U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

June 13, 2023

VIA ELECTRONIC SUBMISSION

Honorable Deb Haaland
Secretary
U.S. Department of the Interior
1849 C St. NW,
Washington, D.C. 20240

Re: Conservation and Landscape Health (88 Fed. Reg. 19583; April 3, 2023).

Dear Secretary Haaland:

On April 3, 2023, the U.S. Department of the Interior's Bureau of Land Management (BLM) published a proposed rule entitled "Conservation and Landscape Health." The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments on the proposed rule. Advocacy and small businesses support activities to mitigate and restore public lands. Advocacy is concerned, however, that BLM's proposed rule may be contrary to the statutory land management principles laid out in the Federal Land Policy Management Act (FLPMA). Furthermore, BLM's proposed rule does not adequately consider the impacts to small businesses as required by the Regulatory Flexibility Act (RFA). Advocacy makes the following additional comments below.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),[1] as amended by the Small Business Regulatory Enforcement Fairness Act

[1] 5 U.S.C. §601 et seq.

(SBREFA),[2] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[3] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.[4]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[5]

B. The Proposed Rule

The Federal Land Policy and Management Act (FLPMA) of 1976 lays out provisions for BLM to follow in its management of federal lands within the United States.[6] FLPMA directs the agency to manage the lands in a way that balances the need to preserve and protect certain lands in their natural habitat while also recognizing the need for domestic sources of "minerals, food, timber, and fiber."[7] FLPMA further directs BLM to follow specific criteria for the development of land use plans. These criteria include principles of multiple use and giving priority to the designation and protection of areas of critical environmental concern (ACEC).[8]

FLPMA defines multiple use as including the management of public lands in a way that "best meet[s] the present and future needs of the American people."[9] Multiple use is further defined as a combination of uses including but not limited to "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values."[10] FLMPA also defines six principal uses for land management that include and are *limited* to, "domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production."[11]

Pursuant to FLPMA, if the Secretary of the Interior issues a land management decision that excludes or eliminates one or more principles of major use for two or more years, the Secretary

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[2] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).
[3] Small Business Jobs Act of 2010 (PL. 111-240) §1601.
[4] *Id*.
[5] *Id.*
[6] 43 U.S.C. § 1701 et seq.
[7] *Id.* at (a) (12).
[8] 43 U.S.C. § 1712 (c).
[9] 43 U.S.C. § 1702 (c).
[10] *Id.*
[11] *Id.* at (l). (Emphasis added).

is required to report their decision to Congress. Congress may issue a concurrent resolution of non-approval for the decision.[12] In such an instance, the Secretary must terminate such decision.[13]

On April 3, 2023, BLM published its proposed "Conservation Land Health" rule.[14] The rule proposes three major changes to current land management practices. First, it applies land health standards to all BLM managed lands.[15] This provision requires that BLM use data and information to prepare an assessment of land health for all BLM managed lands, not just those used for grazing, as is the current practice.[16] Second, the rule adds "conservation" as a land use category and allows for conservation leases.[17] These leases would be available to entities seeking to restore public lands or provide mitigation for a particular action.[18] Conservation leases would be issued for an initial maximum term of ten years, but can be extended as necessary to serve the purpose for which the lease was first issued.[19] Third, the rule expands the use of Areas of Critical Environmental Concern (ACECs).[20] The rule would emphasize ACECs as the principal designation for protecting important resources, and establish a "more comprehensive framework" to consider areas for ACEC designation.[21]

II. Advocacy's Small Business Concerns[22]

On May 17, 2023, Advocacy held a virtual small business roundtable to discuss the rule.[23] Advocacy also conducted outreach directly to small businesses. Small businesses in agriculture, forestry, and mining spoke to Advocacy about the rule, as well as to representatives of BLM. During this outreach, small businesses expressed concern with BLM's assertion that the rule would not have a significant impact on their business. They were especially concerned about the impact the new conservation leases would have on other uses and whether this may inhibit grazing, mining, and timber leases. Many small businesses questioned the need for the rule. They also questioned whether the rule was outside the bounds of FLPMA. Small businesses are already providing mitigation and restoration measures as prescribed under the National Environmental Policy Act (NEPA) and other environmental statutes.

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[12] 43 U.S.C. § 1712 (e) (2).
[13] *Id.*
[14] Conservation Land Health, 88 Fed. Reg. 19853, (April 3, 2023).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 19586.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 19584.
[22] At the time of filing of this letter many of the stakeholders with whom Advocacy engaged have not yet filed their own comments. Advocacy therefore requests that BLM carefully review and consider the comments of small businesses and their representatives and that any issues not raised herein that are of concern to small businesses be given their due weight and consideration.
[23] *See*, Office of Advocacy Natural Resources Roundtable (May 17, 2023), https://advocacy.sba.gov/2023/04/27/small-entity-natural-resources-roundtable-may-17-2023/.

