STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

June 20, 2023

U.S. Department of Interior
Director Tracy Stone-Manning
Bureau of Land Management
1849 C Street NW, Room 5646
Washington, DC 20240
Attn: 1004-AE92

Submitted via https://www.regulations.gov

RE: Opposition to Proposed Rule "Conservation and Landscape Health"

Director Stone-Manning:

The Bureau of Land Management's proposed rule, "Conservation and Landscape Health," presents grave concerns for states across the country. The BLM's proposed rulemaking would rewrite land management policy—and not for the better. The rule would inflict immediate injuries on State, public, and small business interests. Not only is the proposed rule bad policy, but it is also unlawful. It exceeds statutory authority and violates clear caselaw. Accordingly, we, the Attorneys General of Idaho, Arkansas, Mississippi, Montana, Nebraska, North Dakota, South Carolina, South Dakota, and Utah request the BLM to immediately withdraw the proposed rule in its entirety.

EXECUTIVE OFFICE
P.O. BOX 83720, BOISE, IDAHO 83720-0010
TELEPHONE: (208) 334-2400, FAX: (208) 854-8071
LOCATED AT 700 W. JEFFERSON STREET, SUITE 210

DISCUSSION

I. The BLM has no authority to adopt or implement the proposed rule.

The proposed rule is an astonishing attempt to create agency authority where none exists, in clear violation of federal law. 5 U.S.C. § 706(2)(C). Congress specifically defined major and principal uses in the Federal Land Policy and Management Act of 1976 ("FLMPA") and did not grant executive branch agencies additional statutory authority to define new uses under the statute.[1] 43 U.S.C. 1702(l). Placing conservation as a use "on par" and "on an equal footing" with the congressionally designated uses that have been in place for over 50 years is well beyond the scope of BLM's authority.

Conservation in this newly defined construct is not a use at all—it is a non-use and an unauthorized withdrawal of public lands. Furthermore, to the extent the proposed rule's aim is environmental conservation, it is duplicative and unnecessary. Federal law already provides numerous environmental statutes that prioritize conservation, such as the Wilderness Act, Endangered Species Act, NEPA, Clean Air Act, Clean Water Act, Antiquities Act, and others.

But as relevant here, the FLPMA mandates that public lands be managed based on multiple uses and sustained yield. However, as stated in the proposed rule, "once the BLM has issued a conservation lease, the BLM *shall not authorize any other uses* of the leased lands that are inconsistent with the authorized conservation use." Section 6102.4(a)(4) (emphasis added). This squarely contradicts the FLPMA's multiple use and sustained yield policy and congressional intent, and it far exceeds the scope of agency authority granted by Congress.

The BLM does not have authority to exercise powers it does not have—here, leasing public lands for "conservation" as a use. Similar unilateral actions have most recently been recognized by the U.S. Supreme Court as a "particular and recurring problem: agencies asserting highly consequential power beyond what congress could

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[1] 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. 43 U.S.C. 172(l) (emphasis added).

reasonably be understood to have granted." *W. Virginia v. E.P.A.*, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2609 (2022). On this basis alone, the BLM should immediately withdraw the proposed rule.

II. The proposed rule violates existing caselaw.

The BLM attempts to re-write the FLPMA through rulemaking by selectively deleting existing language and inserting new, novel, and dangerously vague concepts and regulatory regimes that are not likely to withstand judicial scrutiny. The proposed rule creates a new major and principal use ("conservation"), introduces new terms that are nowhere to be found in the FLPMA (e.g. "intact landscape" and "resilient ecosystem"), modifies existing definitions ("sustained yield"), and implements dozens of new mandates—all without any apparent stakeholder input or statutory basis. This violates existing caselaw striking down a similar regulation as "invalid on its face." *See Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999), *aff'd*, 529 U.S. 728, 120 S. Ct. 1815 (2000); 5 USC § 706(2)(C).

For example, the language in proposed section 6101.5 titled, "Principles for Ecosystem Resilience," reads verbatim from the FLPMA's congressional intent: "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 . . ." 43 U.S.C. § 1701(a)(8).

