



November 10, 2025

U.S. Department of the Interior
Director (630), Bureau of Land Management
1849 C St. NW, Room 5646
Washington, DC 20240

Attention: 1004-AF03

To Whom It May Concern,

The Independent Petroleum Association of America writes in support of The BLM's Proposed Rule to rescind the Conservation and Landscape Health Rule adopted on May 9, 2024, via 89 FR 40308, with an effective date of June 10, 2024. The Independent Petroleum Association of America (IPAA) is a national upstream trade association representing thousands of independent oil and natural gas producers and service companies across the United States. Independent producers operate 95 percent of the nation's oil and natural gas wells and are responsible for 85 percent of US oil production and 90 percent of natural gas production onshore.

Attached, please see IPAA's comment letter we submitted in 2023, detailing how the Rule creates a profound shift in how public lands are managed that is inconsistent with the intent of the Federal Lands Policy and Management Act of 1976 (FLPMA). IPAA is gravely concerned that the Rule fundamentally changes the way BLM carries out its multiple-use and sustained yield mandates by elevating conservation to a "use" under FLPMA.

Should you have any additional questions, please feel free to contact me at (202) 857-4722.

Sincerely,

Dan Naatz
Chief Operating Officer & SVP of Government Relations
Independent Petroleum Association of America

July 5, 2023

VIA ELECTRONIC FILING

Tracy Stone-Manning
Director
Bureau of Land Management
Attention: 1004-AE92
1849 C St. NW, Room 5646
Washington, DC 20240

**Re: Proposed Rule, Bureau of Land Management: Conservation and Landscape Health
(88 Fed. Reg. 19,583 – 19,604, April 3, 2023)**

Dear Director Stone-Manning:

We appreciate the opportunity to comment on the Bureau of Land Management's ("BLM") Conservation and Landscape Health Proposed Rule ("Proposed Rule"). The undersigned organizations (collectively, the "Coalition") include businesses in many areas of the broader economy, including energy, mining, grazing, and other community stakeholders that are impacted by this Proposed Rule.

The U.S. Chamber of Commerce is the largest business trade association in the world, representing more than 3 million companies of all sizes and sectors. The Independent Petroleum Association of America ("IPAA") is a national upstream trade association representing thousands of independent oil and natural gas producers and service companies across the United States. Independent producers develop 91 percent of America's oil and natural gas wells. These companies account for 83 percent of America's oil production, 90 percent of its natural gas and natural gas liquids ("NGL") production, and support over 4.5 million American jobs. The National Rural Electric Cooperative Association ("NRECA") is the national trade association representing nearly 900 electric cooperatives and utilities that power rural communities across America. The American Farm Bureau Federation ("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. The Public Lands Council ("PLC") is the sole national organization dedicated to representing the unique rights and interests of cattle and sheep producers whose hold 22,000 federal grazing permits on public lands in the western United States. The National Cattlemen's Beef Association ("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. ConservAmerica is a non-profit organization dedicated to market-based, common-sense solutions to our nation's environment, conservation, and energy challenges.

I. Introduction

We are dedicated to ensuring that wise and lawful management practices are followed so that current and future generations may use and appreciate the natural resources with which

America has been richly endowed. Our organizations and the companies and members we represent have a business presence across the country and a unique perspective on the importance and use of our public lands. Our members rely on access to public lands managed by BLM to conduct their operations and to serve their communities. Indeed, the broader business community across America depends on reliable, affordable, domestic energy and natural resources that are delivered from and across public lands to make and transport their products. As can be too often forgotten, businesses are made up of people, and hardworking Americans who live near, work on, and recreate on our public lands would be adversely affected by these proposed conservation and landscape health measures if the concerns raised in this letter are not carefully addressed. The Coalition shares the laudable goal of conserving and restoring our public lands; however, at the same time, the Coalition is concerned that the Proposed Rule exceeds BLM's statutory authorities and conflicts with congressional directives.

With this perspective in mind, the Coalition urges BLM to reconsider the Proposed Rule. There are many ways to conduct the lawful conservation and the wise management of our country's natural resources through appropriate actions taken pursuant to lawful authorities, including congressional actions to designate national parks, agency recommendations to Congress for additional wilderness areas, and use of Inflation Reduction Act of 2022 ("IRA") funds for conservation efforts. But BLM's Proposed Rule is both misguided policy and legally problematic, including for the following reasons:

- i) First, the Proposed Rule would harm the U.S. economy and energy security by hindering the energy production on public lands that Congress has repeatedly supported.
- ii) Second, the Proposed Rule would treat conservation as a "use," and rather than putting it "on par" with other productive uses under the Federal Land Policy and Management Act of 1976 ("FLPMA"), would prioritize conservation over statutorily defined and authorized uses. But this ignores the fact that conservation, as used here by BLM, is a *non-use*. And while claiming to put all uses on equal footing, the Proposed Rule is in fact favoring *non-use* over use, contrary to what FLPMA requires.
- iii) Third, the Proposed Rule would create a one-way ratchet towards the *non-use* of public land by restricting other productive uses on land for potentially indefinite periods of time through conservation measures and leases.
- iv) Fourth, the Proposed Rule would violate BLM's statutory authorities and directives under FLPMA, would run counter to Congress's intent in creating and delegating conservation powers to the BLM, and would be arbitrary and capricious in violation of the Administrative Procedure Act ("APA").
- v) Fifth, the Proposed Rule creates a vague and unworkable scheme that BLM would not be able to consistently and timely apply in practice.
- vi) Finally, there are concerns that the Proposed Rule could violate the Congressional Review Act ("CRA") for lack of appropriate analysis as to whether it is a major rule for CRA purposes; in addition, the Rule could be vulnerable on CRA grounds because

Congress previously enacted a CRA resolution that disapproved a prior BLM regulation to which the Proposed Rule is similar in a number of respects.

The Coalition's members are directly affected by BLM's Proposed Rule due to the impacts it would have on mining, mineral extraction, timber production, grazing, energy production, and every other productive and congressionally authorized use of our public lands. The Proposed Rule would also indirectly affect other businesses and industries by (1) decreasing the availability of raw materials including, but not limited to, timber, minerals, ore, and aggregates; (2) adversely impacting the local, regional, and national economies, especially in areas of the western United States that depend on reliable access to federal lands; (3) jeopardizing America's energy security and reliability; and (4) reducing and otherwise negatively impacting the domestic food supply.

If the Proposed Rule is made final, its impact would be felt collectively across America in the form of higher food and energy prices and reduced domestic production and competitiveness. The Proposed Rule would result in additional roadblocks to obtaining necessary permits and approvals, needlessly increasing the costs of the affected goods and services. It also would threaten the international competitiveness of America's energy sector by raising operating costs and jeopardizes businesses' ability to produce and deliver electricity on and across our public lands. The Proposed Rule would hinder our ability to both effectuate a domestic energy transition and to provide international leadership in the production of renewable energy sources. The Proposed Rule would inhibit access to critical mineral deposits on public lands and also complicate the leasing of public lands for renewable generation projects. Furthermore, BLM's proposed policy scheme for increased conservation does not match the reality of conservation already occurring on public lands by leaseholders, much of which is already required by existing bonding provisions. Americans are already struggling with high inflation and supply chain shortages and cannot afford the additional, unnecessary burden of these overreaching policies.

II. Proper Management of Public Lands is Critical for Domestic Production and Economic Security.

Congress declared its policy 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," including the implementation of the Mining and Minerals Policy Act of 1970.¹ Today, public lands are a critical resource not only for the people who work them, but for America as a whole. Public lands provide necessary grazing rangelands that form a cornerstone of our food supply, as well as forestry, mining, and mineral resources that serve a growing and transitioning economy. Public lands also facilitate the generation, transmission, and distribution of electricity and broadband internet across America, and particularly to rural communities. The importance of these resources has been especially emphasized by recent events, including the COVID-19 pandemic, Russia's invasion of Ukraine, and the cascading effects of ongoing supply chain disruptions.

Congress' policy for managing public lands is unambiguous and it prioritizes production. The Proposed Rule is in direct conflict with this mandate and would dramatically affect the

¹ 43 U.S.C. § 1701(a)(12).

production of minerals, food, timber, and fibers from the public lands, as well as the use of rights-of-way for electric transmission and distribution, in detriment to our economic stability.

- A. *Mining on public lands is essential to America's economy, including to produce critical minerals for renewable energy sources on federal lands in order to support the energy transition.*

Mining on federally managed public lands plays a critical role in the economic prosperity, wellbeing, and security of the United States. Public lands contain significant amounts of valuable raw minerals and other extractable materials. Having and producing materials from secure domestic sources ensures that our supply chains are protected from disruption by reducing our dependence on other nations. This is critically important and, as discussed in the context of energy security, has been emphasized by recent events, including the COVID-19 pandemic, Russia's invasion of Ukraine, and the cascading effects of ongoing supply chain disruptions. As the country transitions energy sources, minerals and other materials available on public lands will become increasingly important not only as a raw material source for consumer and industrial products, but also as a way of ensuring energy independence.

BLM oversees more than 700 million acres of federal onshore subsurface mineral estate and provides technical supervision of mineral development on an additional 57 million acres of Bureau of Indian Affairs mineral estate.² The Department of the Interior estimated that the total value of mining of coal and solid minerals on federal lands in 2018 supported \$13.9 billion in GDP impact, \$24.2 billion in economic output, and 81,700 jobs.³ Mining on federal lands is also a significant revenue source for the government. According to the U.S. Government Accountability Office, mine operators paid about \$550 million in royalties for solid minerals produced under leasing systems in fiscal year 2018.⁴ This does not include the economic productivity and associated taxes that result from the mining companies and their downstream customers.

The minerals on public lands also play an important role in the energy transition. Currently, the United States is reliant on imported minerals to meet the national demand. However, most of the minerals listed on the USGS net import reliance chart⁵ are available on public lands, and many of the minerals listed as 100% import dependent have the potential for domestic production.⁶ Some known critical minerals also lie on federal lands, including sizeable cobalt and nickel deposits.⁷ Cobalt and nickel are two of five critical minerals for lithium batteries, which are presently necessary for batteries and other energy transition products. Because of the scarcity of these metals

² MARK K. DESANTIS, CRS, R45480 v.2, U.S. DEPARTMENT OF THE INTERIOR: AN OVERVIEW, 1, 7 (Jan. 31, 2019), <https://crsreports.congress.gov/product/pdf/R/R45480/2>.

³ BRANDON S. TRACY, CRS, R46278, POLICY TOPICS AND BACKGROUND RELATED TO MINING ON FEDERAL LANDS, 1 (Mar. 19, 2020), <https://crsreports.congress.gov/product/pdf/R/R46278> (citing U.S. DEP'T OF THE INTERIOR, U.S. DEPARTMENT OF THE INTERIOR ECONOMIC REPORT FY 2018, 2 (Sept. 30, 2019), <https://www.doi.gov/sites/doi.gov/files/uploads/fy-2018-econ-report-final-9-30-19-v2.pdf>).

⁴ U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-461R, Letter to the Chairman of the House Committee on Natural Resources regarding Mining on Federal Lands, 9 (May 28, 2020), <https://www.gao.gov/assets/gao-20-461r.pdf>.

⁵ See U.S. GEOLOGICAL SURV., *supra* note 36, at 7.

⁶ MARC HUMPHRIES, CRS, R43864, CHINA'S MINERAL INDUSTRY AND U.S. ACCESS TO STRATEGIC AND CRITICAL MINERALS: ISSUES FOR CONGRESS, 13 (Mar. 20, 2015), <https://crsreports.congress.gov/product/pdf/R/R43864/6>.

⁷ GAO, *supra* note 4 at 9; see *id.* at 14.

and reliance on foreign sources, there are risks for the energy transition supply chain. Access to these metals on federal lands is an opportunity that must be captured if we wish to secure energy and material independence.

B. Domestic oil and gas production on public lands is critical to energy security, the economy, and the energy transition.

1. Federal onshore oil and gas leasing is an essential piece of our energy security puzzle.

Energy security plays a key role in the United States' economic success by ensuring the availability of affordable, reliable, and diversified sources of energy capable of fueling America's economy.⁸ In an increasingly global energy market, the United States has become more vulnerable to disruptions of our energy supplies, whether attributable to geopolitics, weather, market volatility, terrorism, or some other source.⁹ These disruptions can increase the price of energy, which in turn has negative economic consequences that affect consumers and industry alike.¹⁰ Supply diversity is one of the key tools to temper threats to energy security, as increased supply diversity blunts the effect on price that any one disruption can cause in the wider energy market.¹¹

For the United States, our access to rich, diversified sources of oil and natural gas, including from our federal lands, provides an essential source of supply diversity. As the U.S. Department of Energy ("DOE") has observed, our "highly diversified" oil and gas industry has, through "technical innovation and entrepreneurial initiative," spurred "a renaissance in oil and gas production in the United States over the last decade" that "has improved domestic, and thus global, energy security."¹² The production numbers more than back up DOE's conclusion. In 2019, the United States produced record levels of crude oil (12.2 million barrels per day) and natural gas (40.7 trillion cubic feet)—increases of 11.3% and 10.6% from 2018 levels, respectively.¹³ The United States, as a result, enjoyed its best energy security since 1970¹⁴ and became a net energy exporter for the first time since 1952.¹⁵ Producing additional domestic barrels corresponds to hundreds of millions of barrels per day that the United States has not had to competitively purchase and import on the global market.

⁸ See *Energy Security: Reliable, Affordable Access to All Fuels and Energy Sources*, INT'L ENERGY AGENCY ("IEA"), <https://www.iea.org/topics/energy-security> (last visited June 8, 2023).

⁹ See U.S. DEP'T OF ENERGY ("DOE"), VALUATION OF ENERGY SECURITY FOR THE UNITED STATES, 43–44 (January 2017), https://www.energy.gov/sites/prod/files/2017/01/f34/Valuation%20of%20Energy%20Security%20for%20the%20United%20States%20%28Full%20Report%29_1.pdf.

¹⁰ *Id.* at 2, 44.

¹¹ *Id.* at 44.

¹² *Id.* at 12.

¹³ See GLOB. ENERGY INST. ("GEI"), U.S. CHAMBER OF COM., 5 (2020 ed.), https://www.globalenergyinstitute.org/sites/default/files/2020-10/024036%20Global%20Energy%20Institute%20US%20Index_Web.pdf.

¹⁴ *Id.* at 5. In fact, after the United States received a record-high risk score of 100.9 in 2011, its score fell in seven of the subsequent eight years to a record low of 70.1 in 2019; *id.* at 4.

¹⁵ See *U.S. Energy Facts Explained*, U.S. ENERGY INFO. ADMIN. ("EIA") (June 10, 2022), <https://www.eia.gov/energyexplained/us-energy-facts/imports-and-exports.php>.

Amidst this boom in production, America's oil and gas reserves represent one of the nation's key strategic physical assets, serving as a stable and predictable backbone of supply.¹⁶ Oil production in federal areas, both onshore and offshore, routinely exceeds 20% of total U.S. production.¹⁷ For gas, federal onshore production constitutes approximately 10% or more of total U.S. production, or between 3 and 4 trillion cubic feet.¹⁸ For 2021, BLM estimates that leases under its management—almost 89,000 oil and gas wells—accounted for about 8% of domestic natural gas production (3.65 trillion cubic feet) and 9% of domestic oil production (473 million barrels).¹⁹ A robust, streamlined onshore federal oil and gas leasing program is therefore vital to America's continued energy security and economic prosperity.

Congress has made clear the continued importance and priority of developing America's vast oil and gas interests. As early as the Mineral Leasing Act of 1920 ("MLA"), Congress has sought to encourage and incentivize private enterprise in developing our nation's rich mineral reserves.²⁰ Through the MLA, Congress "intended to promote wise development of . . . natural resources and to obtain for the public a reasonable financial return on assets that 'belong' to the public."²¹ More recently, as part of the IRA, Congress went so far as to direct BLM to go forward with specific oil and gas lease sales and to directly tie federal onshore oil and gas development to America's ongoing energy transition by explicitly providing that BLM may not issue certain rights-of-way and leases for solar and wind energy development unless it simultaneously offers federal lands for oil and gas leasing.²²

Despite all of this, oil and gas production from federal areas as a share of total U.S. production has decreased over the previous decade and has failed to keep pace with production on non-federal leases, as the Congressional Research Service ("CRS") reported in 2018.²³ The CRS's figures, reproduced below, highlight these trends:

¹⁶ See Waste Prevention, Production Subject to Royalties, and Resource Conservation, 87 Fed. Reg. 73,588, 73,590 (Nov. 30, 2022) (to be codified at 43 C.F.R. §§ 3160, 3170) ("The BLM's onshore oil and gas management program is a major contributor to the nation's oil and gas production."); see also MARC HUMPHRIES, CONG. RSCH. SERV. ("CRS"), R42432, U.S. CRUDE OIL AND NATURAL GAS PRODUCTION IN FEDERAL AND NONFEDERAL AREAS, 3 (Table 1) (Oct. 23, 2018), <https://crsreports.congress.gov/product/pdf/R/R42432> ("Crude oil production on federal lands, particularly offshore, is likely to continue to make a significant contribution to the U.S. energy supply picture and could remain consistently higher than previous decades depending on the level of total U.S. crude oil production.").

¹⁷ See CRS, *supra* note 16, at 3 (Table 1).

¹⁸ *Id.* at 5 (calculated from Table 3).

¹⁹ See 87 Fed. Reg. at 73,590.