Advocacy heard from some county executives in Western states where more than 80 percent of land within the county is managed by BLM, and significant portions of the county's economy is tied to these federal lands.[24] Small business representatives from Montana indicated that nearly 30 percent of the state's lands are public lands, and that grazing leases are an essential part of farming and ranching in the state. Some small businesses pointed to BLM's own economic report that states that lands managed by BLM account for nearly 201 billion dollars in economic output in the U.S.[25] Advocacy heard from some mining representatives who stated that close to 80 percent of their member companies are small businesses.[26]

Recreation and outfitting industries also have an interest in the rule. Some businesses expressed to BLM that conservation leases may be compatible with outdoor recreation activities and therefore may create opportunities for multi-use leases. Others, however, shared the concerns of other industries and noted that conservation leases may be incompatible with certain types of recreation, including those that require the use of motorized vehicles. Some noted that this could pose accessibility issues for those individuals with limited mobility if BLM, or the conservation lease holder, limits the types of recreational activities that can occur in a particular area.

Advocacy also acknowledges that there may be instances where a small business may find portions of BLM's rule beneficial in providing mitigation opportunities. There may also be new and emerging small businesses because of the proposed rule. While these small businesses may enjoy some benefits of the proposed rule, the rule itself is problematic. Given that the rule has the potential to impact a substantial number of small businesses across various industry sectors BLM must properly and thoroughly consider these impacts and modify the proposed rule's RFA analysis accordingly. Advocacy makes the below comments on the proposed rule.

A. BLM's proposed rule has unintended consequences that are contrary to the agency's goals and the statutory requirements for land management under FLPMA.

1. The proposed rule does not properly explain how conservation leases are compatible with the multiple use land management goals laid out in FLPMA.

FLPMA expressly states that BLM must balance the need to protect and preserve public lands with the principal land uses laid out in the Act.[27] FLPMA further states that public lands need to be managed in a way that recognizes the country's need for domestic sources of natural resources and food.[28] Within its proposed rule, BLM cites FLPMA §102 (a) (8) as the basis for issuing its proposed rule.[29] This section describes that BLM must manage public lands in a manner that will protect the quality of resources and preserve some public lands in their natural

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[24] Advocacy has not independently verified this data.
[25] *See* U.S. Bureau of Land Mgmt., "The BLM: A Sound Investment for America 2022", (November 2022), https://www.blm.gov/about/data/socioeconomic-impact-report-2022.
[26] Advocacy has not independently verified this data.
[27] 43 U.S.C. § 1701 et seq.
[28] *Id.* at 102 (a) (12).
[29] *Id.* at 102 (a) (8).

condition.[30] FLPMA § 102 (b) states that the policies of the Act, "shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation." Within this rulemaking, BLM is proposing to create a new category of leases, conservation leases. In creating a conservation land use lease, BLM will disrupt the current multiple use landscape. BLM's proposed rule states that such conservation leases "would not override valid existing rights or preclude other, subsequent authorizations so long as those subsequent authorizations are compatible with the conservation use."[31]

BLM has not, however, clarified within the proposed rule how conservation leases will be compatible with the other principal uses laid out in FLMPA.[32] In at least two instances, mining and grazing, the proposed rule is incompatible. Without proper clarification from BLM regarding the implications of conservation leases on other uses, and the inevitable incompatibility that may result, the proposed rule has the effect of placing conservation leases above other interests.

This is contrary to the statutory intent outlined in FLPMA. As indicated above, BLM does not have statutory authority to create such additional uses that would make the other principal uses incompatible. According to the statutory text cited throughout this letter, Congress did not intend for land uses to be excluded on a programmatic level. BLM's rule has the impact of excluding various land uses programmatically simply because of their incompatibility with conservation. While BLM's objectives in issuing the proposed rule are well-intended, the agency is ignoring the fact that the current multiple use land management landscape is working and does not need the proposed change. This current landscape balances the need to protect and preserve lands while also acknowledging that these lands are necessary for ensuring domestic supply chains for food, minerals, and natural resources, just as FLPMA had intended.

Furthermore, according to FLPMA, these conservation leases would need to be submitted to Congress. These leases could go through rounds of voting in Congress only to be eventually struck down.[33] BLM should therefore reconsider the proposed rule and whether it has statutory authority to take such actions. BLM should consider whether there are alternatives, such as more opportunities for mitigation, rather than creating additional lease categories that are not expressly authorized by FLPMA. Whatever alternatives BLM considers, the agency must require that the leaseholder identify the uses that are consistent with the principal use and be able to justify the exclusion of other principal uses as outlined in the statute. By modifying the rule so that it better aligns with the principles of FLPMA, BLM can ensure that its agency goals and priorities are in line with the statute and retain regulatory durability.

2. The proposed rule offers too much discretion to BLM that may result in elevating conservation above the other principal land management uses.

