OFFICE OF THE GOVERNOR
STATE OF MONTANA

GREG GIANFORTE
GOVERNOR

KRISTEN JURAS
LT. GOVERNOR

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U.S. Department of Interior
Director (630)
Bureau of Land Management
1849 C. Street NW, Room 5646
Washington, DC 20240
Attn: 1004-AE92

Re: Proposed Conservation and Landscape Health Rule (RIN 1004-AE92)

Secretary Haaland and Director Stone-Manning:

Thank you for the opportunity to offer comment on the United States Bureau of Land Management's (BLM) proposed "Conservation and Landscape Health" rule (Rule) (88 Fed. Reg. 19583 (Apr. 3, 2023)). After reviewing the Rule, the State of Montana concludes that the Rule is not supported by law and constitutes significant and excessive federal overreach. For the following reasons, Montana encourages the BLM to withdraw the Rule.

1. ***The Rule's creation of "conservation leases" conflicts with the Taylor Grazing Act (TGA), Federal Land Policy and Management Act (FLPMA), and Public Rangelands Improvement Act (PRIA).***

Issuance of conservation leases on TGA lands will violate the TGA, FLPMA, and PRIA. The acts only authorize the Secretary of the Interior (SOI) to issue permits to graze livestock on these lands.

The Tenth Circuit addressed the authority to implement conservation leases in *Pub. Lands Council (PLC) v. Babbitt*, 167 F.3d 1287 (10th Cir. 1999). There, PLC challenged the 1995 grazing rule amendment that added "conservation use" as a permissible use of a grazing permit. *See,* 43 C.F.R. § 4100.0-5 (1995) (60 Fed. Reg. 9894, 9961 (Feb. 22, 1995)). That revision defined "grazing permit" as a document authorizing use of public lands within a grazing district, to include "livestock grazing, suspended use, and conservation use." *Id.* In turn, "conservation use" was defined to mean

> an activity, excluding livestock grazing, on all or a portion of an allotment for purposes of—
>
> (1) Protecting the land and its resources from destruction or unnecessary injury;
> (2) Improving rangeland conditions; or
> (3) Enhancing resource values, uses, or functions.

Id. The Tenth Circuit held that this rule conflicted with TGA, FLPMA, and PRIA, which all confirm that the Secretary of the Interior's (SOI) authority is limited to issuing permits to grazing livestock. *PLC*, 167 F.3d at 1307-1308. None of these statutes contemplate authorizations for conservation use.

The Rule, which defines "conservation" as "maintaining resilient, functioning ecosystems by protecting or restoring natural habitats and ecological functions," contemplates availability of conservation leases on ***all*** lands or interests owned by the United States and administered by the SOI through the BLM. 88 Fed. Reg. at 19598, 19600 (*see,* 43 C.F.R. §§ 6101.4 and 6102.4). Where a conservation lease issues, the Rule prohibits the BLM from authorizing "any other uses of the leased lands that are inconsistent with the authorized conservation use." *Id.* at 19600 (*see,* 43 C.F.R. § 6102.4(a)(4)).

This Rule is nothing more than a revival of the 1995 conservation use rule, already stricken by the courts as unlawful. While the code section may have changed, this Rule would still provide an avenue for the issuance of "conservation" authorizations to the exclusion of public lands grazing. This Rule should be withdrawn as it suffers from the same fatal flaws as the 1995 provision.

2. The Rule conflicts with the multiple use, sustained yield mandates of FLPMA.

The Rule cites 43 U.S.C. § 1732(b) as the basis for its conservation leasing authority. *Id.* at 19591. That provision states, in part:

> In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns:...

43 U.S.C. § 1732(b). To read this as the basis for issuing conservation leases is a stretch, given the development context of the provision. The tenuousness of the BLM's interpretation is further underscored by FLPMA's trademark requirement that the BLM manage public lands under principles of multiple use and sustained yield. 43 U.S.C. § 1732(a).

