

Bureau of Land Management
U.S. Department of the Interior
1849 C St. NW, Room 5646
Washington, DC 20240
Attention: 1004-AE92

RE: Docket No. DOI-2023-0001: Proposed Rule Related to Conservation and Landscape Health

Submitted via online portal (<https://www.regulations.gov/commenton/BLM-2023-0001-0001>)

To Whom It May Concern:

The Public Lands Council (PLC), American Farm Bureau Federation (AFBF), American Sheep Industry Association (ASI), and the National Cattlemen’s Beef Association (NCBA) and our undersigned affiliates (herein, the “coalition”) write to provide comments regarding the Bureau of Land Management’s (BLM) proposed rule related to Conservation and Landscape Health (herein, “proposed rule”).

PLC is the sole national organization dedicated to representing the unique rights and interests of cattle and sheep producers whose operations include production on and stewardship of vast private, state, and federal lands. Directly, PLC represents producers who hold 22,000 federal grazing permits throughout the West, and together with our 12 state affiliates and 3 national affiliates we represent cattle and sheep producers in every state who value and practice sound land management.

AFBF is the nation’s largest general farm organization, with almost six million farm and ranch member families in all 50 states and Puerto Rico, working together to build a sustainable future of safe and abundant food, fiber, and renewable fuel for our nation and the world.

ASI is the national organization representing the interests of more than 100,000 sheep producers located throughout the United States since 1865.

NCBA is the oldest and largest national trade association representing the interest of U.S. cattle producers, with nearly 26,000 direct members and over 178,000 members represented through its 44 state affiliate associations.

Collectively, the undersigned associations represent the grazing industry and the rural communities that would be affected by the BLM’s substantive change in federal lands management. All-told, grazing activities on BLM land generate \$1.439 billion on an annual basis and support more than 2 million jobs across the West. ¹ Direct economic benefits of livestock sales attributable to public lands forage alone exceeds \$1 billion annually.²

¹ Bureau of Land Management, *Socioeconomic Impact Report 2022*, <https://www.blm.gov/about/data/socioeconomic-impact-report-2022>

² Sloggy, M. & Anderes, S. & Sánchez, J. (2023). Economic Effects of Federal Grazing Programs. *Rangeland Ecology & Management*. 88. 1-11. 10.1016/j.rama.2023.01.008.

Grazing also provides indirect economic benefits by helping conserve regional ecosystems. Wildlife habitat, open space and recreation opportunities are just a few of the many benefits retained when land is used for grazing. Though many of these services are difficult to put a monetary value on because they are not sold or traded, estimates have been generated for forage production, general services (intended to capture conservation and climate-related benefits) and wildlife values (focused on wildlife preservation and recreation). Nationally, researchers have estimated that federal rangelands contribute a minimum of \$3.7 billion annually in ecosystem services which translates to \$20.15 per public acre grazed.³ For comparison, after adjusting for the approximately \$26 million⁴ ranchers pay in grazing fees each year, taxpayers support appropriations for rangeland management programs at about 30 cents per acre. Excluding all other benefits of public lands grazing, taxpayers have a net return of \$19.85 per 30 cents spent to support federal lands grazing.

These strict contributions pale in comparison to the second- and tertiary-contributions of ranching enterprises in rural economies that depend on the separate but related contributions of the individuals who are engaged in ranching communities. Ranchers are county commissioners, teachers, bankers, truck drivers, energy workers, hunters, sportsmen, and more – contributing in direct ways to the BLM’s \$201 billion portfolio generated each year and the larger state economies.

Despite these significant contributions and longstanding relationships between the BLM and individual grazing permittees (and the coalition at large), the BLM gave no indication that the agency was contemplating or developing the proposed rule prior to the text being made public on March 31, 2023; despite notification that the agency was working on a “public lands rule” in the spring federal regulatory agenda, the timeline was consistent with other public lands rules and the agency repeatedly declined to provide additional information about any rulemaking. The coalition remains concerned about the BLM’s failure to solicit feedback or engage in meaningful or substantive discussion ahead of publication, and in the days following the proposed rule. Despite calls for meaningful consultation and engagement, the BLM chose to hold five public briefings, during which there was little public or stakeholder engagement and a significant number of stakeholder questions were met by the agency with calls for stakeholders to “tell the BLM how to answer this question in comments because [they] don’t know.”

Accordingly, the coalition wrote to BLM Director Stone-Manning on June 6, 2023 expressing concerns about how the deficient process, the agency’s lack of forthright engagement with – and in some cases, outright hostility toward – the stakeholders, and the contents of the rule have compromised the relationship between the BLM and stakeholders and has been an historic step backwards in the trust between the agency and the regulated community that has been a professed priority from current leadership.

The coalition remains concerned that a proposed rule is not the appropriate vehicle for the concepts BLM purports to address. Due to the many unanswered questions about the contents and function

³ Maher, A., Ashwell, N., Maczko, K., Taylor, D., Tanaka, J., & Reeves, M. (2021). An economic valuation of federal and private grazing land ecosystem services supported by beef cattle ranching in the United States. *Translational Animal Science*. 5(3),txab054, <https://doi.org/10.1093/tas/txab054>.

⁴ Vincent, Carol H. Grazing Fees: Overview and Issues, Congressional Research Service. RS21232, Updated Mar. 4, 2019.

of the proposal and the lack of meaningful stakeholder engagement, the coalition recommends the agency withdraw the proposed rule in favor of a truly meaningful discussion with stakeholders about how to improve the BLM's stewardship of western landscapes and how the agency can and should be a better partner to those actively managing the landscape. This is what should have been the agency's first step through an Advanced Notice of Proposed Rulemaking (ANPR), a Notice of Intent (NOI) attached to a National Environmental Policy Act (NEPA) evaluation, or even a Request for Information (ROI). The proposed rule creates unnecessary divisions between stakeholders by picking winners and losers on federal land, creates poor legal precedent and exposes the agency to additional risk of litigation, and will ultimately undermine the agency's ability to plan, implement, and sustain meaningful landscape scale management improvements.

If the BLM declines to withdraw the proposed rule and elects to proceed with the proposed rule, the coalition remains incredibly concerned about the implications for rural communities, the grazing industry, and general BLM program function. The coalition offers the following feedback to that end.

Congress, Not BLM, Has Primary Authority to Create New Uses of the Public Lands

The coalition objects to the BLM's attempt to create a novel use of the Federal Lands Policy and Management Act (FLPMA) without consideration of the clear direction Congress has already provided through FLPMA and a host of other federal laws that instruct the agency's multiple use and sustained yield mandate. The coalition holds that Congress, not the agency, has the primary authority to create uses on public lands, and that Congress was quite intentional in outlining those uses.

Although FLPMA⁵ provides broad discretion to the BLM to manage the public lands according to "multiple use" and "sustained yield" principles and to protect resource values thereon, that discretion is not unlimited. In light of recent Supreme Court case law directing courts to look closely at agency rules on issues with major political and economic consequences, BLM must carefully consider whether the vast changes proposed by this rule are within the scope of the agency's delegated authority. *E.g.*, *West Virginia v. EPA*,⁶ (noting agencies must be able to point to "clear congressional authorization," especially when regulating in areas of ambiguity); *Sackett v. EPA*.⁷

Congress's power to manage the public lands derives from Article IV, Section 3 of the United States Constitution, which states, in part, "Congress shall have the power to dispose of and *make all needful rules and regulations* respecting the territory or other property belonging to the United States; . . ." (emphasis added). Congress has delegated some, but not all, of this authority to the Department of the Interior, and the BLM, to manage the public lands via statutory authorities that

⁵ 43 U.S.C. § 1701-1785

⁶ 142 S. Ct. 2587, 2609 (2022).

