BOUNDARY LINE FOUNDATION
HELPING ADMINISTRATIVE GOVERNMENT UNDERSTAND AND RESPECT ITS LIMITS

Survey of the History, Background, and Compliance of the Proposed BLM Landscape, Conservation and Health Rule with The Public Land Laws of the United States

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EXECUTIVE SUMMARY

This survey evaluates the proposed Bureau of Land Management (BLM) *Conservation and Landscape Health Rule* (CLHR) through investigation of the original statutory purpose and mission of the agency, and by application of a century of public land laws to a proposed rule that would transition vast regions of productive federal lands landscape level wildlife conservation using a conservation biodiversity ideology.

Using a side-by-side approach, we contrast BLM's mission to manage approximately 135 million acres of Taylor Grazing Act CVG District lands with the conservation leasing program proposed in the CLHR. By applying controlling statutes and originally sourced references, we demonstrate how the CLHR, if adopted, would illegitimately transition working public lands to non-productive use for landscape-level wildlife conservation, wildlife corridors, ecosystem resilience, and implementation of a synthetic, natural resource asset capitalization and accounting system proposed by the White House Office of Science and Technology Policy.

To understand the international context, we trace the policies enabled by the Department of Interior's Climate Action Plan (CAP) and Secretarial Order 3399 to the Nationally Determined Contribution (NDC) decarbonization agenda, the America the Beautiful Atlas, EO 14008, and the unratified Paris Climate Agreement.

A century of U.S. public land statutes and policies enacted by the Taylor Grazing Act (TGA), the Federal Land Policy Management Act (FLPMA), and the Public Rangelands Improvement Act (PRIA) demonstrate that BLM's core mission is to manage the Taylor Grazing Act CVG District lands for the Principal Use of domestic livestock grazing, range development, and stabilization of the U.S. livestock industry dependent upon range access - not wildlife conservation.

In glaring contrast to BLM's congressionally delegated authority, the CLHR proposes to implement a top-down transformative regulatory framework that will foreseeably result in a single principal use of public lands for wildlife-only landscape conservation. Similarly, the CLHR proposes to diminish the role of state and county governments in federal land use planning, replacing the FLPMA government-to-government federalistic approach with centralized land planning and a natural asset-based economy that would enable international trading of the natural resources belonging to the United States.

This survey provides three recommendations for counties to consider when engaging the U.S. Congress and the BLM. First, if the CLHR is adopted, we recommend that county networks collectively advocate for the CLHR to be rejected by Congress under the Congressional Review Act (CRA). Second, we recommend that counties press the Congress to rescind the *Bureau of Land Management Foundation*, which is the non-profit exchange hub that will enable the CLHR-proposed conservation leases to be inventoried and traded under Natural Resource Asset Capitalization trading apparatus.

Finally, we propose that counties encourage legislation mandating that the Secretaries of the Departments of the Interior and Agriculture amend all National Forest Management Plans (NFMPs), Resource Management Plans (RMPs) and internal policies to recognize Taylor Grazing Act CVG Districts as Reservations under Section 4(e) of the Federal Power Act and require incorporation of cadastral TGA CVG District mapping of all Taylor Grazing Act CVG Districts in federal planning processes and land management plans.

PREFACE

On February 6, 2017, the 115th Congress invoked its Congressional Review Act (CRA) legislative prerogative and rejected the BLM *Resource Management and Planning 2.0 Rule* through H.J. Resolution 44. Rejection of the *Planning 2.0 Rule* included a congressional determination that the *Planning 2.0 Rule* was a Major Federal Action and not a procedural Rule as purported by the Secretary of the Interior in the Federal Register.

The *Planning 2.0 Rule* and the proposed BLM Conservation and Landscape Health Rule (CLHR) have common policy elements that if adopted would illegitimately transition the congressional intent for the Federal Land Policy Management Act (FLPMA) from a bottom up, county-to-agency model to a centralized, command-and-control natural resource management system driven by wildlife biodiversity and climate change ideology.

Elements common to both the *Planning 2.0 Rule* and the CLHR include promotion of landscape-level natural resource planning; confusion of statutory county-to-agency prerogatives by illegitimate elevation of private/public partnerships; establishment of wildlife corridors and vast expansion of Areas of Critical Environmental Concern (ACEC); imposition of punitive mitigation requirements in natural resource planning processes; and elevation of subjective Tribal Ecological Knowledge (TEK) and Indigenous Knowledge (IK) at the expense of objective federal scientific standards and peer review requirements.

This survey reviews the history and mission of the BLM and applies the congressional mandates that form the basis and purpose for BLM's existence. Our approach is straight-forward in that we apply seven acts of Congress, federal administrative procedural requirements, memoranda from the Solicitor of the Interior, and relevant case law to conclude legitimate rightful authority and assess compliance of the CLHR with congressional intent.

Administrative repackaging of the Planning 2.0 Rule as the CLHR signals a need for collective advocacy and active engagement with Secretary of the Interior and BLM Director as they align their policymaking with the statutory requirements of the public land laws of the United States. To that end, we offer the following for consideration by county governments, the Congress, and the interested public:

- Facilitate and support legislation that requires the Secretaries of the Interior and Agriculture to recognize, inventory, and incorporate Taylor Grazing Act Chiefly Valuable for Grazing District Reservation Maps in all forest and Resource Management Plans;
- Encourage states and counties host to Taylor Grazing Act Chiefly Valuable for Grazing Districts to identify and incorporate TGA CVG District maps in all state, county, and local land use plans;
- Investigate the purpose the *Bureau of Land Management Foundation* (DBA as *Foundation for America's Public Lands*) in the outworking of proposed CLHR conservation leasing program and Natural Asset Capitalization and Inventory System;
- Consider legislation that rescinds the *Bureau of Land Management Foundation Act* at Section 122 of the Consolidated Appropriations Act of 2017 and 43 U.S.C. § 1748c as FLPMA intends for natural resource leasing and management programs to be self-supporting.

Table of Contents

1.0 SITUATION APPRAISAL 1
1.1 *Background -* 1
1.1.1 Summary of the CLHR and Federalism Issues 1
1.1.1.1 *BLM's Statutory Responsibility Over Wildlife Conservation* 3
1.1.2 International Agenda Behind U.S. Executive Land Use Policy 4
1.1.3 Executive Policies Traced Through DOI and Implemented by CLHR 4
1.1.4 Ideological Context Behind the CLHR: Biodiversity Conservation 6
1.1.5 Policy Questions Raised 7

2.0 APPLICATION OF U.S. PUBLIC LAND LAW TO CLHR 8
2.1 *History and Purpose of the Taylor Grazing Act -* 8
2.1.1 CVG Districts as Reservations Under the Federal Power Act of 1920 9
2.1.1.1 *History and Statutory Basis for CVG Districts as Reservations* 9
2.1.1.2 *CVG Districts as Reservations Affirmed by Solicitor of the Interior* 10
2.1.1.3 *Required Administrative Actions for Modification of CVG District Boundaries* 12
2.2 *The Public Rangelands Improvement Act of 1978 -* 13
2.2.1 History and Purpose of PRIA 13
2.2.2 Mandates and Objectives for Inventory; Coordination with County Governments 14
2.3 *The Federal Land Policy and Management Act of 1976 -* 16
2.3.1 Congressionally Defined and Limited Principal or Major Land Uses 17
2.3.2 Congressional Delegation Doctrine and Intelligible Principle in FLPMA 17
2.3.3 Purpose, Objective, and Use of ACECs in Land Use Policy 18
2.3.3.1 *ACECs as Reservations Under FPA* 19
2.3.3.2 *Designation of ACECs within TGA CVG Districts & Mitigative Action* 19

3.0 FINDINGS OF FACT and CONCLUSIONS OF LAW 20

Attachments

Attachment A: BLM TGA CVG District Maps

Attachment B: Natural Resource Asset Accounting Strategy

Attachment C: FDR Executive Orders 6910 and 6964

Attachment D: DOI Solicitor Memorandum M-37008: *Authority for the BLM to Retire Grazing Permits on Public Lands*

Attachment E: DOI Solicitor Memorandum: *Clarification M-37008*

Attachment F: DOI Solicitor Memorandum M-37005: *Whether Public Lands are Reservations under Section 4(e) of FPA*

Attachment G: BLM Policy Manual 1613: Areas of Critical Environmental Concern ACEC

Attachment H: Federal Register Notice Volume 88 Number 63: *Conservation and Landscape Health Rule*

1.0 SITUATION APPRAISAL

1.1 *Background* -

1.1.1 Summary of the CLHR and Federalism Issues

This work demonstrates that the proposed BLM Conservation and Landscape Health Rule (CLHR), if adopted, would subordinate and conflict with the longstanding multiple-use and sustained yield doctrine that is integrated throughout the fabric of U.S. public land law, and replace it with a dominant-use, landscape-scale wildlife and conservation leasing system and a synthetic natural asset capitalization inventory and reporting program. (Appendix B)

The CLHR is dismissive of state-delegated and 10th amendment constitutional powers possessed by county government, and minimizes the functional statutory prerogative county governments enjoy in joint federal/county land use planning on BLM-managed public lands.

In FLPMA[1] Congress specifically provided for intergovernmental coordination during development and amendment of BLM Resource Management Plans (RMPs) and USFS Forest Management Plans. The FLPMA, Title II coordination mandate clearly distinguishes the county-to-agency, government-to-government prerogative from public/private partnerships, non-governmental organizations, environmental groups, or the public at large during land use and planning processes.

Congress specifically requires for both the Secretaries of the Interior and Agriculture "*to keep apprised of and attempt consistency"* with county land use plans, policies, and requirements and to provide early notice of federal actions affecting county governments:

> *"to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located… "*[2]

In FLPMA's policy declaration, Congress codified its intent for the United States to receive fair market value from the natural resource and wildlife assets managed and developed by the BLM and U.S. Forest Service.

The legislative background and statutory construct of FLPMA clearly demonstrates congressional preference for a productive, market-based utilization model for the lands and natural resources of the United States:

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1 43 U.S.C. 1701 *et seq*
2 43 U.S.C. 1712 (c)(9)

> *(a) "The Congress declares that it is the policy of the United States that—*
>
> *(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;"*
>
> *(12) "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands"*

and,

> *(13) "the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of immunity of Federal lands from State and local taxation.[3]"*

To achieve its FLPMA-mandated objective for productivity, Congress defined and limited the scope of principal and major uses to:

1. Domestic livestock grazing,
2. **Fish and wildlife development and utilization,**
3. Mineral exploration and production,
4. Rights-of-way,
5. Outdoor recreation, and
6. Timber Production.

Through the phrase "**includes, and is limited to,**" Congress applied its nondelegation doctrine prerogative to unambiguously articulate an intelligible principle prohibiting addition of any new principal or major uses or alteration of any of the existing defined uses. Application of nondelegation doctrine[4] unambiguously denies BLM the authority to designate conservation as a principal or major use for the purposes of FLPMA or its implementing regulations at 43 CFR Part 1600, or the newly-proposed Part 6100.

Because the term "conservation" is not specifically defined in FLPMA, we believe *Black's Law Dictionary* provides an authoritative alternative:

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[3] 43 U.S.C. § 1701 (a)(9).

[4] *West Virginia v. Environmental Protection Agency*, 597 U.S. ___ (2022) - "With the explosive growth of the administrative state since 1970, the major questions doctrine soon took on special importance. In 1980, this Court held it "unreasonable to assume" that Congress gave an agency "unprecedented power[s]" in the "absence of a clear [legislative] mandate."" *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U. S. 607, 645 (plurality opinion). "In the years that followed, the Court routinely enforced "the nondelegation doctrine" through "the interpretation of statutory texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."" *Mistretta v. United States*, 488 U. S. 361, 373, n. 7 (1989). "As the Court puts it today, it is unlikely that Congress will make an "[e]xtraordinary gran[t] of regulatory authority" through "vague language" in "'a long-extant statute.'" Ante, at 18–20 (quoting *Utility Air*, 573 U. S., at 324).

> *"The supervision, management, and maintenance of natural resources such as animals, plants, forests, etc., to prevent them from being spoiled or destroyed; the protection, improvement, and use of natural resources in a way that ensures the highest social as well as economic benefits."*[5]

The overarching intent of FLPMA is that the working public lands of the United States be managed for productive multiple use and sustained yield, whereas conservation as a principal use is management of public lands for an individual or a reduced number of the statutorily-defined principal use values. The FLPMA approach allows for joint renewable land use decisions to be made based on a determination of sustainable yield during intergovernmental land use planning processes.[6]

The FLPMA also requires extraction and consumption of nonrenewable resources to take place using a systematic interdisciplinary approach that achieves integrated consideration of physical, biological, economic, and other sciences.[7] As a result, land and resource conservation takes place in the context of the use of working lands.

1.1.1.1 *BLM's Statutory Responsibility Over Wildlife*

The legislative record of the TGA, FLPMA, PRIA, and historical application of the public land statutes demonstrates that Congress intends for BLM to manage working public lands for productive use and wildlife *development* - not sequestration of natural resources. With respect to conservation, BLM's statutory responsibility is to manage the lands and natural resources under its charge with an objective of wildlife production, use and potential harvesting: "*Fish and wildlife development and utilization.*"

Congress has and continues to provide for wildlife management and protection in the National Wildlife Refuge System which falls under the responsibility of the United States Fish and Wildlife Service (FWS). Review of the congressional record indicates that BLM's core land management responsibilities do not include landscape level resource management, prioritization of ecosystem resilience, promotion of wildlife corridors, or the need to resolve fragmentation issues to assure wildlife resiliency.

During enactment of the Game Range Act of 1976 the *House Merchant Marine and Fisheries Committee* distinguished BLM's responsibilities over working lands from wildlife protection and noted glaring conflicts with BLM's record on wildlife management. The committee went on to report that BLM's mission does not include "*wildlife enhancement:"*

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5 *Black's Law Dictionary*. Tenth Edition. Thomson Reuters.
6 FLPMA § 202. 43 U.S.C. § 1712 (a).
7 43 U.S.C. § 1712 (a).

> "*Clearly, the record of BLM's wildlife management has not been an encouraging one. The Committee believes that the reason for this arises from the fact that BLM has a number of other important missions such as mining, logging, livestock grazing, and fossil fuel development which often conflict with wildlife management. In performing these conflicting missions, BLM is unable to devote sufficient attention to the needs of wildlife. In short, its mission is not wildlife protection or enhancement.*"[8]

1.1.2 International Agenda Behind U.S. Executive Land Use Policy

Since execution of Executive Order 14008 on January 27, 2021 and the Paris Agreement on February 19th, 2021, the executive branch of the United States Government has aggressively pursued development of an administrative framework to implement the Nationally Determined Contribution (NDC) inventory system and the *America the Beautiful Atlas* (Atlas) to comply with the Paris Agreement.

The policies of the NDC and the Atlas require the United States to monitor and report progress toward achieving NDC targets in conformance to the United Nations Framework Convention on Climate Change (UNFCCC) and the 2006 IPCC good guidance for decarbonization under the Paris Agreement.[9]

Presidential Executive Orders 14008 and 13990 direct federal agencies to undertake a "*whole of government*" and "*whole of economy*" approach. These directives have led to a cascade of downstream policy initiatives that are currently being implemented as Climate Action Plans (CAPs) in 27 federal agencies, including the Department of the Interior.

1.1.3 Executive Policies Traced Through DOI and Implemented by CLHR

The conservation and leasing policies, and the natural asset inventory and reporting system represent the implementation phase of the binding targets, timetables, and reporting mechanisms of the Paris Agreement in the public land laws of the United States. The LCHR policies are traced through the DOI Climate Action Plan (CAP), Secretarial Order 3399, the America the Beautiful Conservation Atlas, and Executive Order 14008 to the Paris Agreement.

Executive Order 14008 implements the following policy items and initiatives across the federal agencies of the United States:

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[8] Report to Congress on H.R. 5512. House Merchant Marine and Fisheries Committee.

[9] The nationally determined contribution of the United States of America is: To achieve an economy-wide target of reducing its net greenhouse gas emissions by 50-52 percent below 2005 levels in 2030. In accounting for the NDCs the United States intends to use the 2006 IPCC guidelines and 100-year global warming potential from Assessment Report 5 for estimating anthropogenic emissions and removals.

- Binds the United States to rejoin the Paris Agreement - (Part 1 Sec. 102).
- Directs the United States to **immediately begin development of its nationally determined contribution** (NDC) reporting required under the Paris Agreement - (Part 1 Sec. 102(e)).
- Calls for the development of a **Climate Finance Plan** - the **first of its kind** in the U.S. government - with a focus on **international climate finance** - (Part 1 Sec. 102(f)).
- Directs the United States to transition to a carbon-free economy by leveraging the purchasing and banking power of the **United States Treasury Department** and **demonetization of investments in the fossil fuel industry** and encourages the multinational banking community **to divert capital from the coal, natural gas, and fossil fuel sectors** to green energy - (Part 1 Sec. 102(g), (h)).
- Establishes a White House Office of Domestic Climate Policy and a **National Climate Task Force** - (Part 2 Sec. 203).
- Directs the head of each federal agency to develop a Climate Action Plan (CAP) to be submitted to the National Climate Task Force and the Federal Chief Sustainability Officer - (Part 2 Sec. 211).
- Directs the Secretary of the Interior to achieve the goal of conserving at least **30 percent of the nation's lands and waters by 2030** - (Part 2 Sec. 216).

The LCHR implements the binding targets and timetables of the Paris Agreement at the agency level by proposing modification to BLM regulations at 43 CFR Part 1600 and creates a completely new Part 6100.[10] The conservation leasing component of the **LCHR implements at the regional and local levels** the economic and biodiversity objectives of Executive Order 14008, Executive Order 13990, and the monetized natural asset inventory and reporting system by the White House National Strategy to Develop Statistics for Environmental Economic Decisions. (Attachment B)

The LCHR illegitimately expands the congressionally-limited FLPMA definition of "principal or major use" and implements the White House *Natural Capital Accounting Strategy* by promoting natural resource conservation as an economic necessity for the nonproductive use of the public lands of the United States. This places the non-use conservation leasing program of the LCHR on the same level as domestic livestock grazing, mineral exploration and utilization, and productive oil and gas leasing programs on BLM lands.

With respect to natural asset monetization and valuation, the LCHR mandates valuation of non-beneficial uses of BLM lands and requires an inventory of those assets under the administration's 30 x 30 conservation objective. According to the National Strategy to Develop Statistics for Environmental Economic Decisions, the White House states:

[10] 43 CFR Part § 6100 currently does not exist. We surmise that through the adoption process BLM would have to create a new body of regulations under Title 43, Subchapter F - **Preservation and Conservation**.

> *"The planned Conservation Stewardship Atlas is a tool for tracking a range of conservation benefits provided by U.S. lands and waters, particularly for biodiversity, climate and equity benefits."*

For its part, the **Conservation Stewardship Atlas** implements a dual-purpose international inventory: 1) Creates an economic portfolio to monetize natural assets to provide carbon offsets for corporate industries; 2) Tracks and inventories the progress toward the **transitioning** of working public lands to conservation; and 3) Requires biannual reporting as part of the Paris Agreement.

The outworking of Executive Orders 14008 and 13990 impose a vast and transformative economic and political process on the executive branch agencies and economy of the United States without clear and specific delegation of congressional authority and in the absence of Senate ratification of the Paris Agreement.[11] Even the executive branch recognizes the novelty of the "*goals and objectives*" through the use of the words "*first ever*." This sits in stark contrast with FLPMA policy statement that "*all goals and objectives are to be established by United States law*."[12]

1.1.4 Ideological Context Behind the CLHR: Biodiversity Conservation

For decades environmental advocates, activist scientists, and some career agency bureaucrats have advocated the transition of working public lands from the productive FLPMA multiple use and sustained yield management model to a centralized, government-imposed land planning model based upon *biodiversity conservation*.[13]

In the early 1990s President Clinton signed the *Biodiversity Convention*, a product of the UN Conference on Environment and Development, and in the mid-1990s Secretary of the Interior Bruce Babbit attempted to elevate biodiversity conservation as a central mission for public lands management across the Department of the Interior.

Biodiversity conservation and climate-change theory activists have had marginal success at convincing the U.S. Congress or the American public to incorporate biodiversity conservation, the Paris Agreement, or other conservation-based ideologies into the public land laws of the United States. As a result, the FLPMA and other land use statutes remain the controlling and sovereign law under which the public lands of the United States are to be managed by BLM.

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[11] Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." E. Gellhorn & P. Verkuil, *Controlling Chevron Based Delegations*, 20 Cardozo L. Rev. 989, 1011 (1999); we presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn. v. FCC*, 855 F. 3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc). *West Virginia v. Environmental Protection Agency*, 597 U.S., 20-1530 (2022).

[12] 43 U.S.C. § 1701 (a)(7).

[13] *Biodiversity and Land*. Bradley C. Karkkainen. Cornell Law Review, Vol 83, Issue 1. 1997.

1.1.5 Policy Questions Raised

This survey raises two major questions about the proposed CLHR:

1) Does the assertion of Executive authority in the CLHR involve matters of vast economic and political significance?

and,

2) Has the Congress, through the Public Land Laws of the United States, expressly and specifically delegated authority to the Executive and the Secretary of the Interior to adopt the CLHR as proposed?[14]

We specifically raise the question of whether the President of the United States has been delegated the constitutional authority to impose binding international targets and timetables upon federal administrative agencies that encroach upon and expand the limited authorities delegated to the Secretary of the Interior through the public land laws.

A second, related question is whether the Congress has delegated to the President or the Secretary of the Interior its Article IV, Section 3, Clause 2 Property Clause authority to enact Executive Orders that effect broad and transformative administrative changes as proposed by the CLHR conservation leasing system and vast expansion of the FLPMA ACEC program.

In previous surveys, the Boundary Line Foundation reported on how, during enactment of FLPMA, the Congress constrained the authority of the President by limiting the *implied-delegation-due-to-congressional-acquiescence* doctrine that enabled the President to make land withdrawals without the advice or consent of the legislative branch.[15] Findings from that work product may reasonably be applied to the issues currently being raised on the CLHR.

[14] *All Roads Lead to Paris.* Administrative Chronology and Structural Violations of the Climate Policy Agenda Under the Biden Administration Executive Orders 14008 and 13990. Nathan Descheemaeker. January 27, 2023.

[15] *Survey and Application of Delegated Congressional Authorities for Land and Mineral Withdrawals by the Secretary of the Interior.* Boundary Line Foundation. January 14, 2021. Pages 6,7.

2.0 APPLICATION OF U.S. PUBLIC LAND LAW TO CLHR

2.1 *History and Purpose of the Taylor Grazing Act -*

In June 1934, the United States Congress enacted the Taylor Grazing Act (TGA), a comprehensive body of land use statutes that effected the withdrawal, reservation, and classification of 135 million acres of **vacant, unreserved, and unappropriated** working lands across a twelve-state region of the western United States (Attachment A).

Five months following TGA enactment, President Roosevelt issued Executive Order 6910 withdrawing 80 million acres of federal lands for **classification** as *Chiefly Valuable for Grazing* (CVG) of domestic livestock:

> *"NOW, THEREFORE...it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural Resources."*[16]

Together, the TGA and Executive Order 6910 enacted a geopolitically bounded, cadastrally mapped[17] Chiefly Valuable for Grazing District (CVG District) land classification system that was affirmed by Congress in the Federal Land Management Policy Act of 1976 (FLPMA), the Public Rangelands Improvement Act of 1978 (PRIA), and through over a century of U.S. public land law and policy.

In February 1935, using land withdrawal authority under the now repealed Pickett Act,[18] President Roosevelt issued Executive Order 6964 effecting the withdrawal of **all remaining public lands** over a twelve-state region.[19] The combined action of Executive Orders 6910 and 6964, along with concurrent appropriations by Congress, increased the original acreage for CVG District classification from 80 to 142 million acres,[20] reportedly drawing the ire from the General Land Office which had reported that as of the summer of 1935, no unreserved public lands remained in the federal system:

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16 Executive Order 6910

17 Map of BLM Grazing Districts, May 1945.

18 Pickett Act of June 25, 1910. Ch. 421, 36 Stat. 847 et seq. (43 U.S.C. § 141 et seq.)

19 Executive Order 6964

20 43 U.S.C. § 315. Notes from the Office of Law Revision Counsel: Amendments **1936—Act of June 6, 1936**, increased acreage which could be included in grazing districts from 80 million to 142 million acres; **1954—Act of May 28, 1954**, struck out the first sentence of the provision limiting to one hundred forty-two million acres the area which might be included in the grazing districts.

> "*Because of the withdrawals made by the Executive orders…there were no unreserved public lands at the close of business on June 30, 1935*."[21]

The TGA and Executive Order 6910 system includes provisions for orderly use and mechanical improvement of public rangelands; requirements for collection and distribution of revenues to host county governments; standards for economic stabilization of the domestic "*livestock industry dependent upon the public range,*"[22] and a federalistic permit system that to this day delegates preeminent access to public lands for domestic livestock grazing.

Notably, the TGA, FLPMA, and PRIA land use and classification system does not grant general access to indigenous, or non-domestic livestock such as bison, which require a special permitting structure and BLM management processes.[23]

At the time that the TGA CVG District lands were withdrawn[24] and reserved from further appropriation, a new federal agency, the Division of Grazing, was authorized by Congress and its responsibilities were delegated to the Secretary of the Department of the Interior (DOI). The primary function of the Division of Grazing (later the Grazing Service, and in 1946 the Bureau of Land Management) is to administer the TGA classification system, facilitate improvement of marginal TGA rangelands through orderly development, and ensure implementation of a geopolitical boundary management system:

> *"…the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range;*[25]*"*

As of 1999, approximately 135 million acres[26] of reserved, TGA CVG District lands were still being managed by BLM under the FLPMA and PRIA statutes.

2.1.1 CVG Districts as Reservations Under the Federal Power Act of 1920

2.1.1.1 *History and Statutory Basis for CVG Districts as Reservations*

The combined actions of TGA, Executive Order 6910, and Executive Order 6964 effected the withdrawal of all "*vacant, unreserved and unappropriated lands from settlement, location, sale or entry*" from the public domain and reserved CVG Districts for classification and management as *chiefly valuable* for grazing by the Secretary of the Department of the Interior.

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[21] General Land Office Annual Report. 1:2. 1935.

[22] EO 6910

[23] 43 CFR § 4100.0-5 Definitions. "*Livestock or kind of livestock means species of domestic livestock- cattle, sheep, horses, burros, and goats.*"

[24] 43 U.S.C. 1702 (j).

[25] 43 U.S.C. § 315a. Protection, administration, regulation, and improvement of districts; rules and regulations; study of erosion and flood control; offenses.

[26] Estimates of the number of BLM acres vary widely - both within the agency and in the public record.

Section 4(e) of the Federal Power Act of 1920[27] (FPA) defines reservations as:

> "*...lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws."*

The FPA definition of "*reservation*," also recognized through U.S. Supreme Court case law,[28,29] distinguishes **only** national monuments, national parks, or public lands from those lands withdrawn and reserved for a specific use:

> "*reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks*."[30]

Because CVG Districts **are not national parks nor national monuments**, and **by statute are not subject to private appropriation**, they cannot legitimately be classified as "public lands." This leaves only the category of "*reservations*," alongside of ACECs, Native American Reservations, Wilderness Study Areas, National Petroleum Reserve Lands, Wild and Scenic River Designations, and like kind FPA-defined reservations.

2.1.1.2 *CVG Districts as Reservations Affirmed by Solicitor of the Interior*

The Federal definition of "public lands" has remained unchanged by Congress or the courts since 1920, and Congress notably did not alter or change the definition of "public lands" during enactment of either FLPMA or PRIA.

In a January 19, 2001 Opinion,[31] the Solicitor of the Interior affirmed that public lands withdrawn by Executive Orders 6910 and 6964 were Reservations as defined under Section 4(e) of FPA:

> *"most enduringly public lands have been defined as those lands subject to sale and other disposal under the general land laws"*

and,

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[27] Federal Power Act. 41 Stat 1063. (1920) codified at 16 U.S.C. § 791a et seq.

[28] *Escondido Mut. Water v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984)

[29] FPC v. Tuscarora Indian Nation, 362 U.S. 99, 111 (1960)

[30] 16 U.S.C. § 796(1),(2) Definitions.

[31] Memorandum M-37005. *Whether Public Lands Withdrawn by Executive Orders 6910 and 6964 or Established as Grazing Districts are "Reservations" within the Meaning of Section 4(e) of the Federal Power Act* (Jan. 9, 2001). Solicitor of the Interior. January 19, 2001.

> *"Public lands" means such lands and interests in lands owned by the United States as are subject to private appropriations and disposal under public land laws. It shall not include "reservations" as hereinafter defined. "Reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in land owned by the United States and withdrawn, reserved or withheld from private appropriation and disposal under the public land laws..."*

and,

> *"Although the story is complex in its details, as discussed in the next few paragraphs, the bottom line for purposes of the legal question before me is simple: TGA lands are "withdrawn, reserved or withheld from private appropriation and disposal under the public land laws" in terms that fit the definition of "reservations" in the FPA.* 16 U.S.C. § 796(2)*."*

With reference to the adoption of the TGA in FLPMA, the Solicitor of the Interior notes that Congress **did not** repeal the provisions of TGA, but instead protected and preserved the CVG District grazing, permit, and classification system:

> "*When enacting FLPMA, Congress did not repeal or modify the grazing provisions of the TGA. Instead, FLPMA set forth a new structure for the Secretary and the BLM to manage federal lands. Congress also expressly protected the grazing permit system as contemplated by the TGA and expressly preserved the classifications and withdrawals that led to the creation of grazing districts*."[32]

According to the Solicitor, the TGA mandates that regulate the CVG District system were preserved by Congress when enacting FLPMA, and those mandates are still binding upon all agencies within the Department of the Interior.

Because CVG Districts and domestic livestock grazing lands are interspersed throughout the national forest system of the United States, the substance of the Solicitor's determination in Memorandum M-37008 and other opinions as well as the mandates in FLPMA and PRIA apply to lands within the national forest system administered by the Secretary of the Department of Agriculture and Chief of the U.S. Forest Service (USFS).

[32] Ibid. Page 4.

2.1.1.3 *Required Administrative Actions for Modification of CV District Boundaries*

When enacting FLPMA, Congress purposefully preserved and adopted the TGA CVG District classification and grazing permit system. Review of BLM records indicates that the 12-state cadastral CVG District system remains intact to this day, and recent maps published by BLM document that CVG Districts that were withdrawn and reserved for grazing of domestic livestock remain intact across the western United States.

It is noteworthy that over time both the Secretary of the Interior and the Secretary of Agriculture, U.S. Forest Service have failed to incorporate TGA CVG District Reservation Maps and descriptions of the CVG District system in Resource Management Plans (RMPs), National Forest Management Plans (NFMPs), and other natural resource management planning programs and processes.

Omission of TGA CVG District reservation maps from agency planning processes and local public meetings has likely led to confusion of cadastral boundaries and administrative neglect for the preeminent purpose of CVG Districts for domestic livestock grazing on 135 million acres of BLM lands and within national forest system, including wilderness areas. It is also possible that ACECs, WSAs or other reservations have been designated over original TGA CVG lands or boundaries, raising first-in-time first-in-right conflicts of preeminent land use.

Courts have determined that BLM cannot legitimately give preference to conservation use over the preeminent principal land use of domestic livestock grazing and have also concluded that as long as the boundaries and CVG District classification remain in place, there remains a legal presumption that that the preeminent Principal Use for these lands is domestic livestock grazing.[33]

In an October 22, 2002 opinion responding to the PLC v. Babbitt decision of the administrative burden required of the Secretary of the Interior before leases, permits, or principal uses of CVG Districts can be altered, the Solicitor of the Interior concludes:

> *"When considering a proposal to cease livestock grazing on public rangelands, BLM must address a number of important land use planning factors..."*
> "*When the lands are within a grazing district, as the vast majority of grazing land are, BLM must also analyze whether the lands are still 'chiefly valuable for grazing and raising other forage crops 43U.S.C 315.' If BLM concludes that the lands still remain chiefly valuable for these purposes, the lands must remain in the grazing district.*"[34] (Attachment D)

[33] PLC v. Babbitt, 167 F.3d 1287, 1308 (10th Cir. 1999), affirmed on other grounds, 529 U.S. 728 (2000).

[34] Memorandum. *M-37008*. Solicitor of the Interior to the Secretary. *Authority for the Bureau of Land Management to Consider Requests for Retiring Grazing Permits and Leases on Public Lands*. May 13, 2003. Page 3.

In a subsequent opinion, the Solicitor of the Interior clarifies the conditions and administrative actions required before a CVG District may be repurposed, such as would occur if the Secretary of the Interior would propose imposition of an Area of Critical Environmental Concern over lands bordered by a CVG District:

> "*Whenever the Secretary considers retiring grazing permits within a grazing district, she must determine whether the permitted lands remain chiefly valuable for grazing if any such retirement may ultimately result in the modification of the district's boundaries. This determination must be adopted in a land use plan or through an amendment to the existing plan. Administrative factors the Secretary should consider in making this determination are: (1) the disruptive effect to any remaining grazing allotments within the district; (2) the decision's effect on the distribution of future grazing revenues within the district; and (3) whether rangeland health can be improved without constructing or maintaining physical range improvements*."[35] (Attachment E)

According to the Solicitor of the Interior and the FLPMA, before the Secretary of the Interior [Agriculture] may affect the boundaries, retire domestic livestock grazing permit(s), eliminate one or more principal use(s), or impose reservation of any type within a CVG District(s), the Secretary **must** perform a *chiefly valuable for grazing determination* that:

- Assesses the disruptive effect to any remaining grazing allotments within the CVG District;
- Determines the decision's effect on the distribution of future grazing revenues within the CVG District;
- Concludes whether rangeland health can be improved without constructing or maintaining physical range improvements;
- Facilitates a procedural public land use review process that includes a *Federal Register* notice; a consistency analysis of local county or tribal land use plan(s); and incorporation of a Record of Decision (ROD) in a searchable database readily available to the public.

2.2 *The Public Rangelands Improvement Act of 1978* -

2.2.1 History and Purpose of PRIA

Two years after the enactment of FLPMA the unsatisfactory condition and low productivity of CVG District lands captured the attention of the 96th Congress, which responded with passage of the Public Rangelands Improvement Act of 1978 (PRIA).

[35] Memorandum. *Clarification of M-37008*. Solicitor of the Interior to Assistant Secretary - Policy, Management and Budget, et al. May 13, 2003. Page 1.

In its PRIA declaration of policy, Congress expressed concern that CVG Districts were under-producing and soil erosion was contributing to siltation and salinity of watersheds, rivers, and reservoirs. Congress also noted that federal range programs were underfunded and reiterated the importance of a stable domestic livestock industry protected by the TGA.[36]

The statutory construct of PRIA specifically provides for **active** improvement of CVG District rangelands, economic protection for the domestic livestock industry, and language that furthers the TGA range development and improvement programs:

> *"unsatisfactory conditions on public rangelands present a high risk of soil loss, desertification, and a resultant underproductivity for large acreages of the public lands; contribute significantly to unacceptable levels of siltation and salinity in major western watersheds including the Colorado River."*[37]

and,

> *"to prevent economic disruption and harm to the western livestock industry, it is in the public interest to charge a fee for livestock grazing permits and leases on the public lands which is based on a formula reflecting annual changes in the costs of production;"*[38]

The congressional intent of PRIA combines the economic wellbeing of the domestic livestock industry with land management, local land use planning, active inventorying, and human-based improvements on CVG District lands.

2.2.2 Mandates and Objectives for Inventory; Coordination with County Governments

PRIA requires the Secretaries of the Interior and Agriculture to maintain a current inventory of the health, range conditions, and range trends for each of the CVG Districts managed throughout the 135 million acres (BLM) and the national forests (USDA) of the western United States.[39, 40]

To facilitate the range development and improvement goals, PRIA codifies the inventory, range improvement, and permit fee programs established in FLPMA Title IV, the doctrine of multiple use and sustained yield, and land use planning and inventory statutes:

> "*Following enactment of this chapter, the Secretary of the Interior and the Secretary of Agriculture shall update, develop (where necessary) and maintain on a continuing basis thereafter, an inventory of range conditions and record of trends of range conditions on*

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36 NRDC v. Hodel, 62 F.Supp. 1945, 1054 (D. Nev.1985) - "The Mandate of Congress in PRIA was that livestock use was to continue as an important use of public lands; they should be managed to maximize productivity for livestock and other specified uses."

37 43 U.S.C. § 1901(a)(3) Congressional findings and declaration of policy.

38 Ibid. 43 U.S.C.§ 1901(a)(5).

39 43 U.S.C. § 1901.

40 43 U.S.C. §1711(a)(2).

> *the public rangelands, and shall categorize or identify such lands on the basis of the range conditions and trends thereof as they deem appropriate*."[41]

and,

> *"The Secretary shall manage the public rangelands in accordance with the Taylor Grazing Act (43 U.S.C. 315–315(o)), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701–1782), and other applicable law consistent with the public rangelands improvement program pursuant to this chapter."*[42]

and,

> "*the goal of such management shall be to improve the range conditions of the public rangelands so that they become as productive as feasible in accordance with the rangeland management objectives established through the land use planning process, and consistent with the values and objectives listed in sections 1901(a) and (b)(2) of this title."*[43]

and,

> *"the above-mentioned conditions can be addressed and corrected by an intensive public rangelands maintenance, management, and improvement program involving significant increases in levels of rangeland management and improvement funding for multiple-use values;*[44]

By delegating its authority to BLM to achieve the PRIA range management objectives, Congress mandated that the Secretary of the Interior fulfill the "*management objectives and the land use planning process established pursuant to Section 1712* [FLPMA] *of this title*:"

> *"(2) manage, maintain and improve the condition of the public rangelands so that they become as productive as feasible for all rangeland values in accordance with management objectives and the land use planning process established pursuant to section 1712 of this title;*

The federalistic construction of FLPMA, as codified in PRIA, is unambiguous in its intent to meaningfully include county governments in federal land use planning processes. In FLPMA Section 1712 (c)(9), Congress specifically provides for intergovernmental participation during revision of federal land use plans and processes; the requirement for BLM and USFS to understand and attempt consistency with county land use plans and policies; and, provisions for early notice of federal actions that affect county governments:

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41 43 U.S.C. § 1903. Rangelands inventory and management; public availability.

