mexico,* CEHMM, 2023, p. 5.

[22] *Id*., p. 30.

[23] Moreover, this directive is both unnecessary and arbitrary. BLM frequently reconciles competing land uses on the same tract of land, such as oil and gas development with coal development, grazing, potash mining, and other uses.

Further, proposed section 6102.4 fails to offer any criteria as to what constitutes an "incompatible" use. Without giving BLM direction to assess what uses are "incompatible" with a conservation, proposed section 6102.4 will almost certainly cause inconsistent BLM decision-making and lead BLM to improperly and unnecessarily denying compatible land uses.

Proposed Section 6102.4 Disregards FLPMA's Land Use Planning Requirement.

Ironically, the Proposed Rule's purported interest in promoting FLPMA's goals results in the Proposed Rule completely ignoring FLPMA's fundamental requirement of land use planning. "At its core, FLPMA is a land use planning statute." *Wyoming v. U.S. Dep't of the Interior*, 493 F. Supp. 3d 1046, 1063 n.16 (D. Wyo. 2020). Even if BLM possessed statutory authority to issue conservation leases, it could only do so after designating areas as eligible for conservation leasing in an RMP for two reasons. First, BLM must account for any use of the public lands in its RMPs.[24] FLPMA requires BLM to "develop, maintain, and, when appropriate, revise land use plans **which provide by tracts or areas for the use of the public lands**." 43 U.S.C. § 1712(a) (emphasis added); *see also* BLM Handbook H-1601-1 – Land Use Planning Handbook § II.B.2.a, at 13 ("Land use plans must identify uses, or allocations, that are allowable, restricted, or prohibited on the public lands and mineral estate."). In the Proposed Rule, however, BLM disregards FLPMA's requirements by asserting that it "will determine whether a conservation lease is an appropriate mechanism based on the context of each proposed conservation use and application, not necessarily as a specific allocation in a land use plan." 88 Fed. Reg. 19591. The Proposed Rule fails to require BLM to account for conservation leasing in its land use plans.

Second, and relatedly, proposed section 6102.4 fails to require BLM to revise its RMPs with the goal of analyzing and identifying areas where conservation leasing could occur. This proposed section states that "once the BLM has issued a conservation lease, the BLM shall not authorize any other uses of the leased lands that are inconsistent with the authorized conservation use." Proposed Rule § 6102.4(a)(4). To the extent issuance of a conservation lease would preclude BLM from issuing new oil and gas leases or granting new rights-of-way, FLPMA would require BLM to revise an RMP to analyze where and how issuance of new conservation leases would interfere with other land uses. Similarly, BLM must engage in the planning process to identify areas where valid existing rights exist and therefore may not be suitable for conservation leasing. Additionally, BLM must revise an RMP to disclose to the interested public the areas where conservation leases could be issued so that the public can anticipate the possibility of BLM issuing conservation leases in these areas and plan accordingly.

Proposed section 6102.4 wholly fails to account for BLM's land use planning obligations.[25] For this reason, BLM cannot finalize section 6102.4 of the Proposed Rule.

[24] As explained above, however, conservation as defined in the Proposed Rule is a goal, not a land use.
[25] Furthermore, BLM fails to disclose whether it has the funding to revise numerous RMPs to address conservation leasing.

BLM Cannot Issue Conservation Leases Without Complying with the National Environmental Policy Act.

Proposed section 6102.4 fails to acknowledge that BLM cannot issue a conservation without complying with NEPA and preparing an environmental assessment or environmental impact statement. The fact that a conservation lease may improve or beneficially impact the public lands does not absolve BLM from the obligation to comply with NEPA. Rather, the Council on Environmental Quality regulations implementing NEPA recognize that the "effects" of agency actions that an agency must analyze under NEPA "may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial." *See* 40 C.F.R. § 1508.1(g)(4). Proposed section 6102.4 fails to account for BLM's NEPA obligations associated with any conservation leases.

Proposed Section 6102.4 Fails to Account for Valid Existing Rights.

Conservation leases are not compatible with the exercise of valid existing rights, and proposed section 6102.4 fails to account for these rights. Proposed section 6102.4 fails to require BLM to assess the suitability of a proposed conservation lease in relation to the valid existing rights in an area. Furthermore, proposed section 6102.4 fails to prohibit BLM from issuing conservation leases in areas with significant valid existing rights, such as federal oil and gas leases. As a result, the Proposed Rule invites, and will inevitably lead to, conflicts between the proposed conservation leases and valid existing rights, such as federal oil and gas leases.

Proposed Section 6102.4 Fails to Establish Maximum Sizes of Conservation Leases.

Proposed section 6102.4 fails to identify the maximum sizes of conservation leases. BLM cannot authorize conservation leases of unlimited size, particularly when BLM will preclude productive land uses on these leases. Conceivably, BLM could issue a conservation lease covering hundreds of thousands of acres and, thus, remove these lands from any productive use. BLM cannot allow conservation leases of limitless size to lock up federal lands from development.

Moreover, BLM's failure to identify a maximum size for conservation leases is inconsistent with other types of authorizations on the public lands. For example, federal onshore oil and gas leases are limited to 2,640 acres in size. 30 U.S.C. § 226(b)(1)(A); 43 C.F.R. § 3120.2-3. Therefore, the lack of a maximum size for conservation leases is another fatal flaw in proposed section 6102.4.

BLM Cannot Issue Conservation Leases of Perpetual Duration.

