Public Lands Foundation

Comments

Conservation and Landscape Health Proposed Rule

Attention: 1004-AE-92

Submitted to www.regulations.gov

These comments are submitted by the Public Lands Foundation (PLF) in response to a request from the Bureau of Land Management (BLM) for review of a Proposed Rule on Conservation and Landscape Health under the 43 CFR 1600 and 6100 regulations. The responses to the questions that BLM specifically requested public comment on regarding certain aspects of the Proposed Rule are contained in Attachment A. Attachment B includes the Teshekpuk Lake Caribou Herd Conservation Authorization as a mitigation measure in the recently approved Willow Master Development Plan in Alaska as an example that commits the BLM to "explore creating a bi-lateral or multi-lateral conservation instrument to provide protections" for the Teshekpuk Lake Caribou Herd.

Summary of Proposed Rule

The Proposed Rule would clarify and support the principles of multiple use and sustained yield in the management of the public lands, restore degraded habitat, and apply land health standards to all BLM-managed public lands. This rule would incorporate climate resiliency and restoration through conservation and preservation in the management of the public lands pursuant to the Federal Land Policy and Management Act (FLPMA) and other relevant authorities. The Proposed Rule would also revise existing regulations to prioritize designating and protecting Areas of Critical Environmental Concern (ACECs) and provide an overarching framework for multiple BLM programs to promote ecosystem resilience on the public lands. The Proposed Rule would also provide for the use of “conservation leases” to support mitigation efforts and promote the protection and restoration of public lands. The Proposed Rule was published in the Federal Register on April 3, 2023, and comments were required to be submitted to the BLM no later than June 20, 2023.

The PLF is an organization composed mostly of retired individuals who dedicated all, or a significant portion, of their working lives to public service with the BLM. For that reason, the organization has access to considerable experience and expertise in the application of FLPMA to the public lands. The Proposed Rule is a clear instance where the PLF can offer a unique review and comments based on extensive technical expertise and experience. Like most major rulemakings, the current public comment period is sure to draw passionate arguments seeking to advance various interests. Our comments aim to avoid those tendencies, relying instead on the

accumulated and combined experience of our members in the management of the public lands. The comments that follow emphasize the land management expertise we can offer relating to the Proposed Rule.

Summary of PLF Comments

1. For the Proposed Rule and its implementation to be successful, conservation use requires a better definition in addition to how it relates to multiple use and sustained yield.

2. The success of the Proposed Rule and its implementation will be dependent on the participation and "buy in" of the public and the agencies and entities that share responsibilities for conservation. To gain this "buy in", PLF recommends that terms such as intactness and resilience be defined or replaced with currently used vernacular such as proper functioning and sustainability.

3. Federal, State, and local government collaboration in conservation efforts is occurring throughout the west at different scales and under various existing authorities. These ongoing interagency approaches should be identified as best practices and promoted in the rule.

4. Extensive regional data sets and assessments currently exist, and the rule should promote the use of this information in collaborative efforts rather than new data requirements. Additionally, the workload associated with planning and implementation will be so substantial, the agency must consider all ways to streamline the planning and NEPA processes, including providing for regional approaches to planning and implementation.

5. Further guidance regarding ACECs will be required to link what is required in FLPMA and what will be expected in the Proposed Rule.

6. There are many instruments that allow for mitigation or restoration of public lands. The Proposed Rule should permit the BLM to use the most appropriate tool to authorize or participate in conservation efforts, which may or may not include a conservation lease.

7. BLM capacity is a significant issue. The agency is funded well below the levels of other land management agencies on a per acre basis. Therefore, the success of this rule and its implementation will depend on the most effective and efficient communication tools to bring partners to the table.

Conservation as a Land Use

The rulemaking makes a transition of protecting and managing conservation values to that of conservation as a land use under the BLM mission of multiple use and sustained yield. The public lands managed by the BLM are conventionally referred to as multiple-use lands – they are lands that are used for many purposes. They are used to produce commodities for commercial markets including livestock, wood products, minerals, oil and gas, and renewable energy. They are used to transport energy through transmission lines and pipelines. They are used to provide habitat for

fish and wildlife and forage for wild horses and burros. They are used for hunting and fishing and many other types of recreation including opportunities for primitive recreation and for highly mechanized recreation. They are used to replenish ground water aquifers and store water. They are used for carbon sequestration. They are used to train our military and for other purposes of national defense. They are used to conserve our natural and cultural heritage including areas that are significant to Native Americans. They are used for scientific research, education, and spiritual renewal.

FLPMA specifically defines multiple use (Section 103(c)) to include the land conservation values of public land such as "watershed, wildlife and fish, and natural scenic, scientific and historical values" alongside more human-centered uses such as "recreation, range, timber (and) minerals". The law sets a policy (Section 102(a)(8)) that, under the agency's mission, "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 lands in their natural condition; that will provide food and habitat for fish and wildlife…" again alongside providing for "domestic animals,…outdoor recreation and human occupancy and use." The law couples these policies with sustained yield concepts like "taking into account the long term needs of future generations….", and "harmonious and coordinated management of the various resources without permanent impairment of the land and the quality of the environment…" Congress has also recognized this responsibility in other statutes including the Clean Air Act, the Clean Water Act, the Endangered Species Act, the National Historic Preservation Act, the Migratory Bird Act, the National Trail System Act, the Wild Horse and Burro Protection Act, the Wild and Scenic Rivers Act, and the Wilderness Act.

