July 5, 2023

Submitted via Regulations.gov
Director Tracy Stone-Manning
Bureau of Land Management
U.S. Department of the Interior
1849 C Street NW, Room 5646
Washington DC 20240

Re: Conservation and Landscape Health Proposed Rule; 88 Fed. Reg. 19,583 (April 3, 2023); OMB Control No. 1004-0NEW; RIN 1004-AE92

Dear Director Stone-Manning:

The American Petroleum Institute (API), the American Exploration and Production Council (AXPC), the Montana Petroleum Association (MPA), the New Mexico Oil and Gas Association (NMOGA), and the Utah Petroleum Association (UPA) (collectively "the Associations") appreciate this opportunity to provide the enclosed comments in response to the Bureau of Land Management's (BLM's or Bureau's) "Conservation and Landscape Health" (CLH) Proposed Rulemaking, published at 88 Federal Register 19,583 (April 3, 2023) (CLH Proposed Rule or Proposed Rule). Although the Associations' members actively support the goals of conservation on federal lands, our members strongly believe the CLH Rule as proposed is deeply flawed for the legal, policy, and science-based reasons set forth in the enclosed comments.

Thank you for your consideration of these comments. If you have any questions, please do not hesitate to contact Amy Emmert at emmerta@api.org or (202) 682-8372.

Sincerely,

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Enclosure

Comments Submitted by the American Petroleum Institute (API), American Exploration and Production Council (AXPC), Montana Petroleum Association (MPA), New Mexico Oil and Gas Association (NMOGA), and the Utah Petroleum Association (UPA)

BLM's Conservation and Landscape Health Proposed Rule

88 Fed. Reg. 19,583 (April 3, 2023);
OMB Control No. 1004-0NEW; RIN 1004-AE92

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Table of Contents

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Additional time is necessary for the wide range of affected stakeholders to evaluate the full extent of impacts arising from this proposal and to provide meaningful comments. Thus, we join with other stakeholders who have urged BLM to extend the public comment process on this controversial new proposal that applies to *all BLM lands and programs*.[2]

Notwithstanding this request for an extension of the comments period, the Associations offer comments on the Proposed Rule. Although the Associations' members actively support the goals of conservation on federal lands, we strongly believe the CLH Proposed Rule as proposed is deeply flawed for the legal, policy, and science-based reasons set forth in these comments. These flaws are discussed in more detail in Section II. Should BLM nevertheless elect to proceed with the Proposed Rule despite its serious flaws, in Section III the Associations identify a number of questions raised by the Proposed Rule that BLM must address if it hopes to adopt a workable system.

We offer our expertise to serve as a resource to BLM as it considers whether the CLH Proposed Rule and its contemplated changes are in the national interest and consistent with law.

I. The Associations' Interests in the CLH Rulemaking

API is a national trade association representing nearly 600 member companies that operate throughout the United States and are involved in all aspects of the oil and natural gas industry, including exploration, development, production, transportation, refining, and marketing. Many of our members operate on federal lands, including onshore areas managed by the Bureau of Land

[1] The Federal Register Notice is titled "Conservation and Landscape Health" Proposed Rule. Accordingly, we have referred to this proposal as the "CLH" Proposed Rule. We note that BLM has begun to refer to this proposal as the "Public Lands Rule," *see* BLM, *Update: BLM Releases Public Meeting Information for Proposed Public Lands Rule* (May 10, 2023), https://www.blm.gov/press-release/update-blm-releases-public-meeting-information-proposed-public-lands-rule, though that name is not used at any place in the notice of proposed rulemaking nor does it specifically describe the proposed action or distinguish it from other rules or regulations adopted by BLM.

[2] *See*, *e.g.*, LETTER FROM CHAIRMAN BRUCE WESTERMAN, COMMITTEE ON NATURAL RESOURCES, U.S. HOUSE OF REPRESENTATIVES, ET AL., TO SECRETARY DEBRA HAALAND (May 17, 2023) (requesting a 75- to 150-day extension of the public comment period). BLM extended the comment deadline by two weeks, 88 Fed. Reg. 39,818 (June 20, 2023), but additional time is necessary for stakeholders to adequately comment on this comprehensive rulemaking effort.

Management.[3] For many years, API has worked collaboratively with the Department of the Interior (DOI) and its agencies, including BLM, to help provide for the continued safety of industry workers, protection of the environment, and proper economic development of resources in fulfillment of federal law.

AXPC is a national trade association representing 34 leading independent oil and natural gas exploration and production companies in the United States. AXPC companies support millions of Americans in high-paying jobs and invest a wealth of resources in our communities. Dedicated to safety, stewardship, and technological advancement, AXPC's members strive to deliver affordable, reliable energy to consumers while positively impacting the economy and the communities in which we live and operate. As part of this mission, AXPC members understand and promote the importance of advancing positive environmental and public-welfare outcomes and responsible stewardship of the nation's natural resources. AXPC's members are committed to being good stewards of federal and Indian resources and operating in compliance with all federal requirements. AXPC member companies produce more than half of U.S. onshore production each year.

MPA is a Montana-based trade association representing over 150 member-companies involved in all aspects of the oil and natural gas industry. MPA's members include producers, refiners, suppliers, pipeline operators, transporters, and mineral owners as well as service and supply companies that support all segments of the industry and employ a substantial number of hard-working Montanans.

NMOGA is a coalition of oil and natural gas companies, individuals, and stakeholders dedicated to promoting the safe and environmentally responsible development of oil and natural gas resources in New Mexico. Representing over 1,000 members, NMOGA works with elected officials, community leaders, industry experts, and the general public, to advocate for responsible oil and natural gas policies and increase public understanding of industry operations and contributions to the state. New Mexico's oil and natural gas activity is concentrated in two areas: the Permian Basin in the southeast and the San Juan Basin in the northwest. New Mexico is one of the United States' leading producers, ranking 2nd in annual oil production and 9th in annual natural gas production. New Mexico is attracting interest and attention from around the globe, as the Permian Basin undergoes a resurgence of production and investment activity.

UPA is a statewide oil and gas trade association established in 1958 representing companies involved in all aspects of Utah's oil and gas industry. UPA members range from independent producers to midstream and service providers, to major oil and natural gas companies widely recognized as industry leaders responsible for driving technology advancement resulting

[3] The CLH Proposed Rule does not mention the Outer Continental Shelf (OCS) or other offshore areas and is not being proposed in coordination with the Bureau of Ocean and Energy Management (BOEM). Accordingly, we presume that the CLH Proposed Rule would, if adopted, only apply to onshore areas. Moreover, the proposed rule would apply to lands administered by BLM under resource management plans implementing the multiple-use mandate of FLPMA. The proposed rule would *not* apply to other lands administered by BLM, which typically have a primary purpose designated by Congress. We encourage BLM to maintain clarity on these points so that neither BLM (or other federal agencies) nor the regulated community of public land users have to labor under uncertainty about the scope of application of the regulations.

in environmental and efficiency gains. UPA members operate extensively on federal lands and have a long history of stewardship and conservation.

A. Global Leadership in Energy Production

The U.S. is a global leader in both emissions reductions[4] and energy production.[5] Oil and natural gas exploration and development on federal lands and waters provide enormous benefits to our nation and its citizens—for our economy, our environment, and our national security. Because of the vital importance of energy production on public lands, overreaching land management regulations place our domestic energy supply at risk. Reduced production on public lands also harms local communities who depend upon the jobs and revenues generated by lawful energy development. To the extent the CLH Proposed Rule reduces opportunities for energy development on public lands, the U.S. and its allies will likely import more oil and natural gas from countries with lower environmental standards and could revert to coal for power generation, resulting in higher emissions domestically and internationally—precisely the opposite of the Administration's overriding policy objectives.

The oil and natural gas industry produces and delivers nearly 70% of the energy our country uses. Our nation and the world will continue to need reliable, affordable energy for public health and economic growth, energy that will serve as the foundation for broader opportunities for decades to come. Energy production on public lands is a crucial part of the nation's program for energy security and economic strength. Likewise, the oil and natural gas industry is essential to supporting a modern standard of living by providing communities with access to affordable, reliable, and cleaner energy. The Associations' top priority remains public health and safety, and our member companies have well-established policies in place for proactive community engagement and feedback aimed at fostering a culture of trust, inclusivity, and transparency. We believe that all people should be treated fairly, regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. In this regard, it is crucial to bear in mind that energy development on federal lands promotes investment in rural areas where State and local economies depend on the industry for jobs, continued economic prosperity and revenue generated from state severance tax and other local taxes generated from these projects.

B. Support for Environmental Conservation

As importantly, our members support the health and sustainability of public lands and resources. The oil and gas industry employs technology and strategies as part of its support for environmental stewardship—taking measures to prioritize protecting public health and the environment, while working to deliver plentiful energy. Measures for the protection of species,

[4] According to EPA, "Between 1970 and 2020, the combined emissions of the six common pollutants (PM2.5 and PM10, SO2, NOx, VOCs, CO and Pb) dropped by 78 percent. This progress occurred while U.S. economic indicators remain strong." EPA, *Progress Cleaning the Air and Improving People's Health* (May 1, 2023), https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health#pollution.

[5] According to the Energy Information Administration (EIA), the United States is ranked first globally in total energy production from both natural gas and from petroleum and other liquids. U.S. Energy Info. Admin., *Total Energy Production from Natural Gas* (last visited June 14, 2023), https://www.eia.gov/international/rankings/world?pa=287&u=2&f=A&v=none&y=01%2F01%2F2021.

habitats and groundwater are all part of our approach to oil and natural gas development, and projects are designed, managed and operated to identify and address potential environmental impacts associated with activities ranging from initial exploration to eventual closure. Our members make efforts to improve the compatibility of their operations with the environment while responsibly and economically developing energy resources and supplying high quality products and services to consumers. Indeed, across these varied operations, our members are working every day to minimize and reduce impacts to air, water, and land resources, including to protected species and habitats.

Our industry is dedicated to developing affordable energy while working to reduce our emissions and protecting air quality. As noted above, total emissions in the U.S. of the six traditional criteria pollutants have dropped dramatically even while energy consumption has increased.

We also recognize the importance of reducing emissions intensity, including greenhouse gas (GHG) emissions like carbon dioxide (CO_2) and methane (CH_4). The Congressional Budget Office (CBO) recently found that the "downward trend in emissions related to energy is largely attributable to a shift away from coal-fired generation to natural gas–fired generation in the electric power sector," with approximately "two-thirds of the decline in CO_2 emissions in that sector" resulting from "the switch from coal to natural gas."[6] At the same time, companies implement and improve innovative practices and technology while continuing to bolster research that looks for new ways to minimize environmental impacts. In addition, we monitor, compile and report emissions data per government regulations and on a voluntary basis as appropriate, conduct studies with academic institutions, and work closely with state and federal regulators.

Our industry also is continuing to invest substantially in modernizing our nation's energy infrastructure, including construction of new, state-of-the-art pipelines that safely transport oil and natural gas and reduce truck usage and emissions in and around our operations.[7] Equipment and hardware are monitored and replaced with more efficient and effective parts as appropriate. Companies use low-emission diesel or clean-burning natural gas to power some sites when practicable; in some instances, solar is used to power operations.

We also take steps to appropriately manage water. We assess the availability of water, design plans for usage, develop technology, and conduct inspections to ensure well integrity. In conducting operations, our industry takes precautionary measures so we can be good stewards of our natural resources. For example, before drilling, seismic tests and surveys help determine if aquifers are present and if so, their location. When drilling a well, companies use multiple layers of steel and cement to provide structural integrity and completely seal the well and surrounding formation from one another. These casings extend below aquifers, adding several layers of protection.