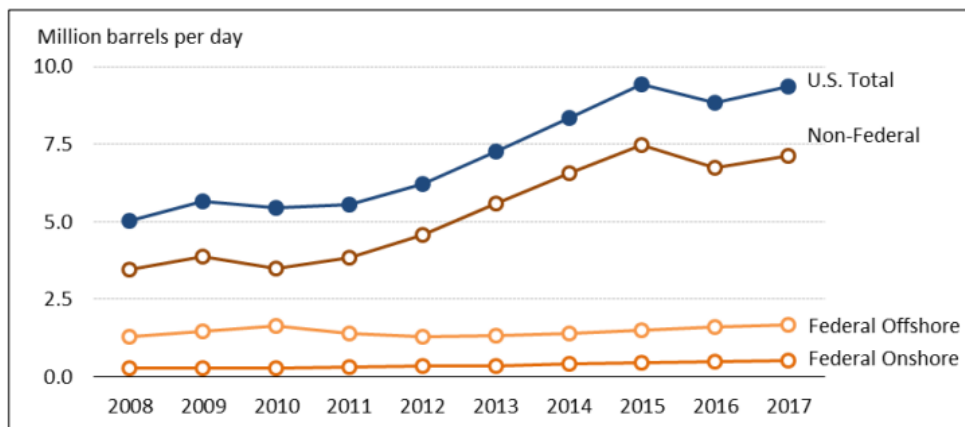
²⁰ See Mineral Leasing Act ("MLA"), Pub. L. No. 66-146, § 1, 41 Stat. 437, 437–38 (1920) ("[D]eposits of . . . oil, oil shale, or gas, and lands containing such deposits owned by the United States . . . shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States."); see also 56 Cong. Rec. H6986 (May 23, 1918) (citing need to "insure [sic] a proper development and an intelligent utilization of our mineral resources").

²¹ *California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961).

²² See Inflation Reduction Act of 2022, Pub. L. No. 117-169, §§ 50264–65, 136 Stat. 1818, 2059–61.

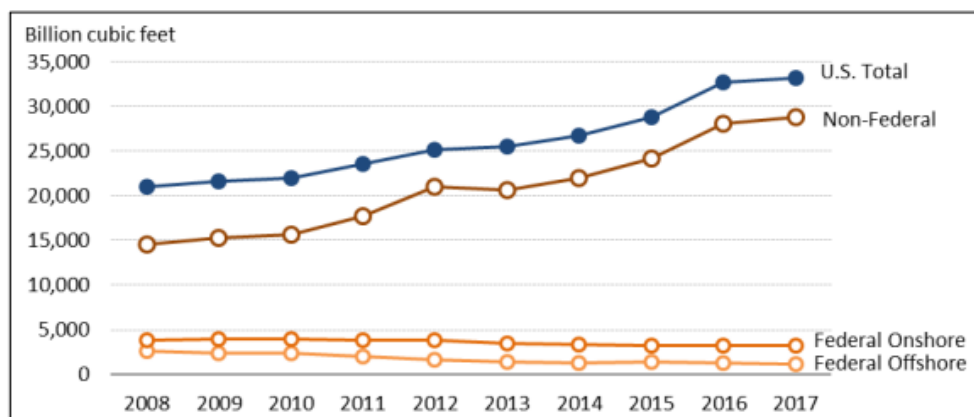
²³ See CRS, *supra* note 16, at 3, 5–6.

Figure 1 - U.S. Crude Oil Production: Federal and Nonfederal Areas 2008-2017



Sources: Federal data obtained from ONRR Production Data, <http://www.onrr.gov>. Nonfederal from EIA. Figure created by CRS.

Figure 2 - U.S. Natural Gas Production: Federal and Nonfederal Areas 2008-2017



Source: Federal data obtained from ONRR Statistics, <http://www.onrr.gov> (using calendar year data). Figure created by CRS.

If not for increases in production on state and private lands over the previous decade, the United States' energy security position would have been far less secure, likely necessitating increased reliance on oil and gas imports from international, and less reliable, sources. BLM can, and should, do more to increase production of our abundant federal oil and gas reserves. Otherwise, we risk weakening America's energy security.

2. Domestic oil and gas production is a key driver of economic health and growth.

Beyond energy security, diversified sources of oil and gas, including those on federal lands, are crucial to national economic health and growth. At the consumer level, energy needs represent a sizable portion of everyday Americans' budgets, whether it be the prices consumers pay at the

pump, the amounts spent on power or heating bills, or the price tags of countless consumer goods.²⁴ Oil and natural gas, in particular, are critical to allowing Americans to affordably power the vehicles that deliver their products or allow them to commute to work, and represent the vast majority of energy consumed for these transportation purposes.²⁵ In fact, “for many households, transportation is the second-largest expense in annual budgets, costing as much as 20% to 25% of annual household income.”²⁶ Moreover, half of all American households rely on natural gas for heating their homes and water, cooking, and drying clothes, making them especially sensitive to fluctuations in the price of natural gas.²⁷

Oil and natural gas have also become essential to the electric generation and industrial sectors, such that fluctuations in supply and price can contribute to or hinder economic growth. Since 2005, the annual consumption of natural gas has grown by nearly 41%, or 9 trillion cubic feet, with the electric generation (up 60%) and industrial (up 28%) sectors comprising nearly 90% of the increase in annual consumption.²⁸ Natural gas has displaced other power generation sources to become the primary fuel for electric power generation over the previous decade.²⁹ Any decrease in supply of domestically produced natural gas could result in electricity shortages, increased rates, and decreased reliability of electric power across America. It also could chill investments into grid hardening and expansion that are necessary to accommodate new and renewable sources of energy, and to meet increased electricity demand resulting from the growing electrification of our lives.

Further, manufacturers use oil and gas as a feedstock or as a fuel for production. A stable supply of oil and gas is therefore critical to ensure adequate production of petrochemicals, medical devices, plastics, solvents, fertilizers, and many other products that American consumers use on a regular basis.³⁰

Accordingly, BLM must be mindful of the downstream economic consequences that can follow any proposed policy or regulation restricting or imposing burdensome compliance costs on federal oil and gas leasing, including on members of economically disadvantaged or environmental justice communities who are least able to absorb the increased costs of fuel to heat their homes and transport them to work, electricity to power their lives, and the increased costs of other basic necessities impacted by higher production and transportation costs.

²⁴ See DOE, *supra* note 9, at 31–34; see also Josh Mitchell, *Soaring Energy Prices Raise Concerns About U.S. Inflation, Economy*, WALL ST. J. (Oct. 10, 2021), <https://www.wsj.com/articles/soaring-energy-prices-raise-concerns-about-u-s-inflation-economy-11633870800>.

²⁵ See DOE, *supra* note 9, at 32–33.

²⁶ *Id.* at 33.

²⁷ See *Natural Gas Explained: Use of Natural Gas*, EIA, <https://www.eia.gov/energyexplained/natural-gas/use-of-natural-gas.php> (last updated Nov. 16, 2022); see also DOE, *supra* note 9, at 34.

²⁸ See *Climate Solutions: Technology Solutions: Natural Gas*, CTR. FOR CLIMATE AND ENERGY SOLS. (“C2ES”), <https://www.c2es.org/content/natural-gas/> (last visited June 8, 2023).

²⁹ *Id.*

³⁰ See IEA, *The Future of Petrochemicals: Towards More Sustainable Plastics and Fertilisers* 11 (2018), https://iea.blob.core.windows.net/assets/bee4ef3a-8876-4566-98cf-7a130c013805/The_Future_of_Petrochemicals.pdf (“[Petrochemicals] are set to account for more than a third of the growth in oil demand to 2030, and nearly half to 2050, ahead of trucks, aviation and shipping.”).

3. *Domestic oil and gas will continue to play an important role in the ongoing energy transition.*

Oil and natural gas will not only continue to play an important role in supplying America's energy needs, but are also integral to the development of the nation's renewable energy infrastructure. In the present term, natural gas has displaced other power generation sources, such as coal, to become the primary fuel for electric power generation over the past ten years.³¹ For the industrial sector in particular, natural gas provides almost one-third of the sector's energy, such as for on-site energy generation for boilers and turbines or process heat to melt glass, process food, preheat metals, and dry various products.³² This transition towards natural gas has notably resulted in substantial reductions in GHG emissions since 1990.³³ And beyond the present term, the U.S. Energy Information Administration projects that oil and natural gas will remain the most-consumed sources of energy in the United States through 2050.³⁴

Beyond directly meeting energy needs, oil and gas will have important roles to play in any energy transition scenario. For one thing, there are myriad short- and medium-term roadblocks to the full and robust deployment of renewable generators at the scale necessary to meet all of America's energy needs, particularly as the trend of greater electrification of our daily lives continues to accelerate. These roadblocks include, among others, permitting complications;³⁵ reliable access to markets in rare earth metals and critical minerals that serve as critical components for batteries, electric vehicles, solar panels, and wind turbines;³⁶ and the weather dependency of many renewable generation sources that lack reliable battery storage and deployment.³⁷ Further, petrochemicals and petroleum products are important base materials for renewable infrastructure, such as the layers of copolymers between photovoltaic solar panels³⁸ and the plastics, resins, and

³¹ See C2ES, *supra* note 28.

³² *Id.*

³³ See U.S. ENV'T PROT. AGENCY, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS, EPA 430-R-23-002, ES-11 (2022), <https://www.epa.gov/system/files/documents/2023-04/US-GHG-Inventory-2023-Main-Text.pdf> ("Total direct and indirect emissions from the industrial sector have declined by 20.7 percent since 1990.").

³⁴ See EIA, *EIA Projects U.S. Energy Consumption Will Grow Through 2050, Driven by Economic Growth* (Mar. 3, 2022), <https://www.eia.gov/todayinenergy/detail.php?id=51478>.

³⁵ See Michael Wigmore, Brandon Tuck & Kelly Rondinelli, *Feds May Need Power to Take State Lands for New Grid*, LAW360 (Oct. 20, 2021), <https://www.law360.com/articles/1432198/feds-may-need-power-to-take-state-lands-for-new-grid>; DJ Gribbin, *Environmental Permitting Might Block Biden's Clean Energy Targets*, BROOKINGS INST. (May 13, 2021), <https://www.brookings.edu/blog/the-avenue/2021/05/13/environmental-permitting-might-block-bidens-clean-energy-targets>.

³⁶ See IEA, THE ROLE OF CRITICAL MINERALS IN CLEAN ENERGY TRANSITIONS: WORLD ENERGY OUTLOOK SPECIAL REPORT (Mar. 2022), <https://iea.blob.core.windows.net/assets/ffd2a83b-8c30-4e9d-980a-52b6d9a86fdc/TheRoleofCriticalMineralsinCleanEnergyTransitions.pdf>; see also U.S. GEOLOGICAL SURV., *Mineral Commodity Summaries 2023*, 142–43 (Jan. 31, 2023), <https://pubs.usgs.gov/periodicals/mcs2023/mcs2023.pdf> (noting that China was the source of 74% of rare earths imported to the U.S. between 2018 and 2021, produced more than half of the total rare earths mined worldwide in 2021 and 2022, and has more than one-third of the total worldwide reserves of rare earths).

³⁷ See *Atmospheric Science for Renewable Energy Challenges*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://www.esrl.noaa.gov/gsd/renewable/challenges.html> (last visited June 8, 2023) (discussing weather forecasting technologies that must be optimized and developed to help forecast renewable energy generation).

³⁸ See *Renewable Energies Rely on Petrochemicals from Oil and Natural Gas*, AM. FUEL & PETROCHEMICAL MFRS. (Mar. 4, 2019), <https://www.afpm.org/newsroom/blog/renewable-energies-rely-petrochemicals-oil-and-natural-gas> (last visited Jun. 8, 2023).

fiberglass in wind turbines.³⁹ Finally, given the current technological limitations and scarcity of grid-scale batteries, generators that combust fossil fuels will be necessary to ensure sufficient dispatchable electric “capacity”—the capability of the generators linked to a grid to produce energy on demand—to prevent brownouts or, worse, blackouts. In fact, most generation fleets use, and are likely to continue using, natural gas-fired power plants as “peaking plants” that can run on demand and provide capacity during periods of high demand. Decreased domestic oil and gas production could jeopardize electric reliability across America, especially at peak demand times.

4. *Oil and gas production on federal lands directly supports the U.S. economy and federal budget.*

Production of oil and gas on federal lands also directly creates well-paying jobs in a number of areas where such opportunities may otherwise be in short supply. For areas in the west where federal land dwarfs private or state-owned lands, a robust leasing and production program creates economic opportunities that would not otherwise be available. These jobs within the oil and gas industry in turn support other local industries and services and promote local economic viability. The U.S. oil and gas industry’s total employment impact is estimated at 11.3 million domestic jobs, or 5.6% of total U.S. employment.⁴⁰ And each direct job in the oil and natural gas industry supports an additional 3.5 jobs elsewhere in the U.S. economy.⁴¹ Moreover, these jobs are not overly concentrated, as 31 states boast at least 100,000 jobs directly or indirectly supported by the oil and gas industry.⁴²

Separate from the myriad downstream benefits of additional domestic oil and gas production, production on federal lands provides a much more direct benefit to our federal fiscal balance sheet in the form of royalty payments. This is by congressional design. Nearly 100 years ago, Congress passed the MLA to “promote the orderly development of oil and gas deposits in publicly owned lands of the United States through private enterprise,” and “to obtain for the public reasonable financial returns on assets belonging to the public.”⁴³ The MLA creates such revenues for the public by establishing a competitive leasing program and requiring lessees to pay a royalty on the “production removed or sold from the lease.”⁴⁴ Likewise, the Federal Oil and Gas Royalty Management Act of 1982 (“FOGRMA”) creates a thorough system for collecting and accounting for federal mineral royalties.⁴⁵ And the resulting royalty system has, by BLM’s own estimates, generated more than \$4.2 billion in royalties to the federal and state governments.⁴⁶ When

³⁹ See Leon Mishnaevsky, Jr. et al., *Review: Materials for Wind Turbine Blades: An Overview*, 10 MATERIALS 1285 (Nov. 9, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5706232/pdf/materials-10-01285.pdf>; CHRISTOPHER MONE ET AL., NAT’L RENEWABLE ENERGY LAB’Y, 2015 COST OF WIND ENERGY REVIEW, 65 (May 2017), <https://www.nrel.gov/docs/fy17osti/66861.pdf> (discussing the effect of raw material pricing on wind turbine costs).

⁴⁰ See PWC & AM. PETROLEUM INST., IMPACTS OF THE OIL AND NATURAL GAS INDUSTRY ON THE U.S. ECONOMY IN 2019, E-2 (Jul. 2021), <https://www.api.org/-/media/files/policy/american-energy/pwc/api-pwc-economic-impact-report.pdf>.

⁴¹ *Id.* at E-2.

⁴² *Id.*

⁴³ *Wyoming v. U.S. Dep’t of the Interior*, 493 F. Supp. 3d 1046, 1062 (D. Wyo. 2020) (cleaned up).

⁴⁴ See, e.g., 30 U.S.C. § 226(b)(1)(A).

⁴⁵ 30 U.S.C. § 1751.

⁴⁶ See 87 Fed. Reg. at 73,590.

regulatory requirements become so onerous that it is no longer economic to produce available oil and gas reserves, production stops, along with the royalty payments.⁴⁷

- a) *The IRA intended for the leasing of public land for renewable energy use. Reducing land that can be used for this work is directly at odds with BLM's intent to close off land from use.*

Recognizing the importance of domestic oil and gas production for our economy and energy security, Congress included key measures within the IRA⁴⁸ that condition the availability of rights-of-way on federal lands for solar and wind developments on the offering for sale of oil and gas leases on federal land.⁴⁹ Other provisions permit offshore drilling leases in certain areas and require quarterly oil and gas lease sales.⁵⁰ The Proposed Rule is at odds with these provisions: Congress would not have intended to both expand energy production on public lands while simultaneously directing—or expecting—agencies to restrict these public land uses. In addition, when the executive branch recently signaled its intent to prevent energy production on federal lands,⁵¹ Congress reprimanded the associated agency actions which sought to pause, scale back, or outright prohibit energy production on federal lands by passing legislation that required the lease sales to move forward.⁵² Congress has not signaled any departure from this stance and has maintained its support of energy production.⁵³

Some provisions of the IRA provide funds to agencies for conservation purposes. These funds are limited to projects, not a complete foreclosure of public lands from productive development.⁵⁴ The inclusion of these provisions alongside multiple provisions promoting productive use of public lands demonstrates that Congress has not abandoned its support of sustained yield and multiple use for public lands, and has a wholly separate plan for conservation than the Proposed Rule provides.

C. *Federal leasing for livestock grazing is critical to ensuring affordable domestic food supplies and supports domestic jobs.*

Grazing is another one of the defined, principal uses for public land under FLPMA.⁵⁵ Grazing has always been a significant use for public lands in the western United States. In fact, BLM was formed by the merger of the General Land Office and the U.S. Grazing Service. Today, the BLM manages nearly 18,000 grazing permits covering 63 percent of the public lands managed

⁴⁷ See *Wyoming*, 493 F. Supp. 3d at 1070.

⁴⁸ Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

⁴⁹ 43 U.S.C. § 3006(b).

⁵⁰ *Id.*

⁵¹ See Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Feb. 1, 2021) (pausing new oil and gas leases in public lands and offshore waters); Anna Phillips, *Biden Pulls 3 Offshore Oil Lease Sales, Curbing New Drilling This Year*, WASH. POST (May 12, 2022, 10:15 AM), <https://www.washingtonpost.com/climate-environment/2022/05/11/gulf-of-mexico-leasing-canceled/> (noting the cancelation of planned oil leases in Alaska and the Gulf of Mexico).