42 Ibid.

43 Ibid.

44 43 U.S.C. § 1901 (a)(4) Congressional findings and declaration of policy.

> *"to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located..."*

and,

> *"In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands."*[45]

When engaging in intergovernmental land use planning, the federalistic FLPMA coordination and consistency mandate prioritizes counties over the general public, special interest and environmental groups, public/private partnerships, or other non-governmental organizations. The FLPMA mandate for coordination with local government is also found in BLM policies, programs, and in BLM's field handbook. By contrast, the CLHR illegitimately subordinates local land use planning prerogatives to the level of non-governmental organizations and the public.

2.3 The Federal Land Policy and Management Act of 1976 -

In October 1976, after a decade of studies, legislative debate, and issuance of a comprehensive report on the condition of public lands by the Public Land Law Review Commission (PLLRC),[46] the 95th Congress enacted the Federal Land Policy Management Act (FLPMA).

FLPMA adopted nearly all the 137 recommendations from the PLLRC Report, itself the work of a twelve-year legislative effort. In 1964, through Public Law 88-607,[47] the Secretary of the Interior was required to develop criteria that would distinguish between those public lands slated for disposition and lands to be retained for ongoing management and administration as public lands.

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[45] 43 U.S.C. § 1712 (c)(9).

[46] *One Third of the Nation's Land — A Report to the President and to the Congress by the Public Land Law Review Commission*. (1970).

[47] Public Law 88-607. 78 Stat 986. September 19, 1964 (repealed).

2.3.1 Congressionally Defined and Limited Principal or Major Land Uses

In FLPMA Title I, Congress reiterated and clarified the MUSYA terms "multiple use" and "sustained yield," and identified only six limited "Principal Use or Major Use" classifications to be applied by the Secretaries of the Interior and Agriculture during administration of CVG Districts: [48]

> *"The term "principal or major uses" includes, and is limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.*

2.3.2 Congressional Delegation Doctrine and Intelligible Principle in FLPMA

In exercising its nondelegation prerogative, and through the use of unambiguous intelligible principle statutory language, Congress limited the principal or major use categories to only six (6).

The narrow scope of the FLPMA definition of "principal or major uses" precludes **any** administrative expansion of the term's statutory definition, a separation of powers prerogative that Congress unambiguously chose not to delegate to administrative agencies. This alone is cause to eliminate the CLHR Part 6100 from consideration, as landscape conservation is not a "use" but an objective to be achieved in the context of active multiple use and sustained yield of BLM-managed public lands.

BLM states that its authority for the proposed Part 6100 is derived from 16 U.S.C. § 7202 and 43 U.S.C. § 1701 *et seq*. The proposed Part 6100 in the CLHR is not possible unless conservation-as-a-use could be granted FLPMA principal or major use status. Promotion of conservation as a principal or major use is also barred in 16 U.S.C. § 7202 by the prohibition against adding new uses to the definition at 43 U.S.C. § 1702(l). 16 U.S.C. § 7202(d)(1)(E) states:

> "*Nothing in this chapter enhances, diminishes, or modifies any law or proclamation (including regulations relating to the law or proclamation) under which the components of the system described in subsection (b) were established or managed, including- …the Federal Land and Policy Management Act of 1976 (43 U.S.C. 1701 et seq.).*"

[48] 43 U.S.C. § 1702(l).

2.3.3 Purpose, Objective, and Use of ACECs in Land Use Policy

Areas of Critical Environmental Concern (ACEC) are land and resource priority areas that require special and prescriptive management[49] to provide protection of resource values identified during administrative processes. ACECs have designated boundaries, are generally limited in scope and size, and typically are limited to one or a few principal uses. ACECs are distinguished from other BLM-managed lands in that special management for fewer principal uses takes place at the expense of the other multiple land use values.

The ACEC designation process is a complex administrative undertaking that takes place during the Resource Management Planning (RMP) or RMP amendment process. Administrative procedural processes for ACECs include coordination between BLM, county, state and tribal governments.[50] Once a potential ACEC has been identified, longstanding BLM ACEC planning procedures require assessment using BLMs "*relevance*" and "*importance*" criteria[51] outlined in BLM's policy manual for designating ACECs. (Attachment G)

The ACEC designation and management requirements are unique, complex, procedurally detailed, and administrated at the local or state BLM office level.[52] ACECs have a designated boundaries with the total acreage being based on the area necessary to protect the relevant and important values and prescriptive management requirements.

The resulting RMP documents the relationship of the ACEC with respect to other land use designations and provides procedural guidance on ACEC monitoring and management.[53] This prescription includes allowable uses, restrictions, and limits based upon the special management practices derived from the process.[54] The final step for ACEC approval in the RMP or an amendment process is special notice in the *Federal Register* with a 60-day public comment period.[55]

The conservation leasing and natural asset inventory proposed in the CLHR is designed to expand the scope and area of ACECs to accommodate landscape level wildlife conservation and wildlife connectively through expanding corridor systems. The proposed expansion of ACEC designations is a distortion - or complete reversal - of the FLPMA intent and purpose for ACEC designations.

Because ACECs are typically designated for a single or fewer Principal Uses than normal BLM managed lands, the proposed, expanded landscape area will result in a reduction or elimination of other FLPMA Principal Uses by establishing wildlife conservation as a preference, preeminent, or even dominant Principal Use.

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[49] BLM Manual Section 1613.2.22.A.5; BLM Manual Section 1613.2.B.2.
[50] 43 U.S.C. § 1712 (c)(9).
[51] BLM Manual Section 1613.1.06. Policy.
[52] BLM Manual Section 1613.1.12.
[53] BLM Manual Section 1613.3.33.C.
[54] Ibid.
[55] BLM 1613.3 Public Notice and ACEC Documentation Standards.

2.3.3.1 *ACECs as Reservations under FPA*

ACECs are classified as reservations under Section 4(e) of the Federal Power Act (FPA) using the same administrative processes as those used for Wild and Scenic River Designations, Watershed Reserves, Designated Wilderness Areas, and CVG District lands.

Once established, reservation status cannot be altered or removed outside of complex administrative land use planning processes, nor can management programs be altered outside of information provided to the land use planning process from science-based monitoring data and information. [56]

In his January 19, 2001 Opinion M-37005, Solicitor of the Interior Leshy recognized ACEC designations as Reservations under Section 4(e) of the Federal Power Act:

> "*The BLM has also considered numerous other categories of lands as "reservations" for purposes of the FPA, including National Petroleum Reserve lands, California Desert Conservation Area lands, Areas of Critical Environmental Concern, Outstanding Natural Areas, Wild and Scenic Rivers designations, Land Utilization Project lands, watershed reserves, and Designated Wilderness Areas."* [57]

2.3.3.2 *Designation of ACECs within TGA CVG Districts and Mitigative Action*

Both ACECs and TGA CVG Districts are mapped and cadastrally-bounded reservations under the Federal Power Act. Under the public land use statutes and the RMP "*relevance*" and "*importance*" criteria for ACEC designations, BLM is mandated to administratively address preexisting land use or natural resource value conflicts before making any designations. This includes resolving resource value conflicts and determining whether a proposed ACEC, Wild and Scenic River, Watershed Reserve, or Wilderness Area might pose a conflict with a preexisting CVG District, its boundaries, or established values for grazing of domestic livestock.

Land use planning under FLPMA also requires that any decision that excludes one or more of the principal or major uses for two or more years on a tract of land of one hundred thousand acres or more shall be referred by the Secretary to the House of Representatives and the Senate for approval.[58]

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[56] Memorandum M-37005. *Whether Public Lands Withdrawn by Executive Orders 6910 and 6964 or Established as Grazing Districts are "Reservations" within the Meaning of Section 4(e) of the Federal Power Act*. Solicitor of the Interior. Page 2.

[57] Ibid. Solicitor of the Interior. M-37005. January 19, 2001.

[58] 43 U.S.C. § 1712 (e)(2)

3.0 FINDINGS OF FACT and CONCLUSIONS OF LAW

I. The Secretary of the Interior has not been delegated the authority to modify the FLPMA definition of "principal or major uses:"

a. In its *Federal Register* notification for the proposed LCHR, BLM proposes to add "conservation" as a principal or major use which would increase the number of principal or major uses to seven (7)

b. FLPMA defines "*principal or major uses*" at 43 U.S.C. § 1702(l) as:

> *The term "principal or major uses"* ***includes, and is limited to****, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.*

c. In FLPMA Congress employed its non-delegation prerogative to define what uses are "principal or major," and limited that definition to only those uses through the use of the phrase "*includes, and is limited to.*" This action established the statutory framework that constrains BLM's rulemaking authority.[59]

d. The only legitimate pathway for adding a principal or major use to the FLPMA at 43 U.S.C. § 1702(l) is through congressional action.

II. Adding conservation as a seventh principal or major use would conflict with the outworking of existing principal or major uses.

a. Congress intentionally limited the number of principal or major uses in FLPMA to ensure that BLM-managed CVG Districts and public natural resources remain accessible for productive use under the longstanding doctrine of multiple use and sustained yield.

b. Conservation activities in the BLM-managed public lands context do not generate revenue but instead consume resources. The norm of FLPMA, absent specific administrative procedural determinations, is to facilitate productive use, not resource sequestration.

c. Conservation as a principal or major use conflicts with existing principal uses by imposing a new use value that subordinates existing congressionally intended uses and valid rights.

d. Conservation leases on the BLM-managed public lands would constrict or eliminate other principal or major uses on the same land g and transition the land to single or fewer use value(s).

[59] *Constitution Annotated, Artl.S1.5.3 Origin of Intelligible Principle Standard*

e. The proposed LCHR at 43 CFR Part 6100 § 6102.4(a)(4) states:

> *"Subject to valid existing rights and applicable law, once the BLM has issued a conservation lease, the BLM shall not authorize any other uses of the leased lands that are inconsistent with the authorized conservation use."*

f. The construct of the CLHR language proposed at Part 6100 illegitimately subordinates the six statutory FLPMA principal or major land uses to preeminent use for conservation.

g. The construct of the CLHR language clearly exhibits BLMs intent to subordinate productive principal uses to conservation in direct and substantive conflict with the congressional intent of FLPMA.

III. The Secretaries of the Interior and Agriculture have a statutory obligation to protect chiefly valuable for grazing district reservations, boundaries, uses, privileges, and access for the preeminent, principal use of domestic livestock grazing:

a. The legislative history and BLM record document approximately 135 million acres of CVG Districts across 12 western states.

b. CVG Districts are *chiefly valuable for grazing* land reservations under Section 4(e) of the Federal Power Act.

c. Under TGA, FLPMA, and PRIA, CVG Districts are reserved for the preeminent principal use of grazing domestic livestock - a use that the Secretaries of the Interior and Agriculture have a statutory obligation to "*adequately safeguard*."

d. CVG Districts that are interspersed within the national forests and BLM managed lands have preexisting and geopolitically mapped boundaries recognized on maps by the Federal Government.

e. The TGA mandates that no other designations, withdrawals, or reservations may be superimposed over CVG District reservations, except following specific administrative determinations: "*Provided, that no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department…*"[60]

f. The BLM cannot legitimately impose an ACEC, make land withdrawals or designations, or designate reservations within a CVG District boundary without performing site specific administrative actions that include a chiefly valuable for grazing determination; a boundary survey; a consistency review of affected county land use plans; public notice in the *Federal Register*; and amendments to BLM Resource Management Plans (RMPs) documented through a Record of Decision (ROD).

[60] 43 U.S.C. § 315a

h. The Chief of the U.S. Forest Service is required to *maintain convenient* right-of-way access to CVG Districts within the national forest system and wilderness areas for stock driving purposes:

> *"Whenever any grazing district is established pursuant to this subchapter, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access…"*

and,

> *Within wilderness areas in the national forests designated by this chapter, and… (2) the grazing of livestock, where established prior to September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture.*[61,62]

IV. Conservation or other federal initiatives that propose to modify CVG District boundaries or retire TGA grazing leases require the Secretary of the Interior to perform a chiefly valuable for grazing determination:

The Secretary of the Interior is obligated to perform a chiefly valuable for grazing determination whenever an administrative action could establish, modify, or affect a grazing district boundary; or when grazing permits or leases within a CVG district are proposed to be retired.

a. TGA factors to be considered by the Secretaries when making CVG determinations are: The disruptive effect boundary changes would have on adjacent leases or allotments; economic distribution of revenues to state or local governments; the effect on the local livestock industry; and, whether rangeland health can be maintained in the absence of ongoing improvement and development of CVG Districts.

b. TGA and PRIA acknowledge that range development and orderly use will result in the betterment of forage conditions, improved watershed protection, and increased livestock production.

c. Conservation initiatives invariably require removal of fences, stock reservoirs, dam structures, and other manmade improvements. According to PRIA, this constitutes removal of federally-owned, taxpayer funded **range development improvements**.

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61 16 U.S.C. § 1133(d)(4)(2)

62 36 CFR § 293.7. *Grazing of livestock in wilderness areas*.

d. Conservation leases or imposition of reservations in a CVG District is subject to public processes, consistency review, boundary survey, and land use plan amendment requiring *Federal Register* notification.

V. The conservation leasing program is inconsistent with the mandate that requires BLM to administer lands for the highest and best use; carries significant federalism implications, and requires BLM to perform an analyses of impact to state and local governments.[63]

a. Presidential Executive Order 13132 Sec. 2 (i) states that:

> *"The national government should be deferential to the state when taking action that affects the policymaking discretion of States and should* ***act only with the greatest caution where state or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government****."*[64]

VI. The proposed LCHR conservation leasing program would foreseeably encourage 3rd party acquisition of private and dependent commensurate lands associated with BLM CVG Districts:

a. The TGA, as adopted by FLPMA and PRIA, mandates the Secretaries of the Department of the Interior and Agriculture to *safeguard* domestic grazing privileges and markets.

b. Lands administered by BLM within CVG Districts are linked to private lands recognized by law as dependent commensurate properties leased to stockmen engaged in the domestic livestock industry of the United States.

c. As contemplated by the CLHR, the only pathway for an entity to apply for conservation lease(s) on a CVG District grazing allotment is to first acquire base properties attached to the BLM managed grazing allotments.

d. The proposed CLHR conservation leasing program conflicts with the statutory duty of the Secretary of the Interior to administer reserved CVG Districts for the preeminent principal use of domestic livestock grazing.

e. The proposed conservation leasing system will create an illegitimate mechanism for international special interest groups, public/private partnerships, or non-profit corporations to transition U.S. public lands reserved for the domestic livestock industry to a single use for conservation purposes.

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[63] "*Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there*." Utility Air, 573 U. S. at 324.

[64] Presidential Executive Order 13132, Federalism. 64 Fed. Reg. 43,255 (1999).

f. The CLHR poses direct conflicts to 135 million acres of CVG District lands which are reserved for the preeminent, principal use of domestic livestock grazing without congressional action.

VII. The CLHR definition of "indigenous knowledge" is redundant, was rejected by Congress through a joint CRA resolution, and diminishes the federal standards of the Data Quality Act (DQA).

a. The CLHR defines "*Indigenous Knowledge*" (IK) information as:

> *"Indigenous Knowledge (IK) means a body of observations, oral and written knowledge, practices, and beliefs developed by Tribes and Indigenous Peoples through interaction and experience with the environment. IK is applied to phenomena across biological, physical, social, cultural, and spiritual systems. IK can be developed over millennia, continues to develop, and includes understanding based on evidence acquired through direct contact with the environment and long term experiences, as well as extensive observations, lessons, and skills passed from generation to generation. IK is developed by Indigenous Peoples including, but not limited to, Tribal Nations, American Indians, Alaska Natives, and Native Hawaiians."*[65]

b. On February 7, 2017, through H.J. Resolution 44, the 115th United States Congress rejected the substantially similar definition of "*Traditional Ecological Knowledge*" (TEK) in the BLM-proposed Planning 2.0 Rule.[66]

c. Once a major federal rulemaking has been rejected, the Congressional Review Act **prohibits adoption of a substantially similar or new rule**:

> "*A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule*."[67]

d. The CLHR definition of *Indigenous Knowledge (IK)* and the rejected definition of *Traditional Ecological Knowledge* in H.J. Resolution 44 are substantively identical in policy scope and intent.

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[65] Federal Register Vol. 88, No. 63 at 19598. Monday, April 3, 2023.

[66] Federal Register Vol. 81, No. 37. Thursday, February 25, 2016. Page 9689.

[67] 5 U.S.C. § 801 (b)(2).

e. The Data Quality Act (DQA)[68,69] requires information disseminated by federal agencies to meet four standards: *Quality, Utility, Objectivity*, and *Integrity*. In promulgating the DQA, and with respect to the quality of information for federal decision-making, Congress specifically requires:

> "*The more important the information, the higher the quality standards to which it should be held, for example, in those situations involving influential scientific or statistical information:"*[70]
>
> i. *The "Objectivity" component of DQA requires information used for resource planning to identify all sources of information, and standards for models, data, financial information or information in statistical contexts are to be documented "so the public can assess for itself whether there may be some reason to question the objectivity of the sources."*
>
> ii. *The "Reproducibility" component of DQA requires that information used for RMPs be "capable of being substantially reproduced subject to an acceptable degree of imprecision."*
>
> iii. *The "Utility" component of DQA refers to the usefulness of the information for its intended users, including the public. In disseminating information under the "Usefulness" requirement, Federal agencies "need to consider the uses of the information not only from the perspective of the agency, but also from the perspective of the public."*

c. The CLHR proposed *Indigenous Knowledge* of tribal "*observations, oral knowledge, practices, and beliefs…"* obtained through "*interaction and experience with the environment…*"and "*social, cultural, and spiritual systems*" is subjective and falls short of the FLPMA scientific standard which calls for BLM to: "*use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.*"[71]

d. Since oral traditions are typically not published, *Indigenous Knowledge* may not be subject to peer review. Tribal observations are not easily verified, and the public could be disenfranchised by inclusion of *Indigenous Knowledge* as a scientific standard during federal resource planning processes.

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[68] Section 515(a) U.S. Treasury and General Government Appropriations Act. Pub.L. 106-554.

[69] H.R. 5658; 66 FR 49718 September 28, 2001.

[70] 66 FR 49718.

[71] 43 U.S.C. § 1712(c)(2). (Pub. L. 94–579, title II, § 202(c)(2), Oct. 21, 1976, 90 Stat. 2748.)

e. IK fails to meet the federal "*objectivity*" and "*reproducibility*" standards of the Data Quality Act.

VIII. Certification by the Secretary of the Interior and the Office of Information and Regulatory Affairs that the CLHR would not have an impact on a significant number of small entities is arbitrary, not publicly verifiable, and erroneous:

a. In FR Vol. 88, No. 63 at 19583 the Secretary of the Interior certifies that the CLHR would not have a significant impact on a substantial number of small entities as defined by the Regulatory Flexibility Act at 5 U.S.C. §§ 601-612, Executive Orders 12866, and 13563.

b. A Regulatory Flexibility Act impact analysis **is required to determine** if the CLHR would have a significant impact on small businesses or entities. [5 U.S.C. § 603(a)]

c. According to the federal NAICS standards[72] a federal action that has an annual impact of greater than 2.5 million dollars to the Beef Cattle Ranching and Farming Industry constitutes an impact to a small entity.

d. The Bankhead Jones and Farm Tenant Act of 1937 (7 U.S.C. § 1012) directs the Secretary to reimburse counties 25% of the net revenues received by the Secretary **for the use of lands** in which Bankhead Jones lands are located.

e. Bankhead Jones and Farm Tenant Act revenues derived from livestock grazing, mineral extraction, and oil/gas production leases on BLM lands across an eleven-state area that are paid by the Secretary to county governments constitute a significant source of revenue.

f. Large tracts of **Montana's** Land Utilization (LU) lands are located in Montana CVG Districts 1,2,3 and 6. LU lands are fiscally administered to benefit rural communities, provide support for local schools, supplement maintenance of county roads, and fund county operations.

g. In **Wyoming**, where BLM manages 18.4 million acres of government land, greater than 97% of beef cattle farms and ranches <u>are family owned</u>. The statewide annual economic impact to Wyoming could be as high as $215.3 million dollars **per year**.

h. In **New Mexico**, where BLM manages 2,300 domestic livestock grazing allotments on 13.5 million acres, and 42 million acres of oil, natural gas, and mineral leases, the economic impact to small businesses has not been quantified at all as required by RFA.

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[72] 13 CFR § 121.201 (standards by which an entity will qualify as a "small business" for purposes of the Small Business Act). *See also* 5 U.S.C. § 601(3) ("small business" has the "same meaning as the term 'small business concern' under section 3 of the Small Business Act").

i. The transition of working federal lands from production to conservation for wildlife corridors and a conservation lease program will have a significant annual impact on counties dependent upon domestic livestock grazing across a 135 million acre area in the 11-state region occupied by CVG Districts.

j. The public record is silent as to the method, approach, or logic used by the Secretary of the Interior and Office of Information and Regulatory Affairs to conclude non-impact to a substantial number of small entities as required by RFA.

k. The certification by the Secretary of the Interior that the CLHR will not have an impact to small entities is without basis, arbitrary, and inconsistent with requirements at 5 U.S.C. §§ 601-612.

IX. BLM is prematurely implementing CLHR policies in its FY 2024 budget and in a North Dakota BLM Resource Management Plan.

a. Two Alternatives from a currently proposed BLM Resource Management Plan[73] (RMP) and Environmental Impact Statement (EIS) covering North Dakota propose to withdraw vast areas of federal, private, and North Dakota trust lands citing "conservation" as a land use.

b. Comments to the public record by the Attorney General of North Dakota conclude: "*the efforts by BLM to advance conservation for land management determinations in the North Dakota RMP Proposal are unlawful*." [74]

c. The Attorney General of **North Dakota** concludes that "*BLM's RMP Proposal promotes conservation and other non-codified uses over FLPMA's multiple use mandates*."[75]

d. Incorporation of conservation as a FLPMA principal or major use in the North Dakota BLM RMP is inappropriate as the CLHR rule may not be adopted.

e. Premature incorporation of conservation as a use or other CLHR mandates/provisions in RMP processes without authority could constitute governmental misfeasance by an agency or individual.

X. The CLHR misapplies and distorts the FLPMA purpose for ACECs:

a. Under the proposed CLHR, ACECs will be reserved for a designated use of landscape ecosystem resilience or for conservation purposes.

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[73] Notice of Availability of Draft Resource Management Plan and Draft EIS for the North Dakota Field Office. 88 Fed. Reg. at 3757. January 20, 2023.

[74] Office of the Attorney General. State of North Dakota. Notice of Availability of the Draft Resource Management Plan and Environmental Impact Statement. Comments to the Record. May 22, 2023.

[75] North Dakota AG Comments on RMP.

b. ACECs require specific boundaries, are typically limited in size, and require prescribed management plans for one or more principal use(s).

c. The land use planning process for ACECs typically eliminates one or more FLPMA principal use(s) to focus on one or a few principal use values.

d. Because the CLHR gives priority to conservation and the ACEC designation allows for principal uses to be administratively eliminated, the CLHR proposed conservation program will constrict and displace statutorily legitimate principal uses.

XI. BLM's claim of NEPA Categorical Exclusion for the CLHR is premature, unsubstantiated, and contrary to established case law:

a. In Section V. Procedural Matters at FR 19596 the BLM states:

> *"The BLM intends to apply the Department Categorical Exclusion (CX) at 43 CFR 46.210(i) to comply with the National Environmental Policy Act. This CX covers policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case by case. The BLM plans to document the applicability of the CX concurrently with development of the Final Rule."*

b. In its CLHR FR Notice BLM is proposing two separate and distinct major federal actions: The first action is **revision** of 43 CFR Part 1600; the second action is **development of a new body of rules** at Part 6100.

c. BLM's proposal to grant itself a Categorical Exemption neglects the unambiguous Council of Environmental Quality (CEQ) Rules at 40 CFR § 1508.1(q)(2). The CEQ rule specifically identifies agency actions that are major federal actions subject to the NEPA EA and EIS process:

> "*Major Federal actions may include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§1506.8 of this chapter).*"

d. The combination of two major federal actions requires two separate NEPA determinations. According to NEPA and case law, the proposed CLHR cannot legitimately be considered in isolation from the cumulative, future effects on RMPs, human systems, or the natural environment.[76, 77]

> i. *"A central purpose of an EIS is lost "if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken." Thomas v. Peterson, 753 F.2d 754, 761 (9th Cir. 1984)."*

and,

> ii. *Actions must not be segmented to avoid the requisite analysis. An agency "impermissibly segments NEPA review when it divides connected, cumulative, or similar federal actions into separate projects" and fails to address the true scope and impact. Myersville Citizens for a Rural Community, Inc v. F.E.R.C, 783 F.3d 1301 (D.C. Cir.2002).*

e. By its own admission, BLM has not evaluated the CLHR in sufficient detail so as to be able to publish whether any impact(s) to the human or natural environment may or may not occur as a result of CLHR.

f. BLM's proposal to issue itself a Categorical Exclusion under NEPA is premature, inappropriate, and contrary to established case law.

XII. The CLHR is substantively the same as the 2016 Resource Management Planning (Planning 2.0) Rule that was determined by Comptroller General to be a Major Federal Action and rejected under the Congressional Review Act:

a. In its February 25, 2016, Federal Register Notice, BLM purports that the Planning 2.0 Rule was "*Procedural*" in nature, not a Major Federal Action, and claimed a NEPA Categorical Exemption:

> *"The BLM does not believe this rule would constitute a major Federal action significantly affecting the quality of the human environment, and has prepared preliminary documentation to this effect, explaining that a detailed statement under the National Environmental Policy Act of 1969 (NEPA) would not be required because the rule is categorically excluded from NEPA review. This rule would be excluded from the requirement to prepare a detailed statement because, as proposed, it would be a regulation entirely procedural in nature."*[78]

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[76] 40 CFR § 1508.7

[77] *Native Ecos. Council v. Dombeck,* 304 F.3d 886, 893-94 (9TH Cir. 2002).

[78] FR Vol 81, No. 37 at 9724. Thursday, February 25, 2016.

b. In Joint Resolution H.J. 44 the Comptroller General of the U.S. Congress procedurally recognized the 2016 Resource Management Planning (Planning 2.0) Rule as a major rule subject to review under the Congressional Review Act (CRA).[79]

c. The CRA prohibits adoption of a substantially similar or new rule once a major federal rulemaking has been rejected under CRA:

> "*A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule*." [80]

d. Similar the CLHR, the 2016 Resource Management (Planning 2.0) Rule also proposed to "*apply landscape-scale management approaches*" to BLM resource management planning processes:

> "*Specifically, planning 2.0 seeks to achieve three goals: (3) improve the BLM's ability to address landscape-scale resource issues and to apply* ***landscape-scale management*** *approaches."*[81]

and,

> "*The BLM would also identify the role of the public land in addressing* ***landscape-scale resource issues*** *or supporting national, regional or local policies, strategies or plans*."[82]

and,

> *"In addition, recent Presidential and Secretarial policies and strategic direction emphasize the value in applying* ***landscape-scale management approaches to address climate change****, wildfire, energy development, habitat conservation, restoration, and mitigation of impacts on Federal lands*."

and,

> Forty-nine additional references to "*landscape-scale management."*

e. The Congressionally-rejected 2016 BLM Resource Management (Planning 2.0) Rule also proposed to integrate ***habitat connectivity or wildlife migration corridors, and areas of large and intact habitat*** into the BLM resource management and planning process:

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79 5 U.S.C. § 801 (a)(2)(A).

80 5 U.S.C. § 801 (b)(2).

81 FR Vol 81, No. 37 at 9674. Thursday, February 25, 2016.

82 FR Vol 81, No. 37 at 9675.

"Proposed paragraph (c)(5)(iii) of this section would refer to other areas of key fish and wildlife habitat such as big game wintering and summer areas, bird nesting and feeding areas, habitat connectivity or wildlife migration corridors, and areas of large and intact habitat. The identification of these areas is important at the onset of planning, as fish and wildlife habitat often crosses jurisdictional-boundaries and conservation of such habitat may require landscape-scale management approaches."[83]

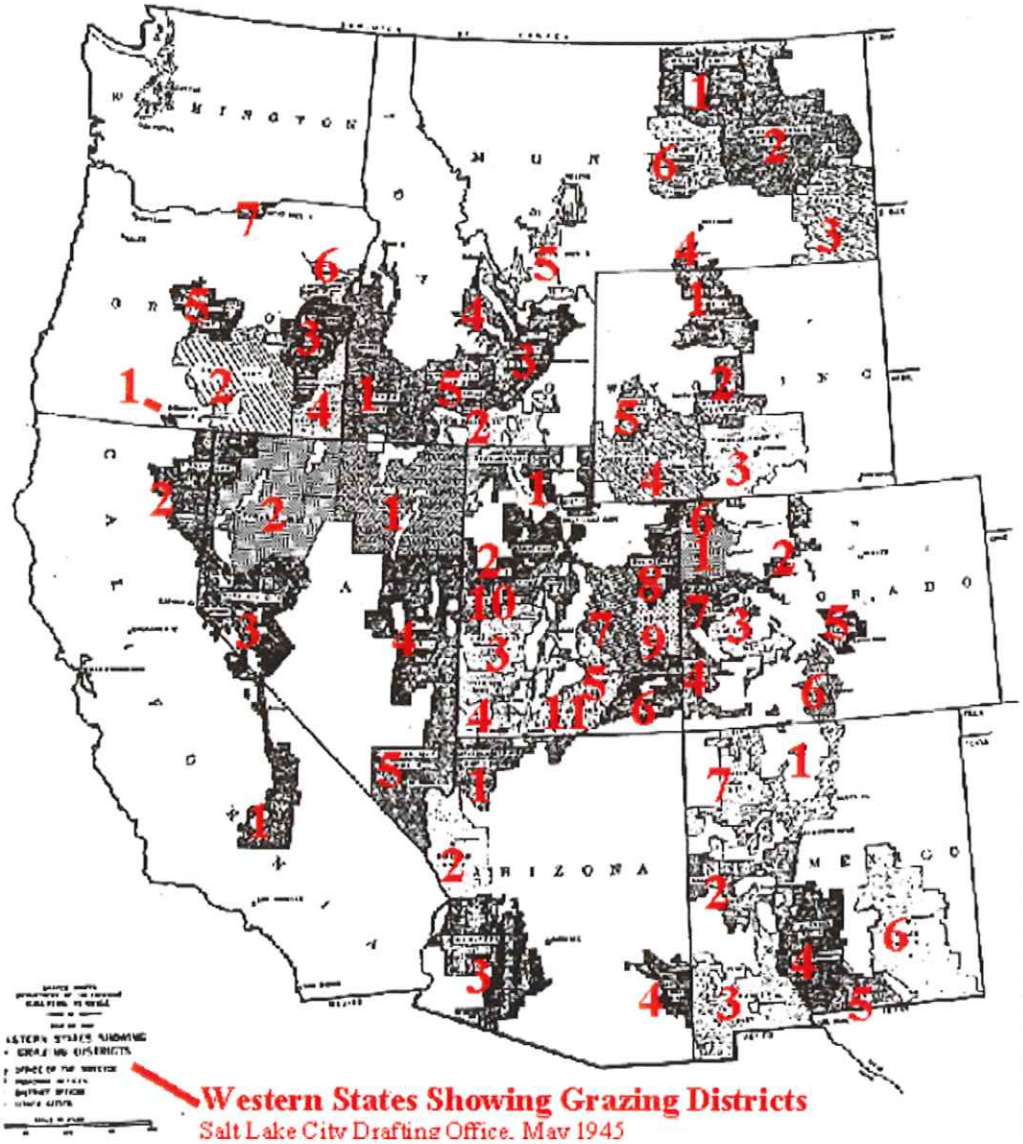
f. The CLHR is substantively identical in content, intent, and purpose to the 2016 BLM Resource Management (Planning 2.0) Rule determined by the Congressional Comptroller to be a major federal action.

g. The substance contained in the CLHR has been rejected by the U.S. Congress and must be withdrawn by the Secretary of the Interior from further consideration.

[83] FR Vol 81, No. 37 at 9708.

Attachment A

Taylor Grazing Act CVG Districts - May, 1945
Taylor Grazing Act CVG Districts - 2018



Western States Showing Grazing Districts
Salt Lake City Drafting Office, May 1945

Arizona
1. Arizona Strip
2. Kingman
3. Maricopa
4. Safford

California
1. Mojave
2. Honey Lake

Colorado
1. Meeker
2. Summit
3. Ouray
4. Dolores
5. Royal Gorge
6. Yampa
7. Rifle
8. San Luis

Idaho
1. Owyhee
2. Twin Falls
3. Lost River
4. Lemhi
5. Wood River

Montana
1. Malta
2. Musselshell
3. Mizpan
4. Bridger
5. Butte
6. Roundup

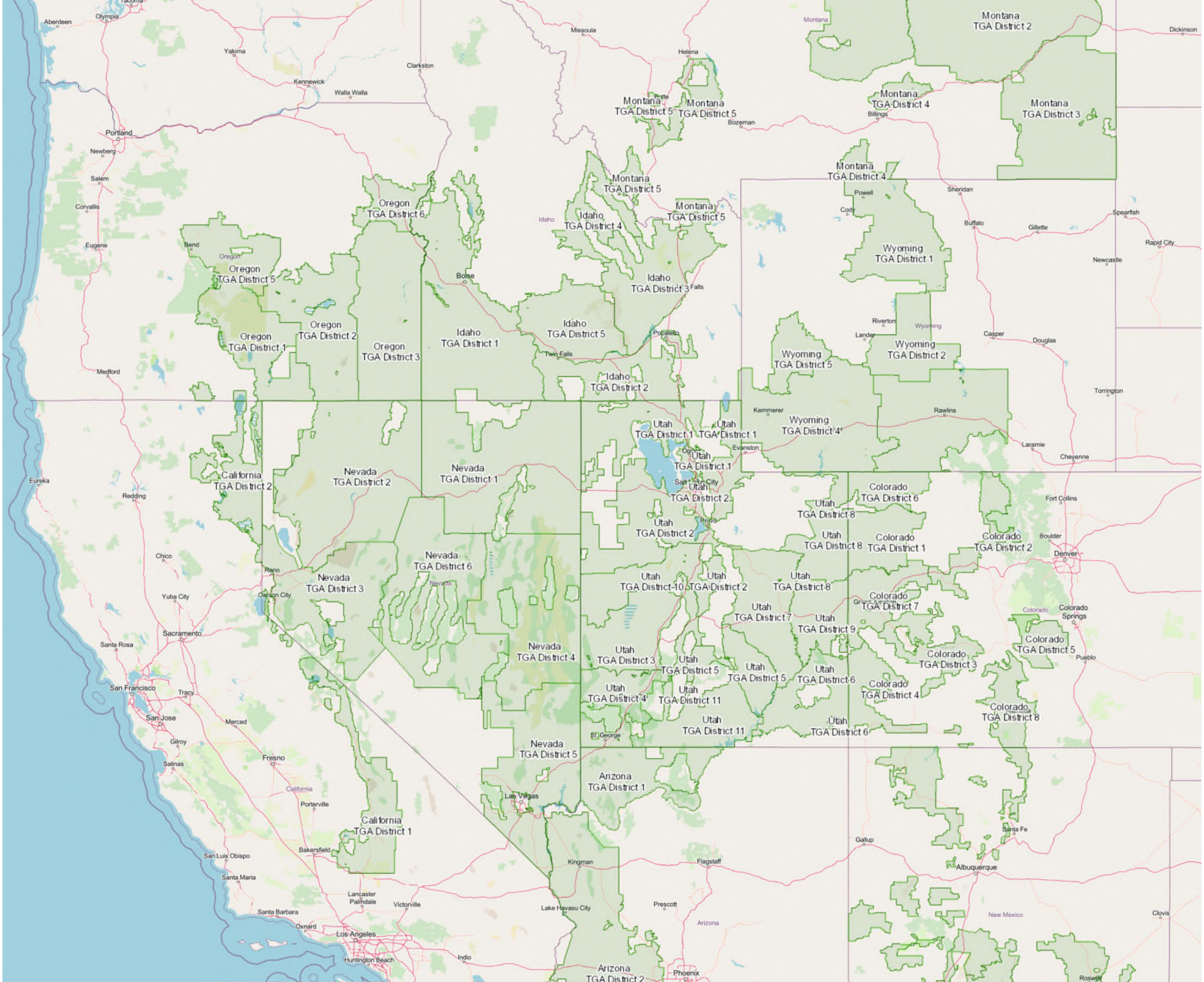
Nevada
1. Elko
2. Pyramid
3. Virginia City
4. Ely
5. Searchlight

New Mexico
1. San Isidro
2. Magdalena
3. Border
4. Tularosa
5. Mesa
6. Pecos
7. Chaco

Oregon
1. Bonanza
2. Basin
3. Vale
4. Jordan
5. Crooked River
6. Baker
7. Echo

Utah
1. Promontory
2. Bonneville
3. Panvant
4. Virgin
5. Escalante
6. Monticello
7. San Rafael
8. Ducnesne
9. Grand
10. Hebo
11. Vermillion

Wyoming
1. Tensleep
2. Wind River
3. Divide
4. Green River
5. Sublette


Montana TGA District 2
Montana TGA District 4
Montana TGA District 3
Montana TGA District 5
Montana TGA District 5
Montana TGA District 5
Montana TGA District 4
Wyoming TGA District 1
Idaho TGA District 4
Idaho TGA District 3
Oregon TGA District 6
Oregon TGA District 5
Oregon TGA District 2
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Oregon TGA District 3
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Idaho TGA District 2
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Wyoming TGA District 4
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Utah TGA District 8
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Utah TGA District 8
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Utah TGA District 9
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Utah TGA District 5
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Utah TGA District 6
Colorado TGA District 6
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Colorado TGA District 2
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Colorado TGA District 4
Colorado TGA District 8
California TGA District 2
California TGA District 1
Nevada TGA District 2
Nevada TGA District 1
Nevada TGA District 6
Nevada TGA District 3
Nevada TGA District 4
Nevada TGA District 5
Arizona TGA District 1
Arizona TGA District 2
Aberdeen
Olympia
Yakima
Kennewick
Walla Walla
Clarkston
Missoula
Helena
Billings
Bozeman
Dickinson
Portland
Newberg
Salem
Corvallis
Eugene
Bend
Boise
Twin Falls
Pocatello
Idaho Falls
Riverton
Lander
Casper
Douglas
Sheridan
Powell
Cody
Buffalo
Gillette
Spearfish
Rapid City
Newcastle
Torrington
Kemmerer
Rawlins
Evanston
Laramie
Cheyenne
Fort Collins
Boulder
Denver
Colorado Springs
Pueblo
Santa Fe
Albuquerque
Gallup
Clovis
New Mexico
Medford
Eureka
Redding
Chico
Reno
Carson City
Yuba City
Sacramento
Santa Rosa
San Francisco
Tracy
San Jose
Merced
Gilroy
Salinas
Fresno
Porterville
Bakersfield
San Luis Obispo
Santa Maria
Lancaster
Palmdale
Victorville
Santa Barbara
Oxnard
Los Angeles
Huntington Beach
Indio
Las Vegas
Lake Havasu City
Kingman
Flagstaff
Prescott
Phoenix
Provo
Salt Lake City
Ogden
St. George

Attachment B

Excerpt from
Natural Asset Capital Accounting Strategy

National Strategy to Develop Statistics
For Environmental-Economic Decisions

Office of Science and Technology Policy

January, 2023

NATIONAL STRATEGY TO DEVELOP STATISTICS FOR ENVIRONMENTAL-ECONOMIC DECISIONS

A U.S. SYSTEM OF NATURAL CAPITAL ACCOUNTING AND ASSOCIATED ENVIRONMENTAL-ECONOMIC STATISTICS

OFFICE OF SCIENCE AND TECHNOLOGY POLICY
OFFICE OF MANAGEMENT AND BUDGET
DEPARTMENT OF COMMERCE

JANUARY 2023

THE WHITE HOUSE
WASHINGTON

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Table of Contents

Preface from the Co-chairs iv
Executive Summary vi
The Interagency Policy Working Group and Process for Developing the Strategic Plan x
The Working Group xi
Strategic Plan: Audience, Goals, and Organization xii
How "Statistics for Environmental-Economic Decisions" is Organized xii
I. The Need for a System of Statistics for Environmental-Economic Decisions 1
A. Natural Capital Accounting and Sustainable Development of the U.S. Macro-Economy 4
B. Natural Capital Accounting and Federal Decision Making 7
C. Natural Capital Accounting and Competitiveness of U.S. Businesses 8
D. Natural Capital Accounting and Resilient State, Territorial, Local, Tribal, and Indigenous Communities 10
E. Conservation as an Economic Necessity 12
II. Renewing U.S. Leadership and Building on Strength 13
III. Connecting Natural Capital Accounts and Environmental-Economic Statistics with National Economic Accounts 15
Structuring National Capital Accounts and Environmental-Economic Statistics 15
Accounting Boundaries 18
Anchoring in Economics 26
IV. Developing a U.S. System of Statistics for Environmental-Economic Decisions: Targets, Timelines, and Tasks 28
Headline Summaries 33
Satellite Accounts, Other Reports, and Supporting Products 35
Environmental Sectors for Natural Capital Accounts and Environmental-Economic Statistics 37
Phase I Environmental Sectors 40
Phase II Environmental Sectors 52
Phase III Environmental Sectors 61
Other Supporting Technical Activities 62
Classification Systems 62
Valuation Standards for Natural Capital Accounting and other Environmental-Economic Statistics and Connections to Benefit-Cost Analysis 64

Guidance on Biodiversity 66
V. Administrative Coordination Across the Federal Government 68
Coordination 68
Facilitating Data Sharing and Promoting Interoperability 69
Interoperability 70
Data Sharing 70
Website and Data Serving 71
Engagement 71
International 72
State, Territorial, and Local Governments 72
Tribal Governments and Indigenous Organizations 73
Private Sector, Natural Resource Stewards, Non-Governmental Sector, Academia, and the General Public 73
VI. Conclusion 75
List of Acronyms 76
Appendices 78
Appendix A. The Development of Environmental-Economic Statistics 78
Appendix B. Connecting Natural Capital and Environmental-Economic Statistics with National Economic Accounts. 80
Stocks and Flows 80
Supply-Use Tables and Input-Output Tables 80
Other Summaries and Indicators 82
Appendix C. Pathway to Production Grade Accounts and Core Statistical Products 83
Research 83
Experimental Statistics 83
Production Grade or Core Statistical Products 84
Appendix D. Authority and Applicable Guidelines for Developing Natural Capital Accounts and Associated Environmental-Economic Statistics within the United States 85
The Paperwork Reduction Act of 1995 85
Foundations for Evidence-Based Policymaking Act of 2018 86
Other Authorities 87
Applicable Guidelines 87
Appendix E. Themes from Public Comment 88

The nation's economy and environment are deeply intertwined. A strong economy depends on a stable climate, clean air and water, and all nature has to offer. We have taken it for granted, but we can no longer afford to do so. Climate change and the loss and degradation of ecosystems impact our country's economic growth and opportunity. Historically, we've lacked a standard approach to track the condition of nature or its economic role and value, which impairs our ability to fight the climate crisis, build a strong and sustainable economy, and advance economic equity.

