

June 15, 2023



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

Dear Director Stone-Manning:

We are law teachers of Public Lands Law, Natural Resources Law, and Environmental Law, with substantial experience in the Federal Land Policy and Management Act and its implementation over the past near half-century. We offer these comments on the Bureau of Land Management’s proposed rule of April 3, 2023, which calls for BLM to consider and manage its lands to produce and maintain resilient ecosystems.

At the highest level, the proposed rule tracks closely to and is consistent with Congress’s clearly expressed intentions in FLPMA that BLM manage the public lands for conservation, as well as consumption, that is, “for multiple use and sustained yield.” Public lands must be managed “in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, and archaeological values ... [and] that, where appropriate, will preserve and protect certain public lands in their natural condition.” Congress directed that BLM “establish comprehensive rules and regulations after considering the views of the public” to effectuate these goals. That is precisely what BLM is doing with this proposed rule.

We support the agency’s effort to produce resilient ecosystems by protecting intact landscapes and applying land-health standards to achieve land health, among other needed strategies identified in the proposed rule. We are especially supportive of the proposed rule’s long-delayed recognition of areas of critical environmental concern (ACECs) as a principal mechanism for protecting important natural, cultural, and scenic values. However, below we make recommendations as to how BLM can improve the proposed regulations.

The proposal’s reliance on healthy landscapes and resilient ecosystems as a centerpiece of multiple use and sustained yield management is long overdue. Conservation of existing healthy landscapes is essential to achieving resilient ecosystems. Identification of these landscapes in all BLM land plans will enable the agency to designate them for conservation use and to track any adverse effects to intact landscapes in a national tracking system. The proposal’s commitment to consider land-health standards in all decision making is also a welcome development. Maintaining an inventory of public lands based on land-health fundamentals will ensure consistency, and the promise to revise the standards every five years will ensure contemporary value.

FLPMA has always called for BLM to give priority to the designation and management of ACECs, and we applaud the proposed rule’s effort to achieve that congressional directive. The proposal not only authorizes nomination of ACECs by the public (both within and outside the planning process), it defines criteria for ACEC designation. Its call for identifying ACECs as part of land planning, especially when plans are revised or amended, will give greater prominence to

ACECs among BLM personnel. Requiring the identification of potential ACECs in all plans and the development of at least one alternative that considers and evaluates proposed ACEC designation may finally enable BLM to achieve the statutorily required priority of ACECs in BLM planning and management.

We support the proposal's adoption of a mitigation hierarchy that emphasizes avoiding adverse effects first, then minimizing and compensating for remaining adverse effects. The regulatory directive of requiring mitigation to address adverse effects on important, scarce, or sensitive resources to the maximum extent possible is also, we think, central to sound multiple-use management.

We also support the authorization of conservation leases for restoration or mitigation with some reservations that are fleshed out below. Conservation leasing can protect, manage, or restore natural environments, cultural, or historic resources, and ecological communities, including species and their habitats. Conservation leases that advance these goals may provide important interim protections for BLM lands. BLM states that, "(c)onservation leases should not disturb existing authorizations, valid existing rights, or state or Tribal land use management. Once issued, a conservation lease would preclude the BLM, subject to valid existing rights and applicable law, from authorizing other uses of the leased lands that are inconsistent with the authorized conservation use." Sec. 6102.4(a)(4). On the other hand, conservation leases seem designed to allow the BLM to delegate its own legal responsibility to protect public lands. While this could stretch the BLM's limited resources, if not carefully monitored, it could also lead to the unintentional degradation of public lands.

While generally supportive of the proposal, we think it could be improved substantially with the following amendments:

1) *Areas of Critical Environmental Concern.* The proposal is the first substantive regulation on ACECs, but in its current form it fails to fully live up to Congress's express direction that BLM "give priority to the designation and protection" of such areas. Because of our prior engagement on ACECs, we offer the detailed comments below:

- The final rule should require that all eligible areas meeting ACEC criteria must be designated as ACECs and managed accordingly. As to ACEC Eligibility (1610.7-2(c)(3)), we suggest that interim management "will" be considered instead of "may."
- It appears the definitions (6101.4) only apply to Part 6100 of the proposed regulations. Thus, the terms "conserve, protect, and restore," as used in sections 1610.7-2(a), (c)(3), (d)(3)(1), (e)(1), (j)(1), remain undefined in the proposed regulations, and any definition would revert to the existing, inadequate definition. We think that is unwise. Please ensure that this oversight is remedied in the final rule.
- Concerning Special Management Attention, 1610.7-2(c), BLM should remove (2) - (4) as mandatory factors to consider at this stage. It may be appropriate to consider other uses, feasibility of management, and the presence of other designations when determining appropriate management needed to "protect" the ACEC values, but those factors are not pertinent to the question of whether special management is needed to protect a resource, value, or natural hazard once BLM has determined that an area meets the "relevance" and "importance" criteria.

