BLM'S CONSERVATION RULE AND CONSERVATION AS A "USE"

by Jamie Pleune

Jamie Pleune is an Associate Professor of Law (Research) and Wallace Stegner Center Fellow at the University of Utah, S.J. Quinney College of Law.

SUMMARY

In April, the Bureau of Land Management (BLM) proposed new regulations governing land management decisions on public lands. Dubbed the "conservation rule," this rule seeks to protect intact landscapes, restore degraded habitat, and manage for ecosystem resilience. Detractors have attacked the rule as lacking statutory authority, particularly the provisions regarding "conservation leasing." This Article responds by demonstrating that conservation is inherent in BLM's statutory duties articulated in the Federal Land Policy and Management Act, and that the proposed rule is an appropriate exercise of BLM's discretion. The deterioration of public lands, exacerbated by climate change, justifies BLM's prioritization of ecological resilience, intact landscapes, restoration, mitigation, and land health. Emerging market opportunities for conservation and mitigation also justify BLM's discretion to develop conservation leases, which are consistent with statutory authority and existing regulations.

When the Bureau of Land Management (BLM) was established in 1946,[1] its first logo depicted five men seemingly marching in a line, each carrying the tools of their trade.[2] A surveyor gripped his tripod closely, apparently eager to put it to use. Next to him, a logger shouldered an ax; an oil worker carried a large wrench; a cowboy gripped his lasso; and a miner sported a lantern. Behind them covered wagons labored forward. Ahead of them, factories, oil rigs, and skyscrapers dominated the landscape.[3] The logo seemed to draw inspiration from John Gast's classic painting of *American Progress*, in which the maiden spirit of Manifest Destiny led stagecoaches, wagons, trains, and settlers westward, resolutely displacing Native Americans, buffalo, bears, and wild landscapes.[4]

By the 1960s, shortcomings inherent in this style of land management became apparent. The U.S. Department of the Interior (DOI) began to speak of a "quiet crisis" facing America's citizens due to "unplanned progress and explosive growth—something that threatened the nation's natural resources and its citizens' quality of life."[5] In 1965, BLM adopted a new logo that it still uses to this day. Unlike the earlier logo, which heralded people and extractive uses, the new logo celebrates the landscapes that BLM manages. It depicts a winding river, grassland, a conifer tree, and a mountain.[6] This nature-based emblem symbolized BLM's emerging land ethic, which included conservation as a strategy for managing public lands.[7] In 1976, with the passage of the Federal Land Policy and Management Act

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1. BLM, Our Public Land Heritage: From the GLO to the BLM (2016), https://www.blm.gov/sites/default/files/About_historytimeline.pdf.
2. *Id.*; *see also* Charles H. Stoddard, *A New Emblem for BLM*, *in* James Muhn & Hanson R. Stuart, U.S. Department of the Interior, Opportunity and Challenge: The Story of BLM 116 (1988) [hereinafter Opportunity and Challenge].
3. *Id.*
4. John Gast, American Progress (oil on canvas) (1872). For a description and reproduction of the painting, see Martha A. Sandweiss, *John Gast, American Progress, 1872*, Picturing U.S. Hist., https://picturinghistory.gc.cuny.edu/john-gast-american-progress-1872/ (last visited Sept. 19, 2023); Tony Hiss, Rescuing the Planet 128 (2021) (describing the painting and its implications).
5. Opportunity and Challenge, *supra* note 2, at 104.
6. *Id.* at 116.
7. *Id.* at 104-56.

(FLPMA),[8] the principles of multiple use and sustained yield solidified a place for conservation within BLM's duty to manage public lands "in the combination that will best meet the present and future needs of the American people."[9]

Over time, as the needs of the American people have changed, BLM's management strategies have adjusted. In 2003, Bruce Babbitt, former Secretary of the Interior, observed, "The day is coming, I believe, when the BLM, so often dismissed as the Bureau of Livestock and Mining, will be better known as the Bureau of Landscapes and Monuments."[10] This year, BLM continued that evolution. On April 3, it proposed new regulations that "would advance the BLM's mission to manage the public lands for multiple use and sustained yield by prioritizing the health and resilience of ecosystems across those lands."[11] The purpose of the proposed rule is to ensure that BLM will "protect intact landscapes, restore degraded habitat, and make wise management decisions based on science and data."[12]

Unsurprisingly, the proposed rule has generated mixed reviews. The prominent news outlet E&E News referred to it as a "seismic shift."[13] The American Exploration & Mining Association called it "vague, counterproductive, and illegal."[14] The Outdoor Alliance praised it as offering "real ways for the BLM to balance conservation with extraction and development."[15]

This Article proceeds as follows. After this introduction, Part I provides a very brief background and description of the proposed Conservation Rule and arguments against it. Part II discusses FLPMA's statutory language and a brief history of its passage, demonstrating that conservation is inherent in BLM's statutory mandate. Part III argues that the proposed rule is an appropriate response to the current conditions on public lands. Deteriorating land health, exponential development, and the challenges of climate change justify BLM's prioritization of ecological resilience, intact landscapes, restoration, and mitigation.

Part IV focuses on the proposed creation of conservation leases. It argues that emerging market opportunities for conservation and mitigation justify BLM's exercise of discretion to develop conservation leases, which are consistent with the principles of multiple use and sustained yield. Part V concludes.

8. 43 U.S.C. §§1701-1785, ELR Stat. FLPMA §§102-603.
9. Opportunity and Challenge, *supra* note 2, at 158; 43 U.S.C. §1702(c).
10. Bruce Babbitt, *The Heart of the West: BLM's National Landscape Conservation System*, *in* Michael P. Dombeck et al., From Conquest to Conservation: Our Public Lands Legacy 101 (2003).
11. Conservation and Landscape Health, 88 Fed. Reg. 19583, 19583 (Apr. 3, 2023) [hereinafter Proposed Public Lands Rule].
12. *Id.*
13. Scott Streater, *BLM Proposes Seismic Shift in Lands Management*, E&E News (Mar. 30, 2023), https://www.eenews.net/articles/blm-proposes-seismic-shift-in-lands-management/.
14. Mark Compton & Sid Smith, *AEMA: BLM's Proposed Conservation Rule: Vague, Counterproductive, Illegal*, Burgex Mining Consultants (June 27, 2023), https://burgex.com/2023/06/27/blms-proposed-conservation-rule/.
15. Tania Lown-Hecht, *BLM's Public Lands Rule Would Benefit Outdoor Recreation and Conservation*, Outdoor All. (May 30, 2023), https://www.outdooralliance.org/blog/2023/5/30/blms-public-lands-rule-would-benefit-outdoor-recreation-and-conservation.

I. The Proposed Conservation and Landscape Health Rule

Commonly referred to as the Public Lands Rule or the Conservation Rule, the rule's preamble recognizes that BLM has "three primary ways to manage for resilient public lands: (1) protection of intact, native habitats; (2) restoration of degraded habitats; and (3) informed decisionmaking, primarily in plans, programs and permits."[16] To support these activities, the proposed rule takes several actions. It establishes that land health standards apply to all 245 million acres managed by BLM, where previously they only applied to grazing leases.[17] It also clarifies that conservation is a "use" within FLPMA's multiple use framework, and it creates conservation leases as a tool to facilitate that use.[18]

The rule revises existing regulations to better meet FLPMA's requirement that BLM prioritize designating and protecting areas of critical environmental concern (ACECs).[19] Finally, it provides an overarching framework for multiple BLM programs by incorporating principles of ecosystem resilience, mitigation, and monitoring in planning, permitting, and management decisions.

Not everyone greeted the rule with approval. In May, two bills were introduced in the U.S. Congress instructing BLM to withdraw the proposed rule.[20] On May 24, 2023, the Oversight and Investigations Subcommittee for the U.S. House of Representatives Committee on Natural Resources held a hearing on the "[Joseph] Biden Administration's Efforts to Limit Access to Public Lands."[21] The hearing memo asserted that the rule represented an "attempt to unlawfully circumvent Congress to rewrite FLPMA, expand its mandate, and restrict the American public's access and use of federal lands."[22]

This theme resonated in editorials. In Utah, the BlueRibbon Coalition asserted that BLM "doesn't have the authority to create this rule out of administrative thin air."[23] A comment letter submitted by the American Petroleum Institute on behalf of itself and four other oil and gas

16. Proposed Public Lands Rule, *supra* note 11, at 19585.
17. *Id.*
18. *Id.* at 19586.
19. *Id.* at 19583.
20. A Bill to Require the Director of the Bureau of Land Management to Withdraw a Rule of the Bureau of Land Management Relating to Conservation and Landscape Health, S. 1435, 118th Cong. (2023); To Require the Director of the Bureau of Land Management to Withdraw a Rule of the Bureau of Land Management Relating to Conservation and Landscape Health, H.R. 3397, 118th Cong. (2023).
21. House Committee on Natural Resources, *Hearings: Examining the Biden Administration's Efforts to Limit Access to Public Lands*, https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=413283 (last visited Sept. 19, 2023).
22. Memorandum from Staff of the Subcommittee on Oversight and Investigations of the House Committee on Natural Resources to Subcommittee on Oversight and Investigations Republican Members on Oversight Hearing Titled "Examining the Biden Administration's Efforts to Limit Access to Public Lands" (May 24, 2023), https://naturalresources.house.gov/uploadedfiles/hearing_memo__sub_on_oi_ov_hrg_05.24.23.pdf.
23. Ben Burr, *Bureau of Land Management Has It Wrong With New Conservation Rule*, Salt Lake Trib. (May 24, 2023), https://www.sltrib.com/opinion/commentary/2023/05/24/burr-bureau-land-management-has-it/.

