WMC
WOMEN'S MINING COALITION

June 16, 2023

Submitted Electronically to:
www.Regulation.gov (https://www.regulations.gov/commenton/BLM-2023-0001-0001)

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

RE: Comments on the Conservation and Landscape Health Proposed Rule RIN 1004-AE92, Federal Register Vol. 88, No. 63

Dear Director Stone-Manning:

I. Introduction

The Women's Mining Coalition (WMC) has numerous serious concerns about the Department of the Interior's/Bureau of Land Management's (DOI's/BLM's) Conservation and Landscape Health Proposed Rule ("Proposed Rule") that was published on April 3, 2023, in the Federal Register, Vol. 88, No. 63. As discussed in detail below, the Proposed Rule exceeds BLM's legal authority and conflicts with BLM's legal obligations under the Federal Land Policy and Management Act of 1976 (FLPMA). Numerous elements of the Proposed Rule conflict with FLPMA's multiple use directives, including: the creation of conservation leases; the designation of more lands as Areas of Critical Environmental Concerns (ACECs) where multiple use will be restricted, and the preservation of intact landscapes where multiple uses will be prohibited. The Proposed Rule also conflicts with the U.S. Mining Law.

About WMC

WMC is a grassroots organization with over 200 members nationwide. Our mission is to advocate for today's modern domestic mining industry, which is essential to our Nation. WMC members work in all sectors of the mining industry including hardrock and industrial minerals, coal, energy generation, manufacturing, transportation, and service industries. We convene Washington, D.C. Fly-Ins to give our members an opportunity to meet with members of Congress and their staffs, and with federal land management and regulatory agencies to discuss issues of importance to both the hardrock and coal mining sectors.

WMC members have extensive experience with FLPMA, the U.S. Mining Law, the National Environmental Policy Act (NEPA), and BLM's 43 CFR Subpart 3809 surface management regulations (3809 regulations) governing locatable minerals and mining activities pursuant to the U.S. Mining Law.

We have provided comments on numerous NEPA documents for proposed locatable mineral projects on BLM-administered public lands. Some WMC members also have expertise in preparing third-party NEPA documents.

Lastly, our Advisory Council is made up of industry experts from all facets of the mining industry. Based on this experience, WMC is well qualified to review BLM's Proposed Rule and provide these comments.

WMC members are keenly aware of the nation's dangerous and unsustainable reliance on mineral imports, having been involved with this issue for a number of years. Our overarching concern about BLM's Proposed Rule is that it will reduce domestic mining and thereby exacerbate our dependency on foreign countries for critical and other minerals. As such, BLM's Proposed Rule is diametrically opposed to other policies espoused by this administration which seek to increase domestic production of critical minerals in order to strengthen domestic critical minerals supply chains.

II. The Proposed Rule Should be Withdrawn as Requested by the May 11, 2023 Letter from Sixteen Western Senators

WMC concurs with the May 11, 2023 letter to you from sixteen western U.S. Senators outlining the reasons why BLM should immediately withdraw this Proposed Rule. As the senators state, the Proposed Rule "threatens the longstanding approach governing multiple use on our nation's public lands...[and] includes a number of problematic initiatives that will result in limited access to energy production, grazing, recreation, and other statutory uses as mandated under FLPMA."

The senators' letter questions whether protection and restoration activities, which define conservation, could "override a mandated use enshrined in statute" and asserts that limiting uses is "contrary to the congressional intent to prioritize multiple use of our taxpayer-owned resources." The senators also warn BLM that it lacks the authority to create conservation leases:

> This new leasing regime opens the door for a new, noncompetitive process designed to lock away parcels of land, with no limits to size, for a period of 10 or more years. It's clear that anti-grazing and anti-development organizations would abuse this tool to attempt to halt ranching and block access to our nation's abundant energy reserves located on public lands.

We agree with the senators' characterization of the Proposed Rule as responding to special interests that seek to put public lands off-limits to development, contrary to Congress' clear directive in FLPMA that BLM must manage the public lands for multiple use:

> ...BLM's proposed Public Lands Rule is an effort to empower special interests that have long opposed BLM's statutory mandate by prioritizing non-development over the principles of multiple use and sustained yield. Taking large parcels of land out of BLM's well-established multiple use mandate would cause significant harm to many western states and negatively impact the livelihoods of ranchers, energy producers, and many others that depend on access to federal lands. As such, the proposal should be withdrawn immediately.

There is no legal authority for BLM to establish this rule, which is inconsistent with the fundamental purpose of FLPMA's mandate that the agency manage the publicly-owned lands for multiple-use.

III. The Proposed Rule will Increase U.S. Reliance on Foreign Minerals

The USGS tracks the country's reliance on imported minerals in its annual Mineral Commodity Summaries reports. Figure 2 in the 2023 report[1] shows U.S. dependency during 2022 on foreign countries for minerals. Some of the key findings in the 2023 USGS report include the following:

- In 2022, imports made up more than one-half of the U.S. apparent consumption for 51 nonfuel mineral commodities, and the United States was 100% net import reliant for 15 of those.

- Of the 50 mineral commodities identified in the "2022 Final List of Critical Minerals," the U.S. was 100% net import reliant for 12, and an additional 31 critical mineral commodities had a net import reliance greater than 50% of apparent consumption.

- For most critical minerals, the U. S. is heavily reliant on foreign sources for its consumption requirements; exceptions include beryllium, magnesium, and zirconium.

Comparing the 2022 report with the 2021 report shows that the U.S. is becoming increasingly dependent on imported minerals. In 2021, the U.S. was 50 percent reliant on 47 minerals. In 2022, that reliance increased to 51 minerals. So rather than reducing our reliance on foreign minerals, the U.S. is headed in the wrong direction.

At a time when demand for the minerals essential to the energy transition is projected to skyrocket, it makes no sense to propose a draconian rule that would create *de facto* new land withdrawal mechanisms resulting in substantially reduced mining of these minerals from public lands.

[1] https://pubs.usgs.gov/periodicals/mcs2023/mcs2023.pdf

This is the wrong time to implement a Proposed Rule that has the potential to dramatically reduce production of critical minerals.

The Proposed Rule is at counter purposes to the critical minerals directive in President Biden's February 2021 Executive Order 14017 "On America's Supply Chains," which directs cabinet officials to develop policies to increase domestic production of critical minerals to reduce the risks associated with the county's dependency on mineral imports. The definition of minerals supply chain in Executive Order 14017 includes "the exploration, mining, concentration, separation, alloying, recycling, and reprocessing of minerals."

The BLM's Proposed Rule is inconsistent with Executive Order 14017 because it will put lands off-limits to mineral exploration and development and consequently thwart President Biden's stated goals to strengthen domestic critical minerals supply chains in order to lessen the Nation's dependency on foreign minerals.

The Proposed Rule is also completely at odds with the June 2021 White House report entitled "Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth"[2] ("2021 White House Report") that was prepared in response to Executive Order 14017. This report includes an entire chapter devoted to critical minerals: "Review of Critical Minerals," prepared by the Department of Defense (DOD). The Proposed Rule is incompatible with the following DOD findings in the 2021 White House Report:

- Strategic and critical materials are the building blocks of a thriving economy and a strong national defense. They can be found in nearly every electronic device, from personal computers to home appliances, and they support high value-added manufacturing and high-wage jobs, in sectors such as automotive and aerospace.

- The global supply chain[s for] strategic and critical materials...are at serious risk of disruption—from natural disasters or *force majeure* events...and are rife with political intervention and distortionary trade practices, including the use of forced labor.

- Contrary to a common belief, this risk is more than a military vulnerability; it impacts the entire U.S. economy and our values.

[2] https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf

- [T]he need for strategic and critical materials is likely to intensify...[to] enhance or enable...many environmentally friendly "green" technologies, such as electric vehicles, wind turbines, and advanced batteries. A recent report by the International Energy Agency (IEA) notes: "A typical electric car requires six times the mineral inputs of a conventional car and an onshore wind plant requires nine times more mineral resources than a gas-fired plant. Since 2010, the average amount of minerals needed for a new unit of power generation has increased by 50 percent as the share of renewables in new investment has risen."[3]

- Economic efficiency took priority over diversity and sustainability of supply...[and] U.S. manufacturers increasingly lost visibility into the risk accumulating in their supply chains. Their suppliers of strategic and critical materials, and even the workforce skills necessary to produce and process those materials into value-added goods, became increasingly concentrated offshore...[where] disregard for environmental emissions and workforce health and safety could thrive.

- The U.S. Government, collectively, has examined the risk in strategic and critical materials supply chains for decades. Now is the time for decisive, comprehensive action by the Biden-Harris Administration, by the Congress, and by stakeholders from industry and non-governmental organizations to support sustainable production and conservation of strategic and critical materials.

The incongruity between the country's needs for domestic supplies of critical minerals, as stated in Executive Order 14017 and in the DOD's points listed above, and the Proposed Rule is inexplicable. On the one hand, the Biden administration strongly embraces the need to increase production of domestic critical minerals, and on the other hand its DOI is proposing a rule that will impede and even prohibit mineral exploration and development on public lands.

IV. After Nearly 50 Years of Adhering to FLPMA's Multiple Use Directives, BLM is Unlawfully Seeking to Redefine this Multiple Use Law into a Non-Use Law

A. BLM Cannot Change the Definition of Multiple Use to Mean Conservation

Congress' purpose in enacting FLPMA was to direct BLM to manage public lands for multiple use. As defined under FLPMA Section 103, "multiple use" includes, but is not limited to: recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values.

[3] International Energy Agency, *The Role of Critical Minerals in Clean Energy Transitions* (May 2021), https://iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions

FLPMA directs the BLM to (1) inventory public lands and create management plans that implement the multiple-use and sustained-yield mandate, and (2) promulgate regulations necessary to carry out the purposes of the Act. BLM is exceeding the scope of this regulatory authority to promulgate the current Proposed Rule.