- With respect to Special Management Attention in Approved Plans, 1610.7-2(h), the current proposal is vague about what "special management attention" will look like in an approved plan, which could lead to weak and inadequate implementation. We suggest clarifying that an approved plan must identify specific "management prescriptions," and must include a requirement for conserving, protecting, and enhancing the resources, values, and/or hazards.
- The section on removal of ACECs (Section 1610.7-2 (j)(1) & (2)) should be tightened up in order to preclude a situation like BLM's arbitrary elimination of 1.8 million acres of ACECs in the Bering Sea Western Interior plan. Specifically, the regulations must ensure that the authority to remove ACEC designation under either (1) or (2) is expressly non-delegable. We recommend that 1610.7-2 (j)(1) be deleted, as this measure seems to give the State Director almost unlimited authority to remove ACEC designation.
- Section 1610.7-2(d)(3), Special Management Attention, defines "Special Management Attention" to mean management prescriptions that "[c]onserve, protect, and restore relevant and important values" The proposed definitions in Part 6100 do not apply to Section 1610. Moreover, the draft regulations appear to collapse together the "designation" of an ACEC - which requires a determination of the need for SMA to protect an important and relevant resource, value, and so forth - and the "protection" of the designated ACEC through management prescriptions. The test for whether an area that has acknowledged, relevant and important values, resources, and so forth, should be distinct from the test of the scope and breadth of management prescriptions needed to protect the ACEC and associated resources, and values. The former should be concerned with whether the resources and values need heightened protections in order to safeguard the identified resources and values (thus completing the ACEC "designation" process), whereas the latter should focus on the breadth and scope of these protections needed. These are not the same inquiry, and they should be addressed in different sections.
- The new regulation applies only to "Identification" and "Designation" of ACECs and does not address "Protection" of ACECs. Please consider adding a new Section, 1610.7-3 (for example) that strengthens protection of ACECs through specific management prescriptions. We suggest including language from the Dingell Act, P.L. 116-9, 133 Stat. 580 (2019) – which would adopt a management standard for ACECs that prohibits any activity within the ACEC contrary to the conservation purposes for which the land was designated, including (1) disposal; (2) rights-of-way; (3) leases; (4) livestock grazing; (5) infrastructure development; (6) mineral entry; and (7) off-highway vehicle use (except on designated routes, off-highway vehicle areas designated by law, and administratively designated open areas. This amended limitation would not be an absolute bar to all identified activities, but instead would require a site-specific assessment of compatibility. Moreover, adoption of a new management standard for ACECs would fall firmly within the FLPMA authority to prioritize the designation and protection of ACECs.
- We support the use of overlapping management designations to protect important resources, values, and hazards and oppose the language allowing for overlapping management regimes to inform a decision to remove an existing ACEC designation under 1610.7-2(j)(1).

2) *Monitoring*: The proposed rules define "monitoring" to mean: the periodic observation and orderly collection of data to evaluate:

- (1) existing conditions;
- (2) the effects of management actions; and
- (3) the effectiveness of actions taken to meet management objectives.

Section 6101.4. The preamble cross-references BLM's Assessment, Inventory and Management (AIM) framework that it promotes as a standardized strategy for assessing natural resource condition and trends on BLM public lands. The AIM strategy seeks to bring greater specificity to resource assessment and review process, and that is a laudable goal. But the strategy does not go far enough. It does not require the kind of specific metrics that agency officials can measure to determine the success of a conservation program. The BLM should include in its monitoring definition a requirement to adopt SMART goals. This would better allow the agency and the public to measure objectively the success of a land conservation, enhancement, mitigation, or restoration program. SMART goals would require the BLM to adopt specific, measurable, achievable, realistic (or relevant), and time-bound standards to evaluate the success of a conservation program. See [The Only SMART Goals Template You'll Ever Need \(niagarainstitute.com\)](http://niagarainstitute.com). SMART goals would enhance transparency and afford the public a far better understanding of what it might take to successfully conserve public land resources.