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[6] Cong. Budget Office, *Emissions of Carbon Dioxide in the Electric Power Sector* (Dec. 2022), https://www.cbo.gov/system/files/2022-12/58419-co2-emissions-elec-power.pdf.

[7] ICF, *U.S. Oil and Gas Infrastructure Investment through 2035: Study Prepared for American Petroleum Institute* (Apr. 2017), https://www.api.org/-/media/Files/Policy/Infrastructure/API-Infrastructure-Study-2017.pdf.

Finding opportunities to responsibly manage water usage is important for our industry. The primary use for water in oil and natural gas development is in the drilling and completion phases of operations. The amount of water usage depends on a number of factors including basin and geography. During the oil and natural gas development process, water levels and quality around the area are identified, benchmarked, monitored and reported in accordance with local, state and federal environmental and water protection regulations.

Whether operating onshore or offshore, the industry works to protect and preserve some of the most complex and diverse habitats on earth. Our industry works with government agencies as well as wildlife groups like the National Fish and Wildlife Foundation to develop plans and protocols for protecting wildlife. For example, voluntary efforts by the oil and gas industry and others, in partnership with federal, state, and local agencies, are helping to "facilitate the conservation of the lesser prairie-chicken and its habitat."[8] According to the FWS, "[t]hese partnerships have resulted in millions of acres of land being voluntarily enrolled over the past two decades to implement various conservation measures across the lesser prairie-chicken's range."[9] Though just one of many such efforts, the Western Association of Fish and Wildlife Agencies (WAFWA) Candidate Conservation Agreement with Assurances (CCAA) for oil and gas covers portions of Colorado, Kansas, New Mexico, Oklahoma, and Texas, and allows oil and gas companies to voluntarily enroll. This effort attracted over 110 oil and gas industry participants (with more than 6 million acres of land enrolled in the conservation program). Industry also worked with the New Mexico BLM to voluntarily restore over 2 million acres of grassland through the Restore NM project. The ongoing Pecos Watershed Conservation Initiative is another example of these partnerships to protect important habitats in New Mexico through the National Fish and Wildlife Foundation. These projects demonstrate the existing ways that parties can participate in conservation projects without the proposed conservation leases.

This type of collaboration has resulted in improved habitat and species health. For example, modern energy production methods and technologies have resulted in a 70% reduction in surface disturbance when compared to historic practices.[10] Our industry also works with many stakeholder groups to understand migration patterns and routes in areas where we operate. Companies adapt operations to address impacts to these animal movements and habitats. We recognize the importance of protecting and maintaining these historic migrations.

C. Value of Oil & Gas Production on Federal Lands Managed by BLM

Energy production on BLM lands provides immense value for the nation. BLM manages approximately 245 million acres of surface estate of public lands in the United States (more than

[8] FWS, *Partners in Lesser Prairie-Chicken Conservation* (last visited June 14, 2023), https://www.fws.gov/lpc/partners-lpc-conservation.

[9] *Id*.

[10] *See* David H. Applegate & Nicholas Owens, *Oil and Gas Impacts on Wyoming's Sagegrouse: Summarizing the Past and Predicting the Foreseeable Future*, 8 HUMAN–WILDLIFE INTERACTIONS 284, 289–90 (2014), https://www.researchgate.net/publication/267765279_Oil_and_Gas_Impacts_on_Wyoming%27s_Sagegrouse_Summarizing_the_Past_and_Predicting_the_Foreseeable_Future.

any other federal agency).[11] BLM also manages the federal government's onshore subsurface mineral estate (approximately 700 million acres).[12]

The Congressional Research Service (CRS) recently explained the enormous importance of energy production on federal lands to the federal government, the states, local communities, and the nation as a whole.[13] Production of oil and gas from onshore federal lands represents almost 10% of total domestic production of crude oil and natural gas. CRS found that total revenues from oil and natural gas leases on onshore federal lands exceeded $4.2 billion in fiscal year 2019. This substantial return for the taxpayer is comprised of royalty payments, bonuses, interest payments on leases, rents, and other sources. In turn, these funds were disbursed to states (more than $2 billion), the Reclamation Fund (more than $1.5 billion), and the U.S. Treasury ($444 million), among other things.[14]

More recent data published by the Interior Department's Office of Natural Resources Revenue (ONRR) shows that, for fiscal year 2022, federal leases generated over $7.6 billion in revenues (from bonus bids, royalties, rents, and other sources).[15] For FY 2022, ONRR disbursed over $4.3 billion in funds collected from leasing activities on federal lands and waters to 33 states.[16] As stated by CRS, "[f]ederal revenues from oil and natural gas leases provide income streams that support a range of federal and state policies and programs."

II. The CLH Rule Suffers from Fundamental Flaws

The CLH Rule suffers from several legal flaws, ranging from failure to comply with basic administrative law principles to foundational separation of powers concerns which are amplified here, in the particular context of federal lands management, by the fact that *Congress* holds constitutional power to decide the laws governing federal lands. Longstanding statutory frameworks—the Mineral Leasing Act of 1920 (MLA),[17] and the Federal Land Policy and Management Act (FLPMA) and its Multiple Use Framework—already account for the environmental concerns BLM seeks to protect through this rulemaking.

The CLH Rule—and the expansive landscape approach contained therein—offers scarce statutory backing for upsetting a balance Congress has carefully crafted. These defects are

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[11] The White House, *Department of the Interior*, *in* THE BUDGET FOR FISCAL YEAR 2024 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/int_fy2024.pdf.

[12] BLM, *About the BLM Oil and Gas Program* (last visited June 14, 2023), https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about#:~:text=The%20BLM%20manages%20the%20Federal,benefit%20of%20the%20American%20public.

[13] BRANDON S. TRACY, CONG. RES. SERV., R46537, REVENUES AND DISBURSEMENTS FROM OIL AND NATURAL GAS PRODUCTION ON FEDERAL LANDS (2020), https://crsreports.congress.gov/product/pdf/R/R46537.

[14] *Id.*

[15] DOI, *Interior Department Announces $21.53 Billion in Fiscal Year 2022 Energy Revenue, Highest-Ever Disbursements from Clean Energy from Federal Lands and Waters* (Nov. 4, 2022) [*hereinafter FY 2022 Announcement*], https://www.onrr.gov/press-releases/FY2022.Disbursements.Press.Release.pdf.

[16] *Id.*

[17] Mineral Lands Leasing Act of 1920, Pub. L. No. 66-146, 41 Stat. 437 (1920), *codified at* 30 U.S.C. § 181 *et seq.*

especially problematic in light of the legislative history underlying the Multiple Use Framework as well as the fact that Congress already rejected a BLM final rule—the Planning 2.0 Rule—that resembles the CLH Proposed Rule in many key respects. And even though the CLH Proposed Rule asserts that conservation and environmental protection would remain on "equal footing" with other values and uses as set forth in FLPMA, the actual proposal indicates the contrary. Under the proposed CLH approach, conservation goals would assume a preeminent role across all BLM lands and programs, in clear violation of FLPMA's Multiple Use Framework. Congress has rightfully protected vast stretches of federal lands with special conservation status, and in those specially designated areas, environmental protection and conservation practices are and should be preeminent. Yet most federal lands managed by BLM are not of that sort and are made available by Congress for a variety of uses consistent with the MLA and FLPMA. Finally, to the extent that BLM claims that the CLH Rule is grounded in the "best available science," no part of the rulemaking record indicates so, and BLM's attempt to stretch expansive landscape-based approaches across all BLM programs and lands far exceeds any conservation or environmental mandate that Congress has granted to BLM for that purpose.

In light of these fundamental flaws—which are discussed further below—BLM should withdraw the Proposed Rule and reconsider its approach.

A. The Existing Legal & Regulatory Framework Provides Robust Conservation and Environmental Protection for BLM Lands

The CLH Proposed Rule is, in large part, a solution in search of a problem. A host of federal laws and regulations already ensure "the health and resilience of ecosystems across [public lands]."[18] The Associations understand how important healthy, resilient ecosystems are for public lands, which provide "clean air and water, food and fiber, renewable energy, and wildlife habitat."[19] But it is *because* these issues are so important to everyone that FLPMA along with multiple other environmental laws and regulations already provide important backstops against significant "degradation and fragmentation" of these lands.[20]

The Multiple Use Framework ensures that conservation and environmental protection are considered in connection with *every* use of public lands. Before adoption of this Framework, the MLA long ago established a structured process set by DOI to use public lands for resource extraction (such as oil and gas).[21] Under the MLA, federal onshore lands with possible fossil energy resources are available for exploration and production and may be leased by BLM to lessees in exchange for lease payments and royalties (except where those activities have been prohibited by law). While the MLA provides broad authority for use of federal onshore areas for energy production, Congress provided special exclusions and protections for national parks and

[18] 88 Fed. Reg. at 19,583.

[19] *Id.* at 19,584.

[20] *See id.* (expressing concerns about public lands being "degraded and fragmented").

[21] *See* 30 U.S.C. § 181.

monuments, certain areas protected as part of the National Wilderness Preservation System, and lands in incorporated cities, towns, and villages.[22]

Under FLPMA, Congress specifically instructed that federal lands must be managed "on the basis of multiple use and sustained yield unless otherwise specified by law."[23] Key terms like "multiple use" and "sustained yield" are expressly defined in FLPMA by Congress.[24] The Multiple Use Framework, as defined in 43 U.S.C. § 1702(c), requires BLM to consider a variety of factors when managing public lands:

> *The term "**multiple use**" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.*[25]

Likewise, the term "sustained yield" means "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."[26]

As further discussed in Section II.E, *infra*, conservation and environmental protection considerations do not preempt permitted use of public lands in this context. The Multiple Use Framework accounts for the fact that public land use must be multifaceted and still meet present resource needs. But contrary to the concern that underlies the CLH Rule's preamble, the relevant statutes already incorporate conservation and environmental protection principles to help inform and guide the proper use of federal lands for resource extraction or other economic purposes.

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[22] *Id*.; *see also* 16 U.S.C. §1133(d)(3) (special provisions governing mineral leasing in designated wilderness areas); 30 U.S.C. § 226(h) (special provisions for national forest system lands).

[23] 43 U.S.C. § 1701(a)(7).

[24] *See id*. § 1702(c), (h).

[25] *Id*. § 1702(c).

[26] *Id.* § 1702(h).

Within the Multiple Use Framework, BLM has codified a procedure to administer public lands, commonly known as Resource Management Plans (RMPs).[27] RMPs present multiple opportunities and avenues to make sure environmental protection and conservation receive the attention they deserve. RMPs start with scoping plans to develop a range of alternative management strategies based on significant input by stakeholders and members of the general public.[28] These comment and correction periods provide ample opportunities to raise environmental issues, and BLM must account for such issues raised at each juncture. In sum, to the extent conservation and environmental issues arise in any public land management situation, the existing RMP procedures preserve the issues for the Bureau to adequately consider and balance with other competing objectives. ACEC designations during planning are an existing tool for BLM to require special management of areas with sensitive resource values. Nothing in the CLH Proposed Rule or its preamble explains how the existing RMP process fails to adequately consider conservation and environmental protection, nor does the proposal explain and justify BLM's departure from the current approach (as embodied in existing statutes, regulations, and policies) in favor of a new expansive landscape-based approach.

