AMERICAN STEWARDS of Liberty

July 5, 2023

Ms. Tracy Stone-Manning
Director
Bureau of Land Management
1849 C Street NW, Rm. 5665
Washington DC 20240

Dear Director Stone-Manning,

Attached are comments on the Bureau of Land Management's Conservation and Landscape Health proposed rules (88 Fed. Reg. 19,583 - April 3, 2023). These comments are being submitted by the following entities:

Chairman John Martin, Garfield County Colorado Board of Commissioners
Chairman Jeff Bilberry, Chaves County New Mexico Board of Commissioners
Chairman Wade Heaton, Kane County Utah Board of Commissioners
Chairman Dean Jackson, Lea County New Mexico Board of Commissioners
Chairman Colby L. Corker, Jackson County Colorado Board of Commissioners
Chairman Vicki Marquardt, Otero County New Mexico Board of Commissioners
Chairman Leland Pollock, Garfield County Utah Board of Commissioners
Chairman Bruce Adams, San Juan County Utah Board of Commissioners
Chairman Kathy Rhodes, Modoc County California Board of Commissioners
Chairman Tony Bohrer, Moffat County Colorado Board of Commissioners
Margaret Byfield, Executive Director, American Stewards of Liberty
Craig Rucker, President and Founder, Center for a Constructive Tomorrow
Myron Ebell, Director Center for Energy & Environment, Competitive Enterprise Institute

We appreciate the opportunity to provide the BLM with these comments that highlight how the proposed rule, as currently drafted, will irreparably harm the local economies and the health, safety and welfare of the people who live in communities with BLM managed lands.

Warm regards,

Margaret W. Byfield

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Executive Director

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COMMENTS ON THE BUREAU OF LAND MANAGEMENT'S PROPOSED CONSERVATION AND LANDSCAPE HEALTH RULE

88 Fed. Reg. 19,583 (April 3, 2023)

July 05, 2023

The following comments on the Bureau of Land Management's ("BLM's") proposed rule entitled Conservation and Landscape Health, 88 Fed. Reg. 19583 (April 3, 2023) (the "Proposed Rule") are provided by Chaves County, NM; Garfield County, CO; Garfield County UT; Jackson County, CO; Kane County, UT; Lea County, NM; Modoc County, CA; Moffat County, CO; Otero County, NM; and San Juan County, UT, as well the American Stewards of Liberty, the Competitive Enterprise Institute, and the Center for a Constructive Tomorrow (collectively, the "Counties"). For the reasons set forth below, the Counties oppose the Proposed Rule, which will radically alter how the public lands are managed by unlawfully prioritizing ecosystem resilience and treating conservation as a land use. The BLM has no legal authority to impose these changes.

A. Overview.

The BLM manages some 240 million acres of public lands – more than any federal agency. These lands are heavily concentrated (over 99%) in the 11 contiguous western states and Alaska. The residents and businesses within that region, which include the Counties submitting these comments, depend on their ability to use public lands for agriculture, domestic livestock grazing, oil and gas development and production, mining and mineral production, timber production, and outdoor recreation. Consequently, the manner in which the BLM manages public lands is critically important to the western states and to the people who reside and work there. The Proposed Rule will make dramatic changes to planning and management of the public lands, causing significant economic, social and environmental impacts and dislocation, and undermining the multiple use-sustained yield management framework established by the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 *et seq.*

According to BLM's summary, the purpose of the Proposed Rule is to "manage the public lands for multiple use and sustained yield *by prioritizing the health and resilience of ecosystems across those lands*." Proposed Rule at 19583 (emphasis added). To support this new management focus, the Proposed Rule would

- Create a new public land use called "conservation use to achieve ecosystem resilience" and allow public lands to be leased for such "use," which are not authorized under FLPMA.

- Require the BLM to manage the public lands to maintain "ecosystem resilience" protect "intact landscapes" – requirements that conflict with FLPMA's multiple use mandate.

- Authorize agency decision-makers to impose mitigation requirements on public land users without any legal authority to do so and without clear standards to govern this new obligation.

- Apply the Fundamentals of Rangeland Health, developed in 1995 for the administration of livestock grazing, to all public lands and public land uses.

- Modify the definition of "areas of critical environmental concern" by relaxing long-standing requirements in the BLM's planning rules, without providing a reasoned explanation for such change.

- Allow large tracts of land to be set aside in order to promote ecosystem resilience in violation of FLPMA's limitations on public land withdrawals.

The Proposed Rule also would adopt and impose a number of vague and confusing definitions that are not found in FLPMA or in FLPMA's implementing regulations, such as "conservation," "important, scarce, or sensitive resources," "intact landscape," "land enhancement," and "resilient ecosystem." It would also improperly modify the statutory definition of "sustained yield" in FLPMA to incorporate an entirely new concept, "ecosystem resilience."

These land management changes would override existing rules that have governed public land planning, management, and use for decades, and would transform the multiple use-sustained yield principles in FLPMA into a program "prioritizing" "ecosystem resilience" and "healthy landscapes." *See*, *e.g.*, Proposed Rule at 19583. As discussed below, the BLM has no legal authority to change FLPMA from a multiple use statute into a land preservation statute, and, tellingly, the BLM has not cited any credible authority for this rulemaking in the Proposed Rule. *See* Proposed Rule, 88 Fed Reg. at 19587 (explaining the "statutory authority" for the Proposed Rule).

Indeed, the reasoning given in the BLM's rulemaking preamble for the regulatory seachange it is proposing amounts to mere *ipse dixit*. Maintaining "resilient ecosystems" is not "foundational" to multiple use of the public lands, nor is managing the public lands for "intact landscapes" or "habitat connectivity." FLPMA – the agency's authority for the Proposed Rule – does not contain these concepts nor does the statute authorize conservation leases to be issued under the guise that conservation is a land use. The Tenth Circuit Court of Appeals has held that the BLM lacked authority under FLPMA to issue 10-year permits for "conservation use" of public land within grazing districts, rejecting the BLM's argument that these permits would help achieve the goal of multiple use. *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1307-08 (10th Cir. 1999). The same logic applies here, where the BLM is proposing to issue long-term conservation leases that will exclude other land uses to achieve ecosystem resilience.

The fact that FLPMA was enacted 47 years ago, and the BLM is only now claiming that these fuzzy concepts are part of FLPMA's multiple use-sustained yield mandate shows that the BLM is overreaching. *See*, *e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2608-10 (2022) (discussing cases holding that agencies acted unlawfully in imposing significant regulatory requirements without authority delegated by Congress).

The BLM has violated several other requirements in this proposal. First, the BLM has violated FLPMA by failing to coordinate with States and local governments in developing the Proposed Rule. Because of the importance of the public lands to western states and, in particular, rural areas and their economies, FLPMA § 202(c)(9) requires coordination between the Secretary

and State and local governments in connection with the development and revision of rules and regulations affecting the management of the public lands. This important requirement has been ignored, requiring invalidation of the rule.

Next, the BLM is violating the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332. According to the Proposed Rule, the BLM "intends" to rely on the categorical exclusion ("CE") in 43 C.F.R. § 46.210(i) to avoid NEPA compliance, but has not documented the rationale supporting the applicability of such CE. Proposed Rule at 19596. As explained below, the Interior Department's regulations set forth several extraordinary circumstances that preclude the use of a CE in this case. In short, given the extremely broad, programmatic nature of the Proposed Rule, which will apply to BLM planning activities and land use decisions affecting public lands throughout the West and Alaska, and the significant amount of controversy surrounding the changes mandated by the Proposed Rule, the BLM cannot avoid compliance with NEPA under a CE.

And for similar reasons, the BLM's assertion in its Economic and Threshold Analysis that the Proposed Rule will not have any economic impact on individuals and small business entities in rural portions of the West is nonsense. The Proposed Rule will significantly alter the manner in which the public lands are managed by, among other things, altering FLPMA's multiple use mandate to prioritize ecosystem resilience and landscape health, declaring that "conservation" is a public land use on par with the principal or major uses recognized in FLPMA, and by imposing the rangeland heath standards adopted for livestock grazing in 1995 on other public land uses. The public's ability to use *over 200 million acres of land* will be affected. The economic impacts of this new management regime on small entities and rural communities must be evaluated.

B. The Proposed Rule Lacks Legal Authority.

The Proposed Rule will implement a number of dramatic changes to the management and use of the public lands. As noted, these include treating "conservation" as a use that is on par with other uses under FLPMA and authorizing "conservation leases" of public lands; establishing "ecosystem resilience" and "intact landscapes" as overriding management objectives for the public lands; imposing mitigation requirements when public land uses are authorized; and relaxing the statutory definition of ACEC. The Proposed Rule states that its purpose is to "promote the use of conservation to ensure ecosystem resilience." Proposed Rule at 195597 (proposed rule § 6101.1). It also states that its objectives are to:

> (a) Achieve and maintain ecosystem resilience when administering [BLM] programs; developing, amending, and revising land use plans; and approving uses on the public lands;
>
> (b) Promote conservation by protecting and restoring ecosystem resilience and intact landscapes;
>
> (c) Integrate the [Fundamental of Rangeland Health and Standards and Guidelines for Grazing Administration] into resource management; . . . [and]
>
> (f) Ensure that ecosystems and their components can absorb, or recover from, the effects of disturbances or environmental change through conservation,

> protection, restoration, or improvement of essential structures, functions, and redundancy of ecological patterns across the landscape.

Id. at 19597-98 (proposed rule § 6101.2).

The Proposed Rule will apply to virtually all BLM land management programs, land use planning, and decision-making activities, imposing an overarching set of requirements that do not appear in FLPMA or any other federal law. They will apply to the development, amendment, and revision of BLM land use plans, as well decisions authorizing various land uses under FLPMA and it implementing regulations, including the principal or major uses of the public lands. *See* 43 U.S.C. § 1702(l). The renewal of a grazing permit, the issuance of an oil or gas lease, the approval of a mining plan of operations for a new mine, the issuance of a right-of-way for a transmission or solar facility, and the contracts for the sale of merchantable timber will be subject to the new requirements imposed by the Proposed Rule. And these regulatory changes will impact over 200 million acres of land concentrated in the 11 contiguous western states and Alaska, in areas that depend on access to the public lands for activities essential to their local economies and the social fabric of rural communities located there.

In an extraordinary case like this, where a federal agency asserts extremely broad and unprecedented authority that will have far reaching economic and social impacts, the Supreme Court has required agencies to demonstrate a very clear delegation of authority for the adoption of dramatic changes to an established regulatory program. Last year, for example, in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Court explained:

> Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices. Nor does Congress typically use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme. 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. We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies.
>
> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.

Id. at 2609 (cleaned up; citations omitted).

West Virginia addressed a legal challenge to EPA's regulations addressing carbon dioxide emissions from power plants under the Clean Air Act. Relying on a seldom-used statutory provision, the agency imposed new regulatory requirements that would require the closure of most coal-fired power generation plants and the substitution of power generated by wind and solar facilities. *Id.* at 2602-04, 2610. In holding that the agency lacked authority to adopt the

regulations, the Court noted that EPA "claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority." *Id.* at 2610 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)) (cleaned up).

