July 5, 2023

Tracy Stone-Manning
Bureau of Land Management
U.S. Department of the Interior
1849 C Street NW, Room 5646
Washington, D.C. 20240

*Submitted via Federal eRulemaking Portal ID No. 1004—AE--92*

**Re: Comments on the Bureau of Land Management's Proposed Rule on Conservation and Landscape Health**

Dear Director Stone-Manning:

The National Rural Electric Cooperative Association ("NRECA") respectfully submits these comments in response to the U.S. Bureau of Land Management's ("BLM") proposed Conservation and Landscape Health Rule ("Proposed Rule").[1]

NRECA is the national trade association representing nearly 900 local electric cooperatives and other rural electric utilities. America's electric cooperatives are owned by the people that they serve and comprise a unique sector of the electric industry. From growing exurban regions to remote farming communities, electric cooperatives power 1 in 8 Americans and serve as engines of economic development for 42 million Americans across 56 percent of the nation's landscape.

Electric cooperatives operate at cost and without a profit incentive. NRECA's member cooperatives include 63 generation and transmission ("G&T") cooperatives and 832 distribution cooperatives. The G&Ts generate and transmit power to distribution cooperatives that provide it to the end of line co-op consumer-members. Collectively, cooperative G&Ts generate and transmit power to nearly 80 percent of the distribution cooperatives in the nation. The remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

The nature of electric co-ops' service territories, and their local, member-driven structure empowers them to play a vital role in transforming communities, innovating to meet tomorrow's energy demands, and being good stewards of the environments in which they operate. As such, electric co-ops have a vested interest in protecting the land, water, species, and air in the communities that they serve.

[1] 88 Fed. Reg. 19585 (April 3, 2023).

Indeed, the remote nature of co-op service territory means that co-ops have more special use authorizations, easements, and rights-of way across our nation's public lands than many other electric utilities. Electric co-ops have long worked closely with BLM to be good stewards of our public lands in and around their rights-of-way, while ensuring the reliability and affordability of the electric system.

NRECA urges BLM to withdraw this Proposed Rule, as it could have disproportionate impacts on rural co-ops and the communities that they serve, including 92 percent of the nation's persistent poverty counties.[2] Increased planning, permitting, access, mitigation, fuel supply, and vegetation management requirements and costs that result from this proposal could jeopardize the reliability and affordability of electric service throughout NRECA members' territories. Should BLM choose to move forward with the rulemaking, NRECA urges BLM to keep these impacts in mind when it develops the final rule.

NRECA members live in and serve communities across America that will be negatively impacted by this Proposed Rule. We are concerned that this fundamental shift in BLM's management of our public lands could result in devastating impacts to businesses, our food supply, energy and mineral supply, U.S. competitiveness, and the provision of affordable and reliable electric service. NRECA members provide electricity to Americans in all regions, and a variety of industries and communities. While this letter addresses NRECA's specific concerns about this Proposed Rule's potential impacts to co-ops' generation, transmission, and distribution of electricity, NRECA also shares concerns about the wider impact of this Proposed Rule and joins and incorporates by reference the coalition letter submitted by the U.S. Chamber of Commerce on behalf of impacted businesses and industries.

NRECA respectfully requests that BLM consider the following information and insight about how this Proposed Rule may impact the critical services our members provide throughout rural America.

## NRECA COMMENTS ON THE PROPOSED RULE

### *BLM Failed to Engage with Stakeholders*

NRECA has long partnered with the U.S. Department of the Interior ("DOI") and BLM in fostering good stewardship of our natural resources and public lands. We appreciate the opportunities that BLM has facilitated, particularly in recent months, to discuss issues involving wildfire and right-of-way management. However, BLM failed in this Proposed Rule to engage with stakeholders about its plans prior to the release of the Proposed Rule; to conduct its necessary due diligence to understand the breadth of impacts this Proposed Rule would have on our nation; and to remain within the scope of its statutory authority.