But now, the first-ever U.S. National Strategy to Develop Statistics for Environmental-Economic Decisions (National Strategy) recognizes and addresses this issue. It creates a U.S. system to account for natural assets—from the minerals that power our tech economy and are driving the electric-vehicle revolution, to the ocean and rivers that support our fishing industry, to the forests that clean our air—and quantify the immense value this natural capital provides. This National Strategy will help us understand and consistently track changes in the condition and economic value of land, water, air, and other natural assets. It will also help the federal government fulfill its responsibility to the American people to provide a fuller understanding of our economy. And it will provide data to guide the federal government and the economy through the transition we need for sustainable growth and development, a stable climate, and a healthy planet.

Natural assets, like land and water, underpin businesses, enhance quality of life, and act as a stabilizing force for economic prosperity and opportunity. They also help counteract the destabilizing risks to our environment and markets caused by climate change and nature loss. Yet the connections between nature and the economy are not currently reflected in our national economic statistics. When the government spends a dollar to restore a coral reef or a forest that will attract tourism, supply water, or clean the air, our current system does not capture the economic value of this investment. The National Strategy gives us a path to change that. Clearly measuring the quantity and value of natural capital will enable more accurate economic growth forecasts and facilitate a more complete picture of economic progress to inform how we prioritize investments.

Our understanding of the American economy keeps evolving, and our approach to measuring and tracking economic inputs and outputs must evolve too. In the wake of the Great Depression, the U.S. government developed innovative ways to better measure our economy, giving Americans an overall picture of the state of the nation's economy for the first time. That pioneering work fundamentally changed how we talk about the economy, conduct economic policy, and measure progress. Over the years, that system for measuring our economy has continued to evolve and our view of the economy must evolve with it, so we may enable policymakers, investors, business, and communities to make evidence-based decisions. Tackling climate change, restoring nature, cleaning our air, lakes, rivers, and the ocean, and regenerating degraded lands often are economic activities—they are investments in our economy and future, and thus need to be captured in our economic accounts.

We are proud of this National Strategy and the 27 Federal departments, agencies, and offices that collaborated to produce it. We are also grateful for the input from private citizens, businesses, trade groups, non-profits, and experts in economics, statistics, and science whose engagement strengthened the National Strategy. We look forward to measuring our economy more holistically, and finally including the valuable role that nature plays in our nation and world.

Arati Prabhakar, Ph.D.
Assistant to the President and Director,
Office of Science and Technology Policy

Shalanda D. Young
Director, Office of
Management and Budget

Gina M. Raimondo
Secretary of Commerce,
Department of Commerce

Executive Summary

> *"Nature plays an immense role in our climate but also in every other aspect of our lives. What does it take to stop eroding nature that we depend on for so much in our lives? It starts by accounting for the economic value of land and water, fish and forests, and other natural assets, rather than effectively counting nature as zero on the balance sheet."*
>
> – Dr. Arati Prabhakar, President Biden's Science Advisor and Director of the White House Office of Science and Technology Policy, 10/21/2022 remarks to AAAS

People depend on nature to supply important services and economic opportunities. For example, families escape their daily grinds to recreate in nature and travel to experience majestic mountains and tranquil beaches; soils, water, and bees work with America's farmers to grow food; and trees, grasses, and other plants are the original carbon capture and storage system and also filter other pollutants, complementing the efforts of nurses and doctors to make Americans healthier and more productive. With every passing year, scientists, innovators, and economists discover more evidence about how the economy relies on nature and how economic activities change nature's ability to provide services. The fact that nature provides people with services now and opportunities in the future is why economists refer to nature as a form of capital. This natural capital supports economic prosperity in similar ways to the financial capital that is traded on Wall Street or the buildings and machines that make up the physical capital on Main Street.

Natural assets or natural capital stocks are durable physical or biological elements of nature that persist through time and contribute to current or future economic production, human enjoyment, or other services people value.

Environmental-economic statistics are organized data that enable measurement of the quantity and value of natural assets, connecting their services to the economy and human wellbeing, and tracking changes in these values through time.

The National Strategy to Develop Statistics for Environmental-Economic Decisions: A U.S. System of Natural Capital Accounting and Associated Environmental-Economic Statistics charts a course to measure natural capital in official U.S. economic statistics. The current absence of these important economic metrics and the omission of nature from the national balance sheet lead to erosion of current and future economic opportunities. The proposed expansion of the national economic accounting system seeks to provide new information to capture links between nature and the economy. This Strategic Plan uses existing authorities and builds on and integrates numerous existing natural capital measurement efforts across many Federal agencies. The resulting multi-year effort will lead to more inclusive and forward-looking conversations about "the economy." It will provide and organize the information needed to make informed decisions that enhance economic prosperity in the present, while securing future nature-dependent economic opportunities.

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Why is a plan needed? Our current national economic accounts—the organized data describing the U.S. economy, often summarized as Gross Domestic Product (GDP)—are largely disconnected from the natural world. Yet American families, American businesses, and the American economy depend on nature. For example:

- **Nature starts many supply chains.** Critical minerals underlie many new technologies, water and pollinators help grow the fruits and vegetables eaten at the dinner table, and trees create much of the timber framing American houses.
- **Nature motivates many modern innovations.** Plants and wild animals inspire designs and provide critical models and raw materials for many drugs and cosmetics.
- **Nature undergirds many firms' successes, across many sectors.** Natural landmarks drive much of the tourism industry, and wild fish provide food for grocery stores and restaurants to sell.
- **Nature protects property and other infrastructure.** Reefs, dunes, and forests reduce the damage caused by storms, floods, and other extreme weather events.
- **Nature provides recreational opportunities and community and cultural connections.** Forests, beaches, and wildlife underpin recreational and cultural services that are important to Americans, and these services are often free of charge.
- **Nature promotes health.** Green and blue spaces and clean air facilitate mental health, and reduce heat stress, saving money on health care, increasing productivity, and improving quality of life.

Despite how the health of nature drives the health of the economy, implementation of the national economic accounts is disconnected from our understanding of nature. The national economic accounts guide how people see the economy, how governments discuss policy, and how statisticians measure economic growth. These accounts are imperfect, yet pragmatic. They were devised at a time when nature's ability to provide seemed limitless. Over many decades, the economic accounts have continued to evolve and expand to cover new sectors in response to new understanding of what drives the economy. For example, it wasn't until 2013 that the Bureau of Economic Analysis recognized in a blog post that producing artistic originals like making a movie or writing a book was recognized as investing in capital that could generate returns for years to come. Some elements of nature are part of the conceptual framework for national economic accounts but go unmeasured or are misattributed in practice. Other connections between nature and the economy are newly understood. The quantity, condition, and value of nature, however, still remain a blind spot in the national economic accounts.

This knowledge gap prompts the need to evolve the national economic accounting system and connect nature to the measurement of the economy. Policy makers are increasingly concerned about the role of nature in long-term economic forecasts. Banks, investors, insurers, and consumers increasingly demand information about environmental dependencies and risks to economic sectors. Regulators and regulated industries increasingly desire dependable information and structure to devise and plan for regulations that protect the environment, while growing the economy and creating good-paying jobs. The challenges of climate change, biodiversity loss, air and water pollution, and environmental injustice carry implications for the economy and the environment, and society cannot effectively or efficiently confront those challenges if economic and environmental accounting and policy proceed on two separate tracks.

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To unify these tracks most effectively, the United States needs a unified system of economic and environmental statistics. This Strategic Plan charts the path to achieving that goal.

This document, shortened hereafter to *Statistics for Environmental-Economic Decisions* or the Strategic Plan, presents a robust and pragmatic pathway to bring nature into the national economic accounts by developing natural capital accounts supported by environmental-economic statistics. The path articulated in this Strategic Plan treats nature as an asset and incorporates these natural assets on the national balance sheet. These accounts and statistics can work alongside traditional economic statistics, such as GDP, to help guide economic decision making to be more inclusive of the services—or benefits to humans—nature provides. The Strategic Plan also supports Executive Order 14072 that directs agencies to better understand, account for, and find solutions in nature.

Putting nature on the national balance sheet is an exciting effort for the Federal Government, but it is not a new idea. American economist Irving Fisher first proposed doing so over 100 years ago, and academic researchers, multiple Nobel laureate economists, Federal scientists, economists, and statisticians have been researching and prototyping this idea since the 1970s. The National Academy of Sciences has produced multiple reports and the U.K. Treasury released the high-profile Dasgupta Review in 2021 supporting the idea. The international statistical community adopted the United Nations-developed System of Environmental-Economic Accounting standards, and over 80 countries, including many U.S. allies, are formalizing natural capital accounting in their nations' economic statistical systems. Fortunately, the United States has the expertise and data to put nature on the national balance sheet.

Following the Administration's commitment to initiate natural capital accounts and environmental-economic statistics in April 2022, *Statistics for Environmental-Economic Decisions* makes five recommendations to Federal departments and agencies for how to develop and use natural capital accounts and environmental-economic statistics.

Recommendation 1. The natural capital accounts and environmental-economic statistics should be pragmatic and provide information to:

a. Guide sustainable development and macroeconomic decision making;
b. Support Federal decision making in programmatic, policy, and regulatory settings;
c. Provide structure and data that promote the competitiveness of U.S. businesses;
d. Support resilient state, territorial, Indigenous, Tribal, and local communities; and
e. Facilitate conservation and environmental policy.

Recommendation 2. The natural capital accounts and associated environmental-economic statistics should provide domestic comparability through time and advance international comparisons and harmonization in order to enable the United States to lead with respect to the development of global standards and implementation of those standards.

Recommendation 3. The natural capital accounts and associated environmental-economic statistics should be embedded in the broader U.S. economic statistical system, and guide the process of embedding with three sub-recommendations. Federal departments and agencies should:

a. Incorporate the internationally-agreed standards of the U.N. System of Environmental Economic Accounting to guide development of U.S. natural capital accounts, where those standards are relevant to the United States and robustly developed. This includes following the standard supply-use framework that structures national economic accounts;

b. Adhere to more than one, but a small number of, specific asset boundaries, connected to economic activities, in order to accommodate different applications and contexts and be inclusive of different uses and perspectives; and
c. Use rigorous and the best available economic science for monetizing the value of natural assets.

Recommendation 4. Federal departments and agencies should use a 15-year phased approach to transition from research grade environmental-economic statistics and natural capital accounts to core statistical products, and produce a single headline summary statistic, along with supporting products, tables and reports that provide information in physical and monetary units.

a. The phased approach is designed to enable new information to be available early in the process, facilitate the first pilot accounts appearing in 2023, provide for testing and development, while over the long term meeting high statistical standards and producing a durable and more comprehensive set of statistics to expand the national economic accounts.
b. The Strategic Plan recommends that natural capital accounts produce a new forward-looking headline measure focused on the change in wealth held in nature: Change in Natural Asset Wealth. Integrating this new measure with changes in GDP would provide a more complete and more useful view of U.S. economic progress. Pairing Change in Natural Asset Wealth with GDP would help society tell if today's consumption is being accomplished without compromising the future opportunities that nature provides.
c. The Strategic Plan also recommends the use of dashboards for biological and physical measures.

Recommendation 5. The Federal Government should apply existing authorities and make use of the substantial expertise within Federal departments and agencies, by coordinating across agencies, to develop and update the system of natural capital accounts and environmental-economic statistics in an efficient manner.

American incomes and the American economy depend on nature. *Statistics for Environmental-Economic Decisions* provides the guidance to update the national economic accounting system so that it continues to provide clear-eyed information to guide policies and business decisions. Like other sectors measured in the national economic accounts, such as health and food for our families, the total value of nature cannot be fully measured in monetary terms. However, by adhering to the standards used elsewhere in the national economic accounting system, it is possible to connect information on nature and the economy to help America prosper as the country overcomes 21st century economic challenges, including those linked to climate change, biodiversity loss, air and water pollution, and environmental injustice.

The Interagency Policy Working Group and Process for Developing the Strategic Plan

On April 22, 2022, the Administration announced the "initiation of the first U.S. national system of natural capital accounts and standardized environmental-economic statistics."[1] The Office of Science and Technology Policy (OSTP), the Office of Management and Budget (OMB), and the Department of Commerce (DOC) organized and co-chaired an Interagency Policy Working Group (Working Group) to develop this Strategic Plan, which enables the United States to connect the national economic accounts with environmental-economic information. The Working Group operated in a way consistent with activities regularly conducted under existing legal authorities and by drawing on the breadth of expertise available across the Federal Government. This Working Group expanded over time, and today, consists of Federal Government employees from 27 Federal agencies and offices with experience and expertise in developing, using, and harmonizing ecological, statistical, and economic research and initiatives.

On August 18, 2022, OSTP, OMB, and DOC made public the draft national strategy for natural capital accounts and associated environmental-economic statistics, *Statistics for Environmental-Economic Decisions*,[2] and OMB issued a Request for Information through the Federal Register to solicit public comment on the draft Strategic Plan.[3] Public comments were primarily accepted through regulations.gov, and those comments can be viewed at https://www.regulations.gov/document/OMB-2022-0009-0001/comment. The Working Group is grateful to members of the public who took the time and effort to comment on the draft strategy.

The Working Group found the comments thoughtful, constructive, and overwhelmingly supportive of the initiative. Comments were received from the private sector and industry groups, not-for-profit and non-governmental organizations, private citizens, and academics and experts from around the world, including Nobel laureate economists and members of the National Academies. Common refrains included that this initiative is long overdue, that natural capital accounting is something the Federal Government is capable of doing, and U.S. Federal leadership is important and should contribute to, and align with, international standards such as the System of Environmental Economic Accounts (SEEA). Commenters also provided suggestions for clarifying language, data sets, and methods for consideration. More information

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[1] The White House. (2022, April 22). *Fact Sheet: President Biden Signs Executive Order to Strengthen America's Forests, Boost Wildfire Resilience, and Combat Global Deforestation.* https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/22/fact-sheet-president-biden-signs-executive-order-to-strengthen-americas-forests-boost-wildfire-resilience-and-combat-global-deforestation/;
U.S. Secretary of Commerce Gina Raimondo. (2022, April 22). *White House Roundtable – "Knowledge In Nature: How Nature Can Help Grow a Better Future."* YouTube. https://www.youtube.com/watch?v=9DvHgx4nmUI (Timestamp 48:32).

[2] The White House. (2022, Aug. 18). *A New National Strategy to Reflect Natural Assets on America's Balance Sheet.* https://www.whitehouse.gov/omb/briefing-room/2022/08/18/A-New-National-Strategy-to-Reflect-Natural-Assets-on-Americas-Balance-Sheet/.

[3] The White House Office of Management and Budget. (2022, Aug. 22). *Request for Information to Support the Development of a Strategic Plan on Statistics for Environmental-Economic Decisions.* U.S. National Archives — Federal Register. https://www.federalregister.gov/documents/2022/08/22/2022-17993/request-for-information-to-support-the-development-of-a-strategic-plan-on-statistics-for.

Attachment C

FDR Executive Order 6910 - January 28, 1934
FDR Executive Order 6964 - February 2, 1935

EXECUTIVE ORDER

WITHDRAWAL FOR CLASSIFICATION OF
ALL PUBLIC LAND IN CERTAIN STATES

WHEREAS, the act of June 28, 1934 (ch. 865, 48 Stat. 1269), provides, among other things, for the prevention of injury to the public grazing lands by overgrazing and soil deterioration; provides for the orderly use, improvement and development of such lands; and provides for the stabilization of the livestock industry dependent upon the public range; and

WHEREAS, in furtherance of its purposes, said act provides for the creation of grazing districts to include an aggregate area of not more than eighty million acres of vacant, unreserved and unappropriated lands from any part of the public domain of the United States; provides for the exchange of State owned and privately owned lands for unreserved, surveyed public lands of the United States; provides for the sale of isolated or disconnected tracts of the public domain; and provides for the leasing for grazing purposes of isolated or disconnected tracts of vacant, unreserved and unappropriated lands of the public domain; and

WHEREAS, said act provides that the President of the United States may order that unappropriated public lands be placed under national-forest administration if, in his opinion, the land be best adapted thereto; and

WHEREAS, said act provides for the use of public land for the conservation or propagation of wild life; and

WHEREAS, I find and declare that it is necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain within certain States for the purpose of effective administration of the provisions of said act;

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed, it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

The withdrawal hereby effected is subject to existing valid rights.

This order shall continue in full force and effect unless and until revoked by the President or by act of Congress.

10 a.m. E.S.T. Franklin D. Roosevelt

November 26, 1934.

EXECUTIVE ORDER

WITHDRAWAL FOR CLASSIFICATION OF ALL PUBLIC LAND IN CERTAIN STATES

WHEREAS title II of the National Industrial Recovery Act, of June 16, 1933 (ch. 90, 48 Stat. 195), provides among other things for the preparation of a comprehensive program of public works which shall include among other matters the conservation and development of natural resources, including control, utilization, and purification of water, prevention of soil or coastal erosion, and flood control; and

WHEREAS in furtherance of the said act the Special Board for Public Works appointed by Executive Order No. 6174, of June 16, 1933, has by its resolution Of July 18, 1934, included in the comprehensive program of public works contemplated by title II of the National industrial Recovery Act certain projects known as "The Land Program, Federal Emergency Relief Administration"; and

WHEREAS the said Land Program contemplates the use of public lands in the States of Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin for projects concerning the conservation and development of forests, soil, and other natural resources, the creation of grazing districts, and the establishment of game preserves and bird refuges; and

WHEREAS I find and declare that it is necessary to classify all the unreserved and unappropriated lands of

the public domain within the said States for the purpose of the effective administration of the said Land Program:

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, Stat. 497), and subject to the conditions therein expressed and to valid existing rights, it is ordered that all the public lands in the States of Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin be, and they are hereby, temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification and pending determination of the most useful purpose to which said lands may be put in furtherance of said Land Program, and for the conservation and development of natural resources.

Public lands within any of the States herein enumerated which are on the date of this order under an existing reservation for a public purpose are exempted from the force and effect of the provisions of this order so long as such existing reservation shall remain in force and effect.

This order shall continue in full force and effect unless and until revoked by the President or by an act of Congress.

Signed: Franklin D. Roosevelt

THE WHITE HOUSE

February 2, 1935.

6964

Appendix D

DOI Solicitor Memorandum M-37008
BLM's Authority to Retire Grazing Permits
October 4, 2002

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

M-37008

OCT - 4 2002

Memorandum

To: Secretary

From: Solicitor

Subject: Authority for the Bureau of Land Management to Consider Requests for Retiring Grazing Permits and Leases on Public Lands

Question Presented and Summary Conclusion

I have reviewed a memorandum from my predecessor to the Director of Bureau of Land Management (BLM) dated January 19, 2001, regarding BLM's authority to terminate or "retire" grazing on particular public lands at the request of a rancher who holds a permit or lease (hereafter, "permit") to graze livestock on those lands. I conclude that BLM has such authority but only after compliance with statutory requirements and BLM decides the public lands associated with the permit should be used for purposes other than grazing. A decision by BLM to retire livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions.

Introduction

This opinion examines the specific situation in which a grazing permittee volunteers to relinquish all or part of a permit to graze livestock upon the condition that BLM will permanently retire grazing on the public lands subject to the permit. This situation arises in the context of resource or land use conflicts and may involve an arrangement between a third party, such as a conservation organization, and a permittee. In such a situation, a third party generally offers to purchase the base property on the condition that the associated grazing permit is permanently retired.[1] This arrangement meets the goals of the two private parties only where BLM, after a public land use planning process, makes an independent decision

[1] This general description is not meant to characterize the only way private parties can reach agreement. A variety of financial arrangements and sale contracts can be used by private parties to acquire private ranches and transfer associated grazing permits. BLM is not a party to these private agreements. While BLM may acknowledge an agreement in the planning process, BLM does its own analysis and makes its own independent decision about devoting public rangelands to a use other than livestock grazing.

regarding the use of the public lands and decides to accept relinquishment of the grazing permit and terminate or "retire" the authorized grazing. However, this "retirement" cannot be considered permanent in nature absent congressional action.[2]

Solicitor Leshy addressed grazing retirement in his January 19, 2001 memorandum. He concluded that BLM could accept relinquished grazing permits through its land use planning process regardless of whether the relinquishment was voluntary or involuntary, although he suggested that voluntary relinquishments should have priority over involuntary relinquishments. He made no distinction between lands within grazing districts and those outside of grazing districts established under the Taylor Grazing Act (TGA). One additional and very important factor concerning grazing relinquishment, whether voluntary or involuntary, must be considered. This factor is that lands within grazing districts have been found to be "chiefly valuable for grazing and the raising of forage crops." There must be a proper finding that lands are no longer chiefly valuable for grazing in order to cease livestock grazing within grazing districts. Moreover, cessation of grazing may implicate congressional reporting requirements and grazing relinquishment decisions are not permanent.

Statutory Framework

Congressional direction regarding livestock grazing on the public lands is found in the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315o-1; the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782; and the Public Rangelands Improvement Act of 1978 (PRIA), 43 U.S.C. §§ 1901-1908.

In the TGA, Congress authorized the Secretary to identify lands as "chiefly valuable for grazing and raising forage crops," to place these lands in grazing districts, and to issue permits to qualified applicants. 43 U.S.C. § 315. Lands outside of grazing districts may be leased for livestock grazing. 43 U.S.C. § 315m. The TGA also gives the Secretary the authority to make adjustments to grazing use based on range conditions and to regulate the occupancy and use of the public rangelands in order to preserve the land and its resources from destruction or unnecessary injury and to provide for the orderly use, improvement, and development of the range. 43 U.S.C. § 315a. Under FLPMA, Congress authorized the Secretary to manage public lands on a multiple use and sustained yield basis through land use plans developed with public involvement. 43 U.S.C. § 1712. FLPMA also defines domestic livestock grazing as a "principal or major use." 43 U.S.C. § 1702(*l*). Lastly, in PRIA Congress recognized the need to manage public rangelands to be as productive as feasible for all rangeland values. 43 U.S.C. §§ 1901(b)(2), 1903(b).

[2] To avoid confusion, the voluntary relinquishment of a grazing permit is best referred to as just that -- "relinquishment," not "retirement."

Discussion and Analysis

When considering a proposal to cease livestock grazing on public rangelands, BLM must address a number of important land use planning factors. Some of these factors are set forth in the Leshy memorandum and apply whether the lands are within a grazing district or not. When the lands are within a grazing district, as the vast majority of grazing lands are, BLM must also analyze whether the lands are still "chiefly valuable for grazing and raising other forage crops." 43 U.S.C. § 315. If BLM concludes that the lands still remain chiefly valuable for these purposes, the lands must remain in the grazing district. As such, they would remain subject to applications from other permittees for the forage on the allotment that is relinquished to BLM.

In *Public Lands Council v. Babbitt,* 167 F.3d 1287 (10th Cir. 1999), *aff'd on other grounds*, 529 U.S. 728 (2000), the Tenth Circuit struck down a BLM regulation authorizing conservation use permits. These permits authorized permittees not to graze during the entire term of a ten-year grazing permit. The court found a presumption of grazing use within grazing districts and struck down the regulation because it reversed this presumption:

> The TGA authorizes the Secretary to establish grazing districts comprised of public lands 'which in his opinion are chiefly valuable for grazing and raising forage crops.' 43 U.S.C. § 315. When range conditions are such that reductions in grazing are necessary, temporary non-use is appropriate . . . . The presumption is, however, that if and when range conditions improve and more forage becomes available, permissible grazing levels will rise . . . . The Secretary's new conservation use rule reverses that presumption. Rather than annually evaluating range conditions to determine whether grazing levels should increase or decrease, as is done with temporary non-use, the Secretary's conservation use rule authorizes placement of land in non-use for the entire duration of a permit. This is an impermissible exercise of the Secretary's authority under section three of the TGA because land that he has designated as 'chiefly valuable for grazing livestock' will be completely excluded from grazing even though range conditions could be good enough to support grazing. Congress intended that once the Secretary established a grazing district under the TGA, the primary use of that land should be grazing.

Id. at 1308. The foregoing language clearly applies in the grazing retirement context. If the Secretary cannot foreclose grazing within a grazing district for a ten year period, the Secretary certainly cannot indefinitely retire grazing within a district.

If BLM determines that lands are no longer chiefly valuable for grazing, BLM must express this determination and support it by proper findings in the record of decision that concludes the land use planning process. For lands outside of grazing districts, this analysis is not necessary because BLM has not made a chiefly valuable determination for these lands.

Another factor is that Congress has recognized livestock grazing as one of the principal or major uses of the public lands. The land use planning process should consider whether discontinuing livestock grazing would implicate congressional reporting requirements. *See* 43 U.S.C. § 1712(e)(2).

Finally, land use planning is a dynamic process. In the future, BLM, through the land use planning process, may designate lands where livestock grazing has ceased as once again available for grazing, as circumstances warrant. A decision to foreclose livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions. Only Congress may permanently exclude lands from grazing use.

Conclusion

A permittee cannot force BLM to permanently retire a grazing allotment from grazing use. BLM has the authority to consider, through the land use planning process, a permittee's proposal to relinquish a grazing permit in order to end grazing on the permitted lands and to assign them for another multiple use. If the lands are within an established grazing district, BLM must analyze whether the lands are no longer "chiefly valuable for grazing and raising forage crops" and express its rationale in a record of decision. BLM must also consider whether the elimination of livestock grazing as a principal or major use of the public lands triggers congressional reporting requirements. A decision to cease livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions. This memorandum supercedes contrary Solicitor's Office memoranda or opinions.

William G. Myers III

Appendix E

DOI Solicitor Memorandum
Clarification of M-37008
CVG Determinations
May 13, 2003

United States Department of the Interior

OFFICE OF THE SOLICITOR

MAY 13 2003

MEMORANDUM

To: Assistant Secretary - Policy, Management and Budget
Assistant Secretary - Land and Minerals Management
Director, Bureau of Land Management

From: Solicitor

Subject: Clarification of M-37008

Background

On October 4, 2002, I issued Solicitor Opinion M-37008 (M-Opinion) concerning the authority for the Bureau of Land Management (BLM) to consider requests for retiring grazing permits and leases on public lands. This memorandum clarifies when BLM must determine if grazing lands are "chiefly valuable for grazing."

This memorandum concludes that chiefly-valuable-for-grazing determinations must be made for administrative purposes whenever the Secretary intends to establish a grazing district, add to a grazing district or modify a district's boundary. Whenever the Secretary considers retiring grazing permits within a grazing district, she must determine whether the permitted lands remain chiefly valuable for grazing if any such retirement may ultimately result in the modification of the district's boundaries. This determination must be adopted in a land use plan or through an amendment to the existing plan. Administrative factors the Secretary should consider in making this determination are: (1) the disruptive effect to any remaining grazing allotments within the district; (2) the decision's effect on the distribution of future grazing revenues within the district; and (3) whether rangeland health can be improved without constructing or maintaining physical range improvements. A chiefly-valuable-for-grazing determination is required only when the Secretary is considering creating or changing grazing districts boundaries. Such a determination is not required nor appropriate when establishing grazing levels within a district.

History of "Chiefly Valuable for Grazing"

The concept of "chiefly valuable for grazing" first appeared in the Stockraising Homestead Act of 1916 (SHA).[1] According to the United States Geological Survey (USGS), the first designation of stock-raising lands (lands chiefly valuable for grazing) under the SHA,

[1]Sec. 2, 39 Stat. 862 (1916).

occurred on November 28, 1917.[2] Prior to this first designation, the Department of the Interior issued instructions to the USGS on how to classify lands under the SHA.[3] Basically, if the land was capable of supporting diversified farming, dry-farming, or was irrigable, the land was not available for disposal as land chiefly for grazing under the SHA.[4] If the land contained merchantable timber, the land was also excluded from designation as chiefly valuable for grazing under the SHA.[5]

The USGS developed a system to classify the public lands by determining the lease value of the land and assessing whether the land was capable of supporting farming. The USGS sorted the lease value of the land into categories of less than one cent per acre, one to two cents per acre, and two to three cents per acre.[6] The one-cent land had a carrying capacity of less than eight animal units to the square mile, the one to two cent land ranged from eight to 15 animal units to the square mile and the remainder able to carry more than 15 or more animal units to the square mile.[7] These designations made up the lands characterized as chiefly valuable for grazing and served as the foundation for the formation of grazing districts.

The Taylor Grazing Act

In 1934, Congress enacted the Taylor Grazing Act[8] (TGA) to prevent overgrazing, to stabilize the livestock industry and to provide for the orderly use of the range.[9] To advance these goals of the TGA, President Roosevelt issued two Executive Orders withdrawing public lands from the operation of the public land laws for the purpose of classifying the land as chiefly

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[2]1918 U.S.G.S. Ann. Rep. 127.

[3]46 I.D. 252 (1917).

[4]Id. at 253.

[5]Id. at 254-55. "The presence of a small amount of timber on the land classified will not exclude it from designation, and a 40-acre tract which contains less than 25,000 feet of saw-timber or its equivalent in poles, posts, or cordwood may, therefore, be designated."

[6]To Provide for the Orderly Use, Improvement, and Development of the Public Range, Hearings on H.R. 6462 Before the Senate Comm. on Public Lands, 73rd Cong., 2d Sess. 49-51 (April 20 to May 2, 1934).

[7]Id.

[8]43 U.S.C. §§ 315-315r (2000).

[9]48 Stat. 1269 (1934) (language derived from uncodified preamble); *see also* 43 U.S.C. § 315a and Executive Order No. 6910 (November 26, 1934), *reprinted in* 54 I.D. 539 (1934). A later order excluded grazing districts from E.O. 6910. Executive Order No. 7274 (January 14, 1936) *reprinted in* 55 I.D. 444 (1936). *See also Andrus v. Utah*, 446 U.S. 500, 516 n. 20 (1980).

valuable for grazing.[10] As envisioned by the TGA, only unreserved public domain lands (exclusive of Alaska) that, in the opinion of the Secretary, "are chiefly valuable for grazing and raising forage crops" may be included within a grazing district.[11] The TGA authorizes the Secretary of the Interior, in his or her discretion, to create grazing districts, to add to the districts and to modify district boundaries.[12] Under this authorization, grazing districts were established and still exist today. Moreover, Congress set apart the chiefly-valuable-for-grazing classification from other classifications by requiring the Secretary to adequately safeguard grazing privileges.[13]

The TGA provides that the Secretary "shall make provision for the protection, administration, regulation and improvement of such grazing districts."[14] Grazing districts, as contemplated by the TGA, provide for the orderly use of the range, effectuate the Secretary's duty to safeguard grazing privileges and determine the formula for the distribution of grazing fees. For example, under the TGA and the Federal Land Policy and Management Act (FLMPA)[15] half of the fees obtained from both grazing permits (issued for grazing within a grazing district) and grazing leases (issued for grazing outside of a grazing district) is deposited in a separate U.S. Treasury account for the purpose of rehabilitation, protection and range improvements on the grazing lands.[16] The other 50% of the fees are treated differently depending upon whether the fees are generated from a grazing district permit or a non-grazing district lease. The 50% of the fees from a grazing district are split with 37.5% sent to the U.S. Treasury as miscellaneous receipts and 12.5% returned to the state or county where the district is located for

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[10]Exec. Order No. 6910 (November 26, 1934) *reprinted in* 54 I.D. 539 (1934). Exec. Order No. 6910 temporarily withdrew all "vacant, unreserved, and unappropriated lands" in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Wyoming from settlement, location, sale, or entry for the express purpose of classification and pending determination of the most useful purpose for which the land may be used under the provisions of the TGA. President Roosevelt issued a similar Executive Order, No. 6964, on February 5, 1934, *reprinted in* 55 I.D. 188 (1935), withdrawing "all public lands" in Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin for determining the most useful purpose under certain projects known as "The Land Program, Federal Emergency Relief Administration," and for conservation and development of natural resources.

[11]43 U.S.C. § 315.

[12]43 U.S.C. § 315.

[13]43 U.S.C. § 315b ("So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded.").

[14]43 U.S.C. § 315a.

[15]43 U.S.C. §§ 1701-1785 (2000).

[16]43 U.S.C. § 315i (TGA) and 43 U.S.C. § 1751(b)(FLPMA). "Such rehabilitation, protection, and improvements shall include all forms of range land betterment including but not limited to, seeding and reseeding, fence construction, weed control, water development, and fish and wildlife enhancement...." 43 U.S.C. § 1751(b)(FLPMA). *See also* 43 C.F.R. § 4120.3-8 (Range Improvement Fund).

expenditure as the State Legislature may prescribe. [17] The TGA and FLPMA both recognize the importance of improving the range by constructing range improvements that lead to "substantial betterment of forage conditions with resulting benefits to wildlife, watershed protection, and livestock production."[18] A portion of the grazing receipts are used for these purposes. These administrative functions remain a vital component of meeting the objectives of the TGA. Thus, the grazing districts initiated by the TGA retain their importance today as contemplated by Congress when it passed the TGA.