industry associations made a similar claim.[24] "[T]he Proposed Rule appears to go *against* what the statute authorizes the Bureau to do in managing public lands and thus cannot serve as the basis for BLM's alleged authority."[25] The arguments against the rule vacillate between asserting that FLPMA's statutory language does not authorize conservation, and claiming that BLM already does enough conservation under existing laws and regulations.[26]

Setting aside the inherent contradiction between these two lines of argument, the arguments also fail on the merits. First, conservation is a foundational element of FLPMA. Multiple provisions direct BLM to preserve specific ecological attributes on public land, including watersheds, fish and wildlife habitats, as well as natural scenic, scientific, and historical values.[27] Second, the current conditions on public lands require an adjustment in land management practices in order to achieve FLPMA's mandate to strike a "combination of balanced and diverse resource uses that takes into account the long-term needs of future generations."[28] In order for future generations to use listed resources like watersheds, wildlife habitat, and natural scenic vistas, BLM must maintain their viability by adjusting to changing conditions. The proposed regulations appropriately fulfill this duty.

This is not to say that the rule is perfect. Like any proposed rule, there are ways in which it could be clarified or improved. However, those subtleties do not detract from the larger question, which is whether BLM has authority to do what it has proposed. In BLM's words, the proposed rule allows it to "plan for and consider conservation as a use on par with other uses under FLPMA's multiple use framework and identify the practices that ensure conservation practices are effective in building resilient public lands."[29] A careful review of FLPMA confirms that recognizing conservation as a use under the multiple use framework is consistent with BLM's statutorily defined duties. Consideration of the land health conditions on public lands further verifies that establishing management strategies for ensuring resilient public lands is an appropriate exercise of BLM's discretion.

II. Conservation Is an Essential Element of BLM's Statutory Duties and Responsibilities

BLM is charged with managing a vast resource portfolio that includes 246 million acres and some of the largest intact public lands in the country.[30] Though BLM enjoys discretion in making management decisions, that discretion must be exercised consistent with statutory management priorities set forth by Congress.[31] BLM's organic act, FLPMA,[32] is the primary public land management statute governing BLM's management decisions.[33] FLPMA's history,[34] purpose, and plain language demonstrate that protecting public lands from environmental degradation and conserving specific ecological attributes, like watersheds and wildlife habitat, have always been a part of BLM's authority.

Passed in 1976, FLPMA marked the culmination of a deliberative process that began 12 years earlier when Congress established the Public Land Law Review Commission (PLLRC).[35] The PLLRC was tasked with the unenviable chore of studying the tangled mass of existing statutes, regulations, policies, and practices concerning management and use of public lands, and recommending modifications that would provide an organizing structure for public land management that ensured "the maximum benefit for the general public."[36]

As some scholars have observed, "The underlying problem was not the lack of statutory authority, but that the hundreds of existing statutes contained inconsistent substantive and procedural mandates. The need for greater uniformity and clarity was obvious."[37] George Turcott, who began his career with BLM as a range conservationist in 1950, and served as associate director of BLM from 1972 to 1979, put it more bluntly: "Many of us old timers in the Bureau said that before we retired we wanted a basic organic act—and not all this crossword puzzle kind of stuff we'd had to work with for 30 years."[38]

24. Comment Letter from American Petroleum Institute et al., to Tracy Stone-Manning, Director, BLM, on Conservation and Landscape Health Proposed Rule (July 5, 2023), https://www.regulations.gov/comment/BLM-2023-0001-152646.
25. *Id*. at 14.
26. *See*, *e.g.*, *id*. at 14-15 and 7-9.
27. *See*, *e.g.*, 43 U.S.C. §1702(c) (listing these values in the definition of "multiple use").
28. *Id.*
29. Proposed Public Lands Rule, *supra* note 11, at 19585.
30. Technical Announcement, U.S. Geological Survey, Managing 246 Million Acres: New Science-Based Tools Support Bureau of Land Management's Landscape Approach (Jan. 19, 2017), https://www.usgs.gov/news/technical-announcement/managing-246-million-acres-new-science-based-tools-support-bureau-land.
31. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.") (internal quotations omitted).
32. 43 U.S.C. §§1701 et seq.
33. Roger Flynn, *Daybreak on the Land: The Coming of Age of the Federal Land Policy and Management Act of 1976*, 29 Vt. L. Rev. 815, 816 (2005).
34. Much has been written on FLPMA's history, an accomplishment that this Article does not seek to replicate. *See*, *e.g.*, John D. Leshy, Our Common Ground: A History of America's Public Lands (2022); Michael C. Blumm, *Our Common Ground: An Appreciative Essay on John Leshy's Public Land Law History*, 31 N.Y.U. Env't L.J. 187 (2023); Opportunity and Challenge, *supra* note 2; Robert B. Keiter & Matthew McKinney, *Public Land and Resources Law in the American West: Time for Another Comprehensive Review?*, 49 Env't L. 1 (2019). This Article only offers a concise but illustrative summary of the history.
35. Pub. L. No. 88-606, §2, 78 Stat. 982 (1964).
36. *Id*. §4(a). For another perspective on FLPMA's passage as it relates to conservation, see Sandra B. Zellmer & Robert L. Glicksman, *A Critical 21st Century Role for Public Land Management: Conserving 30% of the Nation's Lands and Waters Beyond 2030*, 54 Ariz. St. L.J. 1314, 1345-49 (2021) (describing the PLLRC and passage of FLPMA).
37. Keiter & McKinney, *supra* note 34, at 42-43.
38. George Turcott, *The FLPMA Tightrope*, *in* Opportunity and Challenge, *supra* note 2, at 170.

When complete, the PLLRC report offered a comprehensive assessment of existing laws governing the use of public lands, as well as challenges BLM encountered in its role as manager. It included recommendations to clarify BLM's authority and duties in managing public lands. Thus, the PLLRC report, and the recommendations contained within it, provide persuasive evidence regarding the issues that Congress intended to address by enacting FLPMA.[39]

The opening paragraph of the PLLRC's report emphasizes that conservation must be a central tenet of land management standards that meet the needs of "an enlarging population, burgeoning growth, and expanding demand for land and natural resources."[40] The PLLRC also noted "the ever-growing concern by the American people about the deterioration of the environment."[41] For these reasons, the PLLRC recommended that the policy of large-scale disposal of public lands be revised and replaced with a policy of retaining federal lands "whose values must be preserved so that they may be used and enjoyed by all Americans."[42]

The PLLRC also emphasized that responsible stewardship and environmental protection should be a fundamental element of public land management standards, stating:

> [We] have looked in vain to find assurance in the public land laws that the United States, as a landowner, had made adequate provision to assure that the quality of life would not be endangered by reason of activities on federally owned lands. We find to the contrary that . . . there is an absence of statutory guidelines by which land management agencies can provide uniform, equitable, and economically sound provision for environmental control over lands retained in Federal ownership.[43]

To correct that problem, the PLLRC offered several conservation-driven recommendations, including statutory guidelines for land management that "will not endanger the quality of the environment, but will, where feasible, enhance the quality of the environment, both on and off public lands."[44]

The report also defined "responsible stewardship" to include the protection of environmental values "as major permanent elements of public land policy," and ensuring that multiple uses be balanced "without degradation of the environment and, where possible, enhancement of the environment."[45] The PLLRC also distinguished between monetary value and the value of natural resources on the land, which is a central premise of conservation. "The United States need not seek to obtain the greatest monetary return, but instead should recognize improvements to the land and the fact that the land will be dedicated, in whole or in part, to services for the public as elements for the value received."[46] In short, the need for statutory tools that would encourage conservation of environmental values on federal lands was a driving force in the report that set the stage for the passage of FLPMA.