Proposed section 6102.4(a)(3) sets a maximum term of 10 years for restoration or protection leases but does not set a maximum term for a mitigation lease; instead, proposed section 6102.4(a)(3)(ii) provides that a mitigation lease "shall be issued for a term commensurate with the impact it is mitigating." Thus, depending on the nature of the impact being mitigated, conservation leases could last in perpetuity.

As a policy matter, BLM should not issue leases that indefinitely preclude the principal or major uses of the public lands. As a legal matter, conservation leases of indefinite duration run afoul of the limitations on withdrawals established in FLPMA. FLPMA limits withdrawals of 5,000 acres or more to a maximum period of 20 years. 43 U.S.C. § 1714(c)(1). It also limits withdrawals less than 5,000 acres to finite durations that are either "such period of time" as desired for a resource use or a maximum 20-year period for other uses. *Id.* § 1714(d)(1). FLPMA does not permit BLM to issue conservation leases of indefinite duration.

Proposed Section 6102.4 Fails to Establish Adequate Criteria to Identify Proper Holders of Conservation Leases.

Proposed section 6102.4 offers no criteria for holders of conservation leases. Subsection (a)(2) states that BLM may issue conservation leases to "any qualified individual, business, non-governmental organization, or Tribal government," but this section does not define a "qualified" entity. Although subsection (c)(1)(v)(C) provides that BLM may request evidence that an applicant has "the technical and financial capability to operate, maintain, and terminate the authorized conservation use," this general standard raises "pay-to-play" concerns—particularly, that anyone can lock up federal lands for their own interest or gain, so long as they have the resources to undertake "conservation" activities under a lease.

This possibility implicates serious public policy considerations. Conceivably, an entity could obtain and hold a conservation lease—of limitless size—and comply with its terms but still have an undisclosed objective of precluding development on the public lands. This risk has serious implications for the national interest in developing critical minerals and reliable energy sources. The conservation lease holder could be a nongovernmental organization hostile to domestic energy production. More concerning, the conservation lease holder could be a foreign entity seeking to limit the United States' access to its own mineral and energy resources. These risks contradict Congress' stated policy in FLPMA that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands[.]" 43 U.S.C. § 1701a)(12).

The Proposed Rule contains no criteria that would allow BLM to deny an application if faced with these risks. For example, although the Proposed rule states that conservation leases "are not intended to provide a mechanism for precluding other uses," 88 Fed. Reg. 19591, the Proposed Rule does not allow BLM to examine the bona fide intent of the conservation lease holder to avoid this result. BLM would act recklessly by finalizing the Proposed Rule without necessary safeguards on who may hold a conservation lease.

The Proposed Rule Arbitrarily Allows Tribal Governments to Hold Conservation Leases but Not State Governments.

Proposed section 6102.4(a)(2) arbitrarily allows Tribal governments to hold conservation leases but does not allow state governments to do so. BLM offers no justification for this distinction, rendering it arbitrary. Further, the proposal to allow Tribal governments to hold conservation leases but not state governments is inconsistent with FLPMA. Throughout FLPMA, Congress gave States' interests and Tribes' interests at least equal weight and, in places, required consideration solely of State interests.

See, e.g., 43 U.S.C. §§ 1702(b) (defining "holder" to include States but not Tribes), 1712(c)(8) (requiring that land use plans provide for compliance with State pollution standards) and (c)(9) (requiring BLM land use plans to be consistent with State plans but not Tribal plans). Should BLM afford Tribes the ability to hold conservation leases, FLPMA requires that BLM also afford States this ability.

Responses to the questions put forth in the Proposed Rule regarding compensatory leasing.

Is the term "conservation lease" the best term for this tool?

FLPMA does not contemplate conservation leasing. As stated earlier in our comments, BLM has a wide range of authority to provide for avoidance of impacts to sensitive resources. For instance, historic or prehistoric sites, wetlands, or other water bodies, reclamation and restoration of disturbances, and management protocols to protect sensitive wildlife habitats (e.g., nesting, brood rearing, migration corridors, or crucial winter range). However, BLM cannot deem landscape level areas as off-limits to beneficial uses.

What is the appropriate default duration for conservation leases?

As previously stated, BLM should not move forward with conservation leasing as it is completely at odds with the concept of leasing under FLPMA; however, if it decides to finalize the Proposed Rule, FLPMA does not permit BLM to issue conservation lease of indefinite duration, and BLM should not issue leases that indefinitely preclude the principle or major uses of public lands. As a legal matter, conservation leases of indefinite duration run afoul of the limitations on withdrawals established in FLPMA. FLPMA limits withdrawals of 5,000 acres or more to a maximum period of 20 years. 43 U.S.C. § 1714(c)(1). It also limits withdrawals of less than 5,000 acres to finite durations that are either "such period of time" as desired for a resource use or a maximum 20-year period for other uses. Id. § 1714(d)(1).

Should the rule constrain which lands are available for conservation leasing? For example, should conservation leases be issued only in areas identified as eligible for conservation leasing in an RMP or areas the BLM has identified (either in an RMP or otherwise) as priority areas for ecosystem restoration or wildlife habitat?

BLM should not move forward with conservation leasing, but if it does, it should constrain which lands are available for conservation leasing. FLPMA requires BLM to "develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands." The RMP process is a critical element of FLPMA's multiple use mandate. It provides an opportunity for BLM to engage with stakeholders regarding the appropriate uses of federal lands under BLM management, and for stakeholders to ensure BLM is not elevating conservation use above other uses, including the statutorily-defined principle and major uses of federal lands. Therefore, if

BLM designates conservation as a "use" under FLPMA, BLM also must revise its RMPs to identify which lands are appropriate for conservation leases.