Most, if not all, of the public lands have many demands upon their publicly owned and shared resources, and they are all managed for more than one use. On every landscape, land uses interact with one another and have the potential to adversely impact the other uses and values that are present. In order to meet the policy expectations expressed in law, the BLM outlines in land use plans the uses which may occur in particular areas, and requires compliance with terms and conditions when it authorizes certain land uses. Both of these activities incorporate measures to avoid, minimize, or compensate for adverse impacts. Both of these activities use available information to assess the environment and seek to make decisions that include protection for the "scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values", "certain lands in their natural condition", and "food and habitat for fish and wildlife" as commitments or uses of public land.

The present general framework for public land use has existed since 1976. Largely in concert with analysis processes and procedures under the National Environmental Policy Act (NEPA), BLM land use plans and subsequent authorizations are prepared with opportunities for participation by other federal, state, tribal and local agencies of government, other interested parties, and the general public. The actions, terms, or conditions that are applied when a particular use occurs

draw on this same expertise. For conserving resources like fish and wildlife management, watershed management, and cultural resources management, the BLM often engages in, and relies heavily upon, partnerships with other agencies, governments, tribes and local groups to jointly work toward shared goals. This is especially true with states and tribes who have primacy for wildlife, water and other resources.

Recommendations

If conservation is to become a land use it must be defined comprehensively. Additionally, to address public confusion and misinformation about what the mission of multiple use and sustained yield includes, it would be helpful to modify Section 6101.1 of the Proposed Rule as follows:

> "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 conservation uses of public lands that ensure ecosystem resilience. Conservation uses of public lands include land uses that deliver, support, or protect healthy "watershed, wildlife and fish, and natural scenic, scientific and historical values." Thus, the mission to provide for multiple uses and sustained yield requires decisions and actions to protect or improve watershed conditions, provide productive habitats for fish and wildlife, and to maintain natural scenic, scientific, and historic attributes. These are uses of public land that can be present or absent, healthy or degraded, maintained or lost."

The Proposed Rule should be modified to help the BLM and its partners apply the principles of multiple use and sustained yield in a more sustained and integrated fashion. As an example, the Conservation and Management Actions (CMAs) identified in the California Desert Renewable Energy Conservation Plan (DRECP) intended to minimize or mitigate impacts from the development and use of the public lands. (See, for example, Information Bulletin No. CA 2020-004.) In another example, the BLM required the establishment of Regional Mitigation Plans for all designated Solar Energy Zones (SEZs) in the land use plan decisions from the Solar Energy Development Programmatic EIS, to improve the mitigation process for development of solar energy projects on the public lands. The BLM has also issued policies for developing mitigation strategies, implementing mitigation into land use plans, and the use of compensatory mitigation to address impacts from resource uses on the public lands (Instruction Memorandum No. 2021-046, Manual Section MS-1794, and Handbook H-1794-1).

Participation in Conservation

The Proposed Rule would benefit from additional and specific emphasis on the broad participation in creating conservation outcomes by non-agency individuals at the local, state and regional levels. Conservation activity on public lands is a participatory undertaking and has been for a long time. The Taylor Grazing Act led to the establishment of Grazing Advisory Boards in the 1930s. The agency has also had Multiple Use Advisory Councils and, in recent decades, Resource Advisory

Councils. While terminology has frequently shifted with administration changes, some version of "Cooperative Conservation" has marked most modern administrations.

When Congress consolidated national public land policy with FLPMA in 1976, the law provided an overarching declaration of policies in Section 102. The "Definitions" section of the law, Section 103(d) makes it clear that "the term 'public involvement' means the opportunity for participation by affected citizens in rule making, decision making, and planning with respect to public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance." FLPMA returns to this same theme at least fifteen more times in other subsections of the Act. The expectation for interagency cooperation and public involvement is further reinforced by laws such as the Administrative Procedures Act, the National Environmental Policy Act, the Federal Advisory Committee Act (FACA), and by many interagency processes like U. S. Fish and Wildlife Service's Endangered Species Act consultations and Habitat Conservation Planning or the Historic Preservation Act determinations led by State Historic Preservation Officers.

Prominent examples of large-scale public land management efforts in the last 30 years have all incorporated both interagency cooperation and emphasis on public participation, thereby enhancing the understanding, support, effectiveness, and durability of decisions. Evidence of the impact of this approach can be found in the collaboration practices included in the Northwest Forest Plan, multiple efforts at Sage Grouse planning, and the Desert Renewable Energy and Conservation Plan (DRECP). Most recently, the DRECP involved multiple Agreements between Governors and Secretaries of the Interior, process management by a Renewable Energy Action Team composed of two federal and two state agencies, some two and a half years of scoping with a state-sponsored "Stakeholder Group," over four years of meetings with a Tribal Leadership Forum, a Department of Defense working group involving all the California Desert military installations, and interagency technical teams covering such subjects as conservation biology, cultural resources, and the alignment of energy generation and transmission. Data and mapping were also openly and publicly shared throughout the process and ultimately were made available on an independently managed website. Similarly robust participation histories could be summarized for the Northwest Forest Plan, for sage grouse planning, and to varying degrees, for other BLM efforts to plan for and deliver conservation outcomes on public lands.