⁵² Inflation Reduction Act of 2022, § 50264, 136 Stat. 2059–60.

⁵³ On June 1, 2023, Congress passed the Fiscal Responsibility Act of 2023. The Act promotes domestic energy generation with a section devoted to “expediting completion of the Mountain Valley Pipeline.” Fiscal Responsibility Act of 2023, H.R.3746, 118th Cong. § 234 (2023). The President signed the Act on June 3, 2023.

⁵⁴ *E.g.*, Inflation Reduction Act of 2022, §§ 50221–22, 136 Stat. 2052.

⁵⁵ See 43 U.S.C. § 1702(l).

by BLM, or roughly 155 million acres.⁵⁶ The use of public lands in this way is an important generator of economic activity and ecologically advantageous.

In 2022, grazing on BLM lands supported 22,878 jobs, with 64 percent of the jobs shown to be the direct result of livestock grazing.⁵⁷ That same year, grazing on public lands generated approximately \$1.5 billion in economic activity,⁵⁸ with over \$1 billion directly linked to livestock sales attributable to public lands forage.⁵⁹ Livestock grazing improves soil quality through waste-nutrient distribution and significant reduction of sediment erosion.⁶⁰ Healthy, nutrient-rich soil in turn contributes to vigorous vegetation growth on grazing lands.⁶¹ Additionally, grazing has been found to remove natural fire fuels more effectively than most mechanical methods.⁶² The removal of fire fuels, like long grasses or shrubs, prevents wildfires from reaching extreme flame lengths when they do occur, which helps localize and manage the fire damage.⁶³ Grazing also has implications for carbon sequestration, with at least one study determining that by increasing the grazing pressure in some areas, and reducing it in others, rangelands could sequester around 352 million tons of carbon dioxide a year worldwide.⁶⁴ Using land for grazing avoids the emission of within-soil carbon that arises when land is plowed.⁶⁵

Many of these indirect environmental benefits are considered ecosystem services and are not present under alternative land uses or are difficult to replace with human-made services. Nationally, it was estimated that federal rangelands contribute \$3.7 billion in ecosystem services which translated to \$20.15 per public acre grazed.⁶⁶ For comparison, after adjusting for the approximately \$26 million⁶⁷ ranchers pay in grazing fees each year, taxpayers support

⁵⁶ PUBLIC LAND STATISTICS 2021, BLM, 79 (June 2022), https://www.blm.gov/sites/default/files/docs/2022-07/Public_Land_Statistics_2021_508.pdf; *Livestock Grazing on Public Lands*, BLM, <https://www.blm.gov/programs/natural-resources/rangelands-and-grazing/livestock-grazing>; *What We Manage*, BLM, <https://www.blm.gov/about/what-we-manage/national>; *Bureau of Land Management and USDA Forest Service Announce 2023 Grazing Fees*, BLM, <https://www.blm.gov/press-release/bureau-land-management-and-usda-forest-service-announce-2023-grazing-fees#:~:text=The%20federal%20grazing%20fee%20for,by%20the%20USDA%20Forest%20Service>.

⁵⁷ See *The BLM: A Sound Investment for America 2022*, BLM, <https://www.blm.gov/about/data/socioeconomic-impact-report-2022> (last visited June 8, 2023).

⁵⁸ *Id.*

⁵⁹ Sloggy, Matthew & Anderes, Stefan & Sánchez, José. (2023). Economic Effects of Federal Grazing Programs. *Rangeland Ecology & Management*. 88. 1-11. 10.1016/j.rama.2023.01.008.

⁶⁰ See Ann Perry, ARS, *Putting Dairy Cows Out to Pasture: An Environmental Plus*, USDA AGRIC. RSCH. MAG. (May 2011), <https://agresearchmag.ars.usda.gov/2011/may/cows>; see also Robert Hendershot, *Environmental Benefits of Improved Grazing Management*, Illinois Livestock Trail by U. Ill. Extension (May 7, 2004), <https://livestocktrail.illinois.edu/pasturenet/paperDisplay.cfm?ContentID=6618#:~:text=The%20overall%20soil%20quality%20improves,over%20any%20other%20land%20use>.

⁶¹ See *id.*

⁶² Devii Rao, *Benefits of Cattle Grazing for Reducing Fire Fuels and Hazard*, BERKELEY RAUSSER COLL. OF NAT. RES. (Sept. 11, 2020), <https://nature.berkeley.edu/news/2020/09/benefits-cattle-grazing-reducing-fire-fuels-and-fire-hazard>.

⁶³ *Id.*

⁶⁴ Benjamin B. Henderson et al., *Greenhouse Gas Mitigation Potential of the World's Grazing Lands: Modeling Soil Carbon and Nitrogen Fluxes of Mitigation Practices*, 207 AGRIC., ECOSYSTEMS & ENV'T 91 (Sept. 1, 2015).

⁶⁵ *Id.*

⁶⁶ Maher, Anna T; Quintana Ashwell, Nicolas E; Maczko, Kristie A; Taylor, David T; Tanaka, John A; Reeves, Matt C. 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): 401. <https://doi.org/10.1093/tas/txab054>.

⁶⁷ Carol H. Vincent, *Grazing Fees: Overview and Issues*, Congressional Research Service RS21232, Updated Mar. 4, 2019

appropriations for public rangeland management programs at only about 30 cents per acre. Excluding all other benefits of public lands grazing, consumers have a net return of \$19.85 per 30 cents spent to support federal lands grazing.

The Proposed Rule would adversely affect these benefits. If grazing permits are harder to obtain, many operators would be forced to graze on private lands and reduce the size of their herds. Because BLM lands dominate the western United States, with some state comprised of more federal than private or state-owned lands, there are areas where restrictions on the use of public lands would have catastrophic results on local economies. Restrictions may force some operations to completely shut down, affecting employees and others who depend not only on the individual businesses, but on the economic activity generated by those businesses. Rural and oftentimes disadvantaged communities in the western United States would be hardest hit. These small towns typically do not have the capacity to absorb unemployment and career transitions, especially if significant groups of individuals are put out of work at the same time. This puts those ranchers in a hard spot—many would need to move to find work, potentially displacing generational ranches and communities. This increases unemployment and underemployment, putting more strain on the government’s welfare system.

III. The Proposed Rule Would Violate BLM’s Statutory Authorities.

BLM is directed by the provisions of FLPMA.⁶⁸ When Congress enacted FLPMA, it understood that the management of public lands would require balancing between competing policies and uses. FLPMA requires that BLM:

. . . manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed [by BLM] . . . except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.⁶⁹

Under FLPMA, the BLM is charged with managing public lands “in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values....”⁷⁰ At times, and only where appropriate, this may include “preserv[ing] and protect[ing] *certain* public lands in their natural condition”⁷¹ However, FLPMA is overwhelmingly focused on the *productive* use of public lands and was not designed as an environmental protection statute as evidenced throughout the Act. While conservation plays a role in administering public lands under FLPMA, at its core this conservation is designed to allow for a sustained *yield*; in other words, for continuous productive use.

The Proposed Rule would shift the goalposts on what is considered “sustained yield.” Under FLPMA, sustained yield is defined 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.”⁷² Under this proposal, BLM would redefined sustained yield to mean “achievement and maintenance in perpetuity of a high-level annual or regular periodic output of

⁶⁸ 43 U.S.C. § 1701 *et seq.*

⁶⁹ 43 U.S.C. § 1732(a).

⁷⁰ 43 U.S.C. § 1701(a)(8).

⁷¹ *Id.* (emphasis added).

⁷² 43 U.S.C. § 1702.

the various renewable resources of BLM-managed lands without permanent impairment of the productivity of the land.”⁷³ Under the statute, *multiple use* is a key requirement; the concept of an absence of permanent impairment is not identical to this requirement and cannot be used to replace it. The Proposed Rule states that, “[p]reventing 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.”⁷⁴ BLM cannot rewrite the statute to fit its own purposes, and must follow the definition that Congress provided in FLPMA, which specifically requires consistency with multiple use.⁷⁵

A. FLPMA Mandates the Productive Use of Public Lands

Whereas protection of some lands in their natural state may be appropriate in limited circumstances, FLPMA directs the agency to manage *all public lands* “in a manner which recognizes the Nation’s need for domestic sources of minerals, food, timber, and fiber *from the public lands*....”⁷⁶ This policy determination was not delegated to the BLM. Any agency action that prioritizes other uses ahead of Congress’ preferred uses would be beyond the scope of BLM’s delegated powers.

1. Congress mandated the principles of multiple use and sustained yield

The Act further emphasizes the principles of multiple use and, with respect to renewable resources, sustained yield.⁷⁷ These concepts predate FLPMA by many decades and were codified in the Multiple Use Sustained Yield Act (“MUSYA”).⁷⁸ The principles were repeated in FLPMA, which describes multiple use as “the management of 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...”⁷⁹ and 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*.”⁸⁰ The concepts are plainly derivative of the MUSYA, as confirmed by the legislative history of FLPMA.⁸¹ The principles of multiple use and sustained yield require the various productive resource values of the public lands to be given equal weight. Priorities for any one resource varies on a locality by locality basis, with specific areas of public land better situated for different productive uses.⁸² These concepts require BLM to manage the public lands in a productive way that makes use of the natural resources available based on the

⁷³ 88 Fed. Reg. 19,583 (to be codified at 43 C.F.R. § 6101.4) (emphasis added).

⁷⁴ 88 Fed. Reg. 19,583 (to be codified at 43 C.F.R. § 6101.4) (emphasis added).

⁷⁵ 43 U.S.C. 1702(h).

⁷⁶ 43 U.S.C. § 1701(a)(12) (emphasis added).

⁷⁷ 43 U.S.C. § 1732(a) (“The Secretary *shall manage* the public lands under principles of multiple use and sustained yield . . .”).

⁷⁸ 16 U.S.C. § 528 *et seq.*

⁷⁹ 43 U.S.C. § 1702(c).

⁸⁰ 43 U.S.C. § 1702(h) (emphasis added).

⁸¹ SEN. REP. NO. 95-583 (“this [multiple use] definition is very similar to that . . . which presently appears at section 4 of the Multiple-Use Sustained-Yield Act of 1960....”); H.R. NO. 94-1163 (“the definition of multiple use preserves essentially its same meaning as used in the Forest Service Multiple Use Act of 1960.”).

⁸² H.R. REP. NO. 86-1551, *as reprinted in* 1960 U.S.C.C.A.N. 2377, 2379 (“In practice, priority of resource use will vary locality by locality and case by case... Thus, in particular localities the various resource uses might be given priorities because of particular circumstances.”).

best use for any given area. This framework prohibits BLM from giving a superior priority to any one resource or resource set over others.⁸³

2. *Congress designed FLPMA in light of other statutory schemes that promote the productive use of public lands*

a. *Mining and Minerals Policy Act*

FLPMA also requires BLM to recognize the congressional directives from other laws intended to encourage production of resources on public lands. For example, in 1970, Congress created the Mining and Minerals Policy Act, declaring:

[T]hat it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial security and environmental needs⁸⁴

The multiple use mandate of FLPMA specifically integrates and protects this existing policy under the Mining and Minerals Policy Act of 1970, stating:

The Congress declares that it is the policy of the United States 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 including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands⁸⁵

By expressly referencing the Mining and Minerals Policy Act in FLPMA, Congress clearly intended that the Act be emphasized in connection with public land planning and management. The Mining and Minerals Policy Act also provides: "It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section."⁸⁶

In 1980, Congress strengthened its clear directives regarding the importance of mining and created the National Materials and Minerals Policy, Research and Development Act which requires responsible departments and agencies to "promote and encourage private enterprise in the development of economically sound and stable domestic materials industries" and to encourage federal agencies to "facilitate availability, development, and environmentally responsible production of domestic resources to meet national material or critical mineral needs."⁸⁷ Doubling

⁸³ See 43 U.S.C. §§ 1701(a)(3); *National Wildlife Fed'n v. Buford*, 835 F.2d 305, 308–09 (9th Cir. 1987) (finding that classifications must be reviewed consistent with the principles of multiple use and sustained yield).

⁸⁴ 30 U.S.C. § 21a (stating also that "It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section.").

⁸⁵ 43 U.S.C. § 1701(12).

⁸⁶ 30 U.S.C. § 21a.

⁸⁷ 30 U.S.C. § 1602.

down on the importance of mining, Congress defined the term “materials” as including “minerals.”⁸⁸

3. Mineral Leasing Act of 1920

Congress’ interest in preserving the right to produce minerals on public lands is also emphasized by the reference and inclusion of the Mineral Leasing Act of 1920⁸⁹ in FLPMA.⁹⁰ Congress has made clear the continued importance of developing America’s vast oil and gas interests. As early as the MLA, Congress has sought to encourage and incentivize private enterprise in developing our nation’s rich mineral reserves.⁹¹ Through the MLA, Congress “intended to promote wise development of . . . natural resources and to obtain for the public a reasonable financial return on assets that ‘belong’ to the public.”⁹² More recently, as part of the IRA, Congress went so far as to direct BLM to go forward with specific oil and gas lease sales and to directly tie federal onshore oil and gas development to the nation’s ongoing energy transition by explicitly providing that BLM may not issue certain rights of way and leases for solar and wind energy development unless it simultaneously offers federal lands for oil and gas leasing.⁹³

Some public lands, known as withdrawn lands, are not open for mineral exploration and mining. Discussing the limitation on withdrawals, FLPMA required the Secretary of the Interior to make an expedited review of all withdrawn lands to make a determination of which lands would satisfy the new requirements under FLPMA.⁹⁴ This review was to be concluded within 15 years and required that a report would be submitted to the President, the President of the Senate, and the Speaker of the House of Representatives.⁹⁵ FLPMA directed the Secretary to consider all public lands except those “formally identified as primitive or natural areas or designated as national recreation areas,” because these areas are already excluded from the Mining Law of 1872 and the MLA. Congress was essentially doublechecking that all previous withdrawn lands complied with the new requirements of FLPMA so as to maximize the availability of public lands for the purposes of the Mining Law and the MLA.

4. Taylor Grazing Act

The Proposed Rule would also violate the Taylor Grazing Act (“TGA”)⁹⁶ and the associated rights adopted under FLPMA. The TGA predates the BLM, and provides for a system of grazing districts to manage the public rangelands.⁹⁷ These grazing districts ensure that local knowledge and participation are central to the decision-making process affecting both the public

⁸⁸ 30 U.S.C. § 1601(b).

⁸⁹ 30 U.S.C. §181 *et seq.*

⁹⁰ 43 U.S.C. § 1714(l)(1).

⁹¹ See MLA, *supra* note 20, 41 Stat. at 437–38 (“[D]eposits of . . . oil, oil shale, or gas, and lands containing such deposits owned by the United States . . . shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States”); see also 56 Cong. Rec. H6986 (May 23, 1918) (citing a need to “insure [sic] a proper development and an intelligent utilization of our mineral resources”).

⁹² *California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961).

⁹³ See *supra* note 22.

⁹⁴ 43 U.S.C. § 1714(l)(1).

⁹⁵ 43 U.S.C. § 1714(l)(2).

⁹⁶ 43 U.S.C. § 315 *et seq.*

⁹⁷ *Id.*

rangelands and those that use these public lands for grazing. As we have already discussed, the use of public lands for grazing is a critical component of America's food security and a notable segment of the national economy. FLPMA also lists grazing as one of the principal or major uses for the public lands⁹⁸ and includes both food and fiber as specific productive uses in the Congressional Declaration of Policy.⁹⁹

The TGA and FLPMA coexist in the management of the public rangelands. FLPMA specifically describes the distribution of funds from grazing fees and adopts the language of the TGA, by reference.¹⁰⁰ FLPMA also specified that leases under the TGA are for a period of ten years, except in specific circumstances. It is thus concerning that the Proposed Rule does not address how it would impact or implicate the TGA, including the rights of existing permit holders. Under FLPMA, permit holders have the first priority for renewal of expiring permits if they have complied with the terms of the permit and agree to comply with the terms of a new permit.¹⁰¹ In such a situation, "the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease."¹⁰² However, the Proposed Rule does not provide the same right as the statute. In fact, the BLM's own conservation and landscape health goals could prevent a permit holder from renewing a lease, even if the permit holder had complied with the terms of its expiring permit, if a conservation lease or conservation permit is proposed as an alternative use.¹⁰³

The Proposed Rule does not adequately address how its provisions would conflict with numerous other statutes. Given the directives from Congress and laws described above, the provisions of FLPMA often must be read in light of other statutory schemes. Congress has often tied FLPMA to other laws or programs that emphasize that public lands are intended for productive use, and particularly the production and development of certain resources. For example, land planning under FLPMA must also take into account the Federal Coal Leasing Amendments Act of 1976, the Federal Coal Management Program (implemented under, *inter alia*, FLPMA authority¹⁰⁴), and the Surface Mining Control and Reclamation Act of 1977. Any new planning efforts must be properly integrated with agencies' responsibilities for land planning under these various statutory schemes and their relationship to multiple use management on public lands.

While the Proposed Rule opaquely references BLM's other existing authorities, it does not reconcile these statutory directives with its new proposed approach. The Proposed Rule should be modified to do so. BLM's current rule states,

The objective of resource management planning by the [BLM] is to maximize resource values for the public through a rational, consistently applied set of regulations and procedures which promote the concept of multiple use management

⁹⁸ 43 U.S.C. § 1702(l).

⁹⁹ 43 U.S.C. § 1701(a)(12).

¹⁰⁰ 43 U.S.C. § 1751.

¹⁰¹ 43 U.S.C. § 1752(c).