Beyond the MLA and FLPMA, various other federal statutes also protect our nation's public lands and provide for proper consideration of environmental and conservation factors in the federal land use process. For example, the National Environmental Policy Act (NEPA), which "resolved 'to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans,'"[29] statutorily requires that federal agencies such as BLM consider the environmental implications of every major federal action affecting the human environment.[30] Likewise, the National Historic Preservation Act (NHPA) requires federal agencies to consult with the State and Tribal historic preservation officers on alternatives to avoid, minimize, and mitigate the adverse effects of federal undertakings on historic properties, including Tribal resources.[31] The ESA also ensures that federal actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[32] The Clean Water Act, the Clean Air Act, and various other federal environmental laws also work in tandem to ensure protection of the environment across all federal lands and elsewhere.

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[27] *See, e.g.*, 43 C.F.R. § 1601.0-2 ("The objective of resource management planning by [BLM] is to maximize resource values for the public through a rational, consistently applied set of regulations and procedures which promote the concept of multiple use management . . . .").

[28] *See, e.g.*, 43 C.F.R. §§ 1610.2 ("Public participation"), 1610.5-3 ("Protest procedures").

[29] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193 (D.C. Cir. 1991).

[30] *See* 42 U.S.C. § 4332(2)(C) (requiring all federal agencies, "to the fullest extent possible," to include a "detailed" environmental impact statement in every recommendation or report for major federal actions significantly affecting the human environment); *see also* Pub. L. No. 118-5, § 321 (amending NEPA); 43 C.F.R. § 1601.0-6 (requiring proposed RMPs to include "environmental impact statement[s]").

[31] *See, e.g.*, 54 U.S.C. § 306108; 36 C.F.R. pt. 800 (implementing regulations).

[32] 16 U.S.C. § 1536(a)(2); 50 C.F.R. pt. 402 (discussing the interagency cooperation process in implementing the ESA).

Thus, combined with the MLA and FLPMA, a broad range of federal environmental statutes and regulations provide an extensive overlay of federal environmental requirements that account for conservation considerations associated with proposed uses of public lands. The multi-tiered procedures, found in the Multiple Use Framework and BLM's Resource Management Plans, already provide that when public lands are used for economically productive purposes, conservation uses are accounted for to protect the land's sustainable use.

B. Origins of CLH Approaches

Not content with this robust existing framework for conservation and environmental protection, the CLH Proposed Rule is built upon an expansive notion of landscape-based approaches to land management, including protection of "intact landscapes."[33] Landscape-based approaches are not necessarily new, yet Congress has never made the kind of expansive approach described in the CLH Proposed Rule part of the general federal land management statutory framework. BLM should not—and has no authority to—do so now on its own.

BLM has defined a "landscape approach" in various ways over the years. For example, in BLM's "Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior," BLM defined a "landscape" as a "large area encompassing an interacting mosaic of ecosystems and human systems that is characterized by a set of common management concerns. The landscape is not defined by the size of the area, but rather by the interacting elements that are meaningful to the management objectives."[34] There, BLM defined the "landscape approach" as "integrat[ing] multiscale information to understand the effects of natural and human influences on resource conditions and trends. Thus, the landscape approach enables effective decision-making to meet the BLM's multiple use and sustained yield mission."

The scientific literature first discussing landscape-based approaches acknowledged that, as a mode of making decisions about land uses, they are inherently "value-laden"[35] and focused on "achiev[ing] maximum flexibility [over land uses] for future options."[36] In 1992, a paper entitled "The Concept of Landscape Health" explained the landscape health approach, with a focus on a "three-dimensional mosaic of environmental compartments or zones."[37] Under this approach, "Landscape design and management, while accommodating human use, should aim not to tip a healthy landscape out of its homeostatic equilibrium."[38] "Landscape health is the landscape's taking care of itself. The landscape reigns in its own dominion."[39] As such, "landscape is an ideal-

[33] 88 Fed. Reg. at 19,585 ("As intact landscapes play a central role in maintaining the resilience of an ecosystem, the proposed rule emphasizes protecting those public lands with remaining intact, native landscapes and restoring others.").

[34] BLM, *The Bureau of Land Management's Landscape Approach* (last visited June 14, 2023), https://www.blm.gov/sites/blm.gov/files/about_howwemanagelandscapehandout.pdf.

[35] D.J. Rapport, et al., *Evaluating Landscape Health: Integrating Societal Goals and Biophysical Process*, 53 J. ENVT'L MGMT. 1, 2 (1998) [*hereinafter* Rapport Paper].

[36] *Id.* at 7.

[37] Bruce Ferguson, *The Concept of Landscape Health*, J. ENVT'L MGMT. 129, 130 (1992) [*hereinafter* Ferguson Paper].

[38] *Id*. at 129.

[39] *Id.* at 135.

seeking system,"[40] and "landscape design should have the humility and restraint to follow the Hippocratic injunction, 'Above all, do no harm.'"[41]

In 1998, the Rapport study explained that "primary objectives of landscape management are to satisfy present societal goals and to ensure the flow of ecosystem goods and services for future generations."[42] Under that approach, land "management ought to consider a broad range of potential societal needs and goals and then strive to *achieve maximum flexibility for future options*."[43] This means, also, that "[l]andscape management decisions ought to be based on long-term (intergenerational) sustainability which employ mechanisms for sustaining major ecological processes within a regional mosaic which run the gamut from heavily managed systems to nearly pristine systems."[44] The "criteria for landscape health," as articulated by the Rapport study, include "provision for a suite of ecosystem goods and services that satisfy the present (and anticipated future) needs of society," and achieving "economic viability and social welfare without negatively impacting the health of neighboring landscapes and ecosystems."[45] Again, the focus is on "maintenance of management options" for "future generations."[46]

The CLH Proposed Rule lacks *any* meaningful discussion of the scientific literature explaining the use of landscape-based approaches, the precise form of landscape health approaches contemplated in the proposal, and the potential applicability of those approaches to federal land management in a manner that is consistent with and supported by federal law. In fact, the Federal Register notice merely cites two scientific articles: (1) N.B. Carr, et al., *A Multiscale Index of Landscape Intactness for the Western United States* (2016), https://www.sciencebase.gov/catalog/item/57d8779de4b090824ff9acfb [*hereinafter* Carr Paper]; and (2) Kevin Doherty et al., *A Sagebrush Conservation Design to Proactively Restore America's Sagebrush Biome* (2022), https://pubs.er.usgs.gov/publication/ofr20221081 [*hereinafter* Doherty Paper]. BLM cites these papers for the basic proposition that climate change is "creating new risks and exacerbating existing vulnerabilities," but BLM does not explain, in any meaningful way, how the research found in these papers support the deployment of landscape-based approaches *across all BLM programs and lands in the uniform fashion that the Proposed Rule describes*.

The Carr Paper, which "describe[s] a landscape approach to natural resource management," expressly acknowledges that it was issued in conjunction with BLM's "implementing [of] a major new planning initiative, Planning 2.0, as part of their implementation of a landscape approach."[47] Of course, the Planning 2.0 Rule was disapproved by Congress and never went into effect (as

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[40] *Id.*

[41] *Id.* at 136.

[42] Rapport Paper, *supra* note 35, at 6.

[43] *Id*. at 6–7 (emphasis added). Under FLPMA, multiple use requires consideration of, among other things, "the long-term needs of future generations for renewable and non-renewable resources," 43 U.S.C. § 1702(c), but that is a far cry from "achiev[ing] maximum flexibility for future options."

[44] *Id.* at 7.

[45] *Id.* at 11–12.

[46] *Id*. at 12.

[47] Carr Paper, *supra* page 11, at 3.

discussed in more detail herein). As defined by the Carr Paper, a "landscape approach is a set of concepts and principles used to guide resource management when multiple stakeholders are involved and goals include diverse and sustainable social, environmental, and economic outcomes within and across landscapes."[48] Importantly, the Carr Paper acknowledges that "[e]nergy development and wildlife conservation are examples of land uses that often conflict but are essential to meeting multiple-use objectives on lands managed by the BLM."[49] This paper also highlights various common features of a landscape approach, such as developing strong stakeholder partnerships, obtaining scientific information across "broad spatial extents," and considering the impacts of proposed environmental actions "across broad landscapes."[50]

Landscape approaches are not, in and of themselves, objectionable, and the Associations strongly support the use of the best available science in making decisions related to federal lands management. Yet, in many respects, the expansive and ambiguous landscape-based approaches described in the CLH Proposed Rule (and in the underlying literature) conflict with express directives in federal statutes, as discussed in more detail herein. For example, FLPMA and NEPA and their implementing regulations address environmental impact analyses. These requirements are not as expansively drawn as those reviews and requirements contemplated by the landscape-based approaches described in the proposal. Expansive landscape approaches would have limited utility as there are "no predefined rules for determining the exact size or number of spatial scales at which to consider the potential effects of a resource decision."[51]

Separate from the notion of "landscape health"—which is not actually discussed in any detail in the "Conservation and Landscape Health" Proposed Rule—is the concept of "land health" and "land health standards," which are central parts of the CLH Proposed Rule. Based on a vague notion of "land health," the CLH Proposed Rule references the need to uphold "land health standards" in making decisions about BLM programs and lands. The CLH Proposed Rule "would apply land health standards to *all BLM-managed public lands and uses* . . . ."[52] Currently, these approaches have only been adopted for use on certain grazing areas.[53] No statute has authorized BLM's use of such "land health standards" across all BLM programs and lands, nor does the Proposed Rule define "land health standards" with any degree of specificity. For its part, the Carr Paper describes "land health standards" as "standards [that] are ecological goals that conform to the Fundamentals of Rangeland Health and have been established at State or regional levels to reflect the characteristics of rangelands within that area. Land health evaluations establish the degree to which land health standards are being achieved by measuring specific indicators relevant to the land health standards of each State or region."[54] Again, the concept is left vague and ill-suited for application across all lands and programs. The Doherty Paper focuses on a particular

[48] *Id*. at 8.

[49] *Id*.

[50] *Id.* at 9–11.

[51] *Id*. at 12.

[52] 88 Fed. Reg. at 19,583 (emphasis added).

[53] *See, e.g.*, 43 C.F.R. subpt. 4180.

[54] Carr Paper, *supra* page 11, at 40.

context, but does not discuss "land health" or "land health standards," nor does it delve into the legal basis for adoption of those standards for purposes of all BLM lands and programs.

To be clear, landscape health approaches may be appropriate in particular contexts involving special conservation areas. Indeed, Congress has incorporated landscape-level approaches in discrete situations.[55] However, Congress has never authorized use of expansive landscape-based approaches across all BLM lands in the manner set forth in the CLH Proposed Rule and doing so now raises significant concerns, as addressed in these comments. In particular, as discussed below, Congress expressly rejected the BLM Planning 2.0 Rule, which itself was based largely on similar landscape-level approaches to land use management.[56]

C. The CLH Proposed Rule Lacks Clear Statutory Support and Contravenes Existing Law

A bedrock principle of administrative law is that agency regulations must be based on statutory authority. Congressional statutes define the permissible bounds of a federal agency action.[57] This is especially true for federal agencies seeking to exercise authority over federal lands, as the Constitution's Property Clause expressly provides: "**The *Congress* shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States**."[58] Agency actions with significant consequences for federal land use management should be based on clear congressional authorizations.[59] Accordingly, Congress has the right and power to determine the proper balance of uses for federal lands, and against that constitutional backdrop, Congress has established the Multiple Use Framework to guide BLM's effectuation of that legislative purpose.