⁷ 143 S. Ct. 1322 (2023).

include FLPMA and other use-specific statutes that pre- or post-date FLPMA.⁸ Congress explicitly envisioned that subsequent legislation would be required in many cases to implement FLPMA's broad policies.⁹

FLPMA and other use-specific laws outline Congress's choices for how to meet the Nation's need for minerals, food, timber and fiber, to conserve and protect our natural resources, and to balance these sometimes competing values. When Congress enacted FLPMA in 1976, it recognized this balancing act, declaring it the policy of the United States that:

the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;¹⁰

At the same time, Congress required 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."¹¹

FLPMA provides the Secretary of the Interior with a number of tools and direction for resolving these sometimes competing multiple-use values. Two primary tools are the general planning authority contained in Section 202 (43 U.S.C. § 1712) and the general leasing and permitting authority contained in Section 302 (43 U.S.C. § 1732(b)). However, Congress placed important sideboards or limitations on these delegations of authority. In particular, the plain language of Section 103(l) of the statute is directly at odds with the idea of elevating conservation as a "use," as it defines and limits what principal or major uses are covered by FLPMA:

"The term 'principal or major uses' *includes and is limited to*, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production."¹²

⁸ A comparable approach was also taken with the Department of Agriculture, and its land management agency, the U.S. Forest Service, via the Organic Act of 1897 (16 U.S.C. § 473 et seq.), the National Forest Management Act of 1976 (NFMA) (16 U.S.C. § 1600, et seq.), and the Multiple-Use Sustained-Yield Act of 1960 (MUSYA) (16 U.S.C. § 528 et seq.). Examples of use-specific statutes specifying management of the public lands and National Forest System include, but are not limited to, the Taylor Grazing Act (43 U.S.C. § 315, et seq.), the Mining Law of 1872 (30 U.S.C. § 21, et seq.), and the Surface Use Act (30 U.S.C. § 612(b)).

⁹ 43 U.S.C. § 1701(b) ("The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation.")

¹⁰ 43 U.S.C. 1701(a)(8).

¹¹ 43 U.S.C. 1701(a)(12).

¹² 43 U.S.C. 1702(l) (emphasis added).

Conservation, as typically defined, includes preservation and protection.¹³ Congress did not provide authority for elevating conservation activities to be recognized as a type of principal or major use, which are explicitly limited to those contained Section 103(l) of FLPMA.

It is also telling where Congress retained authority, particularly for decisions that would meaningfully alter public land designations. For example, Congress reserved the right to approve additions to the National Wilderness System, National Historic/Scenic Trails System, and National Wild and Scenic Rivers System, and to congressionally designate public land areas as National Recreation Areas and National Conservation Areas. Congress also established a reporting and veto mechanism for any management decisions that would effectively change a major land designation by excluding one or more principal or major uses from large tracts of land for two or more years, requiring the Secretary to inform the House and Senate of any such action under Section 202.¹⁴

To be clear, explicit authority for designating conservation as a “use” does not exist within FLPMA and it is likely that courts will review the proposal with “skepticism” under the Supreme Court’s non-deferential major questions doctrine. The proposed rule acknowledges this lack of explicit authority, as it notes that BLM seeks to “clarify” that conservation is technically a “use” on par with other statutorily recognized principal uses.¹⁵ A change of this magnitude would do more than clarify BLM’s existing authority or fill in gaps; rather, it conflicts directly with existing statutory language and context in FLPMA and other use-specific statutes.

BLM Erred in the Determination that Analysis Under the National Environmental Policy Act Was Not Warranted

The National Environmental Policy Act (NEPA) provides the process by which agencies assess the likely impacts of implementation of federal policy. Recent congressional action amended NEPA to state that a “major federal action” is “an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility.”¹⁶ BLM owns or manages the relevant land, and would control all aspects of implementation of the contents of the proposed rule, and therefore has “substantial Federal control and responsibility.” This clearly meets the threshold that requires full NEPA review.

Given the BLM’s insistence that this proposed rule would modernize the agency and provide landscape-scale benefits, it logically follows that any program that affects the entirety of the BLM’s 245 million surface acres and 700 million subsurface acres would have widespread impacts on the human environment, economy, and ecosystems contained therein.

¹³ “Conservation.” *Merriam-Webster Dictionary* (accessed June 7, 2023) (“a careful preservation and protection of something; especially: planned management of a natural resource to prevent exploitation, pollution, destruction, or neglect”). Preservation and protection are not commonly understood to be “uses”—but rather would tend to indicate absence or reduction of incompatible uses to prevent damage to valuable resources. “Preservation.” *Merriam-Webster Dictionary* (accessed June 7, 2023) (“the activity or process of keeping something valued alive, intact, or free from damage or decay”)

¹⁴ 43 U.S.C. 1712.

¹⁵ 88 Fed. Reg. at 19,584 (emphasis added).

¹⁶ P.L. 188-5

BLM's reliance on the Department Categorical Exclusion (CX) at 43 CFR 46.210(i) is entirely insufficient. The first portion of the CX which lends itself to "*Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature;*" is clearly exceeded by the scope of the proposed rule. The proposed rule seeks to add a new use to FLPMA, establishes a new leasing system, provides for the practical exclusion of uses through programmatic implementation of the agencies directives, and undermines the agency's ability to deliver on their multiple use mission.

The second part of the CX, which provides for exceptions for actions "... *whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case*" is also far exceeded by the rule. While the effects of the rule are certainly broad and speculative, language of the rule clearly lends itself to exclusion of uses, substantive changes in land management designations and public access, each of which have a long history of economic analyses that could, and should, be modeled here. Additionally, the CX provision that actions will later be subject to a NEPA analysis may not apply here; the agency has so far been mute on their intent to provide for NEPA analyses of individual leases or clusters of leases. More concerningly, the agency has been quite clear that conservation leases would not necessarily be implemented or coordinated through a land use plan¹⁷, so the extent to which these new, significant actions would undergo NEPA remains unclear.

This is generally incongruous with other similar agency actions. When an action affects or has the potential to affect landscape-level program implementation, even when those changes have been procedural in nature, the agency has consistently elected to undertake robust NEPA analyses, and each time has solicited stakeholder feedback prior to issuance of any rule, regulation, or planning exercise:

- Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Revision of Grazing Regulations for Public Lands, January 21, 2020
- Notice of Intent to Amend Land Use Plans Regarding Greater Sage-Grouse Conservation and Prepare Associated Environmental Impact Statements, November 22, 2021
- Notice of Intent to Amend Multiple Resource Management Plans Regarding Gunnison Sage-Grouse (*Centrocercus minimus*), July 6, 2022
- Notice of Intent to Prepare a Programmatic Environmental Impact Statement to Evaluate Utility-Scale Solar Energy Planning and Amend Resource Management Plans for Renewable Energy Development, December 8, 2022

Additionally, BLM is currently in the process of preparing revisions to the agency's grazing regulations, for which the BLM is in the process of preparing an Environmental Impact Statement (EIS). BLM's assertion that a Categorical Exclusion in this instance is incongruous with other agency actions and neglects required NEPA analysis.