There are numerous successful collaborative conservation examples at different scales in other states as well. The Utah Watershed Restoration Initiative (WRI) is a partnership-driven effort to conserve, restore and manage ecosystems in priority areas across the state. BLM has participated along with other agencies and individuals in the WRI across all land ownerships in Utah since its inception in 2005. The WRI focuses on enhancing Utah's water quality and yield as well as its biological diversity. To date WRI has completed almost 2,600 projects covering almost 2.4 million acres. The Wyoming Landscape Conservation Initiative (WLCI) was established in 2007 as a long-term, science-based effort to conserve and enhance fish and wildlife habitats while facilitating

responsible development through local collaboration and partnerships. The WLCI covers almost nineteen million acres including all land ownerships in southwest Wyoming, with sagebrush, mountain shrub, aspen, riparian, and aquatic communities being the focus for the initiative's conservation work. As its website says, "WLCI facilitates cooperation between land managers, private landowners, industry, and the public to maintain the long-term viability of these communities."

Recommendations

To enhance this reliance on cooperation and participation in conservation under the Proposed Rule, the PLF recommends additional attention to the following in the final rule and the implementation steps that follow:

- Federal agencies, especially the U.S. Fish and Wildlife Service, the U.S. Geological Survey, the U.S. Forest Service, and the National Park Service, have collaborated with the BLM on collecting and mapping land and water-based data, assessing watershed and land health, conducting land use planning, and making difficult decisions. This interagency approach could be explicitly identified as a best practice.

- State agencies, whether managing fish, wildlife, historic preservation, or soil, air and water resources, each bring 1) additional expertise and data to conservation initiatives that affect or involve public lands, and 2) play a significant role in the delivery of conservation outcomes on the public lands. Historically, cooperation with these agencies has been governed by consultation, designation as a cooperating agency, participation in good neighbor agreements [Good Neighbor Authority (16 U.S.C. §2113a)], coordination, signing of cooperative agreements, use of the Wyden amendment authority, and through MOUs. These processes are already authorized and in use. They have no relationship to the fair market value requirements in FLPMA. So, state agencies should not need to negotiate, and hold, an equivalent of a geographically specific conservation lease or authorization that recognizes the right to conduct specific conservation undertakings (a lease may not be the appropriate instrument under Title III of FLPMA). However, Section 6102.4(a)(2) of the Proposed Rule limits conservation leases to "any qualified individual, business, non-governmental organization, or Tribal government." The PLF recommends BLM consider whether this section of the Proposed Rule should be changed to allow state or other government agencies to hold a conservation lease or other conservation authorization if necessary, consistent with the management of mitigation banks or mitigation funds.

- Local governments frequently play pivotal roles in conservation outcomes on most public lands. This scenario is most intense in populous counties in California and Nevada, in the California Desert, and in western Oregon counties associated with Oregon and California (O&C) Grant lands. In these areas, the coordination of conservation actions across all

ownerships in a watershed, county, or planning area directly affects how many activities and projects are authorized or mitigated at all levels of government. Many of these relationships with local governments have long histories. The O&C counties have had a direct revenue interest in sustainability on federal forests since the governing legislation was passed in 1937. In the California Desert, the counties have been intensively involved since the creation of the California Desert Conservation Area in 1976 and cooperated in creating an integrated conservation design (federal/state/local) in the DRECP.

- Tribes are also governments with direct interests in conservation activities and outcomes on public lands. In addition, they bring knowledge and expertise about landscapes and practices that pre-date European settlement of the Americas by centuries. In many cases, Tribes also have specific treaty-based interests that reflect their usual and accustomed land uses. These interests in management have historically been reflected or recognized in different ways such as through consultation, through legislation, in proclamations, and through agreements. While leaving the models for tribal involvement flexible, and allowing various instruments available for cooperating on conservation, it would be helpful to more specifically acknowledge expectations regarding tribal participation in the Proposed Rule.

- Volunteer citizen's groups, non-profit organizations, conservation corps, and educational institutions also play critical roles in delivering conservation outcomes on public lands. There are over a hundred, and perhaps hundreds, of these groups who work directly with BLM Districts and Field Offices to provide on-the-ground services as diverse as visitor center staffing, trail maintenance, monitoring, scientific studies, and restoration projects. Whether under a lease, or more likely a permit, contract or agreement, it may be helpful to explicitly facilitate the delivery of the conservation services these groups provide.