The CLH Proposed Rule does not align with this constitutional and statutory framework. As mentioned earlier, FLPMA adopts a Multiple Use Framework which treats conservation as one

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[55] *See, e.g.*, 16 U.S.C. § 460nnn-23 (providing for "active management of Western Juniper on a landscape level" at BLM's Steens Mountain Cooperative Management and Protection Area); 43 U.S.C. 1752(h)(B)(ii)(I) (allowing issuance of grazing permit or lease without an environmental impact statement or environmental assessment under NEPA if the allotment is "meeting land health standards").

[56] The Associations note that the CLH Proposed Rule reflects a landscape-based approach that the FWS is implementing as part of its ESA authorities. *See* 88 Fed. Reg. 31,000 (May 15, 2023) (adopting "revised Mitigation Policy [that] establishes fundamental mitigation principles and provides a framework for applying a *landscape-scale approach* to achieve, through application of the mitigation hierarchy, *no net loss of resources* and their values, services, and functions resulting from proposed actions" and a revised "ESA Compensatory Mitigation Policy [that] adopts the mitigation principles established in the Mitigation Policy").

[57] *See, e.g.*, 5 U.S.C. § 706(2)(C) (finding unlawful agency actions "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) ("Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" (brackets in original)).

[58] U.S. CONST. ART. IV, § 3, cl. 2 (emphasis added); *see also Utah Div. of State Lands v. United States*, 482 U.S. 193, 201 (1987) ("The Property Clause grants Congress plenary power to regulate and dispose of land within the Territories . . . ."); *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) ("[D]eterminations under the Property Clause are entrusted primarily to the judgment of Congress.").

[59] *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) ("So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.").

of many value systems to consider when managing public lands. Under the "Statutory Authority" section of the preamble, BLM cites the Multiple Use Framework as its basis of authority to "define and regulate *conservation* use on the public lands" and "provide for third party authorizations to use the public lands *for conservation*."[60] Further, the CLH Rule seeks to "give priority to ACECs [Areas of Critical Environmental Concern]."[61] Contrary to BLM's representations, the 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.

Similarly, while BLM also cites to Section 2002 of the Omnibus Public Land Management Act of 2009 (2009 Omnibus Act), *codified in* 16 U.S.C. § 7202, as another statutory basis for its approach,[62] this provision does not provide the statutory authority BLM claims. The 2009 Omnibus Act still required public land management to be "in accordance with any applicable law" and undertaken "in a manner that protects the values for which the components of the system [i.e., public lands administered by BLM] were designated."[63] Moreover, the statute expressly prohibits the modification of "any law . . . under which the components of the system . . . were established or are managed, including— . . . the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.)."[64] Putting these provisions together, the 2009 Omnibus Act merely preserves the statutory approach of FLPMA, which includes the Multiple Use Framework and the related mandate that conservation is one of many competing values to be factored in when managing public lands.[65] As a result, the 2009 Omnibus Act does not expand BLM's authority such that it could elevate conservation over other public land use principles.[66]

Far from *authorizing* the approach taken in the CLH Proposed Rule, federal statutes would seem to *prohibit* what BLM seeks to accomplish here. FLPMA defines "principal or major uses" to be "limited to[] domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production."[67] Importantly, conservation, environmental protection, and preservation of resilient ecosystems are not included in "principal or major use." By extension, even if BLM may have some discretion to identify conservation as a value, it cannot be promoted by regulations in such a way as to exclude or diminish any "principal or major uses."

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[60] 88 Fed. Reg. at 19,587 (emphases added).

[61] *Id.*

[62] *Id*. at 19,587.

[63] 16 U.S.C. § 7202(c).

[64] *Id.* § 7202(d).

[65] *Cf. Agdaagux Tribe of King Cove v. Jewell*, 128 F. Supp. 3d 1176, 1195 (D. Alaska 2015) (finding that the 2009 Omnibus Act does not "inject into the NEPA proceedings a public health or safety component" because it is "clear that the act does not establish a 'health and safety' purpose and need").

[66] *Cf. Agdaagux Tribe of King Cove v. Jewell*, No. 3:14-CV-0110-HRH, 2014 WL 12513891, at *9 (D. Alaska Dec. 19, 2014) (rejecting argument that the 2009 Omnibus Act imposes a specific trust duty given that "no language" in the Act suggests so).

[67] 43 U.S.C. § 1702(*l*).

D. The CLH Proposed Rule Is Inconsistent with Congressional Intent and Resembles Prior BLM Regulations Rejected by Congress

Several non-textual sources, including legislative history, confirm that the Proposed Rule is far from what Congress intended. It is well known that FLPMA's Multiple Use Framework was largely inspired by the Multiple-Use Sustained-Yield Act of 1960 (MUSYA),[68] a law that authorized/directed the Department of Agriculture to develop and administer certain resources (such as timber, water, and wildlife) in national forests.[69]

But notably, FLPMA's definition of "multiple use" *expanded* from what was originally defined under MUSYA. Whereas MUSYA specified that the national forest administration shall be "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes,"[70] FLPMA offered a broad framework for public land usage.[71] Additionally, whereas MUSYA referred to multiple use as meeting the "needs of the American people" and called for management that did not involve "impairment of the productivity of the land,"[72] FLPMA narrowed the scope of what would constitute "impairment" and made sure the "needs" account for present needs as well.[73]

To summarize, the legislative history—as demonstrated by the expanded definition of what would constitute "multiple use"—indicates that Congress intended an *increased* variety of considerations beyond environmental protection when BLM administers public lands. CLH directly contradicts such legislative history by constraining the "use" of public lands through a more regimented process potentially limiting uses that have long been effectively conducted under the Multiple Use Framework.

Recent congressional rejection of a former BLM rule also demonstrates a legislative intent contrary to the Proposed Rule. In late 2016, near the end of the Obama Administration, BLM finalized its "Planning 2.0 Rule," which comprehensively changed and expanded the RMP process.[74] However, BLM's Planning 2.0 Rule was disapproved by Congress in early 2017 pursuant to the Congressional Review Act (CRA), and in turn was rescinded.[75] It is important to note that the Planning 2.0 Rule relied on the same or very similar landscape-based approaches

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[68] Pub. L. No. 86-517, 74 Stat. 215 (1960).

[69] *See, e.g.*, S. Rep. No. 94-583, at 38 (1975) ("This definition ["Multiple use"] is very similar to that which appeared in the [MUSYA]."); H.R. Rep. No. 94-1163, at 5 (1976).

[70] 74 Stat. at 215.

[71] *See* 90 Stat. at 2746 ("*including, but not limited to*, recreation, range, timber, *minerals*, watershed, wildlife and fish, and natural scenic, scientific, and historical values" (emphases added)).

[72] 74 Stat. at 215.

[73] *See* 90 Stat. at 2745–46 ("best meet *the present and future* needs of the American people" and avoid "*permanent* impairment of the productivity of the land and the quality of the environment" (emphases added)).

[74] *See* 81 Fed. Reg. 89,580 (Dec. 12, 2016).

[75] 82 Fed. Reg. 60,554 (Dec. 21, 2017) ("Effectuating Congressional Nullification of the Resource Management Planning Rule Under the Congressional Review Act").

embodied in the CLH Proposed Rule. As an initial observation, both rules' preambles use similar language attempting to justify and provide authority for their proposed rules.[76]

More importantly, concepts advanced in the Planning 2.0 Rule appear to pervade the CLH Proposed Rule. For example, the Planning 2.0 Rule emphasized a "landscape-scale approach," which it defined as "a structured and analytical process that guides resource management decisions at multiple geographic scales in order to consider multiple overlapping landscapes and to achieve multiple social, environmental, and economic goals."[77] Such focus on landscapes also appears in the CLH preamble.[78]

Likewise, the Planning 2.0 Rule attempted to expand the designation and protection of ACECs similar to what has been proposed in the CLH Rule. In fact, the designation criteria are effectively the same,[79] and both rules require draft and proposed RMPs to put greater emphasis on conservation when it comes to the "special management attention" of such ACECs.[80]

Under the CRA, when a rule is disapproved, the rule "may not be reissued in substantially the same form, and a new rule that is substantially the same may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution."[81] Given the close similarities between the CLH Proposed Rule and the Planning 2.0 Rule, BLM may be in violation of the CRA if it finalizes the CLH Rule. At minimum, Congress's express disapproval of the CLH Rule's core features raises serious questions about the validity of the CLH Proposed Rule.

E. Contrary to FLPMA's Multiple Use Framework and BLM's Stated Intent of Placing All Uses on "Equal Footing," the Proposed Rule Would Elevate Conservation to a Preeminent Factor

The Associations support efforts to consider multiple uses of public lands on "equal footing," because that is what the statute requires. But the CLH Proposed Rule fails to align with BLM's assertion that it "does not prioritize conservation above other uses."[82] Contrary to the preamble's assertion that the proposal "puts conservation on an equal footing with other uses,

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[76] *Compare, e.g.*, 81 Fed. Reg. at 89,581 ("The final rule emphasizes the role of using high quality information . . . in the planning process."), *with* 88 Fed. Reg. at 19,584 ("[T]he proposed rule codifies the need across BLM programs to use high-quality information to prepare land health assessments and evaluations . . . .").

[77] 81 Fed. Reg. at 89,585.

[78] *See, e.g.*, 88 Fed. Reg. at 19,585 ("As intact landscapes play a central role in maintaining the resilience of an ecosystem, the proposed rule emphasizes protecting those public lands with remaining intact, native landscapes and restoring others.").

[79] *Compare* 81 Fed. Reg. at 89,670–71 ("Relevance" and "Importance"), *with* 88 Fed. Reg. at 19,597 ("Relevance" and "Importance"),

[80] *Compare* 81 Fed. Reg. at 89,662 ("to protect and prevent irreparable damage . . . or to protect life and safety from natural hazards"), *with* 88 Fed. Reg. at 19,597 ("Conserve, protect, and restore relevant and important resources . . . or that protect life and safety from natural hazards").

[81] 5 U.S.C. § 801(b)(2).

[82] 88 Fed. Reg. at 19,584.

consistent with the plain language of FLPMA,"[83] the proposal actually elevates conservation values and environmental uses far above other uses.

Various provisions in the CLH Proposed Rule demonstrate that the new approach would give conservation "most favored use" status, contradicting FLPMA's Multiple Use Framework.

First, proposed Section 6101.1 states that the purpose of the entire CLH framework is "to promote the use of conservation to ensure ecosystem resilience." Thus, BLM, at the outset, proposes to base its public lands administration on a paradigm that favors "conservation" and "ecosystem resilience" over other values outlined in 43 U.S.C. § 1702(c).

Second, proposed Section 6102.1 "prioritizes" conservation and protection of "intact landscapes" and "resilient ecosystems" above all other uses. But it is a virtual certainty that other public land uses placed on equal footing under FLPMA will affect landscapes and ecosystems in some shape or form based on the nature of the activity. While those uses may be disruptive, they may, as FLPMA provides, "mak[e] the most judicious use of the land,"[84] such as scenarios where the resources developed at that site are socially valuable. These uses should not become secondary to conservation purposes. Proposed Section 6102.1 *mandates* the land stay "intact" and "resilient,"[85] which means any activity that might alter that land's status will presumptively be disfavored even if the operator takes steps to mitigate any environmental impacts. Further, authorized officers must "*prioritize* actions that conserve and protect intact landscapes."[86] A verb such as "prioritize" puts a heavy thumb on the scale, and the preamble explaining these provisions confirms such preference.[87] These measures threaten to functionally designate public lands as de facto wilderness areas without congressional approval.