To end the historic practice of policy implementation on an ad hoc basis, without congressional guidance, the PLLRC recommended that Congress take action. "Congress should establish national policy in all public land laws by prescribing the controlling standards, guidelines, and criteria for the exercise of authority delegated to executive agencies."[47] Six years later, Congress acted on the PLLRC's recommendation and passed FLPMA. Notably, the first section of FLPMA is a "[c]ongressional declaration of policy"[48] regarding the management of public lands. Many of the policy pronouncements mirror recommendations included in the PLLRC report—a strong indication that Congress took the PLLRC's recommendations to heart.[49]

Turning to FLPMA's language, the national policy articulated in the statute's opening passage clearly demonstrates that Congress intended BLM to include conservation as an element of its land management duties. It is a tenet of statutory construction that where a statute includes a statement of purpose, that is assumed to be the express legislative policy of the statute.[50] FLPMA's "[c]ongressional declaration of policy" directs that

> public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological 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.[51]

39. West Virginia v. Environmental Prot. Agency, 142 S. Ct. 2587, 2607-08, 52 ELR 20077 (2022) ("Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be 'shaped, at least in some measure, by the nature of the question presented'—whether Congress in fact meant to confer the power the agency has asserted." (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000))). In the case of FLPMA, Congress explicitly directed BLM to manage and maintain its lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. §1701(8).
40. PLLRC, One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review Commission (1970).
41. *Id.* at 3.
42. *Id.* at 1.
43. *Id.* at 3.
44. *Id.*
45. *Id.* at 7.
46. *Id.* at 5.
47. *Id.* at 2.
48. 43 U.S.C. §1701.
49. *Compare* 42 U.S.C. §1701, *with* PLLRC, *supra* note 40, at 1-6. *But see* Keiter & McKinney, *supra* note 34, at 45-46 (acknowledging that the impact and legacy of the PLLRC "is mixed," but noting that Jerome Muys, who served as PLLRC's general counsel, asserted that Congress "implemented the vast bulk of the Commission's recommendations").
50. 3 Norman J. Singer & J.D. Shamble Singer, Statutes and Statutory Construction §47:8, at 313-14 (7th ed. 2008) ("The legislative purpose set forth in the purview of an enactment is assumed to be the express legislative policy, and only those subjects expressly exempted by the proviso should be freed from the operation of the statute."); *id.* §46:05, at 177 ("Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail.").
51. 43 U.S.C. §1701(8).

In other words, conservation of specific environmental values, including scenic, historical, ecological, environmental, and archeological values, is expressly articulated as part of public land management policy.

Comments by the chairman of the U.S. Senate Committee on Energy and Natural Resources confirm this point. In a letter following FLPMA's passage, he observed, "The policies contained in the Federal Land Policy and Management Act will shape the future development and conservation of a valuable national asset, our public lands."[52] Simply put, BLM's recognition in the proposed rule that conservation is an appropriate use of public lands is consistent with the congressional declaration of policy set forth in FLPMA.

FLPMA's substantive provisions also include conservation as an element of BLM's land management responsibilities. FLPMA instructs that public lands shall be managed "on the basis of multiple use and sustained yield."[53] This "deceptively simple"[54] phrase is broken into two separate, statutorily defined elements—multiple use[55] and sustained yield.[56]

The definition of "multiple use" is so broad that it required four semicolons to string it together.[57] Despite the length and breadth of the definition, the principle of conservation weaves throughout. First, the definition establishes a multigenerational management horizon by instructing BLM to "meet the present and future needs of the American people" and to find a balance of resource uses that "takes into account the long-term needs of future generations."[58] Second, the definition lists specific land values to be preserved for future generations. Those land values include "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values."[59] Third, the definition of multiple use includes a conservation-oriented limit. BLM must avoid "permanent impairment of the productivity of the land and the quality of the environment."[60]

Recognizing that proper land management may require sacrificing short-term profit for long-term value, the definition instructs BLM to consider "the relative values of the resources and not necessarily . . . the combination of uses that will give the greatest economic return or the greatest unit output."[61] Thus, throughout the definition of "multiple use," conservation appears consistently as a fundamental element of BLM's land management responsibilities. BLM's recognition in the proposed rule that "healthy landscapes and resilient ecosystems" are central to the principles of multiple use[62] is consistent with the statutory definition.

The definition of "sustained yield" also imposes a multigenerational management horizon that cannot be achieved without using conservation as a tool. The definition instructs BLM to achieve and maintain "in perpetuity" periodic "output of the various renewable resources of the public lands consistent with multiple use."[63] The term "various renewable resources" is not defined. However, the congressional declaration of policy in §1701 helps clarify that renewable resources include "scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values."[64]

Similarly, the definition of "multiple use" defines "renewable and non-renewable resources" as "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values."[65] As a practical matter, achieving "a high level annual or regular period output" of these resources requires healthy grasslands, resilient forests, clean watersheds, and productive wildlife and fish habitat. Thus, recognizing conservation as an appropriate use of land on par with more extractive uses is consistent with the multigenerational management horizon imposed by the definition of "sustained yield."[66]

Congress also reduced ambiguity in how to balance multiple extractive uses by discretely listing specific ecological values throughout FLPMA that BLM should protect.[67] The introductory declaration of policy enumerated several resources, including "the quality of . . . ecological, environmental, air and atmospheric, water resource, and archeological values," as well as preservation of "certain public lands in their natural condition," in order to provide "food and habitat for fish and wildlife and domestic animals," and "outdoor recreation and human occupancy and use."[68] The definition of "multiple use" instructed that watersheds, rangeland, forests, fish and wildlife, air, and

52. Flynn, *supra* note 33, at 816 (quoting S. Comm. on Energy & Nat. Res., 95th Cong., Legislative History of the Federal Land Policy and Management Act of 1976, at vi (Comm. Print 1978)).
53. 43 U.S.C. §1701(7).
54. Norton v. Southern Utah Wilderness All., 542 U.S. 55, 58, 34 ELR 20034 (2004).
55. 43 U.S.C. §1702(c).
56. *Id.* §1702(h).
57. *Id.* §1702(c).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. Proposed Public Lands Rule, *supra* note 11, at 19597 (§6101.1) ("The BLM's management of public lands on the basis of multiple use and sustained yield relies on healthy landscapes and resilient ecosystems. The purpose of this part is to promote the use of conservation to ensure ecosystem resilience.").
63. 43 U.S.C. §1702(h).
64. *Id.* §1701(8).
65. *Id.* §1702(c) (listing "renewable and non-renewable resources" as including "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values").
66. *Id.* §1702(a).
67. RadLAX Gateway Hotel LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) ("It is a commonplace of statutory construction that the specific governs the general. That is particularly true where Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." (internal quotations and citations omitted)); California v. Bernhardt, 472 F. Supp. 3d 573, 596, 50 ELR 20174 (N.D. Cal. 2020) (finding that, as a whole, FLPMA requires BLM to "balance the need for domestic minerals against the need to 'protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, and archeological values; . . . [and] provide for outdoor recreation and human occupancy and use'" (quoting 43 U.S.C. §1701(a)(8) and concluding that this responsibility precluded a rule that prioritized the economic well-being of oil and gas operators over BLM's "public welfare obligations")); 3 Singer & Singer, *supra* note 50, §46:05, at 177 ("Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail.").
68. 43 U.S.C. §1701(a)(8).

the atmosphere should be managed without "permanent impairment."[69] The definition of "areas of critical environmental concern" lists "historic, cultural, or scenic values, fish and wildlife resources, or other natural systems or processes" as worthy of protection from irreparable harm.[70]

By descriptively listing ecological values that should be protected in the multiple use balance, Congress clearly expressed an intent as to what must not be permanently impaired or subject to unnecessary or undue degradation.[71] Recognizing conservation as a use on par with extractive uses in the multiple use framework avoids a statutory interpretation that would ignore these specific clauses, rendering them superfluous.[72] In the proposed rule, BLM's prioritization of ecosystem resilience, restoration, protection of intact landscapes, mitigation, and land health[73] gives meaning to the ecological values repeatedly identified by Congress throughout FLPMA.

In sum, recognizing conservation as part of multiple use falls squarely within BLM's statutory authority. "[M]aintaining resilient, functioning ecosystems by protecting or restoring natural habitats and ecological functions"[74] is consistent with Congress' instruction that BLM protect natural, scenic, scientific, and historical values, including rangelands, forests, watersheds, and wildlife and fish habitat, on a multigenerational investment horizon.[75] It is also consistent with the express statutory announcement of national policy that "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," including preserving and protecting "certain public lands in their natural condition" in order to provide food and habitat for fish and wildlife.[76] Managing for ecosystem resilience, protecting intact landscapes, emphasizing and prioritizing restoration, standardizing mitigation policies and requirements, defining fundamental principles of land health, establishing land health standards and guidelines, and monitoring land health[77] are all management strategies within BLM's discretion to ensure protection of the ecological values explicitly listed in FLPMA.

III. Prioritizing Ecosystem Resilience and Formalizing Conservation Is Appropriate Given Current Conditions

Congress understood that BLM would face multiple, unforeseen challenges in striking the right balance of multiple uses, and that the relative value of uses would change over time. FLPMA's broad language grants BLM regulatory flexibility to respond to new scientific evidence as well as changing economic and societal needs.

For example, the definition of "multiple use" recommends "periodic adjustments in use to conform to changing needs and conditions."[78] It also instructs BLM to consider the "present and future needs of the American people."[79] When engaged in land use planning, BLM must "weigh long-term benefits to the public against short-term benefits."[80] Additionally, BLM must keep the inventory of public lands "current so as to reflect changes in conditions and to identify new and emerging resources and other values."[81] This broad language "reflects an intentional congressional effort to confer the flexibility necessary to forestall . . . obsolescence."[82]

Two indisputable trends justify BLM's decision to manage for ecosystem resilience and to formalize conservation uses on public lands. The first is deteriorating land health conditions that are likely to be further exacerbated by climate change. The second is the emergence of new, valuable land uses, including mitigation banks and conservation markets.