Congress mandated that BLM engage with the public on land management decision making in various portions of the Federal Land Policy and Management Act ("FLPMA").[3] Indeed, FLPMA's accompanying Congressional Report states the intention of Congress to direct BLM "to allow public involvement" and that "[a]s to the extent of public participation in each case a rule of reason will be applied so that the cost of input

[2] *See Electric Co-op Facts and Figures*, National Rural Electric Cooperative Association (1:18 PM, April 24, 2023), https://www.electric.coop/electric-cooperative-fact-sheet.
[3] *See, generally* 43 U.S.C § 1701 *et. seq.* (1976).

procedures does not exceed the values involved. However, some expenditures will always be justified to ensure public exposure of proposed decisions."[4] BLM failed to heed this directive in this rulemaking.

BLM missed the opportunity to benefit from early and frequent stakeholder engagement prior to drafting and issuing this Proposed Rule. Processes such as issuing an Advanced Notice of Proposed Rulemaking or a request for information could have strengthened BLM's proposal and resulted in enhanced stakeholder relationships and goodwill. Instead, BLM chose to issue the Proposed Rule without advanced notice to or collaboration with those who will be most impacted; to hold few public meetings and to prohibit questions at those abbreviated meetings; and accept public comment on a proposal with vast economic and political significance only for a short time.

NRECA values our relationship with BLM and would have welcomed the opportunity to work with BLM in shaping this Proposed Rule into a more effective instrument that addresses America's need for balanced use and conservation of our public lands, and reliable and affordable electricity service. But we were not given the opportunity to do so. We expect more from our federal partners and are disappointed that BLM chose to forgo conducting its due diligence and stakeholder outreach in such a substantial rulemaking.

As residents of rural America, we understand that healthy public lands enrich lives and provide untold benefits. While we understand BLM's desire to manage its lands with a conservation focus so that we may preserve them for generations to come, this Proposed Rule is bad policy with the potential to detrimentally affect industry and communities across the nation, and the reliable and affordable electricity upon which they depend.

## *The Proposed Rule Exceeds BLM's Statutory Authority Under FLPMA*

BLM, which manages approximately one in ten acres of our nation's landmass, proposes to fundamentally alter how it manages those lands by changing our nation's doctrine of Multiple Use and Sustained Yield ("MUSY") to include a new major use, conservation.[5] It seeks to accomplish this through a rushed rulemaking process, without substantive involvement of stakeholders, the public, or Congress.

Congress enacted FLPMA in 1976 with the unambiguous, expressly stated purpose of managing our public lands "in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands."[6] It mandated that BLM "shall manage the public lands under principles of multiple use and sustained yield" which means the "management of the public lands and their various resource values

[4] H. R. Rep. No. 94-1163 at § 202 (1976).

[5] Bureau of Land Management, *What We Manage,* U.S. DEPT. OF THE INTERIOR (June 9, 2023 2:58 PM) https://www.blm.gov/about/what-we-manage/national; 88 Fed. Reg. 19585. *See also,* 88 Fed. Reg. 19590 (BLM proposes to attach to FLPMA's mandate of multiple use, sustained yield, a principle that BLM "must conserve renewable natural resources at a level that maintains or improves ecosystem resilience." It would achieve this by "recognizing conservation as a land use within the multiple use framework, including in decision making, authorization, and planning processes; protecting and maintaining the fundamentals of land health; restoring and protecting intact public lands; applying the full mitigation hierarchy to address impacts to species, habitats, and ecosystems from land use authorizations; and preventing undue or unnecessary degradation." It then goes on to state that "conservation is a use on par with other uses of public lands" and that BLM will implement this use by "promoting conservation use, limiting subsequent authorizations when incompatible with conservation use, and mitigating impacts to natural resources on public lands).