Third, CLH Rule's emphasis on land health standards, compensatory mitigation, and management actions for ecosystem resilience likewise elevates conservation over other uses.[88] As just one illustration out of many, pursuant to proposed Section 6102.5(b), BLM must, "[c]onsistent with the management of the area, avoid authorizing uses of the public lands that permanently impair ecosystem resilience." Yet BLM also acknowledges in the preamble that "[p]ermanent impairment would be difficult or impossible to avoid, for example, on lands on which the BLM has authorized intensive uses, including infrastructure and energy projects or mining, or where BLM has limited discretion to condition or deny the use."[89] This mandatory obligation imposed on BLM to avoid authorizations that "permanently impair ecosystem resilience" could effectively bar any right-of-way, lease, or permit for the development of the public lands. Likewise, proposed

[83] *Id.* (emphasis added).

[84] 43 U.S.C. § 1702(c).

[85] 43 C.F.R. § 6102.1(a)(1), (3) (proposed).

[86] *Id.* § 6102.1(b) (proposed) (emphasis added).

[87] *See* 88 Fed. Reg. at 19,590 ("Section 6102.1(b) would call on authorized officers to prioritize protection of such landscapes.").

[88] *See id.* at 19,602–03 (proposed §§ 6102.5, 6102.5-1, 6103.1, 6103.1-1, which correspond to "Management actions for ecosystem resilience," "Mitigation," "Fundamentals of land health," and "Land health standards and guidelines," respectively).

[89] *Id.* at 19,592.

Section 6103.1 would require all BLM "[s]tandards and guidelines developed or revised by the BLM in a land use plan" to be "consistent with the . . . fundamentals of land health" as set forth in the proposal. BLM staff would be mandated to "manage all lands and program areas to achieve land health in accordance with the fundamentals of land health and standards and guidelines,"[90] and any proposal inconsistent with land health standards may not be authorized, which disregards the Multiple Use Framework.

Fourth, proposed Section 1610.7-2 specifically requires BLM, as part of the "land use planning process," to "give priority to areas that have potential for designation and management as ACECs," including for purposes of "development and revision" of RMPs. (Other concerns with the Proposed Rule's approach to ACECs are discussed below.) This prioritization effectively elevates special conservation designations above other uses.

Finally, the structural changes to BLM's regulations made by the CLH Proposed Rule show that the proposal would fundamentally alter how conservation considerations are addressed. Currently, BLM's regulations are found in a set of subchapters identified as Subchapter A (General Management), Subchapter B (Land Resource Management), Subchapter C (Minerals Management), Subchapter D (Range Management), Subchapter E (Forest Management), Subchapter F (Preservation and Conservation), Subchapter G (Reserved), Subchapter H (Recreation Programs), and Subchapter I (Technical Services). Currently, Subchapter F addresses "management of designated wilderness areas" only, and does not provide conservation requirements generally applicable to all BLM lands and programs. General conservation and environmental requirements are set forth in the other subchapters dealing with land resource management, minerals management, and the like. The CLH Proposed Rule fundamentally transforms the structure of BLM's regulations by imposing, in Subchapter F, a new expansive landscape health process applicable to all BLM lands. In doing so, the proposal creates redundancies as well as vast expansions of the conservation element of BLM reviews and decision-making.

Many other supporting examples are found throughout the Proposed Rule but the main point is simple: the CLH proposal does not ensure "equal footing" for all uses, contrary to BLM's stated purpose.

F. Specific Components of the CLH Proposed Rule Also Lack Clear Legal Support

Beyond the core legal defects that permeate the proposal, the Associations are specifically concerned with the following concepts in the CLH Proposed Rule. None of these regulatory provisions are grounded in the text of FLPMA or the MLA—in fact, they are inconsistent with FLPMA.

1. "Conservation Leases"

BLM proposes to establish "conservation leases," which according to the Bureau are a "new tool" that "would allow the public to directly support durable protection and restoration

[90] 43 C.F.R. § 6103.1(b) (proposed).

efforts to build and maintain the resilience of public lands."[91] FLPMA does not support, let alone authorize, this measure.

Section 302(b) of FLPMA, the statutory basis which BLM cites as the applicable authority for conservation leases, provides as follows:

> [T]he Secretary shall . . . regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, *the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns*.[92]

Notably, the term "use" in this particular provision of FLPMA is not passive, but instead means active use. At least three structural components of FLPMA indicate that the term "use" (as referred to in FLPMA Section 302(b)) cannot include passive usage such as letting a land stay idle exclusively for conservation's sake.

First, there is contextual association. As shown above, the term "use" is followed by the terms "occupancy" and "development," both of which are for the intended purpose of "utiliz[ing] public lands for habitation, cultivation, and the development of small trade or manufacturing concerns." It is a canonical rule of statutory interpretation that "[a]ssociated words bear on one another's meaning (*noscitur a sociis*)."[93] In *Yates v. United States*, which was a case involving alleged records destruction in violation of 18 U.S.C. § 519, the Supreme Court found that because it was grouped with and followed "records" and "documents" in the statutory text, the term "tangible object" included only a subset of "tangible objects involving records and documents" as opposed to "any tangible object."[94] Here, the word "use" in the FLPMA leasing context cannot mean "any use" because, otherwise, *any* activity authorized by the Bureau would satisfy the statute. Instead, the implicit limiting principle in the text is that the term "use" for purposes of leasing authority has a narrower meaning that closely aligns with the other activities referenced—all of which have some active human use component such as "cultivation," "habitation," "development," or "occupation," and certainly excludes forcing the land to stay idle.

Nor is this the only place in FLPMA where "use" means "active use." For example, Section 103(*l*) of FLPMA defines "principal or major use" which "includes, and is limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production."[95] Once again, the "use" that

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[91] 88 Fed. Reg. at 19,586, 19,591–92, 19,600–02.

[92] 43 U.S.C. § 1732(b) (emphasis added).

[93] *See Yates v. United States*, 574 U.S. 528, 543 (2015) ("[W]e rely on the principle of noscitur a sociis—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress'.") (quoting *Gustafson v. Alloyd Co*., 513 U. S. 561, 575 (1995)); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195–98 (2012).

[94] *Yates*, 574 U.S. at 543.

[95] 43 U.S.C. § 1703(*l*).

Congress deemed to be "principal or major" are examples of active uses such as grazing and mineral production. Moreover, FLPMA Section 202(e)(1) demands heightened scrutiny for any land use decision that excludes one or more principal or major uses,[96] which is contrary to BLM's direction in the CLH Proposed Rule to allow for conservation "use" on par with other active uses.

Similarly, FLPMA's right-of-way provision, which establishes a procedure for BLM to grant rights-of-way on public lands,[97] also considers active uses and development—as opposed to conservation. Paragraphs 1761(a)(1) to (7) elaborate on various usage of public lands, such as using the land for transportation and distribution of materials, or the generation and transmission of power. Either way, the provision clearly is for active uses of the land and not conservation purposes like "restoration," "land enhancement," or "mitigation," none of which fairly constitute the "use, occupancy, and development of the public lands" within the meaning of FLPMA.[98]

While FLPMA allows BLM to consider conservation as one factor when implementing FLPMA's Multiple Use Framework, that broad principle does not provide authority to implement an entirely new conservation leasing regime under the specific leasing authority in FLPMA Section 302. This is especially true given that the Act already prescribes express mechanisms to address conservation concerns: ACEC designation,[99] and withdrawal of public lands from mineral entry.[100] And these prescribed mechanisms require a regimented procedure for designating an area for non-use.[101]

Conservation leases would improperly bypass the public processes and heightened scrutiny demanded for ACEC designations and withdrawals because BLM could claim that the lands are still being "used," or even claim that the land is being preserved for "subsequent use." Such de facto withdrawal on a piecemeal basis would sidestep an enumerated process Congress created, in violation of FLPMA.

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[96] *See* 43 U.S.C. § 1712(e).

[97] 43 U.S.C. § 1761.

[98] Contemporaneous definitions from around the time of enactment of FLPMA in 1976 support this active notion of the statutory terms "use," "occupancy," and "development" of public lands. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2523 (1976) (defining noun form of "use" as "the act or practice of using something"); *id.* at 1560 (defining "occupancy" as "the taking and holding possession of real property under a lease or tenancy at will"); *id.* at 618 (defining "development" as "the state of being developed"); OXFORD AMERICAN DICTIONARY 1024 (1980) (defining noun form of "use" as "using, being used" or "the purpose for which something is used…"); *id.* at 617 (defining "occupancy" in relation to "occupant" as "a person occupying a place or dwelling or position"); *id.* at 235 (defining "development" as "something that has developed or been developed"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1448 (1st ed. 1968) (defining the noun form of "use" as "the act of employing, using, or putting into service" or "the state of being employed or used"); *id.* at 919 (defining "occupancy" as "the act, state, or condition of being or becoming a tenant or of living in or taking up quarters in or on something"); *id.* at 363–64 (defining "development" as "a developed state, form, or product").

[99] 43 U.S.C. §§ 1702(a), 1711(a), 1712(c)(3) (FLPMA Sections 103(a), 201(a), 202(c)(3)).

[100] *Id.* §§ 1712(e)(3), 1714 (FLPMA Sections 202(e)(3), 204)).

[101] *See, e.g.*, *id.* §§ 1711(a) (requiring DOI to prepare and maintain an inventory of such public lands), 1714(a) (permitting "withdrawals but only in accordance with the provisions and limitations of this section").

Case law confirms BLM's lack of authority for conservation leases in this context. The U.S. Court of Appeals for the Tenth Circuit in *Public Lands Council v. Babbitt* rejected a position similar to that taken in the CLH Proposed Rule.[102] The court struck down a regulation that allowed "the issuance of ten-year permits to use public lands for conservation purposes to the exclusion of livestock grazing," finding it to be "invalid on its face."[103] Indeed, the court rejected DOI's position that "the issuance of conservation use permits helps achieve the goal of multiple use," and that "conservation use is a mechanism to achieving [the] goal of 'managing, maintaining, and improving the condition of the public rangelands so they become as feasible as possible for all rangeland values.'"[104] The court did so because the statute "unambiguously reflect[s] Congress's intent that the Secretary's authority to issue "grazing permits" be limited to permits issued "for the purpose of grazing domestic livestock."[105] A similar express "purpose" is found in 43 U.S.C. § 1732(b) as well, i.e., the "use, occupancy, and development of the public lands" is for the stated purpose of utilizing public lands for "habitation, cultivation, and the development of small trade or manufacturing concerns."[106]

2. Compensatory Mitigation Approaches

BLM proposes to authorize the use of third-party mitigation fund holders to "facilitate compensatory mitigation."[107] Again, no part of FLPMA contemplates compensatory mitigation measures. Underlying this provision is the (unsupported) theory that land uses that may disrupt conservation are disturbances that inherently must be "compensated." However, the statute does not embody any such theory.