- As a final but important point, when engaging in such complex collaborative efforts, it is important that all parties understand and agree on the terms being used to describe conservation goals and outcomes. In a few places, changes in terminology might be considered. For example, Section 6102 of the Proposed Rule describes and relies upon the conservation values which the FLPMA identifies for protection (Section 102(a)(8)). Then the Proposed Rule introduces scientific terms such as "intactness" and "resilience" that, while common and consistent with scientific methods and measures for assessing and protecting those same values, may cause confusion because they are not in general public use in relation to public lands. It may be helpful to:

    - Replace "ecosystem resilience" with "*achieving sustainability*," a concept long accepted as an outcome or measure of resilience and landscape health. With this shift in wording, the Proposed Rule would be substantively similar. It would state *achieving sustainability requires* that "ecosystems… 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."

- Similarly, the "intactness" concept might be replaced with "proper functioning" terminology which represents the state of physical processes that include interactions among hydrology, vegetation, and geomorphology (soils and landform).

The use of more broadly understood terminology might avoid some unnecessary arguments over semantics already in evidence in media coverage of the Proposed Rule.

Inventory, Assessment, and Planning

The Proposed Rule requires BLM authorized officers to identify and seek to maintain intact landscapes on the public land; include a restoration plan in any new or revised Resource Management Plan; and 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.

Given the way the Proposed Rule is written, it would be easy to assume that the identification of intact ecosystems, the identification of restoration priorities, and the application of land health fundamentals are discrete "activities" and that these activities can or should be conducted field office by field office. From PLF's perspective, both of these assumptions would be wrong.

The identification of resilient ecosystems and restoration priorities are interconnected activities as is the application of the land health fundamentals, especially at larger landscape or geographic scales. Given the fact that multiple spatial scales are involved, it would be counterproductive to approach all parts of this work field office by field office. Significant improvements in the efficiency, quality and usefulness of these activities can be achieved by designing processes that involve multiple levels of the agency and cooperating with other agencies as this work is conducted. Integrating and focusing these inventories, assessments and planning activities will better facilitate implementation of the rule, while also enabling the BLM to make more efficient use of its limited resources.

Recommendations

Specifically, the PLF recommends the BLM:

- Recognize that extensive regional data sets and assessments already exist. The BLM should build on this existing work. Where these data sets and assessments need to be augmented with more fine-grained, local information, the BLM should work with its partners to pull together the required information as efficiently as possible. In many instances, the Ecological Site Inventories of the 1980s were conducted by crews that

operated across Districts or regions within a state. Current available technology, including remote sensing, can also greatly expedite this work.

- Seek opportunities to integrate plan amendment and NEPA processes on a regional scale and, where possible, with other already-planned undertakings. When the BLM developed a strategy in the late 1980s to amend its land use plans and associated NEPA documents to bring them into compliance with the Conner v. Burford decision, the BLM identified the Field Offices with the greatest potential for oil and gas development and amended them on a state-by-state basis. Similarly, when the BLM wanted to develop a planning base to expedite wind and solar energy development on the public lands, it prepared regional programmatic EISs and plan amendments. These types of programmatic processes can provide a platform for more efficient amendments across broad regions.

- Commit to developing regional approaches that engage multiple office levels and partners in implementing this rule. Regional approaches can build on the extensive work that has been done by regional, cross-jurisdictional collaborations such as the September 2022, USGS sagebrush conservation design. Other work the BLM has done in recent years with its partners provides starting points because it has already done regional analysis to identify development zones, priority areas for restoration, and old growth forests.

- Promote broad participation in implementation. Encourage other federal, state and tribal agencies, non-governmental organizations, and the general public to participate in determining how implementation is approached. There are numerous examples of where the BLM has invited the public to participate in the development of regional conservation strategies. Directly applicable to this Proposed Rule at the national level, in the late 1980's, on the advice of the Solicitor's Office, the BLM provided the public with an opportunity to comment on the "Draft" planning manuals, an implementation step that does not typically require public participation. In 2015, the BLM also provided the public with an opportunity to comment on the "Draft" Instruction Memoranda implementing the Greater Sage-Grouse (GRSG) land use plan amendments. These would be good models to follow and allow for a public review and comment period on "Draft" implementation guidance and policies or development of regional conservation strategies.

- Sequence the implementation of regional approaches once a final rule is adopted. Certain implementation steps, such as development of land health standards, where needed, for non-grassland ecosystems, may lend themselves to creating a priority-based sequence.

- Some implementation details and relationship of the land use plans to the required five-year reviews need clarification. As land use plans identify the resources, processes, and functions that should be conserved or restored either in specific areas or across planning areas as a whole, the plan should create a baseline and a starting point for restoration work. The five-year reviews of priority landscapes and restoration activities are essentially plan

maintenance activities that incorporate new data, changes in natural conditions, and monitoring and assessment information concerning restoration effectiveness under long-established, existing BLM regulations and BLM Handbook 1601. It would be helpful to make a clearer connection between restoration work and the land use planning process for readers less familiar with both. More importantly, the five-year requirement should be treated as a guideline rather than a requirement in order to accommodate the broad diversity in planning area environments and expected timeframes for restoration response. The need for updates to an initial land use plan is heavily reliant on ground-level conditions, a concept already covered in the existing framework for plan maintenance or amendment. Adopting this plan maintenance approach should help avoid unnecessary plan amendments and NEPA processes.