United States Code defines "multiple use" as

> the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; ***a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical***

> ***values***; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

43 U.S.C. § 1702(c) (emphasis added). "Conservation" is not an independent, singular use recognized under FLPMA or embraced by common sense. Rather, "conservation" is an implicit principle manifest in the BLM's duty to make balanced decisions for the "long-term needs of future generations for renewable and nonrenewable resources...." *Id.* Conservation is a management paradigm that should be considered in *all* multiple use decisions made by the BLM, but not at the sacrifice or to the detriment of the overarching multiple use mandate.

Even if "conservation" were an autonomous use, the Rule impermissibly elevates conservation above all other uses. 88 Fed. Reg. at 19600 (*see,* 43 C.F.R. § 6102.4). While FLPMA does not require BLM to permit *all* resource uses on a given parcel of land, it does preclude the BLM from unequivocally elevating one use above all others. *See generally, Rocky Mountain Oil & Gas Ass'n v. Watt,* 696 F.2d 734, 738-739 (10th Cir. 1982). FLPMA requires the BLM to acknowledge competing values. For the BLM to crown "conservation leases" the de facto king, without analysis or acknowledgement of circumstance, whenever there is a conflict between uses is antithetical to FLPMA and unsupported by existing law.

The special consideration afforded "conservation leases" is pervasive throughout the Rule. For example, 43 C.F.R. § 6102.4(a)(3)(iii) removes an authorizing officer's discretion in the issuance of conservation lease extensions, mandating that such extensions "shall" issue "if necessary to serve the purpose for which the lease was first issued." 88 Fed. Reg. at 19600. Such singular treatment is not supported by statute.

The broader land use and economic implications of elevating "conservation" above all other uses is significant, warranting an entirely separate comment altogether. The multiple uses that occur on BLM lands support economies and livelihoods, which will be damaged if those multiple uses are deemed to conflict with "conservation" and removed from the landscape. Additionally, the checkerboarded ownership of federal, State, and private lands amplify the exclusion of existing multiple uses on State and private lands.[1]

In addition to flipping FLPMA's multiple use paradigm on its head, the Rule similarly conflicts with FLPMA's "sustained yield" provision. The Rule purports to "use the FLPMA definition of 'sustained yield,'" (88 Fed. Reg. at 19589), but in fact departs from Congress' definition. FLPMA defines "sustained yield" as

> the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.

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[1] For example, this Rule could limit or preclude the grant of rights-of-way across BLM land, landlocking private and State surface and mineral interests.

43 U.S.C. § 1702(h). The Rule, however, defines the same term as

> 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.***

88 Fed. Reg. at 19599 (*see,* 43 C.F.R. § 6101.4) (emphasis added). Congress was clear in its definition, and Congress has given no authority to BLM to editorialize and twist that definition to fit its own agenda. Doing so is unprecedented and without legal foundation.

The principles of multiple use and sustained yield are the very cornerstones of FLPMA. This Rule undermines that foundation and must be withdrawn.

3. *The Rule's otiose terminology and subjective criteria are breeding grounds for agency overreach.*

Even if the Rule were founded in law, its terminology and criteria are so ill-defined and lacking in quantifiable metrics that agency overreach is inevitable. The following are examples of some of the terms and provisions of the Rule that are particularly ambiguous.

- The Rule defines "resilient ecosystems" as

  > 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.

  Id. (*see,* 43 C.F.R. § 6101.4). However, there is no explanation as to what constitutes "fundamental structure, processes, and function" or what metrics are used to measure "environmental stressors." Finally, it is also unclear what "capacity to maintain and regain" means or how it is quantifiably demonstrated. All of these aspects, critical to the definition, are vague and confusing. The vagueries that pervade the definition of "resilient ecosystems" similarly taint other provisions which incorporate the term. *Id.* at 19597, 19599, and 19602 (*see,* 43 C.F.R. §§ 6101.1, 6102.1(a)(3), and 6102.5(a)(2)).