[6] 43 U.S.C. § 1701(a)(12).

so that they are utilized in the combination that will best meet the present and future needs of the American people."[7] Such uses include "recreation, range, timber, minerals, watershed, wildlife and fish, natural scenic, scientific, and historical values."[8]

Importantly, Congress specified that "domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production" are *principal* or *major uses* of public lands under FLPMA.[9] Facilitating these specific principal or major uses is the primary reason for FLPMA and the BLM's existence. Rural electric co-ops utilize one such principal and major use—countless rights-of-way across BLM managed public lands—which enable them to provide critical electricity to communities across the nation. Should BLM significantly alter how such uses are facilitated or prioritized, as it proposes to do in this rulemaking, co-ops will be impacted.

Co-ops also depend upon other principal or major uses of public lands, including oil, gas, and coal production, which provide domestic sources of natural gas and other fuels that power electric generation, increase our supply of affordable and easily dispatchable electricity, and secure the reliability of our electric grid. Co-ops also depend upon domestic mineral production on our public lands, which provides necessary minerals for the technologies and supplies that are used to generate and transmit our electricity, to operate our facilities, and aid in securing our grid. Beyond those specific uses, co-ops also indirectly depend upon industries such as grazing, agriculture, timber, and mining because they serve as cornerstones for many of the rural communities in which we live and serve. Any changes to how BLM manages major and principal uses on public lands will necessarily impact NRECA's members across the nation.

BLM erroneously states that "FLPMA's declaration of policy and definitions of "multiple use" and "sustained yield" reveal that conservation is a use on par with other uses under FLPMA."[10] NRECA requests clarification of how BLM reached that conclusion, as conservation is not identified as a use on par with other major or principal uses under FLPMA. It is not even mentioned by Congress in the context of use at all.

This rulemaking also may violate the Major Questions Doctrine.[11] Congress presumably "intends to make major policy decisions itself, not leave those decisions to agencies."[12] In enacting enabling legislation such as FLPMA, Congress does not give an agency an "open book to which the agency [may] add pages and change the plot line" nor does it "empower an agency to make a radical or fundamental change to a statutory scheme."[13] Designating conservation as a brand new "use" under FLPMA is indeed a radical and fundamental change to the statutory intent enacted by Congress to manage our public lands. Indeed, designating a new principal or major use under FLMPA should require an act of Congress.

Congress has repeatedly spoken to the need for conservation and preservation of our lands and natural resources through specific legislation that prioritizes those goals, including the Clean Air Act, the Clean Water

[7] *Id.* at §1732(a).
[8] *Id.* at § 1702(c).
[9] *Id.* at § 1702(l) (emphasis added).
[10] 88 Fed. Reg. at 19585.
[11] *See West Virginia v. Envt'l Protection Agency,* 142 S. Ct. 2587 (2022).
[12] *See West Virginia v. Envt'l Protection Agency,* 142 S. Ct. at 2609 (citations omitted).
[13] *Id.*

Act, the Endangered Species Act, and the National Environmental Policy Act, among others.[14] It has created and protected national parks, wilderness areas, and wild and scenic rivers.[15] Congress has specifically provided statutory authority and mechanisms by which we can preserve and conserve our public lands, many of which already achieve the purposes BLM purports to require in this rulemaking.

Congress notably did *not* authorize conservation as a use in FLPMA. Indeed, in the text of FLMPA itself, and in the vast and detailed legislative history of the Act, Congress, "conspicuously and repeatedly declined to enact" conservation measures in FLPMA.[16] Congress never intended FLMPA to be a conservation statute. It intended it to be a vehicle for the productive management, use, and sustained yield of our public lands. To declare conservation a major or principal use under FLPMA would prioritize the *non-use* and *non-yield* of our public lands, in direct contravention of congressional intent.