¹⁰² 43 U.S.C. § 1752(c)(1).

¹⁰³ Statement by Brian St. George, BLM, Proposed Public Lands Rule Public Meeting (June 5, 2023) (corrected Zoom virtual meeting transcript) (Mr. St. George stated that, ". . . if the BLM receives an application for conservation lease, we'll consider that application based on the merits of the proposal and the goals of that lease to advance restoration or mitigation on public lands so where a conservation lease and a grazing permit may conflict ostensibly the BLM would continue to work with the applicant for the conservation lease and the grazing permit to seek a resolution.").

¹⁰⁴ 43 C.F.R. § 3400.0-3.

and ensure participation by the public, state and local governments, Indian tribes and appropriate Federal agencies. Resource management plans are designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses.¹⁰⁵

This objective is consistent with FLPMA by stating exactly what a resource management plan is supposed to do—maximize resource values and promote multiple use management. By contrast, the Proposed Rule would shift the focus away from this multiple use mandate.

B. Congress has already defined the principal or major uses for public lands

FLPMA also specifies the “principal or major uses” for public lands. A land use plan that excludes one of the principal or major uses “remain[s] subject to reconsideration, modification, and termination through revision by the Secretary or [the Secretary’s] delegate.”¹⁰⁶ Further, FLPMA requires any exclusion of the principal or major uses from an area of 100,000 acres for two or more years to be reported to Congress.¹⁰⁷ This proviso emphasizes the importance that Congress has placed on a few select uses of the public lands. Policies meant to limit or exclude these uses from public lands are contrary to the will of Congress and exceed the powers delegated to the agency. While Congress anticipated limited exclusion of these productive uses from the public lands (permitting limited exclusions up to two years for specific purposes),¹⁰⁸ agency policies that undermine the congressional directive to put the public land to productive uses is not allowed. Congress was clear and intentional when it defined the principal and major uses. The definition is “*limited to domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.*”¹⁰⁹ Short of a congressional act, no other use of public lands can be on-par, or exceed, the priority given to these uses.

The Proposed Rule, as currently drafted, would therefore exceed the powers that Congress has delegated to BLM because it ignores the plain meaning of FLPMA, including the directive to use the public lands in a way that (1) recognizes America’s need for raw materials, (2) adheres to concepts of multiple use and sustained yield, and (3) gives deference to the principal or major uses. The Proposed Rule not only elevates a “use” that Congress chose to exclude from FLPMA, but it effectively demotes the principal and major uses that Congress has specifically called for. The Proposed Rule is contrary to Congress’ delegation of power to BLM and it is therefore not within BLM’s power to promulgate the Proposed Rule. As the Supreme Court has explained, “[a]gencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line.”¹¹⁰ And it is well settled that “an agency literally has no power to act . . . unless and until Congress confers power upon it.”¹¹¹

¹⁰⁵ 43 C.F.R. § 1601.0-2.

¹⁰⁶ 43 U.S.C. § 1712(e)(1).

¹⁰⁷ 43 U.S.C. § 1712(e)(2).

¹⁰⁸ 43 U.S.C. § 1712(e)(2).

¹⁰⁹ 43 U.S.C. § 1702(l) (emphasis added) (cleaned up).

¹¹⁰ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (cleaned up).

¹¹¹ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986); *see also Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress. Thus, if there is no statute conferring authority, a federal agency has none.”) (cleaned up).

- C. *Introducing conservation as a “use” goes against the purpose of BLM and the directive under FLPMA to put the public lands to the highest combination of productive uses.*

Because FLPMA prescribes that public lands should be put to productive use, policies that *prioritize* conservation over production are inconsistent with the Act. As already discussed, FLPMA prescribes “principal or major uses” as “limited to” certain specific productive uses.¹¹² These uses are largely incompatible with preserving land in a natural state. Although the Coalition recognizes that principles of conservation and good land management practices are necessary for BLM to carry out its management responsibilities — for example, to ensure sustained yields of renewable resources — the Proposed Rule goes beyond what the Agency has been directed to do by Congress. Rather than conservation for the enhancement of productive uses, the Proposed Rule prioritizes conservation at the *expense* of productive uses, in violation of the Act.

- D. *BLM cannot create its own conservation “use” that is on par with the statutorily defined productive uses*

The Proposed Rule “would require the BLM to plan for and consider conservation as a use on par with other uses under FLPMA’s multiple use framework”¹¹³ In conjunction with that shift in policy, the Proposed Rule would have the BLM offer “conservation leases.” These leases could override existing rights or preclude other, subsequent authorizations if those subsequent authorizations are not compatible with the conservation use.¹¹⁴ This seismic shift in policy would violate FLPMA both by restricting productive use of the federal land impermissibly and also by demoting the congressionally defined principal and major uses below the Agency’s current preference.

The Proposed Rule justifies the shift by elevating the value of conservation to a “use.” But Congress has already provided a way for the BLM to conserve land that does not require further restrictions on multiple use and sustained yields, either through the Agency’s recommendation of land for wilderness designation or the classification of areas of critical environmental concern. The Proposed Rule would go too far by putting conservation on par with other uses, when Congress has always treated conservation differently than the principal or major uses and other productive uses of the public lands.

BLM’s suggestions in the Proposed Rule that such conservation is necessary for the Agency to fulfill the mandate to manage the land according to principles of sustained yield misses the mark. For decades the Agency has, by its own accounting, managed the public lands according to principles of multiple use and sustained yield, with conservation the primary use *only* in areas specifically set aside for that purpose.¹¹⁵ Conservation leases and the expansion of conservation

¹¹² *Supra* Section III.B; 43 U.S.C. 1702(l) (emphasis added).

¹¹³ 88 Fed. Reg. 19,585.

¹¹⁴ 88 Fed. Reg. 19,586 (“[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.” (emphasis added)).

¹¹⁵ See, e.g., *National History*, BLM, <https://www.blm.gov/about/history/timeline> (last visited June 8, 2023) (“In 2021, the BLM is commemorating . . . the 45th anniversary of the principal law defining its mission: the Federal Land Policy and Management Act of 1976. . . . What this means, on a practical level, is that the BLM – except in areas specifically set aside for conservation purposes – must multitask to fulfill its duties.”).

areas eliminate yield, they do not sustain them. A comparison to prior BLM policies or guidance demonstrate that the Proposed Rule would not be consistent with the meaning of sustained yield and multiple uses.¹¹⁶

- E. *Congress has already provided, in another statute, a legal process for conserving public lands in their natural state and has not given BLM the authority to create its own method under FLPMA*

The Wilderness Act of 1964 is the model for how Congress has chosen to provide conservation areas within public lands. Congress' intention for BLM to follow the requirements under the Wilderness Act is evidenced by its reference and incorporation in FLPMA. Under the Wilderness Act, specific public lands were to be designated as "wilderness areas" for the "purposes of recreation, scenic, scientific, educational, conservation, and historical use."¹¹⁷ The Wilderness Act provided a strict timeline for the designation of public lands as wilderness areas and the specific requirements for such lands. The United States Forest Service and the BLM were both directed to identify qualifying areas and make recommendations to Congress. Even though Congress had specifically directed the agencies to make these recommendations, it is telling that Congress reserved the right to make such designations. This is because, time and time again, Congress has shown that it has an interest in ensuring that public lands are available for production and has limited the ability of the executive branch to interfere with that objective.

Even the Wilderness Act, which was designed to ensure certain public lands "retain[ed] its primeval character" and are "managed so as to preserve its natural conditions" had specific carveouts for other uses in the designated and protected areas.¹¹⁸

1. Mineral interests are not abandoned under the Wilderness Act, which provides that nothing shall prevent within these areas "any activity, including prospecting, for the purpose of gathering information about mineral or other resources" provided that the activity is carried out consistent with the preservation of the wilderness environment.¹¹⁹
2. For mining interests, the Wilderness Act started a countdown clock for the time available to locate a mining claim within wilderness areas and requiring the Secretary to permit ingress and egress from these areas "consistent with the use of the land for mineral location and development and exploration, drilling, and production." Valid mining claims made before January 1, 1984 were protected from the non-use designation and were not withdrawn under the Wilderness Act.

¹¹⁶ See, e.g., Statement of Michael Need, BLM Deputy Director of Operations, before the House Committee on Natural Resources Subcommittee on Energy and Mineral Resources (Mar. 12, 2019), <https://www.doi.gov/ocl/blm-policies-and-priorities>.

¹¹⁷ 16 U.S.C. § 1133(b).

¹¹⁸ 16 U.S.C. § 1133(c).

¹¹⁹ 16 U.S.C. § 1133(d)(2).

3. Grazing interests were also protected under the Wilderness Act for any area that had been subject to grazing before September 3, 1964, subject only to “reasonable regulations” by the Secretary.¹²⁰
4. Recreational uses, including commercial services, may also be performed within the designated wilderness areas in order to “realiz[e] the recreational or other wilderness purposes of the areas.”¹²¹

F. *BLM cannot expand the scope of the areas of critical environmental concern (“ACEC”)*

The Proposed Rule “clarifies and expands existing ACEC regulations . . .” and “better leverage[s] this statutory tool for ecosystem resilience.”¹²² As the Proposed Rule explains, one of the principal tools that Congress has created to allow BLM to conserve and preserve public lands is through the designation of ACECs. ACECs are specific areas where special management attention is needed to protect important historical, cultural, and scenic values, fish, or wildlife resource, or other natural systems and processes, or to protect human life and safety from natural hazards.¹²³ The concept of ACECs appears only four times in FLPMA:

1. In the Congressional Declaration of Policy, FLPMA states, “The Congress declares that it is the policy of the United States that . . . regulations and plans for the protection of public land areas of critical environmental concern be promptly developed”¹²⁴
2. In the Definitions, FLPMA states, “The term ‘areas of critical environmental concern’ means areas within the public lands 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.”¹²⁵
3. In the discussion of public land inventories, FLPMA states, “The Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values . . . giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values. The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands.”¹²⁶

¹²⁰ 16 U.S.C. § 1133(d)(4).

¹²¹ 16 U.S.C. § 1133(d)(5).

¹²² 88 Fed. Reg. § 19,586.

¹²³ 43 U.S.C. § 1702(a).

¹²⁴ 43 U.S.C. § 1701(a)(11).

¹²⁵ 43 U.S.C. § 1702(a).

¹²⁶ 43 U.S.C. § 1711(a).

4. In the discussion of land use plans, FLPMA states, “In the development and revision of land use plans,... the Secretary shall give priority to the designation and protection of areas of critical environmental concern”¹²⁷

The designation of ACECs, although a priority of Congress, has a limited role within the scope of FLPMA and the role of BLM. The Proposed Rule seeks to expand the purpose and use of such ACECs to accomplish a goal that is wholly separate from what Congress provided—that is, “protect[ing] intact landscapes through ACEC designation” This is a departure from the purpose of the ACECs, which is plainly stated in the definition—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.

The Proposed Rule ignores this definition and limitation when it proposes to “expand” ACEC regulations to include “intact landscapes.” Such designation for conservation and other purposes is contrary to the scope and purpose of the ACEC, which provides a limited exception from the general rule of productive use of public lands for exceptional areas of concern that are especially vulnerable. Any attempt to use the exception to craft a rule with widespread implications, or otherwise to broaden the exception beyond its boundaries, would be contrary to the purpose and scope of the ACEC provisions of FLPMA.

G. Congress has already created a process for withdrawing land from productive use

The Coalition is concerned that Proposed Rule would create a way for the BLM to effectuate a withdrawal without the administrative process required under FLPMA.¹²⁸ Under FLPMA, a withdrawal is defined as “withholding an area of Federal land from settlement, sale, location, or entry . . . 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”¹²⁹ Under the Proposed Rule, public lands could be removed from other uses for the purposes of restoration and conservation.¹³⁰

1. Under FLPMA, BLM’s authority to withdraw land is clearly defined and limited

Congress’ process to withdraw federal lands is multistep and requires authorization from the Secretary of the Interior or a delegated officer who has been appointed by the President with the advice and consent of the Senate.¹³¹ All withdrawals, except emergency withdrawals, require public notice in the Federal Register and a public hearing.¹³² Certain withdrawals, based on size and duration of the withdrawal, require notices to Congress for approval, including the furnishing of specific information about the proposed withdrawal.¹³³ These statutory requirements put

¹²⁷ 43 U.S.C. § 1712(c)(3).

¹²⁸ 43 U.S.C. § 1714.

¹²⁹ 43 U.S.C. § 1702(j).

¹³⁰ 88 Fed. Reg. § 19,591 (“Once a conservation lease is issued, § 6102.4(a)(4) would preclude the BLM, subject to valid existing rights and applicable law, from authorizing other uses of the leased lands that are inconsistent with the authorized conservation use.”).

¹³¹ 43 U.S.C. § 1714(a).

¹³² 43 U.S.C. § 1714(b); 43 U.S.C. § 1714(h).

¹³³ 43 U.S.C. § 1714(c).

limitations on the powers of the BLM to withdraw public lands from the productive use that Congress has intended. The requirements also necessitate that BLM include Congress in the process when decisions about public lands, and especially the restriction of the use of public lands, are made for large areas or that will affect public lands for long periods of time. Requiring the Secretary of the Interior or other appointed delegates to authorize the withdrawal also separates the bureaucrat from the power to restrict by putting such decisions closer to the electorate.

2. The Proposed Rule would circumvent the statutory withdrawal process

In the context of the Proposed Rule, conservation leases, and management of public lands for ecosystem resilience, the Coalition is concerned that BLM would be creating powers for itself that Congress has already intentionally limited or else altogether has not delegated. The Proposed Rule appears to create effective withdrawals of public lands from public and productive use in the name of “conservation,” “restoration,” and “intactness.” These concepts are not included in FLPMA which has only limited references to conservation within designated conservation system units and designated conservation areas. Outside of the designated conservation areas, conservation is based on specific, narrow restoration objectives. The Proposed Rule would also presume 10-year timeframes for such conservation activities, with potentially longer, ill-defined and nebulous periods to meet the needs of the project. Extensions and renewals would also be available, resulting in the potential for indefinite periods of time that public access and productive use would be prohibited on those public lands without any clearly defined limiting principle.¹³⁴ This indefinite nature is particularly true for conservation leases used for mitigation purposes. The Proposed Rule, in many ways, would amount to discretionary withdrawals by the Agency, a power that Congress specifically chose not to delegate. Although BLM states that this Proposed Rule would not lead to withdrawals, the Coalition is concerned that presently there is no safeguard, and no limiting mechanism to prevent this result.

3. The Proposed Rule as currently drafted disavows Congress’ intent

The BLM does not explain how the conservation leases would affect the other uses, especially the principal or major uses, and whether the conservation leases would bar access to those lands indefinitely. The Proposed Rule states that “[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.”¹³⁵ The scheme is set up so that an increasing portion of public land would become “intact” through conservation leasing and policies. And once “intact” these lands would no longer be available for statutorily authorized uses under FLPMA.

Furthermore, given BLM’s historic policies and agency actions towards commercial use on public land, the Coalition is concerned that this Proposed Rule would become a one way ratchet that would remove significant portions of public land from productive use in the name of conservation. These concerns are echoed by members of Congress, who have witnessed similar attempts by the BLM to redefine its own purpose and limit the productive use of public lands. The

¹³⁴ 88 Fed. Reg. 19,588 (“Some public lands could be temporarily closed to public access for purposes authorized by conservation leases”); 88 Fed. Reg. 19,591 (“the purposes of a lease may require that limitations to public access be put in place in a given instance . . .”).

¹³⁵ 88 Fed. Reg. at 19,600 (to be codified at 43 C.F.R. § 6102.4(a)(3)(ii)).

concern is captured in the words of Utah Senator Mike Lee, whose state is more than half federal lands:

Take the Grand Staircase-Escalante National Monument, designated by President Clinton in 1996. The Clinton administration designated 1.7 million acres of land – or about 67% of Kane county [Utah] – for the monument, all the while claiming that grazing would remain at “historical” levels. But this promise was not kept. Since then, the BLM has revoked permits and closed much-needed rangeland. Today, grazing is down almost one-third from what it had been twenty years ago. Ranchers were hit hard. Many lost their ability to fence in water resources and maintain roads around them. In some cases, they could no longer bring water to their cattle, and many families were forced to reduce their herds, sometimes by half.¹³⁶

The Coalition is therefore concerned that BLM would manage these conservation leases in a way that continues to shrink the use of public lands for productive uses. As such, the Proposed Rule would violate FLPMA.

H. *In enacting FLPMA, Congress unmistakably decided not to include provisions to protect or create conservation uses.*

Conservation, its benefits, and other environmental concerns were not foreign to Congress when it passed FLPMA in 1976. Twelve years prior, Congress passed the Wilderness Protection Act of 1964.¹³⁷ Six years prior to FLPMA, Congress passed the National Environmental Policy Act (“NEPA”).¹³⁸ In fact, FLPMA came about at the height of the environmental movement in the United States.¹³⁹

Instead of giving BLM wide discretion to conserve or preserve public lands in their natural state, as already discussed, FLPMA directs the BLM to focus on the principles of multiple use and sustained yield. In fact, the *few* circumstances in which Congress directs the BLM to preserve or conserve land are closely limited. Consider, for example, the process for “withholding an area of federal land from settlement, sale, location, or entry... for the purpose of limiting activities... in order to maintain other public values.”¹⁴⁰ Although this sounds similar to the concept of a conservation lease under the Proposed Rule, Congress anticipated such an action in FLPMA and designated it a “withdrawal.”¹⁴¹ New mining claims cannot be located within withdrawn areas, and other productive uses are similarly limited or prohibited. However, the mandated process of

¹³⁶ Senator Mike Lee, Address to Congress on the 116th Public Lands Package (Feb. 11, 2019) (transcript available at <https://www.lee.senate.gov/2019/2/116th-public-lands-package>); see also John Hollenhorst, *BLM, Ranchers at Odds Over Cattle Grazing in Escalante National Monument*, KSL (Apr. 29, 2015 9:09 PM), <https://www.ksl.com/article/34374555/blm-ranchers-at-odds-over-cattle-grazing-in-escalante-national-monument>.