3) *Conservation leasing*. The new proposal to allow conservation leasing to qualified entities seems well-intentioned but also raises some concerns. On the plus side, leases would only be authorized for restoration, land enhancement, or mitigation. Section 6102.4(a)(1). Also, and as noted above, such leases would preclude the BLM from authorizing incompatible uses. *Id.* at (a)(4). The proposed conservation leasing rule, however, also raises the following concerns:

- The proposed rule should spell out more clearly how conservation leasing might be used as mitigation for approval of a development project. More specifically, the rules should make clear that the development plan will not be approved before the conservation leasing plan has been approved and determined, presumably through the NEPA process, to afford adequate mitigation of the adverse impacts of the project.
- The provision for review of leases at Section 6102.4(a)(3)(i) and (ii) seems wholly inadequate. Although it is not entirely clear, the conservation leasing rule appears to provide for “review” every five years (or mid-term). That is far too long to ascertain whether the lease is helping or exacerbating the problem it is supposed to address. Early and frequent review seems particularly critical at the front end of the project, which is where problems are most likely to be identified, and where adjustments can be most easily made. Moreover, the proposed rule is unclear as to whether the “review” process falls under the monitoring rule. Plainly, however, it should. Indeed, the conservation leasing program could benefit greatly if it required the lessee to include in its application SMART goals for measuring the success of the lease.
- Section 6102.4(c) sets forth the requirements for a conservation lease application. After listing several required items, the proposed rule includes a category (1)(v) that is apparently for three items that must only be provided when requested by the authorized officer. But every single one of these items should be required of all applicants. This includes additional studies if the BLM needs them, documentation of other approvals, and most importantly, “(e)vidence that the applicant has, or prior to commencement of conservation activities will have, the technical and financial capability to operate, maintain, and terminate the authorized conservation use.” Such evidence is critical information for any application for a conservation lease.

4) *Intact natural landscapes.* Although the proposal recognizes the importance of intact natural landscapes, it unwisely defers protection of them to future planning. Protection of these areas cannot wait; they must be surveyed and protected immediately. Before approving any development plan, the rule should require BLM to inventory intact natural landscapes within the project area, like lands with wilderness characteristics, and ensure that any such development will not degrade any intact natural landscape.

5) *Habitat Connectivity.* BLM has a 2022 interim policy of prioritizing the identification and protection of habitat connectivity for wildlife, which is essential to allow wildlife species to adapt to climate change. It is surprising that the proposal that does not require the identification and protection of habitat connectivity areas, consistent with BLM's interim policy. It should.

6) *Old-growth and mature forests.* President Biden issued Executive Order 14072 in 2022, which directed BLM to inventory and propose policies to protect and restore mature public forests. The proposed rule fails to incorporate the order's directive to protect and restore mature forests, like the Oregon and California Lands that BLM manages.

7) *Tribal Consultation and Co-management.* To fulfill President Biden's 2021 Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, BLM must consult with Tribes if the agency is to foster opportunities for co-management, benefit from indigenous knowledge, respect Tribal sovereignty and treaty rights, protect Tribal cultural sites, and honor the unique historic and contemporary connection of Native Americans to public lands. The final regulations should reflect this obligation.

Thank you for the opportunity to comment on this issue of significant importance to public lands management.

Sincerely,

Professor Bret C. Birdsong
University of Nevada
William S. Boyd School of Law
4505 Maryland Parkway, Box 451003
Las Vegas, NV 89154

Professor Michael C. Blumm
Jeffrey Bain Faculty Scholar
& Professor of Law
Lewis & Clark Law School
10101 S. Terwilliger Blvd.