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[30] *Id.*
[31] 88 Fed. Reg. 19583 at 19856.
[32] 43 U.S.C. § 1701 (a) (7).
[33] 43 U.S.C. § 1712 (e) (2).

Within the proposed rule, BLM states that conservation leases will be issued for a maximum term of 10 years. The agency then states that it may, "extend the lease if necessary to serve the purpose for which the lease was first issued."[34] Conservation is not a finite use of land in the same way that other uses are. Conservation can be a prolonged and permanently sustained use of land. BLM does not make clear what it will use to measure when a conservation land use has been achieved, nor is this a clear-cut thing that can be measured. Restoration as a land use implies that once the land is restored, the lease has a logical endpoint.

Here, however, BLM has expressly chosen to use the term conservation, and not restoration. This provision of the proposed rule, therefore, would give BLM broad discretion to renew conservation leases indefinitely so long as they meet the purpose for which they were issued. This would all but ensure that other uses such as mining, grazing, logging, and some forms of recreation would not be able to co-exist on these lands, which, once again, is outside the bounds of FLPMA. By locking up a particular public land in an indefinite conservation lease, BLM is neglecting to ensure the sustainability of the domestic supply chain, and instead contributing to the lack of domestically available materials. This may have significant unintended consequences to the domestic supply chain. [35]

BLM should therefore reconsider whether there are other alternatives that may more adequately achieve the agency's objectives for the proposed rule. These alternatives may include broader mitigation opportunities on public lands that are more compatible with other land uses. This will ensure that BLM is not overstepping the statutory principles laid out in FLPMA.

3. BLM's proposal does not account for required actions that lease holders already take with respect to conservation goals and does not consider alternatives.

FLPMA directs BLM to balance and create multiple use land management plans. In doing so, FLPMA defines multiple use as a combination of uses including the six principal land management uses.[36] Within BLM's proposed rule, the agency does not consider and discuss requirements that lease holders are already complying with to meet the agency's goals for increased conservation. Many small businesses discussed the NEPA compliance measures that they are already taking to restore lands once their activities have expired, and to mitigate the impacts of those activities.

By considering measures that businesses are already taking, BLM can focus its attention on areas for improvement with respect to those activities rather than creating additional land uses that are not statutorily supported. Within its own rule BLM cites restoration of degraded lands and increased mitigation opportunities as reasons for issuing the proposed rule. BLM should

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[34] 88 Fed. Reg. 19583 at 19586.

[35] A lack of domestically available materials may have an impact on renewable energy priorities. These projects require mineral resources such as lithium, copper, and many other locatable minerals. It may also impact domestically sourced food.

[36] 43 U.S.C. § 1702 (c), Stating that the six principal land uses include, "domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production."

therefore reconsider whether the provisions of the proposed rule meet these goals, and whether they are statutorily permitted under FLPMA.

B. The proposed rule lacks a proper factual basis for certification that the rule will not have a significant economic impact on a substantial number of small entities.

Within BLM's proposed rule, the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[37] Under § 605(b) of the RFA, if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, they must include a factual basis for such certification.[38] BLM's certification provides no such factual basis, and offers no information as to how they arrived at this conclusion.[39]

As noted above, many small businesses are concerned about the impacts the rule may have on both their existing leases and the opportunity for future leases. While BLM is not required to attempt to calculate the impact the proposed rule may have on potential future lease sales, BLM is required to offer a discussion of the impacts the rule may have on current lease holders.

At a minimum BLM should identify the small businesses that currently engage with the agency and/or hold leases. As noted above, many activities would be rendered incompatible with conservation leases which constitutes lost revenue for those businesses. While it is difficult to quantify those potential impacts, they should at least be discussed by BLM and should appear within its RFA analysis. BLM could also have asked for public comment and data directly from small businesses to help inform a more thorough analysis of the impacts.

Advocacy therefore requests that BLM revise its RFA analysis and instead provide a supplemental document with an initial Regulatory Flexibility Act analysis that includes a discussion of the impacted small entities, what if any impacts those small entities may face, and what regulatory alternatives the agency considered.

III. Conclusion

Advocacy appreciates BLM's intention to prioritize restoration of degraded public lands. However, BLM's proposed rule falls short of achieving these stated goals. The rule has unintended consequences that are contrary to the statutory provisions of FLPMA. Furthermore, BLM's RFA certification lacks a factual basis, and does not adequately consider the economic impacts of the rule on small businesses. For the foregoing reasons BLM should consider alternatives to the proposed rule that better align with the statutory provisions of FLPMA and should conduct a proper and thorough RFA analysis for the proposed rule.

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[37] 5 U.S.C. § 605(b).
[38] *Id.*
[39] 88 Fed. Reg. 19583 at 19594.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel David Rostker at (202) 205-6966 or by email at david.rostker@sba.gov.

Sincerely,

/s/
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