¹³⁷ Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified at 16 U.S.C. §§ 1131–36).

¹³⁸ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321–47).

¹³⁹ E.g., Marion Clawson, *Federal Land Policy and Management Act of 1976 in a Broad Historical Perspective*, 21 ARIZ. L. REV. 585, 595 (1979).

¹⁴⁰ 43 U.S.C. § 1702(j).

¹⁴¹ 43 U.S.C. § 1702(j).

withdrawing public lands sets up a system of checks and balances that limits the powers of the BLM and provides numerous opportunities for stakeholders, including Congress, to prevent or override an agency decision. For example, authorization to withdraw land must be made by the Secretary of the Interior or by individuals “who have been appointed by the President, by and with the advice and consent of the Senate.”¹⁴²

The process Congress created to restrict or “withdraw” public lands from productive use promotes accountability for all such decisions and was an intentional component of FLPMA. Requiring the decision to be made by an officer who has been confirmed by the Senate¹⁴³ speaks to Congress’ desire to maintain control of the process. Similarly, requiring withdrawals to comply with traditional administrative procedures, including publication in the Federal Register,¹⁴⁴ exposes these decisions to public scrutiny.¹⁴⁵ FLPMA also has specific notice requirements for withdrawals, requiring the Secretary to give notice to Congress under certain circumstances¹⁴⁶ and prohibiting the Secretary from making any withdrawals “which can be made only by Act of Congress.”¹⁴⁷ Congress thus concretely limited BLM’s power to restrict the productive use of public lands.

1. *Congress has always been careful with the powers it has given to the executive branch to reserve federal lands for non-productive uses.*

From time to time, Congress has delegated powers to the executive branch for the conservation of public lands, completely reserving the lands for non-productive uses. However, the use of public lands is obviously an important priority for Congress, because it consistently imposes specific limitations on the exercise of this power and often reserves outright for itself the ability to designate a conservation area, as demonstrated in this partial list of statutory authorities. This list of statutory directives on the handling of particular resources on public lands demonstrates that Congress did not intend for BLM to craft its own, separate method for specially designating lands for conservation, and demonstrates why the Coalition is concerned that the Proposed Rule is outside the scope of BLM’s statutory authority:

- a. *The Antiquities Act:* Congress gave the President the authority to proclaim certain historic landmarks, structures, or objects of historic or scientific importance as “national monuments.”¹⁴⁸ Any land reserved under the Act must be limited to the smallest area compatible with the care and management of the objects to be protected.¹⁴⁹ Congress retains the right to modify and abolish monuments, which it

¹⁴² 43 U.S.C. § 1714(a).

¹⁴³ U.S. CONST. art. II, § 2.

¹⁴⁴ 43 U.S.C. § 1714(b)(1).

¹⁴⁵ Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 602–03 (2018) (noting that public participation prompted by notice-and-comment rulemaking “serves to discipline the agency and act as a quality control mechanism”).

¹⁴⁶ 43 U.S.C. § 1714(c).

¹⁴⁷ 43 U.S.C. § 1714(j).

¹⁴⁸ 54 U.S.C. § 320301. An act of Congress is required for monument declarations in Wyoming or for those over 5,000 acres in Alaska. 43 U.S.C. § 1714(j); 16 U.S.C. § 3213.

¹⁴⁹ 54 U.S.C. § 320301(b).

has done on many occasions.¹⁵⁰ The president’s powers under the Antiquities Act, and how to limit or abolish those powers, have also been the topic of recent congressional debate.¹⁵¹

- b. *The Wilderness Act*: Congress directed various agencies to inventory its land holdings and recommend specific areas that meet the qualifications to be protected as wilderness areas.¹⁵² These areas would be protected from development and certain other human activities. Wilderness areas must ultimately be designated by an act of Congress.¹⁵³
- c. *Section 2002 of the Omnibus Public Land Management Act of 2009*: Section 2002 of the Omnibus Public Land Management Act of 2009 created the National Landscape Conservation System, which was designed to conserve, protect, and restore nationally significant landscapes with outstanding cultural ecological, and scientific values.¹⁵⁴ Areas included in the system are specifically defined by Congress.
- d. *Wild and Scenic Rivers Act*: Congress directed various agencies to study and recommend rivers for designation as wild, scenic, or recreational rivers.¹⁵⁵ Designated rivers are protected from development that would adversely affect the river or its wildlife.¹⁵⁶ Congress retains the authority to both authorize a river to be studied and to designate a river as wild, scenic, or recreational.¹⁵⁷
- e. *National Trail Systems Act*: Congress delegated the ability to designate trails close to urban areas as “national recreational trails.” The designation reserves the land for recreational use.¹⁵⁸ Congress requires that the agencies have the consent of the agency, State, or political subdivision having jurisdiction over the land involved, limiting the agency authority.¹⁵⁹ Under the same Act, Congress delegated the ability to designate side trails within a federal recreation area as additions to existing national scenic trails.¹⁶⁰ However, Congress retained for itself the ability to designate the national scenic trails. National scenic trails are protected for outdoor recreation.¹⁶¹

¹⁵⁰ CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 4 (2023), <https://crsreports.congress.gov/product/pdf/R/R41330/43>.

¹⁵¹ *Id.* at 13–14.

¹⁵² 16 U.S.C. §§ 1131, 1136.

¹⁵³ *Id.* §§ 1131(a), 1132.

¹⁵⁴ 16 U.S.C. § 7202.

¹⁵⁵ 16 U.S.C. §§ 1273(b), 1275(a).

¹⁵⁶ 36 C.F.R. § 297.4–5 (1984).

¹⁵⁷ *Id.* §§ 1273(a), 1275(a).

¹⁵⁸ 16 U.S.C. §§ 1242 (a)(1), 1243(a).

¹⁵⁹ *Id.* § 1243(a).

¹⁶⁰ *Id.* § 1245.

¹⁶¹ *Id.* §§ 1242(a)(2), 1244(a).

- f. *Wildlife Disaster and Recovery Act*: Under FLPMA and the Wildlife Disaster and Recovery Act, Congress delegated the ability to establish research natural areas.¹⁶² Research natural areas must have representations of typical, unusual, threatened, or endangered plants and animals or typical or outstanding geological features and must be managed as to remain in “virgin or unmodified conditions with no occupancy or permanent improvements.”¹⁶³ Research natural areas are designated through the same process as ACECs, and thus designation decisions are subject to FLPMA’s periodic review provisions.¹⁶⁴
- g. *Federal Cave Resources Protection Act*: Congress delegated the power to designate certain caves with plant or animal habitat, cultural, geological, mineralogical, paleontological, hydrological, recreational, educational, or scientific value as significant caves.¹⁶⁵ Significant caves are managed to “secure, protect, and preserve” the cave for perpetual enjoyment, and alteration, destruction, disturbance, and harm is prohibited.¹⁶⁶ However, Congress specified that designation does not affect mining or mineral leases and rights, and the Act narrowly defines the public lands at issue.¹⁶⁷
- h. *National Park Service Act*: Congress delegated the responsibility to monitor areas with nationally significant natural, cultural, or historic resources for potential protection as national parks. The delegation of authority includes the right to make yearly recommendations to Congress;¹⁶⁸ however, Congress retains the authority to designate national parks and to authorize the study of any potential designations.¹⁶⁹
- i. *Historic Sites Act*: Congress delegated the power to designate national natural landmarks, which may be used in land management planning decisions.¹⁷⁰ The Act narrowly defines the public lands at issue and clearly states that a designation is not a withdrawal, does not dictate activity, and does not require any further land use action or decision.¹⁷¹
- j. *Endangered Species Act*: Congress delegated the ability to designate specific areas essential to the conservation of that species as critical habitat, concurrent with the determination that a species is endangered or threatened.¹⁷² All agencies must ensure that any actions authorized, funded, or carried out in critical habitat is “not likely to result in the destruction or adverse modification” of a listed species’ critical habitat.¹⁷³ Congress further delegated to the agencies the power to purchase

¹⁶² 16 U.S.C. § 551; 43 U.S.C. § 1711; Land Uses, 36 C.F.R. § 251.23; 43 C.F.R. § 8223.0–6.

¹⁶³ 36 C.F.R. § 251.23; 43 C.F.R. § 8223.0–5.

¹⁶⁴ BLM, H-1601-1, LAND USE PLANNING HANDBOOK app. C at 28 (2005); 43 U.S.C. § 1712.

¹⁶⁵ 36 C.F.R. § 290.3.

¹⁶⁶ 16 U.S.C. §§ 4301(b), 4306(a).

¹⁶⁷ *Id.* § 4308(d).

¹⁶⁸ 54 U.S.C. § 1005047(a), (b)(1).

¹⁶⁹ *Id.* § 100507(b)(4).

¹⁷⁰ 16 U.S.C. § 641; 36 C.F.R. § 62.2–4.

¹⁷¹ 36 C.F.R. § 62.3.

¹⁷² 16 U.S.C. § 1533(a)(3), (b)(2).

¹⁷³ 50 C.F.R. § 17.94(a).

lands or waters for the purpose of conserving listed species.¹⁷⁴ However, designation of land is contingent on a listing, which significantly limits the scope of delegated power. Congress permits the agencies to modify critical habitat “from time-to-time” as appropriate, and restricts agencies from designating any Department of Defense lands as critical habitat.¹⁷⁵

- k. *Fish and Wildlife Coordination Act*: Congress delegated to the agency the power to manage national fish hatcheries as mitigation measures for water resource development projects, with the fundamental purpose of propagating and distributing fish species and protecting all species of wildlife.¹⁷⁶ However, Congress reserves for itself the right to designate individual fish hatcheries.¹⁷⁷ Fishing and attempted or actual hunting, killing, capturing, or taking is generally prohibited in national fish hatcheries.¹⁷⁸

Other laws that demonstrate Congress’ intent to manage the exclusive use of public lands for conservation—at the exclusion of the productive principal or major uses set forth in FLPMA—include the Great American Outdoors Act;¹⁷⁹ the Bipartisan Infrastructure Law;¹⁸⁰ the National Historic Preservation Act;¹⁸¹ the National Wildlife Refuge System Administration Act;¹⁸² and the National Forest Management Act.¹⁸³ Throughout all the decades of congressional action with respect to environmental and conservation laws, no act of Congress has given BLM the type of conservation power that it now claims for itself.

2. *Congress does act with respect to its conservation objectives*

Congress also has not been shy about designating conservation areas. In the Omnibus Public Land Management Act of 2009,¹⁸⁴ Congress designated millions of acres of federal land as wilderness and also established the National Landscape Conservation System, which includes various national monuments, national conservation areas, BLM wilderness areas, wilderness study areas, historical trails, national scenic trails, and other outstanding lands designated for conservation.¹⁸⁵ Separately under the Act, Congress designated thousands of new miles to the National Wild and Scenic Rivers System as well as additional trails to the National Trails System.¹⁸⁶

¹⁷⁴ 16 U.S.C. § 1534(a).

¹⁷⁵ *Id.* § 1533(a)(3)(B).

¹⁷⁶ 16 U.S.C. § 663; 50 C.F.R. § 70.1.

¹⁷⁷ *See, e.g.*, 16 U.S.C. § 757a (establishing the Anadromous, Great Lakes, and Lake Champlain fish hatcheries); 43 U.S.C. § 620g (establishing the Hotchkiss National Fish Hatchery); 16 U.S.C. § 760 (establishing the Wolf Creek National Fish Hatchery).

¹⁷⁸ 50 C.F.R. § 70.4.

¹⁷⁹ Pub. L. No. 116-152 (2020).

¹⁸⁰ Pub. L. No. 117-58 (2021).

¹⁸¹ Pub. L. No. 89-665 (1966).

¹⁸² Pub. L. No. 89-669 (1966).

¹⁸³ Pub. L. No. 94-588 (1976).

¹⁸⁴ 16 U.S.C. 7202.

¹⁸⁵ *E.g.*, Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, tits. I–II, 123 Stat. 991, 999–1126.

¹⁸⁶ *Id.* tit. V, 123 Stat. at 1147–65.

Thus, it is not only outside of BLM’s delegated powers to designate areas for conservation or to lease and permit conservation areas, but Congress has demonstrated a desire and a willingness to handle the issue of public land conservation designations on its own without agency interference.

Congress has also demonstrated an interest in supporting the limited conservation powers that it *has* delegated, for example by providing funding for landscape restoration efforts.¹⁸⁷ As recently as 2022, Congress promoted conservation on public lands by providing funds to BLM to engage in restoration projects through the IRA.¹⁸⁸ Congress chose to do this instead of amending FLPMA or any other statute governing the use of public lands for productive use. BLM has also engaged in conservation efforts using these funds, without requiring the Proposed Rule to accomplish such efforts.¹⁸⁹ Thus, the statutory scheme created by Congress is sufficient and the Proposed Rule goes beyond Congress’ intent.

IV. BLM has misread the statutory text of FLPMA by functionally defining “non-use” as a “use.”

The Coalition is concerned that the Proposed Rule, at its core, is not about sustained yield and multiple use. Instead, it is about leaving the land in its natural state. In the Proposed Rule, BLM makes clear that it intends to preserve intact landscapes in their native form.¹⁹⁰ An “intact landscape” is defined as “an unfragmented ecosystem that is free of local conditions that could permanently or significantly disrupt, impair, or degrade the landscape’s structure or ecosystem resilience, and that is large enough to maintain native biological diversity, including viable populations of wide-ranging species.”¹⁹¹ This definition suggests that BLM intends to conserve lands that are already in their undisturbed native form. And as they are largely undisturbed, conservation would primarily consist of leaving the land alone, not actively managing it. The Coalition acknowledges that this situation is different than if the conservation is an active use, with requirements to make active improvements to promote the land’s resiliency, including active monitoring of that land by both the lessee/permittee and by the BLM. However, the end goal of the Proposed Rule is for the land subject to the leases to become intact and therefore no longer eligible for “use.” Furthermore, the Proposed Rule contains no mechanism requiring active conservation under this Proposed Rule. As a result, this Proposed Rule would actively promote inactive conservation even through its purported uses. In other words, the end goal is non-use. That end goal runs contrary to the congressional mandate in FLPMA.

Notably, “the proposed rule uses the term ‘conservation’ in a broader sense 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.”¹⁹² But using this broad sense of

¹⁸⁷ Scott Streater, *BLM touts ‘once-in-a-generation’ landscape restoration funding*, E&E (May 31, 2023, 4:27 PM), <https://subscriber.politicopro.com/article/eenews/2023/05/31/blm-touts-once-in-a-generation-landscape-restoration-funding-00099500>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ 88 Fed. Reg. 19,599 (to be codified at 43 C.F.R. § 6102.1).

¹⁹¹ 88 Fed. Reg. 19,598 (to be codified at 43 C.F.R. § 6101.4).

¹⁹² 88 Fed. Reg. 19,585.

conservation through *all* BLM lands and programs cannot be squared with FLPMA and BLM's other statutory directives.

As already discussed, FLPMA requires that the land be planned according to principles of multiple use and sustained yield.¹⁹³ It is a fundamental notion that a word in a legal text is not meant to convey the opposite meaning.¹⁹⁴ This basic idea that a word in a statute should be given its plain meaning has long been the accepted practice.¹⁹⁵ Here, Congress has not defined the term “use.” The Supreme Court has explained that when a statute does not define a term, it will “look first to the word’s ordinary meaning.”¹⁹⁶ When looking at the dictionary definitions of the word “use,” they denote action and utilization. For example, *Webster’s Ninth New Collegiate Dictionary* defines “use” as “to put into action or service, avail oneself of, employ” and “to expend or consume by putting to use.”¹⁹⁷ The *Compact Oxford English Dictionary* defines “use” as “[t]he act of employing a thing for any (esp. a profitable) purpose; the fact, state, or condition of being so employed; utilization or employment for or with some aim or purpose, application, or conversion to some (esp. good or useful) end.”¹⁹⁸ Of the approximately 5 pages devoted to the term “use,” the *Compact Oxford English Dictionary* never indicates term “use” to support a meaning of “non-use.”

Furthermore, as explained above, when reviewing the language around the term “multiple-use,” it becomes clear that “use” did not include leaving land in its natural state. Although BLM states that “use” includes “the use of land for conservation,” the practical reality is that conservation here means “non-use,” which is at odds with the ordinary meaning of the word “use” as employed by Congress and the average person. BLM’s textual interpretation is especially problematic given the Supreme Court’s rules regarding congressional construction of statutes.

Furthermore, land that is not put to “use” under FLPMA is necessarily conserved. A significant portion of BLM land is not impacted by production—even land that is leased or put to a productive use does not lose all of its conservation qualities. Accordingly, conservation as this Proposed Rule imagines it is already the *de facto* status for much of the federal land and an additional conservation “use” is not needed. Thus, with its bonding requirements, grazing conditions, and other assorted use requirements, BLM already has been engaging in conservation of lands, and a new conservation program as set forth in the Proposed Rule is unnecessary.

¹⁹³ 43 U.S.C. § 1701(a)(7).