The Federal Land Policy and Management Act and Grazing

When enacting FLPMA, Congress did not repeal or modify the grazing provisions of the TGA.[19] Instead, FLPMA set forth a new structure for the Secretary and the BLM to manage federal lands. Congress also expressly protected the grazing permit system as contemplated by the TGA[20] and expressly preserved the classifications and withdrawals that led to the creation of grazing districts.[21]

FLPMA requires the Secretary to "develop, maintain, and, when appropriate, revise land use plans" for all federal land uses.[22] Land use planning decisions, including allotment management plans (AMPs), control livestock grazing on federal land.[23] These land use plans determine grazing levels and periods of use in order to meet the objectives of multiple use and

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[17] 43 U.S.C. § 315i. For grazing lease receipts, the remaining 50% return to the state and county of the grazing lease.

[18] 43 U.S.C. § 1751(b)(1). *See also* 43 U.S.C. § 315a (improvement of the range); Public Range Improvement Act, 43 U.S.C. § 1901(f) ("the term 'range improvement' means any activity or program on or relating to rangelands which is designed to improve production of forage; change vegetative composition; control patterns of use; provide water; stabilize soil and water conditions; and provide habitat for livestock and wildlife. The term includes but is not limited to, structures, treatment projects, and use of mechanical means to accomplish the desired results.").

[19] 43 U.S.C. § 1701(b) (FLPMA "shall be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.").

[20] § 701(a), Pub. L. 94-579 (1976) ("Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [Oct. 21, 1976].").

[21] § 701(c), Pub. L. 94-579 (1976) ("All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act [Oct. 21, 1976] shall remain in full force and effect until modified under the provisions of this Act or other applicable law.").

[22] 43 U.S.C. § 1712(a).

[23] 43 U.S.C. § 1702(k) ("An 'allotment management plan' means a document prepared in consultation with the lessees or permittees involved, which applies to livestock operations on the public lands or on lands within National Forests in the eleven contiguous Western States....").

sustained yield as well as economic and other objectives as determined by the Secretary.[24] The land use planning process, as opposed to the classification process, establishes grazing use. Therefore, determining whether federal land remains chiefly valuable for grazing is neither required nor appropriate during the land use planning process when establishing grazing levels, as in an allotment management plan. An exception to this principle exists when and if the Secretary chooses to create a new grazing district, add to a district or modify a district's boundary as envisioned by the TGA.[25]

The M-Opinion recognizes that the Secretary has the discretion to adjust grazing use based on range conditions, including cancelling a permit, and to regulate the occupancy and use of the range. The BLM determines actual levels and periods of use through the land use planning process. If the BLM develops an AMP for the grazing lands, FLPMA requires the BLM to do so "in careful and considered consultation, cooperation and coordination with the lessees, permittees, and landowners involved."[26] The Secretary has discretion under FLPMA to use the land use planning process to cancel a permit, change grazing use distributions, or to devote the land to another public purpose or disposal, but such a decision must be in accordance with the relevant land use plan.[27]

Grazing "Retirement"

Even though the Secretary has discretion to discontinue grazing, complete and permanent elimination of grazing or a grazing district must be carefully considered and should avoid contravening the purposes for which Congress enacted the TGA. Eliminating grazing or a grazing district may

- disrupt the orderly use of the range,
- breach the Secretary's duty to adequately safeguard grazing privileges,
- be contrary to the protection, administration, regulation and improvement of public lands within grazing districts,
- hamper the government's responsibility to account for grazing receipts, or
- impede range improvements as foreseen by the TGA and FLPMA.[28]

In deciding when the BLM must determine whether federal lands remain chiefly valuable

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[24] 43 U.S.C. § 1702(k)(1).

[25] 43 U.S.C. § 315.

[26] 43 U.S.C. § 1752(d).

[27] 43 U.S.C. § 1752(g). *See also* 43 U.S.C. § 1712(e)(2) (discontinuing a major federal land use may compel Congressional reporting requirements).

[28] 43 U.S.C. § 315i and 43 U.S.C. § 1751(b).

for grazing, we look to the TGA itself. Under section 1 of the TGA, the Secretary must determine whether federal lands are chiefly valuable for grazing when she establishes a grazing district, adds to a district or modifies a district's boundaries.[29] Land restoration achieved by temporary non-grazing may be authorized through land use planning and does not require reconsidering a chiefly-valuable-for-grazing determination.[30] The Secretary may also make a chiefly-valuable-for-grazing determination under section 7 of the TGA. Section 7 of the TGA authorizes the Secretary to classify lands for any uses other than grazing and raising forage crops (as would occur if the Secretary permanently retired public lands from grazing), for disposal in satisfaction of an entry, exchange, or selection or location under any of the remaining non-discretionary land laws (excluding Mining Laws).[31] However, since the passage of FLPMA and its land use planning requirements, section 7 classifications rarely occur in today's federal land management.

Classification of lands as chiefly valuable for grazing is no longer necessary for land use planning because the Secretary has already made the original classification required by TGA. Therefore, there is no need for the BLM continually to re-determine whether the lands remain chiefly valuable for grazing during the land use planning process when establishing grazing levels or when renewing a grazing permit. Thus, a permittee may relinquish a permit but, barring a better use as determined by the Secretary through land use planning, the forage attached to the permit remains available for other permittees until the TGA classification is terminated or the land is removed from the grazing district. As long as the boundary of the grazing district remains in place and the classification and withdrawals remain in effect, there is a presumption that grazing within a grazing district should continue. This was the holding in *PLC v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999), *aff'd on other grounds*, 529 U.S. 728 (2000) ("Congress intended that once the Secretary established a grazing district under the Taylor Grazing Act (TGA), the primary use of that land should be grazing.").[32] Finally, as stated in the M-Opinion, any decision to retire livestock grazing on federal lands is not permanent, absent some congressional action. Any such action is subject to reconsideration and reversal during subsequent land use planning.[33]

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[29] 43 U.S.C. § 315 ("[T]he Secretary is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or modify the boundaries thereof...").

[30] This memorandum does not address other activities that FLPMA may authorize within grazing districts.

[31] 43 U.S.C. § 315f. In these situations, the BLM looks *prospectively* at the intended land use without examining the existing classification.

[32] *See also* NRDC v. Hodel, 624 F.Supp. 1045, 1054 (D. Nev. 1985). "[The mandate of Congress in PRIA was that livestock use was to continue as an important use of public lands; they should be managed to maximize productivity for livestock and other specified uses."

[33] *See* 43 U.S.C. § 1712(e)(1) ("Such decisions, including but not limited to exclusions (that is, total elimination) of one or more of the principal or major uses made by a management decision shall remain subject to reconsideration, modification, and termination through revision by the Secretary or his delegate, under the provisions of this section, of the land use plan involved.").

Conclusion

The Secretary has already determined that the lands within grazing districts are chiefly valuable for grazing. The Secretary need only make a chiefly-valuable-for-grazing determination when the Secretary is creating a district, adding to a district or modifying a grazing district's boundaries. The Secretary may also make a chiefly-valuable-for-grazing determination under section 7 of the TGA to classify lands for any uses other than grazing and raising forage crops or for disposal. Any decision to retire livestock grazing on federal lands is not permanent, unless made permanent through congressional action. Any such decision is subject to reconsideration and reversal during subsequent land use planning.

Appendix F

DOI Solicitor Memorandum

"*Whether Public Lands Withdrawn by Executive Orders 6910 and 6964 or Established as Grazing Districts are 'Reservations' Within the Meaning of Section 4(e) of the Federal Power Act"*

January 19, 2001

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

M-37005

Memorandum

JAN 19 2001

To: Secretary
Director, Bureau of Land Management

From: Solicitor

Subject: Whether Public Lands Withdrawn by Executive Orders 6910 and 6964 or Established as Grazing Districts are "Reservations" within the Meaning of Section 4(e) of the Federal Power Act

I. Introduction

Section 4(e) of the Federal Power Act (FPA[1]) gives the Secretary of the Interior (Secretary) authority to impose conditions on licenses issued by the Federal Energy Regulatory Commission (FERC[2]) for hydropower projects located on "reservations" under the Secretary's supervision. See 16 U.S.C. §§ 796(2), 797(e); see also Escondido Mut. Water v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984). Specifically, section 4(e) provides:

> That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations.

16 U.S.C. § 797(e).

This conditioning authority was reserved to the Departments of the Interior, Agriculture and War at the time the FPA was enacted to allow, in the words of the U.S. Supreme Court, "the individual Secretaries to continue to play the major role in determining what conditions would be

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[1]Title I of the FPA was originally enacted as the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063. A 1935 amendment changed the name to the Federal Power Act. See Act of Aug. 26, 1935, ch. 687, § 213, 49 Stat. 838, 863 (codified at 16 U.S.C. § 791a). This Opinion generally refers to the 1920 Act and its amendments as the Federal Power Act or the FPA.

[2]In 1977, the Federal Energy Regulatory Commission replaced the Federal Power Commission (FPC), which had been established by the Federal Power Act. See 42 U.S.C. § 7172(a).

included in the license in order to protect the resources under their respective jurisdictions." Escondido, 466 U.S. at 775.[3]

From its enactment in 1920, the FPA's definition of "reservations" has remained essentially unchanged[4]:

> "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks.

16 U.S.C. § 796(2).

The FPA also contains a definition of "public lands," which also has remained essentially unchanged since 1920: "'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined." 16 U.S.C. § 796(1). The FPA's drafters appeared to assume that these terms ("reservations" and "public lands") would together describe all of the lands owned by the United States subject to the Commission's licensing authority.

This Office has previously determined that the Secretary has the authority under section 4(e) of the FPA to issue conditions for hydropower projects located on several categories of Bureau of Land Management (BLM) lands, including the Oregon and California and Coos Bay Wagon Road lands (O&C Act lands), Wilderness Study Areas, and Public Water Reserve (PWR) No. 107 lands. See Memorandum from Associate Solicitor, Energy and Resources, to Director, BLM, on "'Reservations' and the Public Lands under the Federal Power Act" (Aug. 16, 1985) [hereinafter "1985 Opinion"]. The BLM has also considered numerous other categories of lands as "reservations" for purposes of the FPA, including National Petroleum Reserve lands, California Desert Conservation Area lands, Areas of Critical Environmental Concern, Outstanding Natural Areas, Wild and Scenic Rivers designations, Land Utilization Project lands,

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[3]In its original form, the Federal Power Commission was composed of the Secretaries of the Interior, War and Agriculture. See FPA § 1, 41 Stat. 1063 (1920). In 1930, the Commission was changed by removing the Secretaries from membership, and substituting five appointed commissioners. See Act of June 23, 1930, ch. 572, 46 Stat. 797. The fact that the Commissioners were, in the original design, the heads of the Cabinet Departments managing most federal lands helps to provide an understanding of the issue addressed in this Opinion.

[4]The originally enacted version is found at 41 Stat. 1063-64 (1920). The definition was amended in 1935 to reflect the 1921 exclusion of national monuments and national parks from the FPA's general purview and by making plural the 1920 Act's reference to "public purpose" in the second clause. See Act of Aug. 26, 1935, ch. 687, tit. II, § 201, 49 Stat. 838 (1935); see also Act of March 3, 1921, ch. 129, 41 Stat. 1353 (codified at 16 U.S.C. § 797a); H.R. Rep. No. 74-1318, at 22 (1935) ("The only definitions of the present act which are changed are those of 'reservations' and 'corporations'. The definition of the former term has been amended to exclude national parks and national monuments. Under an amendment to the act passed in 1921, the Commission has no authority to issue licenses in national parks or national monuments. The purpose of this change in the definition of 'reservations' is to remove from the act all suggestion of authority for the granting of such licenses.").

Watershed Reserves, and Designated Wilderness Areas. See Letter from Robert F. Burford, Director, BLM, to Hon. Richard H. Lehman, House of Representatives (Mar. 23, 1988) [hereinafter "Burford letter"]. The BLM accordingly has in some cases formulated section 4(e) conditions on licenses for hydropower projects on such lands, just as federal land management agencies like the Forest Service, Fish and Wildlife Service, and Bureau of Indian Affairs have formulated conditions under section 4(e) for the federal lands under their management jurisdiction. See, e.g., Southern Cal. Edison v. FERC, 116 F.3d 507, 518 (D.C. Cir. 1997) (discussing BLM section 4(e) conditions for lands within a watershed reserve).

The question this Opinion addresses is whether "reservations" under the FPA includes lands managed by the BLM which are (a) "withdrawn . . . and reserved" by Executive Order 6910 (Nov. 26, 1934) and Executive Order 6964 (Feb. 5, 1935), or (b) established as grazing districts under the Taylor Grazing Act (TGA). (For simplicity, this Opinion refers to the lands reserved by the Executive Orders and the lands within grazing districts collectively as "TGA lands.")

The Associate Solicitor concluded in 1985 that TGA lands are not "reservations" within the FPA's definition. See 1985 Opinion at 5. This has been the position of the Department ever since (see, e.g., Burford letter, supra), but it has not gone unquestioned. The issue was noted in a House Committee Report in 1988. H.R. Rep. No. 100-950, pt. I, at 3 (1988) (Secretary "does not appear" to have section 4(e) authority over "Taylor Grazing lands"[5]); see also id. at 11 n.2 (minority report noting that "when the FERC was asked to respond to questions about its 4(e) authority, it treated all BLM lands as if they were reserved or withdrawn from the public domain"); Amendments to Federal Land Rights-of-Way Authorities: Hearing on H.R. 3593 Before the Subcomm. on Nat'l Parks and Public Lands of the House Comm. on Interior and Insular Affairs, 100th Cong. 149 (1988) (FERC told the Committee that it had not been resolved whether lands administered by the BLM are "reservations" for the purposes of the FPA and said "[f]or the purposes of answering these questions, BLM lands will be treated as reservations").

In 1989, while addressing the question of whether BLM and the Forest Service had authority to require FERC-licensed hydroelectric projects located on lands under their management to obtain rights-of-way under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1761, the Comptroller General stated that "[u]nder the FPA's definition of 'reservation,' all of the . . . 'public lands' (other than national monuments and parks), over which BLM has jurisdiction, are reservations." See "The FPA, FLPMA, and the Respective Roles of FERC and the Land Management Agencies," Dec. Comp. Gen. 2, B-230729 (July 7, 1989). The Comptroller General's statement that BLM public lands qualify as FPA reservations did not go unnoticed by the BLM or Congress.

A few weeks later, Chairman Dingell of the House Committee on Energy and Commerce wrote

[5]It appears that the Committee Report's statement regarding "Taylor Grazing lands" was directed solely to lands established as grazing districts, and not to lands that are withdrawn by the Executive Orders of 1934/35. Compare H.R. Rep. No. 100-950, pt. I, at 3 (1988) (reporting that "Taylor Grazing lands . . . account for 34% of the BLM lands") with 1997 Public Land Statistics 9 tbl.5 (reporting that 34% of the public lands under the exclusive jurisdiction of the BLM were within grazing districts).

the Secretaries of the Interior and Agriculture and the Chairman of FERC asking them for their views and comments on the CG's Opinion. Letter from John D. Dingell, Chairman, House Comm. on Energy and Commerce, to Secretary of the Interior Manuel Lujan, Jr., et al. (July 31, 1989). BLM Director Cy Jamison later wrote Congressman Lehman, saying that "[s]ince the Comptroller General's opinion provides only a conclusion on this question, we cannot accept that position at this time. We are asking the Solicitor's Office to re-examine this question and will advise you of the conclusion reached." Letter from Cy Jamison, Director, BLM, to Hon. Richard H. Lehman, House of Representatives (Oct. 30, 1989). The BLM Director had earlier asked the Associate Solicitor for "re-examination of this issue in light of the Comptroller General's Opinion and advise [sic] whether your 1985 Opinion should be modified. We would like to accept the Comptroller General's Opinion." Memorandum from Director, BLM, through Deputy Assistant Secretary, Land and Minerals Management, to Associate Solicitor, Energy and Resources (Sept. 18, 1989).[6]

Attorneys in what was then the Division of Energy and Resources subsequently drafted a memorandum for the Associate Solicitor's signature which concluded that the issue "is not susceptible to a ready response. Arguments may be advanced to support either a positive or a negative response to [the] question, but neither line of reasoning provides a definitive answer." Draft Memorandum from Associate Solicitor, Energy and Resources, to Director, BLM, on "'Reservations' under the Federal Power Act" at 13 (June 1, 1990) [hereinafter "1990 Draft Memorandum"]. The 1990 Draft Memorandum, which was never signed, recommended adherence to the existing administrative practice of not imposing section 4(e) conditions on TGA lands until the courts provided more clarification. Id. The position expressed in the 1985 Opinion has been followed in practice by the BLM and by FERC. See, e.g., Idaho Water Resource Board, 84 FERC ¶ 61,146, at p. 61,792 & n.20 (1998); Henwood Assocs., 50 FERC ¶ 61,183, at p. 61,556 & n.53 (1990); id. at 61,573 (Trabandt, Comm'r, dissenting).

Ongoing and upcoming FERC licensing proceedings for new and previously-licensed hydropower projects has led the BLM to ask me to fully review this question and provide definitive guidance. This opinion is the result. After careful consideration, and for the reasons set out below, I conclude that the TGA lands are "reservations" for purposes of section 4(e) of the FPA. Because the term "reservations" is, as the Supreme Court has noted, "artificially" defined in the FPA to carry out the specific purposes of section 4(e), my conclusion is limited to that context. FPC v. Tuscarora Indian Nation, 362 U.S. 99, 111 (1960). For example, this conclusion does not mean that TGA lands qualify as reservations or reserved lands carrying with them federal reserved water rights. Therefore the conclusion in a previous Solicitor's Opinion, 86 Interior Dec. (I.D.) 553, 592 (1979), that "no reserved water rights were created by the [Taylor

[6]At least one academic commentator has also questioned whether withdrawal of BLM lands for classification purposes might create reservations for purposes of section 4(e). See Teresa Rice, Beyond Reserved Rights: Water Resource Protection for the Public Lands, 28 Idaho L. Rev. 715, 741 (1991-92) ("The status of these lands under section 4(e) is not clear.").

Grazing] Act,"[7] is not affected by this Opinion, which is strictly based on and limited to the meaning of "reservations" for purposes of the FPA.

II. Background: Nineteenth Century Land Laws, the Taylor Grazing Act, and the "Withdrawal" of the Public Lands

The congressional intent behind the FPA's definition of "reservations" is illuminated by the history of the FPA in relation to the contemporary federal public lands policy and laws. From the early days of the Republic throughout nearly all of the nineteenth century, the basic policy regarding public lands was to dispose of them. The laws providing for their disposition were commonly referred to as "the public land laws." They included the so-called entry acts (such as the preemption and homestead statutes) which, when fully complied with, resulted in the divestiture of title to public lands to individuals. They also included laws governing transfers to corporations, such as the railroad land grant acts.

By the end of the nineteenth century, however, public lands policy was evolving toward retention of many public lands in federal ownership, accomplished through the "withdrawal" of lands from the application of the public land laws, and also sometimes the "reservation" of lands for particular purposes. Withdrawals were accomplished both by the Congress and the Executive. See United States v. Midwest Oil, 236 U.S. 459 (1915). By 1901, about 50 million acres of the public domain had been withdrawn as forest reserves. Within a few years, that figure had about tripled.[8] In 1910, Congress delegated broad withdrawal and reservation authority to the Executive under the authority of the Pickett Act, ch. 421, § 1, 36 Stat. 847 (1910) (codified at 43 U.S.C. § 141 (repealed 1976) (also called the General Withdrawal Act).[9]

While the FPA was being debated in Congress, many of the "public land laws" providing for private appropriation and disposal of the public domain were still in effect, and new ones were still being enacted. For example, the Stock-Raising Homestead Act, enacted in 1916, eventually resulted in the disposition of title (other than minerals, which were reserved to the United States)

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[7] Cf. Pamela Baldwin, Congressional Research Service Report for Congress: Legal Issues Related to Livestock Watering in Federal Grazing Districts (Aug. 30, 1994) (hereinafter, CRS Report).

[8] See George Cameron Coggins et al., Federal Public Land and Resources Law 111-12 (4th ed. 2000). National parks were reserved as early as 1872, when Yellowstone was set aside as a "public park or pleasuring-ground," Act of Mar. 1, 1872, ch. 24, § 1, 17 Stat. 32 (1872) (codified at 16 U.S.C. § 21); national forests were reserved beginning in 1891 with the General Revision Act, ch. 561, § 24, 26 Stat. 1095, 1103 (1891) (codified as amended at 16 U.S.C. § 471) (repealed 1976); and federal wildlife refuges were reserved at least as early as 1903, when Pelican Island was set aside, Exec. Order of Mar. 14, 1903.

[9] Other federal laws contained more specific withdrawal and reservation authority. See, e.g., Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431-33).

of some thirty million acres of federal land.[10] The FPA's legislative history reflects congressional awareness of the fact that public lands policy was then in a transitional period between disposal and retention, and the definitions in the Act reflected this awareness.[11]

During this era the distinction between "public lands" on the one hand, and "withdrawn" and "reserved" lands on the other, was generally apparent. As described in the 1934 House Committee Report on the bill that would become the TGA, "[t]hese public lands form a vast domain . . . . Their surface is now and always has been a great grazing common free to all users. The grazing resources of these lands are now being used without supervision or regulation . . . ." H.R. Rep. No. 73-903, at 1 (1934); see also Omaechevarria v. Idaho, 246 U.S. 343 (1918).

However, the distinction between "public lands," and "reserved" and "withdrawn" lands became thoroughly blurred with enactment of the TGA later that year and the events that followed in its wake. Pub. L. No. 73-482, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315-315r). As noted by a leading public land historian (and the BLM's first Director):

> One consequence of the establishment of permanent types of federal land units by reservation of public domain was to create some confusion as to the meaning of the latter term. . . . [The term 'public domain'] gradually came to be applied to the land not yet reserved or set aside for continued management. . . . With the passage of the Taylor Grazing Act, even this land is in a sense reserved.

Marion Clawson & Burnell Held, The Federal Lands: Their Use and Management 29 (1957); see also Baldwin, CRS Report, supra note 7 (examining the legislative, judicial, administrative and historical support for categorizing TGA lands as reserved).

Although the story is complex in its details, as discussed in the next few paragraphs, the bottom line for purposes of the legal question before me is simple: TGA lands are "withdrawn, reserved or withheld from private appropriation and disposal under the public land laws" in terms that fit the definition of "reservations" in the FPA. 16 U.S.C. § 796(2).

The TGA authorized the Secretary to "establish grazing districts" on the "vacant, unappropriated, and unreserved lands" of the United States. § 1, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. § 315). It also provided that public notification of a proposal to establish grazing districts "shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement." Id. at 1270. That Act originally limited the creation of grazing districts on public lands to eighty million acres. See id. at 1269.

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[10] See Coggins et al., supra note 8, at 80. At least ten million acres of public domain were entered every year up until 1922; although entries decreased thereafter, they amounted to as much as 5 million acres in 1931. See Marion Clawson, The Federal Lands Revisited 35 (1983).

[11] See, e.g., H.R. Rep. No. 64-66, pt. 2, at 25 (1916) ("Development of Water Power: Views of the Minority") ("Until now the national policy has been to convey the absolute title to the land in whatever way it may be disposed of. But it is now proposed to hold the title to the land in the Federal Government and lease it on long leases. This would be a radical change in Governmental policy.").

Because, as the Supreme Court put it, "the Taylor Grazing Act as originally passed in 1934 applied to less than half of the federal lands in need of more orderly regulation," Andrus v. Utah, 446 U.S. 500, 513 (1980), President Franklin Delano Roosevelt turned to his authority under the Pickett Act of 1910.[12]

FDR issued two sweeping executive orders that effectively withdrew all the public lands from disposal. The first order applied to twelve States in the far West. See infra note 13. In those States, all "vacant, unreserved and unappropriated public land [was] . . . temporarily withdrawn from settlement, location, sale or entry and reserved for classification" for "the purpose of effective administration of the provisions of [the TGA]." Exec. Order No. 6910 (Nov. 26, 1934), reprinted in 54 I.D. 539 (1934). A little more than two months later, FDR acted again. This time he ordered "all the public lands" in twelve other States "temporarily withdrawn . . . and reserved for classification" for "the purpose of the effective administration of the [Land Program authorized by title II of the National Industrial Recovery Act of 1933 (NIRA), ch. 90, § 202, 48 Stat. 195, 201]." Exec. Order No. 6964 (Feb. 5, 1935), reprinted in 55 I.D. 188, 189 (1935).[13] FDR's orders led to this terse conclusion in the General Land Office's 1935 Annual Report: "Because of the withdrawals made by the Executive orders . . . there were no unreserved public lands at the close of business on June 30, 1935." 1935 G.L.O. Ann. Rep. 12.

Acting in the wake of FDR's Executive Orders, Congress amended section 7 of the TGA in June of 1936 to provide for the further classification of the lands "withdrawn . . . and reserved" by these Orders or within grazing districts:

> [T]he Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, . . . and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws . . . . Such lands shall not be subject to

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[12]The Pickett Act of 1910 authorized the Executive to "temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals." § 1, 36 Stat. 847 (repealed 1976). "[S]uch withdrawals or reservations shall remain in force until revoked by [the President] or by an Act of Congress," id., and therefore in law and in practice Pickett Act withdrawals can continue indefinitely. See, e.g., Mecham v. Udall, 369 F.2d 1, 4 (10th Cir. 1966).

[13]Unlike the 1934 Executive Order, which withdrew "all of the vacant, unreserved and unappropriated public land" (emphasis added) in AZ, CA, CO, ID, MT, NV, NM, ND, OR, SD, UT, and WY, the 1935 Executive Order withdrew "all the public lands" in AL, AR, FL, KS, LA, MI, MN, MS, NE, OK, WA, and WI, though it specifically exempted from its effect all "[p]ublic lands . . . which are on the date of this order under an existing reservation for a public purpose . . . so long as such existing reservation remains in force and effect." The slight change in language in the 1935 Order might have been the result of some of the confusion that had resulted from the language of the 1934 Executive Order. See Executive Withdrawal Order of November 26, 1934, as Affecting Taylor Grazing Act and Other Prior Legislation, 55 I.D. 205, 209 (Feb. 8, 1935); Executive Withdrawal Order of November 26, 1934, as Affecting Mineral Permits and Leases and Rights of Way--"Vacant, Unreserved, and Unappropriated Public Land" Construed, 55 I.D. 211 (Feb. 20, 1935).

> disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided*, That locations and entries under the mining laws . . . may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this Act.

Act of June 26, 1936, ch. 842, § 2, 49 Stat. 1976 (codified as amended at 43 U.S.C. § 315f).

Several decades later, the Supreme Court came to address this mid-1930s activity in Andrus v. Utah, 446 U.S. 500 (1980). It noted that the discretionary classification authority Congress gave the Secretary in the 1936 amendment to section 7 of the TGA "was consistent with the dominant purpose of both the Act and Executive Order No. 6910 to exert firm control over the Nation's land resources through the Department of the Interior." 446 U.S. at 519. The Court characterized the effect of these actions this way: "In sum, the Taylor Grazing Act, coupled with the withdrawals by Executive Order, 'locked up' all of the federal lands in the Western States pending further action by Congress or the President, except as otherwise permitted in the discretion of the Secretary of the Interior for the limited purposes specified in § 7." 446 U.S. at 519; see also 1937 G.L.O. Ann. Rep. 1-2 ("Since the passage of . . . the Taylor Grazing Act, as amended . . . , and the withdrawal of the public lands from entry by Executive orders . . . , the work of the General Land Office has undergone a very decided change. Conservation rather than disposals is the dominant note in the administration of the public lands under existing laws.").

The vast majority of the lands withdrawn by the 1934 Executive Order (No. 6910) were later included within grazing districts.[14] Once so included, they were removed from the application of the 1934 Order. See Exec. Order No. 7274 (Jan. 14, 1936), reprinted in 55 I.D. 444 (1936) (amending Executive Order 6910 "by excluding from the operation thereof all lands which are now, or may hereafter be, included within grazing districts duly established . . . so long as such lands remain a part of any such grazing district"). Of course, these lands remain withdrawn by the terms of the TGA itself "from all forms of entry of settlement" and "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." 43 U.S.C. §§ 315, 315f; see also 43 C.F.R. § 2400.0-3 (1999) ("Classification under section 7 [of the TGA] is a prerequisite to the approval of all entries, selections, or locations" on BLM lands, with certain exceptions). Lands covered by the 1934 Executive Order that are not within grazing districts remain subject to the 1934 Order and section 7 of the TGA. The 1935 Executive Order (No. 6964) generally remains applicable to the lands it withdrew and "reserved for classification." Some TGA lands also have been withdrawn or reserved for other purposes.

In a variety of instances, public lands initially "withdrawn . . . and reserved" by the 1934/35 Executive Orders were subsequently opened to entry and disposal through the TGA's classification process. Usually such lands were specifically classified (or reclassified) in order to dispose of them. The net effect is that basically all the public lands that have been classified and

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[14]The most recent available information is that nearly 135 million acres of BLM land are within grazing districts, leaving a little more than 43 million acres of BLM land in the lower 48 States outside of these districts. See 1999 Public Land Statistics 13-14 tbl.1-4 ("Public Lands Under Exclusive Jurisdiction of the Bureau of Land Management, Fiscal Year 1999").

opened to disposal have either been disposed of or have since been reclassified for retention. See, e.g., Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 876 (1990) (by 1970, "'virtually all' of the country's public domain . . . had been withdrawn or classified for retention") (citing Public Land Law Review Comm'n, One Third of the Nation's Land 52 (1970)); 43 C.F.R. § 2400.0-3(a) (1999, adopted in 1970) ("All vacant public lands, except those in Alaska, have been, with certain exceptions, withdrawn from entry, selection, and location under the non-mineral land laws by [the Executive Orders of 1934/35] . . . and by the establishment of grazing districts . . . ."). In FLPMA, enacted in 1976, Congress firmly stamped its imprimatur on this evolution when it declared as "the policy of the United States that (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a); see also id. § 1712 (development, maintenance and revision of land use plans).

III. The Plain Language of the FPA

The FPA's definition of "reservations" refers to "lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." 16 U.S.C. § 796(2) (emphasis added). BLM lands that have been established as grazing districts, as well as BLM lands that continue to be governed by the Executive Orders, all seem to fit squarely within the plain meaning of this definition. That is, because TGA lands are not "subject to disposition, settlement, or occupation until after the same have been classified and opened to entry," 43 U.S.C. § 315f, they would seem properly to be considered "reservations" under the FPA, 16 U.S.C. § 796(2).

IV. The Legislative History of the FPA

The FPA's legislative history supports this plain meaning. The proviso of section 4(e) was derived from House Bill 16673, 63d Cong., 2d Sess. (1914), which provided, in pertinent part, that hydropower projects could be permitted on federal reservations upon a finding by the "chief officer of the department under whose supervision . . . [a] reservation falls that the lease will not injure, destroy, or be inconsistent with the purpose for which such . . . reservation was created or acquired." H.R. Rep. No. 63-842, at 1-2 (1914). This bill did not define the term "reservations," however, which resulted in some discussion on the House floor over the exact scope of that term. The discussion reflected a general agreement that Executive withdrawals under the Pickett Act were properly described by the terms "withdrawn" and "reserved." See, e.g., 51 Cong. Rec. 13701, 13795 (1914) (statements of Rep. Ferris) (referring to Pickett Act withdrawals as "withdrawn" lands and "Executive-order reservations"); id. at 13703 (statement of Rep. Mondell) ("The term 'reserved' is used to designate lands that are withdrawn temporarily under some form of withdrawal, such as the general withdrawal [i.e., the Pickett] act.").

In 1918, the Secretaries of the Interior, Agriculture, and War submitted a bill to Congress that was, with some minor modifications, enacted as the FPA two years later. See H.R. 8716, 65th Cong., 2d Sess. (1918); Escondido Mut. Water v. La Jolla Band of Mission Indians, 466 U.S.

765, 773 n.15 (1984); FPC v. Tuscarora Indian Nation, 362 U.S. 99, 111-12 (1960). The bill adopted the concept for the 4(e) proviso from House Bill 16673, and, following on the earlier discussion on the House floor, specifically defined the term "reservations" to include all lands "withdrawn, reserved, or withheld from private appropriation and disposal under the public-land laws." H.R. 8716, 65th Cong., 2d Sess. (1918). Thus, the legislative history is consistent with the idea that the FPA's definition of "reservations" includes withdrawals under the Pickett Act.

V. Judicial Guidance

The Supreme Court has determined the meaning of "reservations" in the FPA by, not surprisingly, focusing on the statutory definition. See FPC v. Tuscarora Indian Nation, 362 U.S. 99, 111 (1960) (holding that certain lands which were part of the Tuscarora Indian Reservation were not FPA "reservations" because they were owned in fee simple by the Tribe, and thus not "owned by the United States," as required under § 3 of the FPA, 16 U.S.C. § 796(2)). As the Court there noted, "Congress was free and competent artificially to define the term 'reservations' for the purposes it prescribed in that Act[, a]nd we are bound to give effect to its definition of that term." Id.

The Supreme Court has, in sum, regarded the FPA definition as simple and straightforward: "'Public lands' are lands subject to private appropriation and disposal under public land laws. 'Reservations' are not so subject." FPC v. Oregon, 349 U.S. 435, 443-44 (1955).[15] The Court has also concluded that lands withdrawn under the authority of the Pickett Act are reservations within the meaning of the FPA. See id. at 438 n.5, 439 n.6, 443, 444.

Lower courts have also concluded that TGA lands are withdrawn and reserved for purposes of other statutes, although they have not addressed the question in the context of the FPA. For example, in Red Canyon Sheep Co. v. Ickes, 98 F.2d 308 (D.C. Cir. 1938), the plaintiff challenged a proposed exchange involving public lands that had been withdrawn by Executive Order 6910 and later established as a grazing district under the TGA. Applicable law permitted the United States to exchange only "unreserved and unappropriated public lands." Act of June 25, 1935, ch. 308, 49 Stat. 422 (1935). The court declared that "the exchange is not authorized by the Act" because the public lands were, since the issuance of the 1934 Executive Order, "presently reserved and appropriated lands," rather than "unreserved and unappropriated public lands" as required by the exchange statute. 98 F.2d at 322. Other cases demonstrate a similar understanding of the status of TGA lands. See, e.g., Finch v. United States, 387 F.2d 13 (10th Cir. 1967); Carl v. Udall, 309 F.2d 653 (D.C. Cir. 1962).

The Supreme Court's characterization of the purpose of the section 4(e) conditioning authority also sheds some light on its applicability to TGA lands. Specifically, the Court has viewed this

[15]Some lower court opinions involving FPA hydropower licenses do not slavishly follow this terminological construct, and instead use the term "public lands" as meaning generally federal lands, even in cases where reservations like national forests are involved. See, e.g., Montana Power v. FPC, 185 F.2d 491 (D.C. Cir. 1950).

authority as reflecting Congress's desire for "the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions." Escondido Mut. Water v. La Jolla Band of Mission Indians, 466 U.S. 765, 775 (1984). These "'special responsibilities,'" id. at 774 (quoting O.C. Merrill Memorandum[16]), are as appropriately found on BLM lands that are reserved from disposal by President Roosevelt's withdrawals or established as grazing districts, and that are currently managed under the organic authority of FLPMA, as they are on other federal lands like national forests.

VI. Administrative Agency Guidance

The FPC long ago endorsed the reasoning which leads to the conclusion that TGA lands are "reservations" within the meaning of the FPA. A 1921 Opinion of the FPC's Chief Counsel (which ends with a notation, "Approved by the Commission") concluded that lands withdrawn under the Reclamation Act of 1902 qualified as FPA reservations. "Classes of Withdrawals Included in Reservations Subject to the Federal Water Power Act" (May 4, 1921), reprinted in 2 FPC Ann. Rep. 220 (1922) [hereinafter "FPC Opinion"]. The question addressed in that Opinion which is pertinent to the issue before me was whether "second form" withdrawals under section 3 of the Reclamation Act are reservations under the FPA.[17] The 1902 Act generally permitted the Secretary to "withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from [reclamation project] works," ch. 1093, § 3, 32 Stat. 388 (1902) (emphasis added). The Chief Counsel noted that while the 1902 Act essentially forbade the Secretary from withdrawing such lands under the homestead laws, it was amended in 1910 to put these lands off limits to homestead entry "until such time as the Secretary of the Interior issues public notice, which notice operates to remove them out of the classification of withdrawn lands and restores them as lands subject to entry, in conformity with the act." FPC Opinion at 221 (citing Act of June 25, 1910, ch. 407, § 5, 36 Stat. 836 (codified as amended at 43 U.S.C. § 436)). Focusing on the general language of the FPA's definition of "reservations," the Chief Counsel reasoned that these second form withdrawals are, until issuance of the public notice, lands "'*withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws*,'" and therefore qualify as FPA reservations. FPC Opinion at 221 (quoting 16 U.S.C. § 796(2)) (emphasis in FPC Opinion). This reasoning applies equally to TGA lands, which, as discussed above, "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." 43 U.S.C. § 315f; see also 43 C.F.R. § 2400.0-3 (1999).

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[16]"O.C. Merrill, one of the chief draftsmen of the Act and later the first Commission Secretary, explained that the creation of the Commission 'will not interfere with the special responsibilities which the several Departments have over the National Forests, public lands and navigable rivers.' Memorandum on Water Power Legislation from O.C. Merrill, Chief Engineer, Forest Service, dated October 31, 1917, App. 371." Escondido at 774.

[17]The Opinion also concluded that "first form" withdrawals under the 1902 Reclamation Act and "game preserves, bird preserves, etc." are FPA reservations.

As the FPC Counsel's reasoning shows, the determination of whether federal land has been "reserved" for purposes of the FPA is not affected by the fact that the lands could become available for entry by some future executive action. That is, the Secretary could, simply by issuing a public notice, open land that had been temporarily withheld from homesteading under the provisions of the 1910 Act, but this possibility was not enough to remove the land from the FPA's definition of reservations. Similarly, national forest lands have always been considered reservations even though until 1962, the Secretary of Agriculture retained the authority to classify them as open to entry and disposal under the Forest Homestead Act. See Act of June 11, 1906, ch. 3074, §§ 1-2, 34 Stat. 233 (1906) (codified as amended at 16 U.S.C. §§ 506, 507) (repealed 1962); Act of Mar. 4, 1913, ch. 145, § 1, 37 Stat. 842 (codified as omitted at 16 U.S.C. § 512).[18] The legislative history of the Taylor Grazing Act reflects a similar understanding of the TGA lands. See, e.g., 78 Cong. Rec. 6347 (1934) (statement of Representative Ayers concerning the Taylor Grazing bill) ("the bill takes in all of the land in all of the public-domain States and puts the land into a reserve, the same as the national forest reserve. After these reserves are created in this manner, then on application to the Secretary of the Interior the lands therein may be set aside and homestead entries may be permitted upon them.").