FLPMA's statutory silence on compensatory measures stands in stark contrast to other environmental law provisions. For example, EPA and the U.S. Army Corps of Engineers have promulgated compensatory mitigation requirements for Clean Water Act (CWA) Section 404 permits.[108] These agencies' authority to require compensatory mitigation has effectively been ratified by Congress pursuant to Section 314 of the National Defense Authorization Act (NDAA) for Fiscal Year 2004.[109] In addition, the FWS requires mitigation measures pursuant to permits for

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[102] *See* 167 F.3d 1287 (10th Cir. 1999), *aff'd* 529 U.S. 728 (2000). In its petition for writ of certiorari, DOI did not seek review of the Tenth Circuit's decision that "allowing issuance of permits for conservation use were held unlawful." 529 U.S. at 747 (citing 167 F.3d at 1037–38). Thus, the Tenth Circuit's ruling on this matter is still binding law.

[103] 167 F.3d at 1307.

[104] *Id.*

[105] *Id.* at 1308.

[106] At a minimum, BLM should limit the entities that could apply for conservation leases to be consistent with the statute. For example, the term "holder" means "any State or local governmental entity, individual, partnership, corporation, association, or other business entity receiving or using a right-of-way." 43 U.S.C. § 1702(b).

[107] 88 Fed. Reg. at 19,592, 19,600, 19,602–03.

[108] *See* 40 C.F.R. pt. 230 ("Compensatory Mitigation for Losses of Aquatic Resources").

[109] Pub. L. No. 108-136, § 314(b), 117 Stat. 1392, 1431 (2003) ("establishing performance standards and criteria for the use, consistent with section 404 of [the CWA], of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the Army under such section").

incidental take of endangered and threatened species under Section 10 of the ESA in accordance with the provisions of the Act.[110]

Unlike the implementing regulations of these environmental laws, BLM has not identified a source of authority in FLPMA or the MLA authorizing the Bureau to impose compensatory mitigation requirements. And without any express statutory basis, BLM's proposed compensatory mitigation approaches would be unlawful because the agency "literally has no power to act."[111]

3. Changes to "Areas of Critical Environmental Concern" (ACECs)

The Associations support BLM's proposed adoption of a data-driven approach for identifying and designating ACECs. That approach may help bring more consistency and rigor to the ACEC designation process. However, at least two proposed changes to BLM's ACEC policy go beyond what FLPMA authorizes. First, BLM proposes to add "protecting intact landscapes" as one of the "Importance" criteria for a land to be designated as an ACEC.[112] This addition is beyond BLM's authority and is inconsistent with the Multiple Use Framework. For reasons discussed in Sections II.B, D, and E, *supra*, this approach is not supported by the best available science,[113] is inconsistent with congressional intent as demonstrated by both the legislative history and Congress's rejection of a similar rule in 2017, and unduly elevates conservation values in a manner inconsistent with the Multiple Use Framework.

Second, BLM proposes to remove the public comment period for designation of ACECs.[114] This proposal violates FLPMA Section 202(f), which states that BLM "shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give . . . the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public

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[110] 16 U.S.C. § 1539(a)(2)(A)(ii) (permit applicant must identify steps to minimize and mitigate the impacts of a taking).

[111] *See FEC v. Cruz*, 142 S. Ct. 1638, 1649 (2022) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)); *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (discussing how "statutory silence, when viewed in context, is best interpreted as *limiting* agency discretion" (emphasis added)); *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of certiorari) ("A rule requiring us to suppose statutory silences and ambiguities are both always intentional and always created by Congress to favor the government over its citizens . . . is neither traditional nor a reasonable way to read laws. It is a fiction through and through.").

[112] *See* 88 Fed. Reg. at 19,597.

[113] BLM has previously rejected ACEC designation for the purpose of protecting intact landscapes, citing the difficulty in managing for landscape values on a vast scale. For instance, in 2014, BLM denied an application for the designation of the Greater Chaco Landscape as an ACEC. *See* BLM, GREATER CHACO LANDSCAPE ACEC EVALUATION (Feb. 7, 2014) (available at the BLM Farmington, New Mexico, Field Office). In doing so, the Bureau explained that "[a]s a general rule, it is preferable to identify a reasonably defensible smaller landscape rather than stretching boundaries to distant horizons, and perhaps threatening the credibility of the process." *Id.* at 7. BLM stated that there must be "a definable geographic area that can be distinguished from surrounding properties by changes such as density, scale, type, age, style of sites, buildings, structures and objects, or by documented differences in patterns of historic development or associations." *Id.* BLM's reasoning in its Chaco decision applies to the Proposed Rule as a whole. Designating entire landscapes as ACECs is unmanageable and contrary to the Multiple Use Framework.

[114] *See* 88 Fed. Reg. at 19,593 ("The proposed rule eliminates the existing requirement . . . that the BLM publish a Federal Register notice relating to proposed ACECs and allow for 60 days of comment . . . .").

lands."[115] BLM contends in the preamble that the public would still have opportunity to comment on proposed ACECs through the land use planning process, and considers those public comment opportunities to satisfy the law.[116] However, BLM's position does not account for the full spectrum of ACEC development in the regulatory process. While it is true that most ACECs are designated as part of the resource management planning process (which is where an opportunity for public comments would still be provided), the CLH Proposed Rule would allow for designation and interim management of ACECs *outside* the planning process.[117] This means that there is still a possibility that BLM could designate ACECs without any opportunity for public review and comment, which is impermissible under FLPMA. At a minimum, a public comment process must be provided for any interim application and all proposed ACEC designations.

In addition, BLM should consider amendments to its regulations to address management of ACECs once they are designated. By definition, ACECs require special management attention, and the regulations should set forth some parameters for implementing measures to provide such attention.

4. Changes to the RMP Process

The CLH Proposed Rule makes significant changes to the RMP process that are questionable and unjustified. RMPs are largely governed by 43 U.S.C. § 1712, which sets forth specific criteria for developing and revising RMPs.[118] While conservation and environmental protection are certainly factors the Bureau must consider under the Multiple Use Framework, there are many others, as discussed repeatedly in this comment letter.[119]

Once again, the Proposed Rule puts a thumb on the scale even when developing and revising RMPs. For example, BLM proposes to establish a requirement that, "[d]uring the resource management planning process, some tracts of public lands should be put into a conservation use."[120] In addition, officers now "must" identify "intact landscapes . . . that will be protected from activities that would permanently or significantly disrupt, impair, or degrade the structure or functionality of intact landscapes."[121] However, as discussed above, BLM does not have the authority under FLPMA to simply set aside entire "landscapes" solely for conservation use but

[115] 43 U.S.C. § 1712(f).

[116] *See* 88 Fed. Reg. at 19,593.

[117] *See* 43 C.F.R. § 1601.7-2(c)(3) (proposed) ("If [ACEC] nominations are received outside the planning process, interim management may be evaluated, considered, and implemented . . . .").

[118] 43 U.S.C. § 1712(c).

[119] *See, e.g.*, *id.* § 1712(c)(1), (2), (5), (7) (requiring DOI to "use and observe the principles of multiple use," "use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences," "consider present and potential uses of the public lands," and "weigh long-term benefits . . . against short-term benefits").

[120] 88 Fed. Reg. at 19,590, 19,599 (proposed 43 C.F.R. § 6102.2(b)).

[121] *Id.* at 19,590, 19,599 (proposed 43 C.F.R. § 6102.2(a)).

instead must manage public lands under its jurisdiction in a manner consistent with the Multiple Use Framework.[122]

The CLH Proposed Rule also fails to explain how the new procedures and requirements would impact existing RMPs or RMPs currently in progress. Given the sheer number of RMPs that could be affected by the Proposed Rule, the impact would potentially be substantial. According to BLM, as of April 2022, there are over 175 BLM land use plans already in place, with 200 additional land use plans currently "under review or development."[123] BLM makes clear that the Proposed Rule would apply "to all BLM-managed public lands and uses,"[124] which presumably include all land use plans governing public lands. In the proposal, BLM does not address whether (or how) BLM would apply these new conservation standards to existing land use plans, and whether those changes would occur via RMP revisions or other means. Congress has not authorized the kind of wholesale rewrite of all land use plans that would ultimately flow from the adoption of the CLH Rule. And because such an effort would so clearly depart from the Multiple Use Framework, such a rewrite is not something that Congress has sanctioned under FLPMA. Indeed, given Congress's constitutional authority over federal land use, such a fundamental restructuring of RMPs would need to be based on a clear statement of congressional authorization, which is wholly lacking.

G. The CLH Proposed Rule Lacks a Scientific Record to Support the Proposed Rule Along with an Explanation as to How the CLH Approach Aligns with Existing Law

In addition to the legal flaws discussed above, the Proposed Rule adopts a particular scientific approach to analyzing environmental impacts and valuing resources, but the proposal lacks meaningful discussion of the scientific basis of the approach and how it harmonizes with existing law. The Administrative Procedure Act prohibits arbitrary and capricious rulemaking,[125] and requires agencies to provide a reasoned explanation and to consider important aspects of a problem.[126] In its current form, the CLH Proposed Rule fails to articulate the "problem" it seeks to resolve nor does it provide any meaningful discussion of scientific record support for the chosen approach.

In the Proposed Rule, BLM represents that it "will use the best available science" in keeping with executive orders.[127] But nothing in the CLH Proposed Rule or its preamble indicates

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[122] 43 U.S.C. § 1701(a)(7) (requiring BLM lands to be managed "on the basis of multiple use and sustained yield unless otherwise specified by law").

[123] Land use plans include both resource management plans (RMPs) and management framework plans (MFPs). *See* BLM, *Land Use Plans Under Revision or Development as of April 2022* (last visited May 30, 2023), https://www.blm.gov/programs/planning-and-nepa/plans-in-development; *see also* https://www.blm.gov/sites/default/files/docs/2022-08/BLM_LUP_List_for_PublicPage2022.pdf (spreadsheet attachment provided).

[124] 88 Fed. Reg. at 19,583.

[125] 5 U.S.C. § 706(2)(A).

[126] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009).

[127] *See* 88 Fed. Reg. at 19,587 ("The Department will use the best available science to take concrete steps to adapt to and mitigate climate-change impacts on its resources."), 19594 ("E.O. 13563 emphasizes further that regulations must be based on the best available science . . . ."); *see also* 43 U.S.C. § 1701(a)(8) (requiring, under FLPMA, public lands

that the Bureau has grappled with identifying the "best available science" for assessing land use in this particular context where the Multiple Use Framework governs. No part of the Proposed Rule's general information sections,[128] nor the preamble, reference BLM's methodology in reaching its conclusions or the rationale for why the CLH approach is the most scientifically acceptable policy in light of legal and regulatory requirements. As noted above (*supra* Section II.B), the Proposed Rule merely references two pieces of scientific literature—the Carr Paper and the Doherty Paper. But the preamble is silent as to why the CLH approach, as described in the proposal, is necessary and superior, let alone in compliance with the *legal* contours of FLPMA.

In the context of a rulemaking purporting to adopt a broad scientific approach to land health management, the absence of *any* substantive scientific discussion on BLM's rationale casts further doubt on BLM's proposal.

H. The CLH Proposed Rule Adds New Uncertainty to Productive Use of BLM Lands and Could Jeopardize Investments in Vital Energy, Mining, and Infrastructure Projects

Vague rules and standards create substantial uncertainty, undermine investor confidence, and reduce the value and reliability of partnerships with federal agencies on shared efforts to responsibly operate on and around federal lands and resources. The CLH Proposed Rule purports to apply to *all* BLM lands and programs, and as such, it is imperative that BLM avoid ambiguous terms, conditions, and procedures in its proposal. Yet the CLH Proposed Rule is replete with vague statements and concepts that make it difficult for the regulated community and other stakeholders to understand what the rule would mean and how it would be applied.