¹⁹⁴ “[L]egal texts are supposed to be straightforward expressions of denotation and not the place for literary devices that make words mean what they do not say.” ANTONIN SCALIA AND BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 25 (2012).

¹⁹⁵ *E.g.*, *Lynch v. Alworth–Stephens Co.*, 267 U.S. 364, 370 (1925) (“[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.”) (cleaned up).

¹⁹⁶ *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 407 (2011) (citing *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose”) (internal quotation marks omitted) and *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary meaning.”)).

¹⁹⁷ *Use*, WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1983).

¹⁹⁸ *Use*, THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 3573 (1987).

- A. *The Tenth Circuit has already explicitly struck down proposed conservation leases that relied on FLPMA as its statutory justification in Public Lands Council v. Babbitt.*¹⁹⁹

This is not the first time BLM has attempted to promote conservation over other uses. In 1995, the BLM promulgated regulations allowing for the issuance of permits for conservation use (the “1995 Rule”).²⁰⁰ The Tenth Circuit struck down the conservation permit portion of the 1995 Rule. After reviewing the specific question of whether a grazing permit could encompass conservation use, the Tenth Circuit stated that “[n]one of these statutes [including FLPMA] authorizes permits intended exclusively for ‘conservation use.’”²⁰¹ Similar to what the Coalition has pointed out in this letter, the Tenth Circuit acknowledged the Department of the Interior and BLM have “very broad authority to manage the public lands, including the authority to ensure that range resources are preserved.”²⁰² However, in very firm language, the Tenth Circuit ruled that “[p]ermissible ends such as conservation, however, *do not justify unauthorized means.*”²⁰³

The similarities between the 1995 Rule and the Proposed Rule are striking and the Coalition therefore recommends that BLM address the tensions between the Tenth Circuit’s decision and the Proposed Rule. For example, both the conservation permits and the conservation leases were designed to exclude other activities from the land in order to protect the land and its resources, improve the conditions of the land, and enhance resource values.²⁰⁴ Both conservation permits and conservation leases were designed to be used for a period of up to 10 years.²⁰⁵ Both the 1995 Rule and the Proposed Rule assert that FLPMA gives BLM the authority to issue the conservation mechanisms, although the 1995 Rule also claimed authority from the TGA and the Public Rangelands Improvement Act.²⁰⁶ The conservation leases and permits have slight semantic and procedural differences. One is termed a lease, the other is styled a permit. The conservation leases are presented as a use under FLPMA’s regime, while the conservation permits under the 1995 Rule were a subset of a grazing permit.²⁰⁷ However, these rules are functionally the same — a mechanism that reserves land for conservation for extended periods of time. Indeed, it would be almost impossible to find a closer fit between the conservation schemes proposed in the 1995 Rule and the Proposed Rule.

Given the similarities between the conservation leases and conservation permits, the Coalition has concerns that the Proposed Rule would likewise violate the plain text of FLPMA.

- B. *Even assuming conservation is a valid use under FLPMA, the Proposed Rule would unduly elevate conservation over other congressionally supported uses and create a one-way ratchet towards conservation above any other use.*

¹⁹⁹ 167 F.3d 1287, 1308 (10th Cir. 1999); *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 747 (2000).

²⁰⁰ *Public Lands Council*, 167 F.3d at 1289.

²⁰¹ *Id.* at 1308.

²⁰² *Id.*

²⁰³ *Id.* (emphasis added).

²⁰⁴ *Id.* at 1292; 88 Fed. Reg. 19,591 (conservation leases are issued “for the purpose of pursuing ecosystem resilience through mitigation and restoration.”).

²⁰⁵ *Public Lands Council*, 167 F.3d at 1292; 88 Fed. Reg. 19,591.

²⁰⁶ *Public Lands Council*, 167 F.3d at 1307; 88 Fed. Reg. 19,583.

²⁰⁷ *Public Lands Council*, 167 F.3d at 1307.

The Proposed Rule would prejudice future decision making in favor of conservation to the detriment of other uses that have already been designated by Congress for public lands. First, Proposed Rule § 6102.1 instructs authorized officers to “prioritize actions that conserve and protect intact landscapes.”²⁰⁸ This language would elevate conservation *above* other uses through such prioritization and would therefore be contrary to FLPMA and BLM’s other statutory mandates.

In addition, Proposed Rule § 6102.1 states that BLM “must manage certain landscapes to protect their intactness,” which “requires” “[m]anaging lands strategically for compatible uses while conserving intact landscapes, especially where development or fragmentation is likely to occur that will permanently impair ecosystem resilience on public lands.”²⁰⁹ In the preamble, BLM states that:

Permanent impairment of ecosystem resilience would be difficult or impossible to avoid, for example, on lands on which the BLM has authorized intensive uses, including infrastructure and energy projects or mining, or where BLM has limited discretion to condition or deny the use.²¹⁰

This language is concerning as it indicates that, with time, BLM would use this Proposed Rule to remove greater and greater areas of public land from the energy and mining projects and uses that Congress has specifically provided for. The Proposed Rule notes that “in determining which actions are required to achieve the land health standards and guidelines, the BLM must take into account current land uses, such as mining, energy production and transmission, and transportation, as well as other applicable law.”²¹¹ But without greater clarity about how BLM would consider its other statutory directives, this statement does not ensure that those uses for which Congress has shown a preference would be recognized and protected.

As currently drafted, the Proposed Rule also would require the authorized officer to consider a “precautionary approach for resource use when the impact on ecosystem resilience is unknown or cannot be quantified and provide justification for decisions that may impair ecosystem resilience. In other words, the Proposed Rule does not prohibit land uses that impair ecosystem resilience; it simply requires avoidance and an explanation if such impairment cannot be avoided.”²¹² But for many forms of resource development, such impairment may not be avoidable and the full impacts of those activities would not be known at the early phases of land use planning.

In addition, Proposed Rule § 6103.1–2(e) states that “[u]pon determining that existing management practices or levels of use on public lands are significant factors in the nonachievement of the standards and guidelines, authorized officers *must* take appropriate action as soon as practicable.”²¹³ And “[r]elevant practices and activities may include but are not limited to the establishment of terms and conditions for permits, leases, and other use authorizations and land enhancement activities.”²¹⁴ In order to ensure that it complies with its other statutory requirements,

²⁰⁸ 88 Fed. Reg. at 19,599 (to be codified at 43 C.F.R. § 6102.1).

²⁰⁹ 88 Fed. Reg. at 19,599 (to be codified at 43 C.F.R. § 6102.1).

²¹⁰ 88 Fed. Reg. at 19,592 (emphasis added).

²¹¹ 88 Fed. Reg. at 19,586.

²¹² 88 Fed. Reg. at 19,592.

²¹³ 88 Fed. Reg. at 19,604 (to be codified at 43 C.F.R. § 6103.1–2(e)(1)) (emphasis added).

²¹⁴ 88 Fed. Reg. at 19,604 (to be codified at 43 C.F.R. § 6103.1–2(e)(3)).

BLM must ensure that this provision does not override its obligations to continue to allow for the development of natural resources on public lands.

V. Despite changing its longstanding interpretation of FLPMA and implementing policies, BLM has not “displayed awareness that it is changing position” or providing “good reasons for the new policy.”²¹⁵

BLM openly acknowledges that it is changing its position on the interpretation of FLPMA; however, BLM has not provided sufficient reasons for the new policy. First, BLM has not given any substantive reason for the proposed changes other than vague statements about the importance of conservation and a reference to climate change. Conservation has been viewed as important for over a hundred years,²¹⁶ but BLM does not provide any reason as to why conservation has taken on a heightened importance such that the suddenly new interpretation of an almost 50 year old statute is necessary. BLM’s current reference to climate change is also inadequate, as the Supreme Court has recently instructed that federal agencies cannot use climate change as a reason to overstep their statutory mandates.²¹⁷

Second, BLM has not provided a textual argument as to why its original understanding of FLPMA was inadequate and its new textual position is in better harmony with FLPMA. In other words, BLM has not provided a reason why conservation should have originally been a use on par with the other uses listed in FLPMA. As agencies are bound by law to follow their organic statutes, it would be unreasonable for BLM to not provide a textual explanation for why it now believes that its original interpretation (i.e., holding that conservation is not on par with other uses) is incorrect. Furthermore, BLM has not adequately explain how this new “use” would provide any *productive* benefit from the “use” of federal lands, as it is directed to do under FLPMA.

To the extent BLM does make a textual argument supporting its revised interpretation, its current textual argument is both deficient and incorrect and must therefore be revised. The BLM relies on a few isolated provisions of FLPMA to support its interpretation of responsibilities in Section III, E of the Proposed Rule. For example, BLM cites to the “Congressional declaration of policy”²¹⁸ and explains that “FLPMA further establishes the policy of the United States that public lands be managed in a manner that recognizes the nation’s need for natural resources from those lands, provides for outdoor recreation and other human uses, maintains habitat for fish and wildlife, preserves certain public lands in their natural condition, and protects the quality of the scientific, scenic, historical, ecological, environmental, water-resource, and archaeological values of the nation’s lands.”²¹⁹ However, the Proposed Rule’s singular focus on conservation and preserving land in its natural state neglects the context in which Congress directed the BLM to factor conservation into its management of the lands. FLPMA is overwhelmingly focused on the concept

²¹⁵ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

²¹⁶ For example, President Theodore Roosevelt was a noted champion of conservation and inspired several significant changes during his presidency in the early 1900s to promote conservationism, such as establishing 150 national forests, 51 federal bird reserves, four national game preserves, five national parks, and 18 national monuments. *The Conservation Legacy of Theodore Roosevelt*, U.S. DEP’T OF INTERIOR (Feb. 14, 2020), <https://www.doi.gov/blog/conservation-legacy-theodore-roosevelt>.

²¹⁷ *West Virginia*, 142 S. Ct. at 2610.

²¹⁸ 43 U.S.C. § 1701.

²¹⁹ 88 Fed. Reg. at 19,587.

of production from the land. Informed by the concepts of multiple use and sustained yields, conservation concepts are necessary to ensure that the public lands continue to produce.

Such conservation is not permitted under FLPMA at the expense of productive uses. For example, even the protection of habitat for wildlife and fishes was originally animated by the availability of hunting and fishing stock for the public.²²⁰ References to preservation of land in its natural state, are also limited to “certain” lands that have specific values and it cannot be said that FLPMA provides for the preservation of *any* BLM land in a natural, untouched state. As already discussed, such widespread removal of public lands from production would be tantamount to a withdrawal. BLM cannot subtly withdraw lands under a different process,²²¹ relabel it as a conservation lease, and avoid the statutory requirements for making such a withdrawal.

BLM also writes that conservation “is a shorthand for the direction in FLPMA’s multiple-use and sustained-[yield] mandates to manage public lands for resilience and future productivity.” It goes on to say that, based on BLM’s own definition of conservation, it “is part of the BLM’s mission not only on lands within the [National Landscape Conservation System (“NCLS”)], but on all lands subject to FLPMA’s multiple-use and sustained-yield mandates.”²²² BLM’s current discussion of this issue ignores the fact that Congress designated specific lands for the NCLS and rejected the concept of applying the same strictures to all public lands or even all BLM lands. Managing non-NLCS lands consistent with NLCS lands would create a redundancy in the designations and was (and is) obviously not what Congress intended. BLM also fails to recognize its own history of managing public lands for sustained yield and multiple use for more than 75 years before the Proposed Rule. If BLM were to now take the position that the Proposed Rule is necessary in order to fulfill its statutory purpose would ignore every prior position of the Agency.

BLM also relies on FLPMA’s authorization to promulgate implementing regulations necessary “to carry out the purposes” of the Act.²²³ The Coalition respectfully disagrees; this is outside the purposes of the Act given that the Act:

1. Requires public lands to be managed in a manner which recognizes the Nation’s need for domestic sources of minerals, food, timber, and fiber from the public lands;
2. Shows explicit deference for the Mining Act;

²²⁰ 43 U.S.C. 1732(b) (rejecting any presumption that FLPMA allows for the regulation, by permit, of hunting and fishing on public lands by the Department of the Interior); *see also* S. REP. No. 91-1256, 91st Cong., 2d Sess. 2 (1970) (identifying public access to “hunting, fishing, and other recreation opportunities” as an objective of Senate Bill 3389, an unsuccessful precursor bill to FLPMA).

²²¹ For example, under the Proposed Rule, BLM suggests that some productive uses *may* continue to be permitted within a conservation lease. The Agency cannot use ambiguity to avoid scrutiny. *E.g.*, 88 Fed. Reg. 19,586 (“[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.”); 88 Fed. Reg. 19,591 (“Once a conservation lease is issued, § 6102.4(a)(4) *would preclude* the BLM, subject to valid existing rights and applicable law, from authorizing *other uses* of the leased lands that are inconsistent with the authorized conservation use. Section 6102.4(a)(5) clarifies that the rule itself should not be interpreted to exclude public access to leased lands for casual use of such lands, although the purposes of a lease *may* require that limitations to public access be put in place in a given instance” (emphasis added)).

²²² 88 Fed. Reg. 19,587; *see also Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider.”).

²²³ 43 U.S.C. § 1740.

3. Requires consideration of local and state demand and interest for the use of public lands;
4. Defines specific carve outs for areas that should be protected from physical development as “areas of critical environmental concern,” which designation requires specific administrative requirements (including the involvement of Congress);
5. Defines a process for land “withdrawal,” which includes withholding an area from settlement, entry, location, sale for the purpose of limiting activities... in order to maintain other public values; and
6. Defines “principal or major uses” as “limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.”

In short, BLM relies on the broad policy section, the implementing regulations section, and pulling two phrases from the definition of multiple-use to determine that conservation needed to be elevated to a use on par with all other uses. This is inadequate to support the tremendous transformation that BLM attempts with its Proposed Rule, especially considering there was no adequate reason provided that conservation is overwhelmingly more important now than it was in the past. Accordingly, if these shortcomings in the discussion are not remedies, Proposed Rule, if finalized, would be arbitrary and capricious in violation of the APA.

VI. The Proposed Rule violates the Regulatory Flexibility Act (“RFA”) and Executive Order 13211.

Agencies are required, when publishing a notice of proposed rulemaking, to “prepare and make available for public comment an initial regulatory flexibility analysis.”²²⁴ This analysis is focused on the “impact of the proposed rule on small entities.”²²⁵ As BLM acknowledged, “Congress enacted the RFA to ensure that government regulations do not unnecessarily or disproportionately burden small entities. Small entities include small businesses, small governmental jurisdictions, and small not-for-profit enterprises.”²²⁶

The initial regulatory flexibility analysis is required by law to include, *inter alia*, “a description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply.”²²⁷ BLM never estimated how many small entities would be affected by the Proposed Rule. The Proposed Rule also does not list any specific industries by NAICS number that would be affected, a helpful guide in determining the number of entities that would be affected. Instead of providing a reason why it is not feasible to estimate the number of affected small entities, the BLM concludes, based on an insufficient Economic Analysis which states that future costs are “unknowable,”²²⁸ that the impact would be small, and thus a calculation of the affected entities is

²²⁴ 5 U.S.C. § 603(a).

²²⁵ *Id.*

²²⁶ 88 Fed. Reg. 19,594.

²²⁷ 5 U.S.C. § 603(b)(3).

²²⁸ Economic Analysis, *supra* note 270 at 3.

unnecessary.²²⁹ BLM cannot conclude the impact is small when BLM failed to calculate the amount of people who would be impacted. This runs afoul of the RFA, which requires a lack of feasibility as the reason to not calculate the class size. BLM never cites a lack of feasibility, glossing over this important requirement.

What's more, BLM's analysis on the impact on small entities is deficient. Relying on the flawed Economic Analysis, as discussed above, BLM concludes that, although some small entities may be affected, "the magnitude of the impact on any individual or group, including small entities, is expected to be negligible."²³⁰ It is unreasonable to assume that the effects of the Proposed Rule on small entities would be negligible when one considers that BLM never provided any numbers estimating the monetary impact of the Proposed Rule. Furthermore, even a small impact becomes a substantial one when it affects enough businesses, and there is no indication by BLM of how many entities would be affected.

The initial regulatory flexibility analysis also requires "an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule."²³¹ BLM fails to identify those rules, or even to certify that there are no duplicative statutes.

The initial regulatory flexibility analysis also must "contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."²³² BLM failed to do this as well, as there is no description of alternatives to this rule that could be implemented.

In addition to grazing, mining, and mineral interests, among a host of other small entities that deserve consideration, an RFA analysis should also review the impact of this law on rural electric cooperatives ("co-ops"), which are considered small entities under the standards of the Small Business Administration. Agencies should assess how the Proposed Rule would impact electricity rates, which is of particular importance here as rural co-ops serve countless persistent poverty counties and the businesses and people who live in them.

While BLM is not required to promulgate a regulatory flexibility analysis "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities,"²³³ this exception does not apply here because BLM has not adequately explained its reasoning for why a significant number of small entities would not be affected. As the SBA's Office of Advocacy explained, "[t]he agency's reasoning and assumptions underlying its certification should be *explicit* in order to obtain public comment and thus receive information that would be used to re-evaluate the certification."²³⁴ Courts have struck down agency action that inappropriately rely on the certification exception, as BLM has done here.²³⁵ As one

²²⁹ 88 Fed. Reg. 19,594.

²³⁰ Economic Analysis, *supra* note 270 at 4; *see* 88 Fed. Reg. 19,584.

²³¹ 5 U.S.C. § 603(b)(5).

²³² 5 U.S.C. § 603(c).

²³³ 5 U.S.C. § 605 (b).