In order to justify the draconian changes being proposed in this rule, BLM is asserting a new and profoundly different interpretation of FLPMA that significantly deviates from more than four decades of managing the public lands for multiple use pursuant to FLPMA:

> FLPMA's declaration of policy and definitions of 'multiple use' and 'sustained yield' *reveal* that conservation is a use on par with other uses under FLPMA. The procedural, action-forcing mechanisms in this Proposed Rule grow out of that understanding of multiple use and sustained yield.

(FR at 19585, emphasis added). The revelation that multiple use and sustained yield now mean conservation is indeed curious because BLM has implemented FLPMA's multiple use policy directives for managing public lands since 1976 under both Democrat and Republican administrations.

In the Proposed Rule, BLM is now claiming it has experienced a revelation and finally understands the real meaning of FLPMA. Based on this revelation and BLM's assertion that public lands are "increasingly degraded and fragmented due to adverse impacts from climate change and a significant increase in authorized use," BLM is redefining the FLPMA terms "undue and unnecessary degradation," transforming "conservation" to a "use," and then prioritizing that purpose by actually prohibiting any use of the lands in contravention of "multiple-use." This is a radical departure from the way BLM has interpreted and implemented these land use management principles for the past 47 years and constitutes a sweeping change that only Congress could make. BLM's proposed makeover of multiple use and sustained yield to now mean conservation is totally contrary to FLPMA's directives and definitions.

The multiple use and sustained yield directive in FLPMA Section 102(a)(7) states: "...it is the policy of the United States that–

> goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple **use** and sustained yield unless otherwise specified by law;

It is clear from Section 102(a)(7) that BLM must manage the public lands according to the principles of multiple use and sustained yield as defined in Section 103(c) and Section 103(h). BLM cannot lawfully deviate from the Section 102(a)(7) directive or modify the Section 103 definitions.

In FLPMA Section 102(a)(8), Congress establishes that certain lands must be managed to protect numerous resources, stating: "...it is the policy of the United States that–

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

This directive to "preserve and protect certain public lands in their natural condition" requires that these lands remain available for "human occupancy and use" which includes mineral development. Aside from a mineral withdrawal, there is no authority for BLM to set aside lands and make them inaccessible to mineral exploration and development in conservation leases.

B. <u>BLM Must Adhere to Congress' Definition of Multiple Use and Sustained Yield</u>

Congress defined "multiple use" and "sustained yield" in FLPMA Section 103(c) and 103(h) as follows:

> (c) The term 'multiple use' means 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; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.
>
> (h) The term 'sustained yield' means 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.

Both statutory definitions provide BLM with discretionary authority to modify the way in which some lands are managed to respond to changing "needs and conditions" but they do not authorize BLM to prohibit or extensively limit use at all by creating a new "use" of conservation to effectively prohibit any actual multiple-use activities. The Proposed Rule asserts the dramatic changes to restrict use (e.g., the increased use of the ACEC designation, the creation of conservation leases, and the preservation of intact landscapes) are necessary to respond to climate change by creating "ecosystem resilience." However, BLM has not defined or explained ecosystem resilience or demonstrated how ecosystem resilience, restricting land uses, or putting lands off-limits to development will mitigate climate change impacts.

Moreover, BLM cannot ignore elements of the multiple use definition that require BLM to "best meet the present and future needs of the American people...to conform to changing needs and conditions...[and achieve] a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values."

C. BLM Cannot Eliminate the Balance that FLPMA Demands Between Multiple Uses and Environmental Protection

The land use restrictions and prohibitions in the Proposed Rule eliminate the balance that FLPMA demands. They also completely overlook a change in the country's "needs and conditions," which includes the United States policy objective to develop domestic sources of the minerals needed to build the technologies and infrastructure essential to transition away from fossil fuels and towards increased use of renewable energy. Therefore, the Proposed Rule directly conflicts with both FLPMA and the Biden Administration's stated goals to reach net-zero carbon emissions by 2050. That goal is unachievable without domestic minerals, many of which need to be mined on the Nation's public lands. The rule would thus exacerbate our dangerous dependence on foreign sources of minerals by putting lands functionally off limits to mineral exploration and development, thereby reducing domestic mineral production.

The Proposed Rule also ignores FLPMA's Section 103(l) unambiguous definition of "principal or major uses":

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

The Proposed Rule does not discuss "principal or major uses" or attempt to reconcile the proposed non-uses (e.g., expansion of the ACEC designation, creation of conservation leases, and preservation of intact landscapes) with the FLPMA Section 103(l) list of principal or major uses. The proposed non-uses are irreconcilable with FLPMA's principal or major uses.

BLM's Proposed Rule seeks to add the non-uses listed above and functionally make them future principal or major uses of public lands. There is nothing in the Proposed Rule that suggests these non-use designations would be used sparingly. To the contrary, the Proposed Rule implies that BLM would implement the non-use designations broadly in order to respond to climate change.

FLPMA does not allow conservation to become a principal or major use of public lands. BLM cannot categorically dismiss the Congressional directive that other land uses, including conservation, are not principal or major uses of public lands, write the principal or major multiple uses out of FLPMA, or add conservation to the definition. The Proposed Rule is therefore unlawfully proposing to transform this multiple use statute into a non-use, conservation law.

D. FLPMA Does Not Focus on Conservation

Finally, it is important to note that in contrast to explicitly defining "multiple use" and "sustained yield," FLPMA does not define conservation or include it in the Section 102(a) land use management directives. In fact, FLPMA uses the word "conservation" in a very limited way. It is never used to establish land management objectives. Rather, it is only used in a restricted way to reference previously designated conservation areas. In fact, there are only six sections in FLPMA that use the word "conservation":

- California Desert Conservation Area: Section 206(c), Section 303(e), Title VI, Section 601(c)(1), (c)(2), (d), (e), (f), (g)(1), (h);
- Conservation system unit or the Steese National Conservation Area: Section 302(d)(1);
- Alaska National Interest Lands Conservation Act: Section 302(d)(4) and (d)(6);
- Land and Water Conservation Fund: Section 318(d)
- Kings Range National Conservation Area: Section 602; and
- Conservation of the Yaquina Head Outstanding Natural Area: Section 603(c).

The limited ways in which FLPMA mentions conservation to describe lands that in 1976 were already designated for special management is additional proof that the law was never intended to authorize making conservation a "principal or major use." Concluding otherwise would require us to assume that Congress enacted a useless or superfluous law.[4]

Forty-seven years after FLPMA's enactment, BLM cannot lawfully establish a novel "interpretation" that creates a sweeping change inconsistent with decades of its implementation of FLPMA and the definitions and directives in the statute itself. Nor can it insert a definition of "conservation" into the Section 103 definitions. Only Congress can add conservation to the Section 102(a) Declaration of Policy or amend the definitions in FLPMA Section 103 to include conservation.

V. FLPMA Does Not Authorize Conservation Leases

At the May 16, 2023, hearing before the House Subcommittee on Energy and Mineral Resources/Committee on Natural Resources,[5] (referenced herein as the May 16th hearing), you stated that FLPMA Section 302(b) gives the Secretary of the Interior many tools, including leases, for managing public lands. Unfortunately, this explanation of leasing as an allowable public land management tool is incomplete and therefore misleading.

A complete reading of FLPMA Section 302 reveals that leases are authorized to promote use and development – not to put lands off-limits to development. FLPMA Section 302(b) is clear that the FLPMA's intended purpose in authorizing leases is to promote development of the public lands:

> (b) In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the *use, occupancy, and development* of the public lands, including, but not limited to, *long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns.*(Emphasis added).

---

[4] *See United States v. Premises Known as Lots 50 & 51, 2050 Brickell Ave.*, 681 F. Supp. 309, 313 (E.D.N.C. 1988); *see also Dept. of Defense, Army Air Force Exchange Service v. Federal Labor Relations Authority*, 212 U.S. App. D.C. 256, 659 F.2d 1140, 1160 (D.C.Cir. 1981), *cert. denied*, 455 U.S. 945, 102 S. Ct. 1443, 71 L. Ed. 2d 658 (1982) (A statute should be read in a "manner which effectuates rather than frustrates the major purpose of the legislative draftsmen."); *South Corp. v. United States*, 690 F.2d 1368, 1374 (Fed. Cir. 1982) (A statutory construction which would impermissibly impute a useless act to Congress must be viewed as unsound and rejected.); *United States v. Ferry Cty.*, 511 F. Supp. 546, 550 (E.D. Wash. 1981)("It is a basic tenet of statutory construction that Congress is not presumed to perform useless acts.").

[5] Examining the President's FY 2024 Budget for the Bureau of Land Management and the Office of Surface Mining, Reclamation and Enforcement, https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=413205

As used in Section 302(b), the words "use, occupancy, and development," and the authorization for "long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns" clearly define the scope of Congress' intent for leases. A court "must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw v. Delta Air Lines*, 463 U.S. 85, 97, 103 S. Ct. 2890, 2900 (1983).

Under FLPMA, leases are supposed to authorize use and occupancy of public lands for multiple use development and commercial purposes that are consistent with other laws, like the U.S. Mining Law. Here, Congress' omission of conservation from these purposes for which the Secretary can issue easements, permits, leases, licenses, published rules or other instruments is controlling. Conservation leasing is not within these authorized purposes and is inconsistent with the uses Congress did specify for leases.

It is clear that FLPMA Section 302 *does not* authorize leases for the purpose of non-use or non-occupancy as the Proposed Rule contemplates. During the May 16th hearing, you stated that mining, logging, and other uses that involve surface disturbance would be incompatible with a conservation lease. This is a clear acknowledgment of the purpose of the rule – to put public lands off limits to the multiple-uses Congress clearly directed the Secretary to authorize.

Such an effort by the BLM to close or withdraw lands from mineral entry and mining use is clearly inconsistent with FLPMA, which provides for mineral withdrawals by Congress or by the Secretary through a detailed and lengthy process, not a cursory issuance of a conservation lease.