BLM should also include in the Proposed Rule a requirement to conduct a mineral assessment to see if the area proposed for conservation leasing is highly prospective for minerals. If so, the area should not be offered for conservation leasing.

Should the rule clarify what actions conservation leases may allow?

The Proposed Rule should clarify what actions conservation leases may allow. If this is not done, the Proposed Rule would be applied in a subjective manner that lacks consistency across state and field offices where BLM lands are managed.

Should the rule expressly authorize the use of conservation leases to generate carbon offset credits?

BLM not only lacks authority to do this under FLPMA, but it has also not outlined how a carbon offset program would be developed or managed. If the Proposed Rule survives litigation, using conservation leases for a carbon offset program would require a separate follow-up rulemaking.

Should conservation leases be limited to protecting or restoring specific resources, such as wildlife habitat, public water supply watersheds, or cultural resources?

As stated earlier in our comments, BLM already has the tools to reclaim, restore, and even protect those habitats deemed most valuable on BLM-owned lands in the United States. Additionally, water bodies are protected by the Clean Water Act, and cultural resources are protected through the National Historic Preservation Act. If restoration and protection is not occurring, it is because BLM is not effectively using the tools that are already in place to reclaim, restore, and protect federal lands.

The Proposed Rule is unclear on the scale or magnitude of the conservation leasing program it is contemplating. Through its use of terms such as "landscape" or "functional, resilient ecosystems", the Proposed Rule suggests large swathes of public land will be considered for conservation leasing; however, it fails to disclose to the public the magnitude of the acreage that will be included in the program.

This lack of detail creates regulatory and economic uncertainty which contributes to the negative reaction the rule is receiving from states that rely on BLM lands for their resource-based economies. Given the Biden administration's proclamations to eliminate the federal oil and gas program, refusal to follow the MLA in holding required quarterly lease sales, failure to develop a Gulf of Mexico 5-year plan, and the 30x30 initiative to protect or conserve 30% of the land and waters of the United States, it is no surprise that there are significant concerns being raised on this rule.

It is apparent from the questions and lack of details in the Proposed Rule that BLM has not fully vetted the idea of a conservation leasing program. As such, the Proposed Rule should be withdrawn or at a minimum, conservation leasing needs to be removed from it. If BLM decides to move forward with conservation leasing, it needs to be proposed separately to allow BLM time to fully develop the specifics of the program.

Fundamentals of Land Heath Review Unnecessary for all Uses

The Proposed Rule would require BLM to conduct time-consuming Fundamentals of Land Health reviews prior to authorizations for use. These reviews that are currently only applied to grazing renewals direct BLM authorized officers to consider conditions of watersheds, soil, ecological processes, water quality and habitats that exist in the area prior to permit approval.[26]

BLM already struggles with large backlogs in grazing permit renewals because of this review requirement. Expanding the requirement for BLM to conduct land health reviews for all productive uses is unnecessary and would only serve to increase permitting backlogs. Not only that, but this new requirement would also greatly burden BLM staffing and result in increased costs to taxpayers, something BLM has claimed it is trying to decrease. The requirement for BLM to conduct Fundamentals of Land Health reviews prior to authorizations for all productive uses is unnecessary and unwieldy. It must be removed from the Proposed Rule.

Should BLM decide to move forward with this requirement, BLM must revise proposed section 6103.1-2(d) and (e) because it is inconsistent with FLPMA and NEPA. Proposed section 6103.1-2(d) directs that, "[i]f resource conditions are determined to not be meeting, or making progress toward meeting, land health standards, authorized officers must determine the causal factors responsible for nonachievement." Then, proposed section 6103.1-2(e)(1) directs that, if BLM determines that "existing management practices or levels of use on public lands are significant factors in the nonachievement of the standards and guidelines," BLM "must take appropriate action as soon as practicable." Proposed section 6103.1-2(e)(3) then elaborates that responses "may include but are not limited to the establishment of terms and conditions for permits, leases, and other use authorizations and land enhancement activities."

The process set forth in proposed section 6103.1-2(d) and (e) fails to satisfy the public participation obligations imposed by FLPMA and NEPA. FLPMA requires public participation in management decisions affecting the public lands and, particularly, the users of the public lands. *See W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1069 (D. Idaho 2020). For example, FLPMA direct that BLM "shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give . . . the public adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands." 43 U.S.C. § 1712(f). FLPMA specifically defines "public involvement" as "the opportunity for participation by affected citizens in . . . decision-making . . . with respect to the public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such

[26] 43 C.F.R. § 4180.1.

other procedures as may be necessary to provide public comment in a particular instance." *Id.* § 1702(d). Similarly, "[t]he purpose and function of NEPA is satisfied if . . . the public has been informed regarding the decision-making process." 40 C.F.R. § 1500.1(a).

Proposed section 6103.1-2(d) and (e) circumvents FLPMA's and NEPA's public involvement requirements and allows BLM to make decisions in the dark, away from public review. Particularly, proposed section 6103.1-2(d) does not provide any public insight into, or oversight of, BLM's determination as to the causal factors for nonachievement of land health standards. Furthermore, proposed section 6103.1-2(e)(3) allows BLM to establish "terms and conditions for permits, leases, and other use authorizations and land enhancement activities" without any public input or oversight.[27] Both FLPMA and NEPA demand that BLM afford the public an opportunity to review and provide input on these decisions before they become final.[28] For example, BLM's grazing regulations set forth a process by which BLM will make decisions as to appropriate actions to address nonachievement of rangeland health standards or guidelines. *See* 43 C.F.R. §§ 4160.3, 4180.2(c). BLM therefore must revise proposed section 6103.1-2(d) and (e) to properly afford the public an opportunity to review and comment on responses to nonachievement of land health standards and make clear that modified "terms and conditions for permits, leases, and other use authorizations and land enhancement activities" may only be applied to those issued in the future and have no impact on valid existing rights.