Congress also emphasized that "the integrity of the great national resource management systems will remain under the control of the Congress" and reiterated Congress's role in retaining sole jurisdiction and the authority to remove parcels of land from public use for conservation and other purposes.[17] In fact, Congressional emphasis that public lands are to be managed to facilitate principal or major uses of public lands, such as grazing, mineral extraction, and rights-of-way, was so strong that Congress included a provision in FLPMA that requires BLM to refer to Congress any management decisions which would "exclude one or more principal or major uses [. . . ] for two years or more on areas in excess of 100,000 acres" and reserves the right for either house of Congress to veto such decisions.[18] Congress also unambiguously required BLM to seek congressional approval to withdraw parcels of over 5,000 acres from major or principal uses, and placed limitations on withdrawals of fewer acres.[19]

Precluding major or principal uses from public lands can constitute a withdrawal under FLPMA, which defines the term "withdrawal" as:

> The withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities

[14] *See* e.g., The Clean Air Act, 42 U.S.C. §§ 7401 et seq. (1970); The Clean Water Act, 33 U.S.C. §§ 1251 et. seq. (1972); The Endangered Species Act, 16 U.S.C. §§ 1531 et. seq. (1973); the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (1970).

[15] *See* e.g.The Wilderness Act, 16 U.S.C. §§ 1131 et seq.; The Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271 et seq.

[16] *See West Virginia v. EPA* at 142 S. Ct. 1210.

[17] HR. Rep. No. 94-1163 at § 204. (Congress retains the authority to "create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, Indian reservations, certain defense withdrawals, and withdrawals for National Wild and Scenic Rivers, national Trails, and for other 'national' recreation units, such as National Recreation Areas and National Seashores [. . .] and adding lands to the National Wildfire Refuge System.)

[18] 43 U.S.C. at § 1712(e)(1); H.R. Rep. No. 94-1163 at § 202 ("Management decisions which would exclude one or more principal or major uses (as defined in the bill) for two years or more on areas in excess of 100,000 acres will have to be referred to Congress. Congress reserves the right to veto such decisions by the action of either House.")

[19] 43 U.S.C. §§ 1702(j), 1714(c) and 1714(d) (If BLM desires to withdraw lands "for the purpose of limiting activities [. . .]in order to maintain other public values in the area or reserving the area for a particular public purpose or program" BLM must seek congressional approval for withdrawals of public lands aggregating five thousand acres or more, and Congress has placed strict limitations on withdrawals of less than five thousand acres).

> under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program.[20]

BLM's proposal to designate conservation as a new principal or major use under FLPMA would override valid existing rights and preclude other subsequent authorizations if those authorization or rights are not compatible with the conservation use.[21] This could result in the effective withdrawal of countless acres of public land from major or principal uses, including electricity generation, transmission, and distribution, without the approval of Congress.

Courts also have found that public land management agencies' affirmative removal of public lands from major or principal uses in order to maintain basic environmental values for an indefinite period of time can violate FLPMA's clear requirement that BLM seek congressional approval to properly effectuate a withdrawal.[22] In ordinary circumstances, BLM would be required to seek congressional approval or submit notice to Congress to withhold uses of public lands in favor of conservation. It appears that this rulemaking is designed to avoid congressional oversight of large withdrawals of public lands by designating conservation as a new use under FLPMA. Such actions are blatantly contrary to congressional intent, embedded in FLPMA, to remain in control of public land management and related withdrawals. It also is contrary to BLM's long history of partnering with public lands stakeholders to use and steward our nation's lands and resources.

Congress specifically made clear its intention to retain sole authority to remove large swaths of public lands from major or principal uses, and to limit BLM's authority to only those actions that are necessary to manage BLM lands under the principles of multiple use and sustained yield. Notably, while Congress discussed the importance of recreation, watershed, and scenic values of the lands, it did not include any of those values as major or principal uses, nor did it even mention conservation in the context of use in the text of the law.