Thus, the proposed conservation leases are intended to create *de facto* withdrawal areas where some multiple uses would be disallowed. FLPMA prohibits BLM from using leases to withdraw land in order to preclude multiple uses. Because there is no statutory authority for conservation leases, BLM must modify the Proposed Rule to eliminate the conservation lease concept.

VI. FLPMA Does Not Authorize Establishing a Policy Preference for Preserving Intact Landscapes

Just as FLPMA does not authorize conservation leases, it also does not authorize BLM to propose a policy to identify intact landscapes or to use the restrictive ACEC designation to prevent multiple uses on such lands to preserve their intactness. The intact landscape concept is inconsistent with the multiple use and sustained yield directive in FLPMA Section 102(a)(7). It is also inconsistent with the scope of the protection and preservation directive in Section 102(a)(8), which directs BLM to protect and preserve certain lands but also requires that these lands remain available for human occupancy and use:

> The Congress declares that it is the policy of the United States that–
>
> (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and *human occupancy and use*; (emphasis added)

None of the FLPMA Section 102(a) declarations of policy authorize BLM to manage public lands solely for preservation purposes and to exclude multiple uses, (i.e., human occupancy and use) to achieve land preservation.

In the Proposed Rule, BLM offers the following definition of conservation:

> "The Proposed Rule uses the term ''conservation'' in a broader sense, however, to encompass both protection and restoration actions. Thus, it is not limited to lands allocated to preservation, but applies to all BLM managed public lands and programs." (FR at 19585)

FLPMA does not authorize the broad application of conservation, preservation, and restoration land use management objectives "to all BLM managed public lands." BLM cannot change FLPMA from a multiple use and sustained yield statute to a conservation, preservation, and restoration law. Only Congress could make such a substantial change to FLPMA by enacting an amendment that would essentially upend the original multiple use purpose of this law and transform it into a conservation, preservation, and restoration law.

VII. FLPMA Does Not Authorize BLM to Replace UUD with a Zero-Impact Mandate

The unnecessary or undue (UUD) mandate in FLPMA Section 302(b) is exceptionally effective at protecting the environment because it is a dynamic, activity-specific, and site-specific regulatory mechanism applicable wherever multiple use activities occur on public lands. In implementing the UUD directive, BLM has the necessary authority to custom tailor the interpretation and application of UUD for all types of multiple uses to fit the activities involved and the site-specific environmental and resource conditions at each particular multiple use project.

FLPMA is not a zero-impact, no-use statute. However, the Proposed Rule is seeking to unseat UUD as FLPMA's universal and overarching environmental protection mandate and substitute a new zero-impact standard that would be enforced at many newly designated ACECs, on conservation leases, and on intact landscapes. FLPMA does not authorize BLM to manage public lands with a zero-impact mandate, which differs substantially from UUD.

In contrast to a zero-impact standard, the UUD policy in FLPMA Section 302(b) authorizes necessary degradation of the public lands resulting from multiple uses. A plain language reading of UUD is that it authorizes degradation that is unavoidable in order for the multiple use to occur. In other words, the degradation is necessary or due.

In managing the public lands, BLM must respond to the entirety of Congress' intent in FLPMA and carefully balance both the FLPMA Section 102(a) multiple uses directives and UUD. These statutory directives, which must be read together, compel BLM to authorize multiple uses that comply with the UUD mandate to protect the environment. BLM cannot use the Proposed Rule to administratively insert a zero-impact conservation objective or a land preservation mechanism to prohibit development on ACECs, conservation leases, or on intact landscapes.

BLM's statements during the May 15, 2023, stakeholder meetings and in the Federal Register notice that the Proposed Rule is not intended to reduce or curtail mining or other public land uses are internally contradictory and provide substantial evidence that BLM is struggling to make the Proposed Rule appear to be consistent with FLPMA. Compare, for example, the following statements:

> This provision [conservation leasing] is not intended to provide a mechanism for precluding other uses, such as grazing, mining, and recreation. (FR at 19591)[6]
>
> 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. (FR at 19592)
>
> The Proposed Rule recognizes, however 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. The BLM welcomes comments on how applying the fundamentals of land health beyond lands allocated to grazing will interact with BLM's management of non-renewable resources. (FR at 19586)

In the first statement, BLM says the Proposed Rule is not designed to upset existing land uses. However, the second and third statements admit the Proposed Rule creates conflicts between its conservation objectives and multiple uses. These admissions that the Proposed Rule would create conflicts with authorized multiple uses clearly shows that the Proposed Rule is fatally flawed, unworkable, and inconsistent with Congress' directives in FLPMA dictating how BLM must manage public lands for multiple use.

[6] Similar statements were made during the May 15, 2023, virtual public meeting and the May 16, 2023, hearing.

There is no justification for creating this conflict by proposing this new rule. Rather, BLM should focus on consistently managing public lands for multiple uses that comply with the UUD mandate. Given the effectiveness of UUD as a universally applicable regulatory mechanism, there is no reason to modify it or seek to functionally replace it as BLM is proposing to do in this rule.

VIII. There is No Gap in FLPMA that Needs to be Filled with the Proposed Rule

During the May 15, 2023 virtual public meeting on the Proposed Rule, BLM officials asserted the rule is necessary to fill a gap in FLPMA, stating that BLM needs additional regulatory tools to manage the public lands in a manner that fully protects the environment. This assertion mischaracterizes the authority BLM already has to use the UUD mandate to effectively regulate public land uses to allow for responsible development of public lands and at the same time require environmental protection.

There is no environmental protection or regulatory gap in FLPMA. The 3809 regulations already define UUD and the mechanisms by which BLM prevents UUD. The 3809 regulations implement FLPMA's UUD mandate in a dynamic and effective way. One aspect of preventing UUD demands compliance with all applicable federal and state environmental and cultural resources protection laws. (See 43 CFR 3809.415(a)).

What is being portrayed as a gap is in reality this administration's apparent dissatisfaction with having to respond to the balancing act that FLPMA demands between authorizing simultaneous multiple uses and mandating environmental protection. There is no question that this balancing act is difficult and creates tension between responsibly using public lands and protecting public lands. But that is precisely FLPMA's purpose and is the foundational premise of this law.

Seeking to upset this balance by creating new anti-use tools that prevent development such as preserving intact landscapes and creating conservation leases cannot be used to modify FLPMA's underlying purpose and dual Congressional directives to responsibly use public lands and to protect them. *See Carden v. Kelly*, 175 F. Supp. 2d 1318, 1325 (D. Wyo. 2001) (FLPMA's purpose was to "aid in the management, disposal, and maintenance of federal public land in the nation[']s best interest.").

FLPMA does not authorize BLM to tip the scales in favor of conservation. However, the Proposed Rule is designed to do just that – to create out of whole cloth new restrictive land management tools and designations to limit multiple use. This is flagrantly at odds with Congress' intent in enacting FLPMA, and the plain text of the statute in Section 102(a)(7) which provides that: it is the policy of the United States that—

> ...management of [public lands] be on the basis of multiple use and sustained yield unless otherwise specified by law

In enacting FLPMA, Congress did not give BLM the power it is asserting in the Proposed Rule to establish conservation as a "use" to prohibit other uses and to prioritize that "use" above all others. Conservation is not included in the list of multiple-uses Congress set forth in FLPMA Section 102(a). BLM cannot now assert a new sweeping authority to "manage" use of the public lands by creating conflicting authorizations prohibiting use through the proposed "Conservation" rule. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2608 ("'Congress could not have intended to delegate' such a sweeping and consequential authority 'in so cryptic a fashion.'") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 160, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000)).

Changing FLPMA's balance to favor conservation over multiple use – or even to put conservation and multiple use on the same plateau – would require Congressional action to amend FLPMA. BLM cannot achieve this result through rulemaking.

IX. BLM Does Not Need Additional Regulatory Tools to Protect Public Lands

FLPMA Section 302(b) requires BLM to manage the public lands to prevent land uses from creating UUD: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."

Since the enactment of FLPMA, BLM has effectively implemented the UUD mandate through regulatory programs that govern various public land uses. For example, the overarching purpose of BLM's 3809 regulations is to:

> Prevent unnecessary or undue degradation of public lands by operations authorized by the mining laws. Anyone intending to develop mineral resources on the public lands must prevent unnecessary or undue degradation of the land and reclaim disturbed areas. This subpart establishes procedures and standards to ensure that operators and mining claimants meet this responsibility; (43 CFR § 3809.1(a))

The 3809 regulations include a definition of UUD that is specific and pertinent to mineral exploration and mining. (*See* 43 CFR § 3809.5 and § 3809.415).

BLM has not identified a problem with implementing the UUD mandate or specified the need for additional tools to impose the UUD mandate. In the context of UUD, the Proposed Rule is seeking to fix a problem where none exists.

BLM is proposing to redefine UUD as "harm to land resources or values that is not needed to accomplish a use's goal or is excessive or disproportionate." This proposed definition is essentially a broad restatement of how BLM has interpreted and implemented the UUD mandate for nearly five decades and administered multiple uses on public lands to ensure compliance with the UUD standard.

It is indeed telling that after nearly 50 years of managing public lands in response to FLPMA's overarching mandate to prevent UUD, that BLM is now seeking to redefine UUD, resulting in a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind." *West Virginia v. EPA*, 142 S. Ct. 2587, 2596 (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U. S. 218, 231, 114 S. Ct. 2223, 129 L. Ed. 2d 182).

The agency's own actions over the course of nearly five decades are compelling evidence of the proper and successful interpretation and implementation of FLPMA. Efforts with the Proposed Rule to now make radical changes to how UUD is interpreted and implemented are in conflict with BLM's obligations under FLPMA.