A. Deteriorating Conditions on Public Lands Justify Prioritizing Ecological Resilience and Landscape Health

Conditions on public lands justify BLM's prioritization of ecological resilience, restoration, and preservation of intact landscapes. Many areas under BLM management have been damaged by natural and human causes, including "unreclaimed mining sites, toxic waste discharges, catastrophic wildfires, insect-borne diseases, poor timber harvest practices, livestock overgrazing, and deferred maintenance."[83] These influences have resulted in degraded streams and rivers, lost or impaired wildlife habitat, and compromised

69. *Id.* §1702(c).
70. *Id.* §1702(a).
71. Zellmer & Glicksman, *supra* note 36, at 1348 (observing that the mandate to prevent unnecessary or undue degradation of public lands vests broad discretion in BLM to conserve public lands by constraining activities that threaten to impair FLPMA's management goals and requirements through resource degradation); Jamie Gibbs Pleune et al., *The BLM's Duty to Incorporate Climate Science Into Permitting Practices and a Proposal for Implementing a Net-Zero Requirement Into Oil and Gas Permitting*, 32 Colo. Nat. Res. Energy & Env't L. Rev. 253, 272-77 (2021) (arguing that FLPMA establishes a standard of care that prevents unnecessary or undue degradation, avoids permanent impairment, and ensures sustained yield of natural resources, particularly those specifically listed in the statute).
72. *RadLAX Gateway Hotel, LLC*, 566 U.S. at 645 (noting that "the general/specific canon" also applies to statutes "in which a general authorization and a more limited, specific authorization exist side by side," and the canon "avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one 'violating the cardinal rule that, if possible, effect shall be given to every clause and part of a statute'" (quoting D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932))).
73. Proposed Public Lands Rule, *supra* note 11, at 19599-604 (§§6101.5 and 6102.5; 6102.3; 6102.1 and 6102.2; 6102.5-1; and subpt. 6103, respectively).
74. *Id.* at 19598 (§6101.4).
75. 43 U.S.C. §1702(c); Proposed Public Lands Rule, *supra* note 11, at 19599 (§6101.5(b)).
76. 43 U.S.C. §1701(a)(8).
77. Proposed Public Lands Rule, *supra* note 11, at 19599-604 (§§6101.5 and 6102.5; 6102.1; 6102.3 and 6102.3-1; 6102.5-1; 6103.1; 6013.1-1; and 6013.1-2).
78. 43 U.S.C. §1702(c).
79. *Id.*
80. *Id.* §1712(5).
81. *Id.* §1711(a).
82. Massachusetts v. Environmental Prot. Agency, 549 U.S. 497, 532, 37 ELR 20075 (2007).
83. Keiter & McKinney, *supra* note 34, at 23.

air and water quality.[84] These conditions are contrary to the national policy set forth in FLPMA that protects ecological and environmental values, including water, air, and wildlife habitat.[85] Regulations that incorporate ecological resilience, restoration, and land health are consistent with the "changing needs and conditions on public lands" and necessary to preserve the environmental values identified in FLPMA's statement of national policy and the definition of "multiple use."[86]

Decades of mining, combined with oil and gas development, have left a legacy on public lands that requires restoration. There are at least 22,500 identified abandoned hard-rock mine features on public lands that pose risks to human health or wildlife from long-term exposure to pollutants.[87] Agency officials estimated that there could be an additional 390,000 abandoned hard-rock mine features that have not been identified.[88]

Additionally, nearly 37 million acres of federal land have been leased for oil and gas production, while only 12 million of those acres are currently producing oil and gas.[89] This statistic has two implications. First, there is a vast amount of land poised for future development. For example, in 2018, there were 38,147 active oil and gas leases on 25.5 million acres. Only half of those acres (12.8 million) had been brought into production,[90] leaving 14,119 leases across 12.8 million acres (roughly the size of Vermont and New Hampshire combined) that will likely be developed within the next 10 years.[91]

It also means there are a significant number of wells that have been idled, orphaned, or abandoned, resulting in further degradation of public lands. In 2019, the nonpartisan U.S. Government Accountability Office (GAO) identified 2,294 idle wells that have not produced oil or gas since June 2008, but have not been plugged or reclaimed.[92] Orphaned and abandoned wells present an additional problem. In 2018, the U.S. Environmental Protection Agency (EPA) estimated that the population of unplugged abandoned oil and gas wells was around 2.1 million.[93]

This legacy of extractive practices requires deliberate restoration in order to avoid permanent impairment of the quality of the environment. Without deliberate restoration, the legacy of past practices will further jeopardize the continued productivity of forests, watersheds, wildlife and fish habitat, as well as natural, scenic, scientific, and historical values. The proposed rule meets this challenge by protecting intact landscapes that have not yet been degraded by extractive practices, emphasizing restoration, managing for ecosystem resilience, formalizing mitigation practices, and clarifying that BLM officers should develop land health standards that protect watersheds, ecological practices, water quality, and habitats.[94]

Second, development adjacent to public lands is changing the character of the landscape. BLM's management protocols should adjust accordingly, consistent with the duty to account for the long-term needs of future generations to enjoy renewable resources such as forests, grasslands, watersheds, and wildlife.[95] In 1970, only 15% of the American population lived in the Intermountain West.[96] From 1970-2016, population in the West grew by 120% compared to 46% in the rest of the country.[97]

To accommodate this population growth, farms and ranches are being subdivided and developed.[98] Urban development and loss of open space fragments wildlife habitat, with resulting threats to biodiversity. The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) published a study in 2019 concluding that societal effects on land, freshwaters, and oceans have accelerated in the past 50 years and are contributing to species extinction.[99] Human beings have severely altered 75% of the earth's land-based environment and 66% of the marine environment, degrading ecosystem services and accelerating the rate of extinctions.[100]

Multiple studies show alarming trends. A 2020 study estimated that nearly 40% of all wild plants are threatened with extinction.[101] Vertebrates have also suffered. Another study from 2020 estimated that monitored populations of vertebrates have declined by an average of 68% in the past five decades.[102] A separate study used a compilation of population monitoring data from around the world, and estimated that approximately one-half of the world's wild animals have been lost over the past 40 years.[103]

84. *Id.*
85. 43 U.S.C. §1701(8).
86. *Id.* §§1701, 1702(c).
87. U.S. Government Accountability Office, GAO-20-238, Abandoned Hardrock Mines: Information on Number of Mines, Expenditures, and Factors That Limit Efforts to Address Hazards 1, 16-17 (2020) (the introductory summary refers to 22,500 identified abandoned mine features that may pose risk to human health or wildlife, and pages 16-17 provide more detail).
88. *Id.*
89. Keiter & McKinney, *supra* note 34, at 11.
90. Pleune et al., *supra* note 71, at 314.
91. *Id.*; U.S. Government Accountability Office, GAO-18-411, Oil and Gas Lease Management: BLM Could Improve Oversight of Lease Suspensions With Better Data and Monitoring Procedures 5 n.15 (2018) (explaining that federal oil and gas leases are generally issued for a 10-year primary term).
92. GAO, GAO-19-615, Oil and Gas: Bureau of Land Management Should Address Risks From Insufficient Bonds to Reclaim Wells 17 (2019).
93. U.S. EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2018, at 3-101 (2020), https://www.epa.gov/sites/default/files/2020-04/documents/us-ghg-inventory-2020-main-text.pdf.
94. Proposed Public Lands Rule, *supra* note 11, at 19599-604 (§§6102.2, 6102.3, 6102.5, 6103.1, and 6103.1-1, respectively).
95. 43 U.S.C. §1702(c).
96. Keiter & McKinney, *supra* note 34, at 7.
97. *Id.*
98. *Id.*
99. Sandra Díaz et al., IPBES, Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services 4 (2019) [hereinafter IPBES Global Assessment Report 2019], https://doi.org/10.5281/zenodo.3553579.
100. *Id.*
101. Alexandre Antonelli et al., Kew Royal Botanic Gardens, State of the World's Plants and Fungi 2020, at 12 (2020), https://doi.org/10.34885/172.
102. World Wide Fund for Nature, Living Planet Report 2020, at 4 (Rosamunde Almond et al. eds., 2020).
103. Bruce A. Stein et al., National Wildlife Federation, Reversing America's Wildlife Crisis: Securing the Future of Our Fish and Wildlife 3 (2018).