- The Rule defines "intact landscape" as an

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

Id. at 19598 (*see,* 43 C.F.R. § 6101.4). However, it is unclear what constitutes an "unfragmented ecosystem," a "local condition," or a "wide-ranging" species, or what level of disruption, impairment, or degradation is deemed "significant." It is also unclear what is deemed a "critical" ecosystem functions and what scale is used to assess "conservation value?"

- The Rule defines "unnecessary or undue degradation" as "harm to land resources or values that is not needed to accomplish a use's goals or is excessive or disproportionate." *Id.* at 19599 (*see,* 43 C.F.R. § 6101.4). Who determines if the harm is unnecessary to accomplish a use's goals? What are the quantifiable metrics for assessing whether harm is "excessive or disproportionate?"

- The Rule defines "restoration" as "the process or act of conservation by assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed," *id.*, however there is no definition of what constitutes "degraded, damaged, or destroyed" nor any discussion about the baseline from which degradation, damage, and destruction is measured.

- 43 C.F.R. § 6102.2(b)(2) refers to "lines of evidence." The term is also used in 43 C.F.R. §§ 6102.5(9)(c) and 6103.1-2(c)(2). *Id.* at 19603, 19604. What is a "line of evidence" and who makes that determination? What qualitative requirements define a "line of evidence?" 43 C.F.R. § 6103.1-2(c)(2) states that in the course of conducting land health assessments, officers must

  > [u]se 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.

  Id. at 19604. What are "indicator values" and what are "benchmark values?" What are the qualitative metrics that comprise either value, who sets those metrics, and who determines if those values have been met or obtained?

- 43 C.F.R. § 6102.3-2(b)(3) refers to the development of "holistic restoration actions." *Id.* at 19600. What qualifies as a "holistic restoration action" and who makes that determination?

- 43 C.F.R. § 6102.3-1(a)(5) states that in identifying priority restoration landscapes, officers must consider

  > [w]here 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.

  Id. What is ecosystem conversion and by what metrics is it measured and adjudged? Similarly, what constitutes "permanent" impairment of ecosystem resilience?

- 43 C.F.R. § 6102.5-1(a) states that

> 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.

Id. at 19603. What constitutes an "adverse impact" to a resource? Who makes the determination that an impact is adverse and what qualitative criteria do they apply?

- Finally, to alleviate existing "confusion" in 43 C.F.R. § 1610.7-2, the Rule would replace the term "value" with the phrase "resources, values, systems, processes, or hazards." *Id.* at 19593. The Rule's rationale is head-scratching, given that the "confusing" term continues on in the new rule's phrasing, just accompanied by more "confusing" words, like "systems" and "processes." *Id.* at 19596 (*see*, 43 C.F.R. § 1610.7-2(c)(1)).

Good law requires clarity, and the Rule lacks this critical hallmark. The ambiguity manifest in this rulemaking effort will lead to inconsistent, half-hearted implementation at best and controversial, divisive litigation between an over-reaching agency and stakeholders at worst. The BLM must withdraw this Rule and reengage with States and stakeholders to create a clear and concise product that hews to the laws passed by Congress.

4. The Rule rejects the existing, locally driven "fundamentals of rangeland health" and instead, adopts an ill-fitting, national model.

The Rule touts the adoption of the "fundamentals of land health," but a close examination and comparison of the Rule and existing rangeland rules reveals the falseness of that narrative. In its description, the Rule states

> 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 C.F.R. 4180.1(2005)***) and related standards and guidelines to all renewable-resource management, instead of just to public-lands grazing.

Id. at 19586 (emphasis added).

43 C.F.R. § 6103.1 is **not** a "verbatim" incorporation of 43 C.F.R. § 4180.1, as it deviates from the language of 43 C.F.R. § 4180.1 and contains additional provisions (*see,* 43 C.F.R. § 6103.1(b)). 88 Fed. Reg. at 19603. The most critical distinction is that 43 C.F.R. § 4180.1 references 43 C.F.R. § 4180.2(b), which describes how the fundamentals of rangeland health are developed.

