Testimony of Prairie County, Montana Commissioner Todd Devlin
U.S. House Committee on Natural Resources
Subcommittee on Oversight and Investigations
"Examining the Biden Administration's Efforts to Limit Access to Public Lands"
May 24, 2023

Chairman Gosar, Ranking Member Stansbury and members of the Oversight and Investigations Subcommittee, thank you for the opportunity to testify at today's hearing on the Bureau of Land Management's (BLM) proposed Public Lands Rule. I appreciate the chance to discuss this attempt to rewrite the Federal Land Policy Management Act (FLPMA) and the consequences it would have for public lands counties.

My name is Todd Devlin, and I have served as a Commissioner in Prairie County, Montana since 1995. I am Past President of the Montana Association of Counties and currently serve as Chairman of the National Association of Counties' (NACo) Public Lands Steering Committee. I am testifying on behalf of NACo.

The proposed rule from the BLM would fundamentally change the BLM's multiple use mandate under FLPMA without the necessary initial input from Congress, state and county governments, private industry, recreationists and other impacted stakeholders. Additionally, this proposed rule would exclude counties from land designation processes, includes vague definitions, and empowers the agency to approve conservation leases without acreage limitations which could limit critical vegetation management and infrastructure maintenance projects on federal lands. This rule will mandate the BLM manage for preservation rather than meet their multiple use mandate.

About Prairie County

Prairie County is in eastern Montana with a population of approximately 1,100. 43 percent of Prairie County is owned by the federal government with approximately 80% of our federal land falling under the jurisdiction of the Bankhead–Jones Farm Tenant Act of 1937. The federal government also owns 60 percent of our county's mineral rights. Prairie County also contains the 45,000-acre Terry Badlands Wilderness Study Area still sitting in limbo and a few Areas of Critical Environmental Concern (ACEC).

We work closely with the BLM on both their and the county's land use plans, as cooperating agencies during the NEPA process and on the environmental impact statements for protecting the Greater Sage Grouse and developing solar energy. Our economy is reliant on agriculture, especially public lands grazing, and some oil and gas development. Without the ability to wisely use these federal lands, Prairie County simply would not exist.

Intergovernmental Partnerships

The proposed rule was written behind closed doors without the necessary formal input from states, counties or impacted stakeholders. Proposing a rule with such drastic implications for land and resource management across the West with a 75-day comment period treats the legitimate concerns of states, counties, other intergovernmental partners and the public as second tier. BLM should withdraw the rule or, at a minimum, extend the public comment period to 180 days. Furthermore, BLM's public sessions must also be expanded to allow the public to offer verbal comments, rather than selecting questions by agency representatives that they desire to address.

The BLM also chose to issue this proposed rule under a categorical exclusion to avoid triggering the National Environmental Policy Act (NEPA) process, which would require the federal government to treat state, county and tribal governments as cooperating agencies in the development of the rule from the beginning and mandate the issuance of an environmental impact statement (EIS). BLM stated that the proposed rule's effects would be "too broad, speculative or conjectural." Even a surface-level reading of the proposed rule calls this justification into question, as the issuance of newly established conservation leases or expanded opportunities for the BLM to create areas of critical environmental concern (ACEC) will negatively impact all aspects of land management and the agency's multiple use mandate. Any attempt to rewrite FLPMA implementation in a wholesale manner should be subject to the most thorough environmental analyses, including potential economic impacts, just as the BLM would conduct when studying a specific project's impacts. Counties stand ready to work with BLM on ways to better conserve our lands and resources, but we deserve the chance to formally engage with the federal government from the beginning, especially when the wholesale reimplementation of federal law is in the balance.

Areas of Critical Environmental Concern (ACEC)

The proposed rule also completely changes the way ACECs are designated by the BLM. FLPMA mandates that ACECs can only be designated when a resource management plan (RMP) is finalized.[1] The proposed rule would grant the BLM the authority to manage proposed lands of unlimited acreage as ACECs without the requirement of an updated RMP.

