Comments of the Attorneys General of
Oregon, Connecticut, Illinois, Maryland, New Jersey,
New Mexico, Rhode Island, and Washington

U.S. Department of the Interior
Director (630), Bureau of Land Management
1849 C St., N.W., Room 5646
Washington, DC 20240
Attn: 1004-AE-92

Submitted via Federal eRulemaking Portal at regulations.gov

July 5, 2023

Re: Docket ID No. BLM-2023-0001: Comments on BLM Proposed Conservation and Landscape Health Rule

Dear Director Stone-Manning:

As Secretary of the Interior Deb Haaland has said, "[a]s the nation continues to face unprecedented drought, increasing wildfires and the declining health of our landscapes, our public lands are under growing pressure. It is our responsibility to use the best tools available to restore wildlife habitat, plan for smart development, and conserve the most important places for the benefit of the generations to come."[1] The Bureau of Land Management's (BLM) proposed Conservation and Landscape Health Rule reaffirms the Federal government's commitment to conservation and establishes valuable tools that the Bureau can use to meet that responsibility.

We applaud the BLM's commitment, as reflected in the proposed rule, to ensure that our invaluable public lands are managed in accordance with Section 102(a)(8) of the Federal Land Policy and Management Act (FLPMA). Under FLPMA, 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.'' 43 U.S.C. 1701(a)(8). We concur with the BLM that the proposals in this rule carry out the intent of Congress in enacting FLPMA.

We support the BLM's proposals to clarify that conservation is a use on par with other uses of the public lands under FLPMA's multiple-use and sustained-yield framework; to apply the

[1] Press release, Department of Interior, Interior Department Releases Proposed Plan to Guide the Balanced Management of Public Land (March 30, 2023), https://www.doi.gov/pressreleases/interior-department-releases-proposed-plan-guide-balanced-management-public-lands

fundamentals of land health and related standards and guidelines to all BLM-managed public lands and uses; to establish a more comprehensive framework for the BLM to identify, evaluate, and consider special management attention for Areas of Critical Environmental Concern (ACECs) in land use planning; and to commit BLM to identifying and protecting intact landscapes.

Our comments address: (1) provisions of the proposed rule that we think are particularly important, and (2) additions or clarifications that we believe would make the proposed rule even stronger. As detailed below, we believe the rule could be strengthened by, *inter alia*, adding detail on how fundamentals of landscape health will be addressed in contexts other than rangeland; ensuring that the definition of "intact landscape" is not read too narrowly; defining allowable uses within the conservation lease period; adding standards for protection and restoration actions; and adding enforcement provisions that will ensure that durable restoration and mitigation, when appropriate, is achieved on the landscape in a manner that promotes ecosystem resilience.

Applying the fundamentals of land health to all BLM lands:

We strongly support this aspect of the proposed rule. Since, to date, land health standards and guidelines have been designed for rangeland, it is vitally important that, as the proposed rule states:

> Authorized officers must review land health standards and guidelines during the land use planning process and develop new or revise existing land health standards and guidelines as necessary for all lands and program areas to ensure the standards and guidelines serve as appropriate measures for the fundamentals of lands health.

§ 6103.1–1(a)(2), 88 Fed. Reg. 19,604.

Some clarification, however, is in order. We recommend that the BLM explicitly require the development of program-specific land health standards and guidelines for each program area. We also recommend that, as in the rangeland health context, the BLM develop, for each program area, fallback standards to be applied "[u]ntil such time as state or regional standards and guidelines are developed." 43 CFR § 4180.2(f). Although some of the rangeland health standards and guidelines may be equally applicable to all lands, many of the rangeland health standards and guidelines are rangeland-specific. We anticipate that the BLM will conclude that other program areas also require specific standards and guidelines.

Finally, we recommend that the Final Rule establish deadlines for the BLM to develop state and regional program-specific standards and guidelines, and commit to a timeline for the BLM to establish fallback standards and guidelines pending the completion of state and regional plans.

The proposed rule also states that "upon determining that existing management practices or levels of use on public lands are significant factors in the nonachievement of the standards and guidelines, authorized officers must take appropriate action as soon as practicable," and that "[r]elevant practices and activities may include but are not limited to the establishment of terms

and conditions for permits, leases, and other use authorizations and land enhancement activities." § 6103.1–2(e)(1) and (2), 88 Fed. Reg. 19,604. These, again, are vitally important provisions of the rule that would benefit from elaboration.

The BLM could look to its management of rangeland, where it has already been managing under principles of land health under 43 CFR Subpart 4180, to outline possible terms and conditions that could be applied to logging leases, mining leases, oil and gas leases, and other types of permits and leases. Of course, some of the specific conditions sometimes applied to rangeland in order to restore land health – *e.g.*, reducing the number of cattle allowed to graze – would not be applicable in other contexts, but the BLM could look to those as models for analogous conditions.