The Department of the Interior has also generally regarded the TGA lands to be "reserved" in a variety of contexts. For example, in 1935, the Solicitor addressed the question whether lands withdrawn by Executive Order 6910 but not included within a grazing district may be leased for grazing purposes pursuant to section 15 of the Taylor Grazing Act, 43 U.S.C. § 315m. Executive Withdrawal Order of November 26, 1934, as Affecting Taylor Grazing Act and Other Prior Legislation, 55 I.D. 205, 209 (Feb. 8, 1935). The Solicitor answered in the negative because section 15 authorizes the Secretary to lease only "'vacant, unappropriated, and *unreserved* lands.'" Id. (emphasis in the 1935 Opinion). "Having been reserved by the said Executive Order," the Solicitor concluded, "they may not be leased for that purpose so long as the order remains in force." Id.[19] See also Carl v. Udall, 309 F.2d 653, 658 (D.C. Cir. 1962) (speaking of the "reservation" of land under the 1934/35 Executive Orders) (quoting Nelson A. Gerttula, A-23158 (Dec. 31, 1941)); J.A. Allison and Mark L. Johnson, 58 I.D. 227, 234 (1943) (same); Executive Withdrawal Order of November 26, 1934, as Affecting Mineral Permits and Leases and Rights of Way–"Vacant, Unreserved, and Unappropriated Public Land" Construed, 55 I.D. 211 (Feb. 20, 1935) (same). And see discussion infra note 21.

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[18]The fact that TGA lands may be disposed of by sale or exchange, for example, also does not exclude them from FPA reservation status. See, e.g., 43 U.S.C. § 1716(a) (providing that BLM and National Forest System lands may be "disposed of by exchange" where "the Secretary concerned determines that the public interest will be well served by making that exchange"); 36 C.F.R. Pt. 254 (2000) (regulations for the sale and exchange of National Forest System lands); Exec. Order Nos. 7048 (May 20, 1935), 7235 (Nov. 26, 1935), and 7363 (May 6, 1936), reprinted in 55 I.D. 261, 401, 502 (1935-36) (amending Executive Orders 6910 and 6964 to permit sales, exchanges and leases).

[19]Several months later, a new executive order authorized the Secretary to issue leases under section 15 of the TGA on lands withdrawn by Executive Order 6910 whenever the Secretary determined that such lands may be "properly subject to such . . . lease and [are] not needed for any public purpose." Exec. Order No. 7235 (Nov. 26, 1935), reprinted in 55 I.D. 401 (1935).

Many of the TGA lands do remain subject to private appropriation pursuant to the Mining Law of 1872, see 30 U.S.C. § 22, but this does not operate to exclude them from FPA "reservation" status. The FPA has long been applied to include within its definition of reservations lands which are open to appropriation under the Mining Law, but which are otherwise withdrawn or reserved. For example, the national forests also generally remain open to mineral entry, yet they are specifically cited in the FPA's definition of "reservations" as satisfying the definition. See 16 U.S.C. § 478. See also Southern Cal. Edison v. FERC, 116 F.3d 507, 518 (D.C. Cir. 1997), where the court upheld BLM conditions imposed under the FPA's section 4(e) on lands that were "withdrawn from settlement, location, filing, entry or disposal under the land laws of the United States" to protect Los Angeles' water diversions, but which were by the same statute "at all times [to] be open to exploration, discovery, occupation, and purchase permit or lease under the mining or mineral leasing laws of the United States." Act of Mar. 4, 1931, ch. 517, §§ 1-2, 46 Stat. 1530, 1547-48 (1931). As the Supreme Court pointed out in Udall v. Tallman, 380 U.S. 1, 19-20 (1965):

> [T]he term 'public land laws' is ordinarily used to refer to statutes governing the alienation of public land, and generally is distinguished from both 'mining laws,' referring to statutes governing the mining of hard minerals on public lands, and 'mineral leasing laws,' a term used to designate that group of statutes governing the leasing of public lands for gas and oil. Compare Title 43 U.S.C., Public Lands, with Title 30 U.S.C., Mineral Lands and Mining.

This conclusion is consistent with the legislative intent of the FPA because the Secretary retains the kind of "special responsibilities" for TGA lands that the Supreme Court has recognized as underlying the section 4(e) authority. See Escondido Mut. Water v. La Jolla Band of Mission Indians, 466 U.S. 765, 774 (1984); see, e.g., 43 U.S.C. § 1732 (directing the Secretary's management of BLM lands, including those subject to appropriation under the Mining Law).

VII. The 1985 Associate Solicitor's Opinion

The Associate Solicitor for Energy and Resources concluded that TGA lands were not "reservations" for purposes of the FPA because they "lack the necessary element of being dedicated for some public purpose." 1985 Opinion at 5. In one paragraph of analysis, the Associate Solicitor read the FPA's definition of reservations as "contemplat[ing] that a particular purpose for the lands has already been determined." Id. Because FDR's Executive Orders "only withdrew, but did not dedicate the lands for some particular usage, Taylor Grazing lands do not fall within the FPA's definition of 'reservations.'" Id.

This reasoning is not persuasive. First, the statutory definition refers to withdrawals or reservations (i.e. lands "withdrawn, reserved, or withheld from private appropriation and disposal

under the public land laws"). 16 U.S.C. § 796(2); see also FPC Opinion, supra.[20] Second, TGA lands were set aside for identifiable public purposes as required by the Pickett Act (authorizing the President to "withdraw . . . and reserve" public lands for "public purposes to be specified in the orders of withdrawals," ch. 421, § 1, 36 Stat. 847 (repealed 1976)). The 1934 withdrawal was "for the purpose of effective administration of the provisions of the [TGA]," which, the Order stated, "provides, among other things, for the prevention of injury to the public grazing lands by overgrazing and soil deterioration; provides for the orderly use, improvement and development of such lands; and provides for the stabilization of the livestock industry dependent upon the public range; and . . . provides for the use of public land for the conservation or propagation of wild life." Exec. Order No. 6910 (Nov. 26, 1934), reprinted in 54 I.D. 539 (1934).[21] The 1935 withdrawal was "for the purpose of the effective administration of the [Land Program authorized by NIRA, § 202, 48 Stat. 201]," which the Order stated "contemplates the use of public lands . . . for projects concerning the conservation and development of forests, soil, and other natural resources, the creation of grazing districts, and the establishment of game preserves and bird refuges." Exec. Order No. 6964 (Feb. 5, 1935), reprinted in 55 I.D. 188-89 (1935). This Order also recognized that NIRA provides that the Land Program "shall include among other matters, the conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, and flood control." Id. at 188; see also NIRA § 202, 48 Stat. 201 (1933).[22]

Other withdrawals of public lands under the authority of the Pickett Act have long been recognized as being "reservations" within the meaning of the FPA, and no important differences

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[20]The Associate Solicitor's reference to lands being "dedicated for some public purpose" may have been influenced by a separate clause in the definition of reservations that refers to lands "held for any public purposes." However, this clause is separated from the rest of the definition with a semicolon and the word "also," and refers to acquired lands (i.e. "also lands and interests in lands acquired and held for any public purposes"). 16 U.S.C. § 796(2).

[21]In 1935, the Solicitor addressed the question of "whether a grazing district can be established and superimposed on land withdrawn under [Executive Order 6910]." Executive Withdrawal Order of November 26, 1934, as Affecting Taylor Grazing Act and Other Prior Legislation, 55 I.D. 205, 209 (Feb. 8, 1935). Section 1 of the TGA generally authorizes the Secretary to "establish grazing districts . . . of vacant, unappropriated, and unreserved lands" and it prohibits the establishment of grazing districts on "lands withdrawn or reserved for any other purpose . . . except with the approval of the head of the department having jurisdiction thereof." 48 Stat. 1269 (codified as amended at 43 U.S.C. § 315). The Solicitor relied on this exception in concluding that grazing districts could be established on lands affected by Executive Order 6910 so long as the necessary approval was obtained. See 55 I.D. at 209. The Solicitor's reasoning reflected an understanding that such lands were "withdrawn or reserved for a[] . . . purpose" (and that they were not "vacant, unappropriated, and unreserved lands"), 43 U.S.C. § 315.

[22]The TGA states that the purposes of grazing districts are "to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a; see also Pub. Lands Council v. Babbitt, 120 S.Ct. 1815, 1819 (2000) ("The Taylor Act seeks to 'promote the highest use of the public lands.' 43 U.S.C. § 315. Its specific goals are to 'stop injury' to the lands from 'overgrazing and soil deterioration,' to 'provided for their use, improvement and development,' and 'to stabilize the livestock industry dependent on the public range.' 48 Stat. 1269.").

exist between them and TGA lands for purposes of this analysis. The 1985 Associate Solicitor's Opinion itself recognized one important category of Pickett Act withdrawals as being FPA "reservations." That is, President Coolidge invoked his authority under the Pickett Act,[23] to withdraw for public use vacant, unappropriated and unreserved public lands surrounding springs or water holes on public lands. See Exec. Order of April 17, 1926 ("Public Water Reserve No. 107"), reprinted in 51 L.D. 457 (1926). The Associate Solicitor distinguished these from the TGA lands on the ground that PWR 107 lands were "reserved" as well as "withdrawn." 1985 Opinion at 5-6. Yet like the Executive Order for PWR No. 107 lands, the TGA Executive Orders not only withdrew lands "from settlement, location, sale or entry," but also reserved the lands for public purposes under the authority of the Pickett Act. Compare Exec. Orders No. 6910 (Nov. 26, 1934) and 6964 (Feb. 5, 1935) with Exec. Order of April 17, 1926 ("Public Water Reserve No. 107"). Thus, the 1985 Opinion's differential treatment of these withdrawals is unconvincing.

The 1985 Opinion also suggested that the FPA's definition of "reservations" may have contemplated only "a 'permanent' reservation" as opposed to "temporary withdrawals" because the statutory definition names military reservations and national forests.[24] I am not persuaded that any significance can be drawn from the examples used in the definition in this regard. Early legislative history indicates that Congress intended the definition of "reservations" to include all withdrawals and reservations, whether temporary or permanent. See discussion supra Part IV. The House version of the bill that became the FPA contained only the substance of the definition that appeared in the 1920 Act, without including any references to specific categories such as national forests or military reservations. See, e.g., H.R. Rep. No. 65-715 (1918). These references were added later by the Senate. See S. Rep. No. 66-180 (1919). The Supreme Court has said that "[i]t seems entirely clear that no change in substance was intended or effected by the Senate's amendment, and that its 'recasting' only specified, as illustrative, some of the 'reservations' on 'lands and interests in lands owned by the United States.'" FPC v. Tuscarora Indian Nation, 362 U.S. 99, 112 (1960). The 1985 Opinion did not discuss this Supreme Court opinion.

Finally, as noted earlier, many other "temporary" withdrawals have long been considered "reservations" for FPA purposes. See, e.g., FPC v. Oregon, 349 U.S. 435, 438 n.5, 439 n.6, 443, 444 (1955). PWR No. 107 lands were, like the TGA Executive Orders, withdrawn and reserved under the authority of the Pickett Act. The 1921 FPC Counsel's Opinion acknowledged that second form withdrawn lands were only "withh[e]ld . . . from entry . . . until public announcement of the date when water could be applied." FPC Opinion at 221. And the 1985 Opinion itself said that "wilderness study areas" on public lands "must be considered as 'reservations' under the FPA" even though it recognized that the areas might become open to appropriation once wilderness studies were complete on the lands and Congress had acted on them. 1985 Opinion at 7.

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[23] See also Stock-Raising Homestead Act of 1916, ch. 9, § 10, 39 Stat. 865 (codified as amended at 43 U.S.C. § 300) (repealed 1976).

[24] This suggestion was in a footnote in its introductory background section (1985 Opinion at 3 n.3), and not in its discussion of the Taylor Grazing Act.

VIII. The Relationship Between Section 4(e)'s Conditioning Authority and BLM's Right-of-Way Authority

The Comptroller General's 1989 Opinion, which was referred to in the introduction to this Opinion (see discussion supra p. 3), stated that all BLM-managed "'public lands' . . . are reservations" within the meaning of the FPA. The CG was, however, addressing a somewhat different question; namely, whether BLM and the Forest Service had authority to require FERC-licensed hydroelectric projects located on lands under their management to obtain rights-of-way under FLPMA (43 U.S.C. § 1761). The CG answered this question in the affirmative, and this conclusion was accepted by FERC, Henwood Assocs., 50 FERC ¶ 61,183 (1990), but then overturned by the Ninth Circuit, California v. FERC, 966 F.2d 1541 (9th Cir. 1992).

Congress quickly responded to the 9th Circuit's decision in the Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XXIV, § 2401, 106 Stat. 3096-97 (codified at 43 U.S.C. § 1761). There Congress "reiterate[d] and clarif[ied]," albeit prospectively, the authority and responsibility of the BLM to require and condition rights-of-way for FERC-licensed hydropower projects that would occupy any BLM lands. H.R. Rep. No. 102-474, pt. VIII, at 98, reprinted in 1992 U.S.C.C.A.N. 2316. The House Committee Report described the purpose of the provision as to "assure" that federally-licensed hydropower projects requiring such rights-of-way "would not substantially degrade the natural and cultural resources of the affected lands, or interfere with their mangement [sic] for other purposes under applicable law." Id. at 153, reprinted at 2371.

While this statute reflects a congressional concern that BLM (along with the Forest Service) has authority to protect the resources under its management from adverse effects from federally licensed hydropower projects, this authority over rights-of-way does not duplicate BLM's authority under section 4(e) of the FPA. Most important, it essentially extends only to new projects proposed after 1992, or to existing projects that seek to expand onto additional BLM lands after 1992. See 43 U.S.C. § 1761(d). Thus, section 4(e) conditioning remains the primary means for the Secretary to insure the protection of the resources under BLM's management from the impacts of pre-1992 FPA hydropower development.

IX. Practical Effects of this Opinion

At first blush, the conclusion that the TGA lands, which comprise well over one hundred million acres of public land, ought now to be considered "reservations" under the FPA would seem to work a major change in the relicensing process. For a number of reasons, however, the practical effect of this Opinion is limited.

First, most TGA lands are in arid areas and contain few hydropower projects as a result. Second, as noted earlier, a considerable amount of BLM land is already considered a "reservation" under the FPA (e.g., O&C Act lands, Wilderness Study Areas). Third, many BLM lands are adjacent to other federal lands that have always been considered reservations under the FPA. Accordingly, BLM's conditioning authority on its lands is likely to be exercised in a manner similar to that exercised by the neighboring federal agencies, principally the U.S. Forest Service.

Finally, I have determined to make this Opinion prospective only; that is, it authorizes BLM to submit section 4(e) conditions to FERC in all future licensing proceedings,[25] and in all pending proceedings where such conditions reasonably can be formulated and submitted for incorporation into a license by FERC. I have determined not to limit the application of this Opinion simply to applications filed in the future because FERC licensing proceedings may continue for many years, and often there is considerable time at the beginning of the process when information is being gathered. Agency section 4(e) conditions generally are not even solicited by FERC until months, and in some cases years, after the license application is filed. See, e.g., 84 FERC ¶ 61,107, at pp. 61,536-38 (1998) (describing the extreme example of the Cushman Project licensing proceedings, in which conditions and recommendations were not solicited by FERC until 20 years after the proceedings were initiated). We will, however, not seek to reopen existing licenses to add section 4(e) conditions based on this Opinion.

X. Conclusion

The plain language of the FPA, its legislative history, pertinent case law, and administrative rulings all compel the conclusion that BLM-managed lands that are "withdrawn . . . and reserved for classification" by Executive Orders 6910 and 6964 and those that are established as grazing districts, are "reservations" under the FPA. Therefore, I conclude that the Secretary has authority to issue mandatory conditions on licenses issued by FERC for hydropower projects located on such lands under his jurisdiction, and the 1985 Associate Solicitor's conclusion to the contrary is hereby overruled. Accordingly, when the BLM deems that section 4(e) conditions are "necessary for the adequate protection and utilization of" Taylor Grazing Act lands, 16 U.S.C. § 797(e), it should submit them to FERC in all pending licensing proceedings where they reasonably can be formulated and submitted for incorporation into licenses by FERC, and in all future licensing proceedings.

This Opinion was prepared with the substantial assistance of Scott Miller of the Division of Indian Affairs and S. Elizabeth Birnbaum, formerly Special Assistant to the Solicitor and now Associate Solicitor for Mineral Resources, and benefitted from a careful review by Richard J. Woodcock of the Division of Land and Water.

John D. Leshy
Solicitor

I concur:

Secretary

January 19, 2001
Date

[25]The references to licensing proceedings include proceedings for new licenses for previously licensed projects, as well as for new projects (which FERC calls "original licenses").

Attachment G

BLM Signed Policy Manual 1613
Areas of Critical Environmental Concern
Release 1-1541

Form 1221-2
(June 1969)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

MANUAL TRANSMITTAL SHEET

Release
1-1541

Date
9/29/88

Subject

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

1. Explanation of Material Transmitted: This release transmits a new Manual Section. This Manual Section provides policy and procedural guidance on the identification, evaluation and designation of areas of critical environmental concern (ACEC's) in the development, revision and amendment of resource management plans (RMP's) and amendments of management framework plans not yet replaced by RMP's. It also contains the material formerly found at .8 in Manual Section 1617.

2. Reports Required: Annual Status Reports.

3. Material Superseded: None.

4. Filing Instructions: File as directed below:

REMOVE:	INSERT:
None	1613
	(Total: 11 Sheets)

Deputy Director

USP LVN

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

Table of Contents

.01 Purpose
.02 Objectives
.03 Authority
.04 Responsibilities
.05 References
.06 Policy

.1 Characteristics of ACEC's
  .11 Identification Criteria
    A. Relevance
    B. Importance
  .12 Special Management Attention

.2 Analysis and Designation Procedures
  .21 Identifying Potential ACEC's
    A. Compile A List of Areas To Be Considered
    B. Obtain Information and Data on Relevance and Importance
    C. Evaluate Each Resource or Hazard to Determine If It Meets Both the Relevance and Importance Criteria
    D. Areas Dropped From Further Consideration for ACEC Designation
    E. Provide Temporary Management of Potential ACEC, If Necessary
  .22 Develop Management Prescriptions for Potential ACEC's
    A. Identify Factors Which Influence Management Prescriptions
    B. Incorporate Management Prescriptions For Potential ACEC Into Appropriate Alternatives
    C. Analyzing Effects of the Prescriptions
  .23 Designating ACEC's
    A. Select Preferred Alternative
    B. Review Public Comments on Proposed ACEC Designations and Management Prescriptions
    C. Approve ACEC Designation

.3 Public Notice and ACEC Documentation Standards
  .31 Notice of Intent
  .32 Special Notice Requirement For Plans Involving ACEC's
  .33 RMP or Plan Amendment
    A. Name, Location, and Size of ACEC
    B. Description of the Value, Resource, System, or Hazard
    C. Provision For Special Management Attention
    D. Relation to Wilderness Study Areas
    E. Rationale For Designating or Not Designating
    F. Areas Dropped From Consideration For ACEC Designation

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

.4 Opportunities for Public Involvement
- .41 Nomination of Potential ACEC's
- .42 Comment on Analysis of Potential ACEC's
- .43 Protest of Proposed ACEC Designations

.5 Relationship of ACEC's to Other Designations
- .51 Congressional Designations
- .52 Secretarial Designations Made By Other Agencies
- .53 Other BLM Designations and Management Areas
  - A. Existing BLM Special Area Designations
  - B. Other Management Areas
  - C. Special Management Areas Avoided

.6 Monitoring and Management of ACEC's
- .61 ACEC Implementation Schedules
- .62 ACEC Activity Plans
- .63 ACEC Monitoring
- .64 Conformance Determinations and NEPA Review
- .65 Annual Status Report on ACEC's

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

.01 Purpose. This Manual Section provides policy and procedural guidance on the identification, evaluation and designation of areas of critical environmental concern (ACEC's) in the development, revision, and amendment of resource management plans (RMP's) and amendments of management framework plans not yet replaced by RMP's. It also clarifies the relationship of ACEC's to other designations and provides procedural guidance on the monitoring and management of ACEC's.

.02 Objectives. ACEC designations highlight areas where special management attention is needed to protect, and prevent irreparable damage to, important historic, cultural, and scenic values, fish, or wildlife resources or other natural systems or processes; or to protect human life and safety from natural hazards. The ACEC designation indicates to the public that the BLM recognizes that an area has significant values and has established special management measures to protect those values. In addition designation also serves as a reminder that significant value(s) or resource(s) exist which must be accommodated when future management actions and land use proposals are considered near or within an ACEC. Designation may also support a funding priority.

.03 Authority. The Federal Land Policy and Management Act (FLPMA) provides for ACEC designation and establishes national policy for the protection of public land areas of critical environmental concern. Section 202(c)(3) of the FLPMA mandates the agency to give priority to the designation and protection of ACEC's in the development and revision of land use plans. The BLM's planning regulations (43 CFR 1610.7-2) establish the process and procedural requirements for the designation of ACEC's in resource management plans and in plan amendments.

.04 Responsibilities. See BLM Manual Section 1601.04.

.05 References.

A. BLM Manual Section 1621. Designations of soil and water related ACEC's (Manual Section 1621.21) and scenic ACEC's (Manual Section 1621.41) are identified as possible determinations made in resource management planning supplemental program guidance for environmental resources.

B. BLM Manual Section 1622. Designation of a priority habitat ACEC is identified as a possible determination made in resource management planning supplemental program guidance for renewable resources (Manual Section 1622.11).

C. BLM Manual Section 1623. Designation of a cultural resource ACEC is identified as a possible determination made in resource management planning (Manual Section 1623.1). Designations of research natural areas (RNA's), outstanding natural areas (ONA's), and natural hazard areas (NHA's) as ACEC's are identified as possible determinations made in resource management planning supplemental program guidance for land resources (Manual Section 1623.31).

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

.06 Policy. The FLPMA requires that priority shall be given to the designation and protection of ACEC's. The ACEC's are identified, evaluated, and designated through BLM's resource management planning process. An ACEC designation is the principal BLM designation for public lands where special management is required to protect important natural, cultural and scenic resources or to identify natural hazards. Therefore, BLM managers will give precedence to the identification, evaluation, and designation of areas which require "special management attention" during resource management planning. An ACEC designation will not be used as a substitute for wilderness suitability recommendations.

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

.1 Characteristics of ACEC's.

.11 Identification Criteria. To be considered as a potential ACEC and analyzed in resource management plan alternatives, an area must meet the criteria of relevance and importance, as established and defined in 43 CFR 1610.7-2.

A. Relevance. An area meets the "relevance" criterion if it contains one or more of the following:

1. A significant historic, cultural, or scenic value (including but not limited to rare or sensitive archeological resources and religious or cultural resources important to Native Americans).

2. A fish and wildlife resource (including but not limited to habitat for endangered, sensitive or threatened species, or habitat essential for maintaining species diversity).

3. A natural process or system (including but not limited to endangered, sensitive, or threatened plant species; rare, endemic, or relic plants or plant communities which are terrestrial, aquatic, or riparian; or rare geological features).

4. Natural hazards (including but not limited to areas of avalanche, dangerous flooding, landslides, unstable soils, seismic activity, or dangerous cliffs). A hazard caused by human action may meet the relevance criteria if it is determined through the resource management planning process that it has become part of a natural process.

B. Importance. The value, resource, system, process, or hazard described above must have substantial significance and values in order to satisfy the "importance" criteria. This generally means that the value, resource, system, process, or hazard is characterized by one or more of the following:

1. Has more than locally significant qualities which give it special worth, consequence, meaning, distinctiveness, or cause for concern, especially compared to any similar resource.

2. Has qualities or circumstances that make it fragile, sensitive, rare, irreplaceable, exemplary, unique, endangered, threatened, or vulnerable to adverse change.

3. Has been recognized as warranting protection in order to satisfy national priority concerns or to carry out the mandates of FLPMA.

4. Has qualities which warrant highlighting in order to satisfy public or management concerns about safety and public welfare.

5. Poses a significant threat to human life and safety or to property.

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

.12 Special Management Attention. To be designated as an ACEC, an area must require special management attention to protect the important and relevant values. Therefore, areas which have important and relevant resource values and for which special management attention is prescribed are to be designated as ACEC's using the procedures set forth in this section. "Special management attention" refers to management prescriptions developed during preparation of an RMP or amendment expressly to protect the important and relevant values of an area from the potential effects of actions permitted by the RMP, including proposed actions deemed to be in conformance with the terms, conditions, and decisions of the RMP. These are management measures which would not be necessary and prescribed if the critical and important features were not present. That is, they would not be prescribed in the absence of the designation. (In other words, the concept of special management is relative.) A management prescription is considered to be special if it is unique to the area involved and includes terms and conditions specifically to protect the important and relevant value(s) occurring on that area. For example, a seasonal use stipulation on permits or other use authorizations may be prescribed specifically to protect an ACEC value. Special management attention also includes any plan provision intended to protect life and safety from natural hazards. Management prescriptions providing special management attention should include more detail than prescriptions for other areas and should establish priority for implementation. Special management often provides for consultation and coordination with identified groups and/or experts having interest or expertise in the affected values.

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

.2 Analysis and Designation Procedures. Designation of ACEC's are only done through the resource management planning process, either in the resource management plan itself or in a plan amendment. Procedural guidance on the nine resource management planning actions is set forth in BLM Manual Section 1616. Specific guidance on the identification, evaluation, and designation of ACEC's in resource management planning is described below:

.21 Identifying Potential ACEC's. All areas which meet the relevance and importance criteria must be identified as potential ACEC's and fully considered for designation and management in resource management planning. Potential ACEC's are identified as early as possible in the planning process. However, new information or evidence about the relevance and importance of resources or hazards may be submitted by the public or identified by the BLM at any time.

A. Compile A List of Areas To Be Considered. Areas to be considered in the identification of potential ACEC's include:

1. Existing ACEC's. Existing ACEC's are subject to reconsideration when plans are revised. Other existing designations must be reviewed, consistent with the standards of .53, to identify those which meet the relevance and importance criteria.

2. Areas recommended for ACEC consideration.

a. External nominations. Members of the public or other agencies may nominate (i.e., recommend) an area for consideration as a potential ACEC. Such nomination/recommendation should be submitted early in the process, preferably during issue identification (BLM Manual Section 1616.1) and in comments on issues identified in the notice of intent (NOI), although they be submitted at any time. There are no formal or special procedures associated with nominations/recommendations submitted by the public or other agencies, i.e., there are no forms or other submission requirements for identifying potential ACEC's. (See .41 below.)

b. Internal nominations. The BLM personnel are encouraged to recommend areas for consideration as a potential ACEC which appear to meet the relevance and importance criteria.

3. Areas identified through inventory and monitoring. An area may be identified for consideration as an ACEC at any time if, as a result of inventory and data gathering, there is evidence the area may meet the relevance and importance criteria (BLM Manual Section 1616.3).

4. Adjacent designations of other Federal and State agencies. Public lands adjacent to designations of other Federal and State agencies must be reviewed to determine if the special values upon which the adjacent designation was based extend into the planning area and meet the relevance and importance criteria.

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

B. Obtain Information and Data on Relevance and Importance. Information on relevance and importance will usually be obtained from inventory and data collection and in comments received in response to the NOI and the proposed planning criteria (BLM Manual Section 1616.1, 1616.2 and 1616.3). Information on relevance and importance is actively sought during planning to aid the evaluation of potential ACEC areas.

1. Evidence of relevance and importance may be derived from non-BLM sources or from the judgement of specialists qualified by knowledge, training or experience to comment on the area or resource in question. Evidence of more-than-local significance of resource values or conditions include, but is not limited to, written comments and expert opinions from officials representing regional or national interests or inclusion of an area on an official State, regional, national or international listing.

2. Non-BLM sources of information include, but are not limited to, other Federal agencies; State or local governments; international organizations or programs; State historic or natural heritage programs; universities and other research institutions; conservation organizations; and public interest groups. Information about resources on adjacent non public lands may also be needed for evaluating the relevance and importance of resource values or hazards on public lands.

C. Evaluate Each Resource or Hazard to Determine if it Meets Both the Relevance and Importance Criteria. This initial evaluation is accomplished by an interdisciplinary team as part of the analysis of the management situation during the resource management planning process (BLM Manual Section 1616.4). The Area Manager, with District Manager concurrence, approves the relevance and importance evaluations. An area meeting the criteria is identified as a potential ACEC appropriate for further evaluation in the RMP process and perhaps temporary management. Normally, the relevance and importance of resource or hazards associated with an existing ACEC are reevaluated only when new information or changed circumstances or the results of monitoring establish the need.

D. Areas Dropped From Further Consideration For ACEC Designation. When an area is found not to meet the relevance and importance criteria, the analysis supporting that conclusion must be incorporated into the plan and associated environmental document. The management prescriptions which are eventually established in the plan for such areas shall reflect consideration of the identified values. The public may comment on the management prescriptions for areas dropped from further consideration when the draft RMP or plan amendment is released for review and comment (1613.23B.1). If an area is being evaluated as a result of a public nomination and it is determined that the area should not be considered further, the nominator should be notified that the area does not meet the required criteria.

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

E. Provide Temporary Management of Potential ACEC, if Necessary. If an area is identified for consideration as an ACEC and a planning effort is not underway or imminent, the District Manager or Area Manager must make a preliminary evaluation on a timely basis to determine if the relevance and importance criteria are met. If so, the District Manager must initiate either a plan amendment to further evaluate the potential ACEC or provide temporary management until an evaluation is completed through resource management planning. Temporary management includes those reasonable measures necessary to protect human life and safety or significant resource values from degradation until the area is fully evaluated through the resource management planning process.

.22 Develop Management Prescriptions for Potential ACEC's. Management prescriptions must be developed for all potential ACEC's. At least one prescription for each potential ACEC must be developed which provides special management attention.

A. Identify Factors Which Influence Management Prescriptions. These factors will vary based on the planning issues and resources in the planning area. They are primarily identified and evaluated during the analysis of the management situation (BLM Manual Section 1616.4). These factors are important in the development of management prescriptions for potential ACEC's. Factors to consider include, but are not limited to, the following:

1. Conditions or trends of the potential ACEC. What is the current condition of the resource(s) or hazard involved? What is the trend in its condition? Can degradation be stopped? Is it reversible? What is the capability of the resource or hazard in terms of the level and type of use it can sustain without risk or threat?

2. Relationship to other resources or activities. What measures can be taken to reduce the adverse effects of other resource uses on the potential ACEC? Are resource uses contributing to the degradation of or threatening the existence of the important and relevant values? What land and resource uses would be compatible and under what conditions should they be conducted or permitted in order to protect the relevant and important values? What uses or actions would not be compatible with protection of the identified values even when conditioned? Considering the objectives of the RMP alternative, do the values of other resources outweigh the need for protection of the important and relevant values?

3. Opportunities for protection and/or restoration of potential ACEC values. What measures can be taken to protect the potential ACEC value(s) without restricting other resource uses? Is it feasible to protect the resource value(s) or reduce or minimize threats from hazards?

4. Wisdom of highlighting the resource. Is it wise to highlight the potential ACEC? Will highlighting achieve some management objective or enhance the area's value? Or will increased public awareness of the area accelerate its degradation?

5. Boundary Review. The boundary of a prospective ACEC is closely reviewed. This review examines surrounding or adjacent public lands and considers likely management requirements and their feasibility. Appropriate adjustments are identified. When a prospective ACEC is located in close proximity to another prospective ACEC, consideration is given to consolidation during boundary review. In some situations, a combination of different kinds of prospective ACEC values may add to the importance of the area as a whole and influence boundary locations.

6. Relationship to non-BLM designations. Is the potential ACEC included in an area recommended for designation (or already designated), e.g., a Wild and Scenic River? Will (or does) management under the other designation afford sufficient protection of potential ACEC values?

7. Opportunities for management by another agency. Are there, in terms of the public interest, any other public agencies or private organizations that could manage the resource value(s) associated with the potential ACEC more effectively than the BLM? Is it appropriate to consider the transfer of the potential ACEC to a another Federal, State or local agency?

8. Relationship to existing rights. What is the status of existing mining claims or pre-FLPMA leases? How will existing rights affect management of the resource or hazard?

B. Incorporate Management Prescriptions for Potential ACEC into Appropriate Alternatives. During the formulation of alternatives, management prescriptions for potential ACEC's are fully developed (BLM Manual Section 1616.5). Management prescriptions will generally vary across the plan alternatives. If there is no controversy or issue raised regarding the management of a potential ACEC, it may not be necessary to develop a range of management alternatives. In other words, the management prescription may not vary significantly across alternatives. A potential ACEC (or portion thereof) must be shown as recommended for designation in any or all alternatives in the draft RMP in which special management attention is prescribed to protect the resource or to minimize hazard to human life and safety. Because special management attention must be prescribed in at least one plan alternative, each potential ACEC will appear as a recommended ACEC in at least one plan alternative. When the designation and special management provisions of an existing ACEC are compatible without change in all alternatives, the procedures set forth in Manual Section 1618.22 Restatement of Decisions must be followed. If, however, there are issues associated with the management of the potential ACEC, the alternatives analyzed in detail shall reflect a reasonable range of management prescriptions for the potential ACEC. Management prescriptions may vary in a number of ways:

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

1. Degree or intensity of management attention. The management prescription for a potential ACEC may vary across the alternatives from no special management attention to intensive special management attention. Variations in management measures may reflect different mixes of allowable uses in or adjacent to the potential ACEC or constraints on uses. Situations in which no special management attention would be prescribed (and therefore no designation) include those in which the allowable uses being prescribed for the vicinity could not result in harmful effects to the important and relevant resource values and those in which the alternative would necessitate the sacrifice of the potential ACEC values to achieve other purposes.

2. Size of area to receive special management attention. In some cases, boundaries may be varied to provide more or less protection of the resource or to accommodate different management prescriptions. The size of a proposed ACEC shall be as necessary to protect life and safety or the important and relevant values within the context of the set of management prescriptions for public lands in the vicinity which would be established by each RMP alternative.

3. Term of special management attention. Usually, ACEC's are designated for the life of the RMP. However, it may be appropriate for the ACEC to be established for a shorter period of time. Such a short-term ACEC would be appropriate when conditions and circumstances justifying the special management are expected to be temporary. In such instances, the management prescription for the ACEC must contain a clear description of the conditions under which the ACEC designation will expire and the change in management prescriptions which will apply. No subsequent public notice of the expiration is required if the original public notice adequately described the term and nature of conditions.

C. Analyzing Effects of the Prescriptions. Designation of an ACEC will not produce effects which can be analyzed. However, the management prescription for the ACEC (i.e. the special management attention) will result in effects. Experience has shown that controversy over proposed ACEC designation is often based on differing perceptions of the anticipated effects of that designation. Therefore, the likelihood of controversy can be reduced by conducting a thorough and well-documented estimation of effects analysis.

.23 Designating ACEC's. Designation is based on whether or not a potential ACEC requires special management attention in the selected plan alternative.

A. Select Preferred Alternative. After completing the analysis of the effects of each alternative (BLM Manual Section 1616.6), the manager selects the preferred plan alternative which best meets the planning criteria and the guidance applicable to the area (BLM Manual Section 1616.7). The preferred alternative reflects the BLM's proposals for designation and management of ACEC's.

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

B. Review Public Comments on Proposed ACEC Designations and Management Prescriptions. Public review of ACEC designations and management prescriptions must be accomplished in accordance with BLM Manual Section 1616.7 and 1616.8 and 43 CFR 1610.7-2. Public notice requirements for RMP's and plan amendments involving potential or proposed ACEC's are set forth at .33 below. The public may comment on any aspect of the ACEC analysis including the relevance and importance evaluation, the projected need for special management attention, and the analysis of impacts of allowable resource uses on the values of proposed ACEC's as well as the impact of ACEC management prescriptions or limitations on other resource uses. The BLM reviews public comments and makes changes as necessary. The BLM then notifies the public of the availability of the proposed RMP or plan amendment and the environmental analysis associated with each.

C. Approve ACEC Designation. Approval, by the State Director, of the proposed plan or plan amendment officially designates ACEC's (43 CFR 1610.7-2).

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

.3 Public Notice and ACEC Documentation Standards.

.31 Notice of Intent. Guidelines on the general notice required at the outset of the planning process inviting public participation are set forth in BLM Manual Section 1614.3. Areas identified during preplanning for consideration as an ACEC, if any, must be described in the NOI. Any anticipated issues related to the consideration of ACEC's should be described too. Existing ACEC's and related designations, particularly if they are associated with any preliminary issues, shall also be identified in the NOI so that the public has an opportunity to participate in their reevaluation. The NOI should invite the public to nominate or recommend areas for ACEC consideration.

.32 Special Notice Requirement for Plans Involving ACEC's. The planning regulations require special notice in the Federal Register for RMP's or plan amendments involving proposed ACEC's (43 CFR 1610.7-2). The notice must provide for at least a 60-day public comment period. The notice must describe proposed ACEC's included in the BLM's preferred alternative and specify resource use limitations, if any which would occur. The notice should also identify potential ACEC's (those areas which satisfy the relevance and importance criteria) which are not proposed for ACEC designation in the preferred alternative. For RMP's and EIS level plan amendments, the notice is issued by the BLM when the draft RMP or plan amendment is published and the associated EIS is filed with the Environmental Protection Agency (EPA) and made available for public comment. The ACEC notice requirements should be incorporated in a notice of availability when the BLM elects to publish its own notice. For environmental assessment level plan amendments, the notice is published sufficiently early enough to afford the public timely notice and opportunity for meaningful input and involvement in the analysis and evaluation.