This gives the BLM a new ability to create de facto Wilderness Study Areas of any size without the input of state and county governments by side-stepping the RMP establishment or revision process mandated by FLPMA. This is another example of the BLM bypassing the input of states, counties and the public. Counties are willing to work with BLM to develop a more standardized approach for ACEC designation, but any updated regulations must meet the statutory requirements of FLPMA.

Intact Landscapes

Another key concern with the proposed rule is the vague definition of "intact landscapes." BLM defines them as "an unfragmented ecosystem that is free of local conditions that could permanently or significantly disrupt, impair, or degrade the landscape's structure or ecosystem resilience, and that is large enough to maintain native biological diversity, including viable populations of wide-ranging species. Intact landscapes have high conservation value, provide critical ecosystem functions, and support ecosystem resilience."[2] This vague and unclear definition, combined with the proposed rule's mandate to analyze landscapes for protection from activities that negatively impact intact landscapes, would encapsulate untold millions of acres around the United States as "intact landscapes" and potentially disrupt necessary actions to make our landscapes and watersheds healthy and resilient. For example, will the BLM now prevent necessary fuels treatments on the landscape, such as the creation of firebreaks to stop the spread of wildfire, because the landscape would suddenly no longer be "intact?"

Furthermore, local BLM managers would be required to track disturbances to the landscape from BLM-authorized activities on a "watershed scale." However, according to the BLM's own Water Resource Program Strategy document, currently posted to the BLM's website, "The term watershed does not

[1] 43 U.S.C. 1711(a)

[2] https://www.federalregister.gov/documents/2023/04/03/2023-06310/conservation-and-landscape-health

define a scale—thus, there is no such thing as 'watershed scale' analyses."[3] BLM expects its field staff to perform analyses the agency says in its public document cannot be conducted. If BLM plans to conduct watershed scale analyses—which their own strategy document says do not exist—would that give a downstream BLM office the ability to veto a valid permit under the jurisdiction of a separate upstream office? This is one of many parts of the proposed rule that are ripe for misinterpretation and inconsistency.

Conservation leases

A final major component of the proposed rule is a new authority to grant conservation leases of up to 10 years and unlimited size to tribes, non-profits, individuals and private entities. Inexplicably, counties and states are excluded from conservation leases. Counties work with BLM every day to meet our mutual goals of improving our landscapes and watersheds. As co-regulators and environmental stewards with extensive expertise in natural resources management, it is perplexing and damaging to federalism that counties and states are not included in this new effort.

While conservation leases may be an effective tool to support landscape and watershed health goals, the proposed rule not only grants them for terms of up to ten years but ensures that no uses beyond those allowed by the conservation lease can be conducted on the landscape in question. This could severely limit opportunities to manage landscapes to reduce wildfire and invasive species threats, livestock grazing, infrastructure maintenance and even recreational opportunities on federal lands, while elevating conservation as a use above the rest of these critical aspects of the agency's mandate. Here, the BLM runs into another legal issue, as the U.S. Court of Appeals for the Tenth Circuit wrote in *Public Lands Council v. Babbitt* that relevant statutes, including FLPMA, do not allow for the issuance of permits "intended exclusively for 'conservation use.'"[4]

Conclusion

Chairman Gosar, Ranking Member Stansbury, and Subcommittee members, thank you again for the opportunity to testify. It is imperative that federal lands agencies coordinate and cooperate with state and county governments as mandated under federal law when proposing sweeping new regulations impacting our environment and economy. Counties look forward to working with our federal partners on ways to better implement FLPMA and improve ecosystem health and economic outcomes.

[3] https://www.blm.gov/sites/blm.gov/files/WaterResourceProgramStrategy.pdf

[4] *Public Lands Council v. Babbitt*, 167 F. 3d 1287 (10th. Cir. 1999)