Professor Alejandro E. Camacho
Chancellor's Professor of Law
Associate Dean for Faculty Research and
Development
Faculty Director, Center for Land,
Environment, and Natural Resources
University of California, Irvine
401 East Peltason Drive, Law 4500-A
Irvine, CA 92697-8000

Professor David N. Cassuto
Professor of Law & Michael A Calandra, Jr.
'05 Faculty Scholar
Faculty Director of Doctoral Programs
Director, Brazil-American Institute
for Law & Environment (BAILE)
Elisabeth Haub School of Law
at Pace University
78 N Broadway, White Plains, NY 10603

Professor Kim Diana Connolly
Professor of Law
Director, Environmental Advocacy Clinic
Director, Environmental Law Program
University at Buffalo School of Law
State University of New York
519 O'Brian Hall, North Campus
Buffalo, NY 14260-1100

Doctor Myanna Dellinger
Executive Director
The EinStrong Foundation
Pasadena, CA

Professor Angelique Eaglewoman
Director, Native American Law and
Sovereignty Institute
(Wambdi A. Was'teWinyan)
Sisseton Wahpeton Dakota Oyate
Mitchell-Hamline School of Law
875 Summit Avenue
Saint Paul, MN 55105

Professor Rick Frank
Professor of Environmental Practice
Director, California Environmental Law
& Policy Center
University of California School of Law
400 Mrak Hall Drive
Davis, CA 95616

Professor Blake Hudson
Dean and Professor of Law
Cumberland School of Law at
Samford University
800 Lakeshore Drive
Birmingham, AL 35229

Professor Kevin Lynch
University of Denver Sturm College of Law
2255 E. Evans Ave.
Denver, CO 80208

Professor Joseph W. Dellapenna
Visiting Professor of Law
Beijing University School
of Transnational Law
Villanova University School of Law
Room 327 Law School Building
800 East Lancaster Avenue
Villanova, PA 19085

Professor Stephen Dycus
Professor Emeritus
Vermont Law School
164 Chelsea Street
P.O. Box 96
South Royalton, VT 05068

Professor Victor B. Flatt
Burke Center Visiting Distinguished Fellow
Dwight Olds Chair; Faculty Co-Director
Case Western Reserve Law School
Environment, Energy, and Natural Resources
University of Houston Law Center

Professor Robert L. Glicksman
J.B. & Maurice C. Shapiro Professor
of Environmental Law
Faculty Director, Environmental
and Energy Law Program
George Washington University Law School
2000 H Street, N.W.
Washington, D.C. 20052

Professor Albert Lin
University of California Davis
School of Law
400 Mrak Hall Drive
Davis, CA 95616

Professor Joel A. Mintz
Professor of Law Emeritus
and C. William Trout Senior Fellow
Nova Southeastern University College of Law
3300 S. University Drive
Fort Lauderdale, FL, 33328-2004

Professor Patrick A. Parenteau
Emeritus Professor of Law and
Senior Fellow for Climate Policy
in the Environmental Law Center
Vermont Law School
164 Chelsea Street
P.O. Box 96
South Royalton, VT 05068

Professor Zygmunt J.B. Plater
Coordinator, Boston College Land
& Environment Program
Boston College Law School
885 Centre Street
Newton Centre MA 02459

Professor Nicholas Robinson
Gilbert & Sarah Kerlin Professor of
Environmental Law Emeritus
Elizabeth Haub School of Law
at Pace University
78 N. Broadway
White Plains, NY 10603

Professor Shelley Ross Saxer
Laure Sudreau Chair in Law
Caruso School of Law
24255 Pacific Coast Highway
Malibu, CA 90263

Professor Todd Wildermuth
Associate Teaching Professor of Law
Director, Environmental Law Program
Policy Director, Regulatory Environmental
Law & Policy Clinic
University of Washington School of Law
4293 Memorial Way Northeast
Seattle, WA 98195

Professor Sandra B. Zellmer
University of Montana Law School
32 Campus Drive
Missoula, MT 59812

Professor Heather Payne
Associate Professor of Law
Seton Hall University School of Law
One Newark Center
Newark, NJ 07102

Professor Jamie Pleune
Associate Professor of Law (Research)
Wallace Stegner Center Research Fellow
S.J. Quinney College of Law
University of Utah
201 President's Circle
Salt Lake City, UT 84112

Professor Daniel Rohlf
Professor of Law
Of Counsel, Earthrise Law Center
Lewis & Clark Law
10101 S. Terwilliger Blvd.

Professor William J. Snape, III
Assistant Dean and Professor
Director, Program on Environmental
and Energy Law
American University
Washington College of Law
4300 Nebraska Ave NW
Washington DC 20016

Professor Mary Christina Wood
Philip H. Knight Professor of Law
University of Oregon School of Law
1515 Agate St.
Eugene, OR 97403
Eugene, OR 97403