Through statutes like FLPMA, longstanding agency regulations and policies, and judicial decisions, the concepts of "multiple use" and "sustained yield" have become well understood. Yet a variety of provisions in the CLH Proposed Rule would create uncertainty about the way this existing framework should be implemented, while also adding a host of other new policies and tools that will further exacerbate that uncertainty.

The proposal's vague and confusing provisions include: (1) the application of the land health standards and guidelines to multiple uses, (2) the principle that "BLM must conserve renewable natural resources" (which is an undefined term) "at a level that maintains or improves ecosystem resilience," (3) the requirement for BLM to "to identify intact landscapes on public lands that will be protected from activities that would permanently or significantly disrupt, impair, or degrade the structure or functionality of intact landscapes," (4) the requirement "to avoid authorizing uses of the public lands that permanently impair ecosystem resilience," (5) the requirement to "[i]ssue decisions that promote the ability of ecosystems to recover or the BLM's ability to restore function," and (6) the requirement to "periodically review authorized uses for consistency with the fundamentals of land health for all lands and program areas." Provisions

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to be "managed in a manner that will protect the quality of scientific . . . values"); Information Quality Act, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153 to -154 (2000) (directing the Office of Management and Budget to issue guidelines "for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies").

[128] *See, e.g.*, 88 Fed. Reg. at 19,597–58 ("Purpose," "Objectives," "Authority").

allowing the use of "conservation leases" on BLM lands also remain very unclear and constitute uncharted waters for BLM. The CLH Proposed Rule also creates new uncertainty as to how oil and gas resources (and other resources) in unleased areas would be reviewed and considered.[129] Likewise, many key terms and concepts are either undefined or ill-defined, such as "renewable resources," "permanent impairment," and "management actions."

Taken together, these proposed changes would, if adopted, cause significant uncertainty about how BLM's land management program should apply to future requests for land-use authorizations on BLM lands, such as for oil and gas, mining, transmission, renewable energy production, and transportation projects. The result of such tremendous uncertainty would be to create conflict among key stakeholders and uses; reduce the regulatory certainty that is essential to support investment in economically productive uses; and hinder the ability of BLM to achieve the congressional mandates set forth in FLPMA and the MLA. Accordingly, these proposals fail to provide the specificity necessary to form the basis of regulation.

I. The CLH Proposed Rule Would Harm States with BLM Landholdings

The CLH Proposed Rule is particularly concerning for the western states, which contain 99% of all lands managed by BLM. The Associations agree with the western states that have expressed concerns about the impact of the proposal on the value of public lands to their states and local communities, including impacts to revenue sharing, funds for local infrastructure and schools, and other valuable benefits. We also share their concerns about BLM's failure to meaningfully consult states with BLM lands before undertaking the proposed comprehensive rewrite of federal lands policy.

As already explained, the MLA provides that "lease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary."[130] The MLA further provides that, as a general matter, 50% of money received from sales, bonuses, royalties, and rentals is distributed to the states where the leased lands are located. As noted above, for FY 2022, federal leases generated over $7.6 billion in revenues (from bonus bids, royalties, rents, etc.). For FY 2022, the ONRR disbursed over $4.3 billion in funds collected from leasing activities on federal lands and waters to 33 states.[131]

According to revenue data published by ONRR,[132] during fiscal year 2022, more than $8.8 billion was distributed to federal and local governments and Native American tribes as a result of federal *onshore* production alone (the majority of which comes from oil and gas production on federal lands). During that same period, almost 440 million barrels of oil and almost 3.5 trillion cubic feet of natural gas were produced from federal onshore lands. For New Mexico alone, disbursements from onshore energy production resulted in over $2.7 billion in disbursements to

[129] A host of questions would need to be addressed. For example, under the CLH Proposed Rule, how would potential development of resources be considered in areas with challenging terrain where viable surface locations for development activities may be limited?

[130] 30 U.S.C. § 226.

[131] DOI, *FY 2022 Announcement*, *supra* note 15.

[132] DOI, *Natural Resources Revenue Data* (May 26, 2023), https://revenuedata.doi.gov/.

state and local governments in FY 2022. In the same period, Wyoming received over $785 million in disbursements for onshore production. Additional funds are distributed to states via the Reclamation Fund, which supports critical infrastructure in local communities; the Land and Water Conservation Fund, which supports state and local efforts to conserve areas; and the Historic Preservation Fund, which supports efforts to preserve historical and cultural resources through state and local grants.

As previously noted, CRS has explained that "[f]ederal revenues from oil and natural gas leases provide income streams that support a range of federal and state policies and programs."[133] States and local governments use these funds to support a variety of needs, including funding for schools, social services, and infrastructure. Because of the direct connection between energy production and state and local revenues, the CLH Proposed Rule risks cuts to these revenues and, hence, direct harm to these states and communities.

Another consideration is that due to the checkerboard nature of federal tracts in some states, state and private mineral interests adjacent to BLM lands could be impacted by the Proposed Rule. This could result in delays or complete exclusion of such non-federal minerals in addition to the previously mentioned loss in federal bonuses and royalties.

We urge BLM to engage directly with the states where BLM lands are situated to ensure that new BLM policies and rulemakings do not result in unjustified impacts on these areas.

III. Specific Aspects of the CLH Proposed Rule Need to be Modified If BLM Moves Forward

If BLM chooses to move forward with the Proposed Rule despite the fact that it lacks a statutory basis, the Proposed Rule raises a host of issues that must be considered. Many specific aspects of the CLH Proposed Rule are vague, inconsistent with existing authorities, unworkable in practice, and/or leave questions unanswered. BLM needs to address these issues before determining how to proceed with its rulemaking. These provisions are discussed below.

A. Proposed Definitions (Section 6101.4)

There are a number of proposed definitions that are troubling in their vagueness. For example, "Important, Scarce, or Sensitive resources" are broadly defined and the definitions are open-ended. "Resources that are not plentiful or abundant" could describe a wide variety of resources depending on how "plentiful" and "abundant" are interpreted and over what area these metrics are applied. A particular resource could be considered "plentiful" in one area but not "plentiful" in another. Resources that "are vulnerable to adverse change" could describe almost

[133] TRACY, *supra* note 13. According to the Western Governors Association, "The federal government has codified several historic agreements and programs to compensate western states for reduced revenue associated with the presence of tax-exempt federal lands within their borders. Western Governors call upon the federal government to honor its statutory obligations to share royalty and lease payments with states and counties. States, as recipients of revenues from these programs and agreements, should be provided meaningful and substantial opportunities for consultation in the development of federal policy affecting those revenues." W. Governor's Ass'n, *WGA Policy Resolution 2023-02* (Dec. 7, 2022), https://westgov.org/resolutions/article/wga-policy-resolution-2023-02-states-share-of-royalties-and-leasing-revenues-from-federal-lands-and-minerals.

any resource, particularly because the resource would not be vulnerable to such change if the change was not "adverse."[134] Collectively, "important, scarce or sensitive" could applied very broadly.

The definition of "landscape"—"a network of contiguous or adjacent ecosystems"—is exquisitely vague. This is troubling given that the concept of a "landscape" is at the heart of the Proposed Rule. The proposed definition states that a landscape is not defined by the size of the area, but by an undefined "set of common management concerns or conditions." This leads to substantial uncertainty regarding the geographic scale at which BLM will apply the principles and directives set forth in the Proposed Rule, as well as what concerns or conditions warrant a landscape classification and the legal authority BLM will rely upon for such a designation. For example, over what area does a landscape need to be "intact" to warrant maintenance of that "intactness" through conservation actions? The Proposed Rule provides none of this essential detail.

The definition of "intact landscape" is likewise concerning. The term is so broadly defined that it excludes any area where anthropogenic activities "permanently or *significantly*" "disrupt, impair, or degrade" the landscape. In other words, where intact landscapes are prioritized, no development that impairs the landscape could be authorized, and no project with *significant* environmental impacts (anything requiring an EIS) could be allowed without potentially compromising the status of the "intact landscape." This very expansive definition, in conjunction with BLM's mandatory language requiring management to protect intact landscapes, could serve as a significant barrier to any form of authorization on public lands in contravention of BLM's multiple-use mandate under FLPMA.

At the same time, a number of other terms that play significant roles in the Proposed Rule are not defined at all. These terms include "renewable resources," "permanent impairment," and "management actions." Defining such terms in a manner consistent with the scope of BLM's authority would help address some of the vagueness that characterizes the Proposed Rule.

B. Ecosystem Resilience Provisions (Sections 6101.5, 6102.5)

The proposed provisions regarding management actions for ecosystem resilience are among those that have the potential to elevate conservation above all other land uses in contravention of FLPMA and other statutory directives. Section 6101.5 would "establish the principle that the BLM must conserve renewable natural resources at a level that maintains or improves ecosystem resilience in order to achieve [its] mission."[135] The section would direct authorized officers to recognize conservation as a land use within the multiple use framework and protect and maintain the fundamentals of land health.[136] Section 6102.5 would "set forth a framework for the BLM to make wise management decisions" regarding public lands that would incorporate these principles but provides inadequate detail as to how these decisions are to be

[134] This definition leads to a preordained conclusion. All resources will have characteristics that are potentially "vulnerable" to a particular type of change—changes that are "adverse" would be expected to create some level of vulnerability, or else the change would not be considered "adverse."

[135] 63 Fed. Reg. at 19,590.

[136] *Id*.

made.[137] The section would require authorized officers to "identify priority watersheds that require protection and restoration efforts."[138] In undertaking these actions authorized officers would be required to consider use of a precautionary approach whenever impacts on ecosystem resilience are unknown or cannot be quantified.[139]

These provisions establish the equivalent of a "no degradation" standard that would have the potential to preclude any future development of public lands on the grounds that such development may be inconsistent with the maintenance of the fundamental of land health and would compromise ecosystem resilience. Since the application of these principles is not limited to priority watersheds, landscapes or ecosystems identified through a public review process, these provisions could be read as foreclosing development on all public lands not previously developed. Such an outcome would be flatly inconsistent with FLPMA's Multiple Use Framework. While these provisions would hold out some prospect of future uses, any authorization of development that alters the natural state of lands could be viewed as compromising resiliency—even if only temporarily. In other words, the time would never be "right" for authorization of development.

These provisions also raise a number of specific questions:

- Section 6101.5(a) includes commitment to "preserve and protect ***certain*** public lands in their natural condition." Which public lands are to be preserved and protected? When is that decision made?

- Section 6102.5(b) states: "In taking management action, and as consistent with applicable law, authorized officers must . . . consistent with the management of the area, avoid authorizing uses of the public lands that permanently impair ecosystem resilience." BLM acknowledges that permanent impairment of ecosystem resilience "would be difficult or impossible to avoid, for example, on lands on which the BLM has authorized intensive uses, including infrastructure and energy projects or mining . . . ."[140] Thus, while energy development can be compatible with environmental protection, the Proposed Rule appears to discourage any approval of energy or infrastructure projects. How does BLM propose to harmonize this requirement with its Multiple Use Framework?

- Section 6102.5 further requires authorized officials to "[i]ssue decisions that promote the ability of ecosystems to recover or the BLM's ability to restore function." As noted above, BLM has indicated that this affirmative obligation to promote ecosystem resilience as part of every decision would be difficult if not impossible to meet for infrastructure and energy projects or mining. Again, how can BLM implement this broad directive under its Multiple Use Framework, keeping in mind the extensive efforts the Associations' members take to protect the environment?