¹⁷ 88 Fed. Reg. at 19,591 (citing proposed Section 6102.4)

BLM Failed to Complete a Meaningful and Accurate Economic and Threshold Analysis or Analysis Under the Regulatory Flexibility Act

Executive Order 12866 requires federal agencies to evaluate the costs and benefits of the impacts of a regulatory activity with economically significant effects and submit the findings to the Office of Management and Budget (OMB) for review, in part to ensure that other federal agencies that may be impacted by a rulemaking may have the opportunity to weigh in. The BLM's analysis¹⁸ for this rule is incomplete and draws inaccurate conclusions. As part of their analysis, BLM only accounted for the costs of acquiring a conservation lease and the bonding requirements attached to those leases, for which the minimum bond was set at \$25,000 in the proposed rule. In both the consideration of conservation leases and bonding as well as "addressing resilience in decision-making", the BLM appears to rely heavily on the intangible potential benefits of any improvement in conservation leasing activity, with no recognition of costs. The proposed rule is quite clear that certain uses will be deemed incompatible on the landscape, and that the agency or the conservation lease holder will be precluded from accessing those landscapes for an undetermined period of time while the conservation lease activities are ongoing. The agency made no attempt to quantify any of these impacts, which undoubtedly would be economically significant.

Using the BLM's own economic data from the 2022 Socioeconomic Impact Report, successful multiple use management of the BLM's surface and subsurface acres generated \$201 billion per year and nearly 783,000 jobs across the country in Fiscal Year 2021.¹⁹ According to the BLM's *Sound Investment 2022* publication, grazing generates \$1.439 billion on an annual basis and supports more than 2 million jobs across the West.²⁰ Loss of grazing infrastructure would be crippling both for grazing industries, local communities, and the national beef, lamb, and wool industries. Loss of infrastructure and access to federal lands for a variety of multiple uses that the agency may now deem to be "incompatible" with a conservation lease would be devastating to the national economy.

More specifically, modelling conducted by the University of Wyoming about the economic consequences that would result from removing grazing from federal lands in three western states (Idaho, Oregon, and Nevada) showed crippling losses in rural communities. Combined, the data set modelled losses on 5,389 active grazing permits that, if removed, would result in a 60 percent decrease in ranch sales, a 50 percent decrease in labor income, a 65 percent decrease in personal income (from \$33,940 to \$11,812) and billions of dollars in direct economic losses. These figures are limited to personal, local, and industry income, but additional impacts would be felt across the national food supply chain as well.

In testimony before the House Natural Resources Subcommittee on Oversight and Investigations, it became clear that even a small impact to the federal grazing program would meet the economic

¹⁸ Bureau of Land Management, *Economic and Threshold Analysis for Proposed Conservation and Landscape Health Rule*, 2023.

¹⁹ Bureau of Land Management, *Socioeconomic Impact Report 2022*, <https://www.blm.gov/about/data/socioeconomic-impact-report-2022>

²⁰ Bureau of Land Management, *Socioeconomic Impact Report 2022*, <https://www.blm.gov/about/data/socioeconomic-impact-report-2022>

threshold for this to be a major federal rule:

If the proposed rule has a limiting effect on even half the grazing allotments in Nevada, 20 percent of renewable energy projects, 25 percent of recreation, or less than 1 percent of the nonenergy mineral production in Nevada alone, the BLM will have met the threshold for a significant rule and both the RFA and CRA would apply.²¹

BLM again failed to adequately assess impacts to small entities as required by the Regulatory Flexibility Act (RFA). The Small Business Administration accurately characterized these concerns in their June 13, 2023 letter to Secretary Haaland:

Within BLM's proposed rule, the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Under § 605(b) of the RFA, if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, they must include a factual basis for such certification. *BLM's certification provides no such factual basis, and offers no information as to how they arrived at this conclusion.*

As noted above, many small businesses are concerned about the impacts the rule may have on both their existing leases and the opportunity for future leases. While BLM is not required to attempt to calculate the impact the proposed rule may have on potential future lease sales, *BLM is required to offer a discussion of the impacts the rule may have on current lease holders.*

At a minimum BLM should identify the small businesses that currently engage with the agency and/or hold leases. As noted above, many activities would be rendered incompatible with conservation leases which constitutes lost revenue for those businesses. While it is difficult to quantify those potential impacts, they *should at least be discussed by BLM and should appear within its RFA analysis.* BLM could also have asked for public comment and data directly from small businesses to help inform a more thorough analysis of the impacts.²² (emphasis added).

At a minimum, the agency must heed the calls of the SBA and of other stakeholders to do a robust economic analysis and consideration of impacts to small businesses and small entities, like ranchers grazing permittees, before moving forward with this or a similar proposal.

The coalition also is concerned that the proposed rule did not have the opportunity to undergo other analyses from other agencies that be affected by the rule, including through the implementation of the Migratory Bird Treaty Act, the Endangered Species Act, and other federal

²¹ Testimony of Dr. J.J. Goicoechea before House Natural Resources Oversight and Investigations Subcommittee, "Examining the Biden Administration's Efforts to Limit Access to Public Lands", May 24, 2023. https://naturalresources.house.gov/uploadedfiles/testimony_goicoechea.pdf

²² U.S. Small Business Administration Office of Advocacy, Comment Letter on BLM's Proposed Public Lands Conservation Rule, June 13, 2023, <https://advocacy.sba.gov/wp-content/uploads/2023/06/BLM-Conservation-Letter-FINAL.pdf>.

and state guidance that impacts wildlife management; the proposed rule is clearly targeted to make improvements to specific wildlife habitat, yet no consultation or discussion occurred with any wildlife officials prior to publication.

BLM Erred in the Conclusion That This is Not a “Major Rule”, and Therefore Not Subject to Further Review under the Congressional Review Act

Congress has the ability to provide oversight and a limiting effect on authorities delegated to federal agencies through the use of a CRA resolution for major rules, which the body has elected to utilize a number of times in recent memory. The agency asserts that the proposed rule does not constitute a “major rule” under the Congressional Review Act (CRA) by alleging that the rule would not have an annual effect on the economy of \$100 million or more, that the rule would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic reasons – even going so far to assert that the rule would benefit small businesses by streamlining agency processes, and that the rule would not have significant adverse effects on competition, employment, or other U.S.-based enterprises. BLM’s assessment in each of these areas is woefully inadequate.

For reasons outlined above, the proposed rule meets numerous criteria to be a major federal rule that should be evaluated by other federal agencies under the RFA, NEPA, and all corresponding government reviews. The proposed rule would undoubtedly change the balance and focus of federal land management and BLM’s repeated failures to engage with stakeholders, the regulated community, fellow federal agencies, local, state, and Tribal government stakeholders has resulted in faulty analyses of potential impacts.