.33 RMP or Plan Amendment. Proposed ACEC's and their associated management prescriptions must be identified and fully described in proposed RMP's and plan amendments released for public review. Management activities associated with an ACEC are usually described in greater detail than resource management activities not associated with an ACEC. General guidance on the display and presentation of planning determinations as multiple use prescriptions and plan elements are set forth in BLM Manual Section 1602.23. For each proposed ACEC, the plan or plan amendment shall contain:

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

A. Name, Location, and Size of ACEC. ACEC's should be given a name. The name given an ACEC is usually based on the resource or value determined to warrant special management or on a particular physical feature of an area. In order to provide more specific management guidance and/or to retain the relationship with Federal or State heritage programs, existing names or titles should be incorporated into the name of the ACEC, i.e., the terms research natural area, outstanding natural area, natural hazard area, or other formal or established titles should normally be a part of the ACEC name. This will provide consistency and enhance recognition and understanding by the public (e.g., Salmon Spawning Research Natural Area ACEC, Palomino Landslide ACEC, Grand Mesa National Natural Landmark ACEC). The RMP or plan amendment must describe the proposed boundaries of the ACEC including the total acreage for each alternative studied in detail. The boundaries of each ACEC should be delineated as clearly as possible on a map included in the plan.

B. Description of the Value, Resource, System, or Hazard. The value, resource, system, or hazard which warrants special management attention under the ACEC provisions must be described. This description should clearly indicate why the area is considered relevant and important.

C. Provision for Special Management Attention. Management activities and anticipated future uses considered compatible with the purposes of an ACEC designation, and those considered incompatible, must be described as part of the multiple use prescription developed for each alternative studied in detail (BLM Manual Section 1602.23A). Key planning and management information unique to the ACEC, including proposed special management terms and conditions, must be described as an ACEC element in the plan (draft or proposed) whenever an ACEC is proposed for designation (BLM Manual Section 1602.23B). "Special" actions which must be taken after approval of the RMP must be described, such as acquiring inholding and access, setting up an interpretive center, withdrawing an area from mineral entry, establishing special stipulations to be attached to authorizing actions, or conducting more detailed activity planning. Given the level of public interest in specific ACEC's, it may be desirable to prepare a brochure for each ACEC, based on the plan element, which contains the following information: description of the ACEC including values; location map; summary of the applicable RMP provisions; summary of measures to be initiated by the BLM with estimated costs and priority of implementation; other measures to be carried out; and the standards and intervals for monitoring in accordance with the provisions of 43 CFR 1610.4-9.

D. Relation to Wilderness Study Areas. ACEC's may be designated within wilderness areas. ACEC designation shall not to be used as a substitute for a wilderness suitability recommendation. If an ACEC is proposed within or adjacent to a Wilderness Study Area (WSA), the RMP or plan amendment shall provide a clear description of the relationship of the ACEC to the recommendations being made for the WSA. The relationship shall be described to the level of detail required to avoid misunderstanding or misinterpretation by the public.

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

E. Rationale for Designating or Not Designating. The rationale for ACEC designations in the preferred alternative must be discussed. The rationale for not proposing designation of a potential ACEC in the preferred alternative must also be provided. In other words, if the proposed plan does not call for special management attention of a potential ACEC in the preferred alternative (and therefore, it is not proposed for designation), the reasons for the decision not to provide special management attention must be clearly set forth. The reasons may include:

1. Special management attention is not required to protect the potential ACEC because standard or routine management prescriptions are sufficient to protect the resource or value from risks or threats of damage/degradation. (That is, the same management prescriptions would have been provided for the area in the absence of the important and relevant values.)

2. The area is being proposed for designation under another statutory authority, e.g., Wilderness, and requires no management attention differing from that afforded the entire designation.

3. The manager has concluded that no special management attention is justified either because exposure to risks of damage or threats to safety is greater if the area is designated or there are no reasonable special management actions which can be taken to protect the resource from irreparable damage or to restore it to a viable condition.

F. Areas Dropped From Consideration For ACEC Designation. Areas which were nominated or recommended for consideration as an ACEC but which did not qualify as relevant and important must be identified and the rationale for not considering them described (1613.21D.).

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

.4 Opportunities for Public Involvement. Public involvement is important in the identification, evaluation, and designation of an ACEC. The following guidance highlights some of the opportunities for public involvement.

.41 Nomination of Potential ACEC's. The public has an opportunity to submit nominations or recommendations for areas to be considered for ACEC designation. Such recommendations are actively solicited at the beginning of a planning effort. However, nominations may be made at any time and must receive a preliminary evaluation to determine if they meet the relevance and importance criteria and, therefore, warrant further consideration in the planning process. The public should be advised that nominations should be accompanied by descriptive materials, maps, and evidence of the relevance and importance of the resources or hazards in order to facilitate a timely evaluation.

.42 Comment on Analysis of Potential ACEC's. The public has an opportunity to comment on BLM's assessment of relevance and importance criteria as well as alternative management prescriptions for ACEC's (and supporting analyses) when the draft RMP or plan amendment is made available for public review. The public may also comment on areas the BLM has determined do not meet the criteria. The public should be encouraged to focus their comments on the proposed management of the area rather than on whether or not the area is proposed for designation.

.43 Protest of Proposed ACEC Designations. The public has an opportunity to protest ACEC designations and management prescriptions identified in a proposed RMP or plan amendment. (See protest procedures set forth in BLM Manual Section 1617.2.)

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

.5 Relationship of ACEC's to Other Designations. The ACEC designation is the principal BLM designation for public lands "where special management is required to protect important natural, cultural, and scenic resources and to identify natural hazards." The relationship between ACEC's and the wide range of other public land designations is described below:

.51 Congressional Designations. Congress has reserved the right to approve additions to the National Wilderness System, National Historic/Scenic Trails System, and National Wild and Scenic Rivers System and to congressionally designate public land areas as National Recreation Areas and National Conservation Areas. A potential ACEC may be contained within or overlap one of the above designations provided that the ACEC designation is necessary to protect a resource or value. For example, there are numerous ACEC's within the statutorily-designated California Desert Conservation Area. If, however, the management attention provided under the Congressional designation is adequate to protect a resource or value, it is not necessary or appropriate to designate it as an ACEC.

.52 Secretarial Designations Made By Other Agencies. The Secretary of the Interior is statutorily authorized to designate areas administered by other Interior agencies. Examples include Critical Habitat Areas (Fish and Wildlife Service), National Historic/Natural Landmarks (National Park Service), National Scenic Areas (National Park Service), and Man-and-the-Biosphere Reserves (National Park Service). One or more of these designations may have already been made within the planning area prior to initiation of the resource management planning process. Recommendation for such designations may also result from the planning process. A potential ACEC may be contained within or overlap one of the above designations provided that the ACEC designation is necessary to protect the resource or value. In such an event, close coordination with the other agency should be accomplished during preparation of the RMP. If, however, the management attention provided under another agency's designation is adequate to protect the resource or value, it is not necessary or appropriate to designate it as an ACEC.

.53 Other BLM Designations And Management Areas.

A. Existing BLM Special Area Designations. Areas previously designated by the BLM under 43 CFR Parts 2070, 8223, and 8352, and authorities other than FLPMA must be reviewed in subsequent RMP's or plan amendments using the procedures identified in this Manual Section. Designations made under previous or archaic regulations and/or expired authorities will remain in effect until they are reviewed during scheduled resource management planning. If such areas are then determined to warrant designation as ACEC's, they should be renamed in accordance with Section 1613.33A.

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

B. Other Management Areas. The general planning authority of the FLPMA (Section 202) and other specific authorities are the basis of land use allocations which result in the identification of areas for specific purposes. Examples include special recreation management areas, right-of-way corridors, areas recommended suitable/unsuitable for wilderness designation,, grazing allotment categories, wild horse herd management areas, off-road vehicle designations, areas designated unsuitable for all or certain types of surface coal mining, and many other determinations set forth in the supplemental program guidance for resource management planning. (See Manual Sections 1620-1623.) These areas or types of land use allocations should not be confused as designation under the ACEC concept. They may, however, be incorporated into an ACEC or vice versa.

C. Special Management Areas Avoided. Use of the terms "special area" or "special management area" are to be avoided. These terms are relative and have little useful meaning. This is required to avoid ambiguities and to provide an appropriate context to BLM designation of areas requiring special management attention, consistent with designation authority under the FLPMA and the planning regulations (43 CFR 1610.7). The ACEC procedures set forth in this guidance must be used as a basis for future designations of ONA's, RNA's, NHA's, and other areas requiring special management attention in the sense used in the ACEC provisions of FLPMA. (Note: Supplemental program guidance for resource management planning provides for the designation of ONA's, RNA's, and NHA's as ACEC's.).

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

.6 Monitoring and Management of ACEC's. The FLPMA requires the BLM to give priority to the designation and protection of ACEC's. Protection is afforded by implementing management prescriptions set forth in the approved RMP or plan amendment. Followup monitoring is also essential for ensuring the protection of ACEC values and resources. General guidance on implementing resource management plans or amendments is set forth in Manual Section 1617.3. General guidance on monitoring is set forth in Manual Section 1616.9. Given the FLPMA mandate that the BLM give priority to the designation and protection of ACEC's, implementation and monitoring of ACEC's is also subject to the following requirements and guidelines.

.61 ACEC Implementation Schedules. An implementation schedule must be prepared for each ACEC. Such schedules shall identify the priority, sequence, and costs of implementing activities associated with protection of the ACEC resources or values, including monitoring activities. The schedule may be incorporated into other documents such as an implementation schedule for the entire resource management plan. However, activities associated with the protection of ACEC resources or values must be clearly identified. The ACEC implementation schedule shall be maintained and used as a basis for tracking and reporting on ACEC implementation.

.62 ACEC Activity Plans. Site-specific and more detailed activity plans for ACEC's may be prepared where circumstances warrant. However, activity plans for ACEC's are not required. The specific RMP requirement to describe in the plan the general management practices, allowable uses and constraints, including mitigation measures identified to protect the designated ACEC, often negate the need for activity planning. Generally the RMP or plan amendment will identify activity planning needs, if any, in the discussion of the ACEC management prescription. The preparation of such plans is guided by applicable resource program requirements in conformance with management prescriptions of the plan. The resource value(s) associated with the ACEC determines what activity plan guidance applies. If multiple program activities are involved in a particular ACEC, a coordinated or combined activity plan would be prepared (see Manual Section 1619).

1613 - AREAS OF CRITICAL ENVIRONMENTAL CONCERN

.63 ACEC Monitoring. ACEC monitoring is part of the monitoring provisions in the RMP. The BLM's planning regulations prescribe that the RMP shall establish intervals and standards for monitoring. The intervals and standards are to be based on the sensitivity of the resources. In the case of ACEC's, the resources are assumed to be sensitive. Therefore, careful monitoring is critical--not only to ensure that protection of the identified resource values occurs, but also to keep the managing official aware of how well the RMP provisions are accomplishing their objectives. By so doing, the need, if any, for modification to the RMP will be identified early so that the protection is accomplished and unnecessary measures are not applied. In the case of the ACEC's, it is particularly important that the monitoring measures be systematic and structured so that the managing official is informed on a timely basis of any significant changes in the related plans of other Federal agencies, State or local governments, or Indian tribes. In accordance with 40 CFR 1505.3 (d), the managing official shall, upon request, make available to the public the results of monitoring.

.64 Conformance Determinations and NEPA Compliance. All actions to be conducted or authorized by a BLM official must be in conformance with the provisions of the RMP as defined in 43 CFR 1601.0-5(b). Whenever an ACEC may be affected by the implementation of an authorized or permitted activity, the decision instrument authorizing the specific action must include a description of the special management measures to be applied. An environmental analysis for a proposed action which might affect an ACEC must identify impacts, if any, on the ACEC and must incorporate by reference the pertinent portions of the EIS prepared for the RMP.

.65 Annual Status Report on ACEC's. Annually the State Director is required to report to the Director (760) on progress in implementing and monitoring ACEC's in order to track accomplishments in managing ACEC's and to provide an available base of information for responding to Congressional and other inquiries. The report will cover management measures undertaken and completed during the previous fiscal year as well as proposed management measures to be initiated in the next fiscal year. The report, to be provided to the Director (760) by October 15 of each year, must include, as a minimum, the following information for each ACEC: name of the ACEC; size (in hectares and acres); date of designation; identification of applicable land use plan; relevant and important values being protected; implementation actions accomplished during the previous fiscal year; whether or not an activity plan is deemed necessary and, if so, whether or not it has been prepared; and, scheduled implementation measures for the ensuing fiscal year. The report should utilize a tabular format to the extent possible and be organized by District and Resource Area. Its timely submission is critical.

Attachment H

Federal Register Notice Volume 88 Number 63:
Conservation and Landscape Health Rule

reporting requirements. In addition, 38 CFR part 46 address internal agency processes related to VA medical malpractice review panels that may be subject to change. Therefore, we believe that it should be memorialized in VA policy rather than regulation.

We note that VA is the only Federal agency providing health care to eligible beneficiaries that published regulations on NPDB compliance. The Department of Defense has not published regulations on NPDB, but instead cites to 45 CFR part 60 as authority and issued agency policy to implement the NPDB reporting requirements for the component armed services. Likewise, the U.S. Public Health Service and Indian Health Service also issued policies implementing the NPDB reporting requirements.

The proposed removal of 38 CFR part 46 will not obviate VA's reporting requirements nor will it alter how malpractice is handled for VA practitioners. Rather we believe relying on 45 CFR part 60, supplemented by an MOU with HHS and VA policy, will reduce confusion and allow VA to adhere to all mandatory and permissive reporting requirements by eliminating any inconsistency between HHS and VA regulations.

Based on the foregoing rationale, VA proposes removing part 46 and marking it as reserved for future use and relying on HHS regulations at 45 CFR part 60 for NPDB reporting requirements, supplemented by an MOU between HHS and VA policy.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 directs agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Oder 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). This proposed rule would only affect individuals who are VA employees or independent contractors acting on behalf of VA and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. 2 U.S.C. 1532. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This proposed rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Assistance Listing

The Assistance listing numbers and titles for the programs affected by this document are: 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; 64.039 CHAMPVA; 64.040 VHA Inpatient Medicine; 64.041 VHA Outpatient Specialty Care; 64.042 VHA Inpatient Surgery; 64.043 VHA Mental Health Residential; 64.044 VHA Home Care; 64.045 VHA Outpatient Ancillary Services; 64.046 VHA Inpatient Psychiatry; 64.047 VHA Primary Care; 64.048 VHA Mental Health Clinics; 64.049 VHA Community Living Center; and 64.050 VHA Diagnostic Care.

List of Subjects in 38 CFR Part 46

Health professions, Reporting and recordkeeping requirements.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on March 27, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Consuela Benjamin,

Regulations Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons set forth in the preamble, we propose to amend 38 CFR part 46 as follows:

PART 46—[Removed and Reserved]

■ 1. Remove and reserve part 46, consisting of §§ 46.1 through 46.8.

[FR Doc. 2023–06811 Filed 3–31–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 1600 and 6100

[LLHQ230000.23X.L117000000.PN0000]

RIN 1004–AE92

Conservation and Landscape Health

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Land Management (BLM) proposes new regulations that, pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, and other relevant authorities, would advance the BLM's mission to manage the public lands for multiple use and sustained yield by prioritizing the health and resilience of ecosystems across those lands. To ensure that health and resilience, the proposed rule provides that the BLM will protect intact landscapes, restore degraded habitat, and make wise management decisions based on science and data. To support these activities, the proposed rule would apply land health standards to all BLM-managed public lands and uses, clarify that conservation is a ''use'' within FLPMA's multiple-use framework, and revise existing regulations to better meet FLPMA's requirement that the BLM prioritize designating and protecting Areas of Critical Environmental Concern (ACECs). The proposed rule would add

to provide an overarching framework for multiple BLM programs to promote ecosystem resilience on public lands.

DATES: Please submit comments on this proposed rule on or before June 20, 2023 or 15 days after the last public meeting. The BLM is not obligated to consider comments made after this date in making its decision on the final rule.

ADDRESSES: Mail, personal, or messenger delivery: U.S. Department of the Interior, Director (630), Bureau of Land Management, 1849 C St. NW, Room 5646, Washington, DC 20240, Attention: 1004–AE92.

Federal eRulemaking Portal: https://www.regulations.gov. In the Searchbox, enter ''1004–AE–92'' and click the ''Search'' button. Follow the instructions at this website.

For Comments on Information-Collection Requirements: Written comments and recommendations for the information-collection requirements should be sent within 30 days of publication of this document to *www.reginfo.gov/public/do/PRAMain.* Find this specific information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. You may also provide a copy of your comments to the BLM's Information Collection Clearance Officer via the above address with ''Attention PRA Office,'' or via email to *BLM_HQ_PRA_Comments@blm.gov.* Please reference OMB Control Number 1004–0NEW and RIN 1004–AE92 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Stephanie Miller, Deputy Division Chief for Wildlife Conservation, at 202–317–0086, for information relating to the BLM's national wildlife program or the substance of this proposed rule. For information on procedural matters or the rulemaking process, you may contact Chandra Little, Regulatory Analyst for the Office of Regulatory Affairs, at 202–912–7403. Individuals in the United States who are deaf, deafblind, or hard of hearing, or who have a speech disability, may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Executive Summary
II. Public Comment Procedures
III. Background
IV. Section-by-Section Discussion
V. Procedural Matters

I. Executive Summary

Under FLPMA, the principles of multiple use and sustained yield govern the BLM's stewardship of public lands, unless otherwise provided by law. The BLM's ability to manage for multiple use and sustained yield of public lands depends on the resilience of ecosystems across those lands—that is, the health of the ecosystems and the ability of the lands to deliver associated services, such as clean air and water, food and fiber, renewable energy, and wildlife habitat. Ensuring resilient ecosystems has become imperative, as public lands are increasingly degraded and fragmented due to adverse impacts from climate change and a significant increase in authorized use. To ensure the resilience of renewable resources on public lands for future generations, the proposed rule promotes ''conservation'' and defines that term to include both protection and restoration activities. It also advances tools and processes to enable wise management decisions based on science and data.

The proposed rule provides a framework to protect intact landscapes, restore degraded habitat, and ensure wise decisionmaking in planning, permitting, and programs, by identifying best practices to manage lands and waters to achieve desired conditions. To do so, the proposed rule applies the fundamentals of land health and related standards and guidelines to all BLM-managed public lands and uses; current BLM policy limits their application to grazing authorizations. In implementing the fundamentals of land health, the proposed rule codifies the need across BLM programs to use high-quality information to prepare land health assessments and evaluations and make determinations about land health condition. The proposed rule requires meaningful consultation during decisionmaking processes with Tribes and Alaska Native Corporations on issues that affect their interests, including the use of Indigenous Knowledge.

To support efforts to protect and restore public lands, the proposed rule clarifies that conservation is a use on par with other uses of the public lands under FLPMA's multiple-use and sustained-yield framework. Consistent with how the BLM promotes and administers other uses, the proposed rule establishes a durable mechanism, conservation leases, to promote both protection and restoration on the public lands, while providing opportunities for engaging the public in the management of public lands for this purpose. The proposed rule does not prioritize conservation above other uses; it puts conservation on an equal footing with other uses, consistent with the plain language of FLPMA. Finally, the proposed rule would amend the existing ACEC regulations to better ensure that the BLM is meeting FLPMA's command to give priority to the designation and protection of ACECs. The proposed regulatory changes would emphasize ACECs as the principal designation for protecting important natural, cultural, and scenic resources, and establish a more comprehensive framework for the BLM to identify, evaluate, and consider special management attention for ACECs in land use planning. The proposed rule emphasizes the role of ACECs in contributing to ecosystem resilience by providing for ACEC designation to protect landscape intactness and habitat connectivity.

II. Public Comment Procedures

If you wish to comment on this proposed rule, you may submit your comments to the BLM by mail, personal or messenger delivery during regular hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except holidays, or through the *https://www.regulations.gov* website (see the **ADDRESSES** section).

Please make your comments on the proposed rule as specific as possible, limit them to issues pertinent to the proposed rule, explain the reason for any changes you recommend, and include any supporting documentation. Where possible, your comments should reference the specific section or paragraph of the proposal that you are addressing. The BLM is not obligated to consider or include in the Administrative Record for the final rule comments that we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed previously (see **ADDRESSES**).

Comments, including names and street addresses of respondents, will be available for public review at the address listed under the **ADDRESSES** section. Before including your address, telephone number, email address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. Although you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

As explained below, this proposed rule includes revisions to information-collection requirements that must be approved by the Office of Management

and Budget (OMB). If you wish to comment on the revised information-collection requirements in this proposed rule, please note that such comments must be sent directly to the OMB in the manner described in the **DATES** and **ADDRESSES** sections above. Please note that due to COVID–19, electronic submission of comments is recommended.

III. Background

A. The Need for Resilient Public Lands

The BLM manages more than 245 million acres of public lands, roughly one-tenth of the country. The BLM's stewardship of these lands and resources is guided by FLPMA, unless otherwise provided by law. FLPMA provides the BLM with ample authority and direction to conserve ecosystems and other resources and values across the public lands. Section 102(a)(8) of FLPMA states the policy of the United States that ''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'' (43 U.S.C. 1701(a)(8)). Each of these services and values that FLPMA authorizes the BLM to safeguard emanates from functioning and productive native ecosystems that supply food, water, habitat, and other ecological necessities.

Furthermore, FLPMA requires that unless ''public land has been dedicated to specific uses according to any other provisions of law,'' the Secretary, through the BLM, must ''manage the public lands under principles of multiple use and sustained yield'' (43 U.S.C. 1732(a)). The term ''sustained yield'' means ''the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use'' (43 U.S.C. 1702(h)). The BLM recognizes this need for ecosystems to continue to provide services and values when declaring, in its mission statement, its goal ''to sustain the health, diversity, and productivity of public lands for the use and enjoyment of present and future generations.'' (blm.gov (emphasis added); see also 43 U.S.C. 1702(c).) Without ensuring that native ecosystems are functioning and resilient, the agency risks failing on this commitment to the future.

The term ''multiple use'' means, among other things, ''the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people''; ''the use of some land for less than all of the resources''; ''a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values''; ''harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.'' (43 U.S.C. 1702(c)). FLPMA's declaration of policy and definitions of ''multiple use'' and ''sustained yield'' reveal that conservation is a use on par with other uses under FLPMA. The procedural, action-forcing mechanisms in this proposed rule grow out of that understanding of multiple use and sustained yield.

Public lands are increasingly degraded and fragmented. Increased disturbances such as invasive species, drought, and wildfire, and increased habitat fragmentation are all impacting the health and resilience of public lands and making it more challenging to support multiple use and the sustained yield of renewable resources. Climate change is creating new risks and exacerbating existing vulnerabilities.[1]

To address these threats, it is imperative for the BLM to steward public lands to maintain functioning and productive ecosystems and work to ensure their resilience, that is, to ensure that ecosystems and their components can absorb, or recover from, the effects of disturbances and environmental change. This proposed rule would pursue that goal through protection, restoration, or improvement of essential ecological structures and functions. The resilience of public lands will determine the BLM's ability to effectively manage for multiple use and sustained yield over the long term. The proposed rule, in acknowledging this reality, identifies and requires practices to ensure that the BLM manages the public lands to allow multiple uses while retaining and building resilience to achieve sustained yield of renewable resources. This proposed rule is designed to ensure that the nation's public lands continue to provide minerals, energy, forage, timber, and recreational opportunities, as well as habitat, protected water supplies, and landscapes that resist and recover from drought, wildfire, and other disturbances. As intact landscapes play a central role in maintaining the resilience of an ecosystem, the proposed rule emphasizes protecting those public lands with remaining intact, native landscapes and restoring others.

B. Management Decisions To Build Resilient Public Lands

The proposed rule recognizes that the BLM has three primary ways to manage for resilient public lands: (1) protection of intact, native habitats; (2) restoration of degraded habitats; and (3) informed decisionmaking, primarily in plans, programs, and permits. The BLM protects intact landscapes using various tools, including designation of ACECs. The proposed rule uses the term ''conservation'' in a broader sense, however, to encompass both protection and restoration actions. Thus, it is not limited to lands allocated to preservation, but applies to all BLM-managed public lands and programs. While BLM policy and guidance outlined in Manual Sections 6500, 6840, 5000, and 1740 encourage programs to implement conservation and ecosystem management, the BLM does not currently have regulations that promote conservation efforts for all resources. This proposed rule is intended to address this gap in the Bureau's regulations. The proposed rule would require the BLM to plan for and consider conservation as a use on par with other uses under FLPMA's multiple use framework and identify the practices that ensure conservation actions are effective in building resilient public lands. Conservation, in this proposed rule, includes management of renewable resources consistent with the fundamentals of land health (described below), designed to reach desired future conditions through protection, restoration, and other types of planning, permitting, and program decisionmaking.

The proposed rule addresses protection of intact, native landscapes. One of the principal tools the BLM has

[1] See generally Carr, et al., A Multiscale Index of Landscape Intactness for the Western United States (2016), *https://www.sciencebase.gov/catalog/item/57d8779de4b090824ff9acfb;* Doherty el al., A Sagebrush Conservation Design to Proactively Restore America's Sagebrush Biome (Open-file report 2022–1081 USGS), *https://pubs.er.usgs.gov/publication/ofr20221081.*

available to manage public lands for that type of conservation use is the designation of ACECs. ACECs are areas where special management attention is needed to protect important historic, cultural, and scenic values, fish, or wildlife resources, or other natural systems or processes, or to protect human life and safety from natural hazards. The proposed rule clarifies and expands existing ACEC regulations to better ensure that the BLM is meeting FLPMA's command to give priority to the designation and protection of these important areas. These proposed regulatory changes support and enhance BLM's protection of intact landscapes through ACEC designation and better leverage this statutory tool for ecosystem resilience.

The proposed rule also addresses restoration of degraded landscapes. It offers a new tool, conservation leases, that would allow the public to directly support durable protection and restoration efforts to build and maintain the resilience of public lands. These leases would be available to entities seeking to restore public lands or provide mitigation for a particular action. They would not override valid existing rights or preclude other, subsequent authorizations so long as those subsequent authorizations are compatible with the conservation use. The proposed rule would establish the process for applying for and granting conservation leases, terminating or suspending them, determining noncompliance, and setting bonding obligations. Conservation leases and ACECs could also provide opportunities for co-stewardship with federally recognized Tribes and additional protections for cultural resources.

Conservation leases would be issued for a term consistent with the time required to achieve their objective. Most conservation leases would be issued for a maximum of 10 years, which term would be extended if necessary to serve the purposes for which the lease was first issued. Any conservation lease issued for the purposes of providing compensatory mitigation would require a term commensurate with the impact it is offsetting.

Further, to ensure the BLM does not limit its ability to build resilient public lands when authorizing use, the proposed rule includes provisions related to mitigation (*i.e.,* actions to avoid, minimize, and compensate for certain residual impacts). The proposed rule reaffirms the BLM's adherence to the mitigation hierarchy for all resources. The proposed rule also requires mitigation, to the maximum extent possible, to address adverse impacts to important, scarce, or sensitive resources, and it sets rules for approving third-party mitigation fund holders. There are already several existing approved third-party mitigation fund holders that may receive and administer funds for the mitigation of impacts to natural resources, as well as other funds arising from legal, regulatory, or administrative proceedings that are, subject to the condition that the amounts be received or administered for purposes that further conservation and restoration. The new provisions would ensure that the public enjoys the benefits of mitigation measures and support those seeking permission to use public lands by enhancing mitigation options.

C. Science for Management Decisions To Build Resilient Public Lands

To support conservation actions and decision making, the proposed rule applies the fundamentals of land health (taken verbatim from the existing fundamentals of rangeland health at 43 CFR 4180.1 (2005)) and related standards and guidelines to all renewable-resource management, instead of just to public-lands grazing. Broadening the applicability of the fundamentals of land health would ensure BLM programs will more formally and consistently consider the condition of public lands during decisionmaking processes. Renewable resources on public lands should meet the fundamentals of land health overall at the watershed scale. The proposed rule recognizes, however, that in determining which actions are required to achieve the land health standards and guidelines, the BLM must take into account current land uses, such as mining, energy production and transmission, and transportation, as well as other applicable law. The BLM welcomes comments on how applying the fundamentals of land health beyond lands allocated to grazing will interact with BLM's management of non-renewable resources.

To implement the fundamentals of land health, the proposed rule directs BLM programs to use high-quality information to prepare land health assessments and evaluations and make determinations about the causes of failing to achieve land health. Such information is derived largely from assessing, inventorying, and monitoring renewable resources, as well as Indigenous Knowledge. The resulting data provides the means for detecting trends in land health and can be used to make management decisions, implement adaptive strategies, and support conservation efforts to build ecosystem resilience.

D. Inventory, Evaluation, Designation, and Management of ACECs

To implement FLPMA's direction to ''give priority to the designation and protection of areas of critical environmental concern,'' the BLM follows regulatory requirements found at 43 CFR 1610.7–2 and policy instruction found in Manual Section 1613. The BLM currently inventories, evaluates, and designates ACECs requiring special management direction as part of the land use planning process. The BLM's land use planning process guides BLM resource management decisions in a manner that allows the BLM to respond to issues and to consider trade-offs among environmental, social, and economic values. Further, the planning process requires coordination, cooperation, and consultation, and provides other opportunities for public involvement that can foster relationships, build trust, and result in durable decisionmaking.

In the initial stages of the planning process, the BLM, through inventories and external nominations, identifies any potential new ACECs to evaluate for relevance, importance, and the need for special management attention. The BLM determines whether such special management attention is needed by evaluating alternatives in the land use plan and considering additional issues related to the management of the proposed ACEC, including public comments received during the planning process. Special management measures may also provide an opportunity for Tribal co-stewardship. In Approved Resource Management Plans, the BLM identifies all designated ACECs and provides the management direction necessary to protect the relevant and important values for which the ACECs were designated.

In more than 40 years of applying the procedures found at 43 CFR 1610.7–2 and in Manual Section 1613, the BLM has identified several needed revisions. Additionally, the BLM's procedures for considering and designating potential ACECs are currently partially described in regulation and partially described in agency policy. The proposed rule would codify these procedures in regulation, providing more cohesive direction and consistency to the agency's ACEC designation process. The proposed rule maintains the general process for inventorying, evaluating, designating, and managing ACECs, described here, but makes specific changes to clarify and improve that process.

As part of this rulemaking, the BLM proposes establishing procedures that require consideration of ecosystem resilience, landscape-level needs, and rapidly changing landscape conditions in designating and managing ACECs. The BLM may also revise the ACEC manual and develop an ACEC handbook to integrate the existing rule as well as the changes proposed in this rulemaking, if finalized, into policy. The BLM would thus provide additional guidance for how to incorporate ACECs into resource management decisions in a way that considers trade-offs among environmental, social, and economic values during land use planning.

E. Statutory Authority

The Federal Land Policy and Management Act of 1976, as amended, is the BLM's organic act; it establishes the agency's mission to manage public lands. FLPMA further establishes the policy of the United States that public lands be managed in a manner that recognizes the nation's need for natural resources from those lands, provides for outdoor recreation and other human uses, maintains habitat for fish and wildlife, preserves certain public lands in their natural condition, and protects the quality of the scientific, scenic, historical, ecological, environmental, water-resource, and archaeological values of the nation's lands (43 U.S.C. 1701).

FLPMA governs the BLM's management of the public lands and directs the BLM to manage such lands ''under principles of multiple use and sustained yield'' (except for lands where another law directs otherwise) (43 U.S.C. 1732(a)). Multiple use is defined as the management of the public lands and their various resource values so that they are utilized to the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long- term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output. (43 U.S.C. 1702(c)). FLPMA also authorizes the Secretary to promulgate implementing regulations necessary ''to carry out the purposes'' of the Act (43 U.S.C. 1740). The rule proposed here under that authority would (1) define and regulate conservation use on the public lands in service of FLPMA's multiple-use and sustained-yield mandates; (2) provide for third party authorizations to use the public lands for conservation under FLPMA section 302(b) (43 U.S.C. 1732(b)); and (3) revise the existing regulations implementing FLPMA's direction in sections 201(a) and 202(c)(3) (43 U.S.C. 1711(a), 1712(c)(3)) that the BLM shall give priority to ACECs. (See also 43 U.S.C. 1701(a)(11) (''it is the policy of the United States that—regulations and plans for the protection of public land areas of critical environmental concern be promptly developed.'')

Section 2002 of the Omnibus Public Land Management Act of 2009 (16 U.S.C. 7202) legislatively established the National Landscape Conservation System (NLCS), to include public lands carrying certain executive or congressional designations and set parameters for the management of lands within the system. NLCS lands are subject to regulatory requirements like other BLM-managed public lands. The regulations proposed here define the term ''conservation'' in a way that is distinct from the use of the term in section 2002. Here, ''conservation'' is a shorthand for the direction in FLPMA's multiple-use and sustained-yield mandates to manage public lands for resilience and future productivity. ''Conservation,'' as the term is defined in these regulations, is part of the BLM's mission not only on lands within the NLCS, but on all lands subject to FLPMA's multiple-use and sustained-yield mandates. At the same time, these regulations also would support the BLM's execution of the statutory direction in section 2002 to ''manage the [NLCS] in a manner that protects the values for which the components of the system were designated'' (16 U.S.C. 7202(c)(2)).

F. Related Executive and Secretarial Direction

The proposed rule responds to, and advances directives set forth in several Executive and Secretary's Orders and related policies and strategies. These directives call on the Department of the Interior (DOI), and the Federal Government more generally, to use landscape-scale, science-based, collaborative approaches to natural resource management. Recent Presidential and Secretarial directives also emphasize the importance of responding to, and mitigating the effects of, climate change. Executive Order 13990: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis highlights the need to use science to reduce greenhouse gas emissions, bolster resilience to the impacts of climate change, and prioritize environmental justice. Executive Order 14008: Tackling the Climate Crisis at Home and Abroad calls for quick action to build resilience against the impacts of climate change, bolster adaptation, and increase resilience across all operations, programs, assets, and mission responsibilities with a focus on the most pressing climate vulnerabilities. Section 211 of Executive Order 14008, calls on Federal agencies to develop a Climate Action Plan. In 2021, the DOI completed that plan, which creates policy to confront and adapt to the challenges that climate change poses to the Department's mission, programs, operations, and personnel.

The Department will use the best available science to take concrete steps to adapt to and mitigate climate-change impacts on its resources. Secretary's Order 3399: Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-Making Process establishes a Departmental Climate Task Force to prioritize the use of the best available science to evaluate the climate change impacts of Federal land uses. Multiple directives related to climate change also emphasize the importance of collaboration, science, and adaptive management as well as the need for landscape-scale approaches to resource management. The Departmental Manual chapter on climate-change policy (523 DM 1), issued on December 20, 2012, directs DOI bureaus and agencies to ''promote landscape-scale, ecosystem-based management approaches to enhance the resilience and sustainability of linked human and natural systems.'' The Department of the Interior Climate Action Plan and Climate Adaptation and Resilience Policy, issued on October 7, 2021, provides further guidance.

Secretary's Order 3289: Addressing the Impacts of Climate Change on America's Water, Land, and Other Natural and Cultural Resources, issued on September 14, 2009, and amended on February 22, 2010, directs DOI bureaus and agencies to work together,

with other Federal, State, Tribal, and local governments, and also with private landowners, to develop landscape-level strategies for understanding and responding to climate change impacts.

Secretary's Order 3403: Joint Secretary's Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, issued November 15, 2021, reiterates the Departments' commitment to the United States' trust and treaty obligations as an integral part of managing Federal lands. The Order emphasizes that ''Tribal consultation and collaboration must be implemented as components of, or in addition to, Federal land management priorities and direction for recreation, range, timber, energy production, and other uses, and conservation of wilderness, refuges, watersheds, wildlife habitat, and other values.'' The Order also notes the benefit of incorporating Tribal expertise and Indigenous Knowledge into Federal land and resources management.

Executive Order 14072, Strengthening the Nation's Forests, Communities, and Local Economies, recognizes that healthy forests are ''critical to the health, prosperity, and resilience of our communities.'' It states a policy to pursue science-based, sustainable forest and land management; conserve America's mature and old-growth forests on Federal lands; invest in forest health and restoration; support indigenous traditional ecological knowledge and cultural and subsistence practices; honor Tribal treaty rights; and deploy climate-smart forestry practices and other nature-based solutions to improve the resilience of our lands, waters, wildlife, and communities in the face of increasing disturbances and chronic stress arising from climate impacts.

The Executive order (E.O.) calls for defining, identifying, and inventorying our nation's old and mature forests, then stewarding them for future generations to provide clean air and water, sustain plant and animal life, and respect their special importance to Tribal Nations. This proposed rule would advance all of these objectives.

IV. Section-by-Section Discussion of Proposed Rule

Subpart 6101—General Information

Section 6101.1—Purpose

This section describes the overall purpose for this proposed rule. It is designed to ensure healthy wildlife habitat, clean water, and ecosystem resilience so that our public lands can resist and recover from disturbances like drought and wildfire. It also aims to enhance mitigation options, establishing a regulatory framework for those seeking to use the public lands, while also ensuring that the public enjoys the benefits of mitigation measures. The proposed rule discusses the use of protection and restoration actions, as well as tools such as land health evaluations, inventory, assessment, and monitoring. Pursuant to Executive Order 14072, Strengthening the Nation's Forests, Communities, and Local Economies, and consistent with managing for multiple use and sustained yield, the BLM is working on various aspects of ensuring that forests on Federal lands, including old and mature forests, are managed to: promote their continued health and resilience; retain and enhance carbon storage; conserve biodiversity; mitigate the risk of wildfires; enhance climate resilience; enable subsistence and cultural uses; provide outdoor recreational opportunities; and promote sustainable local economic development. While there are ongoing inter-departmental efforts related to implementing the Executive Order, the BLM is also interested in public comments on whether there are opportunities for this rule to incorporate specific direction to conserve and improve the health and resilience of forests on BLM-managed lands. What additional or expanded provisions could address this issue in this rule? How might the BLM use this rule to foster ecosystem resilience of old and mature forests on BLM lands?

Section 6101.2—Objectives

This section lists the six specific objectives of the proposed rulemaking. These objectives were discussed at length earlier in the preamble for this proposed rule.