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[137] *Id*. at 19,592.

[138] 43 C.F.R. § 6102.5 (proposed).

[139] *Id*. § 6102.5(a)(8) (proposed).

[140] 88 Fed. Reg. at 19,592.

C. Land Use Planning (Section 6103.1)

The proposed provision concerning fundamentals of land health states that "Standards and guidelines developed or revised by the BLM in a land use plan must be consistent with . . . fundamentals of land health." This standard would not be workable. The U.S. Forest Service Planning Rule recognizes that Forest Plans must include plan components to maintain or restore various resources and provide for multiple use.[141] That approach provides flexibility to consider the plan as a whole to see if it is supporting healthy ecosystems. The Associations urge BLM to take a similar approach.

D. Provisions Regarding Intact Landscapes (Sections 6102.1, 6102.2)

The proposed provisions concerning "intact landscapes" are vague and give rise to a number of questions regarding how these provisions would be implemented. The threshold issue is the vagueness of the proposed definition of "intact landscapes," which as noted above is very broad. Does a mandate to protect "intactness" require BLM to conserve intact landscapes? In other words, does it prevent any permanent or significant modification to or impairment of a landscape, which the preamble acknowledges cannot be accomplished when any infrastructure or development is authorized?

The sweeping nature of these proposed provisions is underscored by the proposed requirement that BLM "maintain[] intact ecosystems through conservation actions." The Proposed Rule appears to provide some leeway for future development, stating that BLM must "manage certain landscapes to protect their intactness" and manage lands "strategically for compatible uses while conserving intact landscapes, especially where development or fragmentation is likely to occur that will permanently impair ecosystem resilience on public lands." However, the Proposed Rule does not specify which landscapes are to be protected. Moreover, authorized officers are directed to prioritize actions that conserve and protect intact landscapes. This directive puts conservation uses ahead of all other uses. Consistent with this directive, Section 6102.2 requires authorized officers to identify "intact landscapes on public lands that will be protected from activities that would permanently or significantly disrupt, impair, or degrade the structure of functionality of intact landscapes." Given BLM's statements in the preamble regarding the great difficulty infrastructure and energy projects would have in avoiding impairment of ecosystem resiliency, the Associations are concerned that areas identified as intact landscapes warranting protection—potentially covering broads swaths of land—may become "no development zones" despite environmental protection measures undertaken by the members of the Associations in developing energy projects.

E. Provisions regarding Restoration (Section 6102.3)

The provision concerning restoration is extremely vague. For example, it is not clear how BLM should "emphasize restoration across the public lands."[142] Is this required emphasis on restoration independent of land-use authorizations? Who is expected to implement the "restoration actions required" under Section 6102.3(b) and the "active management" required under Section

[141] *See* 36 C.F.R. § 219.8.

[142] 43 C.F.R. § 6102.3(a) (proposed).

6102.3(c)? Is this a BLM obligation? Are the restoration goals and objectives that BLM must develop under Section 6102.3(b) to be applied in site-specific areas, across a planning area, in a project-specific context, or across all BLM lands?

In addition to being vague, BLM's proposed approach to restoration may in some cases be counterproductive. The Proposed Rule states that "BLM would use conservation leases issued under § 6102.4 for the purpose of restoring, managing, and monitoring priority landscapes."[143] However, BLM needs to consider that these areas might make sense as locations for further development. By emphasizing restoration, BLM may place conservation easements on degraded areas and prevent further use of those areas, which will push development projects to lands that are already in better condition.

F. Conservation Leases (Section 6102.4)

The Associations' concerns regarding BLM's proposed conservation lease program extend to the implementation of the program. Even if FLPMA allowed for conservation leasing, the leasing must be limited to areas designated for such purposes and the process must be clearly defined. Issues regarding BLM's proposed approach to conservation leasing include the following:

- "BLM seeks comment on whether the rule should constrain which lands are available for conservation leasing. For example, should conservation leases be issued only in areas identified as eligible for conservation leasing in an RMP or areas the BLM has identified (either in the RMP or otherwise) as priority areas for ecosystem restoration or wildlife habitat?"[144] The Associations believe the answer to this question must be yes. Just as lands are made available for other types of leasing in the RMP process, conservation leases should only be available in areas that have been designated for conservation leasing through a public process such as the RMP process. At the same time, areas within a buffer zone for an existing oil, gas, or mineral lease should not be considered eligible for a conservation lease.

- The Proposed Rule includes no limit on who can request a conservation lease. Proposed Section 6102.4(a)(2) would allow leasing to "any qualified individual, business, non-governmental organization, or Tribal government." However, the Proposed Rule does not define who is "qualified." The only listed attribute that is arguably a qualification is that the applicant must have "the technical and financial capability to operate, maintain, and terminate the authorized conservation use."[145]

- BLM needs to better define the purpose of a conservation lease. Such leases should not be a means to simply block development. Conservation leases should instead be utilized for protection of specific resources, such as important wildlife habitat (particularly habitat for species of concern), watersheds for public water supplies, cultural resources,

[143] 63 Fed. Reg. at 19,590.

[144] *Id*. at 19,591.

[145] 43 C.F.R. § 6102.4(c)(1)(v)(C) (proposed).

mitigation banking areas, or areas used for generation of carbon offset credits (e.g., direct air capture projects).

- The Proposed Rule does not address the implications of the pendency of an application for a conservation lease. The Associations are concerned that groups opposed to oil and gas development or other types of uses will file applications for conservation leases across the landscape in strategic locations in an attempt to block other uses, even if BLM ultimately decides not to issue the leases. BLM should clarify that the filing of an application itself cannot tie up the land for other authorizations.

- Of greater concern is how a conservation lease related to surface use would affect the mineral estate where the mineral estate is subject to separate (non-federal) ownership or an existing lease. A conservation lease cannot preclude all access to the mineral estate.[146] As a result, BLM should specifically state in any final rule that conservation leases must include reasonable accommodation for access to the mineral estate where it is non-federally-owned.

- The Proposed Rule does not address whether conservation leases would be subject to NEPA review in the same manner as other types of leases. Given that execution of a conservation lease would constitute a federal action, the Associations see no basis for excluding conservation leases from the requirements of NEPA.

- The Proposed Rule does not make any provision for public input with respect to a proposed conservation lease. There is no comment period, public participation period on the lease, or a protest period. Again, the Associations do not believe there is a basis for treating conservation leases differently than other kinds of leases in terms of public involvement.

- BLM claims that conservation leases could benefit industry by providing a streamlined compensatory mitigation option. But BLM does not limit conservation leases to only conservation banks or project proponents in need of compensatory mitigation. Anyone can apply. As a result, groups opposed to development activities on public lands may seek to obtain multiple conservation leases that preclude the use of BLM lands for other uses, including use for mitigation.

- Section 6102.4(c) should be amended to provide that an application for a conservation lease should include an assessment of the potential impacts on the local economy of leasing the area for conservation use.

- Any final rule should clarify that conservation leases cannot result in interference with existing leases, such as oil and gas leases and grazing leases. Soil, water, and habitat conservation measures should be allowed under a conservation lease as long as those efforts do not unreasonably interfere with existing uses or impose burdens on other lessees.

[146] Any such preclusion would give rise to significant Fifth Amendment Takings concerns.

- Likewise, it should not be the case that a conservation lease would preclude all other future uses of the leasehold. For example, installation of pipelines followed by restoration of the surface may result in minimal long-term surface impacts and could be consistent with the intent of a conservation lease. The Proposed Rule should specify that a conservation lease may be subject to rights-of-way or easements for other uses that may be undertaken in a manner consistent with the conservation objectives of the lease.

- The Proposed Rule does not address bonding requirements for conservation leases. Similar to other types of federal leases on BLM lands, BLM should require a conservation lessee to post a bond to cover any financial requirements associated with the lease.

IV. Compliance with Federal Rulemaking Requirements

To support various required determinations related to its proposed rulemaking (e.g., compliance with Executive Order 13563 and the Regulatory Flexibility Act), BLM has prepared an "Economic and Threshold Analysis." The Analysis indicates that the Proposed Rule will result in benefits rather than impacts for all concerned:

> Overall, the proposed rule is expected to improve ecosystem resilience which will benefit all individuals whose livelihoods, health, and welfare depend on ecosystem services provided by public lands. The magnitude of these benefits will depend on future planning and implementation decisions that are subject to existing land use planning and NEPA regulations.[147]

The Analysis glosses over and minimizes any potential adverse impacts on users of federal lands and local communities, stating that the Proposed Rule's requirements "do not appreciably restrict the decision-space" concerning land uses and that the Proposed Rule "does not prohibit any specific land use in any location."[148] The Analysis optimistically assumes without substantiation that "[p]resumably, future decisions will achieve positive net benefits."[149]

The Associations believe that the Analysis is inadequate and cannot be used to support BLM's determination that the Proposed Rule will not have a significant impact on the economy. BLM fails to acknowledge the import of the changes in federal land use the Proposed Rule's provisions would authorize and the potential for substantial economic impacts on the Associations' members and other users or potential users of federal lands as well as local communities that would result from the imperative to prioritize conservation and protection of "intact landscapes" and "resilient ecosystems" above all other uses. The Associations strongly urge BLM to reconsider the Analysis and revise it in a way that takes account of the adverse impacts of the Proposed Rule's mandates.

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[147] Analysis, *supra* page 33, at 3.

[148] *Id*. at 4.

[149] *Id*.

The Associations also believe that BLM should prepare an Environmental Impact Statement (or at a minimum an Environmental Assessment) regarding the Proposed Rule and its potential impacts on the quality of the human environment. The adoption of regulations is an agency action that is potentially subject to NEPA requirements.[150] As discussed above, the Proposed Rule would have a wide variety of impacts and those impacts should be the subject of a NEPA analysis.[151]

Finally, in light of the potential impacts of the Proposed Rule on users of public lands and local communities, the Associations also question BLM's conclusion that a regulatory flexibility analysis is not required. We agree with the Small Business Administration that the Proposed Rule lacks a proper factual basis for the conclusion that the Proposed Rule would not have a significant economic impact on a substantial number of small entities. Accordingly, BLM should prepare a regulatory flexibility analysis.

V. Conclusion

In conclusion, the Associations respectfully request that BLM not move forward with the CLH rulemaking process and refocus the Bureau's efforts on ensuring productive use of public lands consistent with the existing Multiple Use Framework required by statute. Public lands play a vital role in promoting the health and economic well-being of the American people. Congress has fashioned a careful legal and policy balance among multiple uses—economic and conservation—to ensure proper use of federal lands. Where Congress has intended for particular lands to carry special conservation protection, statutes clearly spell out those protections. The CLH Proposed Rule would override that careful balance and usurp Congress's constitutional prerogative to decide how federal lands should be managed.

To the extent BLM proceeds with the CLH rulemaking, the comment period should be extended as requested by various Governors, Members of Congress, and many others, and the Proposed Rule should be substantially modified and re-noticed for additional rounds of public comment. In its current form, the Proposed Rule cannot move forward as the basis for a new federal regulation that sets an unlawful landscape health overlay across all BLM lands and programs in direct contravention of the Constitution and statutes enacted by Congress.

[150] 40 C.F.R. § 1508.1 (definition of "major federal action").

[151] The Associations disagree with BLM's proposed use of a categorical exclusion to address these impacts. The impacts of the rule as proposed are not too broad or speculative to allow an analysis that could meaningfully inform the Bureau's decision regarding the form of any final rule.