The primary drivers of species loss are land use change, natural resource exploitation, pollution, and invasive alien species.[104] These studies verify what land managers have observed—future generations will not enjoy the same quality of forests, grasslands, and wildlife without proactive strategies to conserve and restore those resources. As Secretary of the Interior Deb Haaland explained when announcing the new rule, "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 generations to come."[105]

Concern about biodiversity loss is no longer confined to academic or environmental circles. In 2021, two reports were published that elevated concern about nature loss in the international policy arena: the Dasgupta Review and the Organisation for Economic Co-operation and Development (OECD) Environmental Policy Paper on Biodiversity, Natural Capital, and the Economy (OECD Report).[106] Both reports were commissioned by the United Kingdom, which at the time held the Group of Seven (G7) presidency.[107] The Dasgupta Review chronicled the declining ability of nature to support the quality of human life due to the degradation of ecological values.[108] It warned that continuing to ignore ecological health will have profound economic repercussions because the global economy is embedded in nature.[109] The Dasgupta Review emphasized that conserving nature is less costly than restoring it.[110]

The OECD Report acknowledged the findings of the Dasgupta Review and developed policy recommendations for mainstreaming practices that prioritize nature conservation.[111] The opening paragraph summarized what is at stake: "The unprecedented and widespread decline of biodiversity is generating significant but largely overlooked risks to the economy, the financial sector, and the well-being of current and future generations."[112]

Since the publication of these two reports, recognition of the risks posed by biodiversity loss continues to grow. This year, members of the World Economic Forum's multistakeholder community identified "biodiversity loss and ecosystem collapse" as one of the fastest deteriorating global risks over the next decade.[113] In other words, ecological degradation and biodiversity loss threaten the economy, the financial sector, and societal well-being. Protecting biodiversity and restoring degraded ecological functions is consistent with the "long-term needs of future generations."[114]

Within the United States, the scientific community has responded to the downward trend of ecological health and biodiversity loss by looking for solutions. Public lands offer a valuable tool. As explained by Prof. Robert Keiter:

> [W]idespread agreement has emerged over the need to protect large areas in a natural state to safeguard native species and to permit vital ecological processes to unfold . . . . This profound conclusion is based on the indisputable fact that species are facing extinction at an accelerating pace due primarily to human-driven pressures, including climate change, and the related loss of suitable habitat.[115]

Studies have demonstrated that the habitat available in national parks is not sufficient to sustain viable populations.[116] Other studies have documented that an increasing number of species are eligible for listing under the Endangered Species Act (ESA),[117] and the recovery rate under the Act is not promising.[118]

In light of these trends, biologists have endorsed the related concepts of ecosystem management, landscape conservation, and the promotion of ecological integrity and resiliency as strategies to reduce species loss.[119] They have also recognized that intact landscapes on public land are increasingly critical for maintaining biodiversity. "Between 30-60% of endangered and threatened species in the U.S. utilize the public lands for shelter, migration, and sustenance."[120] This is because "public lands include many of the nation's intact, functioning ecosystems."[121] In light of their increasing rarity and value, protecting the ones that are left is a "judicious use of the land" within the multiple use framework.[122]

Stemming biodiversity loss requires prioritizing intact, functioning ecosystems.[123] The scientific community has endorsed a target of preserving 30% of the earth's surface

104. IPBES Global Assessment Report 2019, *supra* note 99, at 4.
105. Press Release, BLM, Interior Department Releases Proposed Plan to Guide the Balanced Management of Public Lands (Mar. 30, 2023), https://www.blm.gov/press-release/interior-department-releases-proposed-plan-guide-balanced-management-public-lands.
106. Austin Pierce, *In the Clamor About Climate Change, Don't Ignore Natural Capital*, 53 ELR 10095, 10095 (Feb. 2023).
107. *Id.*
108. Partha Dasgupta et al., The Economics of Biodiversity: The Dasgupta Review, Abridged Version 19-21, 26-28 (2021).
109. *Id.* at 26-34.
110. *Id.* at 71.
111. OECD, Biodiversity, Natural Capital, and the Economy: A Policy Guide for Finance, Economic, and Environment Ministers (2021); Pierce, *supra* note 106, at 10095.
112. OECD, *supra* note 111, at 3.
113. World Economic Forum, Global Risks Report 2023, at 7 (2023).
114. 43 U.S.C. §1702(c).
115. Robert B. Keiter, *Toward a National Conservation Network Act: Transforming Landscape Conservation on the Public Lands Into Law*, 42 Harv. Env't L. Rev. 61, 90 (2018).
116. William D. Newmark, *Extinction of Mammal Populations in Western North American National Parks*, 9 Conservation Biology 510, 521 (1995); William D. Newmark, *Legal and Biotic Boundaries of Western North American National Parks: A Problem of Congruence*, 33 Biological Conservation 197, 197, 205 (1985).
117. Erich K. Eberhard et al., *Too Few, Too Late: U.S. Endangered Species Act Undermined by Inaction and Inadequate Funding*, 17 PLOS One 10 (2022) (noting that the number of species listed for protection under the ESA increased by more than 300% between 1985 and 2020); 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
118. Jeffrey J. Rachlinski, *Noah by the Numbers: An Empirical Evaluation of the Endangered Species Act*, 82 Cornell L. Rev. 356, 376-82 (1997) (book review); Maile C. Neel et al., *By the Numbers: How Is Recovery Defined by the U.S. Endangered Species Act?*, 62 BioScience 646 (2012).
119. Keiter, *supra* note 115, at 91-92.
120. Zellmer & Glicksman, *supra* note 36, at 1322; Bruce Stein et al., *Federal Lands and Endangered Species: The Role of Military and Other Federal Lands in Sustaining Biodiversity*, 58 BioScience 339, 339-40 (2008).
121. Zellmer & Glicksman, *supra* note 36, at 1322.
122. 43 U.S.C. §1702(c).
123. Eric Dinerstein et al., *A Global Deal for Nature: Guiding Principles, Milestones, and Targets*, 5 Sci. Advances 1 (2019).

by 2030 (known as 30x30) as a rallying cry and a milestone toward the larger end goal of 50% by 2050.[124] The 30x30 target has gained international acceptance, and has become an element of the Convention on Biological Diversity through the Kunming-Montreal Global Biodiversity Framework.[125] Although the United States is the lone country that has not joined the Convention on Biological Diversity, Executive Order No. 14008 embraced the 30x30 target.[126]

In summary, the scientific, economic, and international communities have acknowledged that nature loss represents a growing crisis threatening biodiversity, and that the appropriate response is to preserve intact ecosystems and restore degraded ones. These changing societal needs, combined with degraded conditions on public lands, justify BLM's focus on developing tools to achieve, restore, and maintain ecosystem resilience.

B. *Climate Change Will Exacerbate Deterioration of Public Lands, and BLM's Protocols Should Respond*

The challenges of landscape degradation, habitat fragmentation, and biodiversity loss are likely to be exacerbated by climate change, and BLM's management strategy should adjust to include climate forecasts. In 2013, GAO observed:

> Climate change is also altering assumptions that have been central to natural resource planning and management [on public lands] in the past and recent reports have highlighted the importance of establishing climate change planning in the federal government to help ensure it can continue to provide important services in a changing environment.[127]

GAO analyzed the degree to which agencies were adjusting their land management strategies in accordance with the observed and forecasted effects of climate change. The study found that four out of five of the land management agencies[128] had developed strategies and guidance for adapting their management to the anticipated effects of climate change.[129] Only BLM had not.[130]

In 2020, a separate study found that BLM still had not adjusted its land management strategies or provided guidance to land managers on how to adapt land management practices to the observed and anticipated effects of a changing climate.[131] The authors observed that climate change would have negative impacts on conservation, ecosystem services, cultural values, recreation, grazing, wildlife, timber production, and mining and energy development.[132] In other words, the anticipated effects of climate change would affect all of the multiple use values that Congress directed should be enjoyed by future generations.[133] By prioritizing conservation, ecosystem resilience, and rigorous land health standards, the proposed rule begins to close that gap.

In the context of climate change, scientific consensus uniformly indicates that future conditions will diverge from the past, which is another reason that BLM should adjust its land management policies to incorporate ecosystem resilience, restoration, and landscape health. The Fourth National Assessment on Climate Change emphasized this point: "the assumption that current and future climatic conditions will resemble the recent past is no longer valid."[134] Climate models eliminate any doubt as to the dire consequences for future generations if we continue our current emissions trajectory.[135]

In 2020, the National Security, Military, and Intelligence Panel on Climate Change issued a report emphasizing the interrelated risks of climate change, environmental degradation, and national security.[136] Acknowledging that climate models offer a plausible picture of the future, the report articulated a corresponding "responsibility to prepare and prevent," observing that "if we see it coming, we must act in a manner that is commensurate to the scale and scope of the threat."[137] Lest we misunderstand the scope of the threat, the report described what is at stake. "If we collectively turn our backs on these threats, we stand on the precipice of some of the greatest, multi-dimensional security threats the world has ever seen."[138]

The degradation of ecological integrity is one of those security threats. "Human health and livelihoods depend directly on the stability of the natural world, from the renewable resources that we consume daily, to the habitats in which we build settlements."[139] Natural resources, including watersheds, wetlands, forests, rangelands, and biodiversity, "are an important component to the security and stability of human society."[140] Climate change and