Resource Management Planning: Designation of Areas of Critical Environmental Concern

Areas of Critical Environmental Concern are proposed as a "principal tool" to manage sites and landscapes where "special management attention" 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…." (FLPMA Section 103. (a)) For these areas, Congress directed BLM to "give priority to the designation and protection of areas of critical environmental concern". There are planning areas where BLM could readily demonstrate the priority placed on the management of "relevant" and "important" values in identified and designated ACECs since the passage of FLPMA. However, decades of experience do suggest the need for improvement to better meet the FLPMA legal standard across all public lands.

Recommendations

Provisions in the Proposed Rule would promote improvement by addressing the following:

- Consolidate regulatory and policy guidance in one place, and directly tie designation and management of ACECs to both the "resources, values, systems, processes, or hazards" identified in FLPMA, and to the "protect and prevent irreparable damage" and "give priority" standards for ACECs in FLPMA.
- Address inconsistencies among land use plans in the assessment and treatment of ACEC proposals in the planning process.
- Address inconsistencies in the evaluation of the need for special management attention for resources, values, systems, processes, or hazards.
- Connect the retention and durability of ACEC designations, once made, directly to the values being protected, thereby giving longer term "priority" to the management of the "critical environmental concern" involved.

The ACEC section would also benefit from more clarity concerning treatment of proposals in the NEPA portion of the planning process. The requirement that planning documents include one alternative "that analyzes in detail all proposed ACECs" should be modified to state that BLM would have an alternative that "lists all ACEC proposals and identifies that they will be analyzed in detail or discloses the rationale why any proposal is not carried forward for further analysis." Such a change would protect the principle "to provide for informed decision-making on the trade-offs associated with ACEC designation." Most proposals would be analyzed while the time and expense of carrying clearly unreasonable proposals through the analysis process, could be avoided. With disclosure, BLM could also be held accountable for any determination not to carry a proposal forward.

Conservation Leasing (Authorization of Conservation Land Uses)

Conservation leasing, as presented in Section 6102.4 of the Proposed Rule, is basically an application, with the intent to achieve a conservation purpose, of one of the existing FLPMA Title III authorities that direct BLM to "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…". The history of incorporating conservation purposes into formal authorizations, mainly as mitigation, is extensive and extends to include authorities covered in other parts of FLPMA such as rights-of-way, grazing permits, and cooperative agreements. The BLM, in the Proposed Rule, requested specific public comment on several questions related to the "conservation lease" proposal. The PLF has included a response to these questions in Attachment A to this comment letter.

The BLM is a decentralized organization with significant delegated authority to Field Managers to use different tools to adapt to on-the-ground needs, options, and potential partners to achieve conservation goals. A short-term revocable authorization (a fuelwood permit) has been used to manage to a lower target-level of dead-and-down material around a campground. Assistance Agreements with groups like Conservation Corps are in common use to accomplish work like trash clean-up, invasive weed removal, inventory, wildlife and fisheries habitat restoration, fuels reduction, planting and seeding, sediment and erosion control, and trail maintenance. Cooperative Agreements between governments have also long played a significant role in delivering conservation outcomes. For example:

> When studies in the 1970s identified significant declines in breeding birds, the biological significance of California's offshore rocks and islands prompted the BLM and California Fish and Game to create a Cooperative Agreement to manage what they called the California Islands Wildlife Sanctuary. In 1983, a Secretarial Order overlaid a 50-year lands and mineral withdrawal. After the passage of FLPMA in 1976, the BLM identified the rocks and islands as an Area of Critical Environmental Concern, providing "special management attention." Those rocks and islands are now part of the California Coastal National Monument.

Where procedural barriers to formal authorization of conservation actions existed, Congress has also acted in this regard. For example, conservation work as part of a fair-market-value timber sale contract was formerly allowed to be included. In the Agricultural Act of 2014, Congress created a new specific authority to value contracts based on an assembled end result. The authority

permits incorporation of conservation services, including those defined in Section 102(a)(8) of FLPMA, into timber sale contracts. The types of land management goals and services associated with "stewardship contracting" (BLM Manual Section MS-5920) are quite broad and include:

1. Road and trail maintenance or obliteration to restore or maintain water quality.
2. Soil productivity, habitat for wildlife and fisheries, or other resource values.
3. Setting of prescribed fires to improve the composition, structure, condition, and health of stands or to improve wildlife habitat.
4. Removing vegetation or other activities to promote healthy forest stands, reduce fire hazards, or achieve other land management objectives.
5. Watershed restoration and maintenance.
6. Restoration and maintenance of wildlife and fish.
7. Control of noxious and exotic weeds and reestablishing native plant species

The authority for, and practice of, formally authorizing actions directed at conservation outcomes on public lands, under a variety of instruments, is well established, and imbedded in BLM's multiple use programs. Under the Proposed Rule, "conservation leasing" is given regulatory structure and a process similar to other forms of authorization, and that is useful. However, the most sensible approach to implementation would be to acknowledge, and retain, the broad array of tools available that accomplish conservation ends. Title III, Section 302(b) of FLPMA states that "In managing the public lands, the Secretary shall…regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns…." Thus, FLPMA Title III "conservation leasing" becomes a better-defined instrument to be applied only where and when it makes the most sense, while all the other options for accomplishing conservation and mitigation work also remain available. The following illustrates an instance where conservation leasing on BLM-managed public lands could address land management needs:

> A mitigation measure in the recently approved Willow Master Development Plan in Alaska commits the BLM to "explore creating a bi-lateral or multi-lateral conservation instrument to provide protections" for the Teshekpuk Lake Caribou Herd. (See Attachment B for more information.)