BLM Cannot Require Compensatory Mitigation from Federal Oil and Gas Lessees

BLM must remove proposed section 6102.5-1(b), which states that "[a]uthorized officers shall, to the maximum extent possible, require mitigation to address adverse impacts to important, scarce, or sensitive resources." First, this statement ignores that the MLA does not permit BLM to require compensatory mitigation of federal oil and gas lessees. Second, this statement fails to acknowledge that BLM cannot condition the exercise of valid existing rights on compensatory mitigation, unless the instrument expressly allows BLM to do so.

> MLA Does Not Allow BLM to Require Compensatory Mitigation from Federal Oil and Gas Lessees.

MLA does not allow BLM to require compensatory mitigation from federal oil and gas lessees. The MLA only allows BLM to regulate the surface activities of an oil and gas lease and to perform reclamation of on-lease impacts. *See* 30 U.S.C. § 226(g). Particularly, the relevant provision of the MLA states:

[27] To the extent that an individual land user may seek review of a term or condition attached to an individual permit or other land use authorization, this ad hoc decision-making does not allow either the land user or the public to programmatically assess BLM's response to nonachievement of land health standards. Moreover, an ad hoc approach improperly burdens land users because, if a land user disagrees with a term or condition attached to a permit or authorization, the land user must either file an administrative appeal with the IBLA—which currently has a backlog of four to five years—or expend tens of thousands of dollars to seek review in federal court.

[28] One avenue to ensure public participation is for BLM to incorporate adaptive management into its RMPs. For example, an RMP could identify responses BLM could take, including specific terms and conditions that BLM incorporate in land use authorizations, if land health standards are not achieved.

> The Secretary of the Interior, or for National Forest lands, the Secretary of Agriculture, shall regulate **all surface-disturbing activities conducted pursuant to any lease** issued under this Act, and shall determine **reclamation** and other actions as required in the interest of conservation of surface resources.

Id. The MLA's plain language does not allow BLM to offset on-lease impacts by requiring a federal oil and gas lessee to perform mitigation actions on off-lease lands.

BLM Cannot Require Compensatory Mitigation from Existing Oil and Gas Lessees.

To the extent BLM maintains that FLPMA provides it with authority to require compensatory mitigation,[29] this authority is subject to valid existing rights, 43 U.S.C. § 1701 note (h), which include oil and gas leases, *Colo. Envtl. Coal.*, 165 IBLA 221, 228 (2005). A compensatory mitigation requirement, however, is inconsistent with the terms of federal oil and gas leases, which do not contain any express requirement to provide compensatory mitigation. *See, e.g.*, BLM Form 3100-011, Offer to Lease and Lease for Oil and Gas (Mar. 2023). Rather, section 6 of the federal oil and gas lease form only contemplates that lessees minimize, rather than mitigate, the impacts of their actions:

> Lessee must conduct operations in a manner that **minimizes** adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users. Lessee must take reasonable measures deemed necessary by lessor to accomplish the intent of this section. **To the extent consistent with lease rights granted**, such measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures.

Id. at 3(emphasis added). For this reason, for nearly two decades, BLM has consistently taken the position that it will not require compensatory mitigation from lessees. *See* BLM Instruction Memorandum No. 2008-204, Offsite Mitigation (Oct. 3, 2008); BLM Instruction Memorandum No. 2005-069, Interim Offsite Compensatory Mitigation for Oil, Gas, Geothermal, and Energy Rights-of-Way Authorizations (Feb. 20, 2005); Wyoming BLM Instruction Memorandum No. WY-96–21, Statement of Policy Regarding Compensation Mitigation (Dec. 14, 1995). Because federal oil and gas leases only allow BLM to impose measures to minimize, rather than mitigate, adverse impacts associated with oil and gas development, BLM cannot apply proposed section 6102.5-1(b) to require compensatory mitigation from proposed oil and gas lessees.

Moreover, compensatory mitigation is inconsistent with the fundamental rights granted by a federal oil and gas lease. By issuing an oil and gas lease, BLM granted the lessee the right to explore and develop the oil and gas lease. *See* BLM Form 3100-11, Offer to Lease and Lease for Oil and Gas at 1 (granting "the exclusive right to drill for, mine, extract, remove and dispose of all of the oil and gas . . . ."). This right includes reasonable use of the surface for exploration and development. Absent a stipulation

[29] Notably, the Proposed Rule cites no authority for the direction in proposed section 6102.5-1(b).

prohibiting surface occupancy, BLM cannot deny the lessee the right to use the surface of the lease.[30] *See id.*; *Conner v. Burford*, 848 F.2d 1441, 1450 (9th Cir. 1988) ("it would be clearly inconsistent with the purpose of the leases if the government prevented all drilling, roadbuilding, pipe-laying, and other lease-rated surface-disturbing activities"); *see also Sierra Club v. Peterson*, 717 F.2d 1409, 1412–15 (D.C. Cir. 1983).