124. *Id.*
125. Pierce, *supra* note 106, at 10096-97; Convention on Biological Diversity, *Kunming-Montreal Global Biodiversity Framework*, U.N. Doc. CBD/COP/15/L.25 (Dec. 18, 2022).
126. Exec. Order No. 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619, 7627 (Feb. 1, 2021) (§216).
127. GAO, GAO-13-253, Climate Change: Various Adaptation Efforts Are Underway at Key Natural Resource Management Agencies 6 (2013).
128. *Id.* at 1 (identifying the four land management agencies as the National Park Service, the U.S. Forest Service, the U.S. Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration).
129. *Id.* at 9-53.
130. *Id.* at 51-57.
131. Elaine M. Brice et al., *Impacts of Climate Change on Multiple Use Management of Bureau of Land Management Land in the Intermountain West, USA*, 11 Ecosphere 1, 2 (2020).
132. *Id.* at 14; Zellmer & Glicksman, *supra* note 36, at 1322.
133. *Supra* Part II.
134. U.S. Global Change Research Program, Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II: Report in Brief 26 (David Reidmiller et al. eds., 2019), https://nca2018.globalchange.gov/downloads/NCA4_Report-in-Brief.pdf.
135. National Security, Military, and Intelligence Panel on Climate Change, A Security Threat Assessment of Global Climate Change 13 (2020) ("Higher levels of warming will pose catastrophic, and likely irreversible, global security risks over the course of the 21st century.").
136. *Id.* at 6.
137. *Id.*
138. *Id.*
139. *Id.* at 19.
140. *Id.*

human activities are "putting these natural systems under increasing strain," which "could have serious implications for our way of life."[141] Given these anticipated changes, it would be irresponsible for BLM not to use its statutory discretion to incorporate conservation as a tool to protect ecological functions and bolster the health and resilience of public lands.

Even DOI has recognized that climate change threatens ecological resources and that its management priorities must shift accordingly.[142] Specifically, DOI acknowledged that climate change threatens "the health and functionality of the Nation's watersheds, causing significant changes in water quantity and quality across the country."[143] DOI admits that climate change is "driving ecosystems to irreversibly transform and displace species."[144] In response, DOI "must continue to restore and reconnect degraded aquatic and terrestrial landscapes through its conservation and restoration initiatives."[145] This includes actions designed to enhance ecological connectivity; protect ecosystems, biodiversity, and native species; and preserve nationally significant landscapes. BLM's proposed rule is consistent with DOI's climate action leadership.

In summary, climate change will exacerbate the threats to ecological services on public lands. These forecasted challenges justify BLM's development of conservation tools to utilize public lands as a tool for ecosystem resilience so that future generations can benefit from the renewable resources that past generations enjoyed.

IV. Market Opportunities Justify BLM's Discretion to Develop Conservation Leases, Consistent With Multiple Use and Sustained Yield

BLM's proposed rule recognizes an emerging, valuable use of public land, which is commercialized conservation. The proposed rule establishes protocols for issuing conservation leases "on such terms and conditions as the authorized officer determines are appropriate for the purpose of ensuring ecosystem resilience through protecting, managing, or restoring natural environments, cultural or historic resources, and ecological communities."[146] The preamble to the rule clarifies that conservation leases are "not intended to provide a mechanism for precluding other uses, such as grazing, mining, and recreation."[147] Instead, conservation leases provide a mechanism to facilitate conservation uses of public lands "on par with other uses under the principles of multiple use and sustained yield."[148] Authorizing restoration and mitigation activities on public lands through conservation leases is consistent with BLM's broad statutory authority and past regulatory practice.

A. *Conservation, Restoration, and Mitigation Present Emerging Market Opportunities*

The global demand for conservation is steadily rising, demonstrating a growing commercial market for conservation and restoration of ecosystem services.[149] In 2016, for example, mitigation banks transacted an estimated $3.6 billion.[150] By volume of credits transacted, wetlands and streambanks in the United States have posted an average annual growth rate of 18% since 2010.[151] While the concept of wetland mitigation banks is familiar, mitigation banking has expanded to other conservation activities, including biodiversity, endangered species, forests, and pollution reduction measures, including greenhouse gas offsets.[152]

According to a joint report issued by the Chesapeake Conservancy and the Environmental Policy Innovation Center, "firms including RES, Lyme Timber, Quantified Ventures and i2 Capital have formed an entire industry around structuring, attracting capital, and executing conservation projects."[153] A report by the Conservation Finance Network explains this trend:

> Two major global trends are contributing to this expansion in impact investing: (1) a new era of resource scarcity that is beginning to change the drivers of value in the global economy and (2) the greatest intergenerational transfer of wealth throughout history. It is expected that the recipients of this new wealth, estimated at $30 trillion, will care more about the impact of their investments than previous wealth holders.[154]

Sustained growth in the voluntary carbon credit market reveals another type of trending commercial conservation.[155] Airlines, oil companies, and individuals are increasingly using voluntary carbon markets to achieve net reductions in greenhouse gas emissions. Multilateral and market-led initiatives, such as the Task Force on Climate-

141. *Id.*
142. DOI, Department of the Interior Climate Action Plan 4 (2021) ("Climate change is widely impacting the people the Department serves, the lands, waters, and natural and cultural resources the Department manages, and the mission-critical and mission-dependent infrastructure managed by the Department.").
143. *Id.* at 7.
144. *Id.* at 9.
145. *Id.* at 10.
146. Proposed Public Lands Rule, *supra* note 11, at 19600 (§6102.4).
147. *Id.* at 19591.
148. *Id.*
149. Timothy Male et al., Environmental Policy Innovation Center, Private Conservation Finance: The Chesapeake Bay's Global Lead and How to Expand It 4 (2021).
150. Genevieve Bennet & Melissa Gallant, Forest Trends' Ecosystem Marketplace, State of Biodiversity Mitigation 2017: Markets and Compensation for Global Infrastructure Development 4 (2017).
151. *Id.*
152. Male et al., *supra* note 149 (describing privately funded mitigation banking projects in Maryland, Pennsylvania, Virginia, and Washington, D.C.).
153. *Id.* at 7.
154. Leigh Whelpton & Andrea Ferri, The Conservation Finance Network, Private Capital for Working Lands Conservation: A Market Development Framework (2017).
155. Stephen Donofrio et al., Forest Trends' Ecosystem Marketplace, Market in Motion: State of the Voluntary Carbon Markets 2021, Installment 1 (2021) [hereinafter State of the Voluntary Carbon Markets 2021].

Related Financial Disclosures (TCFD) and the Task Force on Nature-Related Financial Disclosures (TNFD), are forcing transparency into the environmental footprint of commercial operations.[156] This transparency is creating a growing market for companies seeking to mitigate negative environmental impacts.

In 2021, the annual market value for voluntary carbon credits exceeded $738 million.[157] The largest sector of the market involves forestry and land use projects. Of those, projects offering credits for avoided deforestation grew most rapidly.[158] However, greenhouse gas emission reduction strategies can also generate credits. The American Carbon Registry has already approved an offset methodology for methane capture projects that includes coal mines.[159] On May 24, 2023, it approved the world's first methodology to leverage carbon market finance to plug orphaned and abandoned oil and gas wells in the United States and Canada.[160] In other words, plugging orphaned and abandoned wells on public lands may become a commercial opportunity for innovative operators seeking to generate carbon credits for the voluntary carbon market.[161] The proposed rule for conservation leasing could offer a mechanism to recognize these environmentally beneficial commercial opportunities.

Markets for voluntary biodiversity offsets are also growing.[162] International developments indicate this emerging market is likely to expand, with countries and financial investors adopting standards like "net nature positive."[163] For example, from 2016-2019, environmental professionals in England worked on developing a biodiversity metric.[164] Those efforts generated the "Biodiversity Net Gain Standard" released by the British Standards Institution in 2021.[165] That same year, England became the world's first jurisdiction to require "biodiversity net gain" as part of the planning approval process for buildings and major infrastructure projects.[166] The Netherlands and France have also developed biodiversity offset standards.[167]

Building off these efforts, the International Organization for Standardization (ISO) is in the process of developing a biodiversity standard.[168] All of these standards focus on identifying, quantifying, and mitigating effects to biodiversity caused by a development project. The standards are voluntary and developed through consensus with industry, scientific, and governmental stakeholders.[169] The quality of these commercial conservation projects vary widely, and the rigor of verifying the achievement of con-

156. *See*, *e.g.*, TCFD, Task Force on Climate-Related Financial Disclosures: Overview (2022), https://assets.bbhub.io/company/sites/60/2022/05/TCFD_Overview_Booklet_Digital.pdf ("G20 Finance Ministers and Central Bank Governors asked the Financial Stability Board (FSB) to review how the financial sector can take account of climate-related issues. The FSB established the Task Force on Climate-Related Financial Disclosures to develop recommendations . . . ."); International Organization for Standardization, ISO/TC331, Biodiversity (2020), https://www.iso.org/committee/8030847.html (establishing a technical committee to develop standardization in the field of biodiversity and to develop principles, a framework, requirements, and guidance in that field); British Standards Institution, BS 8683, Biodiversity Net Gain (2021); TNFD, The TNFD Nature-Related Risk and Opportunity Management and Disclosure Framework Beta v0.4-Summary (2023), https://tnfd.global/wp-content/uploads/2023/07/TNFD_v0.4_Short_Summary_v5-1.pdf?v=1690527809 (describing itself as "a global, market-led, science-based and government supported initiative to help respond to the imperative to factor nature into financial and business decisions"); Pierce, *supra* note 106, at 10097-100 (describing private-sector initiatives to create transparency regarding nature loss caused by corporate activities). *See also* BlackRock, *Larry Fink's 2022 Letter to CEOs: The Power of Capitalism*, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter (last visited Sept. 19, 2023) (asking chief executive officers seeking investment from BlackRock to "issue reports consistent with the Task Force on Climate Related Financial Disclosures (TCFD): because we believe these are essential tools for understanding a company's ability to adapt for the future").