Further, BLM is exposing the agency and the department to significant legal scrutiny given the similarity between the proposed rule and a prior agency initiative that was struck down in 2017.²³ The “BLM 2.0” initiative shared many of the same purported goals of this proposed rule. The resemblance between the proposals exposes the agency to unnecessary risk since the CRA prohibits the agency from issuing a new rule that is “substantially the same” as the disapproved rule, “unless the reissued or new rule is specifically authorized by a law” enacted after the original disapproval.²⁴ Congress has passed no such law since 2017. The parallels that exist between BLM 2.0’s instruction to consider and act on areas of intact land²⁵, and the proposed rule’s direction to manage landscapes for intactness (as well as identify intact landscapes for further action)²⁶ are substantially the same. Further overlapping concepts in a series of definitions in both rulemakings, provisions related to Areas of Critical Environmental Concern (ACECs), and the agency’s attempt to codify certain actions without Congressional authorization all put the proposed rule in direct violation of the 2017 CRA. For these reasons, BLM should withdraw the rule and seek to address landscape-level planning items through appropriate means.

²³ Joint Resolution, Pub. L. No. 115-12 (2017).

²⁴ 5 U.S.C. § 801(b).

²⁵ 81 Fed. Reg. at 89,667 (citing proposed amendments to Section 1610.4(d) requiring the agency to identify “areas of large and intact habitat”).

²⁶ 88 Fed. Reg. at 19,599 (proposed Sections 6102.1 and 6102.2 (requiring the agency to identify and prioritize protection of “intact landscapes”)).

BLM Lacks Authority Under FLPMA to Establish the Proposed Conservation Leasing System

As a principal matter, the proposed rule's definition of "conservation" goes well beyond BLM's authority under FLPMA to prevent unnecessary and undue degradation of the public lands in pursuit of the agency's multiple use mandate. The BLM's proposed definition of "conservation" in Section 6101.4 exceeds the common understanding of conservation and BLM's authority under FLPMA by going beyond merely preserving and protecting valuable resources and adding "restoration" as a significant component of the agency's mandate.

To wit, the proposed rule "would direct the BLM to emphasize restoration across the public lands and requires the inclusion of a restoration plan in any new or revised Resource Management Plan."²⁷ When and for what reasons BLM will require restoration and mitigation as related to approval of statutory uses is highly unclear from this proposal and requires additional exploration.²⁸

To the extent that BLM seeks to rely on its general leasing authority under Section 302(b), 43 U.S.C. § 1732(b), to elevate conservation to a "use," that authority has several important limitations. First, BLM's general lease and permitting authority under Section 302(b) is targeted toward the regulation of *active uses* of public lands for purposes such as habitation, cultivation, and development. Under this authority, BLM may utilize a wide variety of "instruments," including easements, permits, leases, licenses, and published rules. The uses allowed under Section 302(b) are not open-ended, but focused on "use, occupancy, and development" of a commercial or residential nature.²⁹ Conservation leases thus do not align with the commercial purposes specified in the limited grant of leasing authority in Section 302(b). Second, this authority is also "subject to [other provisions of FLPMA] and other applicable law," meaning that such instruments must be consistent with use-specific statutes and with FLPMA more generally.

Third, the Secretary's authority under Section 302(b) is limited from a conservation standpoint to preventing unnecessary or undue degradation (UUD). By adopting the UUD standard, Congress declared that FLPMA is not an improvement or recovery statute like the Endangered Species Act, the Clean Water Act, or Clean Air Act, among other examples. In other words, Congress understood there may be degradation of those lands and provided the Secretary with authority "to take any action necessary to prevent *unnecessary or undue* degradation of the lands."³⁰ In other

²⁷ 88 Fed. Reg. at 19,589 (citing proposed Section 6102.3).

²⁸ *See, e.g.*, 88 Fed. Reg. at 19,603 (proposed Section 6102.5-1) ("The BLM will generally apply the mitigation hierarchy to avoid, minimize and compensate for, as appropriate, adverse impacts to resources when authorizing uses of public lands.").

²⁹ 43 U.S.C. § 1732(b) (noting authority may be used to grant long-term leases for purposes of "habitation, cultivation, and the development of small trade or manufacturing concerns"). The automatic allowance of any "casual use" (i.e., non-commercial use) of lands under a conservation lease via proposed Section 6102.4(a)(5) is equally inconsistent with FLPMA's text, context, and history as a tool for managing the sustained economic output of our nation's public lands. *See also* 6101.4 (defining casual use). Whether or not an activity is commercial should not be a distinguishing factor in any conflicts analysis BLM undertakes with regard to a conservation lease. Congress chose to provide specific tools to balance the economic output of FLPMA's principal uses with protection of resources and a change to that scheme requires further direction from Congress.

³⁰ 43 U.S.C. 1732(b).

words, FLPMA authorizes necessary degradation and due degradation, meaning that some level of degradation is reasonable and allowed.

Congress's delegation of authority in the context of ACECs is not significantly more expansive, focusing narrowly on the protection of specific "critical" resource values and prevention of "irreparable damage" to such resources.³¹ Again, Congress's vision for ACECs as provided in Section 201, as with FLPMA more broadly, is one of prevention of irreparable or unnecessary damage, rather than eliminating all potential impacts or improvement and recovery of degraded lands.³² As such, neither of these authorities in Sections 302(b) and 201 provides for the establishment of conservation "uses."

In particular, BLM's focus on restoration as a component of conservation is misled, given that goal is not part of BLM's mandate under FLPMA. For instance, proposed Section 6101.4 defines "restoration" as "the process or act of conservation by assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed." By contrast, Congress *has* directed the establishment of the National Landscape Conservation System (NLCS) of lands "[i]n order to conserve, protect, and *restore* nationally significant landscapes" with outstanding values. Omnibus Public Land Management Act of 2009, 16 U.S.C. § 7202(a).³³ However, even there, Congress was limited in its delegation of authority to BLM to manage such areas, specifying that such lands be managed in accordance with the specific acts particular to such NLCS component lands, and noting that the Omnibus Act did not modify any aspects of those laws.³⁴ Thus, conservation and restoration are goals for NLCS lands only to the extent consistent with specific acts concerning management of those lands.

In short, BLM must have a specific Congressional delegation of authority outside that contained in FLPMA or the Omnibus Public Land Management Act of 2009 to create conservation "uses" of lands or lease lands for conservation use.

³¹ 43 U.S.C. § 1702(a) ("The term 'areas of critical environmental concern' means areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) *to protect and prevent irreparable damage to* important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.") (emphasis added).

³² 43 U.S.C. § 1711(a) (identification of ACECs "shall not, of itself, change or prevent change of the management or use of public lands").

³³ National Landscape Conservation System (NLCS) lands include areas designated as national monuments, national conservation areas, wilderness study areas, national scenic trails or national historic trails designated as a component of the National Trails System, components of the National Wild and Scenic Rivers System, and components of the National Wilderness Preservation System. 16 U.S.C. § 7202(b)(1)(A)-(F).

³⁴ 16 U.S.C. 7202(d)(1). For example, the Omnibus Act references the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 et seq.); the Wilderness Act (16 U.S.C. 1131 et seq.); the Wild and Scenic Rivers Act (16 U.S.C. 1271 et seq.); the National Trails System Act (16 U.S.C. 1241 et seq.); and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.). 16 U.S.C. § 7202(d)(1)(A)-(E).