In *West Virginia*, the Supreme Court cited and discussed numerous cases that involved regulatory overreaching by federal agencies, which were set aside because there was not a clear delegation of authority for the agency's assertion of authority. For example, in *Alabama Association of Realtors v. Dept. of Health and Human Services*, the Court imposed an injunction that prevented the Centers for Disease Control from imposing a moratorium on residential evictions to alleviate burdens caused by the COVID-19 pandemic. 141 S. Ct. 2485 (2021). The agency's purported authority for the moratorium was the Public Health Service Act passed in 1944. However, the Act had never been invoked to justify an action like the eviction moratorium. Instead, regulations adopted under this authority were limited to quarantining infected persons and prohibiting the import or sale of animals know to transmit disease. *See id.* at 2486-87. The Court held that the statute did not grant the agency authority to impose the eviction moratorium and even if the statute was ambiguous, a clear delegation of authority is needed to support the exercise of such significant power by the agency. *Id.* at 2488-89.

In *Utility Air Regulatory Group v. EPA*, the Supreme Court held that EPA lacked authority under the Clean Air Act to impose greenhouse-gas emission standards on stationary sources. 573 U.S. 302 (2014). The Court rejected EPA's argument that its interpretation of the Clean Air Act was justified as an exercise of the agency's "discretion to adopt a reasonable construction of the statute." 573 U.S. at 321 (quotation marks removed). The Court explained:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.

Id. at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 160 (2000)) (cleaned up).

In *Brown & Williamson*, the Food and Drug Administration asserted authority under the Food, Drug, and Cosmetic Act to regulate tobacco products based on its power to regulate "drugs" and "devices," and promulgated regulations that were intended to reduce tobacco use by minors. 529 U.S. at 125-127, 131. Although the Court acknowledged the serious problem associated with tobacco use by adolescents, the Court rejected the agency's interpretation, concluding that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160. The Court also stated that "no matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Id.* at 161 (citation omitted; quotation marks removed).

Here, the Proposed Rule will have far-reaching impacts and significantly modify the management and use of more than 200 million acres of federal land concentrated in the 11 contiguous western states and Alaska. On their face, the Proposed Rule radically alter the BLM's management focus from multiple use-sustained yield to maintaining "resilient ecosystems" and "intact landscapes" and treat conservation as a land use on par with livestock grazing, mining and mineral development, oil and gas development, timber production, and outdoor recreation. Therefore, there must be a very clear expression in FLPMA that Congress intended to authorize these extreme modifications. Because such authority does not exist, the adoption of the Proposed Rule would be unlawful, just like the agency actions in the cases discussed above,.

C. Specific Aspects of the Proposed Rule that Lack Authority.

1. "Conservation" is not a legitimate land use under FLPMA.[1]

The BLM has explained that "conservation is the *foundational concept* for the proposed regulations," and defines "conservation" as "maintaining resilient, functioning ecosystems by protecting or restoring natural habitats and ecological functions." Proposed Rule at 19588, 19598 (emphasis added). The Proposed Rule requires the BLM to treat "conservation" as a public land use that is "on par with" the land uses Congress specified in FLPMA. Proposed Rule at 19585. As explained below, there is no authority for this dramatic revision of FLPMA and its multiple use-sustained yield mandate.

As commonly understood, the noun "use" means "the act or practice of employing something," "the fact or state of being used" or "a method or manner of employing or applying something." Merriam-Webster's Collegiate Dictionary 1297 (10th ed. 1998) (meaning 1). It is also defined as "the legal enjoyment of property that consists in its employment, occupation, exercise of practice." *Id.* (meaning 3). The latter definition is the best fit in this case. Each of the principal or major uses identified in FLPMA are methods of employing the public lands and their resources for the user's benefit: domestic livestock grazing; fish and wildlife development and utilization; mineral exploration and production; rights-of-way; outdoor recreation; and timber production. *See* 43 U.S.C. § 1702(l). FLPMA's definition of "multiple use" mentions the same traditional land uses – recreation, range, timber, minerals, watershed, and wildlife and fish, and also mentions natural scenic, scientific and historical values. *Id.* § 1702(c).

By contrast, "conservation" is not a land use. Instead, conservation prevents or restricts land uses. In the Proposed Rule, "conservation" is defined as "maintaining resilient, functioning ecosystems by protecting or restoring natural habitats and ecological functions." Proposed Rule

[1] The BLM actually provides two sources of authority for the Proposed Rule: FLPMA and the Omnibus Public Land Management Act of 2009 ("OPLMA"). *See* Proposed Rule at 19587, 19598 (proposed rule § 6101.3 Authority). OPLMA, on its face, applies only to certain special category lands administered by the BLM that are specifically identified in the Act. *See* 16 U.S.C. § 7202(b). These lands are within the National Landscape Conservation System and have their own unique management requirements. *Id.* § 7202(c). Therefore, OPLMA does not provide authority for the Proposed Rule. To the extent it is relevant, OPLMA shows that Congress knew how to direct the BLM to manage public lands, when appropriate, "to conserve, protect, and restore nationally significant landscapes." *Id.* § 7202(a). In the Proposed Rule, the BLM is improperly attempting to treat all of the public lands as if they are governed by OPLMA rather than FLPMA by making "conservation" a dominant land use.

at 19598 (proposed rule § 6102.2). This is the opposite of developing and using the public lands and their resources. This is illustrated by proposed subpart 6102, entitled "Conservation Use to Achieve Ecosystem Resilience," in which the normal understanding of "use" is turned upside down. It requires the BLM to manage landscapes to protect their intactness, limiting land uses accordingly. Proposed Rule at 195599 (proposed rule § 6102.1). This subpart also directs the BLM to identify "intact landscapes" and which tracts of land "will be put to conservation use," including land for acquisition "to further protect and connect intact landscapes." *Id.* (proposed rule § 6102.2). Thus, conservation "use" involves identifying and preserving large, intact blocks of public land. This land "use" is actually non-use and thus contrary to FLPMA's multiple use mandate.

Finally, and most incredibly, the Proposed Rule will authorize "conservation leasing." This will involve leasing land for "the purpose of ensuring ecosystem resilience through protecting, managing, or restoring natural environments, cultural or historic resources, and ecological communities, including species and their habitats." *Id.* at 19600 (proposed rule § 6102.4). This is again the opposite of use – it is intended to *prevent* the public land uses authorized by FLPMA from taking place. This is made clear in proposed rule § 6102.4(a)(4), which provides that "once the BLM has issued a conservation lease, the BLM shall not authorize any other uses of the leased lands that are inconsistent with the authorized conservation use." *Id.*

Thus, the Proposed Rule will establish an entirely new management program which overrides FLPMA's multiple use mandate by creating a pseudo land use – conservation. But the term "conservation" is not used in FLPMA except in connection with areas designated as conservation system units (e.g., the California Desert Conservation Area). In fact, the Proposed Rule contain a number of vague terms that are used to describe conservation, including "landscapes," "ecosystems," "resilience" and "intactness." Again, none of these words are found in FLPMA, and none of these concepts, or the new management program generally, has any support in FLPMA.

The BLM, in discussing the basis for its authority for the Proposed Rule, acknowledges that FLPMA does not expressly contemplate "conservation use" or allow "conservation leases":

> FLPMA's declaration of policy and definitions of "multiple use" and "sustained yield" *reveal* that conservation is a use on par with other uses under FLPMA. The procedural, action-forcing mechanisms in this proposed rule *grow out of that understanding* of multiple use and sustained yield.

Proposed Rule at 19585 (emphasis added). Thus, some 47 years after FLPMA was enacted, the BLM has experienced a revelation about the true meaning of multiple use and the scope of FLPMA that agency officials had overlooked for more than four decades. This is clearly disingenuous.

In reality, FLPMA's declaration of policy and definitions of "multiple use" and "sustained yield" do not support the BLM's revelation. Section 102(a) of FLPMA contains 13 separate statements of policy that range from expressing Congress's view that the public lands should generally be retained in federal ownership, that their present and future use be projected through a land use planning process, and that the public lands be managed on the basis of multiple use and sustained yield unless otherwise specified by law. 43 U.S.C. § 1701(a)(1), (2) & (7). The policy

statements also mention various desirable but inconsistent goals, such as managing the public lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" and "in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 . . . ." *Id.* § 1701(a)(8), (12).

But these general policy statements (which do not mention conservation) do not grant the BLM any regulatory authority. Section 102(b) of FLPMA specifically provides that the "*policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation*." *Id.* § 1701(b) (emphasis added). Therefore, the policies must be implemented through a specific provision in FLPMA or another federal law, such as the Mining and Minerals Policy Act of 1970, codified at 30 U.S.C. § 21a. This is consistent with the rule of statutory construction that statements of policy or objectives that accompany a statute do not impose substantive requirements; instead, the operative provisions of the statute are controlling. *E.g.*, *Comm. to Stop Airport Expansion v. FAA*, 320 F.3d 285, 290 (2d Cir. 2003) ("General policy concerns do not overcome the unambiguous meaning of a statute's text."); *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002) ("This case, therefore, presents a conflict between a statute's plain meaning and its general policy objectives. In general, this conflict ought to be resolved in favor of the statute's plain meaning."); Antonin Scalia & Bryan A. Garner, *Reading Law* 219 (2012) ("[A]n expansive purpose in the preamble cannot add to the specific dispositions of the operative text.").

The definitions of "multiple use" and "sustained yield" likewise provide no authority. In *Public Lands Council v. Babbitt*, which involved legal challenges to the BLM's 1995 grazing administration regulations, the Tenth Circuit Court of Appeals aptly summarized these terms:

> FLPMA instructs the Secretary [of Interior] to "manage [through BLM] the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). "Multiple use" requires management of the public lands and their numerous natural resources so that they can be used for economic, recreational, and scientific purposes without the infliction of permanent damage. *Id.*§ 1702(c). "Sustained yield" is defined as "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." *Id.* § 1702(h).

167 F.3d 1287 (10th Cir. 1999), *aff'd* 529 U.S. 728 (2000). While the definition of "multiple use" is longer and more complex than the court's summary, it does not mention "conservation" (or, for that matter, "landscapes" or "ecosystems").

In *Public Lands*, the court set aside for lack of authority the BLM's rule authorizing "conservation use" as a permissible use of grazing district land. "Conservation use" was defined as "an activity, excluding livestock grazing, on all or a portion of an allotment for the purpose of protecting the land and its resources, improving rangeland conditions, or enhancing resource values." *Id.* at 1292 (cleaned up). As in this case, the BLM argued that "the issuance of conservation use permits helps achieve the goal of multiple use" and is consistent with FLPMA's multiple use-sustained yield mandate. *Id.* at 1307. The court rejected that argument, stating:

> In short, it is true that the [Taylor Grazing Act], FLPMA, and the [Public Rangelands Improvement Act], give the Secretary very broad authority to manage the public lands, including the authority to ensure that range resources are preserved. Permissible ends such as conservation, however, do not justify unauthorized means. We hold that the Secretary lacks the statutory authority to issue grazing permits intended exclusively for conservation use.

Id. at 1308. The Tenth Circuit's holding applies with equal force here, where the BLM relies on the definition of multiple use and its general authority to adopt rules "to carry out the purposes of [FLPMA]" as its newly discovered authority for issuing conservation leases. Proposed Rule at 19587 (quoting 43 U.S.C. § 1740).

Finally, the BLM's discovery that conservation is a land use under FLPMA 47 years after the law's enactment is telling. "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *West Virginia*, 142 S. Ct. at 2610; *see also Utility Air*, 134 S. Ct. at 2444 ("When an agency claims to discover in a long-extant statute an unheralded power to regulate . . . we typically greet its announcement with a measure of skepticism").