BLM cannot impose new, unreasonable mitigation requirements on existing leases. Courts have recognized that once BLM has issued an oil and gas lease conveying the right to access and develop the leasehold, BLM cannot later impose unreasonable measures that take away those rights. *See Conner v. Burford*, 84 F.2d at 1449-50; 43 C.F.R. § 3101.1-2 (BLM can impose only "reasonable measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted"). Moreover, 43 C.F.R. § 3101.1-2 only allows BLM to impose reasonable **minimization** measures, not compensatory mitigation measures. BLM cannot expand the plain language of 43 C.F.R. § 3101.1-2. *See* 53 Fed. Reg. 17340, 17341 (May 16, 1988) (explaining that BLM adopted 43 C.F.R. § 3101.1-2 to "[t]o resolve the uncertainty which has existed concerning [BLM's] authority within the terms and conditions of the standard lease form to control site-specific environmental impacts").

Any attempt by BLM to condition development of an existing lease on the lessee's provision of compensatory mitigation would materially alter the fundamental contract between the lessee and the United States. Compensatory mitigation requirements effectively serve as a potential ban on development. BLM cannot unilaterally modify the terms of federal oil and natural gas leases to demand compensatory mitigation in exchange for approving any development on a lease.

Definitions

The Proposed Rule revises existing definitions and adds several new definitions to establish conservation as a priority. Some of the revised definitions are being used differently in other rules and BLM needs to ensure that terms are consistently aligned throughout its rules to avoid confusion or worse, unworkable inconsistency.

The following are comments on the new and revised definitions provided in the Proposed Rule.

Best management practices. BLM should revise the definition of "best management practices" to expressly recognize that a given best management practice must be economically feasible. BLM policy has long recognized that best management practices must be economically feasible. *See, e.g.*, BLM Instruction Memorandum No. 2004-194, Integration of Best Management Practices into Application for Permit to Drill Approvals and Associated Rights-of-Way (June 22, 2004) (defining best management

[30] BLM often cites the IBLA's decision in *Yates Petroleum Corp.*, 176 IBLA 144 (2008), for the proposition that the agency can modify existing leases by imposing conditions of approval on APDs. The *Yates* decision does not stand for the proposition that BLM can impose conditions of approval whenever it deems necessary. Rather, in *Yates*, the IBLA only affirmed the imposition of an additional condition of approval based on site-specific information including recent and directly applicable scientific research. *Yates*, 176 IBLA at 157; *see William P. Maycock*, 177 IBLA 1, 16-17 (2009). The *Yates* decision does not authorize BLM to ignore relevant lease terms or BLM's regulation at 43 C.F.R. § 3101.1-2.

practices as "innovative, dynamic, and economically feasible mitigation measures"); BLM, *Best Management Practices for Reducing Visual Impacts of Renewable Energy Facilities on BLM-Administered Lands* 308 (1st ed. 2013) (defining best management practice" as "a practice or combination of practices that are determined to provide the most effective, environmentally sound, and economically feasible means of managing an activity and mitigating its impacts"). Accordingly, this change is necessary to align the definition of "best management practices" with prior BLM policies.

Casual use. BLM should adopt the definition of "casual use" set forth in Onshore Order No. 1 for Oil and Gas Operations on Federal and Indian Oil and Gas Leases. Onshore Order No. 1 defines "casual use" as "activities involving practices that do not ordinarily lead to any appreciable disturbance or damage to lands, resources, or improvements." 72 Fed. Reg. 10308, 10329 (Mar. 7, 2007). This definition also appears at 43 C.F.R. § 3150.0-5. *See also* 43 C.F.R. §§ 2801.5, 2881.5, 3809.5 (defining "casual use" as "activities ordinarily resulting in no or negligible disturbance" of the public lands), 3200.1 (defining "casual use" as "activities that ordinarily lead to no significant disturbance of Federal lands, resources, or improvements"), 3482.1 (defining "casual use" as "activities which do not cause appreciable surface disturbance or damage to lands or other resources and improvements").

This definition of "casual use" is preferred over the definition in the Proposed Rule. The Proposed Rule would limit casual uses to "noncommercial" activities. *See* Proposed Rule § 6101.4. BLM, however, frequently allows commercial activities as part of casual uses, such as staking activities for oil and gas development. 72 Fed. Reg. 10330. BLM should revise the definition of "casual use" in the Proposed Rule to be consistent with other definitions of this same term.

Finally, BLM should replace the term "disturbance" in the definition of "casual use" with "surface disturbance." Under BLM's existing definitions of "casual use" use the term "disturbance" means "surface disturbance." *E.g.*, 43 C.F.R. § 3809.5 (defining "exploration" as "creating surface disturbance greater than casual use . . . ."). The Proposed Rule, however, proposes to define "disturbance" as something other than surface disturbance; "disturbance" would describe events such as drought and wildlife. 88 Fed. Reg. at 19588. To avoid confusion, BLM should replace the term "disturbance" in the definition of "casual use" with "surface disturbance."

Conservation. The Proposed Rule repeatedly uses the term "conserve," which is undefined. Specifically, the Proposed Rule directs:

- "[T]he BLM's management must **conserve** the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values . . . ." Proposed Rule § 6101.5(a) (emphasis added).

- "The BLM must **conserve** renewable natural resources at a level that maintains or improves future resource availability and ecosystem resilience." Proposed Rule § 6101.5(b) (emphasis added).

- "Authorized officers will seek to prioritize actions that **conserve** and protect intact landscapes in accordance with § 6101.2." Proposed Rule §6102.1(b) (emphasis added).

BLM should clarify whether "conserve," as used in the Proposed Rule, has the same meaning as "conservation." *E.g.*, 16 U.S.C. § 1532(c)(3) (expressly defining "conserve," "conserving," and "conservation" to mean the same thing). Otherwise, use of "conserve" creates ambiguity as to its meaning.

Disturbance. BLM should use a different term than "disturbance" to avoid ambiguity. Typically, BLM uses the terms "disturb" or "disturbance" to describe surface-disturbing activities. Use of "disturbance" to describe activities or events other than surface-disturbing activities will cause confusion.