BLM Creates Unnecessary, Unavoidable, and Unacceptable Conflict by Utilizing Conservation as a “Use” and Conservation Leases (and other tools) to Provide for Displacement of Major and Principal Uses, and Valid and Existing Rights

The proposed rule creates confusion over what “conservation” is in the context of BLM and other agencies’ programs. BLM defines conservation as isolated to restoration and mitigation activities, but repeatedly uses conservation in more broad ways throughout the proposed rule. By defining the term so narrowly “for the purposes of this rule”, the BLM is establishing internal conflict with other programs, unnecessarily limiting their own ability to undertake land management activities that necessarily include conservation, and setting up conflict with other agencies that implement conservation on a much more inclusive basis that recognizing existing conservation as part of other multiple uses. By creating a specific definition of conservation just for this rule, BLM has introduced uncertainty in understanding of how BLM views, and pursues, conservation overall. These inconsistencies will hamper efforts attempted under this rule, and others that occur as part of routine use and management of BLM lands.

Both in process and in content, the proposed rule creates unnecessary conflict among user groups. The proposed rule clearly contemplates, and the agency has confirmed, that the compatibility assessment under the proposed conservation leasing system will necessarily require the agency to pick winners and losers in the existing land management structure.

The proposed rule purports to elevate conservation as a “use” “on par with other uses of the public lands under FLPMA’s multiple-use and sustained yield framework.”³⁵ In an attempt to justify and codify “conservation” as a “use”, the BLM proposes creation of conservation leases in order to fulfill a key function of the multiple use and sustained *yield* mandate, in which there must be a yield that is beneficial to “the present and future needs of the American people.”³⁶ FLPMA, the BLM, and the coalition all recognize that healthy landscapes are inherently valuable to the American people, and that value is evidenced in the ongoing sustained yield – the sustainability – of the productive uses that depend on healthy landscapes for future productivity.

However, there is considerable uncertainty in the proposed rule around how, whether, and when conservation “uses” (whether established via designation of areas of critical environmental concern (ACECs) and/or conservation leases) may affect or preclude outright statutorily recognized uses of the public lands. The proposed rule states plainly that the conservation leasing authority under Part 6100, for example, “is not intended to provide a mechanism for precluding other uses, such as grazing, mining, and recreation.”³⁷

Yet BLM acknowledges it may do just that if it finds that such uses are inconsistent with a conservation use:

“Once a conservation lease is issued, Section 6102.4(a)(4) would preclude the BLM, subject to valid existing rights and applicable law, from authorizing other

³⁵ Conservation and Landscape Health; BLM Proposed Rule, 88 Fed. Reg. 19585 (April 3, 2023) (to be codified at 43 U.S.C 1701 *et seq.*).

³⁶ 43 U.S.C. 315(b).

³⁷ 88 Fed. Reg. at 19,591.

uses of the leased lands that are inconsistent with the authorized conservation use.”³⁸

Further, the proposed rule establishes the expectation that authorizations of activities may be precluded even if they stem from a prior, valid and existing right:

“These leases...would not override valid existing rights or preclude other, subsequent authorizations so long as those subsequent authorizations are compatible with the conservation use.”³⁹

This section establishes that both the ability to exercise the valid and existing rights, as well as the other subsequent authorizations, would be subject to the compatibility analysis, in direct violation of FLPMA and the host of other laws governing multiple uses on federal lands.

To accurately comment further, much more detail and understanding is required of BLM’s plans for assessing potential conflicts between conservation uses and other traditional uses of public lands recognized in Section 103(*I*)—including how, whether, and when BLM will make determinations about conflicts and what criteria will be used to make such determinations. Despite repeated questions in public and in private conversations, BLM provided little insight into what may be compatible because of the wide range of possibilities that may present through varied applicants’ views of potential restoration projects.

While the coalition takes heart that the BLM has indicated they do not intend to approve a conservation lease that conflicts with a grazing permit, there is no protective language in the proposed rule that would carry out the BLM’s purported intent, shared in their “BLM Public Lands Rule Grazing FAQ” document:

If the BLM receives an application for a conservation lease that conflicts with an existing grazing permit or lease, that conservation lease would not be approved. However, interested grazing permittees or lessees could be part of or support a conservation lease to support compensatory mitigation, such as by improving the quality of habitat on their allotment and potentially coordinating with activities on their private land, as well.⁴⁰

This is just one example of the BLM asserting an intention of how they would implement the rule either in verbal comments or documents provided outside the administrative record and corresponding docket. BLM must amend the proposal significantly to address these discrepancies.

Additionally, this sentiment is in direct conflict with practical realities of implementation of the grazing program. Grazing permits are issued on a 10-year basis and are considered for renewal at the end of that period. The Taylor Grazing Act of 1934 (TGA) provides for the concept of

³⁸ 88 Fed. Reg. at 19,591.

³⁹ 88 Fed. Reg. at 19,586.

⁴⁰ Bureau of Land Management, *Frequently Asked Questions: Public Lands Rule and Grazing*, 2023.

<https://www.blm.gov/sites/default/files/docs/2023-05/BLM%20Public%20Lands%20Rule%20Grazing%20FAQs.pdf>

preference⁴¹, and agency policy confirms the right of a grazing permittee to have a preferential position for acquisition or renewal of a grazing permit based on landscape management. Even if the coalition were to assume that the BLM's assurance in their FAQ documents was representative of their intent in implementation, the proposed rule offers no confirmation that a conservation lease would not preclude an ongoing grazing activity.

Further, the proposed rule does not contemplate what would happen if a conservation lease was found to be compatible during an ongoing grazing permit term but then the grazing permit comes due for renewal mid-term of the conservation lease. BLM and the conservation lessee would have the opportunity then to determine that the grazing activity was not compatible and the grazing permit should not be renewed – despite grazing preference, decades or generations of permittee management, and ongoing resource needs. When this question was posed to BLM officials, each time the agency confirmed this was not a scenario they'd previously contemplated. The agency must not proceed with a proposed rule that would provide for the ability to kill the grazing industry in death by a thousand “now and later” cuts when individual decisions could be made about the forage and landscapes that are integral to the success of Western agriculture operations.

Other multiple uses have not received any reassurance from the BLM that their statutory rights and access would be protected. The agency has made clear through the information sessions that any extractive use will be incompatible with a conservation leasing system, effectively allowing for the BLM and conservation lessees to preclude other uses out of hand – everything from mining to solar development, outfitting and guiding to organized trail running would be subject to the subjective compatibility analysis. The BLM must not proceed with any conservation leasing system that would allow for the wholesale preclusion of use and public access, as this is in direct violation of the clear multiple-use and sustained yield mandate in FLPMA.

The coalition remains concerned that this proposed rule is an attempt to circumvent the Tenth Circuit's decision with regard to the 1995 grazing regulations exercise; at the time, the Tenth Circuit was clear allowing for conservation use of a federal grazing permit, was not allowed under TGA or FLPMA.⁴² While the current proposed rule contemplates leases, not permits, and alleges a singular reliance on FLPMA authorities rather than a TGA component, the proposed rule clearly seeks to establish a mechanism for the agency to exclude uses from the landscape for the purposes of protection or enhanced resource values, and do so in a way that would provide a financial benefit for the agency. At a minimum, the proposed rule fails to provide the kind of protection that would be necessary to avoid conflict with the Tenth Circuit decision, and the proposed rule clearly violates the Court's direction that “[n]one of these statutes [including FLPMA] authorizes permits intended exclusively for ‘conservation use.’”⁴³ Whether intentional or incidental, the proposed rule establishes a system whereby the agency is creating a mechanism to provide for a singular use for an undefined period of time.