Productive use and stewardship of our public lands depends on the collaboration of stakeholders, communities, and our public land management agencies. As authorized users of public lands, rural electric co-ops lead the way in beneficial management practices. We operate within the scope of FLPMA, and we depend on our public land management agencies to do the same. To fundamentally shift how public lands are managed in this manner would create chaos and uncertainty for those who use our public lands to provide necessary and critical services across our nation.

This Proposed Rule is unnecessary and could result in more harm than good. Rather than fundamentally altering how our public lands are managed, if BLM feels it necessary to withdraw parcels of public land from congressionally authorized principal or major uses in order to preserve or conserve those lands, it can undergo the congressionally mandated withdrawal process; it can work with Congress to designate a new national park, wild and scenic river area, or wilderness area; it can partner with other federal and state agencies to ensure watershed and critical habitat protections are in place where appropriate; or it can work with the stakeholders, including rural electric co-ops, who are already utilizing and caring for those lands. By working together,

[20] 43 U.S.C. § 1702 (j).
[21] *See* 88 Fed. Reg. 19586 ([C]onservation leases [. . . ] would not override valid existing rights or preclude other subsequent authorizations so long as those subsequent authorizations are compatible with the conservation use.")
[22] *See Mountain States Legal Foundation v. Hodel*, 668 F.Supp. 1466, 1474-75 (D. WYO 1987).

through currently authorized processes, we can continue to ensure that our public lands are properly managed and sustainably used for generations to come.

*Insufficient Due Diligence: OIRA Review, Regulatory Flexibility Act, and Energy Effects Analyses*

BLM incorrectly assumes that its fundamental alteration of public land management would not have an economic impact of $100 million or more, and therefore it determined that the Proposed Rule is not considered a "significant" action and that it will "not have a significant effect on the economy."[23] How BLM reached this conclusion is a mystery, as it did not meaningfully engage with affected stakeholders, including rural electric co-ops, about how the Proposed Rule may affect them prior to publishing it.[24] As a result of BLM's erroneous assumption, the Office of Information and Regulatory Affairs (OIRA) did not review this Proposed Rule, and BLM failed to conduct a Regulatory Flexibility Act (RFA) analysis or a Statement of Energy Effects (SEE). [25]

The Proposed Rule does not substantively raise, nor examine, any impacts that the Proposed Rule would have on existing public lands stakeholders. Nor does it account for the disproportionate impact that designating conservation as a principal or major use under FLMPA may have on rural electric co-op operations, their rates, and the communities that they serve. Had BLM conducted the important RFA and SEE analyses, it would quickly understand the devastating impacts this Proposed Rule could have on the economy, on vital industry, on agriculture and our nation's food supply, and on the supply of reliable and affordable energy that powers communities across the nation.

As a threshold matter, rural electric co-ops are not-for-profit entities. They often have constrained financial resources and operate on limited margins, even as they provide reliable and affordable electric service to 56% of our nation's landmass and serve more public lands and persistent poverty counties than any other type of electric utility. Because of co-ops' unique business model and service territories, any increases in planning, operating, and mitigation costs must ultimately be shouldered by the member consumer via increased rates that many electric co-op member consumers may struggle to afford. Even modest increases in operating or project costs have the potential to increase electricity rates, or to jeopardize project financing in some member service territories. The Proposed Rule also may chill investment in grid hardening and expansion that is necessary to accommodate new sources of energy and increased electrification. Indeed, some provisions of this Proposed Rule, could directly affect not only affordability of electricity service in some rural and impoverished areas, but also could jeopardize the basic provision of reliable electric service across rural America.