In addition, the final rule should specify that "the establishment of terms and conditions for permits [and] leases" can include *denying renewal of a permit or lease* due to a lessee's failure to implement required measures to restore land health. Although we believe this is implicit in the proposed language, we think it should be made explicit, perhaps by adding language to § 6103.1-2(e)(3): "Relevant practices and activities may include but are not limited to the establishment of terms and conditions for permits, leases, and other use authorizations and land enhancement activities, *or non-renewal of existing leases and permits."* 88 Fed. Reg. 19,604 (suggested addition in italics).

Finally, we appreciate the fact that one of the principles of land health that will now extend to all BLM lands is: "Water quality complies with state water quality standards." Proposed 43 CFR §6103.1(a)(3), 88 Fed. Reg. 19,603.

Areas of Critical Environmental Concern:

We support the BLM's proposal to **"**revise existing regulations to better meet FLPMA's requirement that the BLM prioritize designating and protecting Areas of Critical Environmental Concern (ACECs)." 88 Fed. Reg. 19,583. In particular, we support:

- Proposed § 1610.7–2(c), which would require authorized officers to identify areas that may be eligible for ACEC status early in the planning process and would highlight the need to target areas for evaluation based on resource inventories, internal and external nominations, and existing ACEC designations. 88 Fed. Reg. 19,596.

- Proposed § 1610.7–2(g), which would clarify that land use plans must include at least one plan alternative that analyzes in detail all proposed ACECs, in order to analyze the consequences of both providing and not providing special management attention to identified resources. We recommend a clarifying modification. The current language says "[p]lanning documents must include at least one alternative that analyzes in detail all proposed ACECs to provide for informed decisionmaking on the tradeoffs associated with ACEC designation." 88 Fed. Reg. 19,597. Although this point may be implicit, we recommend the following addition to emphasize the environmental consequences of not designating an ACEC: "informed decisionmaking on the tradeoffs associated with ACEC designation, including the environmental consequences of not making such designation."

- Proposed § 1610.7–2 (j), which states that:

  The State Director, through the land use planning process, may remove the designation of an ACEC, in whole or in part, only when:

  (1) The State Director finds that special management attention is not needed because another legally enforceable mechanism provides an equal or greater level of protection; or

  (2) The State Director finds that the resources, values, systems, processes, or natural hazards of relevance and importance are no longer present, cannot be recovered, or have recovered to the point where special management is no longer necessary. The findings must be supported by data or documented changes on the ground.

88 Fed. Reg. 19,597. This limitation on the *removal* of ACEC designations is a most welcome provision.

Intact natural landscapes:

We support the provisions of the proposed rule that **"**require the BLM to identify intact landscapes on public lands, manage certain landscapes to protect their intactness, and pursue strategies to protect and connect intact landscapes." 88 Fed. Reg. 19,589.

The proposed rule quite properly states that "[t]he BLM *must* manage certain landscapes to protect their intactness." § 6102.1(a), 88 Fed. Reg. at 19,599. (Emphasis added.) The proposed rule, however, appears to defer management changes to protect intact natural landscapes until "when [BLM] is revising a Resource Management Plan." § 6102.2(a), 88 Fed. Reg. 15,999. The life of an RMP is typically twenty years. This seems to raise the prospect that the BLM could identify an intact natural landscape in Year 1 of an RMP, and delay taking any action to protect it for another 19.5 years, while waiting for the next RMP cycle, during which time the landscape could cease to be intact. Such a result would be inconsistent with the principle that the BLM "*mus*t manage certain landscapes to protect their intactness" (emphasis added).

The BLM should specify the steps it will take to avoid such results. This could be accomplished by specifying that RMP revision should begin as soon as an intact natural landscape is identified, or by specifying actions the BLM will take to protect intact natural landscapes while awaiting the next iteration of an RMP. The BLM could look to § 1610.7-2(c)(3), relating to ACECs, as a model: "If nominations [for ACEC designation] are received outside the planning process, interim management may be evaluated, considered, and implemented to protect relevant and important values until the BLM completes a planning process to determine whether to designate the area as an ACEC, in conformance with the current Resource Management Plan." §1610.7-2(c)(3), 88 Fed. Reg. 19,596.

With regard to the definition of "intact landscape," we urge the BLM to clarify that "intact landscape" does not have to mean an uninterrupted swath of land of one type under common ownership. Rather, BLM should take an ecosystem perspective. For example, in determining

what is an "intact" landscape in the context of forest lands: if species rely on the proximity of forest lands which are separated by disturbances (which can include the disturbance of harvested portions in between uncut portions of forest), and those lands collectively support an integrated ecosystem, those lands collectively can still be an "intact landscape."

We are thus somewhat concerned about the use of the word "unfragmented" in the proposed definition of "intact landscape" in § 6101.4:

> Intact landscape means 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.

88 Fed. Reg. at 19,598. Our concern is that absent a clarifying definition of the word "unfragmented," the BLM could encounter arguments that even if a stretch of land meets every other portion of the definition, if it is not an uninterrupted swath of land of one type under common ownership, it cannot be an "intact landscape."