X. The Proposed Rule Conflicts with the U.S. Mining Law

The Proposed Rule conflicts with the right to use all lands open to location under the U.S. Mining Law (30 U.S.C. 21a *et seq.)*. Although FLPMA amends the Mining Law, it does so in a very limited way as enumerated in Section 302(b):

> Except as provided in section 314, section 603, and subsection (f) of section 601 of this Act and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

FLPMA Section 302(b) clearly establishes Congress' intent that FLPMA would not change the Mining Law except in the following ways, the first three of which are quite limited in their scope:

- FLPMA Section 314 requires claim owners to record their claims;
- FLPMA Section 603 establishes the provisions for mining claims in Wilderness Study Areas;
- FLPMA Section 601(f) requires mining activities to comply with an "undue impairment" standard to protect scenic, scientific, and environmental values of the public lands in the California Desert Conservation Area; and
- All mineral activities must prevent unnecessary or undue degradation (UUD).

FLPMA's UUD mandate was a major change to the Mining Law that inserted a new environmental protection and reclamation requirement for mineral exploration and mining projects. As discussed in Section VII, UUD effectively safeguards the environment at mineral projects. For mineral projects, UUD is defined at 43 CFR § 3809.5 and requires mineral operators to reclaim their exploration and mine sites when the work is completed and to provide BLM with financial assurance to guarantee reclamation.

Section 22 of the Mining Law says:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

The land use restrictions and prohibitions in the proposed regulation directly conflict with the Section 22 Mining Law directive that lands "shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase" because the Proposed Rule would sequester lands away in conservation leases that would no longer be open to this free exploration and purchase.

The Proposed Rule cannot ignore or override Section 22 of the Mining Law, FLPMA's multiple use and sustained yield mandate, or FLPMA's explicit policy to maintain all aspects of the Mining Law except for the four changes specified in FLPMA Section 302(b). FLPMA does not authorize BLM to put lands off-limits to mining by creating widespread ACECs, issuing conservation leases, or preserving intact areas.

BLM can withdraw lands from operation of the Mining Law, but withdrawals must adhere to the FLPMA Section 204 withdrawal procedures:

> (a) On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section.

During BLM's May 15, 2023, virtual meeting on the Proposed Rule BLM officials explained that mining would likely be deemed an incompatible use in these areas. At the May 16th hearing, you said the same thing in response to questions asking whether BLM would manage these lands for multiple uses including mining.

The Proposed Rule explains that conservation leases could be used as compensatory mitigation to off-set unavoidable impacts associated with multiple use projects on public lands. In order to proceed with such projects, project proponents could be required to enter into conservation leases or purchase conservation credits associated with previously established conservation leases designed to function as mitigation banks. Neither the Mining Law nor FLPMA authorize compensatory mitigation for hardrock mineral projects. Therefore, this aspect of the Proposed Rule cannot be applied to mineral exploration and development projects.

The word "mitigation" appears only once in FLPMA at 43 U.S.C. 1785 (e)(2)(D), which Congress added to FLPMA in 1996 for the Fossil Forest Research Natural Area. This suggests that there is no authority for compensatory mitigation in FLPMA for any type of multiple use activity. Project proponents may wish to offer compensatory mitigation to off-set the unavoidable impacts (e.g., impacts that comply with FLPMA's Section 302(b) mandate to prevent unnecessary or undue degradation are necessary and due) but cannot be compelled to offer compensatory mitigation.

XI. BLM Must Prepare an Environmental Impact Statement

In the Federal Register notice for this rule, BLM states that it intends to apply the Department's Categorical Exclusion (CX) provisions and that BLM is not required to prepare a NEPA document, either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS), to assess the impacts of this Proposed Rule. At the May 16th hearing, you asserted that BLM is not obligated to prepare an EA or an EIS because the rule is "largely procedural."

This assertion strains credulity for a Proposed Rule that will impact 245 million acres of public lands, which are "an economic driver across the West" according to BLM's press release unveiling the Proposed Rule.[7]

The media has appropriately characterized the Proposed Rule as making significant changes to land use management as is readily evident from the following headlines;

[7] https://www.blm.gov/press-release/interior-department-releases-proposed-plan-guide-balanced-management-public-lands.

BLM Proposes Sweeping Rule That Could Change Priorities for Public Lands
https://northernag.net/blm-proposes-sweeping-rule-that-could-change-priorities-for-public-lands/

BLM defends sweeping revamp of public lands rule
https://subscriber.politicopro.com/article/eenews/2023/05/16/blm-defends-sweeping-revamp-of-public-lands-rule-00097116

Sweeping Biden Rule Could Change The Game For Protecting Public Lands
https://news.yahoo.com/sweeping-biden-rule-could-change-225322163.html

BLM proposes seismic shift in lands management
https://www.eenews.net/articles/blm-proposes-seismic-shift-in-lands-management/

BLM needs to take a cue from these headlines and concede that this far-reaching rule will create "sweeping changes" and a "seismic shift" that will cause significant impacts across the western U.S. A rule that will precipitate sweeping changes, alter priorities for public lands, and cause a seismic shift in land management unquestionably qualifies as a major federal action that requires BLM to prepare an EIS. *See Austin v. Ala. DOT*, No. 2:15-cv-01777-JEO, 2016 U.S. Dist. LEXIS 159113, at *4 (N.D. Ala. Nov. 16, 2016) ("An EIS is required before a federal agency undertakes any 'major' federal action 'significantly affecting the quality of the human environment.'") (quoting 42 U.S.C. § 4332(2)(C)).

The Council on Environmental Quality's (CEQ's) 40 CFR Part 1500 regulations that implement NEPA define a major federal action in Section 1508.1 as follows:

> *Major Federal action* includes actions with effects that may be major and which are potentially subject to Federal control and responsibility...
>
> (a) Actions include new and continuing activities;... new or revised agency rules, regulations, plans, policies, or procedures;
>
> (b) Federal actions tend to fall within one of the following categories:
>
> i. Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act (APA), 5 U.S.C 551 *et seq.*. that are formal documents establishing an agency's policies which will result in or substantially alter agency programs.

> ii. Adoption of formal plans, such as official documents prepared or approved by federal agencies ***which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based***. (emphasis added).

Because BLM's acknowledged purpose of the rule is to change how public lands are managed and how federal resources are used to prioritize non-use or conservation, it is clear that BLM's Proposed Rule would "guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based." Consequently, BLM must prepare an EIS for what is obviously a "major federal action."

Because the land use restrictions and prohibitions would thwart solar and wind farms and critical minerals mining projects that are necessary for transitioning to renewable energy, the EIS must take a hard look at the No Action alternative and quantify the CO_2 emission reduction that could be achieved without the rule. The EIS alternatives analysis must disclose how the Proposed Rule would interfere with renewable energy projects and potentially increase CO_2 emissions by not being able to develop some critical minerals and renewable energy projects.

XII. The Proposed Rule is Economically Significant and Must be Evaluated Under NEPA, the OMB, the SBREFA, and the CRA

A. Multiple Uses Generated $201 Billion in Economic Output in 2022

BLM's website "Economic Contributions From BLM-Managed Lands"[8] and BLM's report entitled "BLM: A Sound Investment for America 2022,"[9] (included herein as Exhibit 1) show that multiple use activities on BLM-administered lands generated $201 billion in economic output in 2022 and generated 783,000 jobs. Because the Proposed Rule would significantly interfere with multiple uses such as logging, ranching, oil and gas production, mineral exploration and mining, and renewable energy production, BLM must prepare an EIS that analyzes and quantifies the impacts resulting from the reduced economic output from these multiple uses on western public lands states.

BLM has already developed the baseline data for this analysis in its "Economic Contributions from BLM-Managed Lands" and its Sound Investment for America 2022 report. BLM must complete the job by assessing the socioeconomic consequences of the Proposed Rule, recognizing that BLM's own data show that the multiple uses listed below are significant revenue generators, constituting "an economic driver across the West."[10]

[8] https://www.blm.gov/about/data/socioeconomic-impact-report-2022
[9] https://www.blm.gov/sites/default/files/docs/2022-12/2022-SoundInvestment.pdf
[10] BLM press release, *op cit.*

- Recreation $11.4 billion
- Renewable Energy $4.4 billion
- Nonenergy Minerals[11] $48.8 billion
- Oil and Gas $113.8 billion
- Grazing $2.6 billion
- Coal $8.3 billion
- Timber $1.1 billion
- BLM Expenditures[12] $5.2 billion
- Payments to States and Counties[13] $5.2 billion

BLM must comply with the NEPA requirement to prepare an EIS that takes a hard look at the economic and socioeconomic impacts resulting from the reduction in jobs and local and state tax revenues due to the Proposed Rule. *See Wyoming v. USDA*, 661 F.3d 1209, 1251 (10th Cir. 2011) (explaining that under NEPA, an EIS must "analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts . . . [t]he types of impacts that must be considered include 'ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health [effects].') (quoting 40 C.F.R. § 1508.8). The EIS must also evaluate alternatives to the rule and ways to avoid, minimize, and mitigate these impacts. 40 C.F.R. § 1502.14(a).

B. BLM's Economic Threshold Analysis is Faulty

BLM's Economic Threshold Analysis for this Proposed Rule asserts that the rule would not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. There is a glaring discrepancy between the Economic Threshold Analysis and the data BLM collected to demonstrate the economic importance of BLM's multiple use programs on western public lands. The enormous difference between $100 million and $201 billion must be explained and resolved before BLM proceeds further with this Proposed Rule.

Assuming the Proposed Rule adversely impacts just one percent of the $201 billion currently realized from multiple uses, that would be a $2 billion impact, which would clearly exceed the $100 million threshold that triggers the requirement to prepare the following federal economic evaluations:

- A cost-benefit analysis by the Office of Management and Budget pursuant to Executive Order 12866;

[11] Nonenergy minerals refers to locatable, "hardrock" minerals like copper, gold, silver, lithium, rare earths, zinc, molybdenum, lead, vanadium, tungsten, tellurium, etc. Some of these minerals are on the USGS' critical minerals list.
[12] BLM expenditures refers to goods, services, and contract labor purchased by BLM and BLM employees' purchase of goods and services in the local communities where they live
[13] BLM payments refers mainly to Payments in Lieu of Taxes (PILT) to states and counties.