> The Bureau of Land Management State Director, in consultation with affected Bureau of Land Management resource advisory councils, shall develop and amend State or regional standards and guidelines. The Bureau of Land Management State Director will also coordinate with Indian tribes, other State and Federal land management agencies

> responsible for the management of lands and resources within the region or area under consideration, and the public in the development of State or regional standards and guidelines. State or regional standards or guidelines developed by the Bureau of Land Management State Director may not be implemented prior to their approval by the Secretary. Standards and guidelines made effective under paragraph (f) of this section may be modified by the Bureau of Land Management State Director, with approval of the Secretary, to address local ecosystems and management practices.

43 C.F.R. § 4180.2(b). There is no such reference to 43 C.F.R. § 4180.2(b) in the Rule. 88 Fed. Reg. at 19603. Because there is no express incorporation or adoption of 43 C.F.R. § 4180.1 or 2(b) in the body of the Rule, there is no requirement that the fundamentals contemplated in the Rule follow the same locally-driven process set forth in 43 C.F.R. § 4180.2. There is no requirement that the new fundamentals be developed by the BLM State Director in consultation and coordination with resource advisory councils, State agencies, or the public.

This distinction, in combination with the Rule's reference to establishing "national indicators" to support implementation of the fundamentals of land health, 43 C.F.R. § 6103.1-1(d) and 88 Fed. Reg. at 19592 and 19604 (*see,* 43 C.F.R. § 6103.1-1(d)), threatens the application of ill-suited national standards in land use decision-making. Decision-making must account for State and regional geographic characteristics. For the BLM to think that it can apply the same "fundamentals of land health" and "national indicators" in both Alabama and Montana is naïve, creates an unjust paradigm in which all lands are managed to the lowest denominator, and will result in boneheaded decisions. As such, it is critical that the BLM withdraw the Rule and engage with States and stakeholders to ensure the preservation of locally-driven fundamentals.

5. ***The Rule's incorporation of Executive Order (E.O.) 14072 (2022) is problematic and directly conflicts with efforts to address Montana's forest health crisis.***

In the Rule, the BLM refers to E.O. 14072, *Strengthening the Nation's Forests, Communities, and Local Economics,* stating that the agency is presently working to ensure

> 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.

88 Fed. Reg. at 19588. The BLM asks that the public consider whether there are opportunities for this Rule to incorporate mechanisms to meet the directives of E.O. 14072. *Id.* The State of Montana strongly objects to E.O. 14072 being rammed into this rulemaking, or *any* other federal rulemaking efforts for that matter.

A national definition of old-growth and mature forests, such as that contemplated by E.O. 14072, is neither necessary nor beneficial. "Old-growth" is a complex, site-specific ecological concept, and the very idea that a universal definition could apply across the entire United States is problematic at its core.

In addition to being impractical, efforts to formulate universal definitions are a fruitless errand given that there are no issues with current old-growth forest definitions (or the lack thereof for mature forests). Current land use plans and state forest action plans have sufficiently addressed old-growth, mature forests, and forest health through existing and established planning rules and processes. Any effort to wedge E.O. 14072 into the Rule would interject new definitions, policies, and measures that are incompatible with these sound plans developed through extensive analysis and collaboration.

Montana is facing a forest health crisis. Montana's forests are emitting more carbon than they capture, the core fire season is 40 days longer than it was thirty years ago, and the forest products industry continues to struggle amid record lumber prices. Over 64 percent of forested lands in Montana are federally owned, and of that federal ownership, 53 percent are not available for active management due to existing use designations. Fire exclusion and other past management activities have yielded forests that are out of the range of historic variability and pose at-risk conditions. Active management is necessary to restore many of these landscapes to conditions within their historic range of variability. I would ask that the BLM refocus its efforts away from drafting definitions and instead work to address degraded forest conditions so that Montana will have stands left to classify into old-growth.