²³⁴ OFF. OF ADVOC., U.S. SMALL BUS. ASSOC., THE RFA IN A NUTSHELL: A CONDENSED GUIDE TO THE REGULATORY FLEXIBILITY ACT 7 (2010), https://www.sba.gov/sites/default/files/advocacy/RFA_in_a_Nutshell2010.pdf.

²³⁵ *E.g., North Carolina Fisheries Ass'n, Inc. v. Daley*, 27 F. Supp. 2d 650, 661 (E.D. Va. 1998).

court has explained, “[s]urely, Congress has not intended for administrative agencies to circumvent the fundamental purposes of the RFA by invocation of the certification provision.”²³⁶

Simply put, BLM has not engaged in the required substantive analysis to prove that a certification of non-application is appropriate here. It is a violation of the basic principles of the RFA, as well as its detailed requirements, for BLM to conclude there is no impact when BLM failed to provide any evidence whatsoever of what the impact could be.

BLM has also violated Executive Order 13211, which requires agencies to prepare a Statement of Energy Effects for any proposed significant energy action.²³⁷ As has been elaborated on throughout this letter, this Proposed Rule would have an effect on the supply, distribution, and use of energy, and BLM has failed to meaningfully calculate what that effect would be.

VII. This Proposed Rule raises concerns under the Congressional Review Act.

The Congressional Review Act (“CRA”)²³⁸ requires congressional review for major rules. The Coalition is concerned that the Proposed Rule may violate the CRA because it fails to provide adequate economic analysis to determine whether the rule, when submitted to Congress, should contain a statement that it qualifies as a major rule. Adding additional regulatory requirements to each leasehold for public land use, mining, and mineral extraction would raise costs on industry. Further, restriction on the use of public lands and reserving lands as “conservation use” would detrimentally affect industry and the broader national economy. The combined effects of all outcomes to the Proposed Rule are likely to have an annual value of \$100 million or more. BLM must therefore engage in an economic analysis and must carefully determine whether this rule qualifies as a major rule.

In addition, some may argue that the Proposed Rule, if made final, may be barred in whole or in part by a CRA resolution that Congress passed in 2017. The CRA creates a means through which Congress can police an agency’s exercise of its delegated authority.²³⁹ If Congress disapproves a rule under the CRA, that rule “may not be reissued in substantially the same form,” and the agency is forever barred 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.²⁴⁰

Although the Proposed Rule is presented under a new title and has some new features, it may be argued that, for purposes of the CRA, the Proposed Rule is substantially similar to significant portions of BLM 2.0, or the Resource Management Planning Rule, which was issued by the BLM in 2016.²⁴¹ Under BLM 2.0, BLM attempted to implement landscape-level planning, revise the ACECs process, and strike the term “more than local significance” from the existing 43 C.F.R. § 1610.7–2(a)(2). Following the rulemaking, Congress disapproved of the agency’s action

²³⁶ *Id.*

²³⁷ 88 Fed. Reg. 19,596.

²³⁸ Joint Resolution, Pub. L. No. 115-12 (2017).

²³⁹ Walker, Christopher J., *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J. OF L. & PUB. POL’Y 773, 779 (2022), https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2022/10/4-JLPP-45_3-Walker.pdf.

²⁴⁰ 5 U.S.C. § 801(b).

²⁴¹ 81 Fed. Reg. 89,657.

and rejected the rule under the CRA.²⁴² If the two rules are “substantially the same,” BLM would be barred from finalizing the Proposed Rule.

The Proposed Rule is similar to BLM 2.0 in several ways. For example, both BLM 2.0 and the Proposed Rule attempt to implement a “landscape-scale” approach to land planning. In the final rule of BLM 2.0, BLM officials are directed to consider “relevant landscapes.”²⁴³ BLM officials are also directed to consider “areas of large and intact habitat” in their assessments.²⁴⁴ The Proposed Rule attempts to do this as well. The proposed § 6102.1 is titled “Protection of intact landscapes” and requires BLM to “manage certain landscapes to protect their intactness.”²⁴⁵ It even requires “managing lands strategically for compatible uses while conserving intact landscapes, especially where development or fragmentation is likely to occur that will permanently impair ecosystem resilience on public lands.”²⁴⁶ Furthermore, the Proposed Rule directs BLM officers to “identify intact landscapes on public lands that will be protected from activities that would permanently or significantly disrupt, impair, or degrade the structure or functionality of intact landscapes.”²⁴⁷

BLM 2.0 and the Proposed Rule also define landscapes similarly, recycling many of the same explanatory phrases. BLM 2.0 defines a landscape as “an area of land encompassing an interacting mosaic of ecosystems and human systems characterized by a set of common management concerns. The landscape is not defined by the size of the area, but rather by the interacting elements that are relevant and meaningful in a management context.”²⁴⁸ Similarly, the Proposed Rule defines it as “a network of contiguous or adjacent ecosystems characterized by a set of common management concerns or conditions. The landscape is not defined by the size of the area, but rather by the interacting elements that are relevant and meaningful in a management context.”²⁴⁹ The Proposed Rule also defines “intact landscape” as “an unfragmented ecosystem that is free of local conditions that could permanently or significantly disrupt, impair, or degrade the landscape’s structure or ecosystem resilience, and that is large enough to maintain native biological diversity, including viable populations of wide-ranging species. Intact landscapes have high conservation value, provide critical ecosystem functions, and support ecosystem resilience.”²⁵⁰

Both BLM 2.0 and the Proposed Rule also include language regarding areas of critical environmental concern (“ACECs”) that is similar. BLM 2.0 discusses the “[d]esignation and protection of areas of critical environmental concern” in its proposed § 1610.8-2. ACECs are to be identified “during the inventory of public lands and during the planning assessment” as well as “during the preparation or amendment of a resource management plan.”²⁵¹ The criteria for an ACEC are (1) relevance and (2) importance.²⁵² It also states that ACECs “require special

²⁴² Pub. L. No. 115-12 (2017).

²⁴³ 81 Fed. Reg. 89,666 (43 C.F.R. § 1610.4(a)(1)(22)).

²⁴⁴ 81 Fed. Reg. 89,667 (43 C.F.R. § 1610.4(d)(5)(iii)).

²⁴⁵ 88 Fed. Reg. 19,599 (to be codified at 43 C.F.R. § 6102.1(a)).

²⁴⁶ *Id.* (to be codified at 43 C.F.R. § 6102.1(a)(2)).

²⁴⁷ *Id.*

²⁴⁸ 81 Fed. Reg. 89,666 (43 C.F.R. § 1601.0-5).

²⁴⁹ 88 Fed. Reg. 19,598 (to be codified at 43 C.F.R. § 6101.4).

²⁵⁰ *Id.*

²⁵¹ 81 Fed. Reg. 89,670 (43 C.F.R. § 1610.8-2(a)).

²⁵² *Id.*

management attention.”²⁵³ “Areas having potential for ACEC designation and protection shall be identified through inventory of public lands and during the planning assessment, and considered during the preparation or amendment of a resource management plan.”²⁵⁴ The Proposed Rule discusses the same “designation of areas of critical environmental concern” in its proposed § 1610.7-2. The criteria for an ACECs are also (1) relevance, (2) importance, and (3) special management attention is required.²⁵⁵ Similarly, “[i]n the land use planning process, authorized officers must identify, evaluate, and give priority to areas that have potential for designation and management as ACECs.”²⁵⁶

In addition, both BLM 2.0²⁵⁷ and the Proposed Rule²⁵⁸ strike the terms “more than local significance” from the existing 43 C.F.R. § 1610.7–2(a)(2), and both BLM 2.0 and the Proposed Rule²⁵⁹ attempt to codify the mitigation hierarchy process.²⁶⁰ The definitions of mitigation in both rules are functionally the same,²⁶¹ as each focuses on the mitigation hierarchy²⁶² to “first avoid, then minimize, and then compensate.”²⁶³

Furthermore, both BLM 2.0 and the Proposed Rule use vague terms such as “deciding official” and “authorized officer” to refer to officials making decisions instead of the standard references to Field Managers and State Directors.²⁶⁴ BLM 2.0 defines a “deciding official” as “the BLM official who is delegated the authority to approve a resource management plan or plan amendment.”²⁶⁵ The Proposed Rule is replete with references to a notably undefined “authorized officer” that would make decisions regarding the ecosystem resilience and conservation leases.²⁶⁶ Both of the terms “deciding official” and “authorized officer” are arguably substantially similar because they are vague and a change to BLM’s organizational structure that could consolidate decision-making power in a centralized role or fashion.

²⁵³ 81 Fed. Reg. 89,671 (43 C.F.R. § 1610.8-2(b)).

²⁵⁴ 81 Fed. Reg. 89,670 (43 C.F.R. § 1610.8-2(a)).

²⁵⁵ 88 Fed. Reg. 19,596–97 (to be codified at 43 C.F.R. § 1610.7-2(d)).

²⁵⁶ 88 Fed. Reg. 19,596 (to be codified at 43 C.F.R. § 1610.7-2(b)).

²⁵⁷ 81 Fed. Reg. 89,656.

²⁵⁸ 88 Fed. Reg. 19,593.

²⁵⁹ 88 Fed. Reg. 19,603 (to be codified at 43 C.F.R. § 6102.5-1).

²⁶⁰ 81 Fed. Reg. 89,586 (“The Planning 2.0 initiative will support effective implementation of the regional mitigation policy by ensuring . . . that the mitigation hierarchy process is applied in the development and implementation of a resource management plan.”).

²⁶¹ 81 Fed. Reg. 89,594 (43 C.F.R. § 1601.0-5) (defining “mitigation” as “the sequence of avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts.”).

²⁶² 88 Fed. Reg. 19,603 (to be codified at 43 C.F.R. § 6102.5-1(a)) (“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. As appropriate in a planning process, the authorized officer may identify specific mitigation approaches for identified uses or impacts to resources.”). Furthermore, the Proposed Rule also states that “[a]uthorized officers shall, to the maximum extent possible, require mitigation to address adverse impacts to important, scarce, or sensitive resources.” 88 Fed. Reg. 19,598 (to be codified at 43 C.F.R. § 6101.4).

²⁶³ 88 Fed. Reg. 19,598 (to be codified at 43 C.F.R. § 6101.4).

²⁶⁴ 43 C.F.R. § 1601.0-4 (defining “Field Managers” and “State Directors” as the parties responsible for resource management plans and associated environmental impact statements).

²⁶⁵ 81 Fed. Reg. 89,662 (43 C.F.R. § 1601.0-5); 81 Fed. Reg. 89,669.

²⁶⁶ *E.g.*, 81 Fed. Reg. 19,590.

For these reasons, there are concerns that the current Proposed Rule, or parts of it, if finalized in its current form, could violate the CRA.

VIII. BLM’s reliance on policy statements in climate executive orders²⁶⁷ rather than proper statutory authority would violate FLPMA.

The Proposed Rule improperly ignores FLPMA’s mandate to put the federal lands to productive use under the concept of sustained yield and multiple use on the basis of an executive order. BLM cannot rely on an executive order to circumvent statutory obligations.²⁶⁸ The statutory mandate under FLPMA cannot be made subservient to other policy goals, such as the administration’s climate change pledge, absent concurrence from Congress in the form of an amendment to the statutory requirements. The relied-upon executive orders are at odds with the enabling act, which reads 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.”²⁶⁹

As noted above, FLPMA already provides avenues for the conservation of federal lands, but it does so in a way that restricts and moderates the BLM. Beyond circumventing Congress’ mandates by relying on an executive order, the Proposed Rule significantly expands the power of the agency to act in ways that Congress explicitly limited.

IX. The Economic and Threshold Analysis is Deficient.

As BLM acknowledges, “an agency proposing a significant regulatory action is required to provide a qualitative and quantitative assessment of the anticipated costs and benefits of that action.”²⁷⁰ BLM states in its Economic and Threshold Analysis for Proposed Conservation and Landscape Health Rule (hereafter “Economic Analysis”) that there are three elements of the Proposed Rule that could have a regulatory impact: conservation leases and bonding; addressing resilience in decision-making; and mitigation fund holders. However, BLM provides no economic analysis for these impacts. But as the first section of this comment letter makes clear, the use of BLM-managed land has a significant and direct impact on the United States economy.

The first element that BLM acknowledges “merit[s] further discussion related to regulatory impacts”²⁷¹ is conservation leases and bonding. BLM also writes in regards to conservation leases that “[a]ny future benefit or cost is unknowable currently, as it is not possible to know how many conservation leases will be authorized, or for what purpose.” BLM erred in not projecting or predicting the amount of conservation leases and the financial impact of using BLM land for conservation leases. BLM’s statement proves too much. There will always be unknown costs and benefits associated with new actions, and the Coalition recognizes that, depending on the nature of a proposal, agencies may not be able to fully determine all costs and benefits associated with

²⁶⁷ See 88 Fed. Reg. 19,587.

²⁶⁸ Cf. Mem. Ruling, *Louisiana v. Biden*, No. 21-cv-778, 2022 WL 3570933, at *17 (W.D. La. Aug. 18, 2022) (“A command in an Executive Order does not exempt an agency from the APA’s reasoned decisionmaking requirement.” (citing *California v. Bernhardt*, 472 F. Supp. 3d 573, 600-01 (N.D. Cal. 2020))).

²⁶⁹ 43 U.S.C. § 1701(12).

²⁷⁰ Economic and Threshold Analysis for Proposed Conservation and Landscape Health Rule, BUREAU OF LAND MGMT., at 1 (Apr. 2, 2023), <https://www.regulations.gov/document/BLM-2023-0001-0002> [hereinafter “Economic Analysis”].

²⁷¹ *Id.* at 3.

their proposal. But if agencies could claim the impossibility of predicting the future as a reason to not engage in economic analysis, then no agency would ever need to make economic projections, and it would undermine the ability to determine whether review by the Office of Information and Regulatory Affairs (“OIRA”) is warranted. At the very least, BLM should have solicited comments on the future benefits and costs associated with the Proposed Rule, and the extent to which they may be quantifiable or knowable.

BLM also requires that individuals who purchase conservation leases must purchase bonds. However, BLM does not state what the cost of the bonds would be, only that they would be at least \$25,000 to cover all operations in any one state.²⁷² BLM writes that “These costs are not quantifiable currently since they depend on future lease proposals and decisions.”²⁷³ As the minimum amount of bonds is known, BLM should be able to at least calculate a lower bound of the expected monetary impact of the bonding for such conservation leases by multiplying this minimum bound amount by a predicted amount of conservation leases. BLM frequently predicts the amount of leases that goes to a specific use when creating Land Management Plans—there is no reason it could not do so here.

In regards to the second area of possible impact, resiliency in decision-making, BLM argues that this “proposed rule does not prohibit any specific land use in any location” and concludes “[p]resumably, future decisions will achieve positive net benefits.”²⁷⁴ This is inaccurate analysis because it is clear that this proposed rule *would* have an impact on how land is used in the future. BLM should share its predictions on exactly how resilience would affect decision-making. Would this affect how many conservation leases are given, or lead to more ACECs? Would it lead to more stringent permitting provisions? What economic activities qualify as “permanently impair[ing] ecosystem resilience”?²⁷⁵ Furthermore, a required economic analysis such as this cannot rest its analysis on a conclusory presumption that net benefits will occur without making any calculations as to what those benefits are. As explained above, BLM should, at a minimum, use a supportable methodology to predict how addressing resilience would affect decision making, such as by estimating the amount of conservation leases that would be purchased and the economic value of outputs lost to companies or individuals that would otherwise have leased the land. It also should explain what uses of land would be impacted.

In regards to the third impacted area, mitigation fund holders, BLM provides no analysis of the economic value or cost of using the funds or the impact on the industry. It merely states that organizations that act as mitigation fund holders will benefit from increased use. BLM erred in not doing an analysis. It admits that mitigation accounts and account holders currently engage in this practice, which means that data could be gathered to predict the impact of such rules, including how much money would flow out of this industry and to the agency.

Just to provide one example of the major impact that this Proposed Rule would have, many Farm Bureau members are public lands ranchers, and this rule would impact their ability to access public lands for grazing—an access that is essential to their livelihoods and their way of life. This impact would happen in different ways. For example, there would be a reduction of some magnitude in the amount of public grazing lands in favor of lands under “conservation lease.” BLM has not articulated what uses are compatible or incompatible with conservation in this rule,

²⁷² 88 Fed. Reg. 19,591–92 (to be codified at 43 C.F.R. § 6102.4-2 (a)–(b)).

²⁷³ *Id.*

²⁷⁴ *Id.* at 4.

²⁷⁵ *Id.*

and so when grazing permits are up for renewal, BLM could decide to issue a conservation lease in that area and not allow a grazing permit renewal. Another impact would come from the reduction in public grazing lands in favor of ACECs with restrictive use. The limited availability in land in some areas would force a reduction in herd size. Smaller herds are less efficient to manage and may prove too costly for many ranchers, forcing them out of business.

Impacts would also be seen in the mining industry. The U.S. mining industry directly and indirectly generates more than 1.2 million jobs, and leads to \$80 billion of income.²⁷⁶ As previously mentioned, the Department of the Interior estimated that the total value of mining of coal and solid minerals on federal lands in 2018 supported \$13.9 billion in GDP impact, \$24.2 billion in economic output, and 81,700 jobs,²⁷⁷ and generates approximately \$550 million in annual royalties for the government.²⁷⁸ Mines on public lands would be affected by this Proposed Rule, which would likely lead to some closures of current mines or to future mines being disallowed. This would directly impact not just the mining industry on federal lands but would have ripple effects onto the vast U.S. mining industry as a whole.