- An assessment of how the Proposed Rule would impact small businesses and governments as required by the Regulatory Flexibility Act of 1980 (RFA), and the Small Business Regulatory Enforcement and Fairness Act (SBREFA); and

- Congressional review pursuant to the Congressional Review Act.

Executive Order 12866 requires agencies to assess the benefits and costs of regulatory actions, and for significant regulatory actions, submit a detailed report of their assessment to the Office of Management and Budget (OMB) for review. A rule may be significant under Executive Order 12866 if it meets any of the following criteria:

- Has an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

- Creates a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

- Materially alters the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

- Raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Because the Proposed Rule will result in substantially more than $100 million in economic impacts, BLM should be precluded from proceeding any further with this Proposed Rule until it prepares a detailed cost benefits analysis and provides the results of this analysis to the OMB.

C. BLM Must Comply with the RFA and SBREFA and Analyze Impacts to Small Businesses

The RFA applies to any rule proposal by a federal agency that is subject to notice and comment under the APA. The RFA requires federal agencies to conduct a full regulatory flexibility analysis or to certify that the Proposed Rule will not "have a significant economic impact on a substantial number of small entities." If an agency determines that a proposed or draft rule will not have a significant economic impact on a substantial number of small entities, it must provide a factual basis for this determination, which must be published in the Federal Register at the time the proposed or final rule is published for public comment.

In the Federal Register notice for the Proposed Rule, BLM certifies that the rule will not have "a significant economic impact on a substantial number of small entities" and consequently does not require an analysis pursuant to the RFA (FR 19594). However, BLM has not provided the necessary factual basis as required by the RFA to support this certification. This mirrors what BLM did in 1997 when it improperly issued its bonding rule for locatable minerals without providing the factual basis required to support their certification that the Proposed Rule would not have a significant impact on small entities.

When small businesses believe a rule or regulation will adversely affect them, and that the agency failed to meet its analysis and disclosure obligations under the RFA, SBREFA provides those small businesses with the opportunity to seek judicial review of the agency's action. The SBA's Chief Counsel for Advocacy can become directly involved in such appeals by filing amicus (friend of the court) briefs in the court proceedings brought by the small business appealing the rule and claiming a violation of the RFA.

BLM has first-hand experience with judicial review under SBREFA. In 1998, the District Court for the District of Columbia (DC District Court) ruled in favor of the Northwest Mining Association (now known as the American Exploration & Mining Association), citing BLM's failure to assess the impact of its 1997 proposed bonding rule on small entities as required under the RFA and SBREFA. In *Northwest Mining Association v Babbitt*, 5 F.Supp2d 9 (D.D.C. 1998), the District Court remanded BLM's bonding rule back to the agency for failure to comply with requirements under the RFA and SBREFA to evaluate the impact of its proposed bonding rule on small miners.

In *Northwest Mining Association v Babbitt*, BLM did not use the SBA's definition of a small miner, which the DC District Court noted was 500 or fewer employees. Just as in 1998, many mining and mineral exploration companies who currently own mining claims on BLM-administered lands and who explore and develop these lands pursuant to the right to do so under Section 22 of the U.S. Mining Law have fewer than 500 employees and qualify as small entities as defined by the SBA. Additionally many ranching, logging, outfitting, renewable energy, and oil and gas companies also meet the SBA's definition of a small entity for their industry sectors.

For the same reasons as the DC District Court found that BLM failed to comply with its obligations under the RFA when it finalized its proposed 1997 bonding rule and remanded the rule to BLM for consideration of the rule's impact on small entities, BLM must now comply with the RFA and assess the impact of the proposed Conservation and Land Health rule on small entities or provide the required factual basis to support a certification the Proposed Rule will not "have a significant economic impact on a substantial number of small entities." Proceeding without the proper RFA analysis or the factual basis to support a no significant impact determination, as BLM is currently proposing to do, is unlawful and will render the Proposed Rule void.

BLM must not ignore the SBA's Office of Advocacy (Advocacy) June 13 2023 comment letter on the Proposed Rule to DOI Secretary Deb Haaland (included herein as Exhibit 2). Some of the key points in Advocacy's letter are summarized below:

- BLM's Proposed Rule may be contrary to FLPMA's statutory land management principles;
- BLM's Proposed Rule does not adequately consider the impacts to small businesses as required by the RFA;
- The Proposed Rule has unintended consequences that are contrary to BLM's goals and FLPMA's land management requirements;
- The certification in the Federal Register asserting the Proposed Rule will not significantly impact small entities does not describe the factual basis to support this analysis, as required under the Section 605(b) of the RFA; and
- BLM should consider alternatives to the Proposed Rule that better align with FLPMA's statutory provisions.

D. The Congressional Review Act Precludes BLM from Re-Proposing Landscape-Scale Planning

The Congressional Review Act ("CRA") assists Congress in discharging its responsibilities for overseeing federal regulatory agencies. It provides that "[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit" a report that includes "a concise general statement relating to the rule" and a "proposed effective date." *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 556 (9th Cir. 2019) (quoting 5 U.S.C.S. § 801).

The Proposed Rule bears many similarities to the Planning Rule 2.0 for landscape-scale planning, which Congress repealed in 2017 through the CRA. In fact, references to "landscape-scale planning" are infused throughout the Proposed Rule and attempts to repackage landscape-level planning as a tool to address climate change. This new justification for landscape-scale planning cannot be used to resurrect a concept that Congress has already rejected. Congress' rejection of BLM's Planning Rule 2.0 pursuant to the CRA means BLM is prohibited from reproposing a substantially similar rule.

XIII. Conclusions

For the numerous reasons explained above, the Proposed Rule will be harmful to our country. It will lead to greater dependency on foreign minerals at a time when the President and Congress have established policies to increase domestic mineral production in order to reduce our reliance on mineral imports – especially from China. As discussed in Section III, the U.S. continues to become more and more dependent on other countries for the minerals we need for the energy transition, national defense, and every aspect of modern society. The country's mineral reliance grew in 2022 to 51 minerals compared to the 47 minerals on which we were 50 percent or more import reliant in 2021. As the DOD recently noted, "Contrary to a common belief, this risk [relying on foreign minerals] is more than a military vulnerability; it impacts the entire U.S. economy and our values."

The Proposed Rule is unlawful because Congress has not authorized BLM to subordinate the multiple use directives in FLPMA by putting conservation on the same level as all other multiple uses, and establishing policy preferences that functionally make conservation the highest and best use of the land. BLM cannot make this substantial change without Congressional action to amend FLPMA to authorize the agency's proposed change. Unless and until Congress says otherwise, BLM must manage the public lands pursuant to FLPMA's multiple use mandates.

BLM cannot proceed with the Proposed Rule because it is an unlawful attempt to use the rulemaking process to change FLPMA. WMC concurs with the sixteen western senators who sent a letter to you on May 11, 2023, requesting that the Proposed Rule be immediately withdrawn. Similarly, WMC supports the provision in Section 4005 of Senator Barrasso's Spur Permitting of Underdeveloped Resources (SPUR) Act, S. 1456, which directs the Secretary to withdraw the Proposed Rule and prohibits finalizing and implementing this rule. Additionally, WMC notes the many reasons in the U.S. Small Business Administration's Office of Advocacy's June 13, 2023, letter (Exhibit 2) to Secretary Haaland outlining why BLM needs to jettison the Proposed Rule and consider an alternative that complies with the land management statutory directives in FLPMA.

The UUD mandate in FLPMA already gives BLM the authority it needs to manage public lands to achieve the appropriate balance between multiple use and environmental protection. After nearly fifty years of implementing this mandate, there is no justification for BLM's proposed "seismic shift" in its land management principles. With roughly two-thirds of the nation's lands already off limits to mineral exploration and development,[14] the Secretary does not need the new tools in the Proposed Rule (e.g., the increased use of ACECs, creating conservation leases, and preserving intact landscapes) to limit or prohibit mineral activities and other multiple uses.

[14] John D. Leshy, *America's Public Lands – A Look Back and Ahead*, 67th Annual Rocky Mountain Mineral Law Institute, July 19, 2021.

Finally, the Proposed Rule will inevitably lead to permitting delays for all types of multiple use projects on public lands. Although WMC is primarily concerned about permitting delays affecting mineral exploration and development projects, we note that permitting delays will also affect the infrastructure projects needed for the energy transition, including but not limited to high-voltage transmission lines, and solar, wind, and geothermal renewable energy projects. This is yet another important reason why this is the wrong rule at the wrong time.

Although WMC appreciates this opportunity to provide these comments, we respectfully request that BLM withdraw this Proposed Rule.

Sincerely yours,

Debra W. Struhsacker

Emily Hendrickson
WMC President

Debra W. Struhsacker
WMC Co-Founder and Board Member

Attachments: Exhibit 1 - The BLM: A Sound Investment for America 2022

Exhibit 2 – SBA Office of Advocacy June 13, 2023, comment letter on the Proposed Rule to DOI Secretary Deb Haaland

Exhibit 1
The BLM: A Sound Investment for America 2022

WMC
WOMEN'S MINING COALITION

Benefits of Public Lands

In addition to supporting economic vitality, BLM programs and managed lands benefit families and communities across the United States in ways that are not always reflected in economic activity.

Nonmarket Benefits

Many of the benefits provided by BLM-managed lands are difficult to quantify in economic terms. These "nonmarket benefits" reflect the value that the public derives from access to and preservation of our nation's natural, scenic, recreational, and cultural resources.