Yet the rule eliminates the rest of § 1701(a)(8), expressly identifying the goals of uses to "*provide food and habitat* for fish and wildlife and *domestic animals*" and to "*provide for human occupancy and use*." (Emphasis added). Instead, it replaces these statutory objects with a new one: "maintain the productivity of renewable natural resources in perpetuity; and consider the long-term needs of future generations, without permanent impairment of the productivity of the land." Section 6101.5(a). This not-so-subtle revision spells the eventual elimination of traditional public land uses.

The above example is one of many that appear to be a complete overhaul of the FLPMA. The newly coined term "intact landscape" is another, and by its description

"free of local conditions," implies total prohibition of domestic oil and gas production, mining, grazing, public recreation, and any other use considered a "local condition." "A parcel of land cannot both be preserved in its natural character and mined." *New Mexico ex rel. Richardson v. B.L.M.*, 565 F.3d 683, 710 (10th Cir. 2009). These are only a few of the ways the proposed rule tramples multiple-use and sustained yield mandates.

Agency action is arbitrary and capricious when it relies on factors which Congress did not intend the agency to consider. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007). Implementing the proposed rule would affect a "'fundamental revision of [the FLPMA], changing it from [one sort of] scheme of ... regulation' into an entirely different kind." *W. Virginia, 142 S. Ct. at 2609* (*quoting MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 114 S. Ct. 2223, 2232 (1994)). Implementation of the proposed rule violates existing caselaw and assures litigation on all fronts at the taxpayer's expense.

III. The proposed rule furthers privatization of public lands.

The proposed rule endorses the dangerous trend of "private conservation" which is nothing more than socio-economic class warfare and greed, thinly disguised as "preservation." Public land leases drafted under the guise of "conservation" mimic those of private "conservation easements" that gobble up huge swaths of land, transforming them into private playgrounds and trophy hunting enclaves for the ultra-wealthy, and nature reserves for activist organizations that decry traditional public land activities.

Conservation leases sell out public land to the highest bidder, and seemingly without regard to existing or potential multiple use lessees. Even more alarming than private billionaire and activist lessees is the threat of handing over control of the land to foreign entities who would seek to capture the West's rich landscapes, forage, minerals, timber, and water for their own gain, or to prevent their use by United States citizens. Outsourcing conservation goes against the fundamental principles of public land management and use, and once control is handed over to the lessee, it would be difficult, if not impossible to regain.

Conservation leases will continue to whittle away at what remains of our public land access and create more harm by concentrating use into the "landscapes" not subject to conservation leases. The increased wear and tear would inevitably cause "unnecessary or undue degradation" to the remaining landscapes, trails, and spaces as defined in the proposed rule. Access to public lands in the West is already disappearing at an alarming rate. The proposed conservation leases will undoubtedly become just another cleverly disguised way to erect more "NO TRESPASSING" signs and locked gates in the name of "conservation."

IV. The proposed rule would cause significant, detrimental, economic impacts to important State interests and harm small businesses.

The "Economic and Threshold Analysis" incorrectly categorizes the proposed rule as "<u>not</u> economically significant" (emphasis original). This is false. Federal land comprises significant portions of many states. For example, approximately 63% of Idaho, 30% of Montana, 65% of Utah, and 60% of Alaska are comprised of federal land—the third, eleventh, second, and fourth-highest amounts, respectively. In total, the United States owns more than 640 million acres of land. The BLM alone manages over 245 million acres, which comprise significant percentages of our Western States.[2] Of this amount, over millions of acres are already identified with special designations: for example, BLM-managed wilderness areas; wilderness study areas; areas of critical environmental concern; national monuments; national conservation areas, and thousands of miles of national scenic and historic trails and wild and scenic rivers.[3] In Idaho alone, the Department of the Interior recently identified three new "restoration landscapes" targeting over 3.8 million acres of BLM-managed land.