Restoration:

We support the proposed rule's mandate that "the BLM must emphasize restoration across the public lands to enable achievement of its multiple use and sustained yield mandate." § 6102.3(a), 88 Fed. Reg. 19,599. Critically, the proposed rule provides that "[a]uthorized officers must include a restoration plan in any Resource Management Plan adopted or revised in accordance with part 1600 of this chapter." § 6102.3–2(a), 88 Fed. Reg. 19,600.

We recommend adding accountability measures to ensure that restoration plans are effectively implemented. The proposed rule should include enforcement provisions that hold project proponents—or anyone subject to an RMP—accountable in order to actually achieve durable ecosystem resilience goals and objectives, or otherwise mitigate for unauthorized, unintended, or unmitigated impacts to conservation values.

Mitigation:

We support the BLM's decision to **"**reaffirm[] the BLM's adherence to [a] mitigation hierarchy," 88 Fed. Reg. 19,587, to address impacts to public land resources: "first avoid, then minimize, and then compensate for any residual impacts from proposed actions." § 6101.4, 88 Fed. Reg. 19,598. We support the requirement that "[a]uthorized officers shall, to the maximum extent possible, require mitigation to address adverse impacts to important, scarce, or sensitive resources." § 6102.5–1(b), 88 Fed. Reg. 19.603.

We recommend adding criteria for compensatory mitigation when use or energy development projects are proposed to ensure that impacts to conservation values are avoided, minimized, and

mitigated. The proposed rules state that the goal is to protect the landscape. Specific criteria for achieving this goal should be included in the final rule.

The highest conservation value habitats should be protected and avoided first with no need for compensatory mitigation. Use and energy developments should be considered very carefully when potentially impacting important, scarce, or sensitive resources, so that the final decision results in no net loss of conservation values. This should include project denial to avoid the impact when appropriate.

Tribal Consultation:

The proposed rule quite properly "requires meaningful consultation during decisionmaking processes with Tribes and Alaska Native Corporations on issues that affect their interests, including the use of Indigenous Knowledge." 88 Fed. Reg. 19,584. The Rule also requires Field Managers to seek nominations for ACECs from tribes. 88 Fed. Reg. 19,596. We urge the BLM to also seek the assistance of Tribes and Alaska Native Corporations in identifying "intact landscapes" and in determining how to apply the fundamentals of land health to lands other than rangeland.

Conservation Leases:

The BLM has asked a series of specific questions regarding conservation leases. 88 Fed. Reg. 19,591. Our responses are below. A general comment is that the BLM should define what it means to be a "conservation lease" to ensure that conservation lessees engage in specific conservation, restoration, or enhancement practices.

- What is the appropriate default duration for conservation leases?

    - As to "mitigation leases," we support the BLM's proposal that "[a] conservation lease issued for purposes of mitigation shall be issued for a term commensurate with the impact it is mitigating." § 6102.4(a)(3)(ii). Such an "impact," of course, may extend beyond the term of the development activity for which the conservation lease is mitigating.

    - As to "restoration or land enhancement" leases, we question whether there should be a default period at all, and do not believe a ten-year default is reasonable. Restoration actions often take a longer time to grow and mature especially in arid landscapes, and conservation leases should better align with ecological timelines. A conservation lease should be effective for the length of time it takes to restore the ecosystem to a state of resilience.

    - At a minimum, the BLM should clarify that a conservation lease can be renewed, in successive renewals, for longer than twenty years. The proposed rule states that "[a]uthorized officers shall extend or further extend a conservation lease if necessary to serve the purpose for which the lease was first issued. *Such extension or further extension can be for a period no longer than the original term of the lease*." § 6102.4(a)(3)(iii), 88 Fed. Reg. 19,600 (emphasis added). Although we

do not think this is the BLM's intent, we are concerned that someone might argue that this means that if there is a ten-year lease, it cannot be extended for a total period of more than another ten years. Alternative language could be something like "each individual extension can be for a period no longer than the original term of the lease, but successive extensions may be granted if appropriate to serve the purpose for which the lease was first issued."

- Should the rule constrain which lands are available for conservation leasing? For example, should conservation leases be issued only in areas identified as eligible for conservation leasing in an RMP or areas the BLM has identified (either in an RMP or otherwise) as priority areas for ecosystem restoration or wildlife habitat?

    - No, particularly given the long timeline of RMP processes. If, for example, an Indian tribe, based on its knowledge of the local ecosystem, identifies land that would be suitable for a conservation lease outside the RMP process, that proposal should not be rejected out of hand. But priority could be given to these areas.

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

    - Yes. The rule should broadly define conservation actions, and provide general guidelines for protecting, restoring, and enhancing conservation values and actions.

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

    - Yes, as a general guideline to allow some flexibility for application.

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

    - No. The BLM might see reasonable conservation lease proposals for a wide variety of purposes; any attempt to list and limit the circumstances in which conservation leases are appropriate in advance might foreclose proposals that the BLM might otherwise have looked on favorably.

Sincerely,

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