This is particularly true when considering the second type of conservation leases – those for mitigation. The agency appears to contemplate not only a conservation lease for mitigation of

⁴¹ P.L. 73-482

⁴² *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1292 (10th Cir. 1999); Proposed Rule 19,591 (conservation leases are issued “for the purpose of pursuing ecosystem resilience through mitigation and restoration.”)

⁴³ *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999).

individual activities, but also for the use of a conservation lease to establish a mitigation bank on federal land for large impacts. Neither of these leases issued for mitigation purposes are subject to the maximum 10-year term applied to most conservation leases under the proposed rule, instead leaving the lease term open-ended and subject to potentially unlimited extensions:

(ii) A conservation lease issued for purposes of mitigation shall be issued *for a term commensurate with the impact it is mitigating* and reviewed every 5 years for consistency with the lease provisions.

(iii) Authorized officers *shall extend or further extend a conservation lease if necessary* to serve the purpose for which the lease was first issued. Such extension or further extension can be for a period no longer than the original term of the lease.⁴⁴

While the general leasing authority in Section 302(b) does explicitly provide the Secretary with authority to enter into “long-term leases,” leases on such an extended and uncertain timescale are unprecedented and raise substantial questions about whether BLM has authority to issue them.

Though BLM must balance sometimes competing multiple-use values under the existing regulatory framework, nothing in FLPMA provides for conservation measures to be applied in such a way as to supersede the principal or major uses, much less to do so on an *indefinite* basis. As discussed above, such changes likely exceed BLM’s designated authority by effectively altering land use designations in ways not contemplated by Congress’s vision for managing the public lands.

In addition to creating conflict between multiple uses and among existing statutes, the BLM has proposed a system where litigation is inevitable. Due to the ambiguity of the proposed rule, the unavoidable system of conflicts that the proposed rule establishes, and the agency’s lack of appropriate NEPA review, the legal exposure for the agency is significant. The coalition remains concerned that the agency will be subject to further litigation from groups who wish to obstruct all manners of multiple use; while these kinds of cases exist currently, the proposed rule inappropriately empowers those who wish to turn BLM lands into an unused preserve by precluding the lawful implementation of FLPMA. The coalition urges the BLM to avoid this path by withdrawing the conservation use and leasing language and developing a meaningful conversation with stakeholders and Congress about effective tools to do similar work.

BLM’s Focus on Promoting Increased Use of ACECs is Misaligned, Will Compromise Landscape Health

The coalition remains concerned about the agency’s misplaced focus on the promotion and prioritization of ACECs on the landscape. The BLM has a number of tools to conduct the kind of preservation contemplated in the proposed rule, including through land use planning processes, identification of Wilderness Study Areas, and others. The inclusion of ACECs in this rule is misplaced, and raises questions about the agency’s true intent in seeking to codify ACECs. As

⁴⁴ 88 Fed. Reg. at 19,600 (proposed amendments to Sections 6102.4(a)(3)(ii)-(iii)).

proposed, conservation leases for restoration are assumed to come to a natural conclusion, assuming that restoration work is achieved. BLM purportedly remains focused, however, on the concept of durability in landscape management and so the direction to prioritize and expand ACEC designations to include intact landscapes is mismatched. ACECs fundamentally fail to ensure the kind of management durability the agency has prioritized, due in large part to failed planning efforts. The coalition opposes any effort by the BLM to utilize ACECs as a long-term management designation in a back-door attempt to “guarantee” conservation benefits from a conservation lease. FLPMA clearly did not intend for ACECs to be used to guarantee durable conservation or restoration, and this would be a violation of federal law. Further, the agency has demonstrated that designation of an area as an ACEC is not a guarantee that the BLM will manage the landscape to a higher standard of ecological resiliency; many of the agency’s currently-designated ACECs are operating without the requisite management plan, and the only management changes to the areas have been to preclude uses.

Generally, as proposed, there appears to be a substantial risk that conservation leases or ACEC designations would be sought as a creative means to preclude the use of lands for any competing purposes, potentially including the major or principal uses.⁴⁵ BLM has already taken such steps, including notably removing livestock grazing from certain ACECs during the greater sage grouse resource management planning process.⁴⁶ As part of that effort, BLM significantly reduced multiple-use opportunities in so-called Sagebrush Focal Areas (or sage-grouse focal areas), via adopting substantial buffers for uses near SFAs in what amounted to de-facto ACEC designations.⁴⁷

The consideration of ACEC designations as a tool to protect intact landscapes is a clear departure from the directed use in FLPMA. While the coalition understands and appreciates the importance of intact landscapes for a variety of management strategies, the appropriate management of intact landscapes and all of their varied uses is through a resource management plan and subsequent plan amendments, not further restrictive designations. The proposed rule contemplates protection of intact landscapes, a category of broad “value” that far exceeds Congressional direction for specific management of discrete landscapes with significant value or areas that posed a natural hazard to human health. Were BLM to designate wide swaths of landscapes as ACECs, the agency would have the ability to preclude multiple use on these landscapes, in clear violation of the spirit and letter of FLPMA. The agency’s attempt to remove or reduce public involvement here is unacceptable to the coalition, given the BLM’s ongoing regulatory processes where ACECs feature heavily.

⁴⁵ As discussed elsewhere, the Supreme Court struck down a previous rule authorizing conservation use of a grazing allotment to the exclusion of grazing. *See Public Lands Council v. Babbitt*, 167 F.3d 1287, 1307 (10th Cir. 1999) (noting the Taylor Grazing Act “does not authorize permits for any other type of use of the lands in the grazing districts”).

⁴⁶ *See, e.g.*, Oregon Greater Sage-Grouse Approved RMP Amendment at 2-18 to 2-19 (2015).

⁴⁷ BLM is currently in the process of evaluating a massive proposal to withdraw approximately 10 million acres of land within these SFAs from location and entry under the mining laws to conserve Sage Grouse habitat. *See* 86 Fed. Reg. 44,742 (Aug. 13, 2021).

Expansion of Land Health Standards to All BLM Lands Without Significant Revision Will Result in a Crippled Agency Process

The grazing industry has long raised concerns that the fundamentals of rangeland health and the subsequent evaluations applied only to grazing allotments, as the provisions have long resided in Section 4180 of the agency's regulations.⁴⁸ The coalition directs the agency to the provisions of the March 6, 2020 Public Lands Council comment submitted as part of the BLM's scoping process on grazing regulations, that outlined the following:

The Livestock Groups recommend that all of Part 4180 be removed from the Grazing Regulations. A number of Rangeland Science and Ecological science publications, including the National Academy of Science book "RANGELAND HEALTH, New Methods to Classify, Inventory, and Monitor Rangelands, and BLM's Tech Report 1734 – 6 ("INTERPRETING INDICATORS OF RANGELAND HEALTH") convey that the subject of "land health" is currently an evolving paradigm. Most range professionals and science-based published literature on this subject convey that an assessment of the "health" of rangelands should not be limited to an evaluation of any singular, specific use of the land. The current BLM Grazing Regulations at Part 4180 direct the BLM to take Administrative action against a livestock permittee if a qualitative assessment, not quantitative data, indicate a BLM concern that a causal factor on the land being grazed by a permittee is not "healthy" due to livestock grazing. The Livestock Groups support the BLM's authority to use quantitative data from a monitoring program to support management actions to accomplish allotment objectives, but it is inappropriate to use an evolving paradigm on rangeland health (which is currently a qualitative assessment not grounded in quantitative data) to apply punitive action against a livestock permittee.