Other examples of conservation instruments being used to accomplish mitigation and restoration work include Pathfinder Ranches in Wyoming; Department of Transportation in South Dakota; Kuukpik Corporation in Alaska; and Las Cienegas Conservation Area in Arizona. There are four circumstances in which we think it makes sense for the Bureau to consider using such conservation "instruments":

1. Where an entity is interested in leasing the public lands to sell mitigation credits generated on the public lands,

2. Where an entity is interested in investing mitigation funds to restore degraded areas on the public lands,

3. Where an entity is interested in investing non-mitigation funds in restoring degraded areas on the public lands, and

4. Where an entity is interested in investing funds to help manage a specific tract of public land by, for example, designing and implementing a systematic monitoring program for a specific tract of land.

Recommendations

- The Proposed Rule should permit the BLM authorized officer to use the most appropriate tool, including all of the instruments outlined in Title III, Section 302(b) of FLPMA, not just "leases". And in all cases, whether mitigation- or restoration-focused, the additional framework described above would improve the proposed policy on formal authorizations to support conservation as a land use.

- Regardless of the specific circumstances or location, for any proposal for conservation leasing, the BLM authorized officer should address and meet the following criteria:

    1. The proposed conservation activity is clearly a permitted activity and meets goals in the existing land use plan for the area in question. (While the plan should identify where certain activities might be appropriate, it should not identify tracts.)

    2. The BLM prepares a site specific NEPA document on the proposed activity and provides the public and other interested parties with an opportunity to comment on the proposal.

    3. The NEPA document describes what impact, if any, the proposal will have on other existing and potential uses in the area.

    4. The proposed conservation activity is consistent with the relevant program policies (e.g., Wildlife, Soil/Air/Water, Cultural Resources, etc.).

Extend Agency Capacity and Reduce Procedural Requirements

As a public land management framework, multiple use and sustained yield on the BLM-managed public lands is funded by BLM appropriations at levels that are significantly lower than any other land management agency. Emphasis on park uses, forest uses, and wildlife refuge uses are all funded at per-acre rates that are multiples of the federal funding supporting BLM-managed public lands. While some differences might be explained, the degree of difference ignores the basic similarities in such costs as providing information, infrastructure, and services to sustain conservation outcomes related to similar uses.

In this comment letter, the PLF has recommended several measures, mostly related to implementation steps, to help the agency successfully align with, or develop, capacity to

accomplish the conservation goals described in FLPMA for BLM-managed public land. However, budgets are expected to remain tight and the agency is still recovering from recent losses of talented personnel who might have contributed to effective implementation. So, in all foreseeable scenarios, agency capacity, budget constraints, and staffing will merit special attention in the implementation of the Proposed Rule. Special organization measures like formal, technical mentoring networks and national training opportunities may be necessary to re-establish conservation expertise in some offices.

Efficiency and effectiveness might partially offset the lack of funding, without compromising on policy direction provided in law, if procedural requirements in the rule itself can be simplified wherever possible. As with all rules, additional procedural guidance would be issued as Manuals or Instruction Memoranda. Attention to keeping procedures simple and limited to those that are broadly necessary can help. As the BLM gains experience in implementing the rule, there will certainly be lessons learned and any additional necessary national requirements could be added at a later date.

Implementation sequences and priorities can also be adjusted based on available funding. The rule should anticipate development of a strategy for sequencing implementation both geographically and by scale. For example, the strategy might include:

- Incorporating rule requirements for restoration plans into schedules for ongoing land use plan updates and allowing additional progress to be achieved through land use plan amendments as opportunities present, such as large-scale planning projects or programmatic Environmental Impact Statements.

- Establishing geographic priorities for inventory, monitoring, and assessment based on currently available data. The BLM has already collected a significant amount of Assessment Inventory and Monitoring (AIM) data for rangelands that might help steer geographic priorities for completing assessments.

- In areas where significant amounts of inventory, assessment, and planning are already available, consider creating prototypes for different natural community settings. For example, with a Technical Note treatment, the Northwest Forest Plan might provide examples that are useful for forested systems in other states. Similarly, the DRECP planning area could provide useful formats for use in other desert systems. There are undoubtedly other best practices examples that might be developed and broadly shared.