157. State of the Voluntary Carbon Markets 2021, *supra* note 155, at 1.

158. *Id.* at 12 (noting a 166% increase in avoided unplanned deforestation projects and a 972% increase in avoided planned deforestation).

159. *ARB Mine Methane Capture Offset Projects—Listing, Verification, and Offset Credit Issuance on ACR*, Am. Carbon Registry (June 11, 2014), https://americancarbonregistry.org/news-events/events/arb-mmc-protocol.

160. *ACR Approves First-of-a-Kind Carbon Crediting Methodology for Plugging Orphaned Oil and Gas Wells*, Am. Carbon Registry (May 24, 2023), https://americancarbonregistry.org/news-events/program-announcements/acr-approves-first-of-a-kind-carbon-crediting-methodology-for-plugging-orphaned-oil-and-gas-oog-wells.

161. Emily Pontecorvo, *Abandonment Issues*, Grist (Dec. 1, 2020), https://grist.org/energy/plugging-abandoned-oil-wells-carbon-offsets/; Vanessa Alboiu & Tony Robert Walker, *Pollution Management and Mitigation of Idle and Orphaned Oil and Gas Wells in Alberta, Canada*, 191 Env't Monitoring & Assessment 611 (2019) (describing the Well Done Foundation, which is seeking funding to plug orphaned and abandoned wells through the voluntary carbon market).

162. Bennet & Gallant, *supra* note 150, at 4; Male et al., *supra* note 149, at 22 (describing the emergence of endangered species banks in Pennsylvania).

163. *See*, *e.g.*, Science Based Targets Network, Science-Based Targets for Nature: Initial Guidance for Business (2020); Global Biodiversity Standard, *Home Page*, https://www.biodiversitystandard.org/ (last visited Sept. 19, 2023) (announcing development of biodiversity standard to combat inadvertent destruction of biodiversity during tree planting, restoration, and reclamation projects); Partnership for Biodiversity Accounting Financials, Paving the Way Towards a Harmonized Biodiversity Accounting Approach for the Financial Sector (2020).

164. *See*, *e.g.*, Biodiversity Metric 4.0 (JP039) (2023), http://nepubprod.appspot.com/publication/6049804846366720 (providing the most current version as well as archived versions of the metric).

165. British Standards Institution, Process for Designing and Implementing Biodiversity Net Gain—Specification BS 8583:2021, at 1 (2021).

166. Yarema Ronish et al., *Biodiversity—Gaining Ground?*, 24 Env't L. Rev. 1, 3 (2022).

167. *Biodiversity: A Standardized Method to Build Action Plans*, Ass'n Française de Normalisation (Jan. 26, 2021), https://normalisation.afnor.org/en/news/biodiversity-standardized-method-build-action-plans/?_ga=2.126794125.1054837577.1654042120-1474643323.1654042120 (announcing the availability of standard NF X32-001, a voluntary standard providing a method to conduct biodiversity protection); Partnership for Biodiversity Accounting Financials, *supra* note 163, at 12 (describing development of various biodiversity standards from the Netherlands).

168. ISO, Roadmap ISO/TC 331 Biodiversity (Version Feb. 2022). *See also* Global Sustainability Standards Board, GRI Topic Standard Project for Biodiversity: Project Proposal (2021) (proposing to review and update the Global Reporting Initiative's biodiversity standard, GRI 304, with anticipated completion in 2023).

169. *See*, *e.g.*, Sustainable Finance Platform, Biodiversity in the Financial Sector—From Pledges to Action (2021) (acknowledging that "biodiversity is a complex subject, definitions are still fluid, scoping of responsibilities is ongoing, and biodiversity footprinting methods are still being developed," but still providing case studies of efforts undertaken by a variety of financial institutions); Finance for Biodiversity Foundation, Guide on Biodiversity Measurement Approaches (2d ed. 2022) (providing regularly updated description of available methodologies geared toward the financial sector and designed to assess biodiversity-related risks and opportunities); Johan Lammerant et al., EU Business @ Biodiversity Platform, Update Report No. 3, Assessment of Biodiversity Measurement Approaches for Businesses and Financial Institutions (2021) (describing 19 available biodiversity measurement methodologies, providing case studies, and introducing a decisionmaking wheel for businesses to select the most functional method).

servation benefits also varies, depending on the registry. As these standards grow in popularity, so will the demand for opportunities to offset biodiversity impacts. The proposed rule on conservation leasing could create a mechanism for the development of biodiversity credits through restoration or conservation on public lands.

Notably, other public entities, including managers of state trust lands, have recognized the value that conservation leases can bring. As one scholar explained, "state trust land managers are increasingly capitalizing on the opportunity to generate revenue from non-extractive use of state trust lands through conservation-oriented lease structures."[170] These state conservation leases are established to conserve ecological resources, wildlife, historic preservation, or cultural resources, and are issued through a traditional competitive-lease bidding process, providing stakeholders the opportunity to participate in the market and pay market value to conserve ecological values on state trust land.[171]

Several states have developed conservation programs for state trust lands, including Arizona, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, Washington, and Wyoming.[172] Those programs utilize various models, including conservation leases, ecosystem services leases, and recreational leases.[173]

Monetizing ecosystem services is an active line of business for the Colorado State Land Board, which is responsible for managing state trust lands.[174] The board has a duty to "prudently manage the assets it holds in trust in order to produce reasonable and consistent income over time while protecting and enhancing the long term value and productivity of the assets through the application of sound stewardship."[175] Since 2013, when the board began exploring ways to monetize ecosystem services through creative leases that prioritize conservation values, the program has steadily grown.[176] The board currently holds 16 conservation leases of different types, which brought in more than $500,000 in value in 2022.[177] Most leases are issued for the development of a mitigation bank.[178] That revenue is expected to grow as the conservation bank projects mature and gain value.

In summary, conservation, mitigation, and restoration are increasingly recognized as valuable uses of land that support commercial opportunities.

B. *The Proposed Regulations Governing Conservation Leases Are Consistent With Statutory Authority and Existing Regulations*

In passing FLPMA, Congress understood that land use priorities would change over time. For that reason, it instructed BLM to regularly inventory public lands and their resources—including recreational resources, scenic resources, and ACECs.[179] "This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values."[180] As described above, conservation activities including restoration and mitigation are a new and emerging resource with increasing market value.

Ignoring opportunities for conservation leasing would be inconsistent with BLM's multiple use responsibility to find "a combination of balanced and diverse uses that takes into account the long-term needs of future generations for renewable and non-renewable resources," including forests, rangeland, recreation areas, watersheds, wildlife and fish habitat, and natural scenery.[181] Unlike extractive uses, conservation leases will "generate income for beneficiaries while retaining and even improving the corpus."[182]

The creation of "conservation leases" is a specific exercise of BLM's authority to regulate the use of public lands through a variety of instruments, including leases.[183] BLM first promulgated regulations clarifying procedures for the use of this authority in 1981.[184] The purpose of the regulations was "to establish procedures for the orderly and timely processing of proposals for non-Federal use of the public lands."[185] The regulations apply to a vast, unspecified field of potential uses. According to 43 C.F.R. §1910.1-1, "[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law may be authorized under this part."[186]