In these comments, members of the coalition make clear that not only is it problematic to use land health standards to assess land health and attribute conditions to a singular use, it is similarly problematic that the agency currently uses the land health standards as a causal factor to apply punitive action against a livestock permittee by changing management direction.

While the proposed rule contemplates removal of land health standards from the grazing regulations and applying the paradigm across the landscapes, the second concern remains; if the agency fails to address the use of land health standards as a punitive, decision-making tool rather than as an information gathering exercise as it was intended, the agency is willingly exposing itself to unreasonable staff burdens and an ever-increasing threat of litigation.

Without increased staffing resources or plans for contracting, the agency cannot hope to complete evaluations related to land health standards across the landscape. Prior to implementation of any expansion of the standards across all BLM lands, BLM must address staffing concerns to ensure the agency can meet statutory obligations, and should clarify in regulation that these evaluations do not require changes to agency management based on the outcomes.

⁴⁸ 43 C.F.R. § 4180.1(a)

This is critical, given that the criticisms of the application of land health standards that currently exists within Section 4180 will continue to exist if the proposed rule is finalized. In the 2020 scoping comments, members of the coalition identified that “BLM also needs to recognize that other factors, such as wild horse damage, wildlife forage consumption, fire, or extended dry conditions are routinely responsible for adverse rangeland health determinations and occur irrespective of livestock grazing permitted use.”⁴⁹ If the agency fails to address the scope of the land health standards and expectation for subsequent utilization of that data, the agency will never be able to meet land health standards on Herd Management Areas, burn scars, and other landscapes that have been consistently mismanaged by the agency itself. Failure to acknowledge these concerns and address the unavoidable need for additional staff, will result in BLM being sued, repeatedly, by those who continue to engage in frivolous litigation about existing implementation of Section 4180.

Further, the agency’s focus on conducting analyses at the watershed level is ill-advised. BLM’s own Water Resource Program Strategy from 2015 – 2020 offered the following critique: “there is no such thing as “watershed scale” analyses—but it does describe a specific landscape and includes all the biotic and abiotic elements within and the greater landscape matrix beyond the bounds.”⁵⁰ While the coalition has long urged the BLM to adopt more thoughtful data collection on a landscape level, requiring compliance with this section on a watershed level makes data collection and resulting decision-making less specific. The coalition urges BLM to consider data collection based on ecosystem type and continue to work with on-the-ground partners to ensure data collection can inform further analysis in a meaningful way, rather than giving additional weight – and exposing the agency to additional liability – from an already broad tool.

While the coalition generally appreciates the BLM’s attempt to be responsive by removing this section from the agency’s grazing regulations, the coalition remains concerned that these evaluations will continue to be a tool to reduce grazing. Even in cases where recreation, fire, invasive species, or other uses are determined to be a causal factor for degraded landscape health, the BLM has no additional tools to rein in those uses, and will instead revert to the uses it *can* control and limit. As a permitted, predictable, manageable use, livestock grazing will continue to be at risk without clarity that only the causal factor will be the subject of further BLM action.

The Proposed Rule is Duplicative of Existing Agency Tools

Perhaps one of the most perplexing issues with the proposed rule is that the agency already has the ability to do all of the functions contemplated in the proposed rule:

- While land health standards currently reside in Section 4180 of the grazing regulations, nothing precludes the BLM from conducting ongoing, trend monitoring of BLM landscapes. Data is regularly gathered as part of multiple use management.

⁴⁹ Livestock Industry Comments in Response to the Bureau of Land Management’s Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Revision of Grazing Regulations for Public Lands (85 Fed. Reg. 3410), 2020.

⁵⁰ Bureau of Land Management, *Water Resource Program Strategy – Focus on Integration*, 2015. <https://www.blm.gov/sites/blm.gov/files/WaterResourceProgramStrategy.pdf>

- BLM currently incorporates restoration, mitigation and broader concepts of conservation in each of the multiple use management activities. There are bonding, reclamation, and resource management requirements in each of the multiple use authorizations. All are managed with an eye toward sustained yield, which depends on ongoing conservation (balanced use and landscape health) of the landscape.
- BLM currently conducts restoration and mitigation through a variety of tools, including but not limited to: Memoranda of Understanding (MOU), cooperative agreements, volunteer agreements, conservation leases⁵¹, specific restoration projects⁵², compensatory mitigation⁵³ activities, and even the application of public dollars through the BLM Foundation⁵⁴.
- BLM already has the ability to process and utilize ACECs, and has the ability to identify and prioritize management of landscapes with specific attributes through the existing land management process.

BLM asserts that this rule is necessary for the coordinated restoration and mitigation of damage across BLM landscapes, however the agency already has all of the tools to conduct the underlying function. What the rule does provide, however, is an authorization for BLM to collect revenues – a function that has not been authorized by Congress or evaluated as part of the agency’s larger authorities.

The coalition is concerned that despite the BLM’s purported concern – one that the coalition shares – about durable landscape management, the leasing system and each of the individual pieces of the proposed rule will ultimately create random acts of conservation. One-off leases that are not coordinated through land use plans and are less specific (and have less BLM oversight) than MOUs or cooperative agreements will create only temporary changes to landscape health with potentially lasting impacts on precluded activities.

The coalition remains concerned that the BLM is not focusing on addressing existing issues within the planning process and focusing on engaging stakeholders in existing tools. Here, the agency has crafted a rule that creates no new tools for improved management but increases the risk of litigation, abuse, and mismanagement.

Specific Responses to BLM Questions about Conservation Leases

The notion of improving the tools for organizations and qualified individuals to engage in specific restoration projects, or in landscape improvement projects, is not foreign to the grazing community. From road maintenance to range improvements, volunteer hours and personal investment in the landscape are key to grazing permittees’ engagement with BLM landscapes. Expanding the tools to allow for more individuals to do that work demands that BLM have a clear

⁵¹ BLM staff outlined existing conservation leases as a tool for conservation during the BLM Informational Briefing in Reno, NV.

⁵² <https://www.doi.gov/pressreleases/biden-harris-administration-announces-161-million-landscape-restoration>

⁵³ <https://www.doi.gov/sites/doi.gov/files/m-37075-compensatory-mitigation-m-op-reinstatement-04.15.22.pdf>

⁵⁴ Colloquially known as the BLM Foundation, the Foundation for America’s Public Lands was authorized by Congress in 2017, although the Foundation and structure was not established until 2022.

handle of who will do the work, where the work will happen, when the work will happen, how long the work will last, how outcomes will be ensured, and how existing uses will be protected.