Recommendations

Many of the most critical steps and decisions that align agency capacity with the task of implementing a final rule tend to occur soon after the rule is approved. Early implementation steps are also likely to be essential to its success. For these reasons, the PLF recommends:

- The BLM treat implementation steps as another opportunity for further public engagement. This approach would give the agency access to a broad set of practical ideas, based on the forty-plus years of experience since conservation standards were established in FLPMA, that could work well in various regions, states, and localities. The same approach might also help identify what has not worked and steps to avoid unnecessary controversy. There is precedent. In the late 1980's, on the advice of the Solicitor's Office, the BLM provided the public with an opportunity to comment on the "draft" land use planning manuals. In 2015 the BLM also provided the public with an opportunity to comment on the "draft" Instruction Memoranda implementing the Greater Sage-grouse land use plan amendments.

- Prompt attention to robust, multi-level communication within BLM. With the agency's distributed network of Field Offices, each with strong local relationships in rural communities in the West, it will be important for all levels of the organization to be knowledgeable, well-prepared and coordinated/consistent. Controversy is likely to dissipate where local offices engage early with local stakeholders and discuss the best opportunities for delivering additional or better conservation outcomes in their area – basically focusing on what makes sense. It will also be important for the agency to ensure the public is aware of successful applications of the conservation policy as they occur – sharing best practices across the organization. To these ends, the PLF recommends establishing an internal agency mechanism to encourage constructive public dialogue while closely tracking, managing, and coordinating early implementation steps.

Thank you for the opportunity to provide comments.

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Attachment A

Questions and Answers

The BLM specifically requested public comment on the following aspects of the Proposed Rule.

1. **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?**

The BLM forested lands are managed pursuant to direction provided primarily in FLPMA and the O&C Act of 1937 (for O&C lands only). Management of the Public Domain (PD) Forest Lands has been clarified by the PD Forest Policy found in BLM Manual 5000-1. More recently the Healthy Forest Restoration Act of 2003 was to provide the Federal agencies with added authorities to use science-based practices to maintain landscape resiliency and reduce wildfire severity and risks to communities. Nearly 30 years ago the BLM and Forest Service, with the aid of scientists from several disciplines, developed the Northwest Forest Plan (NFP) to provide a framework for the management of old and mature forests throughout the Pacific Northwest. The NFP relied on the designation of a system of reserves to maintain late successional forest ecosystems, primarily for the protection of Northern spotted owls and other species listed under the Endangered Species Act. Thirty years of research and monitoring the results of the NFP has added significantly to the knowledge base and development of best management practices that benefit the Northwest forests. This body of experience and knowledge has applicability to other forest types in other regions as well, provided local conditions are considered. To restore and maintain resilient forest ecosystems that meet the multiple objectives derived from forests, appropriate management for all successional stages is needed across large landscapes. The Forest Service maintains a web-based synthesis of the applicable science related to the NFP at https://www.fs.usda.gov/research/treesearch/56278 that may be useful.

The BLM and Forest Service recently completed an inventory of old growth and mature forests under the direction of Executive Order 14072. This inventory used approved regional definitions of mature and old growth forests to determine the acreage of each within firesheds. Forests are dynamic and constantly changing and the inventories, by themselves cannot be used to determine site specific conditions or make management prescriptions. However, re-inventorying at periodic intervals, such as every ten years, would allow for a trend analysis of changes to mature and old growth acreage and help determine causes for the changes, such as increases from in-growth or losses from wildfire, harvest, or other disturbances over time. This information could then be used to inform land use decisions in future resource management plan revisions.

2. **Is the term "conservation lease" the best term for this tool?**

Title III of FLPMA provides authority for "easements, permits, leases, licenses, published rules, or other instruments." In general, leases are authorizations that convey possession of a bundle of rights that include the ability to use public lands for a fixed purpose and period of time. Permits

are generally shorter-term and revocable authorizations to use public lands for specified purposes. Easements, including conservation easements, overlay one set of possessory rights over another. A license to use land is a permission to perform certain actions, generally revocable, with no possessory rights. Other instruments have most frequently included agreements and contracts of various types. While it is useful to associate methods and processes with leasing for conservation purposes, it seems unwise to state or imply that a lease will always be the best vehicle or instrument. This determination is best left to the discretion that already rests with the BLM Authorized Officer or within the Land Use Planning process.

3. What is the appropriate default duration for conservation leases?

Ten years might be a good starting point, if left flexible to adapt to the local application and purpose. This concept of adapting the term associated with an instrument to its purpose is already reflected in the treatment of mitigation.

4. 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?

Rulemaking is not the place to make such a determination beyond acknowledging the need for consistency with the land use plan.

5. Should the rule clarify what actions conservation leases may allow?

Yes, with a general description that ties the use of authorizations for conservation purposes to accomplishment of the FLPMA values found in Section 102(a)(8) or the Section 202 ACEC requirement.

6. Should the rule expressly authorize the use of conservation leases to generate carbon offset credits?

No. This would add to the complexity of interfacing with carbon markets. It may become appropriate at some future date after carbon markets are more developed and demand for some type of specific access to public lands has developed.

7. Should conservation leases be limited to protecting or restoring specific resources, such as wildlife habitat, public water supply watersheds, or cultural resources?