In short, BLM has failed to engage in any sort of meaningful analysis, much less adequate analysis about the economic cost or value of this Proposed Rule. There are no estimates and no data that the Coalition can comment on, just vague and conclusory statements that “[p]resumably, future decisions will achieve positive net benefits” and that the future is “unknowable.” This explanation is insufficient, as uncertainty is an inherent part of a forward-looking economic analysis. Although Congress no doubt understands the inherent uncertainty of economic projections, Congress nevertheless *mandated* that BLM provide such an analysis. If BLM could use uncertainty as an excuse to not provide an economic impact, then no agency would ever provide one. Furthermore, without a more complete economic analysis, the Coalition cannot meaningfully comment on whether OIRA should have provided a more in-depth review of the Proposed Rule. As such, no final rule should be issued until BLM provides a substantive economic analysis and provides further opportunity for meaningful public comment. As it stands now, the Proposed Rule, if finalized in its current form, would violate the APA on the ground it cannot be supported by substantial evidence in the record and would therefore be arbitrary and capricious.

X. BLM has violated the APA by failing to engage in meaningful stakeholder interaction.

While BLM held several meetings with stakeholders, those meetings were not adequate. A representative of one Coalition member reported that several of her questions either were not answered or were ignored at the first virtual meeting, and stated that several others who asked questions also had their questions go unanswered. Even though mining interests would obviously be impacted by this rule, BLM did not answer *any* questions about mining in the first virtual meeting. This trend of ignoring pointed questions continued throughout the rest of BLM’s public

²⁷⁶ NATIONAL MINING ASSOCIATION, THE ECONOMIC CONTRIBUTIONS OF U.S. MINING 2021, 1 (2022).

²⁷⁷ BRANDON S. TRACY, CRS, R46278, POLICY TOPICS AND BACKGROUND RELATED TO MINING ON FEDERAL LANDS, 1 (Mar. 19, 2020), <https://crsreports.congress.gov/product/pdf/R/R46278> (citing U.S. DEPARTMENT OF THE INTERIOR, U.S. DEPARTMENT OF THE INTERIOR ECONOMIC REPORT FY 2018, 2 (Sept. 30, 2019), <https://www.doi.gov/sites/doi.gov/files/uploads/fy-2018-econ-report-final-9-30-19-v2.pdf>).

²⁷⁸ U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-461R, Letter to the Chairman of the House Committee on Natural Resources regarding Mining on Federal Lands, 9 (May 28, 2020), <https://www.gao.gov/assets/gao-20-461r.pdf>.

meetings. At the last virtual meeting, BLM ended over 30 minutes early and did not take questions from the audience, despite the BLM press release stating that “[m]embers of the public will have an opportunity to ask questions that facilitate a deeper understanding of the proposal.”²⁷⁹ BLM only answered questions that it had received beforehand, although the press release did not indicate how community members could submit questions in advance. Most importantly, BLM did not answer any of the relevant questions to which the regulated community needs answers in order to understand the implications of the Proposed Rule. This is a fundamental failure to engage with the public in a meaningful, transparent manner. It also exacerbates the Coalition’s concerns that BLM would use this expansive Proposed Rule in a manner that ignores the needs of the Coalition’s members.

XI. The Coalition is concerned that BLM is already struggling to meet its statutory mandates to manage public lands, and by adding a complex new set of considerations into all decision-making, BLM would further strain its limited resources and focus its efforts outside of those areas where Congress has explicitly directed it.

The Coalition is concerned that, with this Proposed Rule, BLM is overextending its resources and that these new obligations would prevent BLM from undertaking its existing statutory obligations. BLM is already stretched thin as evidenced by a maintenance backlog, a delay in processing permits, and a struggle to manage wildfires. Even with more money allocated to hire new employees, BLM has a “chronic staffing shortage” and as of March 2022 had “at least 2,000 vacancies bureau-wide.”²⁸⁰ It also is underfunded, with the National Association of Counties describing the BLM budget as “paltry.”²⁸¹ This understaffing and underfunding creates problems for BLM in fulfilling its current core mission. BLM has an approximately \$1 billion backlog of maintenance.²⁸² The funding and staffing issues have also led to delays in approving permitting in a timely manner. In 2020, the U.S. Government Accountability Office reported that “every year [the BLM] receives more applications than it can review” and that the system used to track applications to drill is known to lose user records.²⁸³ BLM resources are already strained to complete land use plans and updates within the current, less complex mixed-use regulatory framework.

As currently drafted, the Proposed Rule contains a number of vague and ambitious new requirements for the Agency to attempt to implement. For example, Proposed Rule § 6103.1–1 would require authorized officers to “implement land health standards and guidelines that conform

²⁷⁹ Press Release, Bureau of Land Management, *Update: BLM Releases Public Meeting Information For Proposed Public Lands Rule* (May 10, 2023), <https://www.blm.gov/press-release/update-blm-releases-public-meeting-information-proposed-public-lands-rule>.

²⁸⁰ Scott Streater, *BLM Would Undergo a Major Hiring Spree Under Biden Budget*, E&E NEWS GREENWIRE (Mar. 29, 2022 1:29 PM), <https://www.eenews.net/articles/blm-would-undergo-a-major-hiring-spree-under-biden-budget/>.

²⁸¹ Charlie Ban, *Foundation for America’s Public Lands Promises Hope for BLM Funding Needs*, NAT’L ASSOC. OF COUNTIES (Feb. 11, 2023), <https://www.naco.org/articles/foundation-americas-public-lands-promises-hope-blm-funding-needs>.

²⁸² CAROL HARDY VINCENT & LAURA A. HANSON, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 21 (2020), <https://crsreports.congress.gov/product/pdf/R/R42346>.

²⁸³ U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-329, OIL AND GAS PERMITTING: ACTIONS NEEDED TO IMPROVE BLM’S REVIEW PROCESS AND DATA SYSTEM 2, <https://www.gao.gov/products/gao-20-329>.

to the fundamentals of land health across all lands and program areas.”²⁸⁴ This is an incredibly broad directive. The Proposed Rule notes that “BLM’s land use planning process guides BLM resource management decisions in a manner that allows the BLM to respond to issues and to consider trade-offs among environmental, social, and economic values. Further, the planning process requires coordination, cooperation, and consultation, and provides other opportunities for public involvement that can foster relationships, build trust, and result in durable decision making.”²⁸⁵ The Proposed Rule also calls for landscape level planning, adding another layer of complexity to the planning process.

BLM also proposes to impose a new requirement on itself that “not less than every 5 years in conjunction with regular land use plan evaluations,” BLM must “review land health standards and guidelines for all lands and program areas to ensure they serve as appropriate measures for the fundamentals of land health.”²⁸⁶ “If existing standards and guidelines are found to be insufficient, authorized officers must evaluate whether to revise or amend the applicable land use plans.”²⁸⁷ These timelines are, in all likelihood, not feasible given BLM’s current resources and the additional burdens that this Proposed Rule would place on the Agency more generally. The Agency’s job is made even more complicated by the fact that the Proposed Rule instructs that BLM must “incorporate appropriate quantitative indicators available from standardized datasets [and] address changing environmental conditions and physical, biological, and ecological functions” and “[m]ay require consultation with relevant experts within and outside the agency.”²⁸⁸ These requirements would take significant time and Agency resources, and failing to meet these timelines would only invite deadline suits and additional litigation.

Attempting to undertake these responsibilities would further constrain BLM’s already-limited resources to manage public lands in a manner consistent with the clear mandate from Congress in FLPMA and would compound issues that the public already has in accessing and using public lands. This could make America’s resources inaccessible, thereby requiring Americans to purchase foreign resources, and may even be counterproductive to BLM’s stated conservation goals in this Proposed Rule as the Agency would be drawing resources further away from its core function of land management.

XII. The Proposed Rule removes states and local governments from their appropriate role.

Successful land management planning depends on working relationships between state and local BLM decision makers and affected stakeholders in the area. Removing decision making authority from those most familiar with affected land users by taking power from Field Managers and State Directors and placing them in “authorized officers” is a flawed path towards that objective. Congress intended to give state and local governments a front-seat in terms of participation in the land use planning process yet the Proposed Rule relegates state and local governments to a secondary role and does not take into consideration how the new conservation

²⁸⁴ 88 Fed. Reg. at 19,592 (to be codified at 43 C.F.R. § 6103.1–1).

²⁸⁵ 88 Fed. Reg. at 19,586.

²⁸⁶ 88 Fed. Reg. at 19,604 (to be codified at 43 C.F.R. § 6103.1–1(a)(1)(b)).

²⁸⁷ *Id.*

²⁸⁸ 88 Fed. Reg. at 19,604–05 (to be codified at 43 C.F.R. § 6103.1–1).

framework would impact state and local planning or economies. A federalism summary impact statement should be prepared pursuant to Executive Order 13132.

XIII. Specific concerns and critiques of the Proposed Rule

In addition to the broader legal and policy concerns raised in the previous sections, the Coalition also highlights these specific concerns with provisions within the Proposed Rule.

- A. *BLM relies on vague concepts and definitions that do not provide meaningful guidance to BLM staff or the regulated community and would result in arbitrary application.*

1. Definition of Landscapes and Intact Landscapes

Given that protecting and restoring intact landscapes is the focus of the Proposed Rule, it is crucial that this term be clearly defined. The proposed definition of a landscape is “a network of contiguous or adjacent ecosystems characterized by a set of common management concerns or conditions” that are “not defined by the size of the area, but rather by the interacting elements that are relevant and meaningful in a management context”²⁸⁹ This provides no guidance to BLM decisionmakers or anyone seeking to use public land in determining the boundaries of a “landscape.” The Proposed Rule then defines an “intact landscape” is one that “free of local conditions that could permanently or significantly disrupt, impair, or degrade the landscape’s structure or ecosystem resilience, and that is large enough to maintain native biological diversity, including viable populations of wide-ranging species.”²⁹⁰ Read together, these definitions do not provide meaningful guidance or direction on just how far a “landscape” extends or how to evaluate whether it is, or has become “intact.” An “intact landscape” would therefore be an arbitrary moving target without any objective metrics that would not provide any predictability and cannot be applied consistently across various BLM offices and differing geographies or regions.

The Proposed Rule’s attempt to define “intact landscapes” and incorporate this notation into BLM’s land planning process would hinder BLM’s ability to undertake its statutory mandate. BLM also fails to grapple with many important aspects of this problem, including how this definition would interplay with existing land planning areas and may expand the size of planning areas, thereby hindering BLM’s ability to manage localized resource issues, which can most efficiently be resolved at a smaller scale. The traditional planning area boundary for resource management plans (“RMPs”) has typically been a BLM field office area or a state. The advantage to the traditional approach is its simplicity—all stakeholders know upfront what land is within the planning boundary as well as the criteria (district or state lines) for determining that boundary. Planning on a landscape level represents a considerable restructuring of the planning process and fundamentally alters intuitive understanding of the factors that may be used to define planning area boundaries.

2. Definition of “High-quality data”

²⁸⁹ 88 Fed. Reg. 19,598 (to be codified at 43 C.F.R. § 6101.4).

²⁹⁰ *Id.*

BLM must ensure that its use of data conforms with federal laws governing data quality including the Information Quality Act (the “IQA”).²⁹¹ “High-quality information” is defined in the Proposed Rule as,

“information that promotes reasoned, fact-based agency decisions. Information relied upon or disseminated by BLM must meet the standards for objectivity, utility, integrity, and quality set forth in applicable federal law and policy. Indigenous knowledge may qualify as high-quality information when that knowledge is authoritative, consensually obtained, and meets the standards for high-quality information.”²⁹²

This definition provides very little guidance on what specific information Agency decisionmakers should include or prioritize when there are conflicts between different sources of information. Proposed Rule § 6102.5(c) would require the authorized officer to gather high-quality data and select relevant indicators, then translate the values from those indicators into a watershed condition classification framework and document the results.²⁹³

Before finalizing these requirements, BLM should consider whether this information is readily available in a form that can be consistently used across field offices by various BLM officials. Notably, 43 U.S.C. § 1711(a) already requires BLM to “prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values) giving priority to areas of critical environmental concern.” Given this statutory directive, this inventory should serve as the baseline for information utilized in public land use planning. In addition to preparing and maintaining an inventory on a continuing basis, BLM has an obligation to coordinate the land use inventory with land use planning and management programs of state and local governments.²⁹⁴

3. Scope of Required Mitigation and Definition of “Important, Scarce, or Sensitive resources”

The Proposed Rule does not provide sufficient guidance or clarity about the circumstances when those engaged in statutorily authorized uses of public lands, including mineral extraction and mining projects, would be required to mitigate impacts. Under Proposed Rule § 6102.5–1(b), BLM would require mitigation to address adverse impacts to important, scarce, or sensitive resources.²⁹⁵ But the current definition of “Important, Scarce, or Sensitive resources” is arbitrarily vague and would result in unpredictable and inconsistent application between projects. For example, “Important resources” is defined as “resources that the BLM has determined to warrant special consideration.” This definition provides *no* guidance and leaves full discretion to the Agency to make one-off decisions about what resources are “important.”²⁹⁶

²⁹¹ 44 U.S.C. § 3516 (The IQA required the Office of Management and Budget to issue guidelines that “provide policy and procedural guidance to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of the information (including statistical information) disseminated by federal agencies. . .”).

²⁹² 88 Fed. Reg. at 19,598 (to be codified at 43 C.F.R. § 6101.4).

²⁹³ 88 Fed. Reg. at 19,603 (to be codified at 43 C.F.R. § 6102.5(c)).

²⁹⁴ 43 C.F.R. § 1712(c)(9).

²⁹⁵ *Id.*; 88 Fed. Reg. 19,603.

²⁹⁶ 88 Fed. Reg. 19,598 (to be codified at 43 C.F.R. § 6101.3).

4. *Expansion of ACECs*

The language in the Proposed Rule suggests that BLM intends for more aggressive ACEC designations to play a significant role in BLM's future land use decisions. But BLM should not allow expansive ACEC designations and rigid management practices to undermine its ability to meet its other statutory obligations, as these ACECs were intended to be an *exception* to multiple use for public lands. The Proposed Rule currently creates a one-way ratchet towards turning public lands into ACECs but setting a high bar for removing such designations. Specifically, Proposed Rule § 1610.7–2(j) only allows the removal of an ACEC designation, in whole or in part, when:

(1) The State Director finds that special management attention is not needed because another legally enforceable mechanism provides an equal or greater level of protection; or (2) The State Director finds that the resources, values, systems, processes, or natural hazards of relevance and importance are no longer present, cannot be recovered, or have recovered to the point where special management is no longer necessary. The findings must be supported by data or documented changes on the ground.²⁹⁷

In practice, this standard would be difficult to meet, and would almost result in legal challenges from groups that do not want to see ACECs revised or removed. As a result, ACECs would likely to become permanent as a practical matter and therefore over-designation of ACECs could significantly impact BLM's ability to meet its obligations under its other statutory authorities.

5. *Definition of “Unnecessary or Undue Degradation”*

The Proposed Rule would define “Unnecessary or Undue Degradation” to mean “harm to land resources or values that is not needed to accomplish a use's goals or is excessive or disproportionate.”²⁹⁸ This definition is too vague and subjective and thus that it would not allow for consistent application between field offices and project-specific applications, would prejudice decision-making against approving projects, and would invite unnecessary litigation over BLM's decisions. The Proposed Rule does not explain what sort of degradation has occurred on public lands that BLM intends to target with this rule and fails to provide a mechanism to ensure that conservation work would address current degradation. BLM would not be able to consistently determine whether harm to land is “excessive or disproportionate” across a variety of land uses and landscapes, resulting in decisions that are arbitrary and capricious or creating unpredictable outcomes.

Furthermore, BLM has already defined “unnecessary and undue degradation” in 43 C.F.R. § 3809.5 as 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

²⁹⁷ 88 Fed. Reg. at 19,596 (to be codified at 43 C.F.R. § 1610.7–2(j)).

²⁹⁸ 88 Fed. Reg. at 19,599 (to be codified at 43 C.F.R. § 6101.4).

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.

Having two different definitions for the same term would cause confusion in the regulated community. Furthermore, the existing regulation shows that it is possible for BLM to provide a more precise definition of unnecessary and undue degradation, particularly in regard to the “reasonably incident” standard in 43 CFR § 3809.5(2).

6. *Definition of “Resilient Ecosystems”*

“Resilient ecosystems” are defined as “ecosystems that have the capacity to maintain and regain their fundamental structure, processes, and function when altered by environmental stressors such as drought, wildfire, nonnative invasive species, insects, and other disturbances.”²⁹⁹ This definition introduces a lot of complicated and information-intensive decisions, as well as a lot of predictive work about how an ecosystem would respond to a variety of potential environmental stressors that may or may not impact the particular ecosystem. How would BLM make these judgments in an informed way? What would the Agency do with conflicting data or when there is simply not enough data to make an informed decision? Who will be responsible for providing the agency with the information necessary to evaluate an ecosystem’s resilience? Any final rule must make clear that conservation cannot infringe on valid existing rights.

* * *

The Coalition appreciates the opportunity to comment on the Proposed Rule. For the reasons stated above, and based on the information included in this letter, we urge BLM to withdraw the Proposed Rule.

Sincerely,

Alaska Chamber of Commerce
American Farm Bureau Federation
ConservAmerica
Independent Petroleum Association of America
National Cattlemen’s Beef Association
National Rural Electric Cooperative Association
Public Lands Council
U.S. Chamber of Commerce

²⁹⁹ 88 Fed. Reg. 19,599 (to be codified at 43 C.F.R. § 6101.4).