The coalition generally holds that conservation leases are not necessary to answer those questions, or to do that work, however BLM requested feedback on the following questions in the proposed rule, and the coalition offers the following responses:

- ***Is the term “conservation lease” the best term for this tool?***

The coalition believes that the tools to conduct this function already exist. If BLM wishes to establish a new conservation leasing system, it should be created by Congress and undergo the same kind of robust environmental, social, and economic analysis as the other leasing programs. Notably, the conservation leasing system proposed is not a competitive leasing system, creating the opportunity for exploitation and conflict among prospective lessees who may want to conduct projects on the same landscape. Before determining whether these should be called leases, or should in fact be leases, BLM must offer a clear explanation for why this function is preferable to existing tools, and provide for the incorporation of the function in long-term land management planning. Without incorporation into underlying agency function, the name of the tool will be incidental.

- ***What is the appropriate default duration for conservation leases?***

The concept of long-term conservation is implicit in the management of grazing allotments and many other multiple uses. Like existing MOUs, cooperative agreements, and other restoration projects, there is no single “right answer” for what the duration of a project should be – but there are many wrong answers. The proposed rule contemplates mitigation leases into perpetuity, or for a “term commensurate with the impact it is offsetting”⁵⁵. It is inappropriate to provide for a lease that would be able to limit the land under a mitigation lease to a single use into perpetuity.

The coalition makes few comments on the notion that the proposed rule would provide for the establishment of a mitigation bank on federal land, thereby ensuring conversion of a landscape to a single use (in order to provide the kind of predictability and durability demanded in a banking scenario). However, in the proposed rule, the BLM has not contemplated the implications of the BLM itself or of a partner becoming a mitigation banker and competitor with a well-established private industry, a concept which members of the coalition have clearly opposed when similar efforts have been made by other federal agencies.

- ***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?***

The coalition continues to urge the agency to reconsider the concept and need for conservation leases; however if the agency does finalize the concept of conservation leasing, BLM at a

⁵⁵ 88 Fed. Reg. at 19,586.

minimum must make clear that conservation leases cannot and must not displace major or principal uses under FLPMA. Further, the renewal of activities, like the renewal of a grazing permit, must not be able to be precluded by a conservation lease or similar activity. These leases should not be applied to any landscape where multiple use conflicts exist. In any place where a lease would be implemented in the same area as another multiple use, the existing user groups must have the ability to deny the addition of a conservation lease.

Further, any conservation lease or similar mechanism must undergo NEPA, ideally as part of a programmatic EIS as part of any rulemaking associated with this proposed rule, and when implementing activities on the landscape. Any conservation lease or similar activity must address issues already contemplated in a land management plan and other threat analysis, and subsequent management on that landscape must be incorporated into core agency functions. The BLM must take a longer view of landscape management rather than creating a patchwork of temporary “fixes” that ultimately will increase risk of mismatched regulation/management.

- ***Should the rule clarify what actions conservation leases may allow?***

BLM already has the ability to consider a wide variety of cooperative projects for restoration, and has existing regulations that provide for compensatory mitigation and reclamation activities. Any activity contemplated under a conservation lease or similar tool must be considered and thoroughly evaluated under NEPA and FLPMA as part of the planning process, and must not displace or provide for the displacement of or challenge to existing uses, existing authorizations, valid and existing rights, or future authorizations of activities that have been evaluated and approved through land management planning processes.

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

The coalition has been quite clear with BLM; ranchers and the agriculture community have long engaged in credit-based systems on private land. Members of the coalition have worked to ensure that BLM and other federal agencies do not adopt regulations that would preclude ranchers’ ability to engage in future markets; the proposed rule unfortunately does just that. In this rule, the BLM establishes a system where the agency is the arbiter of access, the limiter of tools that promote and protect carbon storage (and other measures of ecosystem health), and is the limiter on who would be able to benefit from the market. While there may be future benefit in this conversation, because BLM failed to engage with stakeholders already engaged in this marketplace, the system in the proposed rule is unworkable for this purpose.

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

Please see response above regarding actions authorized by leases or similar tools.

Conclusion

For generations, the cattle and sheep producers who are members of the undersigned organizations have worked with the BLM to manage hundreds of millions of acres across the United States for the benefit of the American people, the domestic food supply chain, ecosystem health, and all other public lands users. In one fell swoop, the BLM has proposed to upend that carefully cultivated balance, setting the stage for incremental reductions in grazing and access to federal lands. Through the proposed rule, BLM has set aside key obligations under TGA, FLPMA, NEPA, and other interagency consultation requirements, while simultaneously providing a framework to marginalize key partners. BLM has repeatedly offered that the proposed rule was intended to address a bevy of longstanding concerns from all multiple use groups, but the proposed rule falls short of the kind of certainty the coalition would expect from a proposed rule. The coalition recommends the agency reconsider the proposed rule to ensure that any final rule that may contain these concepts will truly be durable, effective, and protective of multiple use long into the future.

Conservation is inseparable from public lands grazing management, and the coalition wants to ensure that remains the case long into the future. The purported goals of the BLM are noble, but the unintended consequences from the proposed rule undermine those goals before the rule is even final. The coalition remains available and prepared to engage with BLM leadership, staff, and partners, as ranchers relish their role as primary managers and conservationists of BLM lands.

Sincerely,

Public Lands Council
National Cattlemen's Beef Association
American Farm Bureau Federation
American Sheep Industry Association
Association of National Grasslands
American Quarter Horse Association
American Goat Federation
Arizona Cattle Growers Association
Arizona Farm Bureau Federation
Arizona Public Lands Council
California Cattlemen's Association
California Farm Bureau
California Public Lands Council
California Wool Growers Association
Colorado Cattlemen's Association
Colorado Farm Bureau
Colorado Public Lands Council
Colorado Wool Growers Association
Idaho Cattle Association
Idaho Farm Bureau Federation
Idaho Public Lands Council
Idaho Wool Growers Association

Indiana Beef Cattle Association
Indiana Sheep Association
Kansas Farm Bureau
Minnesota Lamb & Wool Producers Association
Missouri Sheep Producers
Montana Farm Bureau Federation
Montana Association of State Grazing Districts
Montana Public Lands Council
Montana Stockgrowers Association
Montana Wool Growers Association
Nebraska Cattlemen
Nebraska Farm Bureau Federation
Nevada Cattlemen's Association
Nevada Farm Bureau
Nevada Wool Growers
New Mexico Cattle Growers Association
New Mexico Farm & Livestock Bureau
New Mexico Wool Growers, Inc.
North Dakota Farm Bureau
North Dakota Lamb and Wool Producers Association
North Dakota Stockmen's Association
Oklahoma Cattlemen's Association
Oklahoma Farm Bureau
Oregon Cattlemen's Association
Oregon Farm Bureau
Oregon Public Lands Committee
Oregon Sheep Growers Association
Siskiyou County CattleWomen
South Dakota Cattlemen's Association
South Dakota Sheep Growers Association
Southern Arizona Cattlemen's Protective Association
Utah Cattlemen's Association
Utah Farm Bureau Federation
Utah Wool Growers Association
Washington Cattlemen's Association
Washington Farm Bureau
Wyoming Farm Bureau Federation
Wyoming State Grazing Board
Wyoming Stock Growers Association
Wyoming Wool Growers Association