6. ***The Rule's elimination of land use planning and public involvement in ACEC designations is legally suspect and unacceptable.***

Areas of critical environmental concern (ACECs) are those areas

> within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.

43 U.S.C. § 1702(a). Existing BLM regulation requires that potential ACEC areas be identified and considered in the resource management planning (RMP) process. 43 C.F.R. § 1610.7-2. Upon approving a draft RMP, the State BLM Director must publish notice in the Federal Register, listing each proposed ACEC, specifying resource use limitations that would occur with designation, and providing a 60-day public comment period on the proposed designation. 43 C.F.R. § 1610.7-2(b).

The Rule eliminates this public notice and comment requirement for ACEC identification on the basis that the "general public involvement" processes associated with land use planning are sufficient. 88 Fed. Reg. at 19593. However, the Rule creates new provisions that allow for ACEC designation ***outside*** the land use planning process and, by extension, the "general public involvement" processes associated therewith. *Id.* at 19596-19597 (*see,* 43 C.F.R. § 1610.7-2(c)(3)) ("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.") In other words, upon nomination (which, problematically, can come from *any* entity), this Rule allows the BLM to treat an area as

an ACEC without any formal land use planning, stakeholder engagement, or public process. Aside from being legally rife, such an impenetrable, dictatorial procedure is just bad policy.

Committed to the "bad policy" theme, the Rule disparately treats designations and designation removals. While ACEC designations may be made in the absence of land use planning, designations can only be removed through a land use planning process. The Rule states that

> 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.

Id. at 19597 (*see,* 43 C.F.R. 1610.7-2(j)) (emphasis added). Further exacerbating the inequality manifest in each process, the provision pins designation removals to yet more subjective and undefined mile markers.

ACEC designations and designation removals must be subject to the same or similar public processes. Those processes must strive for inclusive transparency. This Rule must be withdrawn for its failure to achieve such parity.

7. The Rule's prioritization of acquiring inholdings within ACECs is concerning.

The Rule states that the BLM's State Director shall

> [p]rioritize 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.

Id. (*see,* 43 C.F.R. § 1610.7-2(i)(2)). It is unclear under what authority the BLM believes it can pursue land acquisition. More troubling is the BLM's belief that it can prioritize acquisition based on ACECs, rather than other factors, such as whether it can fulfill its multiple use, sustained yield mandate.

Rather than enabling a heavy-handed land grab, the BLM should withdraw the Rule and engage with States and stakeholders to develop sound and effective partnerships that address multi-jurisdictional issues.

8. The Rule should not be categorically excluded from review under the National Environmental Policy Act (NEPA).

Wedded to closed and limited process, the BLM intends to promulgate this rule without NEPA review, relying on a categorical exclusion (CatEx) at 43 C.F.R. § 46.210(i). *Id.* at 19596. That CatEx excludes from NEPA review

> [p]olicies, 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.

43 C.F.R. § 46.210(i).

The import of this Rule requires the BLM to put its best foot forward with regard to NEPA, and the agency's attempts to institute a rule of this magnitude, sans public participation and analysis, is disingenuous at best. The unforthcoming nature of such a move is only underscored by the fact that the BLM *has* undertaken NEPA review on other priority rulemakings, specifically the agency's revision of its grazing regulations (43 C.F.R. Part 4100). While that rulemaking similarly deals with "administrative, financial, legal, technical, or procedural" regulations, the agency has waived CatEx in that rulemaking, recognizing that future decision-making under that regulatory paradigm may affect the quality of the human environment.

I ask that the BLM reconsider its inconsistent position here, withdraw the rule, and engage with States and stakeholders in a transparent and inclusive NEPA process they deserve.

Sincerely,

Greg Gianforte
Governor