Federal, state, and private lands in our states are rich with minerals, oil and gas, forage, timber, wildlife, water, recreation, and wilderness areas—all of which contribute enormously to our economies and small businesses. Take agriculture in Idaho for instance. It is by far the largest contributor to Idaho's economy, accounting for 18% of Idaho's economic output.[4] In 2021, sales of Idaho food and agriculture

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[2] https://www.blm.gov/about/what-we-manage/national
[3] *See, e.g.,* https://www.blm.gov/programs/national-conservation-lands/idaho
[4] https://agri.idaho.gov/main/marketing/marketing-publications-and-resources/

products totaled over $2.6 billion dollars.[5] And more than 88% of Idaho exporters are small businesses.[6]

Further, Idaho has more cattle than people. So does Iowa, Kansas, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, and Wyoming. Over 2.1 million head are raised by 7,500 beef cattle operations in Idaho—most of which are family-owned small businesses.[7] Almost half of Idaho's cattle will spend part of their lives on public land. Idaho cattle operations hold approximately 1,900 grazing permits,[8] providing essential supplemental forage to deeded land base properties. Eliminating public land grazing would exacerbate the country's ever-increasing need for food, and decreased sustainable forage would exponentially increase the need for water-intensive crops in an alarming drought emergency.

In addition to harming our agriculture industries, implementation of this rule would stifle domestic mineral production, which is a substantial contributor to our states' economic life and vital to our national security. Idaho contains the nation's second-largest deposit of cobalt and other critical minerals that are necessary for our public defense, clean energy technology, and everyday household use. Of the 50 critical minerals identified by the US Geological Survey, Idaho is one of the only states containing deposits of nearly half of these, including cobalt, antimony, zinc, and thorium.[9] Montana is the only producer of palladium and platinum.[10] Utah is the only producer of beryllium—a key metal in aerospace and other defense applications—and a major producer of bentonite, copper, gold, and vanadium.[11] And Alaska leads the nation in zinc and gold production.[12]

Our states and lands hold minerals on which our nation depends. For example: one electric car battery contains over 30 lbs. of cobalt; one wind turbine uses almost three tons of copper and rare earth elements; one F-35 fighter jet contains nearly

[5] *Id.*
[6] *Id.*
[7] https://agri.idaho.gov/main/idaho-livestock/
[8] https://www.blm.gov/programs/natural-resources/rangeland-and-grazing/rangeland-health/idaho
[9] https://www.usgs.gov/news/national-news-release/us-geological-survey-releases-2022-list-critical-minerals
[10] https://www.usgs.gov/centers/national-minerals-information-center/mineral-industry-montana
[11] https://www.usgs.gov/centers/national-minerals-information-center/mineral-industry-utah
[12] https://www.usgs.gov/centers/national-minerals-information-center/mineral-industry-alaska

1,000 lbs. of critical minerals. Conservation as contemplated in this rule ignores the country's skyrocketing need to meet its raw mineral requirements and policy goals of ending reliance on sourcing minerals from unstable and unfriendly economies.

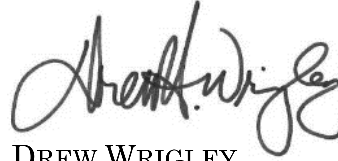
CONCLUSION

For the reasons stated above, the Attorneys General of Idaho, Arkansas, Mississippi, Montana, Nebraska, North Dakota, South Carolina, South Dakota, and Utah submit these comments in strong opposition to the proposed rule. The BLM is without authority to implement the rule, the rule violates existing federal statutes and caselaw, the rule would sell out our public lands to the highest bidder and place their control into uncertain hands, and the rule would substantially affect every part of Idaho's economy. Immediate withdrawal of the rule must occur.

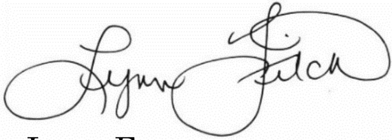
Respectfully,

RAÚL R. LABRADOR
Idaho Attorney General

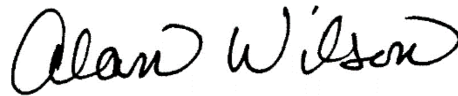
TIM GRIFFIN
Arkansas Attorney General



DREW WRIGLEY
North Dakota Attorney General



LYNN FITCH
Mississippi Attorney General

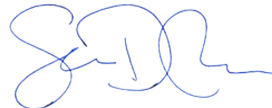


ALAN WILSON
South Carolina Attorney General

AUSTIN KNUDSEN
Montana Attorney General

MARTY JACKLEY
South Dakota Attorney General

MIKE HILGERS
Nebraska Attorney General



SEAN REYES
Utah Attorney General