Section 6101.3—Authority

This section identifies the authorities under which this proposed rule will be promulgated, which include the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*), as amended, and the Omnibus Public Land Management Act of 2009 (16 U.S.C. 7202).

Section 6101.4—Definitions

This section provides new definitions for concepts such as conservation, resilient ecosystems, sustained yield, mitigation, and unnecessary or undue degradation, along with others used throughout the proposed rule text. These definitions apply only in 43 CFR part 6100.

The proposed rule would define the term ''best management practices'' as state-of-the-art, efficient, appropriate, and practicable measures for avoiding, minimizing, rectifying, reducing, compensating for, or eliminating impacts over time. This definition would provide clarity and consistency as the BLM authorizes restoration and compensatory mitigation actions under the proposed rule.

The proposed rule would define the term ''casual use'' so that, in reference to conservation leases, it would clarify that the existence of a conservation lease would not in and of itself preclude the public from accessing public lands for noncommercial activities such as recreation. Some public lands could be temporarily closed to public access for purposes authorized by conservation leases, such as restoration activities or habitat improvements. However, in general, public lands leased for conservation purposes under the proposed rule would continue to be open to public use.

The proposed rule would define ''conservation'' in the context of these regulations to mean maintaining resilient, functioning ecosystems by protecting or restoring natural habitats and ecological functions. The overarching purpose of the proposed rule is to promote the use of conservation to ensure ecosystem resilience, and in doing so the proposed rule would clarify conservation as a use within the BLM's multiple use framework, including in decisionmaking, authorization, and planning processes. The proposed rule would include a stated objective to promote conservation on public lands, and proposed subpart 6102 would outline principles, directives, management actions and tools—including establishing a new tool in conservation leases—to meet this objective and fulfill the purpose of the proposed rule. Because conservation is the foundational concept for the proposed regulations, the proposed definition would provide important guidance and clarity for the BLM to meet the spirit and intent of the proposed rule. Within the framework of the proposed rule, ''protection'' and ''restoration'' together constitute conservation.

The proposed rule would define the term ''disturbance'' to provide the BLM with guidance in identifying and assessing impacts to ecosystems, restoring affected public lands, and minimizing and mitigating future impacts. Identifying and mitigating disturbances and restoring ecosystems are important components of ensuring ecosystem resilience on public lands.

The proposed rule would define the term ''effects'' as the direct, indirect,

and cumulative impacts from a public land use, and would clarify that the term should be viewed synonymously with the term ''impacts'' for the purposes of the rule.

The proposed rule would define the term ''high-quality information'' so that its use would ensure that the best available scientific information underpins decisions and actions that would be implemented under the proposed rule to achieve ecosystem resilience. The proposed definition would also clarify that Indigenous Knowledge can be high-quality information that should be considered alongside other information that meets the standards for objectivity, utility, integrity, and quality set forth in Federal law and policy.

The proposed rule would define the terms ''important,'' ''scarce,'' and ''sensitive'' resources to provide clarity and consistency in BLM's implementation of mitigation requirements, including under the proposed rule.

The proposed rule would define the term ''Indigenous Knowledge'' to reflect the Department of the Interior's policies, responsibilities, and procedures to respect, and equitably promote the inclusion of, Indigenous Knowledge in the Department's decision making, resource management, program implementation, policy development, scientific research, and other actions.

The proposed rule would define the term ''intact landscape'' to guide the BLM with implementing direction. The proposed rule (§ 6102.1) would require the BLM to identify intact landscapes on public lands, manage certain landscapes to protect their intactness, and pursue strategies to protect and connect intact landscapes.

The proposed rule would define ''land enhancement'' to provide clarity for interpreting provisions of the proposed rule that would authorize the BLM to issue conservation leases for the purpose of facilitating land enhancement activities.

The proposed rule would define ''landscape'' to characterize a meaningful area of land and waters on which restoration, protection and other management actions will take place. Assessing how BLM's management can affect the functionality and resilience of ecosystems may require considering resources at the landscape scale.

The proposed rule would define ''mitigation'' consistent with the definition provided by the Council on Environmental Quality regulations (40 CFR 1508.20), which identify various ways to address adverse impacts to resources, including steps to avoid, minimize, and compensate for residual impacts. As a tool to achieve ecosystem resilience of public lands, the BLM will generally apply a mitigation hierarchy to address impacts to public land resources, seeking to avoid, then to minimize, and then to compensate for any residual impacts. This definition and the related provisions in this proposed rule supplement existing DOI policy, which among other things provides boundaries to ensure that compensatory mitigation is durable and effective.

The proposed rule would define the term ''mitigation strategies'' to identify documents that identify, evaluate, and communicate potential mitigation needs and mitigation measures in advance of anticipated public land uses.

The proposed rule would define the term ''monitoring'' to describe a critical suite of activities involving observation and data collection to evaluate (1) existing conditions, (2) the effects of management actions, or (3) the effectiveness of actions taken to meet management objectives. Management for ecosystem resilience requires the BLM to understand how proposed use activities impact resource condition at many scales. Monitoring is a critical component of BLM's Assessment, Inventory and Management (AIM) framework that provides a standardized strategy for assessing natural resource condition and trends on BLM public lands.

The proposed rule would define the term ''permittee'' to identify those persons with a valid permit, right-of-way grant, lease, or other land use authorization from the BLM. The proposed rule largely discusses ''permittees'' when identifying the responsibility of parties in the context of mitigation and in discussing the opportunities to rely on third parties in complying with mitigation requirements.

The proposed rule would define ''protection'' in the context of the overarching purpose of the rule, which is to promote the use of conservation measures to ensure ecosystem resilience of public lands. ''Protection'' is a critical component of conservation, alongside restoration, and describes acts or processes to preserve resources and keep them safe from degradation, damage, or destruction. The proposed rule (§ 6101.2) would include a stated objective to promote the protection of intact landscapes on public lands, as a critical means to achieve ecosystem resilience.

The proposed rule would define ''public lands'' in order to clarify the scope of the proposed rule and its intended application to all BLM-managed lands and uses. The proposed definition is the same as the definition of ''public lands'' that appears at § 6301.5.

The proposed rule would define ''reclamation'' to identify restoration practices intended to achieve an outcome that reflects project goals and objectives, such as site stabilization and revegetation. While ''reclamation'' is a part of a continuum of restoration practices, it contrasts with other actions that are specifically designed to recover ecosystems that have been degraded, damaged, or destroyed. Reclamation often involves initial practices that can prepare projects or sites for further restoration activities. The proposed rule (§ 6102.4–2) discusses reclamation in the context of bonding conservation leases to ensure lessees hold sufficient bond amounts to provide for the reclamation of the conservation lease area(s) and the restoration of any lands or surface waters adversely affected by conservation lease operations.

The proposed rule would define ''resilient ecosystems'' in the context of the rule's foundational precept that BLM's management of public lands on the basis of multiple use and sustained yield relies on resilient ecosystems. The purpose of the proposed rule is to promote the use of conservation to ensure that ecosystems on public lands can resist disturbance maintain and regain their function following environmental stressors such as drought and wildfire. The proposed rule identifies and requires the use of protection and restoration actions, as well as tools such as land health evaluations, inventory, assessment, and monitoring to ensure BLM is managing for resilient ecosystems.

The proposed rule would define ''restoration'' in the context of the overarching purpose of this proposed rule which is to promote the use of conservation to ensure the ecosystem resilience of public lands. ''Restoration'' is a critical component of conservation, alongside protection, and describes acts or processes of conservation that assist the recovery of an ecosystem that has been degraded, damaged, or destroyed. The BLM employs a variety of restoration approaches, including mitigation, remediation, revegetation, rehabilitation, and reclamation. The proposed rule (§ 6102.3) would direct the BLM to emphasize restoration across the public lands and requires the inclusion of a restoration plan in any new or revised Resource Management Plan.

The proposed rule would use the FLPMA definition of ''sustained yield.''

This proposed rule promotes the use of conservation to achieve resilient ecosystems on public lands, which are essential to managing for multiple use and sustained yield.

The proposed rule would define ''unnecessary or undue degradation'' in the context of these regulations to mean ''harm to land resources or values that is not needed to accomplish a use's goals or is excessive or disproportionate.'' This proposed definition is consistent with BLM's affirmative obligation under FLPMA to take action to prevent unnecessary or undue degradation. The proposed rule would establish overarching principles for ecosystem resilience and would direct the BLM to implement those principles in part by preventing unnecessary or undue degradation in its decisionmaking.

Section 6101.5—Principles for Ecosystem Resilience

The proposed rule relies upon express direction provided in FLPMA to manage public lands on the basis of multiple use and sustained yield, and it would establish the principle that the BLM must conserve renewable natural resources at a level that maintains or improves ecosystem resilience in order to achieve this mission.

Section 6101.5(d) in the proposed rule would direct authorized officers to implement principles of ecosystem resilience by recognizing conservation as a land use within the multiple use framework, including in decisionmaking, authorization, and planning processes; protecting and maintaining the fundamentals of land health; restoring and protecting intact public lands; applying the full mitigation hierarchy to address impacts to species, habitats, and ecosystems from land use authorizations; and preventing unnecessary or undue degradation.

Subpart 6102—Conservation Use To Achieve Ecosystem Resilience

The proposed rule would clarify that conservation is a use on par with other uses of public lands under FLPMA's multiple use framework. FLPMA directs the BLM to manage the public lands in a manner that protects the quality of ecological, wildlife, recreation, scenic, environmental, scientific, air, and water resources, among other resources and values, and that protects certain public lands in their natural condition. The BLM implements this mandate through land use plan designations, allocations, and other planning decisions that conserve public land resources and seek to balance conservation use with other uses such as energy development and recreation. The BLM also implements this mandate in other decisionmaking and management actions by promoting conservation use, limiting subsequent authorizations when incompatible with conservation use, and mitigating impacts to natural resources on public lands. The proposed rule would provide specific direction for implementing certain programs in a way that emphasizes conservation use and provide new tools and direction for managing conservation use to ensure ecosystem resilience on public lands.

Section 6102.1—Protection of Intact Landscapes

Section 6102.1(a) of the proposed rule would identify the principles for protecting intact landscapes in the context of increased pressure and increased landscape vulnerability due to climate change and other disturbance. Section 6102.1(b) would call on authorized officers to prioritize protection of such landscapes.

Section 6102.2—Management To Protect Intact Landscapes

Authorized officers would be required by § 6102.2(a) and (b) to identify and seek to maintain intact landscapes, including by utilizing available watershed condition classifications and other available data. During the resource management planning process, some tracts of public lands should be put into a conservation use, such as by appropriately designating or allocating the land, to maintain or improve ecosystem resilience. When determining, through planning, whether conservation use is appropriate in a given area, authorized officers would determine ''which, if any'' landscapes to manage to protect intactness, necessarily taking into account other potential uses in accordance with the BLM's multiple use management approach. (§ 6102.2(b)) In identifying the areas that are most suitable for management as intact landscapes, the BLM could work with communities to identify areas that the communities have targeted for strategic growth and development; managing those areas for intactness is less likely to be appropriate. Section 6102.2(c) would require authorized officers to prioritize acquisition of lands or interests in lands that would further protect and connect intact landscapes and functioning ecosystems, and § 6102.2(d) would direct the BLM to develop a national system for collecting and tracking disturbance data and to use those data to minimize disturbance and improve ecosystem resilience.

Section 6102.3—Restoration

Restoration is the process of assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed. The BLM employs a variety of restoration approaches, including mitigation, remediation, revegetation, rehabilitation, and reclamation. The proposed rule would direct the BLM to emphasize restoration across the public lands to enable achievement of its sustained yield mandate and would encourage active management to promote restoration when appropriate to achieve ecosystem resilience.

Section 6102.3–1—Restoration Prioritization

Section 6102.3–1 would direct authorized officers to identify priority landscapes for restoration at least every five years. Landscape prioritization is to be based on land health and watershed condition assessments, the likelihood that restoration efforts would succeed, partnership opportunities that would enable coordination across a broader landscape, benefits to local communities, and opportunities also to prevent unnecessary or undue degradation of the public lands.

Section 6102.3–2—Restoration Planning

The proposed rule would require authorized officers to include a restoration plan in any new or revised Resource Management Plan, which would have to address criteria set forth in § 6102.3–2(a). Included in the restoration plan would be actions that, under § 6102.3–2(b), would be implemented to achieve set goals and objectives; the actions would have to be performed at the appropriate spatial and temporal scale, and they would have to address the cause of degradation. Authorized offers would plan in 5-year increments, but of course the schedule could describe longer term goals and efforts. Actions would be coordinated with partners, and the BLM would use conservation leases issued under § 6102.4 for the purpose of restoring, managing, and monitoring priority landscapes. Locally appropriate best management practices would be implemented in accordance with § 6102.3–2(b)(5). Authorized officers would also be required to track progress toward achieving restoration goals and ensure restoration projects are consistent with the land health standards, restoration goals and objectives, best management practices, and Resource Management Plan restoration plans.

Section 6102.4—Conservation Leasing

Section 302(b) of FLPMA, 43 U.S.C. 1732(b), grants the Secretary authority to regulate through appropriate instruments the use, occupancy, and development of the public lands. As the U.S. Court of Appeals for the Tenth Circuit has recognized, the authority granted in section 302(b) is considerably broader than the authority granted in subject-specific provisions of FLPMA. *Greater Yellowstone Coal.* v. *Tidwell,* 572 F.3d 1115, 1126–27 (10th Cir. 2009). Under that broad authority, the proposed rule would provide a framework for the BLM to issue conservation leases on public lands for the purpose of pursuing ecosystem resilience through mitigation and restoration. The BLM will determine whether a conservation lease is an appropriate mechanism based on the context of each proposed conservation use and application, not necessarily as a specific allocation in a land use plan. Conservation leases could be issued to any qualified individual, business, non-governmental organization, or Tribal government. The BLM seeks comments on whether State and local governments, including state agencies managing fish and wildlife, also should be eligible for holding conservation leases.

Section 6102.4(a)(2) would establish that conservation leases would be issued for the necessary amount of time to meet the lease objective and specify that a lease issued for restoration or protection purposes would be issued for a renewable term of up to 10 years, whereas a lease issued for mitigation purposes would be issued for a term commensurate with the impact it is mitigating. All conservation leases would be reviewed for consistency with lease provisions at regular intervals and could be extended beyond their primary terms.

Section 6102.4(a)(3) would specify that conservation leases may be issued either for ''restoration or land enhancement'' or ''mitigation.'' The proposed rule would only authorize issuance of conservation leases for ecosystem protection where that protection is related to a restoration or land enhancement project or to support mitigation for a particular action. For example, as part of authorizing a renewable energy project on public lands, the BLM and the project proponent may agree to compensate for loss of wildlife habitat by restoring or enhancing other habitat areas. A conservation lease could be used to protect those areas. Similarly, the BLM may require compensatory mitigation for residual impacts that cannot be avoided. A conservation lease could be used to put compensatory mitigation dollars to work restoring compromised landscapes.

This provision is not intended to provide a mechanism for precluding other uses, such as grazing, mining, and recreation. Conservation leases should not disturb existing authorizations, valid existing rights, or state or Tribal land use management. Rather, this proposed rule is intended to raise conservation up to be on par with other uses under the principles of multiple use and sustained yield.

The BLM requests public comment on the following aspects of the conservation lease proposal.

- Is the term ''conservation lease'' the best term for this tool?
- What is the appropriate default duration for conservation leases?
- Should the rule constrain which lands are available for conservation leasing? For example, should conservation leases be issued only in areas identified as eligible for conservation leasing in an RMP or areas the BLM has identified (either in an RMP or otherwise) as priority areas for ecosystem restoration or wildlife habitat?
- Should the rule clarify what actions conservation leases may allow?
- Should the rule expressly authorize the use of conservation leases to generate carbon offset credits?
- Should conservation leases be limited to protecting or restoring specific resources, such as wildlife habitat, public water supply watersheds, or cultural resources?

Proposed § 6102.4(b) and (c) would set forth the application process for acquiring a conservation lease. Applicants would be required to submit detailed information regarding the proposed conservation use, anticipated impacts and costs, conformance with BLM plans, programs and policies, and the schedule for any restoration activities. The authorized officer would be able to require additional information such as environmental data and proof that the applicant has the technical and financial capability to perform the conservation activities. Once a conservation lease is issued, § 6102.4(a)(4) would preclude the BLM, subject to valid existing rights and applicable law, from authorizing other uses of the leased lands that are inconsistent with the authorized conservation use. Section 6102.4(a)(5) clarifies that the rule itself should not be interpreted to exclude public access to leased lands for casual use of such lands, although the purposes of a lease may require that limitations to public access be put in place in a given instance (for example, temporarily limiting public access to newly restored areas).

Section 6102.4(d) would provide for assignment or transfer of a conservation lease if no additional rights would be conveyed and the proposed assignee or transferee is qualified to hold the lease.

Conservation leases would be available on BLM-managed lands that are not allocated to inconsistent uses, including lands within units of the National Landscape Conservation System. The BLM requests public comments on managing conservation leases within the National Landscape Conservation System, including whether separate regulations should apply to these areas.

Cost recovery, rents, and fees for conservation leases would be governed by existing regulations at 43 CFR 2920.6 and 2920.8. Under those regulations, the BLM must charge a rent of at least fair market value. The BLM seeks comment on how fair market value would be determined in the context of restoration or preservation. Would existing methods for land valuation provide valid results? Would lands with valuable alternative land uses be prohibitively expensive for conservation use? Should the BLM incorporate a public benefit component into the rent calculation to account for the benefits of ecosystem services?

Section 6102.4–1—Termination and Suspension of Conservation Leases

Proposed § 6102.4–1 would outline processes for suspending and terminating conservation leases. Where the lease holder fails to comply with applicable requirements, fails to use the lease for its intended purpose, or cannot fulfill the lease's purpose, the BLM would be authorized to suspend or terminate a conservation lease. An authorized officer would be authorized to issue an immediate temporary suspension of the lease upon determination that a noncompliance issue adversely affects or poses a threat to public lands or public health. Following termination, the lease holder would have sixty days to fulfill its obligation to reclaim the site, *i.e.,* return the site to its prior condition or as otherwise provided in the lease. That obligation is distinct from the goal of restoring the site to its ecological potential that underlies the lease.

Section 6102.4–2—Bonding for Conservation Leases

The proposed rule includes bonding obligations for any conservation use that

involves surface-disturbing activities, with § 6102.4–2 establishing regulations for conservation lease bonds. The BLM seeks public comment on whether this rule should allow authorized officers to waive bonding requirements in certain circumstances, such as when a Tribal Nation seeks to restore or preserve an area of cultural importance to the Tribe. Should the waiver authority be limited to such circumstances or are there other circumstances that would warrant a waiver of the bonding requirement?

Section 6102.5—Management Actions for Ecosystem Resilience

Proposed § 6102.5 would set forth a framework for the BLM to make wise management decisions based on science and data, including at the planning, permitting, and program levels, that would help to ensure ecosystem resilience. As part of this framework, authorized officers would be required to identify priority watersheds, landscapes, and ecosystems that require protection and restoration efforts; develop and implement mitigation, monitoring and adaptive management strategies to protect resilient ecosystems; and meaningfully consult with Tribes and Alaska Native Corporations. Authorized officers would be required to include Indigenous Knowledge in decisionmaking and encourage Tribes to suggest ways in which Indigenous Knowledge can be used to inform the development of alternatives, analysis of effects, and identification of mitigation measures.

Consistent with applicable law and the management of the area, authorized officers would also be required to avoid authorizing any use of the public lands that permanently impairs ecosystem resilience. Permanent impairment of ecosystem resilience would be difficult or impossible to avoid, for example, on lands on which the BLM has authorized intensive uses, including infrastructure and energy projects or mining, or where BLM has limited discretion to condition or deny the use. The proposed rule also would require the authorized officer to consider a precautionary approach for resource use when the impact on ecosystem resilience is unknown or cannot be quantified and provide justification for decisions that may impair ecosystem resilience. In other words, 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.

To ensure the best available science is underpinning all management actions, the proposed rule would require the BLM to use national and site-based assessment, inventory, and monitoring data, along with other high-quality information, as multiple lines of evidence to evaluate resource conditions and inform decisionmaking. In particular, proposed § 6102.5(c) would require the authorized officer to gather high-quality data and select relevant indictors, then translate the values from those indicators into a watershed condition classification framework and document the results. The goal is to use monitoring objectives and possibly conceptual models to identify if watersheds are in properly functioning condition and how the landscape is functioning as a whole.

Section 6102.5–1—Mitigation

The proposed rule would affirm that the BLM will generally apply the mitigation hierarchy of avoid, minimize, and compensate for impacts to all public land resources. Further, § 6102.5–1(a) would require mitigation to address adverse impacts in the case of important, scarce, or sensitive resources, to the maximum extent possible.

The proposed rule would authorize the BLM to use third-party mitigation fund holders to facilitate compensatory mitigation. Proposed § 6102.5–1(d) would require authorized officers to establish mitigation accounts as appropriate when multiple permittees have similar compensatory mitigation requirements, or a single permittee has project impacts that require substantial, long-term compensatory mitigation. Proposed § 6102.5–1(f) would establish criteria that third parties must meet to be approved as mitigation fund holders. Among other things, the proposed rule would require potential mitigation fund holders to have ''a history of successfully holding and managing mitigation, escrow, or similar corporate accounts.'' This language is intended to ensure that mitigation fund holders have sufficient experience to ensure that they are capable of managing funds. The BLM seeks comment on this language. Does it create a barrier to entry for new mitigation banks? Is there alternative language that would be preferable? The requirement that a third party lack any ''family connection'' to the mitigating party refers to the leadership of the potential mitigation fund holder.

Subpart 6103 Tools for Achieving Ecosystem Resilience

Section 6103.1—Fundamentals of Land Health

Proposed § 6103.1 would establish four fundamentals of land health—watershed function, ecological processes, water quality, and wildlife habitat—that would form the basis for land health standards and guidelines that the BLM would develop in land use plans under § 6103.1–1 of this proposed rule. Fundamentals of land health are currently addressed in the BLM's grazing regulations for rangeland health (43 CFR 4180.1 (2005)). The proposed rule would extend the fundamentals of land health to all BLM lands and program areas. The BLM is not proposing any changes to the four fundamentals of land health as articulated in the applicable grazing regulations.

Section 6103.1–1—Land Health Standards and Guidelines

Proposed § 6103.1–1 would instruct authorized officers to implement land health standards and guidelines that conform to the fundamentals of land health across all lands and program areas. This includes reviewing land health standards and guidelines during the land use planning process and developing new or revising existing land health standards and guidelines as necessary, and periodically reviewing land health standards and guidelines in conjunction with regular land use plan evaluations. Until the authorized officer has an opportunity to review and update land health standards and guidelines through land use planning processes, § 6103.1–1(a)(1) of the proposed rule would direct authorized officers to apply existing land health standards and guidelines, including those previously established under subpart 4180 of the agency's grazing regulations (fundamentals of rangeland health), across all lands and program areas.

Proposed § 6103.1–1(b) through (d) would require the authorized officer to establish goals, objectives, and success indicators to ensure that each land health standard can be measured against resource conditions and to periodically review authorized uses for consistency with the fundamentals of land health. Once land health standards and guidelines are established, any action in response to not meeting them would be subject to § 6103.1–2(e)(2) and taken in a manner that takes into account existing uses and authorizations. Under the proposed rule, the BLM may establish national indicators in support of the implementation of the fundamentals of land health.

Section 6103.1–2—Land Health Assessments, Evaluations, and Determinations

The proposed rule would require authorized officers to consider land

health assessments, evaluations, and determinations across all program areas to inform decisionmaking, including preparing new land health assessments, evaluations, and determinations as warranted. Proposed § 6103.1–2(c) would provide direction for completing land health evaluations, including using multiple lines of evidence and documenting supporting information.

In cases where land health standards are not being achieved, proposed § 6103.1–2(d) would require a determination of causal factors. If existing management practices are determined to be a causal factor, the proposed rule would require the authorized officer to take appropriate action to make significant progress toward fulfillment of the standards and compliance with the guidelines. That requirement would be limited, however, by the caveat that appropriate action must be ''consistent with applicable law and the terms and conditions of existing authorizations.'' Thus, when determining what actions are ''appropriate'' to meet the land health standards, the authorized officer would have to take into account existing uses and authorizations.

Section 6103.2—Inventory, Assessment, and Monitoring

The proposed rule would require the BLM to complete watershed condition classifications as part of all land use planning. It is anticipated that watershed condition classifications would frequently be completed not by BLM state offices, but by national-level resources, such as by the National Operations Center, utilizing standardized procedures and existing data and analyses.

Proposed § 6103.2(b) would clarify that the BLM's inventory of public lands includes both landscape components and core indicators that address land health fundamentals, and would require the use of inventory, assessment, and monitoring information, including standardized quantitative monitoring data, remote sensing maps, and geospatial analyses, to inform decisionmaking across program areas. Proposed § 6103.2(c) would establish principles to ensure that inventory, assessment, and monitoring activities are evidence-based, standardized, efficient, and defensible.

Subpart 1610—Resource Management Planning

Section 1610.7–2—Designation of Areas of Critical Environmental Concern

The proposed rule includes changes to the land use planning regulations to emphasize the role of ACECs as the principal designation for public lands where special management attention is required to protect important natural, cultural, and scenic resources, and to protect against natural hazards. It would also emphasize the requirement that the BLM give priority to the identification, evaluation, and designation of ACECs during the planning process as required by FLPMA and would provide additional clarity and direction for complying with this statutory requirement. The proposed rule would codify in regulation procedures for considering and designating potential ACECs that are currently only partially described in regulation and partially described in agency policy.

Proposed § 1610.7–2(c) would require authorized officers to identify areas that may be eligible for ACEC status early in the planning process and would highlight the need to target areas for evaluation based on resource inventories, internal and external nominations, and existing ACEC designations.

Proposed § 1610.7–2(d) would provide more specificity for determining whether an area meets the criteria for ACEC designation of relevance, importance, and requiring special management attention. Requiring a finding that special management attention is necessary is consistent with BLM practice but is not a feature of the existing regulations.

Under the proposed rule § 1610.7–2(d)(2), resources, values, systems, or processes may meet the importance criterion if they contribute to ecosystem resilience, including by protecting landscape intactness and habitat connectivity. The proposed rule would also clarify the scope of the importance criterion by striking ''more than local significance'' in current § 1610.7–2(a)(2). The BLM has found the use of ''local significance'' in the existing definition creates confusion because it may be conflated with the separate question under NEPA as to whether environmental impacts are ''significant.'' Moreover, requiring something more than ''local significance'' is unnecessarily restrictive. In the context of ACECs, a wide variety of areas can support the BLM's management of public lands by contributing to ecosystem resilience.

Proposed § 1610.7–2(e) would newly emphasize that resources, values, systems, processes, or hazards that are found to have relevance and importance are likely to warrant special management attention and would further identify four considerations when evaluating the need for special management attention, to inform potential ACEC designations in a land use plan.

Proposed § 1610.7–2(g) would clarify that land use plans must include at least one plan alternative that analyzes in detail all proposed ACECs, in order to analyze the consequences of both providing and not providing special management attention to identified resources.

Proposed § 1610.7–2(i) would require authorized officers to ensure that inventories used to obtain information and data on the relevance and importance of values, resources, systems or processes, and natural hazards are kept current, consistent with section 201(a) of FLPMA ''so as to reflect changes in conditions and to identify new and emerging resource and other values'' (43 U.S.C. 1711(a)). Authorized officers (likely, here, BLM State Directors) would be required to produce annual reports detailing activity plan status and completed and planned implementation actions for designated ACECs.

Section 1610.7–2(j) would direct that ACEC designations may be removed only when special management attention is no longer needed because the identified resources are being provided an equal or greater level of protection through alternate means or the identified resources are no longer present.

The proposed rule eliminates the existing requirement in current § 1610.7–2(b) that the BLM publish a **Federal Register** notice relating to proposed ACECs and allow for 60 days of comment, in addition to the other **Federal Register** publication requirements that apply to land use planning. The BLM has found that these **Federal Register** publication requirements do not provide value above and beyond the general public involvement process, including through notices in the **Federal Register**, that otherwise applies to land use planning. The public would still have opportunity to comment on proposed ACECs through that latter process.

Finally, throughout the proposed rule under § 1610.7–2, the term ''value'' would be replaced with the phrase ''resources, values, systems, processes, or hazards.'' ''Value'' has been used as a shorthand reference to all the items in the longer phrase but doing so has created confusion. The proposed rule provides for this change as well as other minor changes designed to improve readability throughout the rule text.

The proposed rule provides that ''ACECs shall be managed to protect the relevant and important resources for

which they are designated.'' The BLM is interested in public comment on whether additional regulatory text would help the BLM best fulfill its mandate under FLPMA section 202(c)(3) to ''give priority to the . . . protection of [ACECs].'' Should the regulations further specify how ACECs should be managed?

Severability

The provisions of the proposed rule should be considered separately. If any portion of the rule were stayed or invalidated by a reviewing court, the remaining elements would continue to provide BLM with important and independently effective tools to advance conservation on the public lands. Hence, if a court prevents any provision of one part of this proposed rule from taking effect, that should not affect the other parts of the proposed rule. The remaining provisions would remain in force.

V. Procedural Matters

Regulatory Planning and Review (Executive Order 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The OIRA has determined that this proposed rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rule making process must allow for public participation and an open exchange of ideas. The BLM has developed this proposed rule in a manner consistent with these requirements.

As outlined in the attached Economic and Threshold Analysis, the proposed rule would not have a significant effect on the economy.

For more detailed information, see the Economic and Threshold analysis prepared for this proposed rule. This analysis has been posted in the docket for the rule on the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Searchbox, enter ''RIN 1004–AE92'', click the ''Search'' button, open the Docket Folder, and look under Supporting Documents.

Regulatory Flexibility Act

This proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*). The RFA generally requires that Federal agencies prepare a regulatory flexibility analysis for rules subject to the ''notice-and-comment'' rulemaking requirements found in the Administrative Procedure Act (5 U.S.C. 500 *et seq.*), if the rule would have a significant economic impact, whether detrimental or beneficial, on a substantial number of small entities. See 5 U.S.C. 601–612. Congress enacted the RFA to ensure that government regulations do not unnecessarily or disproportionately burden small entities. Small entities include small businesses, small governmental jurisdictions, and small not-for-profit enterprises.

For the purpose of conducting its review pursuant to the RFA, the BLM believes that the proposed rule would not have a ''significant economic impact on a substantial number of small entities,'' as that phrase is used in 5 U.S.C. 605.

Congressional Review Act (CRA)

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Congressional Review Act. This proposed rule:

a. Does not have an annual effect on the economy of $100 million or more. The BLM did not estimate the annual benefits that this proposed rule would provide to the economy. Please see the Economic and Threshold Analysis for this proposed rule for a more detailed discussion.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The proposed rule would benefit small businesses by streamlining the BLM's processes.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The proposed rule would not have adverse effects on any of these criteria.

Unfunded Mandates Reform Act (UMRA)

This proposed rule does not impose an unfunded mandate on State, local, or tribal governments, or the private sector of more than $100 million per year. The proposed rule does not have a significant or unique effect on State, local, or tribal governments, or the private sector. Under the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1531 *et seq.*), agencies must prepare a written statement about benefits and costs, prior to issuing a proposed or final rule that may result in aggregate expenditure by State, local, and tribal governments, or the private sector, of $100 million or more in any 1 year.

This proposed rule is not subject to the requirements under the UMRA. The proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or to the private sector in any one year. The proposed rule would not significantly or uniquely affect small governments. A statement containing the information required by the UMRA is not required.

Government Actions and Interference With Constitutionally Protected Property Rights Takings (E.O. 12630)

This proposed rule does not effect a taking of private property or otherwise have taking implications under E.O. 12630. Section 2(a) of E.O. 12630 identifies policies that do not have takings implications, such as those that abolish regulations, discontinue governmental programs, or modify regulations in a manner that lessens interference with the use of private property. The proposed rule would not interfere with private property. A takings implication assessment is not required.

Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. It does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. A federalism summary impact statement is not required.

Civil Justice Reform (E.O. 12988)

This proposed rule complies with the requirements of E.O. 12988. Specifically, this proposed rule:

a. Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

b. Meets the criteria of section 3(b)(2) requiring that all regulations be written

in clear language and contain clear legal standards.

Consultation and Coordination With Indian Tribes (E.O. 13175 and Departmental Policy)

The Department of the Interior (DOI) strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this proposed rule under the DOI's consultation policy and under the criteria in E.O. 13175 and have determined that it has no substantial direct effects on federally recognized Indian Tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, and that consultation under the DOI's tribal consultation policy is not required. However, consistent with the DOI's consultation policy (52 Departmental Manual 4) and the criteria in E.O. 13175, the BLM will consult with federally recognized Indian Tribes on any proposal that may have a substantial direct effect on the Tribes.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3521) generally provides that an agency may not conduct or sponsor, and not withstanding any other provision of law a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. This proposed rule contains information collection requirements that are subject to review by the Office of Management and Budget (OMB) under the PRA. Collections of information include any request or requirement that persons obtain, maintain, retain, or report information to an agency, or disclose information to a third party or to the public (44 U.S.C. 3502(3) and 5 CFR 1320.3(c)).

OMB has generally approved the existing information collection requirements contained in the BLM's regulations contained in 43 CFR subpart 1610 under OMB Control Number 1004–0212. The proposed rule would not result in any new or revised information collection requirements that are currently approved under that OMB Control Number.

For the reasons set out in the preamble, the BLM proposes to amend 43 CFR by creating part 6100 which would result in new information collection requirements that require approval by OMB. The information collection requirement contained in part 6100 will allow the BLM to issue a conservation lease to qualified individuals or businesses or State, local, or Tribal governments for the purpose of ensuring ecosystem sustainability. The proposed new information collection requirements contained in this proposed rule are discussed below.

New Information Collection Requirements

Section 6102.4 (b) and (c)—Conservation Leasing: Applications for conservation leases shall be filed with the Bureau of Land Management office having jurisdiction over the public lands covered by the application. Applications for conservation leases shall include a description of the proposed conservation use in sufficient detail to enable the authorized officer to evaluate the feasibility of the proposed conservation use, the impacts, if any, on the environment, the public or other benefits from the land use, the approximate cost of the proposed conservation use, any threat to public health and safety posed by the proposed use, and whether the proposed use is, in the opinion of the applicant, in conformance with the Bureau of Land Management plans, programs, and policies for the public lands covered by the proposed use. The description shall include but not be limited to:

- Details of the proposed uses and activities;
- A description of all facilities for which authorization is sought, including access needs and special types of easements that may be needed;
- A map of sufficient scale to allow the required information to be legible as well as a legal description of primary and alternative project locations;
- Schedule for restoration or land improvement activities; and
- Name and legal mailing address of the applicant.

Section 6102.4(c)(1)(E)—Conservation Leasing (additional information): After review of the project description, the authorized officer may require the applicant to provide additional studies or to submit additional environmental data if such data are necessary for the BLM to decide whether to issue, issue with modification, or deny the proposed conservation use. An application for the use of public lands may require documentation or proof of application for additional private, State, local or other Federal agency licenses, permits, easements, certificates, or other approval documents. The authorized officer may require evidence that the applicant has, or prior to commencement of conservation activities will have the technical and financial capability to operate, maintain, and terminate the authorized land use.

Section 6102.4–1(d)(3)—Termination and Suspension of Conservation Leases: Upon determination that there is noncompliance with the terms and conditions of a conservation lease which adversely affects land or public health or safety, or impacts ecosystem sustainability, the authorized officer shall issue an immediate temporary suspension. Any time after an order of suspension has been issued, the holder may file with the authorized officer a request for permission to resume. The request shall be in writing and shall contain a statement of the facts supporting the request.

Section 6102.4–2(a)—Bonding for Conservation Leases: Prior to the commencement of surface-disturbing activities, the conservation lease holder shall submit a surety or a personal bond, conditioned upon compliance with all the terms and conditions of the conservation lease(s) covered by the bond.

Section 6102.5–1(e)—Mitigation—Approval of third parties as mitigation fund holders: § 6102.5–1(e) would allow in certain limited circumstances authorized officers to approve third parties as mitigation fund holders to establish mitigation accounts for use by entities granted land use authorizations by the BLM. The authorized officer will approve the use of a mitigation account by a permittee only if a mitigation fund holder has a written agreement with the BLM.

Section 6102.5–1(g)—Mitigation—Approval of third parties as mitigation fund holders/State and local government agencies: State and local government agencies are limited in their ability to accept, manage, and disburse funds for the purpose outlined in § 6102.5–1 and generally should not be approved by the BLM to hold mitigation funds for compensatory mitigation sites on public or private lands. An exception may be made where a government agency is able to demonstrate, to the satisfaction of the BLM, that they are acting as a fiduciary for the benefit of the mitigation project or site, essentially as if they are a third party, and can show that they have the authority and perform the duties described in § 6102.5–1.

The information collection requirements contained in this proposed rule are needed to ensure that accountability through restoration monitoring and tracking is carried out effectively and that project goals are being met. The estimated annual

information collection burdens for this proposed rule are outlined below:

Title of Collection: Ecosystem Resilience and Conservation (43 CFR part 6100).

OMB Control Number: 1004–0NEW.

Form Number: None.

Type of Review: New collection of information (Request for a new OMB Control Number).

Respondents/Affected Public: Private sector businesses; Not-for-profit organizations; and State, local, or Tribal governments.

Respondent's Obligation: Required to Obtain or Retain a Benefit.

Frequency of Collection: On occasion.

Estimated Completion Time per Response: Varies from 5 hours to 240 hours per response, depending on activity.

Number of Respondents: 37.

Annual Responses: 37.

Annual Burden Hours: 1,380.

Annual Burden Cost: $0.

If you want to comment on the information-collection requirements of this proposed rule, please send your comments and suggestions on this information-collection by the date indicated in the **DATES** and **ADDRESSES** sections as previously described.

National Environmental Policy Act (NEPA)

The BLM intends to apply the Department Categorical Exclusion (CX) at 43 CFR 46.210(i) to comply with the National Environmental Policy Act. This CX covers policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case. The BLM plans to document the applicability of the CX concurrently with development of the final rule.