170. Temple Stoellinger, *Valuing Conservation of State Trust Lands*, A.B.A. Sec. Env't Energy & Res. (Mar. 3, 2023), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2022-2023/march-april-2023/valuing-conservation/.
171. *Id.*
172. *Id.*; Susan Culp & Joe Marlow, Conserving State Trust Lands: Strategies for the Intermountain West 21 (2015).
173. Stoellinger, *supra* note 170.
174. Colorado State Board of Land Commissioners, Policy No. 300-009, Ecosystem Services Leasing Policy (2022).
175. *Id.*
176. Mindy Gottsegen, Colorado State Land Board Ecosystem Services Program, Presentation at the National Mitigation and Environmental Markets Conference (May 11, 2023).
177. *Id.*
178. *Id.* (showing that the program currently holds leases for eight wetland mitigation banks, three stream mitigation banks, three species mitigation banks—compulsory and voluntary, and one forest carbon lease); Memorandum from Mindy Gottsegen, Conservation Services Manager, Colorado State Land Board, to Colorado State Board of Land Commissioners on Ecosystem Services Business Program (Apr. 13, 2022), https://slb.colorado.gov/2022boardmaterials (under Tab 8 in the April 2022 Board Packet and attached as Appendix 1).
179. 43 U.S.C. §1711(a).
180. *Id.*
181. *Id.* §1702(c).
182. Stoellinger, *supra* note 170.
183. *See, e.g.*, 43 U.S.C. §1732 (authorizing the Secretary to regulate the use of public lands through a variety of legal instruments, including long-term leases); *id.* §1733 (authorizing the Secretary to issue regulations to implement the provisions of FLPMA with respect to the "management, use, and protection of public lands"); *id.* §1740 (authorizing the Secretary to promulgate rules and regulations to carry out the purposes of FLPMA); 43 C.F.R. §2920.0-3 (citing these provisions as authority for the Secretary "to issue regulations providing for the use, occupancy, and development of the public lands through leases, permits, and easements").
184. Leases, Permits, and Easements; Land Use Authorizations Under the Federal Land Policy and Management Act, 45 Fed. Reg. 31284 (proposed May 12, 1980); Leases, Permits, and Easements; Land Use Authorizations Under the Federal Land Policy and Management Act, 46 Fed. Reg. 5772 (Jan. 19, 1981) (codified at 43 C.F.R. pt. 2920).
185. 43 C.F.R. §2920.0-1.
186. *Id.* §2920.1-1.

This expansive description of potential uses is consistent with the legislative history of §302 of FLPMA, which authorizes BLM to regulate the use, occupancy, and development of public lands "through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate."[187] Under this provision, BLM may issue long-term leases "to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns."[188] As explained by Sen. Ted Stevens (R-Alaska), this section

> in effect gives the Secretary of the Interior discretion to establish a new system of habitation, cultivation, trade, and manufacturing concepts under a leasing procedure with all the stipulations and conditions that might be necessary to make this type of use compatible with the surroundings and with the environmental concerns that might be involved as far as the national interest lands are concerned.[189]

Conservation leases fit within the type of uses described by Senator Stevens and codified in §302. Mitigation and restoration activities involve cultivation and trade. In order to restore native species or enhance the quality of wildlife habitat, specific vegetation must be planted and cultivated. Moreover, as described above, there is an emerging market for commercialized conservation in which developers can sell conservation credits to willing buyers, thereby engaging in trade.[190] Additionally, the degraded ecological conditions on public lands demonstrate that prioritizing conservation, restoration, and mitigation are in the national interest.[191]

The proposed §6102.4 is a specific exercise of BLM's long-exercised authority to issue land use authorizations in the form of leases for nonfederal uses of public lands. BLM's existing regulations specify procedures through which a project proponent may request a land use authorization.[192] The proposed regulations for issuing a conservation lease mirror BLM's existing regulations, except that they require more detail.[193] Because the proposed §6102.4 is virtually identical to BLM's long-exercised regulatory authority for issuing leases, it is consistent with more than 40 years of past practice.

BLM's existing regulations also state that BLM itself may "identify a use for the public land and notify the public that proposals for utilizing the land through a lease, permit, or easement will be considered."[194] The proposed regulations for conservation leases do just that. They notify the public that BLM will consider proposals for utilizing public land for the purposes of "ensuring ecosystem resilience through protecting, managing, or restoring natural environments, cultural or historic uses, and ecological communities, including species and their habitats."[195]

The argument that conservation leases are experimental offers no impediment. FLPMA authorizes BLM to "conduct investigations, studies, and experiments, on [its] own initiative, or in cooperation with others, involving the management, protection, development, acquisition, and conveying of public lands."[196] It also authorizes BLM to "enter into contracts and cooperative agreements involving the management, protection, development, and sale of public lands."[197] Finally, BLM is authorized to accept monetary contributions and to recruit volunteers in service of BLM's management responsibilities.[198] Exploring ways to utilize conservation leases falls squarely within each of these authorities and is an appropriate use of BLM's discretion.

In summary, the proposed rule for conservation leasing is an appropriate response to the "changing needs and conditions" on public lands, and a tool that will help serve the "present and future needs of the American people."[199] Conservation leasing recognizes an emerging market opportunity to use public lands in a manner consistent with BLM's statutory and regulatory authority.

V. Conclusion

This spring, the *Atlantic* published a pithy article, "An Ode to Nicknames," arguing that nicknames offer insight into true character traits.[200] "Your friends, however—and your enemies—*they* know who you are. They'll give you your real name."[201] Depending on the speaker, BLM's nickname is either the "Bureau of Livestock and Mining" or the "Bureau of Landscapes and Monuments."[202]

Though these sardonic monikers both offer some truth, they also ignore the obvious—that BLM is tasked with land management, which is not a static activity. The *Merriam-Webster Dictionary* defines "management" as "judicious use of a means to accomplish an end."[203] Congress delineated the means and ends of BLM's management responsibilities by identifying specific environmental values that should be conserved for multiple generations.[204] Fulfilling this land

187. 43 U.S.C. §1732(b).
188. *Id.*
189. 122 Cong. Rec. 4055 (Feb. 23, 1976) (statement of Sen. Stevens).
190. *See supra* Section IV.A.
191. *See supra* Sections III.A & III.B.
192. 43 C.F.R. §§2920.2-1 to .2-5.
193. *Compare* Proposed Public Lands Rule, *supra* note 11, at 19600 (§6102.4(c)(1)), *with* 43 C.F.R. §2920.2-4.
194. 43 C.F.R. §2920.3.
195. Proposed Public Lands Rule, *supra* note 11, at 19600 (§6102.4(a)).
196. 43 U.S.C. §1737(a).
197. *Id.* §1737(b).
198. *Id.* §1737(c), (d).
199. *Id.* §1702(c).
200. James Parker, *An Ode to Nicknames*, Atlantic (Apr. 2023), https://www.theatlantic.com/magazine/archive/2023/04/an-ode-to-nicknames/673099/.
201. *Id.*
202. Zellmer & Glicksman, *supra* note 36, at 1349, 1351; Babbitt, *supra* note 10 ("The day is coming, I believe, when the BLM, so often dismissed as the Bureau of Livestock and Mining, will be better known as the Bureau of Landscapes and Monuments."); Debra Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 Env't L. 721, 774 n.387 (2005) (recounting an occasion when BLM Director Kathleen Clarke attempted to ingratiate herself to a grazing-friendly audience by announcing her intention to reinvigorate the "Bureau of Livestock and Mining").
203. Merriam-Webster Dictionary, *Management*, https://www.merriam-webster.com/dictionary/management (last visited Sept. 19, 2023).
204. *See supra* Part I.

management mandate demands attentive adjustment to the dynamic vagaries of weather, the consequences of prior land use decisions, and the priorities of the moment. For this reason, it is no surprise that BLM's nickname bounces back and forth between management priorities.

Today, the conditions on public lands differ dramatically from the conditions 20 or 30 years ago. Landscapes littered with unreclaimed mine sites, abandoned oil and gas wells, and toxic waste discharges require restoration.[205] A burgeoning population and development adjacent to public lands are changing the character of the landscape and fragmenting habitats. The unprecedented and widespread decline of biodiversity is increasingly recognized as a profound economic risk. Finally, climate change threatens to exacerbate all of these risks to land health.

Like BLM, the proposed rule also has a nickname—the "Conservation Rule." The nickname derives from BLM's explanation that the rule seeks to put conservation on par with more extractive uses.[206] In response to this characterization, detractors question whether the rule falls within BLM's statutory authority. However, these arguments ignore FLPMA's statutory mandate, which tasks BLM with managing public lands in a manner that preserves specific environmental values for multiple generations and responds to the changing needs and conditions on public lands.

Aldo Leopold observed that the best definition of "conservation" "is written not with a pen, but with an axe."[207] "A conservationist is one who is humbly aware that with each stroke he is writing his signature on the face of his land."[208] Unsurprisingly, Leopold's definition of "conservation" recognized that conservation is a form of management. It is "a matter of what a man thinks about while chopping, or deciding what to chop."[209]

Whether characterized as the Bureau of Livestock and Mining or the Bureau of Landscapes and Monuments, BLM's management decisions indeed leave a signature on the face of the land. As a result, the proposed Public Lands Rule does not write on a blank slate. In response to the scars left on public lands by extractive uses, it proposes restoration. In response to escalating development that fragments wildlife and fish habitat, it recognizes the value of the remaining intact landscapes. In response to biodiversity loss, it incorporates ecosystem resilience. In response to emerging market opportunities for conservation and mitigation, it formalizes these uses through conservation leases.

Each of these goals is achieved through BLM's traditional tools of land use planning, leasing, and permitting. The management priorities and actions set forth in BLM's proposed Public Lands Rule are an appropriate response to the "changing needs and conditions" on public lands, and consistent with BLM's statutory duties articulated in FLPMA.

205. *See supra* Section III.A.
206. *Supra* note 29.
207. Aldo Leopold, A Sand County Almanac and Sketches Here and There 67-68 (1949).
208. *Id.*
209. *Id.*