In short, the BLM is not authorized to unilaterally declare that conservation is a public land use and begin issuing conservation leases in order to maintain ecosystem resilience and intact landscapes at the expense of the principle of major land uses identified in FLPMA. There is no authority under FLPMA or any other federal law for the agency's new-found authority.

2. The BLM lacks authority to manage the public lands to achieve "ecosystem resilience" and to protect "intact landscapes."

The BLM also has declared that FLPMA's multiple use-sustained yield mandate involves managing the public lands for "resilient ecosystems" and "intact landscapes." The BLM asserts that the public lands are "increasingly degraded and fragmented" and to address threats to the public lands "it is imperative for the BLM to steward public lands to maintain functioning and productive ecosystems and work to ensure their resilience, that is, to ensure that ecosystems and their components can absorb, or recover from, the effects of disturbances and environmental change." Proposed Rule at 19585. Elsewhere – indeed throughout the preamble and in the proposed regulations themselves – the agency asserts that the BLM must manage the public lands to maintain "resilient ecosystems" and "intact, native landscapes." *E.g.*, *id.* at 19585-86.

In fact, the BLM would rewrite FLPMA by making ecosystem resilience the overriding objective "when administering Bureau programs; developing, amending, and revising land use plans; and approving uses on the public lands," and by requiring the "promot[ion] [of] conservation by protecting and restoring ecosystem resilience and intact landscapes." *Id.* at 19597 (proposed rule § 6101.2 Objectives). Furthermore, the Proposed Rule would mandate the protection and management of intact landscapes, and require the BLM to "emphasize restoration across the public lands." *Id.* at 19599 (proposed rules §§ 6102.1-6102.3).

These new regulatory requirements will result in dramatic changes in the way the public lands are managed and what land uses will be allowed. Like the BLM's unauthorized and unlawful elevation of conservation to the status of a principal or major land use under FLPMA's multiple-use framework, these new land management requirements have no statutory basis and would be unlawful. The word "ecosystem" appears once in FLPMA and only in reference to the California Desert Conservation Area. *See* 43 U.S.C. § 1781(2). The word "landscape" is entirely absent. There is no evidence that Congress, in enacting FLPMA, intended to make achieving ecosystem resilience and maintaining intact landscapes management objectives.

The BLM's rationale for this dramatic change in management focus is unclear. The agency apparently believes that it is authorized to prioritize the achievement of resilient ecosystems and intact landscapes because it cannot otherwise manage the public lands for multiple use and safe yield. *See*, *e.g.*, Proposed Rule at 19585, 19599 (proposed rule § 6101.5 Principles for ecosystem resilience). Again, this assertion is not supported by the definitions of multiple use and sustained yield in FLPMA. Indeed, it is telling that the BLM is proposing to administratively rewrite FLPMA's definition of "sustained yield" by adding to the statutory definition the following language:

> Preventing permanent impairment means that renewable resources are not depleted, and that desired future conditions are met for future generations. *Ecosystem resilience is essential to BLM's ability to manage for sustained yield*.

Id. at 19599 (proposed rule § 6101.4 Definitions) (emphasis added). The need to change the definition of a key statutory term to make it consistent with the agency's newly discovered management objective highlights the lack of statutory authority for the Proposed Rule.

The BLM has been managing the public lands for 47 years without prioritizing ecosystem management and intact landscapes. There are no credible studies or other evidence beyond the BLM's bare assertion that the extreme and unprecedented changes it is proposing are necessary to comply with FLPMA's multiple use-sustained yield mandate. The agency's unsupported pronouncement is nothing more than *ipse dixit* and, for the reasons explained above, cannot support the changes the agency now proposes.

In short, nothing in FLPMA, including the statute's definitions of multiple use and sustained yield, provides authority for radically altering the management of the public lands and deemphasizing FLPMA's principal land uses. As the Tenth Circuit stated in holding that the BLM lacked authority to issue grazing permits for conservation use, "Permissible ends such as conservation . . . do not justify unauthorized means." *Public Lands*, 167 F.3d at 1308; *see also Sackett v. EPA*, 143 S. Ct. 1322, 1343 (2023) ("The EPA also advances various policy arguments about the ecological consequences of a narrower definition of adjacent. But the [Clean Water Act] does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority.").

3. The BLM lacks legal authority to impose mitigation requirements on public land users, and the proposed rule is vague and will invite arbitrary enforcement.

In addition to radically altering the manner in which the public lands are managed, the Proposed Rule would impose mitigation requirements on public land users. Proposed Rule at 19603 (proposed rule 6102.5-1 Mitigation). The initial sections of this rule vaguely state:

> (a) The BLM will generally apply the mitigation hierarchy to avoid, minimize and compensate for, as appropriate, adverse impacts to resources when authorizing uses of public lands. As appropriate in a planning process, the authorized officer may identify specific mitigation approaches for identified uses or impacts to resources.
>
> (b) Authorized officers shall, to the maximum extent possible, require mitigation to address adverse impacts to important, scarce, or sensitive resources.

Proposed Rule at 19603 (proposed rule § 6102.5-1). The rationale for imposing this requirement is "to ensure the BLM does not limit its ability to build [*sic*] resilient public lands when authorizing use" and "to ensure that the public enjoys the benefits of mitigation measures and support those seeking permission to use public lands by enhancing mitigation options." *Id.* at 19586. Once again, no legal authority for the imposition of this new requirement is cited, and rationale for imposing this unprecedented requirement on public land users is extremely weak.

First, nothing in FLPMA authorizes the BLM to impose mitigation requirements. The word "mitigation" is not mentioned in the statute. Instead, adverse impacts to the public lands and their resources are governed by the "unnecessary and undue degradation" ("UUD") standard. This standard is set forth in Section 302(b) of FLPMA, which provides that "In managing the public lands, the Secretary shall take action to prevent undue and unnecessary degradation of the lands." And although FLPMA's legislative history does not mention mitigation, it is notable that the Senate bill had a provision directing the Secretary of the Interior to require appropriate land reclamation as a condition of use likely to entail significant disturbances to or alterations of the public lands, but that requirements was not adopted by the conference committee. H.R. Conf. Rep. 94-1724, at 60 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6228, 6231. If Congress chose not to impose reclamation requirements in enacting FLPMA, it is unlikely that Congress intended to allow the BLM to impose mitigation requirements that go beyond enforcing the UUD standard.

The UUD standard itself has never been interpreted as including an obligation to mitigate adverse impacts. The BLM, for example, has defined UUD in the mining context as "impacts greater than those that would normally be expected from an activity being accomplished in compliance with current standards and regulations and based on sound practices, including use of the best reasonably available technology." 43 C.F.R. § 3802.0-5(l). This definition was adopted in 1980 and closely approximates a contemporaneous interpretation of FLPMA. The Proposed Rule contains a similar definition of UUD: "harm to land resources or values that is not needed to accomplish a use's goals or is excessive or disproportionate." Proposed Rule at 19599 (proposed rule § 6101.4 Definitions). Mitigation is not required.

Moreover, the proposed mitigation rule is extremely vague, creating a serious enforceability problem. It states that the BLM will "*generally* apply the mitigation hierarchy . . . *as appropriate*." Proposed Rule at 19603 (proposed rule § 6102.5-1) (emphasis added). What is "the mitigation hierarchy" and how will it be applied? It is not set forth in FLPMA or in the Proposed Rule. Why will this hierarchy be applied "generally" and "as appropriate"? Will it be applied selectively against disfavored activities? Will it vary depending on the type of public land use or the identity of the user? Or the views of the agency officer? These details are not disclosed. Obviously, this will invite arbitrary decision-making.

In fact, there are no standards that would govern the imposition of mitigation. The two operative subsections, § 6102.5-1(a) and (b), *contain a mere 67 words*. Presumably, mitigation would be imposed on permits and other approvals needed to utilize the public lands, but that is not clear. Furthermore, the nature and extent of what may be required as mitigation is not disclosed. Clear and understandable mitigation standards should be provided to notify the public of this new requirement. In addition, the BLM should explain the relationship between mitigation and the UUD standard that FLPMA imposes.

Subsection (b) states that BLM officers "shall, to the maximum extent possible, require mitigation to address adverse impacts to important, scarce, or sensitive resources." *Id.* "Important, scarce, or sensitive resources" are, once again, vague terms that do not appear in FLPMA. They would include, for example, "resources that the BLM has determined to warrant special consideration," "resources that are not plentiful or abundant," and "resources that are delicate and vulnerable to adverse change." These vague terms provide little guidance to public land users, and will invite arbitrary and inconsistent decision-making. This subsection also suggests that mitigation will be mandatory only to the "maximum extent possible." This seems to be an admission that the BLM lacks authority to impose this requirement.

The Army Corps of Engineers has adopted detailed regulations that establish standards and guidelines for mitigation to compensate for unavoidable impacts to "waters of the United States." These regulations are codified at 33 C.F.R. part 332, and take up 31 pages in the Code of Federal Regulations. Despite their detail, the Corps' mitigation regulations still cause confusion and create compliance issues. But at least that agency made an effort to provide a detailed framework for mitigation. By contrast, the BLM has provided almost no detail on mitigation in the Proposed Rule. The agency has devoted far more space to discussing "mitigation accounts," "mitigation fund holders," and other funding matters, suggesting that the agency's real goal is to collect money from public land users. It is telling that two very short subsections address mitigation requirements, while six much longer subsections deal with the money that the BLM intends to collect. *See* Proposed Rule at 19603 (proposed rule § 6102.5-1).

In short, the BLM's new mitigation requirement lacks legal authority. Mitigation is not mentioned in FLPMA and it has not been required in the past. Furthermore, the BLM has failed to acknowledge that mitigation is a new requirement that may have dramatic impacts on public land users, including a substantial economic impacts on businesses that depend on public land access. The agency's rationale for imposing this new requirement is weak and tied to its improper goal of managing the public lands for ecosystem resilience rather than multiple use. And in any case, the proposed rule is extremely vague and fails to provide reasonable notice to the public of what will be required and under what circumstances.

4. The Proposed Rule improperly modifies the criteria for designating areas as ACECs.

Areas of Critical Environmental Concern ("ACECs") are defined in FLPMA as "areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards." 43 U.S.C. § 1702(a). ACECs are identified through the public land planning process, during which priority must be given to the protection of these areas. *See* 43 U.S.C. § 1712(c)(3).

The BLM's planning rules address ACECs. *See* 43 C.F.R. §§ 1601.0-5(a) (definition of ACECs), 1610.7-2 (requirements and process for designation). The rules, among other things, limit areas that are eligible for designation as ACECs to areas that are *relevant* (i.e., contain a *significant* historic, cultural, or scenic value; a fish or wildlife resource or other natural system or process) and are *important* (i.e., the relevant value or resource possesses substantial significance and values). The BLM is proposing to modify these criteria and the process for ACEC designation. *See* Proposed Rule at 19593. These changes are unjustified and would dramatically and improperly expand the areas that would qualify as an ACEC.

According to the BLM, the proposed changes are intended to "emphasize that the role of ACECs as the principal designation for public lands where special management attention is required to protect important natural, cultural, and scenic resources, and to protect against natural hazards." Proposed Rule at 19593. That assertion is erroneous, however. Large portions of the public lands have already been given special designations by Congress, as reflected in the Omnibus Public Land Management Act of 2009 ("OPLMA"). According to one source, about 34 million acres of public land are managed by the BLM as National Conservation System Lands. *See* Congressional Research Service, "The Federal Land Management Agencies" (updated Feb. 16, 2021). The BLM should designate ACECs only when "special management protection" is necessary to prevent "irreparable damage" to unique and important resources, as the statutory definition and existing agency rules indicate.

More disturbing, however, are the definitional changes the BLM proposes, which would improperly expand the areas eligible to be designated as ACECs. First, areas would be eligible for designation "if they contribute to ecosystem resilience, including by protecting landscape intactness and habitat connectivity." This would go well beyond the plain meaning of FLPMA's definition of ACECs, particularly in light of the extremely broad and vague definitions the BLM proposes for the terms "ecosystem resilience" and "intact landscape." Under those definitions, almost any public land tract could qualify as an ACEC. Congress plainly intended that ACECs consist of specific areas with unique and important features that require special management.

Furthermore, as explained above, FLPMA does not mention "ecosystem resilience," "landscape intactness" or "habitat connectivity." Just as the BLM lacks authority to declare *ipse dixit* that the public lands must be managed to achieve these newly revealed objectives, the agency lacks authority to declare areas to be ACECs because they "contribute" to these murky concepts. The direction to prioritize ACECs during the land planning process is not an excuse to dramatically expand the scope of the term's statutory definition by rule.

Second, the BLM would eviscerate the requirements for ACEC eligibility by modifying the "importance" criterion in the agency's planning rules. Under the existing rules, an area must contain resources, values, systems or processes that are both relevant and important. 43 C.F.R. § 1610.7-2(a). To be important, the relevant resources, values, systems or processes "shall have substantial significance and values. This generally requires qualities of more than local significance and special worth, consequence, meaning, distinctiveness, or cause for concern." *Id.* § 1610.7-2(a)(2). The Proposed Rule would revise the agency's long-standing interpretation to allow consideration of the "local" importance of the relevant resources, values, systems or processes. When combined with the other changes, including considering areas important based on their contribution to vague concepts like "ecosystem resilience," "landscape intactness" and "habitat connectivity," the Proposed Rule will dramatically and improperly expand the areas that may be designated as ACECs and once again invite arbitrary decision-making.

The BLM has failed to provide a legitimate basis for these changes to the agency's existing rules. The agency has asserted that the use of "local significance" in the existing rule has created confusion "because it may be conflated with the separate question under NEPA as to whether environmental impacts are 'significant.'" Proposed Rule at 19593. This seems far-fetched, given that the BLM has applied the "more-than-local significance" requirement for over 40 years. *See* Areas of Critical Environmental Concern; Policy and Guidelines, 45 Fed. Reg. 57318, 57324 (Aug. 27, 1980); Amendments to the Planning Regulations, 48 Fed. Reg. 20364 (May 5, 1983). If this really was a serious problem, it would have been addressed previously. Moreover, the proper solution is to clarify the rule to eliminate the confusion rather than weakening the long-standing eligibility requirements for ACECs.

The BLM also asserted that the existing rule is "unnecessarily restrictive" because it restricts consideration of a resource's local significance *Id.* But, again, the agency's explanation goes on to assert that ACECs should include areas that contribute to "ecosystem resilience." There is absolutely no evidence that Congress intended that portions of the public lands be set aside as ACECs to contribute to ecosystem resilience (or to protecting intact landscapes or habitat connectivity). This justification conflicts with FLPMA's direction to the BLM to "manage the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). It also conflicts with the goal of Congress, when it enacted FLPMA, to ensure that land management, including withdrawals and reservations, remain under the control of Congress. *See*, *e.g.*, H.R. Rep. 94-1163, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6183.

Finally, the weakening of the criterion is not consistent with the guidelines BLM issued shortly after FLPMA was enacted. The guidelines, which were adopted shortly after FLPMA's enactment and reflect the BLM's contemporaneous understanding of the statute, discuss the factors that FLPMA identifies for consideration when deciding to designate an ACEC. These guidelines specifically state:

> Another basic policy established in FLPMA is that the public lands shall be managed by observing the principle of multiple use unless otherwise specified by law (Secs. 102(a)(7), 202(c)(1), and 302(a)). *Thus, the multiple-use principle is to be used in making ACEC designation decisions*.

Areas of Critical Environmental Concern, 45 Fed. Reg. at 57325 (emphasis added). The guidelines do not mention "ecosystem reliance," "landscape intactness" or "habitat connectivity." Creating ACECs based on newly discovered concepts that are not in FLPMA and have never been recognized by the BLM before now would improperly alter the agency's long-standing policy and be inconsistent with the multiple-use mandate.

In short, the designation of ACECs should be an exceptional occurrence that is only appropriate when the relevant resources possess "qualities of more than local significance" and have "special worth, consequence, meaning, distinctiveness, or cause for concern," as the current agency rules and guidelines provide. The BLM has failed to provide a reasoned explanation for substantially revising these existing regulatory requirements. Instead, it is apparent that the BLM is improperly attempting to authorize large swaths of public lands to be set aside for special management in contravention of the intent of Congress.

5. The Rangeland Health Standards should not be extended to all public land uses.

The BLM is proposing to apply the existing fundamentals of rangeland health ("the Fundamentals") to all public lands and program areas. *See* Proposed Rule at 19592-93, 19603-04 (proposed rules §§ 6103.1, 6103.1-1 & 6103.1-2). The Fundamentals are codified currently at 43 C.F.R. § 4180.1. The Proposed Rule would restate the Fundamentals verbatim at proposed rule § 6103.1. As the BLM has explained previously, the Fundamentals are simply broad overarching goals that reflect relevant laws such the Endangered Species Act, the Clean Water Act, and FLPMA. They are implemented through specific standards and guidelines adopted by the relevant BLM State Director and then applied at the local and regional level. *See* Grazing Administration – Exclusive of Alaska, 71 Fed. Reg. 39402, 39492 (July 12, 2006). For example, the BLM has explained:

> Once the standards and guidelines were developed, they became the focus for assessing rangeland health, and for making determinations as to whether existing grazing management was a cause for not meeting standards and needed to be altered to achieve the locally applicable standards and guidelines. Since the adoption of state or regional standards and guidelines, BLM has relied on the standards and guidelines to evaluate rangeland health. BLM is not aware of instances where the standards and guidelines have not been relied upon.

Id. Thus, the "standards and guidelines provide the basis for the application of the broadly stated fundamentals to the management of public lands." *Id.*

Importantly, the standards and guidelines are developed by the BLM State Director in consultation with the affected Resource Advisory Councils ("RACs"). 43 C.F.R. § 4180.2. In addition to the RACs, the State Director is required to coordinate with Indian tribes, and federal land management agencies, and State land management agencies and the public in developing the standards and guidelines. The result is a document that reflects local and regional rangeland conditions and grazing management practices. An example of these standards and guidelines is attached hereto as Attachment A.

The Proposed Rule would dramatically alter the process for developing standards and guidelines and is inconsistent with multiple-use management. The Proposed Rule will eliminate the collaborative process set forth in 43 C.F.R. § 4180.2 and instead direct "authorized officers" (an undefined term) to implement the existing rangeland health standards and guidelines "across all lands and program areas." Proposed Rule at 19604 (proposed rule § 6103.1-1). This would mean, for example, that the standards and guidelines for grazing administration in Arizona, attached as Attachment A, would be applied to all public land uses, despite the fact that the standards and guidelines are obviously specifically tailored to livestock grazing and not the use of a right-of-way for an interstate pipeline or power transmission line or the development of a mineral deposit.

The Proposed Rule would also require the "authorized officer" to review the existing rangeland health standards and guidelines and to develop new or revised standards and guidelines "as necessary for all lands and program areas to ensure the standards and guidelines serve as appropriate measures for the fundamentals of lands [sic] health." *Id.* This will take place during the land use planning process. However, the BLM's planning regulations do not contemplate the development and revision of land health standards and guidelines, and it is uncertain how this would be accomplished. Coordination with State and local governments and Indian tribes would be necessary as well as broader public participation. *See* 43 C.F.R. §§ 1610.2, 1610.3. In addition, the land health standards and guidelines would be subject to FLPMA's consistency requirements. *See* 43 C.F.R. §§ 1610.3-2. NEPA would also apply, requiring the development of a reasonable range of alternatives in conjunction with cooperating agencies.

At a minimum, the BLM needs to clarify the process and procedural requirements applicable to adopting and revising land health standards and guidelines, and explain the rationale for those procedural requirements. As with mitigation, there is a serious problem due to the absence of details about the regulatory standards and process requirements.

In addition, it is unclear how the land health standards and guidelines will be applied to the approval and administration of individual permits and other use authorizations. Livestock grazing is normally authorized through long-term grazing permits that cover thousands of acres of rangeland, with annual adjustments based on forage and other range conditions. And the BLM's grazing regulations contain fairly detailed provisions that govern how the rangeland health standards and guidelines are applied to grazing, including monitoring grazing management practices and forage utilization and steps for adjusting levels of grazing use. *See*, *e.g.*, 43 C.F.R. § 4180.2(c). However, the Proposed Rule do not address how the land health standards and guidelines will be applied to other types of public land uses, including mineral exploration and development, rights-of-way for transmission lines, pipelines and renewable energy projects, various outdoor recreation uses, and timber production.

It is also unclear how the proposed rules in subpart 6103 will function in conjunction with existing subpart 4180 – Fundamentals of Rangeland Health and Standards and Guidelines for Grazing Administration. The latter regulations will not be affected by the proposed rules and continue to govern grazing on the public lands. As explained, while the Fundamentals will be the same under each set of regulations, the standards and guidelines will be developed and revised by different BLM officials under different processes, cover different areas, and may differ substantially.

In short, the BLM has erred in assuming that the rangeland standards and guidelines can be renamed and applied to all public lands and all land uses. The rangeland standards and guidelines were developed for livestock grazing, which is a unique land use that is managed much differently than other land uses. At a minimum, the BLM needs to provide a substantial amount of additional detail concerning the content of land health standards and guidelines, the process by which they are developed, the right of State and local governments to coordinate on them during their development, how the standards and guidelines fit into the BLM's planning regulation and process, and how the standards and guidelines will be administered.

6. The Proposed Rule would circumvent FLPMA's limitations on management decisions and actions that exclude the principal or major public land uses.

FLPMA restricts the authority of the BLM to exclude land uses from tracts of public land. First, all management decisions that implement a land use plan, including decisions that eliminate or exclude one or more of the principal or major uses (i.e., domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and development, rights-of-way, outdoor recreation, and timber production), must remain subject to reconsideration, modification, and termination through revision of the land use plan involved. 43 U.S.C. § 1712(e)(1). In addition, any management decision or action pursuant to a management decision that eliminates one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more must be reported to Congress and is subject to congressional review and disapproval. 43 U.S.C. § 1712(e)(2).

FLPMA also imposes limitations on withdrawals of public lands. "Withdrawal" is defined in FLPMA as

> withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land . . . to another department, bureau or agency.

43 U.S.C. § 1702(j). Under FLPMA, withdrawals can only be made by the Secretary of Interior or an individual in the Office of Secretary who has been appointed by the President and confirmed by Congress. 43 U.S.C. § 1714(a). In addition, withdrawals aggregating 5,000 acres or more must be reported to Congress and are subject to congressional review and disapproval. 43 U.S.C. § 1714(c).

The foregoing limitations on public land restrictions and withdrawals were likely prompted by recommendations made by the Public Land Law Review Commission shortly before FLPMA was enacted. The Commission criticized the extent of executive withdrawals and land classifications that prevented entry under one or more public land laws, and recommended that then-existing withdrawals and reservations be reviewed and, where appropriate, eliminated. The Commission also recommended that in the future, large scale limited or single use withdrawals of a permanent nature should be accomplished only by an act of Congress, and that executive

withdrawals be limited in purpose and duration. *One Third of the Nation's Land: A Report to the President and Congress by the Public Land Law Review Commission* 52-56 (1971)

The Proposed Rule would violate these requirements by allowing large tracts of land to be set aside in order to promote ecosystem resilience. For example, the Proposed Rule requires the BLM to manage landscapes to protect their intactness. Proposed Rule at 19599 (proposed rules §§ 6102.1 Protection of intact landscapes, 6102.2 Management to protect intact landscapes). The term "landscape" is defined as:

> [A] network of contiguous or adjacent ecosystems characterized by a set of common management concerns or conditions. The landscape is not defined by the size of the area, but rather by the interacting elements that are relevant and meaningful in a management context. Areas described in terms of aquatic conditions, such as watersheds or ecoregions, may also be "landscapes."

Id. at 19598 (proposed rule § 6101.4 Definitions). Under this murky definition, a landscape may contain tens of thousands of acres or even significantly more land. An "intact landscape" is defined as:

> An unfragmented ecosystem that is free of local conditions that could permanently or significantly disrupt, impair, or degrade the landscape's structure or ecosystem resilience, and that is large enough to maintain native biological diversity, including viable populations of wide-ranging species. Intact landscapes have high conservation value, provide critical ecosystem functions, and support ecosystem resilience.

Id. Under this definition, the principal land uses recognized under FLPMA as well as other land uses and activities may be restricted over a vast area in order to maintain an intact landscape. This would effectively result in the withdrawal of the landscape, i.e., "limiting activities . . . in order to maintain other public values in the area or reserving the area for a particular public purpose or program." This would violate Section 204 of FLPMA and, in the case of very large landscapes, Section 202(3) of the Act.

In addition, conservation leases are likely to violate Section 204 of FLPMA. The provisions in the Proposed Rule governing conservation impose no limits on the size or extent of such leases, and they could be issued for a variety of purposes including land preservation. Once a conservation lease has been issued, the BLM would be prohibited from authorizing any other uses of the leased lands that are inconsistent with the authorized conservation use. Proposed Rule at 19600 (proposed rule § 6102.4(a), (b)). Thus, under the conservation lease, activities would be limited in order to maintain other public values in the area, constituting a withdrawal. Again, this would violate FLPMA.

D. The BLM Has Violated FLPMA by Failing to Coordinate with State and Local Governments in Developing the Proposed Rule.

FLPMA requires that the Interior Secretary "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has

been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law." 43 U.S.C. § 1732(a). The requirements for the development of land use plans are set forth in FLPMA Section 202, 43 C.F.R. § 1712. Subsection (c)(9) of this section imposes coordination and consistency requirements on the Interior Secretary. Specifically, this provision states:

> [T]o the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, . . . and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, [1] to the extent he finds practical, keep apprised of State, local, and tribal land use plans; [2] assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; [3] assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and [4] shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

43 U.S.C. § 1712(c)(9) (reference to "statewide outdoor recreation plans" removed; numbering added for reference purposes).

This provision is based on settled law recognizing that the States and local governments are "free to enforce [their] criminal and civil laws on federal land so long as those laws do not conflict with federal law." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)); *see also People ex rel. Deukmejian v. Cty. of Mendocino*, 36 Cal. 3d 476, 491, 683 P.2d 1150, 1160 (1984) (holding that county regulation of aerial spraying of pesticides was not preempted by federal law). Even though the public lands are owned by the United States, States and local governments have the authority to plan for and regulate activities occurring on the public lands, unless such regulation is preempted by a federal law. FLPMA Section 202(c)(9) explicitly recognizes and protects that authority.

In enacting FLPMA, Congress acknowledged the important role that States and local governments play in the management of the public lands. The report of the House Interior and Insular Affairs Committee accompanying the House bill (which provided much of the text of FLPMA) stated:

> The underlying mission for the public lands is the multiple use of resources on a sustained-yield basis. Corollary to this is the selective transfer of public lands to other ownership where the public interest will be served thereby. The proper multiple use mix of retained public lands is to be achieved by comprehensive land use planning, coordinated with State and local planning.

H.R. Rep. No. 94-1163, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6176 (emphasis added).

In this case, the BLM is not proposing to adopt a land use plan. But the BLM is proposing to adopt regulations that will make significant changes to the planning process and the content of BLM land use plans. In fact, the Proposed Rule goes much farther than just land use plans. The objectives of the Proposed Rule are to:

> (a) Achieve and maintain ecosystem resilience when administering Bureau programs; developing, amending, and revising land use plans; and approving uses on the public lands.
>
> (b) Promote conservation by protecting and restoring ecosystem resilience and intact landscapes;
>
> (c) Integrate the fundamentals of land health and related standards and guidelines into resource management;
>
> (d) Incorporate inventory, assessment, and monitoring principles into decision-making and use this information to identify trends and implement adaptive management strategies;
>
> (e) Accelerate restoration and improvement of degraded public lands and waters to properly functioning and desired conditions; and
>
> (f) Ensure that ecosystems and their components can absorb, or recover from, the effects of disturbances or environmental change through conservation, protection, restoration, or improvement of essential structures, functions, and redundancy of ecological patterns across the landscape.

Proposed Rule at 19597 (proposed rule § 6101.2). Thus, the BLM's goal in adopting the Proposed Rule is to radically transform how the public lands are managed.

This is reinforced by various provisions in the Proposed Rule imposing requirements that will control future land use planning and decision-making by the BLM. For example, the BLM will be required to manage and protect intact landscapes, shifting the focus of its management activities. *Id.* at 19599 (proposed rules §§ 6102.1 and 6102.2). Likewise, the BLM will be required to emphasize restoration "across the public lands," identify "priority landscapes for restoration," and prepare formal "restoration plans" that are included in agency land use plans. *Id.* at 19599-600 (proposed rules §§ 6102.3, 6102.3-1, 6102.3-2). Another example concerns the management actions that BLM "officers" are required to perform to promote ecosystem resilience, which will supersede land use plans and dictate what land uses may be authorized. *Id.* at 195602-03 (proposed rule § 6102.5). Finally, BLM officers are directed to impose "land health standards" on all

activities to ensure "ecosystem resilience," as discussed above. *Id.* at 195603-04 (proposed rules §§ 6103.1, 6103.1-1).

As these examples demonstrate, the Proposed Rule will make fundamental changes to land use inventory, planning, and management of the public lands and their resources, overriding portions of the BLM's regulations codified at 43 C.F.R. part 1600 and dictating the focus of future resource management planning. As such, the Proposed Rule is subject to coordination under FLPMA Section 202(c)(9).

The plain language of FLPMA Section 202(c)(9) indicates that the requirement to coordinate is significantly broader than simply coordinating BLM and local land use plans. Instead, coordination should occur with respect to all BLM "land use inventory, planning, and management activities" and all State and local government "land use planning and management programs." Thus, coordination is required, for example, in identifying the policies, guidance, strategies and plans for consideration in developing land use plans; formulating land use and resource management alternatives; and developing management measures that are used to implement land use plans following their adoption.

In addition, Section 202(c)(9) requires the BLM to "provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands." 43 U.S.C. § 1712(c)(9). This requirement applies broadly to a range of BLM actions that affect the planning and management of public lands, including the development of land use programs, land use regulations, and land use decisions for the public lands, such as the Proposed Rule in this case.

Similarly, this section specifically authorizes "State and local government officials, both elected and appointed," to advise the Interior Secretary (and the BLM as the Secretary's delegated authority) on the "development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State." It requires government-to-government coordination between State and local officials and the BLM on land use plans, guidelines, and regulations affecting the management and use of the public lands, thereby ensuring that the concerns and recommendations of State and local governments are recognized and addressed.

In this case, the BLM, in developing and proposing the Proposed Rule, has ignored the foregoing requirements. The agency has made no attempt to coordinate with State and local governments in connection with developing the Proposed Rule, despite the fact that the Proposed Rule directly concerns and will dramatically affect land use planning. As stated, coordination goes beyond land use plan development and includes agency rules and guidelines governing the planning process. This is logical because, as the Proposed Rule shows, these rules and guidelines control the inventory and resource planning requirements that the BLM employs, and, in this case, shift the focus of resource management planning from the traditional public land uses to achieving ecosystem resilience and protecting healthy landscapes – concepts that are foreign to FLPMA. Because the BLM has failed to coordinate, the Proposed Rule violates FLPMA and must be withdrawn.

E. The BLM must comply with NEPA prior to adopting the Proposed Rule.

The BLM states that it intends to apply the categorical exclusion ("CE") codified at 43 C.F.R. § 46.210(i) to avoid having to comply with NEPA and its implementing regulations in adopting the Proposed Rule. Proposed Rule at 19596. The CE authorized in § 46.210(i) is a catch-all that excludes from NEPA:

> Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

The Proposed Rule does not disclose which part of this CE would apply in this case. Instead, the agency has not documented the applicability of the CE, and does not intend to do so until the Proposed Rule is finally adopted. Proposed Rule at 19596. This improperly deprives commenters of the ability to analyze the applicability of the CE and provide comments on whether it does, in fact, apply.

The Counties assume that the BLM will contend that the CE applies because the Proposed Rule is purportedly administrative, financial, legal, technical, or procedural in nature. However, major programmatic regulations that establish substantive and procedural requirements for future agency land use decisions are normally subject to NEPA. The CEQ's regulations define "major federal actions" under NEPA to include "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.1(q)(2). The CEQ's regulations also state that "major federal actions" normally include "adoption of official policy, such as rules, regulations, and interpretations adopted under the Administrative Procedure Act," as well as "adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." 40 C.F.R. § 1508.1(q)(3)(i), (iii). In this case, the Proposed Rule will dramatically alter how over 200 million acres of public lands are managed by requiring the BLM to emphasize achievement of ecosystem resilience and protection of intact landscapes, in addition to creating a new "conservation leasing" system. The adoption of this new management regime clearly meets the definition of "major federal action" under NEPA.

Moreover, the Interior Department's NEPA regulations provide several different extraordinary circumstances that apply to the Proposed Rule and preclude the BLM's reliance on a CE. *See* 43 C.F.R. § 46.205(c). These extraordinary circumstances include actions that

- Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources.

- Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.

- Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.

43 C.F.R. §46.215(c), (d) & (f). Given the extremely broad, programmatic nature of the Proposed Rule, which will apply to all BLM planning activities and land use decisions affecting public lands in the West, and the significant amount of controversy surrounding the dramatic management changes mandated by the Proposed Rule, which are not authorized by FLPMA, the BLM cannot avoid compliance with NEPA under a CE.

In similar circumstances, the BLM has complied with NEPA by preparing an environmental impact statement. When the BLM amended its regulations that govern the BLM's administration of livestock grazing on the public lands in 1996, the BLM analyzed the impacts of those rules in an environmental impact statement. *See* Grazing Administration – Exclusive of Alaska, 60 Fed. Reg. 9894, 9957 (Feb. 22, 1995) (discussing compliance with NEPA). The BLM prepared another environmental impact statement in connection with amending its regulations governing the administration of grazing in 2006. *See* Grazing Administration – Exclusive of Alaska, 71 Fed. Reg. 39402, 39502 (July 12, 2006). In contrast, the Proposed Rule is much broader in scope than the grazing amendments. It applies to all uses of the public lands and will dramatically change how the public lands are managed and what uses will be permitted by elevating "conservation" to a dominant use and requiring that the public lands be managed to promote resilient ecosystems and intact landscapes.

The case of *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007) (*Citizens*) is instructive regarding the applicability of NEPA to rules that alter the management of federal land on a programmatic basis like the Proposed Rule. In *Citizens*, notwithstanding the Department of Agriculture's ("USDA's") completion of an environmental assessment ("EA") for earlier versions of its National Forest System planning rules, the USDA applied a CE to the 2005 amendments to the planning rules. *Id*. at 1068. Like the CE the BLM purports to rely on here, the CE at issue in the *Citizens* case excluded "rules, regulations, and policies to establish Service-wide, administrative procedures, program processes, or instruction." *Id*. (quoting 70 Fed. Reg. 1023, 1053-54). The USDA also found that "no extraordinary circumstances exist[ed] that would require preparation of an EA or EIS." *Id*.

Like the BLM here, the Forest Service argued that its 2005 planning rule fit into its "rules, regulations, and policies" CE because "it merely identifies the procedures and standards for later development of forest plans, plan amendments, and plan revisions," and "does not change the physical environment in any way, and that there will be no direct environmental impacts." *Id*. at 1083. The plaintiffs, on the other hand, argued that the Forest Service's 2005 planning rule did much more than establish procedures, asserting that the rule established requirements for sustainability of social, economic and ecological systems, described the nature and scope of plans, and set forth required plan components. *Id*. at 1083-84.

Agreeing with the plaintiffs, the court stated that "NEPA requires *some* type of procedural due diligence – even in cases involving broad, programmatic changes." *Id*. at 1085 (emphasis in original). It also concluded that "NEPA does indeed contemplate preparation of EAs and EISs in the case of programmatic rules and changes." *Id*. Ultimately, the court held that the USDA violated NEPA when it "determined that the 2005 Rule satisfied a CE never before invoked for such large scale actions, and concluded that no further NEPA analysis was required." *Id*. at 1086.

The court further held that application of the CE was improper because there was a possibility that the action may have significant environmental effects. First, the court explained that the rule could impact future site-specific plans. *Id*. at 1087. Second, applying the CEQ's regulations, the court determined that the 2005 rule may have significant environmental effects because it was "highly controversial," set "precedent for future action with significant effects," and "may be related to other action which has individually insignificant, but cumulatively significant impacts." *Id*. at 1089. Accordingly, the court determined that the USDA, at a minimum, should have prepared an EA and remanded the matter to the USDA for further consideration.

As with the 2005 forest planning rules at issue in *Citizens*, the Proposed Rule clearly has the potential to cause a significant impact on the human environment over a vast area in the West and Alaska. Given the Proposed Rule's applicability to virtually all public lands and the dramatic changes in management emphasis that the rule will mandate, the BLM must prepare an environmental impact statement that evaluates the effects that implementation of the Proposed Rule will have in areas subject to this new management regime.

F. The BLM's Economic and Threshold Analysis for the Proposed Rule is Inadequate.

The BLM is responsible for managing over 200 million acres of public lands in the 11 contiguous western states and Alaska. In many rural areas, the ability to access and use the public lands is critical to rural communities and small businesses that are located in those areas. Oil and gas development, mining and mineral production, timber production, outdoor recreation, and livestock grazing are vital aspects of many rural economies. Furthermore, in many rural areas, public lands are interspersed with state and private land, and as a consequence, the manner in which the public lands are managed has an even broader impact in the West.

As explained above, the Proposed Rule will dramatically alter how the public lands are managed and what uses will be permitted. It will impose new requirements on public land users that are likely to have significant economic costs, such as the BLM's new mitigation program. Access to large portions of the public lands will be restricted or eliminated altogether to maintain "intact landscapes" and prevent conflicts with "conservation leases." All of these changes will cause economic impacts over a vast scale.

But despite the likelihood of the Proposed Rule causing significant economic effects, the BLM made no attempt to estimate the impacts of the Proposed Rule. This was clearly improper. The Proposed Rule must be withdrawn until the agency has made a serious effort to analyze the economic impacts of the rule on small entities in the West. This can be done in connection with the agency's preparation of an environmental impact statement to comply with NEPA.

ATTACHMENT A

ARIZONA STANDARDS FOR RANGELAND HEALTH AND GUIDELINES FOR GRAZING ADMINISTRATION (BLM 1997)

ARIZONA STANDARDS
FOR
RANGELAND HEALTH
AND
GUIDELINES
FOR
GRAZING ADMINISTRATION

U.S. DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

ARIZONA

Recommended for Approval:

Sylvia V. Baca

Interim Director

of the Interior

APR 24 1997

Date

Approved:

Bruce Babbitt

Secretary

APR 28 1997

Date

ARIZONA STANDARDS FOR RANGELAND HEALTH AND GUIDELINES FOR GRAZING ADMINISTRATION

INTRODUCTION

The Department of the Interior's final rule for Grazing Administration, issued on February 22, 1995, and effective August 21, 1995, requires that Bureau of Land Management (BLM) State Directors develop State or regional standards and guidelines for grazing administration in consultation with BLM Resource Advisory Councils (RAC), other agencies and the public. The final rule provides that fallback standards and guidelines be implemented, if State standards and guidelines are not developed by February 12, 1997. Arizona Standards and Guidelines and the final rule apply to grazing administration on public lands as indicated by the following quotation from the Federal Register, Volume 60, Number 35, page 9955.

> "The fundamentals of rangeland health, guiding principles for standards and the fallback standards address ecological components that are affected by all uses of public rangelands, not just livestock grazing. However, the scope of this final rule, and therefore the fundamentals of rangeland health of §4180.1, and the standards and guidelines to be made effective under §4180.2, are limited to grazing administration."

Although the process of developing standards and guidelines applies to grazing administration, present rangeland health is the result of the interaction of many factors in addition to grazing by livestock. Other contributing factors may include, but are not limited to, past land uses, land use restrictions, recreation, wildlife, rights-of-way, wild horses and burros, mining, fire, weather, and insects and disease.

With the commitment of BLM to ecosystem and interdisciplinary resource management, the standards for rangeland health as developed in this current process will be incorporated into management goals and objectives. The standards and guidelines for rangeland health for grazing administration, however, are not the only considerations in resolving resource issues.

The following quotations from the Federal Register, Vol. 60, No. 35, page 9956, February 22, 1995, describe the purpose of standards and guidelines and their implementation:

> "The guiding principles for standards and guidelines require that State or regional standards and guidelines address the basic components of healthy rangelands. The Department believes that by implementing grazing-related actions that are consistent with the fundamentals of §4180.1 and the guiding principles of §4180.2, the long-term health of public rangelands can be ensured.
>
> "Standards and guidelines will be implemented through terms and conditions of grazing permits, leases, and other authorizations, grazing-related portions of activity plans (including Allotment Management Plans), and through range improvement-related activities.
>
> "The Department anticipates that in most cases the standards and guidelines themselves will not be terms and conditions of various authorizations but that the terms and conditions will reflect the standards and guidelines.

> "The Department intends that assessments and corrective actions will be undertaken

in priority order as determined by BLM.

"The Department will use a variety of data including monitoring records, assessments, and knowledge of the locale to assist in making the "significant progress" determination. It is anticipated that in many cases it will take numerous grazing seasons to determine direction and magnitude of trend. However, actions will be taken to establish significant progress toward conformance as soon as sufficient data are available to make informed changes in grazing practices."

FUNDAMENTALS AND DEFINITION OF RANGELAND HEALTH

The Grazing Administration Regulations, at §4180.1 (43 Code of Federal Regulation [CFR] 4180.1), Federal Register Vol. 60, No. 35, pg. 9970, direct that the authorized officer ensures that the following conditions of rangeland health exist:

(a) Watersheds are in, or are making significant progress toward, properly functioning physical condition, including their upland, riparian-wetland, and aquatic components; soil and plant conditions support infiltration, soil moisture storage, and the release of water that are in balance with climate and landform and maintain or improve water quality, water quantity, and timing and duration of flow.

(b) Ecological processes, including the hydrologic cycle, nutrient cycle, and energy flow, are maintained, or there is significant progress toward their attainment, in order to support healthy biotic populations and communities.

(c) Water quality complies with State water quality standards and achieves, or is making significant progress toward achieving, established BLM management objectives such as meeting wildlife needs.

(d) Habitats are, or are making significant progress toward being, restored or maintained for Federal threatened and endangered species, Federal Proposed, Category 1 and 2 Federal candidate and other special status species.

These fundamentals focus on sustaining productivity of a rangeland rather than its uses. Emphasizing the physical and biological functioning of ecosystems to determine rangeland health is consistent with the definition of rangeland health as proposed by the Committee on Rangeland Classification, Board of Agriculture, National Research Council (Rangeland Health, 1994, pg. 4 and 5). This Committee defined Rangeland Health ". . .as the degree to which the integrity of the soil and the ecological processes of rangeland ecosystems are sustained." This committee emphasized ". . .the degree of integrity of the soil and ecological processes that are most important in sustaining the capacity of rangelands to satisfy values and produce commodities." The Committee also recommended that "The determination of whether a rangeland is healthy, at risk, or unhealthy should be based on the evaluation of three criteria: degree of soil stability and watershed function, integrity of nutrient cycles and energy flow, and presence of functioning mechanisms" (Rangeland Health, 1994, pg. 97-98).

Standards describe conditions necessary to encourage proper functioning of ecological processes on specific ecological sites. An ecological site is the logical and practical ecosystem

unit upon which to base an interpretation of rangeland health. Ecological site is defined as:

". . . a kind of land with specific physical characteristics which differs from other kinds of land in its

ability to produce distinctive kinds and amounts of vegetation and in its response to management" (Journal of Range Management, 48:279, 1995). Ecological sites result from the interaction of climate, soils, and landform (slope, topographic position). The importance of this concept is that the "health" of different kinds of rangeland must be judged by standards specific to the potential of the ecological site. Acceptable erosion rates, water quality, productivity of plants and animals, and other features are different on each ecological site.

Since there is wide variation of ecological sites in Arizona, standards and guidelines covering these sites must be general. To make standards and guidelines too specific would reduce the ability of BLM and interested publics to select specific objectives, monitoring strategies, and grazing permit terms and conditions appropriate to specific land forms.

Ecological sites have the potential to support several different plant communities. Existing communities are the result of the combination of historical and recent uses and natural events. Management actions may be used to modify plant communities on a site. The desired plant community for a site is defined as follows: "Of the several plant communities that may occupy a site, the one that has been identified through a management plan to best meet the plan's objectives for the site. It must protect the site as a minimum." (Journal of Range Management, 48:279, 1995.)

Fundamentals (a) and (b) define physical and biological components of rangeland health and are consistent with the definition of rangeland health as defined by the Committee on Rangeland Classification, Board on Agriculture, National Research Council, as discussed in the paragraph above. These fundamentals provide the basis for sustainable rangelands.

Fundamentals (c) and (d) emphasize compliance with existing laws and regulation and, therefore, define social and political components of rangeland health. Compliance with Fundamentals (c) and (d) is accomplished by managing to attain a specific plant community and associated wildlife species present on ecological sites. These desired plant communities are determined in the BLM planning process, or, where the desired plant community is not identified, a community may be selected that will meet the conditions of Fundamentals (a) and (b) and also adhere to laws and regulations. Arizona Standard 3 is written to comply with Fundamentals (c) and (d) and provide a logical combination of Standards and Guidelines for planning and management purposes.

STANDARD AND GUIDELINE DEFINITIONS

Standards are goals for the desired condition of the biological and physical components and characteristics of rangelands. Standards:

(1) are measurable and attainable; and
(2) comply with various Federal and State statutes, policies, and directives applicable to BLM Rangelands.

Guidelines are management approaches, methods, and practices that are intended to achieve a standard. Guidelines:

(1) typically identify and prescribe methods of influencing or controlling specific public land uses;

(2) are developed and applied consistent with the desired condition and within site capability; and
(3) may be adjusted over time.

IMPLEMENTING STANDARDS AND GUIDELINES

The authorized officer will review existing permitted livestock use, allotment management plans, or other activity plans which identify terms and conditions for management on public land. Existing management practices, and levels of use on grazing allotments will be reviewed and evaluated on a priority basis to determine if they meet, or are making significant progress toward meeting, the standards and are in conformance with the guidelines. The review will be interdisciplinary and conducted under existing rules which provide for cooperation, coordination, and consultation with affected individuals, federal, state, and local agencies, tribal governments, private landowners, and interested publics.

This review will use a variety of data, including monitoring records, assessments, and knowledge of the locale to assist in making the significant progress determination. Significance will be determined on a case by case basis, considering site potential, site condition, weather and financial commitment. It is anticipated there will be cases where numerous years will be needed to determine direction and magnitude of trend.

Upon completion of review, the authorized officer shall take appropriate action as soon as practicable but no later than the start of the next grazing year upon determining that the existing grazing management practices or level of use on public land are significant factors contributing to failure to achieve the standards and conform with the guidelines that are made effective under 43 CFR 4180.2. Appropriate action means implementing actions that will result in significant progress toward fulfillment of the standards and significant progress toward conformance with guidelines.

Livestock grazing will continue where significant progress toward meeting standards is being made. Additional activities and practices would not be needed on such allotments. Where new activities or practices are required to assure significant progress toward meeting standards, livestock grazing use can continue contingent upon determinations from monitoring data that the implemented actions are effective in making significant progress toward meeting the standards. In some cases, additional action may be needed as determined by monitoring data over time.

New plans will incorporate an interdisciplinary team approach (Arizona BLM Interdisciplinary Resource Management Handbook, April 1995). The terms and conditions for permitted grazing in these areas will be developed to comply with the goals and objectives of these plans which will be consistent with the standards and guidelines.

ARIZONA STANDARDS AND GUIDELINES

Arizona Standards and Guidelines (S&G) for grazing administration have been developed through a collaborative process involving the Bureau of Land Management State S&G Team and the Arizona Resource Advisory Council. Together, through meetings, conference calls, correspondence, and Open Houses with the public, the BLM State Team and RAC prepared Standards and Guidelines to address the minimum requirements outlined in the grazing regulations. The Standards and Guidelines, criteria for meeting Standards, and indicators are an integrated document that conforms to the fundamentals of rangeland health and the requirements of the regulations when taken as a whole.

Upland sites, riparian-wetland areas, and desired resource conditions are each addressed by a standard and associated guidelines.

Standard 1: Upland Sites

Upland soils exhibit infiltration, permeability, and erosion rates that are appropriate to soil type, climate and landform (ecological site).

Criteria for meeting Standard 1:

Soil conditions support proper functioning of hydrologic, energy, and nutrient cycles. Many factors interact to maintain stable soils and healthy soil conditions, including appropriate amounts of vegetative cover, litter, and soil porosity and organic matter. Under proper functioning conditions, rates of soil loss and infiltration are consistent with the potential of the site.

Ground cover in the form of plants, litter or rock is present in pattern, kind, and amount sufficient to prevent accelerated erosion for the ecological site; or ground cover is increasing as determined by monitoring over an established period of time.

Signs of accelerated erosion are minimal or diminishing for the ecological site as determined by monitoring over an established period of time.

As indicated by such factors as:

- Ground Cover
  - litter
  - live vegetation, amount and type (e.g., grass, shrubs, trees, etc.)
  - rock

- Signs of erosion
  - flow pattern
  - gullies
  - rills
  - plant pedestaling

Exceptions and exemptions (where applicable):

••none

Guidelines:

1-1. Management activities will maintain or promote ground cover that will provide for infiltration, permeability, soil moisture storage, and soil stability appropriate for the ecological sites within management units. The ground cover should maintain soil organisms and plants and animals to support the hydrologic and nutrient cycles, and energy flow. Ground cover and signs of erosion are surrogate measures for hydrologic and nutrient cycles and energy flow.

1-2. When grazing practices alone are not likely to restore areas of low infiltration or permeability, land management treatments may be designed and implemented to attain improvement.

Standard 2: Riparian-Wetland Sites

Riparian-wetland areas are in properly functioning condition.

Criteria for meeting Standard 2:

Stream channel morphology and functions are appropriate for proper functioning condition for existing climate, landform, and channel reach characteristics. Riparian-wetland areas are functioning properly when adequate vegetation, land form, or large woody debris is present to dissipate stream energy associated with high water flows.

Riparian-wetland functioning condition assessments are based on examination of hydrologic, vegetative, soil and erosion-deposition factors. BLM has developed a standard checklist to address these factors and make functional assessments. Riparian-wetland areas are functioning properly as indicated by the results of the application of the appropriate checklist.

The checklist for riparian areas is in Technical Reference 1737-9 "Process for Assessing Proper Functioning Condition." The checklist for wetlands is in Technical Reference 1737-11 "Process for Assessing Proper Functioning Condition for Lentic Riparian-Wetland Areas." These checklists are reprinted on the pages following the Guidelines for Standard 3.

As indicated by such factors as:

••Gradient
••Width/depth ratio
••Channel roughness and sinuosity of stream channel
••Bank stabilization
••Reduced erosion
••Captured sediment
••Ground-water recharge
••Dissipation of energy by vegetation

Appendix 1-7

Exceptions and exemptions (where applicable):

••Dirt tanks, wells, and other water facilities constructed or placed at a location for the purpose of providing water for livestock and/or wildlife and which have not been

determined through local planning efforts to provide for riparian or wetland habitat are exempt.

••Water impoundments permitted for construction, mining, or other similar activities are exempt.

Guidelines:

2-1. Management practices maintain or promote sufficient vegetation to maintain, improve or restore riparian-wetland functions of energy dissipation, sediment capture, groundwater recharge and stream bank stability, thus promoting stream channel morphology (e.g., gradient, width/depth ratio, channel roughness and sinuosity) and functions appropriate to climate and landform.

2-2. New facilities are located away from riparian-wetland areas if they conflict with achieving or maintaining riparian-wetland function. Existing facilities are used in a way that does not conflict with riparian-wetland functions or are relocated or modified when incompatible with riparian-wetland functions.

2-3. The development of springs and seeps or other projects affecting water and associated resources shall be designed to protect ecological functions and processes.

Standard 3: Desired Resource Conditions

Productive and diverse upland and riparian-wetland plant communities of native species exist and are maintained.

Criteria for meeting Standard 3:

Upland and riparian-wetland plant communities meet desired plant community objectives. Plant community objectives are determined with consideration for all multiple uses. Objectives also address native species, and the requirements of the Taylor Grazing Act, Federal Land Policy and Management Act, Endangered Species Act, Clean Water Act, and appropriate laws, regulations, and policies.

Desired plant community objectives will be developed to assure that soil conditions and ecosystem function described in Standards 1 and 2 are met. They detail a site-specific plant community, which when obtained, will assure rangeland health, State water quality standards, and habitat for endangered, threatened, and sensitive species. Thus, desired plant community objectives will be used as an indicator of ecosystem function and rangeland health.

As indicated by such factors as:

••Composition

••Structure
••Distribution

Exceptions and exemptions (where applicable):

••Ecological sites or stream reaches on which a change in existing vegetation is physically,

biologically, or economically impractical.

Guidelines:

3-1. The use and perpetuation of native species will be emphasized. However, when restoring or rehabilitating disturbed or degraded rangelands, non-intrusive, non-native plant species are appropriate for use where native species (a) are not available, (b) are not economically feasible, (c) cannot achieve ecological objectives as well as non-native species, and/or (d) cannot compete with already established non-native species.

3-2. Conservation of Federal threatened or endangered, proposed, candidate, and other special status species is promoted by the maintenance or restoration of their habitats.

3-3. Management practices maintain, restore, or enhance water quality in conformance with State or Federal standards.

3-4. Intensity, season and frequency of use, and distribution of grazing use should provide for growth and reproduction of those plant species needed to reach desired plant community objectives.

3-5. Grazing on designated ephemeral (annual and perennial) rangeland may be authorized if the following conditions are met:

- ephemeral vegetation is present in draws, washes, and under shrubs and has grown to useable levels at the time grazing begins;
- sufficient surface and subsurface soil moisture exists for continued plant growth;
- serviceable waters are capable of providing for proper grazing distribution;
- sufficient annual vegetation will remain on site to satisfy other resource concerns, (i.e., watershed, wildlife, wild horses and burros); and
- monitoring is conducted during grazing to determine if objectives are being met.

3-6. Management practices will target those populations of noxious weeds which can be controlled or eliminated by approved methods.

3-7. Management practices to achieve desired plant communities will consider protection and conservation of known cultural resources, including historical sites, and prehistoric sites and plants of significance to Native American peoples.

LOTIC and LENTIC CHECKLISTS

General Instructions

1) The concept "Relative to Capability" applies wherever it may be inferred.

2) This checklist constitutes the Minimum National Standards required to determine Proper Functioning Condition of lotic or lentic riparian-wetland areas.

3) As a minimum, an ID Team will use this checklist to determine the degree of function of a lotic or lentic riparian-wetland area.

4) Mark one box for each element. Elements are numbered for the purpose of cataloging comments. The numbers do not declare importance.

5) For any item marked "No," the severity of the condition must be explained in the "Remarks" section and must be a subject for discussion with the ID Team in determining riparian-wetland functionality. Using the "Remarks" section to explain items marked "Yes" is encouraged but not required.

6) Based on the ID Team's discussion, "functional rating" will be resolved and the checklist's summary section will be completed.

7) Establish photo points where possible to document the site.

Lotic Standard Checklist

Name of Riparian-Wetland Area:_____

Date:_____ Area/Segment ID:_____ Miles:_____

ID Team Observers:_____

Yes	No	N/A	HYDROLOGIC
			1) Floodplain inundated in "relatively frequent" events (1-3 years)
			2) Active/stable beaver dams
			3) Sinuosity, width/depth ratio, and gradient are in balance with the landscape setting (i.e., landform, geology, and bioclimatic region)
			4) Riparian zone is widening or has achieved potential extent
			5) Upland watershed not contributing to riparian degradation

Yes	No	N/A	VEGETATIVE
			6) Diverse age-class distribution (recruitment for maintenance/recovery)
			7) Diverse composition of vegetation (for maintenance/recovery)
			8) Species present indicate maintenance or riparian soil moisture characteristics
			9) Streambank vegetation is comprised of those plants or plant communities that have root masses capable of withstanding high streamflow events
			10) Riparian plants exhibit high vigor
			11) Adequate vegetative cover present to protect banks and dissipate energy during high flows
			12) Plant communities in the riparian area are an adequate source of coarse and/or large woody debris

Yes	No	N/A	EROSION DEPOSITION
			13) Floodplain and channel characteristics (i.e., rocks, overflow channels, coarse and/or large woody debris) adequate to dissipate energy
			14) Point bars are revegetating
			15) Lateral stream movement is associated with natural sinuosity
			16) System is vertically stable
			17) Stream is in balance with the water and sediment being supplied by the watershed (i.e., no excessive erosion or deposition)

(Revised 1995)

REMARKS (Lotic Checklist)

SUMMARY DETERMINATION

Functional Rating:

Proper Functioning Condition _____
Functional--At Risk _____
Nonfunctional _____
Unknown _____

Trend for Functional--At Risk:

Upward _____
Downward _____
Not Apparent _____

Are factors contributing to unacceptable conditions outside BLM's control or management?

Yes _____
No _____

If yes, what are those factors?

____Flow regulations
____Channelization
____Augmented flows
____Mining activities
____Road encroachment
____Other (Specify)_____
____Upstream channel conditions
____Oil field water discharge

Lentic Standard Checklist

Name of Riparian-Wetland Area:_____

Date:_____ Area/Segment ID:_____ Acres:_____

ID Team Observers:_____

Yes	No	N/A	HYDROLOGIC
			1) Riparian-wetland area is saturated at or near the surface or inundated in "relatively frequent" events (1-3 years)
			2) Fluctuation of water levels is not excessive
			3) Riparian-wetland zone is enlarging or has achieved potential extent
			4) Upland watershed not contributing to riparian-wetland degradation
			5) Water quality is sufficient to support riparian-wetland plants
			6) Natural surface or subsurface flow patterns are not altered by disturbance (i.e., hoof action, dams, dikes, trails, roads, rills, gullies, drilling activities)
			7) Structure accommodates safe passage of flows (e.g., no headcut effecting dam or spillway)

Yes	No	N/A	VEGETATION
			8) Diverse age-class distribution (recruitment for maintenance/recovery)
			9) Diverse composition of vegetation (for maintenance/recovery)
			10) Species present indicate maintenance of riparian-wetland soil moisture characteristics
			11) Vegetation is comprised of those plants or plant communities that have root masses capable of withstanding wind events, wave flow events, or overland flows (e.g., storm events, snowmelt)
			12) Riparian-wetland plants exhibit high vigor
			13) Adequate vegetative cover present to protect shorelines/soil surface and dissipate energy during high wind and wave events or overland flows
			14) Frost or abnormal hydrologic heaving is not present
			15) Favorable microsite condition (i.e., woody debris, water temperature, etc.) is maintained by adjacent site characteristics

Yes	No	N/A	SOILS-EROSION DEPOSITION
			16) Accumulation of chemicals affecting plant productivity/composition is not apparent
			17) Saturation of soils (i.e., ponding, flooding frequency and duration) is sufficient to compose and maintain hydric soils
			18) Underlying geologic structure/soil material/permafrost is capable of restricting water percolation
			19) Riparian wetland is in balance with the water and sediment being supplied by the watershed (i.e., no excessive erosion or deposition)
			20) Islands and shoreline characteristics (i.e., rocks, coarse and/or large woody debris) adequate to dissipate wind and wave event energies

(Revised 1995)

REMARKS (Lentic Checklist)

SUMMARY DETERMINATION

Functional Rating:

Proper Functioning Condition _____
Functional--At Risk _____
Nonfunctional _____
Unknown _____

Trend for Functional--At Risk:

Upward _____
Downward _____
Not Apparent _____

Are factors contributing to unacceptable conditions outside BLM's control or management?

Yes _____
No _____

If yes, what are those factors?

____Dewatering ____Mining activities ____Watershed condition
____Dredging activities ____Road encroachment ____Land ownership
____Other (specify)_____

GLOSSARY

ACCELERATED EROSION: Soil loss above natural levels resulting directly from human activities. Due to the slow rate of soil formation, accelerated erosion can lead to a permanent reduction in plant productivity.

ACTIVITY PLAN: A detailed and specific plan for managing a single resource program or plan element undertaken as needed to implement the more general resource management plan decisions. An activity plan is prepared for specific areas to reach specific resource management objectives within stated timeframes.

ALLOTMENT: An area of land where one or more individuals graze their livestock. An allotment generally consists of Federal rangelands, but may include intermingled parcels of private, State, or Federal lands. BLM and the Forest Service stipulate the number of livestock and season of use for each allotment.

ALLOTMENT MANAGEMENT PLAN (AMP): A livestock grazing management plan dealing with a specific unit of rangeland and based on multiple use resource management objectives. The AMP considers livestock grazing in relation to other uses of rangelands and in relation to renewable resources-watershed, vegetation, and wildlife. An AMP establishes the seasons of use, the number of livestock to be permitted on rangelands, and the rangeland improvements needed.

AQUATIC COMPONENTS (HABITATS): Habitats confined to streams, rivers, springs, lakes, ponds, reservoirs, and other water bodies.

AUTHORIZED OFFICER: Any person authorized by the Secretary of the Interior to administer BLM's rangeland management program.

CHANNEL MORPHOLOGY: Relating to the form and structure of channels.

COMPOSITION: The proportions of various plant species in relation to the total on a given area. It may be expressed in terms of cover, density, weight, etc.

DESIRED PLANT COMMUNITY (DPC): The plant community that has been determined through a land use or management plan to best meet the plan's objectives for a site. A real, documented plant community that embodies the resource attributes needed for the present or potential use of an area, the desired plant community is consistent with the site's capability to produce the required resource attributes through natural succession, management intervention, or a combination of both.

ECOLOGICAL SITE: A distinctive kind of rangeland that differs from other kinds of rangeland in its ability to produce a characteristic natural plant community.

EPHEMERAL: A rangeland that does not consistently produce enough forage to sustain a livestock operation but may briefly produce unusual volumes of forage that may be utilized by livestock.

GOAL: The desired state or condition that a resource management policy or program is designed to achieve. Broader and less specific than objectives, goals are usually not

measurable and may not have specific dates by which they must be reached. Objectives are developed by first understanding one's goals.

GRADIENT: Rate of regular or graded ascent or descent.

GRAZING PERMIT/LEASE: Official written permission to graze a specific number, kind, and class of livestock for a specified time period on a defined rangeland.

GULLIES: A furrow, channel or miniature valley cut by concentrated runoff, usually with steep sides through which water commonly flows during and immediately after rains or snow melt.

HYDROLOGIC CYCLE: The circuit of water movement from the atmosphere to the earth and its return to the atmosphere through various stages or processes, such as precipitation, interception, runoff, infiltration, percolation, storage, evaporation and transpiration.

INFILTRATION: The downward entry of water into the soil or other material.

INTERDISCIPLINARY TEAM: A team of varied land use and resource specialists formed to provide a coordinated, integrated information base for overall land use planning and management.

INTERESTED PUBLIC: An individual, group or organization that has submitted a written request to the authorized officer to be provided an opportunity to be involved in the decision-making process for the management of livestock grazing on specific grazing allotments or has submitted written comments to the authorized officer regarding the management of livestock grazing on a specific allotment.

LANDFORM: A discernible natural landscape that exists as a result of geological activity such as a plateau, plain, basin, or mountain.

LENTIC: Standing water riparian-wetland areas such as lakes, ponds, seeps, bogs, and meadows.

LITTER: The uppermost layer of organic debris on the soil surface, essentially the freshly fallen or slightly decomposed vegetative material.

LOTIC: Running water riparian-wetland areas such as rivers, streams and springs.

MANAGEMENT ACTIONS/PRACTICES: Actions or practices that improve or maintain basic soil and vegetation resources. Rangeland practices typically consist of watershed treatments (planting, seeding, burning, rest, vegetation manipulation, grazing management) in an attempt to establish desired vegetation species or communities.

NONFUNCTIONAL: Riparian-wetland areas are considered to be in nonfunctioning condition when they don't provide adequate vegetation, landform, or large woody debris to dissipate stream energy associated with high flows and thus are not reducing erosion, improving water quality, or other normal characteristics of riparian areas. The absence of certain physical attributes such as a flood plain where one should be are indicators of nonfunctioning conditions.

NOXIOUS WEED: A weed arbitrarily defined by law as being especially undesirable, troublesome, and difficult to control.

NUTRIENT CYCLE: The process of use, release and reuse of elements by plants and animals through uptake by incorporation into and decomposition of organisms. Elements involved in

nutrient cycling remain in the vicinity of the earth's surface.

OBJECTIVES: The planned results to be achieved within a stated time period. Objectives are subordinate to goals, more narrow in scope, and shorter in range. Objectives must specify time periods for completion, and products or achievements that are measurable.

PERMEABILITY: The ease with which gases, liquids (water), or plant roots penetrate or pass through a bulk mass of soil or a layer of soil. Since different soil horizons vary in permeability, the particular horizon under question should be designated.

PERMITTED LIVESTOCK USE: The forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and is expressed in animal unit months (AUMs).

PLANT PEDESTALING: A condition where the soil has eroded from around individual plants or other objects such as small rocks, leaving them on small pedestals of soil. Sometimes the result of frost heaving.

PROPERLY FUNCTIONING:
Riparian-wetland areas are functioning properly when adequate vegetation, landform, or large woody debris is present to dissipate stream energy associated with high waterflows, thereby reducing erosion and improving water quality; filter sediment, capture bedload, and aid floodplain development; improve floodwater retention and groundwater recharge; develop root masses that stabilize streambanks against cutting action; develop diverse ponding and channel characteristics to provide the habitat and the water depth, duration, and temperature necessary for fish production, waterfowl breeding, and other uses; and support greater biodiversity. The functioning condition of riparian-wetland areas is influenced by geomorphic features, soil, water, and vegetation.

Uplands function properly when the existing vegetation and ground cover maintain soil conditions capable of sustaining natural biotic communities. The functioning condition of uplands is influenced by geographic features, soil, water, and vegetation.

RESOURCE ADVISORY COUNCIL (RAC): A citizen-based group of 10 to 15 members chartered under the Federal Advisory Committee Act and appointed by the Secretary of the Interior to forward advice on public land planning and management issues to the BLM. Council membership reflects a balance of various interests concerned with the management of the public lands and users of the public lands.

RILL EROSION: Removal of soil by running water forming shallow channels that can be smoothed out by normal cultivation.

RIPARIAN AREA: An area of land directly influenced by permanent water. It has visible vegetation or physical characteristics reflective of permanent water influence. Lake shores and streambanks are typical areas. Excluded are such sites as ephemeral streams or washes that do not exhibit the presence of vegetation dependent on free water in the soil.

SEASON OF USE: The time during which livestock grazing is permitted on a given range area, as specified in the grazing permit.

SEEPS: Wet areas, normally not flowing, arising from an underground water source.

SINUOSITY: The ratio of stream length between two points divided by the valley length between the same two points.

SOIL MOISTURE STORAGE: The water content stored in a soil.

SPECIAL STATUS SPECIES: Plant or animal species listed as threatened, endangered, candidate, or sensitive by Federal or State governments.

STRUCTURAL DIVERSITY: The diversity of the composition, abundance, spacing, and other attributes of plants in a community.

TERMS AND CONDITIONS: Stipulations contained in livestock grazing permits and leases as determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by BLM and to achieve standards for rangeland health and ensure conformance with guidelines for grazing administration.

TREND: The direction of change over time, either toward or away from desired management objectives.

WIDTH/DEPTH RATIO: Bankfull stream width divided by average depth.

UPLANDS: Land at a higher elevation than the alluvial plain or low stream terrace; all lands outside the riparian-wetland and aquatic zones.

WETLANDS: An area that is inundated or saturated by surface or ground water at a frequency and duration sufficient to support and which, under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands include marshes, shallows, swamps, lake shores, bogs, muskegs, wet meadows, estuaries and riparian areas.