2,700 miles of designated wild and scenic rivers

> 330 threatened or endangered species and **2,430 sensitive species** live in BLM-managed habitat

12.3 million objects and scientific specimens on loan to repositories, museums, and universities across the country

251 species of plant seed collected to increase availability of native seeds for habitat restoration

> 30 wildlife and plant species delisted, downlisted, or avoided threatened or endangered listing since 2010 with the help of BLM conservation and other efforts

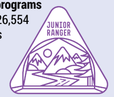
Partnerships

The BLM partners with Tribes and governments, community programs, universities, and national organizations to provide people from all walks of life with opportunities to connect with the natural world. BLM partnerships and engagement programs provide hands-on experiences for professional development, to engage in citizen science, participate in conservation, learn about the histories and cultures tied to public lands, and enhance local recreational opportunities.

12,463 volunteers contributed 525,946 hours of service

1,714 youth engagement programs supported 32,554 participants

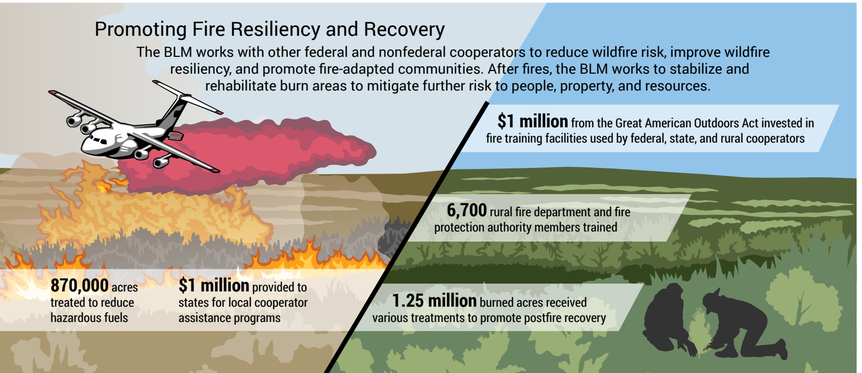
1,114 K-to-12 education programs supported 26,554 participants



1,277 young people and veterans received work experience through the Civilian Climate Corps

Promoting Fire Resiliency and Recovery

The BLM works with other federal and nonfederal cooperators to reduce wildfire risk, improve wildfire resiliency, and promote fire-adapted communities. After fires, the BLM works to stabilize and rehabilitate burn areas to mitigate further risk to people, property, and resources.



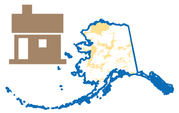
$1 million from the Great American Outdoors Act invested in fire training facilities used by federal, state, and rural cooperators

6,700 rural fire department and fire protection authority members trained

870,000 acres treated to reduce hazardous fuels

$1 million provided to states for local cooperator assistance programs

1.25 million burned acres received various treatments to promote postfire recovery



ALASKA: The White Mountains National Recreation Area is the BLM's only national recreation area, which drew more than 180,000 visitors. The area's 12 cabins had a 25% occupation rate with 1,309 rental days generating $32,000 in revenue for maintenance.

ARIZONA: The BLM approved an amendment request for a right-of-way for a solar energy project that will add battery storage to planned solar energy infrastructure. This project is expected to produce 260 megawatts of electricity and 260 megawatts of energy storage—enough to power 91,000 homes.

CALIFORNIA: The BLM developed a comprehensive management plan for public lands in the Alabama Hills in Inyo County, fulfilling requirements in the John D. Dingell, Jr. Conservation, Management, and Recreation Act. The BLM works to strike a proper balance for land and resource management, increase public access, and create economic prosperity, while protecting and preserving America's treasures.

COLORADO: The McInnis Canyons, Dominguez-Escalante, and Gunnison Gorge National Conservation Areas engaged local communities through the Colorado Canyons Association to provide more than 4,600 hours of volunteer stewardship, including Leave No Trace visitor outreach, fire rehabilitation, and cleanups. These programs helped promote stewardship of public lands.

EASTERN STATES: BLM Eastern States placed 2,588 wild horses and burros into private care, which is nearly 35 percent of animals adopted bureauwide. BLM Eastern States also completed more than 1,250 compliance inspections.

IDAHO: The BLM acquired approximately 650 acres of land in Idaho to preserve open space, enhance outdoor recreation opportunities, and conserve wildlife habitat. This included the 560-acre Healy Toll Road parcel in the Boise foothills. It also included 88.5 acres near Cougar Bay in northern Idaho.

MONTANA/DAKOTAS: The BLM acquired 5,600 acres of land in the Western Montana District, restoring habitat for threatened and endangered species and ensuring proper watershed function for aquatic species. The acquisition also maintains active forestry and fuels programs and continued use of grazing and provides greater access to important areas for Tribal groups.

NEVADA: The BLM in Nevada continues to respond to demands for renewable energy. Through FY 2021, the BLM has permitted utility-scale renewable energy projects that include 29 geothermal, 1 wind, and 12 solar energy projects with a total combined capacity of 3,277 megawatts.

NEW MEXICO: To hunt, fish, or trap on BLM and U.S. Forest Service lands and waters in the state, a habitat stamp and proper license are required. The New Mexico Habitat Stamp Program raised $1 million for habitat restoration and conservation projects on federal lands. In partnership with the state Department of Game and Fish, the BLM contributes to the program free digital maps of hunting units and recreational opportunities.

OREGON/WASHINGTON: The BLM hosted nearly 10 million recreational visitors across Oregon and Washington, contributing more than half-a-billion dollars to local economies. BLM public lands promoted health and wellness by offering unique outdoor experiences through hiking, biking, camping, river activities, and more.

UTAH: In Utah, the BLM manages an abundance of cultural resources. The BLM partnered with the State of Utah to form a cultural site stewardship program to monitor 475 cultural resource sites. This program included 146 volunteers, more than 1,500 volunteer hours, and nearly 28,000 donated miles of travel.

WYOMING: Your box of baking soda probably contains trona, which most likely comes from BLM-managed land in Wyoming. Approximately 18 million tons of trona were produced in Wyoming. Trona is used for glass, paper products, laundry detergents, baking soda, and many other everyday items.

All state facts are for FY 2021.

BLM-administered land

BLM administrative boundaries

www.blm.gov BLM/HQ/GI-22/005+9500 November 2022

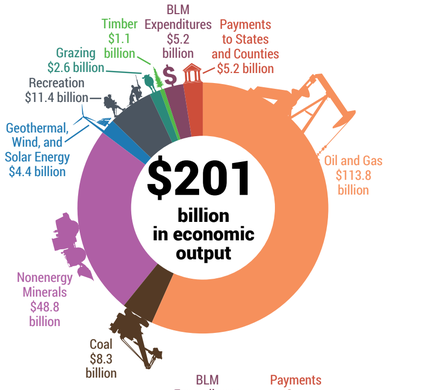
The BLM: A Sound Investment for America 2022

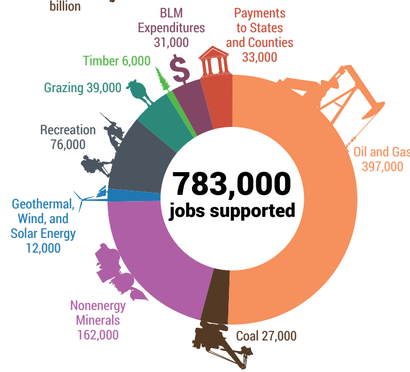
As steward for much of America's public lands, the Bureau of Land Management (BLM) manages some of the nation's most historic and scenic landscapes, as well as vast natural resources, for the benefit of all Americans. These public lands include rangelands, forests, mountains, arctic tundra, and deserts and encompass 10 percent of the nation's surface and approximately one-third of its subsurface mineral resources.

The BLM's balanced management of these lands advances responsible energy policy, promotes restoration, provides recreation for all, and fosters conservation. Billions of dollars and hundreds of thousands of jobs are supported from activities related to the BLM's land management. This brochure provides a snapshot of how authorized use and management of BLM-administered lands supported $201 billion in economic output and nearly 783,000 jobs across the country in fiscal year (FY) 2021. These uses also generated substantial revenue for the U.S. Treasury and state governments. In FY 2021, $2 billion was redistributed to state and local governments for improvement projects and public services under various revenue-sharing programs, including the Taylor Grazing Act, the Mineral Leasing Act for Acquired Lands, Payments in Lieu of Taxes, and the Secure Rural Schools and Community Self-Determination Act.

Economic Contributions from BLM-Managed Lands

Fiscal Year 2021





Economic Sectors

RECREATION: More than 99 percent of BLM-managed lands are available for recreation at no fee to visitors. Lands used for recreational activities attract visitor spending and contribute significantly to local economies. In FY 2021, BLM-managed lands received more than 80 million recreation-related visits, an increase of about 10 percent over the previous year.

GEOTHERMAL, SOLAR, AND WIND: There are 47 currently operating geothermal power plants with federal interest that have an installed capacity of approximately 2,500 megawatts and an average capacity factor (the ratio of actual output to maximum possible output) of more than 70 percent. Through FY 2021, the BLM has approved 38 solar energy projects with a generation capacity of more than 7,110 megawatts and 36 wind energy projects with a generation capacity of more than 3,000 megawatts.

NONENERGY MINERALS: Federal lands contain leasable minerals such as potash, phosphate, sodium, and gilsonite, components used in fertilizers, glass, and paper. In FY 2021, nonenergy leasable minerals produced from more than 580,000 acres of federal lands brought in royalties and other payments of $59 million. Federal lands also contain saleable mineral materials, including sand, gravel, soil, and clay. In FY 2021, nonenergy saleable mineral materials produced from federal lands brought in royalties and other payments of $14.5 million. Federal lands also contain locatable hardrock minerals such as copper and gold. In FY 2021, fees associated with locatable minerals resulted in payments of $98.7 million. The FY 2021 total revenue received for federal nonenergy minerals was $172 million.

OIL AND GAS: Currently, the BLM has more than 24.9 million acres of land under lease for oil and gas development and production, from the Eastern United States to the National Petroleum Reserve in Alaska. In FY 2021, the BLM offered 418 parcels and more than 1.4 million acres for leasing. Federal onshore oil production increased to 387 million barrels of oil during FY 2021, compared to 331 million barrels in FY 2020.