The examples in the question are good illustrations of specific resources that may spur various parties to seek an authorization to conduct conservation actions on public lands. It would be helpful to explicitly and directly tie conservation authorizations to accomplishing purposes expressed in the direction provided by Section 102(a) (8) and meeting a land use plan or ACEC-identified purpose.

8. **How would fair market value 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?**

In general, appraisal standards and processes used to determine realty rental rates are likely to be useful for leases. In limited cases, leasing processes might be able to assess market values using competition in a manner similar to that used for stewardship contracting, a process that allows for discounted values that recognize the public benefits provided. Some types of conservation leases may eventually develop clear national or regional patterns that allow for use of tools akin to rental schedules. Where governments are involved, the BLM should investigate whether concepts like rental could be waived or greatly reduced. Where permits are involved, a fee may, or may not, be necessary to cover processing and monitoring costs.

Section 6102.4(f) requires cost recovery, rents and fees for conservation leases consistent with the provisions of sections 2920.6 and 2920.8 of the BLM regulations. Those regulations only allow for rental fees based on fair market value or as determined by competitive bidding. Section 6102.4(f) should be revised to allow some discretion to revise the rental fee for conservation leases based on other considerations for mitigation efforts determined to be of benefit to programs of the Secretary. Suggested additional language: "The BLM Authorized Officer may, however, grant, issue or renew a conservation lease at reduced rates where the holder of the conservation lease provides a valuable benefit to the public in restoration of the public lands or a benefit to the programs of the Secretary."

9. **Should this rule 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 (Tribal Nations) or are there other circumstances that would warrant a waiver of the bonding requirement?**

The degree of disturbance and risk associated with the proposed conservation uses should be a factor, but a review, and potential waiver based on Trust obligations is appropriate. Criteria might include the attributes of the covered conservation uses and whether the proposed activities are within ceded lands or usual and accustomed use areas.

10. **The Proposed Rule criteria that third parties must meet to be approved as mitigation fund holders requires holders to have "a history of successfully holding and managing mitigation, escrow, or similar corporate accounts." Does this language ensure mitigation fund holders have sufficient experience to ensure that they are capable of managing funds? Does this language create a barrier to entry for new mitigation banks? Is there alternative language that would be preferable? Is the requirement that a third- party**

leader of the potential mitigation fund holder lack any "family connection" to the mitigating party an adequate and necessary protection?

These protections are appropriate where mitigation funds held by a third party are involved. The burden should rest with the applicant to make the case that the entity has necessary attributes to ensure protection of public interests. The assessment of the applicant's qualifications can be part of the approval process with the BLM Authorized Officer.

11. Should managing conservation leases within the National Landscape Conservation System differ from leases held on other public lands, including whether separate regulations should apply to these areas?

Separate regulations are not necessary, but a clarification should be provided in this rule. The clarification should state that Public Law 111-11 standards apply to designated areas within the system including the requirement "to conserve, protect, and restore" specific values for which the designation of each particular area was made. Any conservation lease or authorization affecting designated lands would be required to meet Public Law 111-11 standards for protection of those identified values as well.

Attachment B

Teshekpuk Lake Caribou Herd Conservation Authorization

(Willow Master Development Plan, Record of Decision, March 2023, Appendix A, Mitigation Measures, page 30).

Because Willow will affect the Teshekpuk Lake Caribou Herd (TLCH) more than any other subsistence resource, Kuukpik strongly supports BLM's proposal to "develop compensatory mitigation that provides durable, long-term protection for the Teshekpuk Lake Caribou Herd to fully offset impacts of the Project on that Herd…." Successfully implementing this mitigation measure will virtually eliminate the risk of further development in the most important caribou habitat areas—areas that will become even more important after Willow is constructed.

"In its February 23, 2023 letter to Secretary Haaland regarding its comments on the Final Supplemental EIS, Kuukpik Corporation noted that Kuukpik Corporation made two follow-on recommendations. One, that *the Department clarify that the "durable and long-term protection" would be more than restrictions included in an NPR-A Integrated Activity Plan,* and two, that the buffer for the area to be protected be clarified to have support by conservation and subsistence minded stakeholders that a sufficiently large area will be protected and development-oriented stakeholders that the restrictions are justified and not excessive.

Recognizing the importance of this matter, the BLM is directed to take action to further this mitigation measure.

> The BLM shall explore creating a bi-lateral or multi-lateral conservation instrument to provide protection for the Herd and its key habitat for the duration of the Project's impacts. Within 120 days, the BLM should provide a report to the Principal Deputy Assistant Secretary of Lands and Minerals Management that addresses the following: who would hold the instrument; the scope of the lands to be protected; and the types of protections, with a focus on restricting future leasing and/or surface development. The report should contain a discussion of BLM's findings and recommendations with respect to this conservation instrument, including a proposal for stakeholder engagement and implementation, if approved.

One benefit unique to a conservation instrument is to provide local community entities with greater ability to directly influence the pace, scale and location of future leasing activities and/or surface development impacting an important subsistence resource."