The Proposed Rule itself demonstrates the potential for such confusion. Section 6102.2(d) directs BLM to:

> collect and track **disturbance** data that indicate the cumulative **disturbance** and direct loss of ecosystems at a watershed scale resulting from BLM-authorized activities. This information must be included in a national tracking system. The BLM must use the national tracking system to strategically minimize **surface disturbance**, including identifying areas appropriate for conservation and other uses in the context of threats identified in watershed condition assessments, to analyze landscape intactness and fragmentation of ecosystems, and to inform conservation actions.

(Emphasis added.) The Proposed Rule is unclear whether BLM must track data only related to surface disturbances or data related to all "disturbances." To avoid ambiguity, BLM should clarify or select a term other than "disturbance."

High quality information. This term is unnecessary and redundant. Fundamentally, it states that "BLM must meet standards for objectivity, utility, integrity, and quality set forth in applicable federal law and policy." *See* Proposed § 6101.3. In other words, the definition of "high quality information" is information that BLM is already bound to utilize. BLM's attempt to restate and/or redefine its existing obligations risks confusion and ambiguity in applying the Proposed Rule.

Important, Scarce, or Sensitive resources. BLM must revise the definition of "Important, Scarce, or Sensitive resources" to clarify that BLM must identify these resources in either policy documents or RMPs, rather than on an ad hoc basis. Otherwise, the vague and subjective nature of this term will lead to inconsistent decision-making by BLM staff, particularly across different regions and time periods. Moreover, the vague and subjective nature of this term fails to apprise the public and, particularly, public lands users which resources BLM considers "Important, Scarce, or Sensitive."

Indigenous Knowledge (IK). BLM has not explained how Indigenous Knowledge can be reconciled with the Proposed Rule's definition of "high quality information," which must be objective and "consensually obtained." The definition of "Indigenous Knowledge" does not allow BLM or the public to verify the information obtained. BLM must reconcile the definition of Indigenous Knowledge with its definition of high-quality information.

Intact landscape. This definition contains highly subjective terms, using language such as "unfragmented ecosystem," "significantly disrupt, impair, or degrade," "high conservation value," and "provid[ing] critical ecosystem functions." BLM must incorporate objective standards into this definition; for example, BLM must define minimum or maximum sizes of areas constituting "unfragmented ecosystem[s]." Otherwise, what constitutes an "intact landscape," or what constitutes value, degradation and the like lies in the eye of the beholder, which could lead to arbitrary implementation in the absence of clearer definition and standards.

Landscape. Like the definition of "intact landscape," this term contains highly subjective terms. For example, the phrase "interacting elements that are relevant and meaningful in a management context" offers BLM or the public no guidance as to what constitutes a landscape. BLM has expanded this definition from previous iterations by specifying it includes watersheds and ecoregions. Under this definition, BLM could theoretically (but without adequate justification) find most of the western United States to be a "landscape." BLM must adopt a concrete, objective definition of "landscape."

Protection. The proposed definition of "protection" is inconsistent with FLPMA, for the reasons explained elsewhere in these comments.

Reclamation. BLM should use a different term than "reclamation" to describe the activities listed in the definition of "reclamation." BLM has given the term "reclamation" specific definitions with respect to oil and gas and mining activities. Onshore Order No. 1 defines "reclamation" as "returning disturbed land as near to its pre-disturbed condition as is reasonably practical." 72 Fed. Reg. 10330. BLM's existing RMPs directly or indirectly incorporate this existing definition of "reclamation." *See, e.g.*, Buffalo Field Office Approved Resource Management Plan, app. M, Reclamation Policy for the Buffalo Field Office (2015). Similarly, BLM's recent mitigation manual and handbook use "reclamation" to mean surface reclamation, as described in Onshore Order No. 1. *See* BLM MS-1794 – Mitigation Manual, at 3-1 (Rel. 1-1807 Sept. 22, 2021); BLM H-1794-1 – Mitigation Handbook, at 2-3, 2-12, 3-1, 3-3, 3-4, 3-8 (Rel 1-1808 Sept. 22, 2021).

BLM's mining regulations define "reclamation" as "taking measures required by [43 C.F.R. pt. 3800, subpart 3809] following disturbance of public lands caused by operations to meet applicable performance standards and achieve conditions required by BLM at the conclusion of operations." 43 C.F.R. § 3809.5. Further, 43 C.F.R. § 3809.5 identifies certain "components" of reclamation. *See id.*

The Proposed Rule's use of the term "reclamation," with a new and different definition, will create ambiguity. Specifically, a new definition of "reclamation" will create uncertainty when BLM is interpreting reclamation requirements under existing RMPs; a new definition of "reclamation" in BLM's planning regulations may cause BLM to inappropriately reinterpret reclamation requirements in existing RMPs. BLM should utilize a term other than "reclamation" for clarity.

Resilient ecosystems. This is a new term that means ecosystems that have the capacity to maintain and regain functions in the face of "environmental stressors" like drought, wildfires, or other disturbances. Similar to previous definitions, this is not well defined and is highly subjective. BLM must define how

resilient ecosystems are determined, the necessary criteria, and how BLM will include stakeholder review and feedback.