GRAZING: In 2021, the BLM permitted 12.3 million animal unit months (AUMs) for ranchers who graze their livestock, mostly cattle and sheep, on public lands. An AUM is the amount of forage needed to feed a cow and calf, or the equivalent, for 1 month. The grazing fee in 2021 was $1.35 per AUM. While the number of AUMs permitted remains relatively steady, annual variations in billed use occur due to factors such as drought, wildfire, market conditions, and restoration projects.

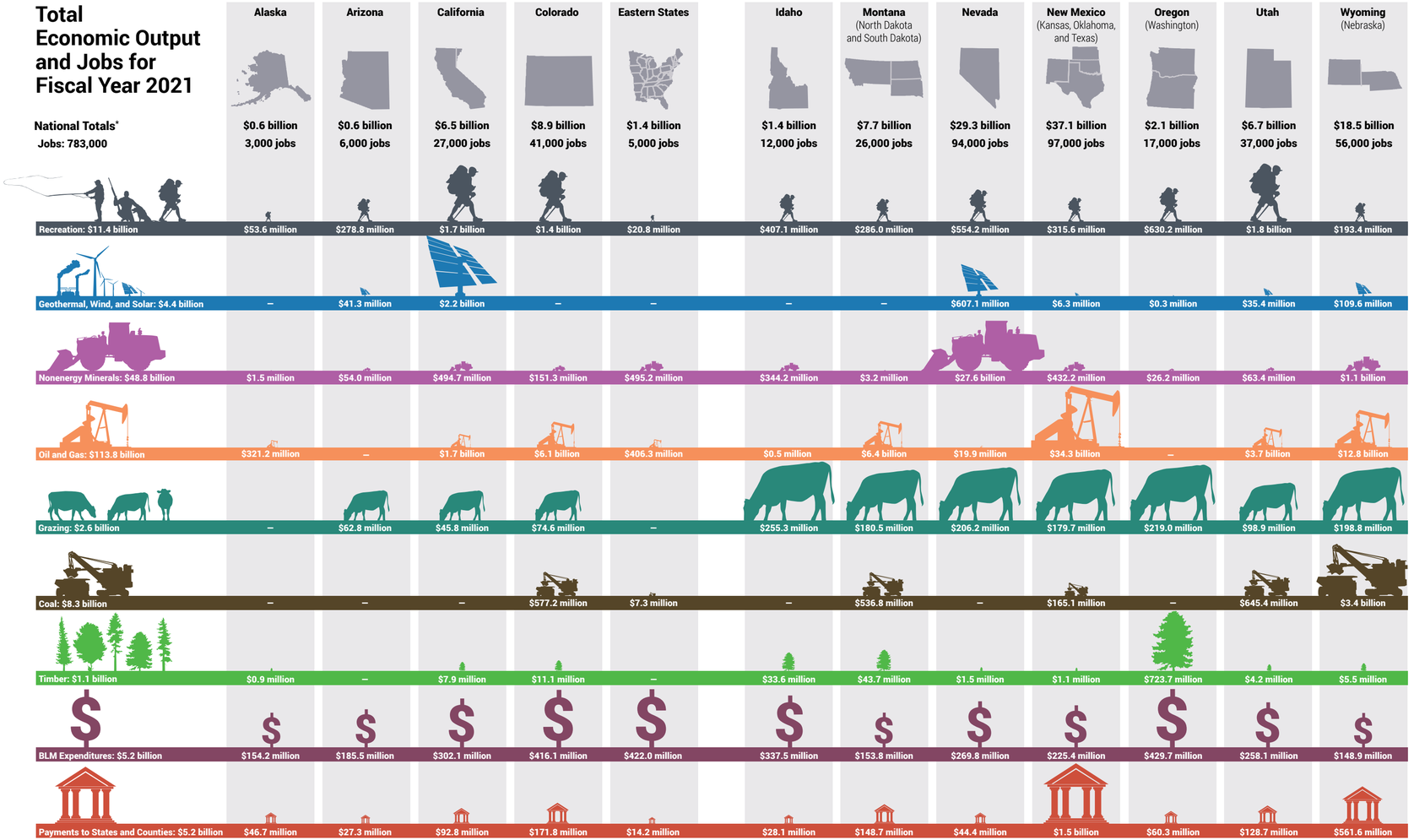
COAL: The BLM administers coal leases encompassing 433,264 acres in 11 states. In FY 2021, coal production from federal lands increased to a total of 258.3 million tons, compared to the 2020 total of 252.9 million tons. This is about 42.9 percent of the total 602.6 million tons produced in the United States from federal, Indian, and state lands in FY 2021.

TIMBER: Twenty percent of the 245 million acres of lands managed by the BLM are forest ecosystems, spread across 13 western states, including Alaska. The BLM ensures the health and resilience of the nation's public forest lands as well as the availability of traditional forest products, such as timber. In 2021, the BLM offered 327 million board feet of timber under new sale and stewardship contracts. The BLM continues to use stewardship contracts for collaborative projects with local communities and interested organizations to improve, maintain, and restore forest and rangeland health, water quality, and fish and wildlife habitat and to reduce wildfire risk.

BLM EXPENDITURES: The BLM employed more than 11,000 permanent, term, and seasonal workers in FY 2021 who spent their wages on goods and services in surrounding communities and generated economic activity in 39 states. BLM purchases, including those for supplies, services, construction costs, and program operations, to complete on-the-ground work through contracts and cooperative agreements also generated economic activity in communities. Some nonlabor spending categories, such as fire suppression and all hazard emergency response, were excluded due to differences in the location/year in which accounting and spending occur.

PAYMENTS TO STATES AND COUNTIES: Under certain laws, the BLM makes payments to states and counties that are used to help fund schools, road improvements, infrastructure, and public services within their jurisdictions. In FY 2021, the BLM distributed nearly $184 million under the Payments in Lieu of Taxes (PILT) program, $24 million under the Secure Rural Schools program, and $1.9 billion in minerals revenue.

Total Economic Output and Jobs for Fiscal Year 2021



* National totals may differ from the sum of individual state numbers because they take into account activity across state borders and average industry productivity across states.

Exhibit 2
SBA Office of Advocacy June 13, 2023, comment letter on the Proposed Rule to DOI Secretary Deb Haaland

WMC
WOMEN'S MINING COALITION

U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

June 13, 2023

VIA ELECTRONIC SUBMISSION

Honorable Deb Haaland
Secretary
U.S. Department of the Interior
1849 C St. NW,
Washington, D.C. 20240

Re: Conservation and Landscape Health (88 Fed. Reg. 19583; April 3, 2023).

Dear Secretary Haaland:

On April 3, 2023, the U.S. Department of the Interior's Bureau of Land Management (BLM) published a proposed rule entitled "Conservation and Landscape Health." The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments on the proposed rule. Advocacy and small businesses support activities to mitigate and restore public lands. Advocacy is concerned, however, that BLM's proposed rule may be contrary to the statutory land management principles laid out in the Federal Land Policy Management Act (FLPMA). Furthermore, BLM's proposed rule does not adequately consider the impacts to small businesses as required by the Regulatory Flexibility Act (RFA). Advocacy makes the following additional comments below.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),[1] as amended by the Small Business Regulatory Enforcement Fairness Act

[1] 5 U.S.C. §601 et seq.

(SBREFA),[2] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[3] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.[4]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[5]

B. The Proposed Rule

The Federal Land Policy and Management Act (FLPMA) of 1976 lays out provisions for BLM to follow in its management of federal lands within the United States.[6] FLPMA directs the agency to manage the lands in a way that balances the need to preserve and protect certain lands in their natural habitat while also recognizing the need for domestic sources of "minerals, food, timber, and fiber."[7] FLPMA further directs BLM to follow specific criteria for the development of land use plans. These criteria include principles of multiple use and giving priority to the designation and protection of areas of critical environmental concern (ACEC).[8]

FLPMA defines multiple use as including the management of public lands in a way that "best meet[s] the present and future needs of the American people."[9] Multiple use is further defined as a combination of uses including but not limited to "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values."[10] FLMPA also defines six principal uses for land management that include and are *limited* to, "domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production."[11]

Pursuant to FLPMA, if the Secretary of the Interior issues a land management decision that excludes or eliminates one or more principles of major use for two or more years, the Secretary

---

[2] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).
[3] Small Business Jobs Act of 2010 (PL. 111-240) §1601.
[4] *Id*.
[5] *Id.*
[6] 43 U.S.C. § 1701 et seq.
[7] *Id.* at (a) (12).
[8] 43 U.S.C. § 1712 (c).
[9] 43 U.S.C. § 1702 (c).
[10] *Id.*
[11] *Id.* at (l). (Emphasis added).

is required to report their decision to Congress. Congress may issue a concurrent resolution of non-approval for the decision.[12] In such an instance, the Secretary must terminate such decision.[13]

On April 3, 2023, BLM published its proposed "Conservation Land Health" rule.[14] The rule proposes three major changes to current land management practices. First, it applies land health standards to all BLM managed lands.[15] This provision requires that BLM use data and information to prepare an assessment of land health for all BLM managed lands, not just those used for grazing, as is the current practice.[16] Second, the rule adds "conservation" as a land use category and allows for conservation leases.[17] These leases would be available to entities seeking to restore public lands or provide mitigation for a particular action.[18] Conservation leases would be issued for an initial maximum term of ten years, but can be extended as necessary to serve the purpose for which the lease was first issued.[19] Third, the rule expands the use of Areas of Critical Environmental Concern (ACECs).[20] The rule would emphasize ACECs as the principal designation for protecting important resources, and establish a "more comprehensive framework" to consider areas for ACEC designation.[21]

II. Advocacy's Small Business Concerns[22]

On May 17, 2023, Advocacy held a virtual small business roundtable to discuss the rule.[23] Advocacy also conducted outreach directly to small businesses. Small businesses in agriculture, forestry, and mining spoke to Advocacy about the rule, as well as to representatives of BLM. During this outreach, small businesses expressed concern with BLM's assertion that the rule would not have a significant impact on their business. They were especially concerned about the impact the new conservation leases would have on other uses and whether this may inhibit grazing, mining, and timber leases. Many small businesses questioned the need for the rule. They also questioned whether the rule was outside the bounds of FLPMA. Small businesses are already providing mitigation and restoration measures as prescribed under the National Environmental Policy Act (NEPA) and other environmental statutes.