Actions Concerning Regulations That Significantly Affects Energy Supply, Distribution, or Use (E.O. 13211)

Federal agencies must prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; (2) Is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) Is designated by the Administrator of OIRA as a significant energy action. This proposed rule is not a significant action within the meaning of Executive Order 12866 or any successor order. This proposed rule does not affect energy supply or distribution.

Clarity of This Regulation (Executive Orders 12866, 12988 and 13563)

We are required by Executive Orders 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1988, to write all rules in plain language. This means that each rule must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use common, everyday words and clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help the BLM revise the proposed rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Authors

The principal authors of this proposed rule are: Stephanie Miller, BLM Deputy Division Chief, Wildlife Conservation; Darrin King, BLM Division of Regulatory Affairs; Chandra Little, BLM Division of Regulatory Affairs, assisted by the DOI Office of the Solicitor.

Laura Daniel-Davis,

Principal Deputy Assistant Secretary for Land and Minerals Management.

List of Subjects

43 CFR Part 1600

Administrative practice and procedure, Coal, Environmental impact statements, Environmental protection, Intergovernmental relations, Public lands, Preservation and conservation.

43 CFR Part 6100

Ecosystem resilience, Conservation use, Land health, and Restoration.

Accordingly, for the reasons set out in the preamble, the Bureau of Land Management proposes to amend 43 CFR part 1600 and add a new 43 CFR part 6100 as set forth below:

PART 1600—PLANNING, PROGRAMMING, BUDGETING

■ 1. The authority citation for part 1600 continues to read as follows:

Authority: 43 U.S.C. 1711–1712

■ 2. Amend § 1610.7–2 to read as follows:

§ 1610.7–2 Designation of areas of critical environmental concern.

(a) An Area of Critical Environmental Concern (ACEC) designation is the principal BLM designation for public lands where special management is required to protect important natural, cultural, and scenic resources, systems, or processes, or to protect life and safety from natural hazards. The BLM designates ACECs when issuing a decision to approve a Resource Management Plan, plan revision, or plan amendment. ACECs shall be managed to protect the relevant and important resources for which they are designated.

(b) In the land use planning process, authorized officers must identify, evaluate, and give priority to areas that have potential for designation and management as ACECs. Identification, evaluation, and priority management of ACECs shall be considered during the development and revision of Resource Management Plans and during amendments to Resource Management Plans when such action falls within the scope of the amendment (*see* §§ 1610.4–1 through 1610.4–9).

(c) The Field Manager must identify areas to evaluate for eligibility as ACECs early in the planning process, including by considering the following sources:

(1) The Field Manager must analyze inventory data to determine whether there are areas containing resources, values, systems, processes, or hazards eligible for designation as ACECs.

(2) The Field Manager must evaluate existing ACECs when plans are revised or when designations of ACECs are within the scope of an amendment, including considering potential changes to boundaries and management.

(3) The Field Manager must seek nominations for ACECs, during public scoping, from the public, State and local governments, Indian tribes, and other Federal agencies (see § 1610.2(c)) when developing new plans or revising existing plans, or when designations of ACECs are within the scope of a plan amendment. If nominations are received outside the planning process, interim management may be evaluated, considered, and implemented to protect relevant and important values until the BLM completes a planning process to determine whether to designate the area

as an ACEC, in conformance with the current Resource Management Plan.

(d) To be designated as an ACEC, an area must meet the following criteria:

(1) *Relevance.* The area contains resources with significant historic, cultural, or scenic value; a fish or wildlife resource; a natural system or process; or a natural hazard potentially impacting life and safety.

(2) *Importance.* The resources, values, systems, processes, or hazards have substantial importance, which generally requires that they have qualities of special worth, consequence, meaning, distinctiveness, or cause for concern. Authorized officers may consider the national or local importance, subsistence value, or regional contribution of a resource, value, system, or process. Resources, values, systems, or processes may have substantial importance if they contribute to ecosystem resilience, including by protecting intact landscapes and habitat connectivity. A natural hazard can be important if it is a significant threat to human life and safety.

(3) *Special Management Attention.* The resources, values, systems, processes, or hazards require special management attention. ''Special management attention'' means management prescriptions that:

(i) Conserve, protect, and restore relevant and important resources, values, systems, processes, or that protect life and safety from natural hazards; and

(ii) Would not be prescribed if the relevant resources, values, systems, processes, or hazards were not present.

(e) Resources, values, systems, processes, or hazards that are found to have relevance and importance are likely to require special management attention. In evaluating the need for special management attention, the Field Manager must consider:

(1) Whether highlighting the resources with the designation will protect or increase the vulnerability of the resources, and if so, how to tailor a designation to maximize protection and minimize unintended impacts;

(2) The values of other resource uses in the plan;

(3) The feasibility of managing the designation; and

(4) The relationship to other types of designations available.

(f) The Field Manager must identify the boundaries of proposed ACECs to encompass the relevant and important resources, values, systems, processes, or hazards, and any areas required for the special management attention needed to provide protection for the relevant and important resources, values, systems, processes, or hazards.

(g) Planning documents must include at least one alternative that analyzes in detail all proposed ACECs to provide for informed decisionmaking on the trade-offs associated with ACEC designation.

(h) The approved plan shall list all designated ACECs, identify their relevant and important resources, values, systems, processes, or hazards, and include the special management attention, including mitigating measures, identified for each designated ACEC.

(i) The State Director shall:

(1) Ensure that inventories used to obtain information and data on relevance and importance are kept current. Monitoring shall be performed and inventories shall be updated at intervals appropriate to the sensitivity of the relevant and important resources, values, systems, processes, or hazards, to ensure that data are available to identify trends and emerging issues during plan evaluations (see § 1610.4–9).

(2) Prioritize acquisition of inholdings within ACECs and adjacent or connecting lands identified as holding related relevant and important resources, values, systems, processes, or hazards as the designated ACEC.

(3) Provide annual reports within the first quarter of each fiscal year identifying for each designated ACEC within the State:

(i) Whether or not an activity plan is deemed necessary and, if so, whether it has been prepared;

(ii) Implementation actions accomplished during the previous fiscal year, highlighting those actions contributing to the conservation, enhancement, or protection of the resources, values, systems, or processes, or protection from natural hazards; and

(iii) Scheduled implementation measures for the ensuing fiscal year.

(j) The State Director, through the land use planning process, may remove the designation of an ACEC, in whole or in part, only when:

(1) The State Director finds that special management attention is not needed because another legally enforceable mechanism provides an equal or greater level of protection; or

(2) The State Director finds that the resources, values, systems, processes, or natural hazards of relevance and importance are no longer present, cannot be recovered, or have recovered to the point where special management is no longer necessary. The findings must be supported by data or documented changes on the ground.

■ 3. Add part 6100 to read as follows:

PART 6100—ECOSYSTEM RESILIENCE

Subpart 6101—General Information

Sec.
6101.1 Purpose.
6101.2 Objectives.
6101.3 Authority.
6101.4 Definitions.
6101.5 Principles for ecosystem resilience.

Subpart 6102—Conservation Use to Achieve Ecosystem Resilience

Sec.
6102.1 Protection of intact landscapes.
6102.2 Management to protect intact landscapes.
6102.3 Restoration.
6102.3–1 Restoration prioritization.
6102.3–2 Restoration planning.
6102.4 Conservation leases.
6102.4–1 Termination and suspension of conservation leases.
6102.4–2 Building for conservation leasing.
6102.5 Management actions for ecosystem resilience.
6102.5–1 Mitigation.

Subpart 6103—Tools for Achieving Ecosystem Resilience

Sec.
6103.1 Fundamentals of land health.
6103.1–1 Land health standards and guidelines.
6103.1–2 Land health assessments, evaluations and determinations.
6103.2 Inventory, assessment and monitoring.

Authority: 16 U.S.C. 7202; 43 U.S.C. 1701 *et seq.*

Subpart 6101—General Information

§ 6101.1 Purpose.

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. This part discusses the use of protection and restoration actions, as well as tools such as land health evaluations, inventory, assessment, and monitoring.

§ 6101.2 Objectives.

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 ecosystem resilience and intact landscapes;

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

(d) Incorporate inventory, assessment, and monitoring principles into decisionmaking and use this

information to identify trends and implement adaptive management strategies;

(e) Accelerate restoration and improvement of degraded public lands and waters to properly functioning and desired conditions; and

(f) Ensure that ecosystems and their components can absorb, or recover from, the effects of disturbances or environmental change through conservation, protection, restoration, or improvement of essential structures, functions, and redundancy of ecological patterns across the landscape.

§ 6101.3 Authority.

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; and section 2002 of the Omnibus Public Land Management Act of 2009 (16 U.S.C. 7202).

§ 6101.4 Definitions.

As used in this part, the term:

Best management practices means state-of-the-art, efficient, appropriate, and practicable measures for avoiding, minimizing, rectifying, reducing, compensating for, or eliminating impacts over time.

Casual use means any short-term, noncommercial activity that does not cause appreciable damage or disturbance to the public lands or their resources or improvements and that is not prohibited by closure of the lands to such activities.

Conservation means maintaining resilient, functioning ecosystems by protecting or restoring natural habitats and ecological functions.

Disturbance means a discrete event in time that affects the structure and function of an ecosystem. Disturbances may be viewed as ''characteristic'' when ecosystems and species have evolved to accommodate the disturbance attributes or ''uncharacteristic'' when the attributes are outside an established range of variation.

Effects means the direct, indirect, and cumulative impacts from a public land use; effects and impacts as used in this rule are synonymous.

High-quality information means information that promotes reasoned, fact-based agency decisions. Information relied upon or disseminated by BLM must meet the standards for objectivity, utility, integrity, and quality set forth in applicable federal law and policy. Indigenous knowledge may qualify as high-quality information when that knowledge is authoritative, consensually obtained, and meets the standards for high-quality information.

Important, Scarce, or Sensitive resources:

(1) *Important resources* means resources that the BLM has determined to warrant special consideration, consistent with applicable law.

(2) *Scarce resources* means resources that are not plentiful or abundant and may include resources that are experiencing a downward trend in condition.

(3) *Sensitive resources* means resources that are delicate and vulnerable to adverse change, such as resources that lack resilience to changing circumstances.

Indigenous Knowledge (IK) means a body of observations, oral and written knowledge, practices, and beliefs developed by Tribes and Indigenous Peoples through interaction and experience with the environment. IK is applied to phenomena across biological, physical, social, cultural, and spiritual systems. IK can be developed over millennia, continues to develop, and includes understanding based on evidence acquired through direct contact with the environment and long-term experiences, as well as extensive observations, lessons, and skills passed from generation to generation. IK is developed by Indigenous Peoples including, but not limited to, Tribal Nations, American Indians, Alaska Natives, and Native Hawaiians.

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

Land enhancement means any infrastructure or other use related to the public lands that is designed to improve production of forage; improve vegetative composition; direct patterns of use to improve ecological condition; provide water; stabilize soil and water conditions; promote effective wild horse and burro management; or restore, protect, and improve the condition of land health or fish and wildlife habitat. The term includes, but is not limited to, structures, treatment projects, and the use of mechanical devices or landscape modifications achieved through mechanical means.

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

Mitigation means:

(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 mitigation hierarchically: first avoid, then minimize, and then compensate for any residual impacts from proposed actions.

Mitigation strategies means documents that identify, evaluate, and communicate potential mitigation needs and mitigation measures in a geographic area, at relevant scales, in advance of anticipated public land uses.

Monitoring means the periodic observation and orderly collection of data to evaluate:

(1) Existing conditions;

(2) The effects of management actions; or

(3) The effectiveness of actions taken to meet management objectives.

Permittee means any person that has a valid permit, right-of-way grant, lease, or other land use authorization from the BLM.

Protection is the act or process of conservation by preserving the existence of resources while keeping resources safe from degradation, damage, or destruction.

Public lands means any lands or interests in lands owned by the United States and administered by the Secretary of the Interior through the BLM without regard to how the United States acquired ownership.

Reclamation means, when used in relation to individual project goals and objectives, practices intended to achieve an outcome that reflects the final goal to restore the character and productivity of the land and water. Components of reclamation include, as applicable:

(1) Isolating, controlling, or removing of toxic or deleterious substances;

(2) Regrading and reshaping to conform with adjacent landforms, facilitate revegetation, control drainage, and minimize erosion;

(3) Rehabilitating fisheries or wildlife habitat;

(4) Placing growth medium and establishing self-sustaining revegetation;

(5) Removing or stabilizing buildings, structures, or other support facilities;

(6) Plugging drill holes and closing underground workings; and

(7) Providing for post-activity monitoring, maintenance, or treatment.

Resilient ecosystems means ecosystems that have the capacity to maintain and regain their fundamental structure, processes, and function when altered by environmental stressors such as drought, wildfire, nonnative invasive species, insects, and other disturbances.

Restoration means the process or act of conservation by assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed.

Sustained yield means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of BLM-managed lands without permanent impairment of the productivity of the land. Preventing permanent impairment means that renewable resources are not depleted, and that desired future conditions are met for future generations. Ecosystem resilience is essential to BLM's ability to manage for sustained yield.

Unnecessary or Undue degradation means harm to land resources or values that is not needed to accomplish a use's goals or is excessive or disproportionate.

§ 6101.5 Principles for ecosystem resilience.

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 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) Authorized officers must implement the foregoing principles through:

(1) Conservation as a land use within the multiple use framework, including in decisionmaking, authorization, and planning processes;

(2) Protection and maintenance of the fundamentals of land health and ecosystem resilience;

(3) Restoration and protection of public lands to support ecosystem resilience;

(4) Use of the full mitigation hierarchy to address impacts to species, habitats, and ecosystems from land use authorizations; and

(5) Prevention of unnecessary or undue degradation.

Subpart 6102—Conservation Use to Achieve Ecosystem Resilience

§ 6102.1 Protection of intact landscapes.

(a) The BLM must manage certain landscapes to protect their intactness. This requires:

(1) Maintaining intact ecosystems through conservation actions.

(2) Managing lands strategically for compatible uses while conserving intact landscapes, especially where development or fragmentation is likely to occur that will permanently impair ecosystem resilience on public lands.

(3) Maintaining or restoring resilient ecosystems through habitat and ecosystem restoration projects that are implemented over broader spatial and longer temporal scales. (4) Coordinating and implementing actions across BLM programs, offices, and partners to protect intact landscapes.

(5) Pursuing management actions that maintain or mimic characteristic disturbance.

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

§ 6102.2 Management to protect intact landscapes.

(a) When revising a Resource Management Plan under part 1600 of this chapter, authorized officers must use available 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 or functionality of 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 establish partnerships to work across Federal and non-Federal lands to protect intact landscapes;

(2) Multiple lines of evidence indicate that active management will improve the resilience of the landscape through reducing the likelihood of uncharacteristic disturbance;

(3) The BLM can work with communities to identify geographic areas important for 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) 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) Standardized quantitative monitoring and best available information is used to track the success of ecological protection activities (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 functioning ecosystems.

(d) Authorized officers must collect and track disturbance data that indicate the cumulative disturbance and direct loss of 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 strategically minimize surface disturbance, 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.

§ 6102.3 Restoration.

(a) The BLM must emphasize restoration across the public lands to enable achievement of its multiple use and sustained yield mandate.

(b) In determining the restoration actions required to achieve recovery of ecosystems and promote resilience, the BLM must consider the degree of ecosystem degradation and develop restoration goals and objectives designed to achieve ecosystem resilience and land health standards (see § 6103.1–1).

(c) The BLM should employ active management to promote restoration. Over the long-term, restoration actions must be durable, self-sustaining, and expected to persist based on the resource objective.

§ 6102.3–1 Restoration prioritization.

(a) Not less than every five years, authorized officers must identify priority landscapes for restoration. In doing so, authorized officers must consider:

(1) Results from land health assessments, watershed condition classifications and other best available information (see subpart 6103 of this part);

(2) The likelihood of success of restoration activities to achieve resource or conservation objectives;

(3) The possibility of implementing a series of coordinated restoration actions benefiting multiple resources at scales commensurate to the cause of the degradation in areas where the BLM manages sufficient lands or partnerships exist to work across jurisdictions;

(4) Where restoration actions will have the greatest social, economic, and environmental justice impacts for local communities; and

(5) Where restoration can concurrently or proactively prevent unnecessary or undue degradation, such as ecosystem conversion, fragmentation, habitat loss, or other negative outcomes that permanently impair ecosystem resilience.

§ 6102.3–2 Restoration planning.

(a) Authorized officers must include a restoration plan in any Resource Management Plan adopted or revised in accordance with part 1600 of this chapter. Each restoration plan must include goals, objectives, and management actions that require:

(1) Measurable progress toward attainment of land health standards;

(2) Clear outcomes and monitoring to describe progress and enable adaptive management (see subpart 6103).

(3) Coordination and implementation of actions across BLM programs and with partners to develop landscape restoration objectives.

(4) Attainment of statewide and regional needs as identified in the assessment of priority landscapes for restoration and consistent with Resource Management Plan goals.

(5) Restoration of landscapes that land health assessments, watershed condition classifications and other best available information suggest should be prioritized for restoration.

(b) Authorized officers must design and implement restoration actions to achieve the goals and objectives adopted under paragraph (a) of this section. In doing so, authorized officers must:

(1) Ensure that actions are designed, implemented, and monitored at appropriate spatial and temporal scales using suitable treatments and tools to achieve desired outcomes.

(2) Ensure that restoration management actions address causes of degradation, focus on ecological process-based solutions, and where possible maintain attributes and resource values associated with the potential or capability of the ecosystem.

(3) Coordinate and implement actions across BLM programs and with partners to develop holistic restoration actions.

(4) Issue conservation leases under § 6102.4 for the purpose of restoring, managing, and monitoring areas within priority landscapes.

(5) Ensure incorporation of locally appropriate best management practices that address the following:

(i) A five-year schedule that describes activities prior to planning (such as pretreatments and native-plant materials procurement), implementation actions (including operation, maintenance, and repair), monitoring (see § 6103.2), and reporting;

(ii) Potential remedial and contingency measures that account for drought and changed circumstances that could delay implementation; and

(iii) Opportunities for compensatory mitigation for important, scarce, or sensitive resources or resources protected by law.

(c) Authorized officers must annually track restoration-project progress toward achieving goals, projects that have achieved project goals, and projects completed without meeting project goals. When assessment and monitoring efforts reveal that restoration outcomes have not been met, authorized officers must assess and track why restoration outcomes are not being achieved and what, if any, additional resources or changes to management are needed to achieve restoration goals.

(d) Authorized officers may authorize a restoration project or approve compensatory mitigation as part of a broader land use authorization only if the proposed restoration project or compensatory mitigation will be consistent with the land health standards, restoration goals and objectives, best management practices and Resource Management Plan restoration plans described in paragraph (a) of this section.

§ 6102.4 Conservation leasing.

(a) The BLM may authorize conservation use on the public lands by issuing conservation leases on such terms and conditions as the authorized officer determines are appropriate for the purpose of ensuring ecosystem resilience through protecting, managing, or restoring natural environments, cultural or historic resources, and ecological communities, including species and their habitats.

(1) Conservation leases on the public lands may be authorized for the following activities:

(i) Conservation use that involves restoration or land enhancement; and

(ii) Conservation use that involves mitigation.

(2) Authorized officers may issue conservation leases to any qualified individual, business, non-governmental organization, or Tribal government.

(3) Conservation leases shall be issued for a term consistent with the time required to achieve their objective.

(i) A conservation lease issued for purposes of restoration or protection may be issued for a maximum term of 10 years and shall be reviewed mid-term for consistency with the lease provisions.

(ii) A conservation lease issued for purposes of mitigation shall be issued for a term commensurate with the impact it is mitigating and reviewed every 5 years for consistency with the lease provisions.

(iii) Authorized officers shall extend or further extend a conservation lease if necessary to serve the purpose for which the lease was first issued. Such extension or further extension can be for a period no longer than the original term of the lease.

(4) Subject to valid existing rights and applicable law, once the BLM has issued a conservation lease, the BLM shall not authorize any other uses of the leased lands that are inconsistent with the authorized conservation use.

(5) No land use authorization is required under the regulations in this part for casual use of the public lands covered by a conservation lease.

(b) The process for issuing a conservation lease is as follows:

(1) An application for a conservation lease must be filed with the Bureau of Land Management office having jurisdiction over the public lands covered by the application. The filing of an application gives the applicant no right to use the public lands.

(2) If the lease application is approved, the authorized officer will issue an approved conservation lease on a form approved by the Office of the Director, Bureau of Land Management.

(c) An application for a conservation lease must include:

(1) A description of the proposed conservation use in sufficient detail to enable authorized officers to evaluate the feasibility of the proposed conservation use; the impacts, if any, on the environment; the public or other benefits from the conservation use; the approximate cost of the proposed conservation use; any threat to public health and safety posed by the proposed use; and how, in the opinion of the applicant, the proposed use conforms to the Bureau of Land Management's plans, programs, and policies for the public lands covered by the proposed use. The description shall include but not be limited to:

(i) Details of the proposed uses and activities;

(ii) A description of all facilities for which authorization is sought, including access needs and special types of leases that may be needed;

(iii) A map of sufficient scale to allow the required information to be legible as well as a legal description of primary and alternative project locations;

(iv) A schedule for restoration or land enhancement activities if applicable; and

(v) The following additional information, upon request of authorized officers:

(A) Additional studies or environmental data, if such studies or data are necessary for the BLM to decide whether to issue, issue with modification, or deny the proposed conservation lease.

(B) Documentation of or proof of application for additional private, State, local or other Federal agency licenses, permits, easements, certificates, or other approvals.

(C) Evidence that the applicant has, or prior to commencement of conservation activities will have, the technical and financial capability to operate, maintain, and terminate the authorized conservation use.

(2) The application shall include the name and legal mailing address of the applicant, as well as a statement of the applicant's interest in the resource or purpose of the lease.

(3) If the applicant is other than an individual, the application shall include the name and address of an agent authorized to receive notice of actions pertaining to the application.

(4) If any of the information required in this section has already been submitted as part of a separate conservation use proposal, the application need only refer to that proposal by filing date, office, and case number. The applicant shall certify that there have been no changes in any of the information.

(d) Approval of the application is not guaranteed and is solely at the discretion of the authorized officer.

(e) A conservation lease may only be assigned or transferred with the written approval of the authorized officer, and no assignment or transfer shall be effective until the BLM has approved it in writing. Authorized officers may authorize assignment or transfer of a conservation lease in their discretion if no additional rights will be conveyed beyond those granted by the original authorization, the proposed assignee or transferee is qualified to hold the lease, and the assignment or transfer is in the public interest.

(f) Administrative cost recovery, rents and fees for conservation leases will be governed by the provisions of §§ 2920.6 and 2920.8.

§ 6102.4–1 Termination and suspension of conservation leases.

(a) If a conservation lease provides by its terms that it shall terminate on the occurrence of a fixed or agreed-upon event, the conservation lease shall automatically terminate by operation of law upon the occurrence of such event.

(b) A conservation lease may be terminated by mutual written agreement between the authorized officer and the lessee to terminate the lease.

(c) Authorized officers have discretion to suspend or terminate conservation leases under the following circumstances:

(1) Improper issuance of the lease;

(2) Noncompliance by the holder with applicable law, regulations, or terms and conditions of the conservation lease;

(3) Failure of the holder to use the conservation lease for the purpose for which it was authorized; or

(4) Impossibility of fulfilling the purposes of the lease.

(d) Upon determination that the holder has failed to comply with any terms or conditions of a conservation lease and that such noncompliance adversely affects or poses a threat to land or public health or safety or impacts to ecosystem resilience, authorized officers shall issue an immediate temporary suspension.

(1) Authorized officers may issue an immediate temporary suspension order orally or in writing at the site of the activity to the holder or a contractor or subcontractor of the holder, or to any representative, agent, employee or contractor of any of them, and the suspended activity shall cease at that time. As soon as practicable, authorized officers shall confirm the order by a written notice to the holder addressed to the holder or the holder's designated agent. Authorized officers may also take such action considered necessary to address the adverse effects or threat to land or public health or safety or impacts to ecosystem resilience.

(2) Authorized officers may order immediate temporary suspension of an activity regardless of any action that has been or is being taken by another Federal or State agency.

(3) Any time after an order of temporary suspension has been issued, the holder may file with authorized officers a request for permission to resume. The request shall be in writing and shall contain a statement of the facts supporting the request. Authorized officers may grant the request upon determination that the adverse effects or threat to land or public health or safety or impacts to ecosystem resilience are resolved.

(4) Authorized officers may render an order either to grant or to deny the request to resume within 5 working days of the date the request is filed. If authorized officers do not render an order on the request within 5 working days, the request shall be considered denied, and the holder shall have the same right to appeal as if an order denying the request had been issued.

(e) Process for termination or suspension other than temporary immediate suspension.

(1) Prior to commencing any proceeding to suspend or terminate a conservation lease, authorized officers shall give written notice to the holder of the legal grounds for such action and shall give the holder a reasonable time to address the legal basis the authorized officer identifies for suspension or termination.

(2) After due notice of termination or suspension to the holder of a conservation lease, if grounds for suspension or termination still exist after a reasonable time, authorized officers shall give written notice to the holder and refer the matter to the Office of Hearings and Appeals for a hearing before an Administrative Law Judge pursuant to part 4 of this chapter. The authorized officers shall suspend or revoke the conservation lease if the Administrative Law Judge determines that grounds for suspension or revocation exist and that such action is justified.

(3) Authorized officers shall terminate a suspension order when authorized officers determine that the grounds for such suspension no longer exist.

(4) Upon termination of a conservation lease, the holder shall, for 60 days after the notice of termination, retain authorization to use the associated public lands solely for the

purposes of reclaiming the site to its use conditions consistent with achieving land health fundamentals, unless otherwise agreed upon in writing or in the conservation lease terms. If the holder fails to reclaim the site consistent with the requirements of these regulations and the conservation lease terms within a reasonable period, all authorization to use the associated public lands will terminate, but that shall not relieve the holder of liability for the cost of reclaiming the site.

§ 6102.4–2 Bonding for conservation leases.

(a) *Bonding obligations.* (1) Prior to the commencement of surface-disturbing activities, the conservation lease holder shall submit a surety or a personal bond conditioned upon compliance with all the terms and conditions of the lease covered by the bond, as described in this subpart. The bond amounts shall be sufficient to ensure reclamation of the conservation lease area(s) and the restoration of any lands or surface waters adversely affected by conservation lease operations. Such restoration may be required after the abandonment or cessation of operations by the conservation lease holder in accordance with, but not limited to, the standards and requirements set forth by authorized officers.

(2) Surety bonds shall be issued by qualified surety companies certified by the Department of the Treasury.

(3) Personal bonds shall be accompanied by:

(i) Cashier's check;

(ii) Certified check; or

(iii) Negotiable Treasury securities of the United States of a value equal to the amount specified in the bond. Negotiable Treasury securities shall be accompanied by a proper conveyance to the Secretary of full authority to sell such securities in case of default in the performance of the terms and conditions of a conservation use authorization.

(b) *State-wide bonds.* In lieu of bonds for each individual conservation lease, holders may furnish a bond covering all conservation leases and operations in any one State. Such a bond must be at least $25,000 and must be sufficient to ensure reclamation of all of the holder's conservation lease area(s) and the restoration of any lands or surface waters adversely affected by conservation lease operations in the State.

(c) *Filing.* All bonds shall be filed in the proper BLM office on a current form approved by the Office of the Director. A single copy executed by the principal or, in the case of surety bonds, by both the principal and an acceptable surety is sufficient. Bonds shall be filed in the Bureau State office having jurisdiction of the conservation use easement covered by the bond.

(d) *Default.* (1) Where, upon a default, the surety makes a payment to the United States of an obligation incurred under a conservation lease, the face amount of the surety bond or personal bonds and the surety's liability thereunder shall be reduced by the amount of such payment.

(2) After default, where the obligation in default equals or is less than the face amount of the bond(s), the principal shall either post a new bond or restore the existing bond(s) to the amount previously held or a larger amount as determined by authorized officers. In lieu thereof, the principal may file separate or substitute bonds for each conservation use covered by the deficient bond(s). Where the obligation incurred exceeds the face amount of the bond(s), the principal shall make full payment to the United States for all obligations incurred that are in excess of the face amount of the bond(s) and shall post a new bond in the amount previously held or such larger amount as determined by authorized officers. The restoration of a bond or posting of a new bond shall be made within 6 months or less after receipt of notice from authorized officers.

(3) Failure to comply with these requirements may:

(i) Subject all leases covered by such bond(s) to termination under the provisions of this title;

(ii) Prevent the bond obligor or principal from acquiring any additional conservation lease or interest therein under this subpart; and

(iii) Result in the bond obligor or principal being referred to the Suspension and Debarment Program under 2 CFR part 1400 to determine if the entity will be suspended or debarred from doing business with the Federal Government.

§ 6102.5 Management actions for ecosystem resilience.

(a) Authorized officers must:

(1) Identify priority watersheds, landscapes, and ecosystems that require protection and restoration efforts;

(2) Develop and implement strategies, including mitigation strategies, and approaches that effectively manage public lands to protect resilient ecosystems;

(3) Develop and implement monitoring and adaptive management strategies for maintaining sustained yield of renewable resources, accounting for changing landscapes, fragmentation, invasive species, and other environmental disturbances (*see* § 6103.2);

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

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

(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 permanently impair ecosystem resilience;

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

(3) Issue decisions that promote the ability of ecosystems to recover or the BLM's ability to restore function;

(4) 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;

(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;

(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;

(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;

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

(9) Provide a justification for decisions that may impair 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.

§ 6102.5–1 Mitigation.

(a) The BLM will generally apply the mitigation hierarchy to avoid, minimize and compensate for, as appropriate, adverse impacts to resources when authorizing uses of public lands. As appropriate in a planning process, the authorized officer may identify specific mitigation approaches for identified uses or impacts to resources.

(b) Authorized officers shall, to the maximum extent possible, require mitigation to address adverse impacts to important, scarce, or sensitive resources.

(c) For compensatory mitigation, the BLM may use a third-party mitigation fund holder. Authorized officers may approve third-party mitigation fund holders to establish mitigation accounts for use by entities granted land use authorizations by the BLM, when such accounts are an appropriate and efficient method for implementing mitigation measures required through a BLM decision document. Approved mitigation fund holders are allowed to collect and manage mitigation funds collected from permittees and to expend the funds in accordance with agency decision documents and permits.

(d) Authorized officers may establish mitigation accounts as appropriate when multiple permittees have similar compensatory mitigation requirements or a single permittee has project impacts that require substantial compensatory mitigation that will be accomplished over an extended period and involve multiple mitigation sites.

(e) Authorized officers may approve the use of a mitigation account by a permittee only if a mitigation fund holder has a written agreement with the BLM as described in paragraph (h) of this section.

(f) Authorized officers may approve a third party as a mitigation fund holder if the party:

(1) Qualifies for tax-exempt status in accordance with Internal Revenue Code (IRC) section 501(c)(3);

(2) Has a history of successfully holding and managing mitigation, escrow, or similar corporate accounts;

(3) Is a public charity bureau for the state in which the mitigation area is located, or otherwise complies with applicable state laws;

(4) Is a third party organizationally separate from and having no corporate or family connection to the entity accomplishing the mitigation program or project, the project proponent, and the permittee;

(5) Adheres to generally accepted accounting practices that are promulgated by the Financial Account Standards Board, or any successor entity; and

(6) Has the capability to hold, invest, and manage the mitigation funds to the extent allowed by law and consistent with modern ''prudent investor'' and endowment law, such as the Uniform Prudent Management of Institutional Funds Act of 2006 (UPMIFA) or successor legislation when funds are needed for long-term management and monitoring. UPMIFA incorporates a general standard of prudent spending measured against the purpose of the fund and invites consideration of a wide array of other factors. For states that have not adopted UPMIFA, analogous state legislation can be relied upon to achieve this purpose.

(g) The BLM may not approve a state or local government agency to hold mitigation funds under paragraph (f) of this section unless the government agency is able to demonstrate, to the satisfaction of the BLM, that it is acting as a fiduciary for the benefit of the mitigation project or site and can show that it has the authority and ability to:

(1) Collect the funds;

(2) Protect the account from being used for purposes other than the management of the mitigation project or site;

(3) Disburse the funds to the entities conducting the mitigation project or management of the mitigation site;

(4) Demonstrate that it is organizationally separate from and has no corporate or family connection to the entity accomplishing the mitigation program or project, the project proponent, and the permittee; and

(5) Adhere to generally accepted accounting practices that are promulgated by the Governmental Accounting Standards Board or any successor entity.

(h) The BLM must execute an agreement with any approved mitigation fund holder. All mitigation fund holder agreements must be recorded with the BLM within 30 days of the agreement being fully executed. The BLM office originating the mitigation fund holder agreement must ensure that annual fiscal reports are accurate and complete.

Subpart 6103—Tools for Achieving Ecosystem Resilience

§ 6103.1 Fundamentals of land health.

(a) Standards and guidelines developed or revised by the BLM in a land use plan must be consistent with the following fundamentals of land health:

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

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

(3) Water quality complies with state water quality standards and achieves, or is making significant progress toward achieving, established BLM management objectives established in the land use plan such as meeting wildlife needs.

(4) Habitats are, or are making significant progress toward being, restored or maintained for Federal threatened and endangered species, Federal Proposed and Candidate species, and other special status species.

(b) Authorized officers must manage all lands and program areas to achieve land health in accordance with the fundamentals of land health and standards and guidelines, as provided in this subpart.

§ 6103.1–1 Land health standards and guidelines.

(a) To ensure ecosystem resilience, authorized officers must implement

land health standards and guidelines that, at a minimum, conform to the fundamentals of land health across all lands and program areas.

(1) Authorized officers must apply existing land health standards and guidelines, including those previously established under subpart 4180 of this chapter, across all lands and program areas.

(2) Authorized officers must review land health standards and guidelines during the land use planning process and develop new or revise existing land health standards and guidelines as necessary for all lands and program areas to ensure the standards and guidelines serve as appropriate measures for the fundamentals of lands health.

(3) Authorized officers will periodically, but not less than every 5 years in conjunction with regular land use plan evaluations, review land health standards and guidelines for all lands and program areas to ensure they serve as appropriate measures for the fundamentals of land health. If existing standards and guidelines are found to be insufficient, authorized officers must evaluate whether to revise or amend the applicable land use plans.

(b) Authorized officers must determine the priority and scale for evaluating standards and guidelines based on resource concerns.

(c) Authorized officers must establish an appropriate set of goals, objectives, and success indicators to ensure that each land health standard can be measured against resource conditions. New and amended standards:

(1) May include previously identified indicators if they are applicable to the new or amended standard;

(2) Must incorporate appropriate quantitative indicators available from standardized datasets;

(3) Must address changing environmental conditions and physical, biological, and ecological functions not already covered by existing standards; and

(4) May require consultation with relevant experts within and outside the agency.

(d) The BLM may establish national indicators for all lands and program areas taken from existing indicators and the development of new indicators, as needed, in support of the implementation of the fundamentals of land health.

(1) Authorized officers must periodically review authorized uses for consistency with the fundamentals of land health for all lands and program areas.

(2) Reserved.

§ 6103.1–2 Land health assessments, evaluations, and determinations.

(a) Authorized officers must consider existing land health assessments, evaluations, and determinations in the course of decisionmaking processes regardless of program area. Authorized officers may prepare new land health assessments, evaluations, and determinations in connection with decisionmaking, and must do so if required by other law or regulation.

(b) In the course of conducting land health assessments, authorized officers must measure applicable indicators.

(c) In the course of conducting land health evaluations, authorized officers must:

(1) Document whether land health standards are achieved through land health assessments, documented observations, standardized quantitative data, or other data acceptable to authorized officers as described in § 6103.2.

(2) Use multiple lines of evidence. Indicator values can be compared to benchmark values to help evaluate land health standards. Attainment or nonattainment of a benchmark for one indicator can be considered as one line of evidence used in the assessment and evaluation.

(d) If resource conditions are determined to not be meeting, or making progress toward meeting, land health standards, authorized officers must determine the causal factors responsible for nonachievement.

(e) Authorized officers must make progress toward determining the causal factors for nonachievement as soon as practicable but not later than within a year of the land health assessment identifying the nonachievement.

(1) Upon determining that existing management practices or levels of use on public lands are significant factors in the nonachievement of the standards and guidelines, authorized officers must take appropriate action as soon as practicable.

(2) Taking appropriate action means implementing actions, consistent with applicable law and the terms and conditions of existing authorizations, that will result in significant progress toward fulfillment of the standards and significant progress toward compliance with the guidelines.

(3) Relevant practices and activities may include but are not limited to the establishment of terms and conditions for permits, leases, and other use authorizations and land enhancement activities.

(4) If authorized officers determine that existing management practices or levels of use on public lands are not significant causal factors in the nonachievement of the standards, other remediating actions should be identified and implemented as soon as practicable to address the identified causal factors.

(5) Authorized officers may authorize changes in management or development of a restoration plan to meet other objectives.

§ 6103.2 Inventory, assessment, and monitoring.

(a) Watershed condition classifications must be completed as part of all land use planning processes.

(b) The BLM will maintain an inventory of public lands. This inventory must include both critical landscape components (*e.g.,* land types, streams, habitats) and core indicators that address land health fundamentals. Authorized officers will use inventory, assessment, and monitoring information, including standardized quantitative monitoring data, remote sensing maps, and geospatial analyses, to inform decisionmaking across program areas, including but not limited to:

(1) Authorization of permitted uses;

(2) Land use planning;

(3) Land health evaluation;

(4) Available watershed assessments;

(5) Restoration planning, including prioritization;

(6) Assessments of restoration effectiveness;

(7) Evaluation and protection of intactness;

(8) Mitigation planning; and

(9) Other decisionmaking processes.

(c) Authorized officers must inventory, assess, and monitor activities employing the following principles:

(1) Structured implementation of monitoring activities through interdisciplinary monitoring plans, which guide monitoring program development, implementation, and data use for decision-makers;

(2) Standardized field measurements to allow data comparisons through space and time in support of multiple management decisions;

(3) Appropriate sample designs to minimize bias and maximize applicability of collected data;

(4) Data management and stewardship to ensure data quality, accessibility, and use; and

(5) Integration with remote sensing products to optimize sampling and calibrate continuous map products.

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