Sustained yield. The Proposed Rule improperly defines "sustained yield" when Congress expressly defined this term in FLPMA. *See* 43 U.S.C. § 1702(h). Although BLM, in the preamble to the Proposed Rule, purports to "use the FLPMA definition of 'sustained yield,'" 88 Fed. Reg. at 19589-90, a close review of the definition in the Proposed Rule reveals BLM did no such thing. FLPMA defines "sustained yield" as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." 43 U.S.C. § 1702(h). By contrast, the Proposed Rule eliminates the qualifier "consistent with multiple use" and instead appends additional language to the statutory definition (reflected in bold):

> Sustained yield means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources **of BLM-managed lands without permanent impairment of the productivity of the land. Preventing permanent impairment means that renewable resources are not depleted, and that desired future conditions are met for future generations. Ecosystem resilience is essential to BLM's ability to manage for sustained yield.**

88 Fed. Reg. at 19599. BLM cannot redefine this statutory term. The Supreme Court has made clear that when "Congress has directly spoken to the precise question at issue," an agency "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). For this reason, courts will not defer to agencies' attempt to redefine a term for which Congress has provided a "precise definition." *Am. Civil Liberties Union v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987); *see also, e.g.*, *Time Warner Ent. Co. v. FCC*, 56 F.3d 151, 190 (D.C. Cir. 1995).

Here, BLM's effort to redefine "sustained yield" is material—and incorrect—because BLM eliminates the statutory directive that sustained yield occur "consistent with multiple use." BLM must remove the proposed definition of "sustained yield" from any final rule.

Unnecessary or undue degradation. BLM must revise the definition of "unnecessary or undue degradation" for clarity and to align with existing and commonly accepted interpretations of this term. The proposed definition of "unnecessary or undue degradation" differs from the only formal definition of this term, which is found in BLM's mining regulations at 43 C.F.R. § 3809.5:

> Unnecessary or undue degradation means conditions, activities, or practices that:
>
> (1) Fail to comply with one or more of the following: the performance standards in § 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and state laws related to environmental protection and protection of cultural resources;
>
> (2) Are not "reasonably incident" to prospecting, mining, or processing operations as defined in § 3715.0–5 of this chapter; or

> (3) Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas.

Additionally, the Proposed Rule's definition of "unnecessary or undue degradation" differs from the interpretations of this term set forth by the Interior Board of Land Appeals (IBLA). The IBLA has described "unnecessary or undue degradation" as "the occurrence of something more than the usual effects anticipated from appropriately mitigated development." *Wildlands Defense*, 192 IBLA 383, 405 (2018) (internal quotations omitted); *see also Intrepid Potash*, 176 IBLA at 123 ("something more than the usual effects anticipated from such development, subject to appropriate mitigation, must occur for degradation to be 'unnecessary or undue'"). In those situations, BLM's decisions will not constitute "unnecessary or undue degradation" if they "have a rational basis in the record." *Wildlands Defense*, 192 IBLA at 405; *see also Biodiversity Conservation Alliance*, 174 IBLA 1, 6–7 (2008).

Similarly, the Proposed Rule's definition of "unnecessary or undue degradation" differs from the interpretation of this term established by judicial precedent. The U.S. Court of Appeals for the D.C. Circuit has recognized that when BLM balances "degrading uses" of the public lands with "conservation of the natural environment" "and follows principles of sustained yield, then generally it will have taken the steps necessary to prevent unnecessary or undue degradation." *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 76. Importantly, as noted above, sustained yield necessarily includes multiple use.

Finally, the definition of "unnecessary or undue degradation" differs from BLM's own interpretation of this term. BLM has previously recognized:

> "Unnecessary and undue degradation" implies that there is also necessary and due degradation. For example, if there is only one route of access possible for development of an existing oil and gas lease, and that route presents the likelihood of some degradation of public lands or resources, such degradation may be considered necessary for the management of the oil and gas resource. . . . As another example, the RMP/EIS or site-specific environmental document may identify mitigation which would result in excessive expenditures of money or unusual technological requirements to achieve compliance. Otherwise there would be some degree of degradation of public lands or resources. If the mitigation would render the proposed operation uneconomic or technologically infeasible so that a prudent operator would not proceed, such degradation may also be considered necessary for the management of the oil and gas resource.

Instruction Memorandum No. 92-67 (Dec. 3, 1991).

The definition of "unnecessary or undue degradation" in the Proposed Rule reflects none of these interpretations. BLM has neither recognized that it is adopting a different definition than those previously established nor offered any reason for not adopting them. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 516 (2009) (holding that, for an agency to depart from a prior policy, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior

policy"). Furthermore, BLM cannot redefine unnecessary or undue degradation to contradict the interpretation of FLPMA set forth by the IBLA, acting with the authority of the Secretary of the Interior. *See generally* 43 C.F.R. § 4.1; *Milton D. Feinberg*, 40 IBLA 222, 228 (1979) (holding that when the IBLA "interpret[s] regulations, statutes and Departmental policies as requiring or prohibiting certain actions, such interpretation establishes Departmental policy which is fully binding upon the Bureau until such time as it is altered by competent authority"). BLM must revise the definition in the Proposed Rule to reflect existing interpretations of "unnecessary or undue degradation."[31] Furthermore, BLM must recognize in any final rule that the "mere act of approving oil and gas development does not constitute unnecessary or undue degradation under FLPMA." *Intrepid Potash – New Mexico, LLC*, 176 IBLA 110, 123 (2008).

Proposed Section 6101.2 Establishes Objectives, Not Enforceable Requirements

Proposed section 6101.2 sets forth certain objectives for public lands management. These objectives, both at the regulatory level and when incorporated in RMPs, do not establish enforceable requirements. The Supreme Court has recognized that "a land use plan is generally a statement of priorities" that "guides and constrains actions, but does not (at least in the usual case) prescribe them." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 71 (2004). Further, "[a] statement by BLM about what it plans to do, at some point, provided it has the funds and there are not more pressing priorities, cannot be plucked out of context and made a basis for" a lawsuit. *Id.* (citing 5 U.S.C. § 706(1)). Thus, the objectives in proposed section 6101.2 do not create binding obligations on BLM. Moreover, these objectives cannot undermine valid existing rights.