---

[12] 43 U.S.C. § 1712 (e) (2).
[13] *Id.*
[14] Conservation Land Health, 88 Fed. Reg. 19853, (April 3, 2023).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 19586.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 19584.
[22] At the time of filing of this letter many of the stakeholders with whom Advocacy engaged have not yet filed their own comments. Advocacy therefore requests that BLM carefully review and consider the comments of small businesses and their representatives and that any issues not raised herein that are of concern to small businesses be given their due weight and consideration.
[23] *See*, Office of Advocacy Natural Resources Roundtable (May 17, 2023), https://advocacy.sba.gov/2023/04/27/small-entity-natural-resources-roundtable-may-17-2023/.

Advocacy heard from some county executives in Western states where more than 80 percent of land within the county is managed by BLM, and significant portions of the county's economy is tied to these federal lands.[24] Small business representatives from Montana indicated that nearly 30 percent of the state's lands are public lands, and that grazing leases are an essential part of farming and ranching in the state. Some small businesses pointed to BLM's own economic report that states that lands managed by BLM account for nearly 201 billion dollars in economic output in the U.S.[25] Advocacy heard from some mining representatives who stated that close to 80 percent of their member companies are small businesses.[26]

Recreation and outfitting industries also have an interest in the rule. Some businesses expressed to BLM that conservation leases may be compatible with outdoor recreation activities and therefore may create opportunities for multi-use leases. Others, however, shared the concerns of other industries and noted that conservation leases may be incompatible with certain types of recreation, including those that require the use of motorized vehicles. Some noted that this could pose accessibility issues for those individuals with limited mobility if BLM, or the conservation lease holder, limits the types of recreational activities that can occur in a particular area.

Advocacy also acknowledges that there may be instances where a small business may find portions of BLM's rule beneficial in providing mitigation opportunities. There may also be new and emerging small businesses because of the proposed rule. While these small businesses may enjoy some benefits of the proposed rule, the rule itself is problematic. Given that the rule has the potential to impact a substantial number of small businesses across various industry sectors BLM must properly and thoroughly consider these impacts and modify the proposed rule's RFA analysis accordingly. Advocacy makes the below comments on the proposed rule.

A. BLM's proposed rule has unintended consequences that are contrary to the agency's goals and the statutory requirements for land management under FLPMA.

1. The proposed rule does not properly explain how conservation leases are compatible with the multiple use land management goals laid out in FLPMA.

FLPMA expressly states that BLM must balance the need to protect and preserve public lands with the principal land uses laid out in the Act.[27] FLPMA further states that public lands need to be managed in a way that recognizes the country's need for domestic sources of natural resources and food.[28] Within its proposed rule, BLM cites FLPMA §102 (a) (8) as the basis for issuing its proposed rule.[29] This section describes that BLM must manage public lands in a manner that will protect the quality of resources and preserve some public lands in their natural

---

[24] Advocacy has not independently verified this data.
[25] *See* U.S. Bureau of Land Mgmt., "The BLM: A Sound Investment for America 2022", (November 2022), https://www.blm.gov/about/data/socioeconomic-impact-report-2022.
[26] Advocacy has not independently verified this data.
[27] 43 U.S.C. § 1701 et seq.
[28] *Id.* at 102 (a) (12).
[29] *Id.* at 102 (a) (8).

condition.[30] FLPMA § 102 (b) states that the policies of the Act, "shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation." Within this rulemaking, BLM is proposing to create a new category of leases, conservation leases. In creating a conservation land use lease, BLM will disrupt the current multiple use landscape. BLM's proposed rule states that such 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."[31]

BLM has not, however, clarified within the proposed rule how conservation leases will be compatible with the other principal uses laid out in FLMPA.[32] In at least two instances, mining and grazing, the proposed rule is incompatible. Without proper clarification from BLM regarding the implications of conservation leases on other uses, and the inevitable incompatibility that may result, the proposed rule has the effect of placing conservation leases above other interests.

This is contrary to the statutory intent outlined in FLPMA. As indicated above, BLM does not have statutory authority to create such additional uses that would make the other principal uses incompatible. According to the statutory text cited throughout this letter, Congress did not intend for land uses to be excluded on a programmatic level. BLM's rule has the impact of excluding various land uses programmatically simply because of their incompatibility with conservation. While BLM's objectives in issuing the proposed rule are well-intended, the agency is ignoring the fact that the current multiple use land management landscape is working and does not need the proposed change. This current landscape balances the need to protect and preserve lands while also acknowledging that these lands are necessary for ensuring domestic supply chains for food, minerals, and natural resources, just as FLPMA had intended.

Furthermore, according to FLPMA, these conservation leases would need to be submitted to Congress. These leases could go through rounds of voting in Congress only to be eventually struck down.[33] BLM should therefore reconsider the proposed rule and whether it has statutory authority to take such actions. BLM should consider whether there are alternatives, such as more opportunities for mitigation, rather than creating additional lease categories that are not expressly authorized by FLPMA. Whatever alternatives BLM considers, the agency must require that the leaseholder identify the uses that are consistent with the principal use and be able to justify the exclusion of other principal uses as outlined in the statute. By modifying the rule so that it better aligns with the principles of FLPMA, BLM can ensure that its agency goals and priorities are in line with the statute and retain regulatory durability.

2. The proposed rule offers too much discretion to BLM that may result in elevating conservation above the other principal land management uses.

---

[30] *Id.*
[31] 88 Fed. Reg. 19583 at 19856.
[32] 43 U.S.C. § 1701 (a) (7).
[33] 43 U.S.C. § 1712 (e) (2).

Within the proposed rule, BLM states that conservation leases will be issued for a maximum term of 10 years. The agency then states that it may, "extend the lease if necessary to serve the purpose for which the lease was first issued."[34] Conservation is not a finite use of land in the same way that other uses are. Conservation can be a prolonged and permanently sustained use of land. BLM does not make clear what it will use to measure when a conservation land use has been achieved, nor is this a clear-cut thing that can be measured. Restoration as a land use implies that once the land is restored, the lease has a logical endpoint.

Here, however, BLM has expressly chosen to use the term conservation, and not restoration. This provision of the proposed rule, therefore, would give BLM broad discretion to renew conservation leases indefinitely so long as they meet the purpose for which they were issued. This would all but ensure that other uses such as mining, grazing, logging, and some forms of recreation would not be able to co-exist on these lands, which, once again, is outside the bounds of FLPMA. By locking up a particular public land in an indefinite conservation lease, BLM is neglecting to ensure the sustainability of the domestic supply chain, and instead contributing to the lack of domestically available materials. This may have significant unintended consequences to the domestic supply chain. [35]

BLM should therefore reconsider whether there are other alternatives that may more adequately achieve the agency's objectives for the proposed rule. These alternatives may include broader mitigation opportunities on public lands that are more compatible with other land uses. This will ensure that BLM is not overstepping the statutory principles laid out in FLPMA.

3. BLM's proposal does not account for required actions that lease holders already take with respect to conservation goals and does not consider alternatives.

FLPMA directs BLM to balance and create multiple use land management plans. In doing so, FLPMA defines multiple use as a combination of uses including the six principal land management uses.[36] Within BLM's proposed rule, the agency does not consider and discuss requirements that lease holders are already complying with to meet the agency's goals for increased conservation. Many small businesses discussed the NEPA compliance measures that they are already taking to restore lands once their activities have expired, and to mitigate the impacts of those activities.

By considering measures that businesses are already taking, BLM can focus its attention on areas for improvement with respect to those activities rather than creating additional land uses that are not statutorily supported. Within its own rule BLM cites restoration of degraded lands and increased mitigation opportunities as reasons for issuing the proposed rule. BLM should

---

[34] 88 Fed. Reg. 19583 at 19586.

[35] A lack of domestically available materials may have an impact on renewable energy priorities. These projects require mineral resources such as lithium, copper, and many other locatable minerals. It may also impact domestically sourced food.

[36] 43 U.S.C. § 1702 (c), Stating that the six principal land uses include, "domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production."

therefore reconsider whether the provisions of the proposed rule meet these goals, and whether they are statutorily permitted under FLPMA.

B. The proposed rule lacks a proper factual basis for certification that the rule will not have a significant economic impact on a substantial number of small entities.

Within BLM's proposed rule, the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[37] Under § 605(b) of the RFA, if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, they must include a factual basis for such certification.[38] BLM's certification provides no such factual basis, and offers no information as to how they arrived at this conclusion.[39]

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

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

Advocacy therefore requests that BLM revise its RFA analysis and instead provide a supplemental document with an initial Regulatory Flexibility Act analysis that includes a discussion of the impacted small entities, what if any impacts those small entities may face, and what regulatory alternatives the agency considered.

III. Conclusion

Advocacy appreciates BLM's intention to prioritize restoration of degraded public lands. However, BLM's proposed rule falls short of achieving these stated goals. The rule has unintended consequences that are contrary to the statutory provisions of FLPMA. Furthermore, BLM's RFA certification lacks a factual basis, and does not adequately consider the economic impacts of the rule on small businesses. For the foregoing reasons BLM should consider alternatives to the proposed rule that better align with the statutory provisions of FLPMA and should conduct a proper and thorough RFA analysis for the proposed rule.

---

[37] 5 U.S.C. § 605(b).
[38] *Id.*
[39] 88 Fed. Reg. 19583 at 19594.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel David Rostker at (202) 205-6966 or by email at david.rostker@sba.gov.

Sincerely,

/s/
Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/
Prianka P. Sharma
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Richard L. Revesz, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget