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July 5, 2023

U.S. Department of the Interior
Tracy Stone-Manning, Director
Bureau of Land Management
1849 C St. NW, Room 5646
Washington, D.C. 20240
Via Eplanning and FedEx

Attention: 1004-AE92

SUBMITTED VIA Federal eRulemaking Portal (https://www.regulations.gov)

Re: Comments on Proposed Conservation and Landscape Health Rulemaking under the Federal Land Policy and Management Act of 1976

Dear Director Stone-Manning:

The Western Environmental Law Center ("WELC"), along with Amigos Bravos, Center for Biological Diversity, Citizens Caring for the Future, Citizens for a Healthy Community, Friends of the Earth, Conservation Voters New Mexico, Interfaith Power & Light: New Mexico & El Paso Region, Montana Environmental Information Center, Sierra Club, Western Watersheds Project, WildEarth Guardians, and Wilderness Workshop (collectively "Citizen Groups"), submit these comments on the proposed Conservation and Landscape Health Rulemaking under the Federal Land Policy and Management Act of 1976 (the "Public Lands Rule").[1] Our organizations are deeply rooted in the Western U.S. and value federal public lands as a cornerstone of our region's ecology, economy, and communities. We appreciate the opportunity to provide comments and recommendations.

We commend the Bureau of Land Management ("BLM") for initiating this rulemaking as a mechanism to fulfill the Federal Land Policy and Management Act of 1976's ("FLPMA's") promise. We also commend the proposed rule's focus on ecosystem resilience and the protection of intact landscapes as a sensible expression of FLPMA's conservation-centered directives. For far too long, these directives have been subordinated if not outright ignored in favor of private interests, such as the fossil fuel industry, who extract and profit from public lands at great cost to the public interest. It is a brittle wall.

[1] A list of all exhibits included in this comment is attached as **Appendix A**.

We are, however, deeply concerned that the proposed rule provides brittle and insufficient guardrails for purposes of implementation and will succumb to chronic agency challenges that have plagued BLM's management of public lands for decades. In saying this, we do not slight BLM's hard-working, stewardship-oriented staff. The agency, over its lifetime, has been under-resourced and buffeted by political cross-pressures. It deserves a robust, clear, and enforceable framework that provides agency officials with the capacity to deliver on FLPMA's promise to conserve public lands in the public interest. This should be done in the rule itself, not deferred to subsequent instruction memoranda or other policies that cannot fix problems with the proposed rule itself and often prove ephemeral with political shifts, which undermine long-sighted, science-based public lands planning and management.

Below, we provide comments and recommendations in service of achieving that aim. In summary:

- **Section I:** Provides a discussion regarding the proposed rule's legal foundation and recommends that BLM expressly acknowledge that the rule is premised on the agency's responsibility and authority as conferred by the U.S. Constitution's Property Clause and can be strengthened by reference to the National Environmental Policy Act.
- **Section II:** Provides comments and recommendations regarding the proposed rule on a section-by-section basis, including specific changes and additions to the proposed rule's language with an eye towards effective implementation.
- **Section III:** Provides comments and recommendations regarding environmental justice.

If you have any questions or would like to discuss these comments further, please do not hesitate to contact us.

Sincerely,

Erik Schlenker-Goodrich
Executive Director
Western Environmental Law Center

On behalf of:

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COMMENTS ON BLM PROPOSED PUBLIC LANDS RULE

July 5, 2023

I. THE LEGAL FRAMEWORK GOVERNING THE PROPOSED RULE IS EXPANSIVE AND SHOULD BE MORE PURPOSEFULLY WOVEN INTO THE PUBLIC LANDS RULE

BLM holds the responsibility and authority to conserve public lands in the public interest. BLM serves as a trustee of public lands and the rich sweep of ecological, environmental, and other resource values these lands hold. In this context, the proposed rule's focus on ecosystem resilience and the protection of intact landscapes is a highly sensible, science-based, and legally well-founded expression of the agency's authority and responsibility. It provides the agency with the opportunity to plan for and manage public lands in service of the public interest.

The U.S. Constitution's Property Clause is the starting point for this conclusion.[2] The Property Clause confers upon Congress the "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[3] As the Supreme Court of the United States teaches, "while the furthest reaches of the power granted

[2] For a summary of the expansive legal authorities delegated to Interior under FLPMA, as well as BLM's authority to require mitigation of impacts resulting from its land use authorizations, see recently reinstated Solicitor's Opinion M-37039, The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations through Mitigation (Dec. 21, 2016).
[3] U.S. CONSTITUTION, Art. IV., Sec. 3, Cl. 2.

by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is *without limitations*.'"[4]

Similarly, as Interior's Solicitor explained in 2016, "[t]he Supreme Court has long recognized that Congress exercises plenary power over the use of and activities on federal property. The capacious scope of this authority reflects the United States' dual role as both proprietor and regulator of federal lands."[5] Such "plenary" and "capacious" constitutional power that is, per *Kleppe*, is "without limitations," underscores the immense opportunity to center public lands as a cornerstone of conservation and climate action.[6]

This is particularly important given the Supreme Court's aggressive efforts to erode otherwise long-settled precedent regarding the legal authority held by BLM's sister agencies, such as the Environmental Protection Agency ("EPA"), to protect the environment. With the Supreme Court actively weakening federal environmental protections, it is more important than ever for BLM to assert its constitutional power to conserve public lands and protect the environment from harms caused by public lands uses.

We thus strongly encourage BLM to expressly acknowledge BLM's authorities and responsibilities conferred by the Property Clause in the final rule's preamble and to consider ways that these authorities and responsibilities should underpin the rule's scope and implementation. For it is with the backing of the Property Clause's "plenary" and "capacious" powers that FLPMA directs BLM to manage federal public lands and resources pursuant to a "multiple use" and "sustained yield" approach, which requires a "delicate balancing" of competing uses.[7]

Under the broad rubric of "multiple use," BLM is charged with the responsibility to manage public lands and resources to "meet the present and future needs of the American people" while "conform[ing] to changing needs and conditions … tak[ing] into account the long-term needs of future generations."[8] Ultimately, the multiple use mandate underpins the agency's broad stewardship responsibility to pursue the "harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment."[9] This long-sighted mandate is also reflected in a "sustained yield" mandate

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[4] *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (emphasis added).
[5] Solicitor's Opinion M-37039 at 9, *available at* https://www.doi.gov/sites/doi.gov/files/m-37039-the-blms-authority-to-address-impacts-of-its-land-use-authorizations-through-mitigation.pdf.
[6] "MLA is compatible with FLPMA's multi-faceted balancing of resources and consideration of long-term protection and preservation of the public's resources. Thus, when the BLM authorizes activities on public lands under a particular statute, such as the MLA, the BLM may also exercise its general authority under FLPMA to apply appropriate mitigation to avoid, minimize, or compensate for impacts." Solicitor's Opinion M-37039 at 27.
[7] *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009).
[8] 43 U.S.C § 1702(c).
[9] *Id*. "The principle of 'multiple use' therefore requires consideration of both the interests of current and future generations; the definition expressly mentions the future twice and prohibits permanent impairment to the productivity of the land and the quality of the environment. It also provides for consideration of development uses ('range, timber, minerals'), as well as recreational uses and conservation ('watershed, wildlife and fish, and natural scenic, scientific and historical values'). By creating such a bold, forward-looking stewardship mandate, Congress granted the BLM broad discretion to chart a course for public lands that accounts for development, conservation, and long-term management." Solicitor's Opinion M-37039 at 7–8.

which obliges BLM to take the long view and to satisfy the multiple use mandate "in perpetuity."[10]

Conservation—now and for future generations—is at the heart of these mandates. In managing public lands for multiple use and sustained yield, FLPMA expressly requires:

> the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.[11]

First, FLPMA directs Interior to engage in resource management planning.[12] Through planning, Interior meets the multiple use directive "to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions."[13] In other words, FLPMA directs Interior to account for the world as it is (not how it once may have been), empowering it to directly and proactively account for emergent and intensifying threats to public lands, such as from the climate crisis. In planning, BLM must, *inter alia*:

- "[U]se and observe the principles of multiple use and sustained yield";
- "[U]se a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences";
- "[C]onsider present and potential uses of the public lands";
- "[C]onsider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values"; and
- "[W]eigh long-term benefits to the public against short-term benefits."[14]

These provisions, distilled to their essence, provide BLM with the responsibility and authority to take a long-sighted, conservation-focused view through planning to shape subsequent implementation-level decision-making. They also substantiate the sensibility and

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[10] 43 U.S.C. § 1702(h) (emphasis added). "The term cautions against managing public lands for the short-term expediencies of the day, and, as the Supreme Court has explained, 'requires the BLM to control depleting uses over time, so as to ensure a high level of valuable uses in the future.' [citing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004).] Because the term 'sustained yield' expressly incorporates principles of 'multiple use,' its reference to perpetually maintained 'output' accounts for impacts to both developable resources, such as timber for harvest, and environmental resources, such as watersheds and wildlife. Principles of sustained yield, like principles of multiple use, do not elevate certain uses over others, but rather, delegate discretion to the BLM to manage public lands in the best interests of the American people today, tomorrow and into the future." Solicitor's Opinion M-37039 at 8–9.

[11] 43 U.S.C. § 1701(a)(8).

[12] 43 U.S.C. § 1712.

[13] 43 U.S.C. § 1702(c).

[14] 43 U.S.C. §§ 1712(c)(1)–(2) & (5)–(7).

logic behind the proposed rule's focus on ecosystem resilience and intact landscapes. This focus intrinsically reflects a "systematic interdisciplinary approach" and an "integrated consideration" of the sciences. It also positions BLM well, especially given changing climatic conditions that compel a transition from fossil fuels, to assess the "present and potential uses of the public lands" and the "relative scarcity of the values involved" given changing climatic conditions, and to thereby "weigh long-term benefits to the public against short-term benefits" of specific management approaches and actions. Historically, BLM has flouted this perspective, as illustrated by age-old characterizations of the agency as the "Bureau of Livestock and Mining," a characterization appallingly evidenced in the 90% of public lands now available for oil and gas leasing despite the climate crisis.

Second, FLPMA directs BLM to "regulate, through easements, permits, leases, licenses, and published rules, or other instruments, the use, occupancy, and development of public lands."[15] In doing so, FLPMA charges Interior with several key non-discretionary duties:

- "[B]y regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands";[16] and
- Manage public lands "without permanent impairment of the productivity of the land and quality of the environment."[17]

These provisions reflect BLM's dual constitutional responsibilities: to manage public lands as the land's owner in trust (for the American people) *and* as the land's principal regulator. The proposed rule's central focus on ecosystem resilience and intact landscapes allows BLM to untangle the complexity of these dual roles to ensure that any authorized use of the public lands inures to the benefit of the public as a whole, not to any particular industry or private interest. This is distinct from private lands, where a property owner, within limits, can prioritize their economic or use interest in a piece of property over the public's interest in that property. FLPMA—rooted in the Constitution's Property Clause—forbids that tradeoff.

The National Environmental Policy Act ("NEPA"), which BLM should also expressly acknowledge in the preamble to its final rule as underlying authority, reinforces FLPMA's public interest thrust. Section 102 of NEPA directs that, "to the fullest extent possible," FLPMA (amongst other "policies, regulations, and public laws of the United States") "*shall be interpreted and administered* in accordance with [section 101 of NEPA]."[18] Section 101(a), in turn, provides that:

> [I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man [*sic*] and nature can exist in

[15] 43 U.S.C. § 1732(b).
[16] 43 U.S.C. § 1732(b).
[17] 43 U.S.C. § 1702(c).
[18] 42 U.S.C. § 4332(1) (emphasis added).

productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[19]

Section 101(b) further directs BLM to use "all practicable means" to:

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive and aesthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.[20]

We emphasize that BLM is *obliged* to interpret and administer FLPMA in accord with these directives – directives that actively provide BLM with the duty and authority to strengthen the proposed rule's focus on ecosystem resilience and the conservation of intact landscapes.

As fundamental as all of these responsibilities are to BLM's mission, it is remarkable and indeed rather shocking that the agency has never promulgated rules interpreting and administering (consistent with NEPA) FLPMA's conservation-centered authorities across the public lands system as a whole. This is particularly so relative to the agency's non-discretionary duties to manage public lands "without permanent impairment" and to "prevent unnecessary or undue degradation."[21] This is in contrast to BLM's promulgation of extensive and specific rules governing the extraction of public lands resources for profit or use. For example, BLM has promulgated rules that implement the Mineral Leasing Act of 1920's ("MLA") oil and gas leasing and permitting directives.[22] Those rules, coupled with the absence of FLPMA-based conservation rules, create an asymmetry in Interior's planning and management framework that favors oil and gas development at the expense of other public resource values. In other words,

[19] 42 U.S.C. § 4331(a).
[20] 42 U.S.C. § 4331(b).
[21] Of note, Interior has promulgated rules to implement its duty to prevent unnecessary or undue degradation in the distinct context of hardrock mining. *See* 43 C.F.R. § 3809.1.
[22] *See* 43 C.F.R. Subt. B, Ch. II, Subch. C, Part 3100 (general oil and gas leasing rules), Part 3110 (noncompetitive oil and gas leasing rules), Part 3120 (competitive oil and gas leasing rules), Part 3150 (oil and gas geophysical exploration rules), Part 3160 (oil and gas operations rules), and Part 3170 (oil and gas production measurement and waste rules).

BLM, absent conservation-centered FLPMA rules, is deprived of its ability to strike the "delicate balance" required by FLPMA's multiple use-sustained yield mandate.[23]

The draft rule begins to right this ship by proposing FLPMA-based rules that are *intended* to place conservation on equal footing with extractive uses. However, *intent* is distinct from *result*. It is far from clear to us how the proposed rule's intent will in fact produce desired results. We therefore encourage BLM to think through, pragmatically, how it can strengthen the rule to better operationalize the rule's focus on ecosystem resilience and the conservation of intact landscapes. We submit that this can and must be done by leveraging FLPMA's non-discretionary duties to prevent permanent impairment and unnecessary or undue degradation, duties that provide non-negotiable public land planning and management guardrails. This must be done in the rule itself, not deferred to subsequent instruction memoranda or other policies that are difficult to enforce and cannot remedy what is either flawed or missing from the rule itself.

Clarity, in the rule and its implementation, is thus essential. Unfortunately, BLM public lands management decisions have typically lacked clarity. Rather than BLM connecting the dots to communicate the agency's decision and the basis for that decision, the public is typically left to do that work. Agency decisions routinely lack an articulated and rational connection between the facts the agency has found through its decision-making process, the agency's actual decision, and a written finding that shows how the decision conforms to FLPMA's duties to prevent permanent impairment, unnecessary degradation, or undue degradation. This has exacerbated and politicized resource conflicts, reduced confidence in BLM's planning and decision-making capacity, and exposed BLM decisions to legal challenge.[24]

The rule's framework for implementation must therefore be strengthened. BLM officials should be directed, *by the rule*, to provide a clear, express, and written finding that any decision they make conforms to FLPMA. That finding must rationally connect the facts found by the agency (e.g., through an environmental review) with the decision itself (e.g., a decision to approve, approve with conditions, or deny a particular use authorization).[25] This would serve as a key mechanism to verify whether, as FLPMA promised nearly a half century ago, that conservation is *in fact* on an equal footing with extractive public lands uses. It would also improve the predictability of agency decisions and provide assurances to the public that BLM's decisions are science-based and well-grounded in the agency's legal responsibilities and authorities. Absent that mechanism, the rule risks wasting time and effort making promises the BLM cannot keep.

Our recommendations thread this core administrative law mechanism throughout the rule and thereby furthers the rule's intent by setting the stage for durable results that *in fact* foster ecosystem resilience and the conservation of intact landscapes.

II. RECOMMENDED CHANGES TO THE PROPOSED RULE

[23] *Richardson*, 565 F.3d at 710 (FLPMA does not require development or other uses to "be accommodated on every piece of land; rather, delicate balancing is required.").
[24] *See, e.g., Dakota Resource Council v .U.S. Dept. of Int.*, 1:22-cv-01853-CRC (D.D.C.); *Ctr. for Biological Diversity v. U.S. Dept. of Int.*, 1:22-cv-01717-TSC (D.D.C.).
[25] *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Recommended section-by-section improvements to the proposed rule are provided below. Our recommendations seek to constructively conform the rule to FLPMA's legal duties and to further the agency's well-reasoned and central focus on ecosystem resilience and the conservation of intact landscapes.

Our recommendations also constructively strengthen the rule by defining key terms, cross-referencing such terms in each section in a clear and consistent fashion, and, most importantly, strengthening the rule's structure and provisions with an eye towards effective implementation and achieving tangible, real-world results.

Proposed additions to the proposed rule are identified with underline. Proposed deletions are identified with ~~strikethrough~~.

A. Section 6101.1 Purpose

BLM is, for the first time, promulgating rules to conform public lands planning and management with FLPMA's core conservation-centered mandates, in particular its duties to prevent permanent impairment (43 U.S.C § 1702(c)), unnecessary degradation (43 U.S.C. § 1732(b)), or undue degradation (43 U.S.C. § 1732(b)). We think it logical and essential for BLM to reference those mandates in the rule's purpose. The rule's purpose should also acknowledge the federal government's environmental justice commitments, which we discuss in more depth below. Accordingly, we recommend the following addition to Section 6101.1:

> The BLM's management of public lands on the basis of multiple use and sustained yield relies on healthy landscapes and resilient ecosystems. The purpose of this part is to promote the use of conservation to ensure ecosystem resilience, prevent permanent impairment, unnecessary degradation, or undue degradation of the lands, and achieve environmental justice. This part discusses the use of protection and restoration actions, as well as tools such as land health evaluations, inventory, assessment, and monitoring.

B. Section 6101.2 Objectives

Given FLPMA's plain language, BLM should explicitly acknowledge that the rule's objectives are to prevent permanent impairment (43 U.S.C § 1702(c)), unnecessary degradation (43 U.S.C. § 1732(b)), or undue degradation (43 U.S.C. § 1732(b)), and to achieve environmental justice. To do this, we recommend the addition of two new subsections, (g) and (h). We also recommend changes to improve the cohesion and consistent use of terminology in the rule as a whole and a new subsection (i) to reflect our recommendations regarding the need and opportunity to set the stage for the rule's effective implementation. In sum, our recommended changes to Section 6101.2 are as follows:

> The objectives of these regulations 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 resilient ecosystems ~~resilience~~ and intact landscapes, including the connectivity of ecological structure, processes, attributes, and functions within and across ecosystems;

(c) Integrate the fundamentals of land health and related standards and guidelines into resource management;

(d) Incorporate inventory, assessment, and monitoring principles into decisionmaking and use this information to identify trends and implement adaptive management strategies;

(e) Accelerate restoration and improvement of impaired or 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.

(g) Prevent permanent impairment, unnecessary degradation, or undue degradation of the lands;

(h) Achieve environmental justice; and

(i) Improve the clarity of Bureau programs and decision-making by rationally connecting decisions to environmental reviews and associated inventory, assessment, and monitoring information.

C. Section 6101.3 Authority

While FLPMA is BLM's organic statute, Section 101 of NEPA establishes the Federal government's overarching environmental policy. Section 102 operationalizes that policy by providing that, "to the fullest extent possible," FLPMA "*shall be interpreted and administered* in accordance with [section 101 of NEPA]."[26] NEPA should therefore be expressly identified in Section 6101.3 as a mechanism to ensure the rule is in fact "in accordance with" Section 101 of NEPA and to strengthen the rule's legal basis. Absent NEPA's inclusion, BLM's ability to leverage or claim it has adhered to NEPA's mandate is weakened. We recommend the following:

These regulations are issued under the authority of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.) as amended; the National Environmental Policy Act of 1970 (42 U.S.C. 4321 et seq.) as amended; and section 2002 of the Omnibus Public Land Management Act of 2009 (16 U.S.C. 7202).

D. Section 6101.4 Definitions

[26] 42 U.S.C. § 4332(1) (emphasis added).

At present, we find the proposed rule's use of terminology confusing. Different sections of the proposed rule use different terms, many of which are not defined, or use the same terms in what appear to be different ways. Further, the relationship and distinction between different sections, namely "principles for ecosystem resilience" (Section 6101.5), "protection of intact landscapes" (Section 6102.1), "management to protect intact landscapes" (Section 6102.2), "management actions for ecosystem resilience" (Section 6102.5), and "tools for achieving ecosystem resilience" (Section 6103.1), is confusing, made worse by the inclusion of some but not all key terms used in these sections in the definitions section (Section 6101.4). In total, the rule suffers from a lack of structural and terminological clarity. It reads like a patchwork of disparate, loosely related provisions written by different authors – not a coherent, consistent whole. This risks unpredictable and widely varying implementation that undermines the rule's intent to provide for ecosystem resilience and the conservation of intact landscapes.

To address this concern, we strongly encourage BLM to refine and expand the rule's definitions section. In particular, BLM must define key and otherwise contested statutory terms, namely "permanent impairment," "unnecessary degradation," and "undue degradation." These are fundamental, statutory terms of art that demand definition to provide BLM and the public with clarity once the agency turns to implementation. We further encourage BLM to use these terms consistently to strengthen the rule's overall clarity, improve the predictability and consistency of the rule's implementation by agency field offices, and deliver on FLPMA's promise to conserve public lands in the public interest.

Recommendations regarding specific terms follow.

1. Conservation

FLPMA directs BLM to, *inter alia*, manage public lands for "wildlife and fish," "provide food and habitat for fish and wildlife," and "preserve and protect certain public lands in their natural condition," and manage public lands "without permanent impairment … of the quality of the environment."[27] In other words, FLPMA charges BLM to manage public lands for biodiversity. If public lands lack native fish and wildlife, then the inescapable conclusion is that those lands have suffered permanent impairment, unnecessary degradation, or undue degradation. Such lands are therefore ripe for action to remove vectors of harm, better mitigate harm, or intervene through active restoration as a way to foster the conditions necessary to safeguard fish and wildlife.

The rule's definition of "conservation" should therefore include "biodiversity." This would reflect the importance of not only individual wildlife and fish species, but the *relationship* of those species with each other and public lands as a fundamental element of ecosystem resilience. BLM acknowledges this dynamic elsewhere in the proposed rule in defining an "intact landscape" as "large enough to maintain native biological diversity, including viable populations of wide-ranging species," and it should be reflected in the rule's definition of conservation.

Further, BLM should clarify that the protection and restoration of intact landscapes is a means of maintaining resilient ecosystems. We recommend also aligning this definition with the

[27] 43 U.S.C. §§ 1701(a)(8), 1702(c).

definition of "resilient ecosystems" by referencing the constituent parts of such ecosystems, namely ecological structure, processes, attributes, and functions.

In sum, we recommend the following:

> *Conservation*: means ~~maintaining~~ the protection or restoration of intact landscapes, biodiversity, and resilient~~, functioning~~ ecosystems, including those ecosystems' ~~by protecting or restoring natural habitats, and ecological~~ structure, processes, attributes, and functions.

2. Landscape-Scale Approach

We strongly encourage BLM to apply a landscape-scale approach to acknowledge the interplay of resource planning and management at broad geographic and temporal scales with specific conservation and other multiple uses at more granular, site-specific scales. This is a function of well-established science, including relative to intensifying ecological stressors such as climate change. As the International Panel on Climate Change ("IPCC") instructs:

> The resilience of species, biological communities and ecosystem processes increases with [the] size of natural area[s], by restoration of degraded areas and by reducing non-climatic stressors … To be effective, conservation and restoration actions will increasingly need to be responsive, as appropriate, to ongoing changes at various scales, and plan for future changes in ecosystem structure, community composition and species' distributions, especially as 1.5°C global warming is approached and even more so if it is exceeded.[28]

We therefore recommend that BLM provide a definition of landscape-scale approach as follows:

> *Landscape-scale approach* means planning and decisionmaking across broad geographic and temporal scales that more granular geographic and temporal scales tier to as a mechanism to conserve ecosystem resilience and specific ecological and environmental values.

3. Mitigation

We appreciate BLM's inclusion of the well-established mitigation hierarchy in its definition of mitigation. The proposed rule, however, kneecaps the purpose and intent of the mitigation hierarchy by vaguely and without explanation stating that it only "generally applies." This language is a recipe for mischief.

The final rule should clarify that the hierarchy is non-negotiable: action to avoid impacts must be considered first. Where impacts cannot be avoided—but it is legally permissible for a proposed action to move forward—then the agency must minimize, rectify, or otherwise reduce or eliminate impacts. Where that is not possible—and where, again, it is legally permissible for a

[28] **Exhibit 1**, IPCC, 2021: Summary for Policymakers and Technical Summary, C.2.4, available at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf.

proposed action to move forward—then, and only then, should the agency consider compensatory action. Accordingly, we recommend that the definition of mitigation be changed as follows:

> Mitigation means, in sequence of priority:
>
> > (1) Avoiding the impacts of a proposed action by not taking a certain action or parts of an action;
> >
> > (2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
> >
> > (3) Rectifying the impact of the action by repairing, rehabilitating, or restoring the affected environment;
> >
> > (4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
> >
> > (5) Compensating for the impact of the action by replacing or providing substitute resources or environments.
>
> ~~In practice, the mitigation sequence is often summarized as avoid, minimize, and compensate. The BLM generally applies m~~Mitigation shall be applied hierarchically: BLM must first avoid impacts, then minimize impacts, then rectify impacts, and then compensate for any residual impacts from proposed actions.

We urge BLM to mandate use of the mitigation hierarchy. But to the degree BLM has a (yet to be disclosed) rational basis for deviating from the mitigation hierarchy, the rule should be modified as follows:

- First, the rule should provide crystal clear criteria providing that any deviation from the mitigation hierarchy must be an exception, not the rule, and explicitly and narrowly state what situations would warrant such a deviation.

- Second, where it is unclear what level of mitigation would be required to address site-specific impacts, such as when BLM issues an oil and gas lease that confers surface or subsurface use rights, the agency must expressly retain the legal authority to impose site-specific mitigation on the basis of site-specific NEPA. In other words, BLM cannot confer site-specific use rights without first considering the need for site-specific mitigation. This is not a hypothetical concern: BLM routinely confers oil and gas lease rights without knowing where, when, or how development will proceed but, by virtue of conferring those rights, limits the agency's mitigation authority once development plans crystallize at the drilling stage.[29] This is a mistake.

- Third, the rule should obligate BLM to substantiate, in the record, why the agency deviated from the mitigation hierarchy and how the agency's ultimate choice adheres,

[29] *See* 43 C.F.R. § 3101.1-2 (defining scope of lease rights and BLM's retained, though limited, authorities).

> legally and factually, to exception criteria and the agency's overarching mandates to prevent permanent impairment, unnecessary degradation, or undue degradation.

Absent these changes, BLM's inclusion of "generally applies" creates a problematic ambiguity that will prove confusing to agency officials, risk non-compliance with FLPMA, and substantially increase the probability that specific decisions will prove contentious and expose BLM to litigation.

In the preamble, we also encourage BLM to better explain the relationship between the mitigation hierarchy and the land management approaches of federal, Tribal, state, and local authorities. We suspect this explanation, in the preamble, could create opportunities to foster cross-jurisdictional, landscape-scale approaches to conserve ecosystem resilience and intact landscapes. We encourage, in particular, improved landscape-scale coordination, the use of layered protections that employ each government entity's distinct authorities, and the identification of existing or emergent regulatory gaps that require policymaking action.

We emphasize serious regulatory gaps arising from the Supreme Court's decision in *Sackett vs. EPA*, 598 U.S. ___ (2023). *Sackett* severely eroded the jurisdictional reach of the Clean Water Act's protections and will particularly imperil the often arid and semi-arid Western U.S. that comprise the public lands system by creating a very real risk of unregulated discharges of pollutants. More generally, *Sackett* joins the Supreme Court's recent decision in *West Virginia v. EPA*, 597 U.S. __ (2022) as a presage of further attacks on core bedrock environmental laws in future litigation.

Given that BLM must protect, *inter alia*, "water resource[s]"[30], regardless of the Clean Water Act's jurisdictional reach, BLM can and should leverage its independent constitutional and statutory legal authorities and key management tools to fill any gap in water resource protection that *Sackett* created.

We have two suggestions on this front.

First, BLM should leverage mitigation as a tool to comply with Tribal and state water quality standards. As the Clean Water Act requires, each federal agency, inclusive of BLM:

> (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, *shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution* in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.[31]

Put simply, even if EPA's jurisdictional reach has been slashed, BLM still has a duty to mitigate water resource impacts within the guardrails set by other government entities, in

[30] 43 U.S.C. § 1701(a)(8).
[31] 33 U.S.C. § 1323(a) (emphasis added).

particular states and Tribes, that are not subject to *Sackett*'s erosive effect. BLM can do this by requiring that all land use activities comply with Tribal, interstate, state, and local water resource protections, including Tribal and state water quality standards.

Second, BLM should clearly state that compliance with water resource protections originating with other government entities serves as a *floor* (not a *ceiling*) of public lands water resource protection. In other words, BLM should require or at least retain the authority to impose additional water resource protections to prevent permanent impairment, unnecessary degradation, or undue degradation.

4. Permanent Impairment

The proposed rule perplexingly fails to define "permanent impairment." This is a mistake. FLPMA's directive that BLM manage the public lands "without permanent impairment" is a key statutory guardrail governing multiple use authorizations that Congress left BLM to define. It is referenced on multiple occasions in the proposed rule and animates the proposed rule's central focus on ecosystem resilience and the protection of intact landscapes.

We propose the following definition. Our proposed language clarifies and directly links FLPMA's statutory mandates with the proposed rule's central focus on ecosystem resilience and intact landscapes:

> *Permanent impairment* means the adverse impact of a land use plan, implementation plan, resource management authorization, or management action, that:
>
> > (1) Permanently or significantly disrupts, impairs, or degrades ecosystem resilience, intact landscapes, the connectivity of ecological structure, processes, attributes, and functions, or scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values;
> >
> > (2) Impairs or degrades an ecosystem such that it is no longer able to sustain native biodiversity or environmental justice;
> >
> > (3) Fails to provide for the sustained yield of renewable multiple use resources;
> >
> > (4) Precludes periodic landscape-scale adjustments of multiple uses to:
> >
> > > (i) Conserve ecosystem resilience;
> > >
> > > (ii) Conform to changing needs and conditions determined by consideration of the best available science;
> > >
> > > (iii) Provide for the long-term needs of future generations for renewable and non-renewable resources;

(iv) Account for the relative values of resources; or

(v) Further or achieve environmental justice.

In providing this recommended definition, we note our concern with BLM's apparent understanding of its duty to manage public lands "without permanent impairment." As the preamble explains, "[c]onsistent with applicable law and the management of the area, authorized officers would [] be required to avoid authorizing any use of public lands that permanently impairs ecosystem resilience."[32] However, in the next sentence, the proposed rule hedges, stating that "[p]ermanent impairment of ecosystem resilience would be difficult or impossible to avoid, for example, on lands on which the BLM has authorized intensive uses, including infrastructure and energy projects or mining[.]"[33] The proposed rule's preamble then rewrites FLPMA by stating that the "proposed rule does not prohibit land uses that impair ecosystem resilience; it simply requires avoidance and an explanation if such impairment cannot be avoided.[34] This is *not* what FLPMA commands. FLPMA commands that BLM manage *all* public lands "without permanent impairment of the productivity of the land and quality of the environment."[35] BLM has no authority to authorize or otherwise condone extractive uses that cause permanent impairment (or unnecessary or undue degradation). Where permanent impairment cannot be avoided, incompatible uses cannot, by law, be authorized.

5. Protection

We recommend that BLM align the definition of "protection" with FLPMA's mandates to prevent permanent impairment, unnecessary degradation, or undue degradation as follows:

> *Protection* is the act or process of conservation by preserving the existence of resources and the contribution of those resources to ecosystem resilience and intact landscapes and, further, by preventing ~~while keeping resources safe from~~ permanent impairment, unnecessary degradation, or undue degradation~~, damage, or destruction~~.

By explicitly referencing FLPMA's key statutory terms, which we define elsewhere in these comments, the terms "damage" and "destruction" would be redundant and not needed.

6. Resilient Ecosystems

In defining "resilient ecosystems," BLM should expressly acknowledge ecosystem "attributes," that is, ecological connectivity, spatial heterogeneity, temporal variability, size of the area, functional redundancy, sensitivity to environmental change, intrinsic rate of population growth, and genetic and biodiversity.[36] BLM should also acknowledge that environmental stressors – whether locally-applied pesticides or broader GHG emissions and climate change –

[32] 88 Fed. Reg. 19,592.
[33] *Id.*
[34] *Id.*
[35] 43 U.S.C § 1702(c).
[36] **Exhibit 2,** Jan Cassin, John H. Matthews 2021, Chapter 4 - Nature-based solutions, water security and climate change: Issues and opportunities. Pages 63–79.

can adversely impact resilient ecosystems in direct, indirect, and cumulative ways and that such stressors can and do arise from resource use. Finally, BLM should acknowledge the relationship between resilient ecosystems and environmental justice, given the important relationship between communities, in particular Indigenous and frontline communities, and adjacent or proximate public lands and resources and the basic fact that people are part of ecosystems. We thus recommend the following changes to the definition of "resilient ecosystems":

> *Resilient ecosystems* means ecosystems that have the capacity to maintain and regain their ~~fundamental~~ structure, processes, attributes, and function when altered, whether directly, indirectly, or cumulatively, by ecological and environmental stressors such as resource use and management, drought, wildfire, nonnative invasive species, insects, and other disturbances, and to contribute to environmental justice.

7. Restoration

We appreciate BLM's inclusion of a definition of "restoration." Given the interwoven biodiversity and climate crises, coupled with intensifying human use and occupancy of public lands, we expect that the coming decades will necessitate amplified investment in restoration as a means of attaining and sustaining ecosystem resilience and intact landscapes.

In this context, we think it prudent to acknowledge that restoration can involve active intervention in an ecosystem—for example, watershed restoration actions such as curtailing pollution from abandoned mines, road decommissioning, streambank stabilization and revegetation—as well as the removal, whether permanent or temporary, of stress vectors that impede the ability of an ecosystem to recover on its own. We propose the following changes to the definition of restoration:

> *Restoration* means the process or act of conservation ~~by~~ that assists~~ing~~ in or accelerates the recovery of an ecosystem that has been impaired or degraded~~, damaged, or destroyed~~. Restoration may entail active intervention in an ecosystem at a landscape or project-level scale to ameliorate harm. It may also involve a prohibition on additional uses or activities or the suspension of ongoing uses or activities that cause impairment or degradation to provide an ecosystem with the opportunity to recover on its own.

8. Unnecessary and Undue Degradation

The directive to "prevent unnecessary or undue degradation" is the "heart" of FLPMA's substantive requirements.[37] Written in the disjunctive, BLM must prevent degradation that is "unnecessary" and, separately, degradation that is "undue."[38] Each of these protective mandates applies to all BLM planning and management decisions.[39] Problematically, the proposed rule

[37] 43 U.S.C. § 1732(b); *Mineral Policy Ctr. v. Norton*, 292 F.Supp.2d 30, 33, 41–43 (D.D.C. 2003).
[38] *Id*. at 41–43.
[39] 43 U.S.C. § 1732(a); *see also*, *Utah Shared Access All. v. Carpenter*, 463 F.3d 1125, 1136 (10th Cir. 2006) (finding that BLM's authority to prevent degradation is not limited to the RMP planning process).

collapses the mandate to prevent "unnecessary degradation" with the separate mandate to prevent "undue degradation." This is needlessly confusing.

To address this deficiency, we recommend the final rule strike the proposed definition and separately define the terms "undue degradation" and "unnecessary degradation." This would substantially improve the clarity of the rule consistent with FLPMA's plain language, as reinforced by judicial precedent and authority.

We also recommend that BLM expressly link these terms to BLM-defined expertise and management goals, objectives, thresholds, and standards. Where such goals, objectives, thresholds, and standards are not defined, BLM, to avoid a finding of permanent impairment, would be required to employ the mitigation hierarchy. Consistent with FLPMA's charge that BLM, through planning, coordinate with other relevant Tribal, federal, state, and local agencies, we further recommend language providing that BLM ensure that public lands activities comply, where appropriate, with other governmental requirements. 43 U.S.C. § 1712(b)(9).

Regarding the definition of "undue degradation," we propose the following:

> *Undue degradation* means the adverse impact of a plan, decision, action, or use that:
>
> > (1) Violates a resource condition goal, objective, threshold, or standard established to conserve resilient ecosystems, intact landscapes, the connectivity of ecological structure, processes, attributes, and functions, or scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, or archeological values;
> >
> > (2) In the absence of an identified resource goal, objective, threshold, or standard, threatens or causes a reasonably foreseeable resource impact that is either not mitigated or is not feasible to mitigate, and results in excessive or disproportionate harm.
> >
> > (3) Fails to comply, to the extent consistent with the laws governing the administration of the public lands, with a land use plan, implementation plan, regulation, or standard of other Federal, Tribal, State, or local departments and agencies; or
> >
> > (4) Is not mitigated within a reasonable time.

Our separate proposed definition of "unnecessary degradation," below, hinges off the BLM's defined purpose and need for a proposed project,[40] not the "use's goals," as the proposed rule is currently written. The agency's interests, as expressed in the purpose and need for a planning or decision-making process, should define what is or is not "unnecessary" to ensure that

[40] Provided the purpose and need is not itself defined so narrowly as to constrain NEPA's requisite consideration of a range of reasonable alternatives or sweep aside BLM's responsibilities, pursuant to FLPMA, to, conserve resilient ecosystems and intact landscapes or to prevent permanent impairment, unnecessary degradation, or undue degradation.

FLPMA's spirit, letter, and intent animates decision-making. The risk in using a "use's goals" should be obvious: a "use's goals" are derivative of the "user's" goals—e.g., an oil and gas operator's profit-centered interests when drilling a well—not the public's interest in providing for use that is compatible with FLPMA's conservation-centered guardrails.

Our proposed definition of "unnecessary degradation" also provides that mitigation is appropriate whatever the prospective severity of an adverse impact. FLPMA's mandate to prevent "unnecessary degradation" is not contingent on the severity of harm. If harm can reasonably be avoided, then it must be avoided to comply with FLPMA. Importantly, even minor adverse impacts can, over space or time, prove cumulatively significant.[41]

In this context, we propose the following definition of "unnecessary degradation":

> *Unnecessary degradation* means the adverse impact of a plan, decision, action, or use that:
>
> > (1) Is not needed to accomplish the purpose and need of the plan, decision, action, or use; or
> >
> > (2) Can be but is not avoided or otherwise mitigated.

D. Section 6101.5 Principles for Ecosystem Resilience

The proposed rule sensibly reconciles FLPMA's various and multiple directives beneath the rubric of "ecosystem resilience." We provide several recommendations that would strengthen this concept and produce, through effective implementation, tangible, on-the-ground results.

We specifically recommend that BLM employ ecosystem resilience to align public lands management with U.S. climate commitments. We recommend the use of carbon budgets, which holds the benefit of making use of BLM's existing work to quantify emissions caused by fossil fuel production on public lands and can be readily linked to U.S. and global climate action.

The United States—as a signatory to the United Nations' Paris Agreement—is committed to keeping global temperatures within 2°C of the pre-industrial climate, and preferably within 1.5°C. To do this, the United States has pledged "to achieve a 50-52 percent reduction from 2005

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[41] *See, e.g.*, *CEQ, National Environmental Policy Act Interim Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196, 1201 (Jan. 9, 2023), *available at* https://www.govinfo.gov/content/pkg/FR-2023-01-09/pdf/2023-00158.pdf (recognizing that "diverse individual sources of emissions each make a relatively small addition to global atmospheric GHG concentrations that collectively have a large impact"); *WildEarth Guardians v. BLM*, 457 F. Supp. 3d 880, 894 (D. Mont. 2020) (noting that "the global nature of climate change and greenhouse-gas emissions means that any single lease sale or BLM project likely will make up a negligible percent of state and nation-wide greenhouse gas emissions. Thus, if BLM ever hopes to determine the true impact of its projects on climate change, it can do so only by looking at projects in combination with each other, not simply in the context of state and nation-wide emissions."); *Dine Citizens Against Ruining Our Env't v. Haaland*, 59 F.4th 1016, 1043–44 (10th Cir. 2023) (recognizing that "all agency actions causing an increase in GHG emissions will appear de minimis when compared to the regional, national, and global numbers"); *Id*. at 1047 (recognizing that Hazardous Air Pollutant (HAP) emissions from thousands of wells cumulatively and over time—even if each individual well emits HAPs for "only" 90 days during well construction and completion—can cause significant long-term exposures and health impacts).

levels in economy-wide net greenhouse gas pollution in 2030" and, ultimately, a "net zero emissions economy-wide by no later than 2050."[42]

President Biden has heralded an "all-of-government" approach as a primary way to follow through on this pledge:

> It is the policy of my Administration to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach that reduces climate pollution in every sector of the economy; increases resilience to the impacts of climate change; protects public health; conserves our lands, waters, and biodiversity; delivers environmental justice; and spurs well-paying union jobs and economic growth, especially through innovation, commercialization, and deployment of clean energy technologies and infrastructure.[43]

The Biden administration's commitments and approaches hold the promise—if implemented by all agencies, including BLM—to empower the U.S. to take profound forward steps to address climate change. This reflects the best available science. In April 2022, the International Panel on Climate Change ("IPCC") published its final report in the "scientific trilogy" of working group reports making up the Sixth Assessment Report (AR6).[44] In recognition of the scientific consensus of the urgency at hand, IPCC chair, Hoesung Lee, remarked:

> We are at a crossroads. *This is the time for action*. We have the tools and know-how required to limit warming and secure a liveable future … [H]uman-induced climate change is widespread, rapid, and intensifying. It is a threat to our well-being and all other species. It is a threat to the health of our entire planet. Any further delay in concerted global climate action will miss a rapidly closing window.[45]

Yet, public lands remain a significant contributor to climate change. Oil and gas companies have eagerly exploited BLM's historic, ongoing, and highly permissive approach to oil and gas development of federal public lands and minerals. These companies have acquired oil and gas development rights to 23.7 million acres of federal public lands and operate over 89,000 wells now in production. Oil and gas companies have also stockpiled over 10,000 additional oil and gas drilling permits.[46] Yet fossil fuel development on BLM-administered lands is already responsible for 15.3% of total U.S. GHG emissions, 1.8% of global emissions, and nearly 21%

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[42] **Exhibit 3,** *The United States of America Nationally Determined Contribution - Reducing Greenhouse Gases in the United States: A 2030 Emissions Target*, United Nations Framework Convention on Climate Change, available at https://www.google.com/search?client=safari&rls=en&q=unfccc&ie=UTF-8&oe=UTF-8.

[43] Executive Order 14008, 86 Fed. Reg. 7619–33, Tackling the climate crisis at home and abroad (January 27, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/.

[44] **Exhibit 4**, IPCC, 2022*: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [P.R. Shukla et al. (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA. doi: 10.1017/9781009157926.

[45] Remarks by the IPCC Chair During the Press Conference Presenting the Working Group III Contribution to the Sixth Assessment Report (April 4, 2022) (emphasis added).

[46] BLM Fiscal Year 2022 Oil and Gas Statistics (last visited June 14, 2023).

of all emissions in the U.S. from fossil fuel production.[47] With respect to carbon dioxide, emissions from fossil fuels (coal, oil, fossil gas) produced on federal lands represent a quarter of *all* CO_2 emissions in the U.S.[48]

Fossil fuel infrastructure is an underlying driver of the climate crisis, harms public lands and communities, and saddles state and local governments with an overdependence on highly volatile oil and gas revenue and the political and economic challenges that flow from such overdependence.[49] Yet the proposed rule fails to acknowledge let alone account for the significant contribution of public lands to the climate crisis and related harms. We suspect this omission is a function of political cross pressures.

While we acknowledge those cross pressures, they are neither a valid nor persuasive reason to ignore the elephant in the room—climate change—and the agency's legal responsibility to address climate change with this rulemaking. If anything, omitting serious consideration of the contribution that public lands now make to the climate crisis only suggests, to any federal court that may review this rulemaking, that BLM is hiding the ball. BLM should therefore take a straightforward and legally defensible approach and forthrightly recognize that public lands are both *vulnerable to climate change impacts*, and, through fossil fuel production, *a cause of the climate crisis*. BLM should account for that reality in the rule itself and substantiate in the record how that reality informs the rule. Failing to do so would render the rule suspect, elevate political considerations over FLPMA's plain language, undermine the rule's intent to place conservation on equal footing with other multiple uses, and hamstring the rule's effectiveness and implementation.

Critically, the climate and biodiversity crises are interwoven. As the IPCC notes, "The rise in weather and climate extremes has led to some irreversible impacts as natural and human systems are pushed beyond their ability to act."[50] The IPCC also explains that "[p]rotecting and restoring ecosystems is essential for maintaining and enhancing the resilience of the biosphere … Degradation and loss of ecosystems is also a cause of greenhouse gas emissions and is at increasing risk of being exacerbated by climate change impacts, including droughts and wildfire."[51] Further, "[c]onservation, protection and restoration of terrestrial, freshwater, coastal and ocean ecosystems, together with targeted management to adapt to unavoidable impacts of climate change, reduces the vulnerability of biodiversity to climate change."[52]

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[47] 2021 BLM Specialist Report at Section 9.1 (Representative Concentration Pathways), ("Climate change is fundamentally a cumulative phenomenon, global in scope, and all GHGs contribute incrementally to climate change regardless of scale or origin."); Section 7.1. (BLM Share of 2020 Annual Global and U.S. GHG Emissions), Table 7-1.

[48] **Exhibit 5,** Merrill, M.D., Sleeter, B.M., Freeman, P.A., Liu, J., Warwick, P.D., and Reed, B.C., Federal lands greenhouse gas emissions and sequestration in the United States—Estimates for 2005–14: U.S. Geological Survey Scientific Investigations Report 2018–5131, 31 (2018).

[49] **Exhibit 6,** Albuquerque Journal, *New Mexico faces a budget abyss if oil and gas goes bust* (Jan. 30, 2023).

[50] IPCC, 2021: Summary for Policymakers and Technical Summary, B.1, available at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf, Exhibit 1.

[51] *Id.* at D.4.2.

[52] *Id.* at C.2.4.

Reflecting this scientific consensus, the Biden administration has pledged to protect 30% of the nation's lands and waters by 2030.[53] The "30x30" commitment operates as a stepping-stone toward a larger goal: protection of 50% of the nation's lands and waters by 2050. The sequence of 30x30 and 50x50 milestones is designed to address the interwoven climate and biodiversity crises. Protected public lands, which provide an array of ecological and community goods and services, can bolster landscape-scale resilience and adaptive capacity in the face of a warming climate, benefiting not only ecological systems but human communities that depend on thriving, healthy public lands or are impacted by degraded, exploited public lands. Importantly, "political commitment and follow-through across all levels of government" is essential to realizing these benefits.[54]

In this context—an imperative to reduce greenhouse gas emissions, constrain fossil fuel production, and conserve biodiversity—we make the following recommended changes to Section 6101.5 as follows:

> Except where otherwise provided by law, public lands must be managed under the principles of multiple use and sustained yield.
>
> > (a) To ensure multiple use and sustained yield, the BLM's management must conserve resilient ecosystems as well as the values that compose such ecosystems; ~~the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; preserve and protect certain public lands in their natural condition (including ecological and environmental values); maintain the productivity of renewable natural resources in perpetuity; and consider the long-term needs of future generations, without permanent impairment of the productivity of the land~~.
> >
> > (b) The BLM must conserve renewable natural resources at a level that maintains or improves future resource availability and ecosystem resilience.
> >
> > (c) The BLM must manage public lands and resources consistent with action to hold the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels and to actively pursue efforts to limit the temperature to 1.5 degrees Celsius, including by establishing a carbon budget for each resource management planning area, each resource sector within a planning area, and each specific land use authorization that causes or contributes to such emissions in each planning area.
> >
> > (d~~e~~) Authorized officers must implement the foregoing principles through:

[53] Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad*, Sec. 216.
[54] IPCC, 2021: Summary for Policymakers and Technical Summary, at C.5.1, available at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf, Exhibit 1.

(1) Explicit integration of ~~C~~conservation as a ~~land use within the~~ multiple use ~~framework, including~~ in planning, decisionmaking, and authorization actions~~, and planning processes~~;

(2) ~~Protection and maintenance of the~~ Application of and compliance with the fundamentals of land health to conserve ~~and~~ ecosystem resilience;

(3) ~~Restoration and protection~~ Conservation of public lands, inclusive of public lands that compose or contribute to intact landscapes, to support ecosystem resilience;

(4) Use of ~~the full~~ mitigation ~~hierarchy~~ to address impacts to ~~species, habitats, and~~ ecosystem~~s~~ resilience from planning, decisionmaking, or land use authorizations; ~~and~~

(5) Planning and decision-making that ~~P~~prevents~~ion of~~ permanent impairment, unnecessary degradation, ~~or~~ and undue degradation of ecosystem resilience as well as scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values;

(6) Identifying and adhering to resource condition goals, objectives, thresholds, or standards that conserve ecosystem resilience and scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values;

(6) Tiered landscape-scale and project-level planning and decisionmaking to conserve ecosystem resilience;

(7) Accounting for foreseeable future circumstances and conditions that may affect ecosystem resilience; and

(8) Action that conserves ecosystem resilience as a mechanism to further or achieve environmental justice.

E. Section 6102.1 Protection of Intact Landscapes

We appreciate and support the proposed rule's intent to conserve intact landscapes as a key mechanism to promote ecosystem resilience. This accords with FLPMA's spirit, letter, and intent. We recommend that BLM not imply that such action is limited to "certain" intact landscapes, which suggests that other landscapes can be fragmented to the point they no longer contribute to ecosystem resilience or, before protections can be afforded, must somehow be designated for protection as an "intact landscape."

Instead, BLM should make it crystal clear that the agency must conserve *all* intact landscapes through application of mitigation and other tools, such as Areas of Critical Environmental Concern, that constrain land use impacts within FLPMA's guardrails—even if

this means prohibiting or throttling back certain uses. It also requires that the rule better link the conservation of intact landscapes to the rule's central focus on ecosystem resilience, which necessitates a landscape-scale approach.

(a) The BLM must conserve intact ~~manage certain~~ landscapes ~~to protect their intactness~~. This requires that BLM employ its planning and decisionmaking processes to:

(1) Inventory, identify, and conserve ~~Maintaining~~ intact landscapes ~~ecosystems~~ and the structure, processes, attributes, and function of those landscapes that support resilient ecosystems~~ through conservation actions~~.

(2) Authorize ~~Managing lands strategically for compatible~~ uses that are complementary to or compatible with~~hile~~ the conservation of~~ing~~ intact landscapes and resilient ecosystems~~, especially where development or fragmentation is likely to occur that will permanently impair ecosystem resilience on public lands~~.

(3) ~~Maintaining or restoring~~ Authorize habitat and ecosystem restoration projects that are implemented through a landscape-scale approach to conserve the connectivity of ecological structure, processes, attributes, and functions~~over broader spatial and longer temporal scales~~.

(4) Coordinate~~ing~~ and implement~~ing~~ actions across BLM programs, offices, and partners to protect intact landscapes.

(5) Pursue~~ing~~ management actions that maintain or mimic characteristic disturbance.

(6) Consider landscape-scale networks of protective designations, such as areas of critical environmental concern, that conserve intact landscapes and the connectivity of ecological structure, processes, attributes, and functions.

(7) Mitigate the adverse impacts of all actions that contribute to the impairment or degradation of intact landscapes and the connectivity of ecological structure, processes, attributes, and functions.

(8) Prohibit, suspend, or constrain the timing and magnitude of uses or activities that cause or contribute to the permanent impairment, unnecessary degradation, or undue degradation of either intact landscapes or the connectivity of ecological structure, processes, attributes, or functions;

(9) Promote conservation of intact landscapes as a mechanism to further or achieve environmental justice.

(b) Authorized officers will ~~seek to~~ prioritize actions that conserve and protect intact landscapes in accordance with § 6101.2.

F. Section 6102.2 Management to Protect Intact Landscape

Below, we provide recommendations to improve implementation of the proposed rule's directive to conserve intact landscapes. These recommendations reflect how important it is for the rule to use terminology consistently, more tightly linking this specific section to the rule's central focus on ecosystem resilience and FLPMA's mandates to prevent permanent impairment, unnecessary degradation, or undue degradation, and furthering the administration's commitment to environmental justice.

> (a) When revising a Resource Management Plan under part 1600 of this chapter, authorized officers must use the best available information ~~data~~, including watershed condition classifications, to identify intact landscapes on public lands that will be protected from activities that would permanently or significantly ~~disrupt,~~ impair~~,~~ or degrade the structure, processes, attributes, or function~~sality~~ of ecological or environmental values conserved by and contained within intact landscapes.
>
> (b) During the planning process, authorized officers must determine which, if any, tracts of public land will be put to conservation use. In making such determinations, authorized officers must ~~consider whether~~:
>
> > (1) ~~The BLM can~~ Employ a landscape-scale approach in ~~establish~~ partnership~~s~~ with Tribal, federal, state, and local agencies ~~to work across Federal and non-Federal lands~~ to protect intact landscapes;
> >
> > (2) ~~Multiple lines of evidence~~ Use the best available information to demonstrate ~~indicate~~ that conservation ~~active management~~ is reasonably likely to ~~will~~ improve the resilience of the landscape by enhancing ecological and environmental values or by mitigating ~~through reducing~~ the risk ~~likelihood~~ of permanent impairment, unnecessary degradation, or undue degradation ~~uncharacteristic disturbance~~;
> >
> > (3) Provide for the fair treatment and meaningful involvement of communities ~~The BLM can work with communities~~ to identify geographic areas important for conservation of intact landscapes, economic use of lands and resources, and to further or achieve environmental justice ~~their strategic growth and development in order to allow for better identification of the most suitable areas to protect intact landscapes~~;
> >
> > (4) ~~The BLM can~~ Identify opportunities for co-stewardship with Tribes;
> >
> > (5) Consider opportunities to use ~~C~~conservation leases (see § 6102.4) ~~can be issued~~ to manage and monitor areas within intact landscapes with high conservation value and complex, long-term management needs; and
> >
> > (6) Use ~~S~~standardized quantitative monitoring and best available information ~~is used~~ to track the efficacy ~~success~~ of conservation ~~ecological protection~~ activities designed to protect intact landscapes (see § 6103.3).

(c) When determining whether to acquire lands or interests in lands through purchase, donation, or exchange, authorized officers must prioritize the acquisition of lands or interests in lands that would further protect and connect intact landscapes and thereby better conserve resilient ~~functioning~~ ecosystems or assist in efforts to achieve environmental justice.

(d) Authorized officers must collect and track disturbance data that indicate the direct, indirect, and cumulative impacts ~~disturbance and direct loss of~~ to ecosystems at a watershed scale resulting from BLM-authorized activities. This information must be included in a national tracking system. The BLM must use the national tracking system to mitigate impacts ~~strategically minimize surface disturbance~~ and conserve ecological and environmental values that contribute to intact landscapes and resilient ecosystems~~, including identifying areas appropriate for conservation and other uses in the context of threats identified in watershed condition assessments, to analyze landscape intactness and fragmentation of ecosystems, and to inform conservation actions~~.

G. Sections 6102.3, 6102.3–1, and 6102.3–2 Restoration, Restoration Prioritization, and Restoration Planning

To improve clarity and implementation, we recommend that BLM consolidate and simplify the rule's framework for restoration (Sections 6102.3, 6102.3–1, and 6102.3–2) into a single Section 6102.3. While our proposal for Section 6102.3 is presented as entirely new language, it uses concepts and specific language from the proposed rule, even as it aligns those concepts and language with other recommendations contained elsewhere in our comments. Our recommended and consolidated Section 6102.3 is as follows:

Section 6102.3 Restoration

(a) The BLM shall use restoration as a component of mitigation to:

(1) Conserve resilient ecosystems and intact landscapes; and

(2) Prevent permanent impairment, unnecessary degradation, or undue degradation.

(b) The BLM shall include a restoration plan in any Resource Management Plan adopted or revised in accordance with part 1600 of this chapter. The restoration plan shall:

(1) Use a landscape-scale approach;

(2) Apply to each resource use planned for or authorized by BLM within the planning area, ensuring that once a resource use is concluded, ecological and environmental values adversely impacted by that use are promptly restored;

(3) Provide that BLM, at least every five years, identify and make available to the public a list of priority landscapes for restoration and the specific restoration activities either planned or approved for those landscapes as determined through consideration of:

(i) The best available information, including results from monitoring as well as land health assessments and watershed condition classifications (see subpart 6103 of this part);

(ii) Opportunities to coordinate restoration across administrative and jurisdictional boundaries with other federal agencies, Tribes, states, local governments, and communities;

(iii) Opportunities to create positive social, economic, and environmental justice impacts for local communities;

(iv) The need and opportunity to conserve resilient ecosystems and intact landscapes and to prevent permanent impairment, unnecessary degradation, or undue degradation; and

(v) Changing patterns of resource use.

(4) Identify clear restoration goals, objectives, standards, and expected outcomes that are consistent with the Resource Management Plan;

(5) Identify specific restoration projects or actions and the management tools BLM will employ to implement those projects and actions, such as conservation leases;

(6) Where feasible, identify remedial and contingency measures, pre-approved by the Resource Management Plan contingent on monitoring results, to account for changed circumstances or conditions;

(7) A monitoring plan to track restoration activities that:

(i) Evaluates progress towards goals, objectives, and outcomes and compliance with standards;

(ii) Provides the basis for authorizing pre-approved remedial or contingency measures; and

(iii) Informs adaptive management strategies to address changing circumstances or conditions or to remedy deficient progress towards goals, objectives, and outcomes or non-compliance with standards.

(c) Each activity or use authorized by BLM shall be consistent with the restoration plan and, as appropriate, provide for restoration of ecological and environmental values as a stipulation, term, or condition of the activity or use.

H. Sections 6102.4 Conservation Leases

We appreciate BLM's proposal to establish a mechanism for conservation leasing. This is a necessary step towards placing conservation on an equal footing with other multiple uses, in particular extractive uses such as oil drilling and livestock grazing.

Before delving into the details of the proposed rule, we offer an overarching note of caution: a system of conservation leases should not carry with it any assumption that public lands without conservation leases are sacrifice zones, have less protection than other public lands, or excuse BLM of its constitutional and statutory duties conserve public lands and prevent permanent impairment, unnecessary degradation, or undue degradation. Further, BLM should not use conservation leases to outsource, privatize, or meet any of its duties or obligations under federal environmental laws. Specifically, BLM cannot rely on conservation leases as a basis for complying with the National Environmental Policy Act, Endangered Species Act, Clean Water Act, or other laws.

Additionally, guardrails are necessary to ensure that conservation leasing is not used as mechanism to circumvent BLM's existing tools for avoiding adverse impacts. These tools include administrative withdrawals, the adoption of no-action or no-leasing alternatives, and conditions of approval, such as no-surface occupancy lease stipulations.

Conservation leases can, however, complement BLM action to satisfy its legal obligations and otherwise better conserve public lands. In this context, the rule should maximize the scope of lands available for conservation leasing. It should require that BLM use the resource management planning process, including action to develop mitigation and restoration plans as a component of that process, to prioritize areas for conservation leasing and to guide what types of conservation leases are desired and appropriate. Cases may arise where a conservation lease turns out to be particularly helpful that could not have otherwise been foreseen. For example, an imperiled or sensitive species might be found in the midst of an oil and gas drilling operation on land that would never previously have been considered appropriate for conservation leasing. There may be entities willing and able to assist that species through mitigation or restoration activities despite existing infrastructure and ongoing production.

The final rule should offer a set of conservation actions that it knows are effective, but it should not constrain that list. New and innovative conservation activities are being developed regularly. For example, beaver dam analogs and "Stage 0" stream restoration are only recently enjoying recognition as effective restoration actions. Twenty years ago, they may have been viewed as "too invasive." Opportunities to lease public lands for conservation should be clearly centered on the proposed rule's focus on ecosystem resilience and encourage the application of ongoing scientific discovery, Indigenous knowledge, and lessons learned from mitigation and restoration activities. taken on public lands and on relevant and similar lands.

As discussed herein, *see* Section III. E. 1., pp. 36-38, BLM requests public comment on whether the rule should expressly authorize the use of conservation leases to generate carbon offset credits.[55] The rule should *not* authorize carbon offset credits on conservation leases. Carbon offset credits do little to nothing to reduce GHG emissions or other pollution, exposures, and corresponding health and safety risks and impacts at the original source. These original onsite exposures, risks, and impacts tend to fall disproportionately on people and communities already overburdened by pollution and other environmental and social stressors—a burden both caused and compounded by social and structural inequities.[56] Moreover, carbon offset programs

[55] 88 Fed. Reg. 19,591.
[56] *See infra* at 37-39 and n. 62.

could provide an excuse to intensify or perpetuate polluting activities, such as oil and gas development, that would only further exacerbate the climate crisis.

We also suggest that fees for conservation leases be minimal. *The value of a conservation lease to the public* will generally not provide lease holders with financial remuneration. Rather, conservation lease holders will likely pay out of pocket to benefit the public. This should be taken into consideration when setting fees. In such cases, fees—if any—should be minimal, and provisions should be made for the BLM (or an authorized user of the land, say an oil and gas company whose operations would otherwise adversely impact public lands and resources) to directly pay the leaseholder to do the work. There is already a long and rich tradition of stewardship contracting, and these programs should be designed to complement each other.

There may be an exception to this approach where a conservation lease is sought for the purpose of mitigation of a commercial enterprise elsewhere. For example, if a developer wants to fill a wetland in one place and rehabilitate a wetland somewhere else on BLM public lands, a comparable price could be found by looking at the private market. However, even in such cases, the policy should be to encourage people to benefit the public, not charge them for it.

Relatedly, we emphasize that BLM's duty is not to lease the land to the highest bidder, but to benefit the public interest, including by considering "the relative value of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output."[57] The amount of public benefit provided should weigh heavily in deciding whether to issue a lease and determining lease costs (if any).

I. Section 6102.5 Management Actions for Ecosystem Resilience

The proposed rule's central focus on ecosystem resilience demands effective and predictable implementation that leads to consistent results across BLM planning areas. We are concerned, however, that the proposed rule's framework will run aground of chronic implementation challenges. The following recommendations are provided to remedy this concern and strengthen the proposed rule's framework to deliver predictable and consistent implementation that conserves ecosystem resilience.

We also recommend that BLM *not* "encourage siting of large, market-based mitigation projects" as proposed. We are skeptical, absent further information, of the viability and efficacy of market-based mitigation as applied to public lands. Typically, market-based mitigation has failed to deliver effective results and risks, here, private commodification of public lands and values that may not align with the public's best interests. As FLPMA's definition of multiple use explains, BLM must be attentive to the "*relative values* of the resources and *not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output*."[58]

In this context, we recommend the following changes to Section 6102.5:

(a) Authorized officers must:

[57] 43 U.S.C. § 1702(c).
[58] 43 U.S.C. § 1702(c) (emphasis added).

(1) Conserve ecosystem resilience and prevent permanent impairment, unnecessary degradation, or undue degradation, and achieve environmental justice ~~Identify priority watersheds, landscapes, and ecosystems that require protection and restoration efforts~~;

(2) Identify appropriate quantitative or qualitative landscape-scale resource condition goals, objectives, standards, and thresholds whose exceedance would trigger a finding of permanent impairment, unnecessary degradation, or undue degradation;

(3~~2~~) Develop, prioritize, and implement mitigation and restoration strategies to conform planning and management to all identified resource condition goals, objectives, standards, or thresholds~~, including mitigation strategies, and approaches that effectively manage public lands to protect resilient ecosystems~~;

(4~~3~~) Retain the full authority to deny, mitigate, or otherwise condition a land use authorization until completion of adequate site-specific environmental review;

(5~~3~~) Develop and implement inventory, assessment, and monitoring programs~~, and~~ as well as related adaptive management strategies to assess changing conditions and circumstances pertinent to ecosystem resilience and specific ecological and environmental values ~~for maintaining sustained yield of renewable resources, accounting for changing landscapes, fragmentation, invasive species, and other environmental disturbances~~ (see § 6103.2);

(6~~4~~) Report annually on the results of land health assessments, including in the land health section of the Public Land Statistics;

(7~~5~~) Ensure consistency in watershed condition classifications both among neighboring BLM state offices and with the fundamentals of land health; and

(8~~6~~) Store watershed condition classification data in a national database to determine changes in watershed condition and record measures of success based on conservation and restoration goals.

(b) In taking management actions, and as consistent with applicable law, authorized officers must:

(1) ~~Consistent with the management of the area, avoid authorizing uses of the public lands that~~ Conserve ecosystem resilience, including intact landscapes where appropriate, and prevent permanent~~ly~~ impairment, unnecessary degradation, or undue degradation ~~ecosystem resilience~~;

(2) Promote ~~opportunities to support~~ conservation and other actions that conserve ecosystem resilience ~~work towards achieving sustained yield~~;

(3) Demonstrate, with a written finding made available to the public, that approved management actions and land use authorizations employ enforceable stipulations, terms, or conditions to conform land use to applicable resource condition goals, objectives, standards, and thresholds ~~Issue decisions that promote the ability of ecosystems to recover or the BLM's ability to restore function;~~

(4) Conform management actions, to the fullest extent possible, to section 101 of the National Environmental Policy Act of 1969, or provide a reasoned and informed explanation for any deviation from that policy;

(5~~4~~) Consider opportunities to meaningfully engage ~~Meaningfully consult~~ with Indian Tribes and Alaska Native Corporations during the decisionmaking process on actions that may have a substantial direct effect on the Tribe or Corporation beyond what is legally required;

(6~~5~~) Allow State, Tribal, and local agencies to serve as joint lead agencies consistent with 40 CFR 1501.7(b) or as cooperating agencies consistent with 40 CFR 1501.8(a) in the development of environmental impact statements or environmental assessments;

(7~~6~~) Respect ~~include~~ Indigenous Knowledge, including by:

(i) Encouraging Tribes to suggest ways in which Indigenous Knowledge can be used to inform the development of alternatives, analysis of effects, and when necessary, identification of mitigation measures; and

(ii) Communicating to Tribes in a timely manner and in an appropriate format how their Indigenous Knowledge was included in decisionmaking, including addressing management of sensitive information;

(8~~7~~) Develop and implement mitigation strategies that identify compensatory mitigation opportunities ~~and encourage siting of large, market-based mitigation projects (e.g., mitigation or conservation banks) on public lands where durability can be achieved~~;

(9~~8~~) Consider a precautionary approach for resource use when the impact on ecosystem resilience is unknown or cannot be quantified; and

(10~~9~~) Provide a written, publicly-available finding and justification for decisions that may impair or degrade ecosystem resilience.

(c) Authorized officers must use national, regional, and site-based assessment, inventory, and monitoring data as available and appropriate, along with other high-quality information, as multiple lines of evidence to evaluate resource conditions and inform decisionmaking, specifically by:

(1) Gathering high-quality available data relevant to the management decision, including standardized quantitative monitoring data and data about land health;

(2) Selecting relevant indicators for each applicable management question (e.g., land health standards, restoration objectives, or intactness);

(3) Establishing a framework for translating indicator values to condition categories (such as quantitative-monitoring objectives or science-based conceptual models); and

(4) Summarizing results and ensuring that a clear and understandable rationale is documented, explaining how the data was used to make the decision.

J. Section 6102.5–1 Mitigation

We recommend that BLM substantially strengthen the proposed rule's provisions for mitigation. At present, the proposed rule provides far too much wiggle room to avoid mitigation. This undercuts predictable and consistent field-level action and BLM's ability to conform planning and management to the agency's statutory responsibilities and authorities.

Specifically, our recommendations would make mitigation mandatory and clearly delineate how mitigation is achieved through distinct planning and land use authorization (or implementation) levels. This includes the development of a landscape-scale mitigation plan for each resource management planning area. We also provide for periodic (at least every five years) assessments of the mitigation plan, a recommendation aligned with the proposed rule's analogous provisions for restoration plans.

With mitigation generally, we emphasize how essential it is to align mitigation with the agency's decision-making and environmental review process. Above, we noted concerns that BLM too often authorizes uses or confers use rights—e.g., oil and gas lease rights—that constrain the agency's authority to employ the full range of mitigation that may be demanded to address adverse impacts that are not identified or understood until a specific project that proposes to make use of those authorizations or rights implementation stage—i.e., with oil and gas, the drilling and production stage. This dynamic is exacerbated, relative to oil and gas, by BLM's rule pertaining to surface use rights, 43 C.F.R. § 3101.1-2, which is far from a model of clarity and, though subject to different interpretations, deprives BLM of its full sweep of statutory authorities to mitigate harm once lease rights are conferred.

This dynamic also shows up, if a bit differently, in other resource management situations such as timber sale projects on Oregon and California Railroad Revested Lands. Some BLM districts are in the practice of planning multi-year timber sale projects on these O&C Lands, in some cases to meet an entire decadal Allowable Sale Quantity, while deferring consideration of site-specific impacts until the point of an individual constituent sale. But when that time comes, BLM typically finds the specific sale is consistent with its earlier and broader multi-year analysis without meaningful site-specific analysis to support that conclusion, or robust public involvement. This creates the perception, if not reality, that the specific timber sale is a predetermined outcome.

Even setting that aside, the agency is employing a shell game that serves to divest itself of the responsibility to consider site- and project-specific mitigation that was not contemplated by the earlier and broader multi-year plan and analysis.

We seek to remedy these concerns with the following proposed changes to Section 6102.5-1:

> (a) The BLM shall ~~will generally~~ apply ~~the~~ mitigation to conserve ecosystem resilience and intact landscapes and prevent permanent impairment, unnecessary degradation, or undue degradation. ~~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~~, through:
>
> > (1) Preparation of a landscape-scale mitigation plan in any Resource Management Plan adopted or revised in accordance with part 1600 of this chapter that, based on the best available information, will conform management with resource condition goals, objectives, standards, and thresholds;
> >
> > (2) The inclusion of enforceable stipulations, terms, and conditions in all land use authorizations to mitigate the adverse impacts risked or caused by those authorizations. Absent a reasoned, informed, and written finding that measures already provided for by the landscape-scale mitigation plan suffice to address granular or resource-specific adverse impacts caused by the land use authorization, BLM shall also identify and require additional site- or project-specific mitigation required to conform the land use to resource condition goals, objectives, standards, and thresholds; and
> >
> > (3) Retention of the full authority to deny, mitigate, or otherwise condition a land use authorization until completion of adequate site-specific environmental review.
>
> (c) Landscape-scale mitigation plans shall be assessed and modified in at least five-year increments as determined through consideration of:
>
> > (1) The best available information, including results from monitoring as well as land health assessments and watershed condition classifications (see subpart 6103 of this part);
> >
> > (2) Opportunities to coordinate mitigation across administrative and jurisdictional boundaries with other federal agencies, Tribes, states, local governments, and communities;
> >
> > (3) Opportunities to create positive social, economic, and environmental justice impacts for local communities;

(4) The need and opportunity to conserve resilient ecosystems and intact landscapes and to prevent permanent impairment, unnecessary degradation, or undue degradation; and

(5) Changing patterns of resource use.

(d~~c~~) …

(e~~d~~) …

(f~~e~~) …

(g~~f~~) …

(h~~g~~) …

(i~~h~~) …

III. ENVIRONMENTAL JUSTICE

A. Overview

The final rule should expressly incorporate environmental justice considerations into all aspects of the rule, from restoration to conservation leasing. Broadly, these considerations include:

- Potential environmental and climate justice impacts—both positive and negative; and
- The imperative to provide just processes and truly "meaningful involvement"—particularly of those in frontline communities—in agency planning and decision-making.

B. General Background on Environmental and Climate Justice

According to the EPA's widely used definition, "environmental justice" is "the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, in the development, implementation, and enforcement of environmental laws, regulations, and policies."[59] BLM defines environmental justice similarly in its own Instruction Memorandum 2022-059 and accompanying FAQ.[60]

[59] *See* U.S. Environmental Protection Agency, *Environmental Justice*, www.epa.gov/environmentaljustice (last visited July 3, 2023).

[60] BLM, IM 2022-059, "Environmental Justice Implementation" (Sept. 20, 2022), *available at* https://www.blm.gov/policy/im2022-059; *see also* BLM, Addressing Environmental Justice in NEPA Documents: Frequently Asked Questions (2022); *and* U.S. Department of the Interior, Bureau of Land Management, Socioeconomics Program, Washington, D.C. ("Environmental justice (EJ) is the fair treatment and meaningful involvement of all potentially affected people—regardless of race, color, national origin, or income—when we in the federal government develop, implement, and enforce environmental laws, regulations, and policies.").

Executive Order 12898 on environmental justice requires each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[61] Even more recently, President Biden's January 27, 2021 "Executive Order on Tackling the Climate Crisis at Home and Abroad" (EO 14008) updated EO 12898 and explicitly recognized the inexorable links among climate, health, and environmental justice, and the corresponding need to address all of them in concert, with a whole-of-government approach.[62]

While we use the term "environmental justice" in these comments, our intent is to encompass both environmental and climate justice. The IPCC's recent Sixth Assessment Report (AR6) underscores the importance of climate justice and outlines its main components, including generational justice, stating:

> The term climate justice, while used in different ways in different contexts by different communities, generally includes three principles: distributive justice which refers to the allocation of burdens and benefits among individuals, nations *and generations*; procedural justice which refers to who decides and participates in decision-making; and recognition which entails basic respect and robust engagement with and fair consideration of diverse cultures and perspectives.[63]

FLPMA's definition of "multiple use" includes several clauses that embody climate justice concepts. Public lands must be managed to "best meet the present and future needs of the American people" through "judicious use of the land" such that there is "sufficient latitude for periodic adjustments in use to conform to changing needs and conditions" and "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources."[64] Multiple use is also defined to provide for "harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and quality of the environment with consideration given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output."[65]

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[61] Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

[62] *See* Executive Order 14008, 86 Fed. Reg. 7619-7633, Tackling the climate crisis at home and abroad (January 27, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/. Section 201 (Policy), for example, recognizes the threat to public health posed by the climate crisis and the need to "deliver environmental justice in communities all across America." Another part of the EO is expressly dedicated to "Securing Environmental Justice and Spurring Economic Opportunity," and Section 219 expands on the language of EO 12898, directing agencies to make environmental justice part of their mission, to expressly include climate, cumulative impacts, and "accompanying economic challenges." Section 221 creates the "White House Environmental Justice Advisory Council" (WHEJAC), which has since submitted draft recommendations to CEQ on an environmental justice screening tool and on updates to EO 12898.

[63] *See* IPCC, 2021: Summary for Policymakers and Technical Summary at 13, *see especially* B.1.4 and B.1.7, available at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf, Exhibit 1; *id*. at 9 (emphasis added).

[64] 43 U.S.C § 1702(c).

[65] 43 U.S.C § 1702(c).

Through resource management planning, BLM must "consider present and potential uses of the public lands," "consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values." and "weigh long-term benefits to the public against short-term benefits."[66] NEPA Section 101(b) reinforces FLPMA's prospective role in achieving environmental justice, directing BLM to use "all practicable means" to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[67]

C. BLM Should Expressly Incorporate Environmental Justice into the Proposed Rule

In the Background section discussing "Related Executive and Secretarial Direction" for the proposed rule, BLM acknowledges Executive Order 14008 and its mandates with respect to climate change and notes that Executive Order 13990 also "highlights … the need to prioritize environmental justice."[68]

In this context, we appreciate the proposed rule's inclusion of environmental justice impacts as a criterion to identify priority landscapes for restoration.[69] However, the proposed rule is otherwise devoid of either discussion of or provisions for achieving environmental justice. Accordingly, above, we recommend that BLM weave environmental justice into appropriate elements of the rule. In general, environmental justice considerations include potential impacts—positive or negative—of conservation leasing, restoration actions, and other land use planning and management processes and projects contemplated by the rule. They also include the need for just, equitable processes, including truly "meaningful involvement" in agency planning and decision-making.

D. Impacts

We appreciate the potential for certain aspects of the proposed rule to advance environmental justice, provided that implementation is just and equitable and that the knowledge, experience, and voices of frontline communities are meaningfully incorporated into and actively shape planning and decision-making.

For example, the proposed changes to regulations governing Areas of Critical Environmental Concern ("ACEC"), and the codification of the process in rulemaking, would require that BLM include in its land use plans at least one alternative that analyzes all proposed ACECs in detail.[70] Alternatives that don't prioritize extraction have typically been given short shrift in BLM land use plans, and this new requirement could support a welcome and long-overdue change in the agency's approach to planning that better prioritizes environmental justice as an element of ecosystem resilience.

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[66] 43 U.S.C. §§ 1712(c) (5)–(7).
[67] 42 U.S.C. § 4331(b).
[68] 88 Fed Reg. 19,587.
[69] 88 Fed. Reg. 19,600, 6102.3-1 Restoration Prioritization.
[70] 88 Fed. Reg. 19,593.

BLM also proposes establishing procedures that require consideration of ecosystem resilience, landscape-level needs, and rapidly changing landscape conditions in designating and managing ACECs.[71] Designation of ACECs can help curtail or remedy the harms caused by extractive activities, such as oil and gas drilling, and thus reduce associated emissions of GHGs and other pollutants that cause or contribute to unnecessary and undue degradation and create adverse and disproportionate risks and harms on those that live proximate to or within developed areas.[72]

Integrating human dimensions into the concepts of landscape-scale ecosystem resilience and the conservation of intact landscapes capable of delivering the full suite of public lands benefits for current and future generations would likely amplify these environmental justice co-benefits. They would also underpin and incentivize opportunities for community-driven proposals and meaningful public involvement in planning and decision-making, such as proposals for ACEC designations, but also mitigation and goal, objective, standard, and threshold setting. This, in turn, could help reduce GHG emissions from federal public lands uses and enhance ecosystem resilience in a way that benefits people and communities who live within or proximate to those ecosystems, whether from clean air and water, or from the provision of other sustainable goods and services that benefit people and contribute to a community's economic and social resilience.

As with conservation leases, however, ACEC designation and other public lands management tools should not be used, even implicitly, to justify treatment of areas outside the ACECs or areas with heightened mitigation or conservation protection as "sacrifice zones" for enabling activities that pollute and degrade the land and harm people and communities, wildlife and ecosystems. Regardless, to reduce this risk and maximize the ecological and community benefits of ACECs, BLM should also take this opportunity to incorporate an express framework for community-driven ACEC proposals into the proposed rule.

E. Additional Comments Related to Environmental Justice

We also urge BLM to ensure that the final rule accounts for and addresses the following concerns related to environmental and climate justice impacts:

1. Carbon Offsets on Conservation Leases

We appreciate BLM's request for public comment on whether the rule should expressly authorize the use of conservation leases to generate carbon offset credits. Given environmental and climate justice concerns, the rule should *not* authorize carbon offset credits on conservation leases—whether expressly or otherwise.

Carbon offset credits do little to nothing to reduce either GHG emissions or related co-pollutant emissions, exposures, and corresponding health and safety risks and impacts, at the

[71] 88 Fed. Reg. 19,586.
[72] **Exhibit 7**, Karin P. Sheldon & Pamela Baldwin, *Areas of Critical Environmental Concern: FLPMA's Unfulfilled Conservation Mandate,* COLO. NAT. RESOURCES, ENERGY & ENV'T L. REV. 28:1.

original source—for example, at oil and gas drilling sites. Already, there is no room in the global carbon budget for additional GHG emissions from extraction on federal public lands.[73] Once emissions occur at the source, their contribution to cumulatively significant climate and environmental justice impacts is set in motion, and those *impacts* cannot be neatly "zeroed out" via offset credits.[74]

Indeed, carbon offsets can create inequitable and unjust "sacrifice zones" that perpetuate environmental and environmental justice harms in one area even as polluters contend that impacts have been mitigated through the purchase of offset credits—credits that do not eliminate regional or local environmental justice harms.[75] Polluting facilities and activities tend to be disproportionately sited in already-overburdened communities.[76] Further, climate change impacts are felt far beyond the source of emissions, and tend to fall most heavily on people and communities already overburdened by environmental, social, and structural inequities and harms.[77] GHG emitters also typically emit co-pollutants, including air toxics like benzene, dioxin, and ammonia, that can profoundly harm human health, even in small concentrations.[78] Carbon offsets do not address these co-pollutant emissions. Offset schemes thus have the "potential … to maintain or exacerbate already existing exposures of lower-income, minority communities to landscapes of environmental injustice."[79] This rule should help facilitate a just transition and prioritize climate justice, resilience, and GHG emissions *reductions*. It should not introduce a pay-to-pollute scheme that, at best, fails to curtail GHG emissions and climate and environmental justice impacts and at worst, exacerbates them.

Nor would allowing carbon offsets on conservation leases satisfy BLM's obligation under FLPMA to avoid unnecessary and undue degradation of public lands, or to take into account the needs of future generations.[80] Instead, it would offer a pathway to avoid that obligation, in particular relative to BLM's mitigation hierarchy where, rather than first avoid or minimize emissions from a fossil fuel project, the agency or project proponent could cite rule provisions for carbon offsets as a permission structure to leap past these optimal mitigation tools and instead use suboptimal compensatory mitigation that, at worst, causes harm.

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[73] *See* **Exhibit 8,** Calverley, D. & Anderson, K., *Phaseout pathways for fossil fuel production within Paris-compliant carbon budgets*, Tyndall Centre, University of Manchester (2022).
[74] Also, importantly, carbon capture actually increases both air pollution and total social costs relative to power generation without carbon capture. **Exhibit 9,** Mark Jacobson, *The health and climate impacts of carbon capture and direct air capture*, ENERGY ENVIRON. SCI., 2019, 12, 3567.
[75] **Exhibit 10,** Raul Lejano et al., *The Hidden Disequities of Carbon Trading: Carbon Emissions, Air Toxics, and Environmental Justice*, FRONT. ENVIRON. SCI. Vol. 8 Art. 593014 (2022), doi: 10.3389/fenvs.2020.593014.
[76] *See, e.g.,* Lejano et al., citing **Exhibit 11,** Carpenter, A., and Wagner, M. (2019). *Environmental justice in the oil refinery industry: a panel analysis across United States counties*, ECOL. ECON. 159, 101–09; *see also* **Exhibit 12,** Rachel Morello-Frosch et al., *Understanding the Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy*, 30 HEALTH AFFAIRS 879 (May 2011).
[77] *See, e.g.,* EPA, Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts, EPA 430-R-21-003 (2021), https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf
[78] Lejano et al 2020, citing **Exhibit 13,** Walch, Ryan, *The effect of California's carbon cap and trade program on co-pollutants and environmental justice: evidence from the electricity sector*, Environment PM 2, 440–448 (2018).
[79] *Id*., citing **Exhibit 14,** Seth Shonkoff et al., *The climate gap: environmental health and equity implications of climate change and mitigation policies in California—a review of the literature*, CLIM. CHANGE 109, 485–503 (2011).
[80] *See infra* Section II. H, pp. 27-29.

Here, BLM should keep in mind that even "short-term" or seemingly "minor" emissions and exposures from any one project can have devastating cumulative and long-term effects on climate and on human, ecosystem, and landscape health.[81] Some of these effects can transcend generations. "Offset credits" in other locations have neither changed this reality nor the fundamental injustices and inequities they reflect and perpetuate. The original onsite exposures, risks, and impacts of projects approved under the pretext their harms have been "offset" tend to fall disproportionately on those in communities already overburdened by pollution and other environmental stressors—a burden both caused and compounded by social and structural inequities.[82] So too the impacts of climate change.[83]

The Biden Administration can best honor its commitments to environmental and climate justice, and BLM can best fulfill its own environmental justice (and FLPMA) obligations, by disallowing the use of conservation leases for controversial carbon "offset" schemes. Far from putting conservation on "equal footing" with other uses, authorizing carbon offsets on conservation leases would hinder urgently-needed *real* (not just speculative "net") reductions in GHG emissions, such as by constraining production and emissions within carbon budgets.

Polluters should not be encouraged to pursue largely business-as-usual operations to the chronic detriment of those in frontline and environmental justice communities. "Conservation leases" that create and perpetuate ecological, climate, and environmental justice "sacrifice zones" through carbon offsets would defeat the stated purpose of the leases and the proposed rule's central focus on ecosystem resilience.

For these reasons, we oppose the use of conservation leases for carbon offsets.

2. Pesticide Use

We are also concerned, from an ecological and environmental justice perspective, about the potential for the proposed rule, as written, to perpetuate harmful pesticide use on federal public lands—whether on conservation leases, in ACEC management (depending on the types of protection for which the ACEC is designated), or otherwise.

We recognize, for example, that "nonnative invasive species" and "insects" are listed among "environmental stressors" in the proposed definition of "resilient ecosystems."[84] We also know that pesticides are currently used on federal public lands to control "invasive species," and

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[81] For example, even short-term exposure to ozone causes multiple negative respiratory effects, from inflammation of airways to more serious respiratory effects that can lead to use of medication, absences from school and work, hospital admissions, emergency room visits, chronic obstructive pulmonary disease ("COPD"), and even premature death. *See, e.g.*, **Exhibit 15,** National Research Council, *Link Between Ozone Air Pollution and Premature Death Confirmed,*
(April 2008), available at: http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12198; *see also* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292 (Oct. 26, 2015); Morello-Frosch et al., Exhibit 12; Lejano et al., Exhibit 10.

[82] *See supra* n. 66-67, 73-76.

[83] Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts, EPA 430-R-21-003. https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.

[84] 88 Fed. Reg. 19599; Proposed Rule § 6101.4 Definitions.

on crops used as food for migratory birds and other species in National Wildlife Refuges.[85] And we know that climate change may prompt increased demand for agricultural pesticide use, particularly herbicides, as crop-destroying weeds tend to be more resistant to climate change than cultivated crops.[86] Moreover, pesticides tend to break down and lose their efficacy faster in higher temperatures, prompting a prospective increase in the demand or perceived need for more re-application and thus higher overall levels of pesticide use.[87] This perpetuates a vicious cycle, as pesticide manufacture also contributes to climate change and exacerbates its effects through the emission of three potent greenhouse gases: CO2, Nitrous Oxide, and Methane.[88] Pesticide volatility and toxicity also tend to increase with higher air and water temperatures.[89]

The harmful effects of pesticides extend far beyond their "targets." The level of risk or harm a particular pesticide poses to people, communities, wildlife, and ecosystems depends on both the toxicity of the pesticide (its capacity to cause illness or injury) and the level and route of exposure. But we know that, in general, pesticides can cause both short- and long-term human health impacts.

- Common short-term impacts include eye, nose, throat, and skin irritation (particularly from common herbicides such as Atrazine, Dicamba, and Glyphosate), dizziness, seizures, and other signs of neurotoxicity, and severe, even deadly asthmatic reactions (particularly from organophosphates commonly used as insecticides on agricultural crops, such as Chlorpyrifos).[90]

- Longer-term effects can be difficult to trace to specific exposures, given that they may take years or even decades to manifest, but can include birth defects and other reproductive effects, genetic and epigenetic changes, blood disorders, nerve disorders, endocrine disruption, and certain cancers.[91]

Some of these impacts can be even more pronounced in wildlife, particularly where pesticides may bioaccumulate or where a particular species' smaller size means pesticides are harmful at even lower doses. For example, Atrazine is an endocrine disruptor that increases the conversion of testosterone and other androgens into estrogens, with dramatic and devastating effects on the reproductive structures of frogs and fish[92]—*and* the potential to increase breast

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[85] **Exhibit 16,** Hannah Connor, *No Refuge: More Acres of America's National Wildlife Refuges are Being Doused in Harmful Pesticides*, Center for Biological Diversity (2020), *available at* https://www.biologicaldiversity.org/campaigns/pesticides_reduction/pdfs/No-Refuge-Report-2020.pdf.

[86] **Exhibit 17,** Asha Sharma et al.. *Pesticides and Climate Change: A Vicious Cycle*, Pesticide Action Network (2022), *available at* https://www.panna.org/wp-content/uploads/2023/02/202301ClimateChangeEngFINAL.pdf

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *See, e.g.,* **Exhibit 18,** Penn State Extension, *Potential Health Effects of Pesticides* (2009), *available at* https://extension.psu.edu/potential-health-effects-of-pesticides; **Exhibit 19,** Earthjustice, Organophosphate Pesticides in the United States (2021), *available at* https://earthjustice.org/feature/organophosphate-pesticides-united-states.

[91] *Id.*; *see also* **Exhibit 20,** Donley, Nathan et al., *Pesticides and environmental injustice in the USA: root causes, current regulatory reinforcement and a path forward*. BMC PUBLIC HEALTH 22: Art. 708 at 7,8 (2022).

[92] *See, e.g.,* **Exhibit 21,** Hayes, Tyrone et al. (2003) Atrazine-induced hermaphroditism at 0.1 ppb in American leopard frogs (Rana pipiens): laboratory and field evidence. Environmental Health Perspectives 111, 4 (2003): 568–

cancer risk in humans.[93] Pesticide use and manufacture can also have devastating ecological effects, in addition to the vicious cycle with climate change discussed above. For example, tens of thousands of acres in Idaho have been disturbed for phosphate mining to make Roundup. Just last month, on June 5, 2023, the U.S. District Court for the District of Idaho vacated BLM's approvals authorizing development of just such a mine (the Caldwell Canyon phosphate mine)—following a January ruling that BLM violated NEPA and FLPMA when it approved the phosphate mine without first analyzing and restricting, mitigating or eliminating impacts to greater sage grouse, including harms to habitat and population connectivity.[94]

As with the risks and effects of climate change, fossil fuel extraction, and other polluting activities, "disparities in exposures and harms from pesticides are widespread, impacting BIPOC and low-income communities in both rural and urban settings and occurring throughout the entire lifecycle of the pesticide from production to end-use," and these inequities are rooted in structural and systemic injustices.[95] For example, over 80% of U.S. agricultural workers identify as Hispanic or Latino, and the average annual income for a farmworker is just $20,000 per year.[96] Meanwhile, 98% of wealthier farm owners and 94% of operators, who are not facing field exposures to pesticides, are white, due in part to racist agricultural lending policies.[97]

We recognize that BLM is not the federal agency with primary responsibility for regulating pesticide use. Nonetheless, BLM does have broad power in how pesticides can and should be applied on public lands and the responsibility to do what it can, in that context, to remedy the inequities, injustices, and other impacts caused by poorly regulated pesticide use. This can be done, in part, by ensuring that the rule provides a robust framework to reduce and constrain pesticide use on public lands and the exposures such use causes.[98]

While provisions for ecosystem resilience—and related statutory duties to prevent permanent impairment, unnecessary degradation, or undue degradation—can be leveraged in service of this approach, the agency should identify pesticides themselves as an "environmental stressor" and retain authority to mandate that agency officials use the least toxic pesticide alternative possible, in particular on conservation leases, in restoration efforts, in ACECs, or otherwise. Similar to our recommendations regarding the mitigation hierarchy discussed elsewhere in these comments, BLM should also: (1) include guardrails in the proposed rule to prohibit pesticide use on conservation leases or in other endeavors authorized by the rule wherever possible; (2) otherwise employ the mitigation hierarchy to avoid and otherwise constrain the harms and risks caused by pesticide use.

75; **Exhibit 22,** Jason R Rohr and Krista A McCoy, *A qualitative meta-analysis reveals consistent effects of atrazine on freshwater fish and amphibians*, ENVIRONMENTAL HEALTH PERSPECTIVES 118, 1: 20-32 (2010).

[93] *See, e.g.,* **Exhibit 23,** Kettles, M.A, et al. (1997). Triazine herbicide exposure and breast cancer incidence: An ecological study of Kentucky counties. Environmental Health Perspectives 105:11: 1222-1227.

[94] *See* **Exhibit 24,** Center for Biological Diversity (June 5, 2023) "Federal Judge Nixes Approval of Idaho Phosphate Mine" Available at https://biologicaldiversity.org/w/news/press-releases/federal-judge-nixes-approval-of-idaho-phosphate-mine-2023-06-05/; *See also Center for Biological Diversity v. United States Bureau of Land Mgmt.,* No.4:21-CV-00182-BLW, 2023 WL 387609 (D. Idaho Jan. 24, 2023); *Ctr. for Biological Diversity v. United States Bureau of Land Mgmt.,* No. 4:21-CV-00182-BLW, 2023 WL 3796675 (D. Idaho June 2, 2023)

[95] Article 708 at 7,8. Donley et al. 2022 at 7, 8, Exhibit 20.

[96] *Id.* at 2.

[97] *Id.*

[98] *See also infra* Section II. H., pp. 27-29.

3. Process Dynamics

As discussed above, "meaningful involvement" of those most affected by a proposed project, agency action or decision—particularly those experiencing historic and ongoing burdens of environmental exposures and impacts—is also a key component of environmental justice. And it is essential to crafting the strongest possible rule and implementing it justly, equitably, and effectively. Existing U.S. federal law and policy, and BLM's own Instruction Memorandum on environmental justice, set minimum standards for what constitutes meaningful engagement by federal agencies with those in frontline and "environmental justice" communities, sovereign Tribal nations, and the broader public, and we urge the BLM to adhere to those standards in all of its relevant actions and decision-making.[99]

However, these minimum standards do not guarantee truly just processes or outcomes. We thus recommend that BLM abide by the following frameworks and guiding principles, and refer to the following additional recommendations and resources with respect to environmental and climate justice, meaningful involvement, meaningful Tribal consultation, and engagement with those in frontline communities:

- The Jemez Principles for Democratic Organizing[100]
- The White House Environmental Justice Advisory Council (WHEJAC) Recommendations[101]
- Executive Order 12898 on Environmental Justice[102]

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[99] *See, e.g.,* 40 C.F.R. § 1506.6 ("public involvement" provisions of the CEQ implementing regulations for the National Environmental Policy Act); 36 C.F.R. §§ 800.1-800.16 (regulations governing consultation and other components of Section 106 of the National Historic Preservation Act ("NHPA"); BLM, IM 2022-059, "Environmental Justice Implementation" (Sept. 20, 2022), *available at* https://www.blm.gov/policy/im2022-059.

[100] **Exhibit 25,** Jemez Principles for Democratic Organizing (1996), *available at* https://www.ejnet.org/ej/jemez.pdf. In December of 1996, the Southwest Network for Environmental and Economic Justice hosted a meeting in Jemez, New Mexico with the goal of "hammering out common understandings between participants from different cultures, politics, and organizations," and participants adopted the six "Jemez Principles" for Democratic Organizing. While the Jemez Principles often guide and help lay ground rules for relationships and processes among (and within) those in community-based groups, other NGOs, and coalitions, these principles have also guided the process surrounding the development, drafting, public comment, and revision of recently-introduced legislation, such as the Environmental Justice for All Act, H.R. 1705. These principles could similarly contribute to more just, equitable processes, policies, and programs related to rule development and implementation. But, because they were originally drafted by and for frontline organizers, by their very nature they cannot simply be applied in a "top-down" way by BLM or other federal agencies. They can, however, help BLM develop a framework for engaging more meaningfully, equitably, and intersectionally with those in frontline and "environmental justice" communities, in rule development and implementation and otherwise.

[101] White House Environmental Justice Advisory Council (WHEJAC) Final Recommendations, https://www.epa.gov/sites/default/files/2021-05/documents/whiteh2.pdf; *id*. at 79, 80, 81 (defining environmental justice, just treatment, and meaningful participation).

[102] Available at https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf

- Executive Order 14008, Tackling the Climate Crisis at Home and Abroad—in particular, Sections 219–23 related to environmental justice[103]
- Executive Order 13175, Consultation and Coordination With Indian Tribal Governments[104]
- Comments submitted by Environmental Defense Fund et al. to the Office of Information and Regulatory Affairs (OIRA) June 6, 2023, *Comments on Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review)*, and the additional sources cited therein, including sources from frontline groups and environmental justice leaders, regarding best practices for community engagement and meaningful public participation.[105]

We also offer some concrete suggestions for facilitating, and removing barriers to, meaningful involvement and meaningful Tribal consultation in BLM meetings and comment processes related to this rule and its implementation (and in general), particularly for those in frontline communities. Barriers to meaningful involvement that BLM should keep in mind may include, but are not limited to:

- Language barriers, with no translator or interpreter, as well as lack of appropriate translation and interpretation.
- Difficulty with transportation to meetings, hearings, etc. (due to distance/time required for travel, lack of access to a personal vehicle and/or reliable, affordable public transportation).
- Lack of reliable internet for accessing and reviewing proposed rules and other relevant materials, submitting comments electronically, or attending virtual meetings/hearings.
- Prioritization of written comments over spoken word.
- Lack of information publicized via linguistically and culturally relevant, widely-accessible channels.
- Child care obligations/difficulty finding child care.

To help address these barriers, BLM should:

[103] Available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/
[104] Available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/
[105] **Exhibit 26,** Comments submitted by Environmental Defense Fund et al. to the Office of Information and Regulatory Affairs (OIRA) June 6, 2023, *Comments on Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review)*, and the additional sources cited therein.

1. Offer simultaneous interpretation and translation in the appropriate languages in all public meetings and, to the fullest extent possible, written documents and materials;

2. Hold meetings in places that are accessible to members of frontline communities (this means accessible locations, and accessible facilities etc. for those individuals with disabilities, the elderly, those without access to transportation, and those with child care needs);

3. Provide opportunities for written and oral comment in a variety of fora;

4. Provide linguistically and culturally appropriate and accessible public notice of opportunities for public comment and involvement; and

5. Ensure that public comment periods allow sufficient time—including for those who do not engage with federal agencies regularly or as part of their jobs—for accessing, reviewing, and responding to relevant documents and materials.

If BLM ignores or excludes the very people and communities who are most affected by its decisions, the agency is not only denying *them* the fair treatment and meaningful involvement fundamental to environmental justice, but also depriving itself, and the general public, of invaluable knowledge and expertise that would enable better-informed and more transparent decision-making. BLM recognizes in the proposed rule that "informed decision-making" is one of "three primary ways to manage for resilient public lands."[106] Such informed decision-making requires extensive, meaningful public involvement throughout an agency's decision-making process—not just "input" on predetermined agendas.[107] Indeed, "environmental justice is not merely a box to be checked."[108]

VI. CONCLUSION

We appreciate the opportunity to provide BLM with these comments and recommendations. If you have any questions or would like to discuss these comments and recommendations with us in more detail, please do not hesitate to contact us.

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[106] 88 Fed Reg. 19585 ("BLM has three primary ways to manage for resilient public lands: (1) protection of intact, native habitats; (2) restoration of degraded habitats; and (3) *informed decision-making, primarily in plans, programs, and permits*.") (emphasis added).
[107] 40 C.F.R. § 1506.6; *see also* White House Environmental Justice Advisory Council (WHEJAC) Final Recommendations, https://www.epa.gov/sites/default/files/2021-05/documents/whiteh2.pdf at 79–81 (defining environmental justice, just treatment, and meaningful participation).
[108] *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68, 92 (4th Cir. 2020).

U.S. Department of the Interior
Tracy Stone-Manning, Director
Bureau of Land Management
1849 C St. NW, Room 5646
Washington, D.C. 20240
Via Eplanning and FedEx

Re: Comments on Proposed Conservation and Landscape Health Rulemaking under the Federal Land Policy and Management Act of 1976

Appendix A

Exhibit 1, IPCC, 2021: Summary for Policymakers and Technical Summary, C.2.4, available at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf.

Exhibit 2, Jan Cassin, John H. Matthews 2021, Chapter 4 - Nature-based solutions, water security and climate change: Issues and opportunities. Pages 63–79.

Exhibit 3, *The United States of America Nationally Determined Contribution - Reducing Greenhouse Gases in the United States: A 2030 Emissions Target*, United Nations Framework Convention on Climate Change, available at https://www.google.com/search?client=safari&rls=en&q=unfccc&ie=UTF-8&oe=UTF-8.

Exhibit 4, IPCC, 2022*: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [P.R. Shukla et al. (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA. doi: 10.1017/9781009157926.

Exhibit 5, Merrill, M.D., Sleeter, B.M., Freeman, P.A., Liu, J., Warwick, P.D., and Reed, B.C., Federal lands greenhouse gas emissions and sequestration in the United States—Estimates for 2005–14: U.S. Geological Survey Scientific Investigations Report 2018–5131, 31 (2018).

Exhibit 6, Albuquerque Journal, *New Mexico faces a budget abyss if oil and gas goes bust* (Jan. 30, 2023).

Exhibit 7, Karin P. Sheldon & Pamela Baldwin, *Areas of Critical Environmental Concern: FLPMA's Unfulfilled Conservation Mandate,* COLO. NAT. RESOURCES, ENERGY & ENV'T L. REV. 28:1.

Exhibit 8, Calverley, D. & Anderson, K., *Phaseout pathways for fossil fuel production within Paris-compliant carbon budgets*, Tyndall Centre, University of Manchester (2022).

Exhibit 9, Mark Jacobson, *The health and climate impacts of carbon capture and direct air capture*, ENERGY ENVIRON. SCI., 2019, 12, 3567.

Exhibit 10, Raul Lejano et al., *The Hidden Disequities of Carbon Trading: Carbon Emissions, Air Toxics, and Environmental Justice*, FRONT. ENVIRON. SCI. Vol. 8 Art. 593014 (2022), doi: 10.3389/fenvs.2020.593014.

Exhibit 11, Carpenter, A., and Wagner, M. (2019). *Environmental justice in the oil refinery industry: a panel analysis across United States counties*, ECOL. ECON. 159, 101–09

Exhibit 12, Rachel Morello-Frosch et al., *Understanding the Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy*, 30 HEALTH AFFAIRS 879 (May 2011).

Exhibit 13, Walch, Ryan, *The effect of California's carbon cap and trade program on co-pollutants and environmental justice: evidence from the electricity sector*, Environment PM 2, 440–448 (2018).

Exhibit 14, Seth Shonkoff et al., *The climate gap: environmental health and equity implications of climate change and mitigation policies in California—a review of the literature*, CLIM. CHANGE 109, 485–503 (2011).

Exhibit 15, National Research Council, *Link Between Ozone Air Pollution and Premature Death Confirmed,*
(April 2008), available at:
http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12198.

Exhibit 16, Hannah Connor, *No Refuge: More Acres of America's National Wildlife Refuges are Being Doused in Harmful Pesticides*, Center for Biological Diversity (2020), *available at* https://www.biologicaldiversity.org/campaigns/pesticides_reduction/pdfs/No-Refuge-Report-2020.pdf.

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