BLM Needs to Address Inadequacy of Existing Programs

The Proposed Rule lacks any discussion on how the BLM's own programs are inadequate or fails to mention the issues that the Proposed Rule would address. It also fails to discuss how overlapping federal and state agencies' rules, authorities, missions and requirements are inadequate or are failing. As such, the Trades request BLM detail how the Proposed Rule avoids duplication and overlap with its own regulatory programs or the regulatory programs by other federal and state agencies.

BLM Needs to Address Staffing and Costs Associated with the Proposed Rule

The Trades have significant concerns that the new requirements in the Proposed Rule e.g., conducting land health reviews, developing restoration plans, implementing new conservation leases, implementing a new ACEC process, and establishing additional oversight and enforcement will further impede BLM's processing timeframes for Applications for Permits to Drill ("APDs"). BLM provides minimal discussion on how it plans to manage this new workload to avoid oil and natural gas permitting delays. We request BLM disclose how it plans to manage the new workload provided under the Proposed Rule in a consistent and timely manner without delaying oil and natural gas development.

[31] At a minimum, BLM must recognize in a preamble to the Final Rule that the definition of "unnecessary or undue degradation" captures, and does not alter, prior administrative and judicial interpretations of this term.

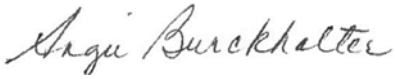
The Proposed Rule Fails to Ensure Regulatory Certainty

BLM's Proposed Rule contains significant subjective judgments, requirements, and determinations, and provides no details of how it will be implemented consistently across BLM state and field offices. For example, the definitions of intact landscape, landscape enhancement, landscape, and resilient ecosystems lack specificity upon which regulated entities can rely with any certainty and be assured that different BLM offices will implement those definitions consistently. The Proposed Rule also lacks specificity of the processes or procedures and is too subjective for stakeholders to provide meaningful comments.

The Trades appreciate the opportunity to provide comments. We urge BLM to withdraw the Proposed Rule as it is unnecessary, illegal, and lacks details, data and analysis required by the Administrative Procedures Act. Please do not hesitate to reach out with any questions.

Sincerely,

Kathleen M. Sgamma
President
Western Energy Alliance



Angie Burckhalter
Sr. V.P. of Regulatory and Environmental Affairs
The Petroleum Alliance of Oklahoma

Ben Shepperd
President
Permian Basin Petroleum Association

William Groffy
Director of Regulatory & Legislative Affairs
Colorado Oil and Gas Association

Chelsie Miera
Executive Director
West Slope Colorado Oil & Gas Association

Attachment A
Public Lands under Conservation Management in the United States

Nearly 40% of the United States consists of lands managed by federal, state, or local government in various designations.[1] Americans enjoy 112 million acres of wilderness areas,[2] 85 million acres of national parks,[3] 58.5 million acres of roadless areas in National Forests,[4] 95 million acres of wildlife refuges,[5] 39 million acres in BLM's National Landscape Conservation System, and 21.3 million acres of Areas of Critical Environmental Concern.[6]

A general summary of conserved lands via special designations is shown in the table below. This administration has as a goal to place 30% of the US land mass under a conservation management designation. Currently about 12% of the US is under these conservation designations. Reaching the 30% target goal outlined by the Biden administration will require another 420 million acres in the United States to be conserved.

Conservation Land Designations		
Agency/Designation	**Size (acres)**	**Scale Perspective**
Total Federal Land Ownership	**610,000,000**	**28% US land mass**
Department of Interior		
BLM	244,000,000	10% of US land mass
ACEC (Areas of Critical Environmental Concern)	21,300,000	8.6% of BLM surface
National Conservation Lands	35,000,000	14.3% of BLM surface
United States Fish and Wildlife Service Refuges	95,000,000	3.9% of US land mass
National Park Service	85,000,000	3.5% of US land mass
Department of Agriculture		
National Forest Service	193,000,000	7.8% of US land mass
Inventoried roadless areas	58,500,000	30% of NFS surface
State Lands		
State Parks	14,000,000	
Conservation Totals	308,000,000	12.6% of US land mass

[1] USGS Gap Analysis Project, U.S. Geological Survey (USGS), July 5, 2022.
[2] Aldo Leopold Wilderness Research Institute home page, U.S. Forest Service Rocky Mountain Research Station, accessed June 8, 2023.
[3] National Park System About Us page, U.S. National Park Service, accessed June 8, 2023.
[4] Welcome to Roadless Area Conservation, USDA Forest Service, accessed June 8, 2023.
[5] National Wildlife Refuge System, U.S. Fish & Wildlife Service, accessed June 8, 2023.
[6] *Public Land Statistics 2021*, U.S. Department of the Interior/Bureau of Land Management, June 2022, Table 5-15.

Geographical Distribution of Federal/Tribal Lands

Federal lands are overwhelmingly located in the Western United States. Very limited federal lands exist in northeastern coastal states. Federally conserved lands consequently occur primarily in western states, including Alaska, and Hawaii. The map below illustrates federal land designations, as well as indigenous tribal lands in the United States. BLM surface lands are shown in yellow, US forests service lands in dark green, National Parks in light green, Fish and Wildlife Service lands in brown, Department of Defense lands in blue, and Indigenous Tribal lands in red.