RFA analyses are intended to examine the impact that federal actions may have on small entities, which include NRECA's distribution members and nearly all of its G&T members under SBA standards. BLM did not conduct an RFA analysis for this Proposed Rule. Instead, it issued a thin, 4.25 page document entitled

[23] 88 Fed. Reg. at 19594-95.
[24] *See* Bureau of Land Management, *Economic and Threshold Analysis for Proposed Conservation and Landscape Health Rule,* U.S. DEPT. OF THE INTERIOR (2023). (Instead of conducting a meaningful assessment of economic impact, BLM instead attached a 4.2 page "Economic and Threshold Analysis" about this Proposed Rule. The Analysis did not have any meaningful information, and instead used broad statements such as "businesses who value increased conservation use will benefit" and "any future benefit or cost is unknowable.")
[25] Regulatory Flexibility Act, Pub. L. 96-354; 94 Stat. 1164 (1980); Exec. Order No. 13211 (2001) ("RFA").

"Economic Threshold Analysis" that states "the proposed rule may affect some small entities."[26] Then, with no data or analysis to support its assertion, BLM stated that "the magnitude of the impact on [. . . ] small entities is expected to be negligible."[27] Again, NRECA requests clarification on how BLM reached that conclusion.

In this period of enhanced electrification, supply chain shortages, global tension and security threats, and economic uncertainty, it is critical that BLM conducts the proper due diligence to assesses the potential impacts that this fundamental shift in how it manages electricity rights-of-way and generation on public lands would have on electricity rates, reliability, and service; and the impacts that changes to electricity rates or reliability would have on rural communities and businesses across the nation. It further must assess the impact that limiting oil and gas leasing in favor of conservation (non)uses on public lands would have on supplies of natural gas and coal, which underpin much of our nation's energy production and reliability. It also should assess the impact that limiting domestic mineral production would have on the technology utilized by the electric utility sector to generate and distribute electricity, to conduct operations, and to secure the grid. Any of these scenarios could be devastating for co-ops, and could jeopardize the delivery of safe and affordable electricity to co-op members and communities across rural America. NRECA encourages BLM to conduct a RFA analysis to analyze the above concerns and better inform its decision making.

Further, pursuant to Executive Order 13211, BLM is required to prepare a SEE for actions related to "any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, use of foreign supplies) should the proposal be implemented."[28] BLM also must prepare "reasonable alternatives to the action with adverse energy effects and the expected effects of such alternatives on energy supply, distribution, and use."[29] BLM did not complete this analysis or prepare reasonable alternatives in the Proposed Rule.

A "significant energy action" in this instance, includes:

> "[A] significant regulatory action under Executive Order 12866 which is "any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation [. . . ] and that is likely to result in a rule that may [. . . ] adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety."[30]

[26] *See* 88 Fed. Reg. 19594; Bureau of Land Management, *Economic and Threshold Analysis for Proposed Conservation and Landscape Health Rule,* U.S. DEPT. OF THE Interior (2023). (Instead of conducting a meaningful assessment of economic impact, BLM instead attached a 4.2 page "Economic and Threshold Analysis" about this Proposed Rule. The Analysis did not have any meaningful information, and instead used broad statements such as "businesses who value increased conservation use will benefit" and "any future benefit or cost is unknowable.") at p. 4.
[27] *Id.*
[28] Exec. Order No. 13211 (2001).
[29] *Id.*
[30] Exec. Order No. 12866 at §§ 3(e) and 3(f) (1993).

While SEEs typically are required for federal actions that could have an effect of $100 million or more, they also may be required if an agency action "has a material effect on the productivity, competition, or prices of energy within a region."[31] This Proposed Rule, if implemented, could certainly result in an effect of $100 million or more, and even if it does not, the inherent consequences of this action, including price increases, jeopardized reliability, decreased electricity service, decreased domestic oil and gas supplies, and other impacts to rural electric cooperatives and the regions and businesses that they serve are deserving of analysis on the record.

A thorough SEE could be a beneficial tool for BLM to better understand the impact that this Proposed Rule could have on entire communities, and the energy supplies upon which they depend.[32] NRECA requests explanation about how BLM came to its erroneous conclusion that there will be no adverse effects on energy supply, distribution, or use and it urges BLM to complete a Statement of Energy Effects for this Proposed Rule. The SEE should include a full analysis of the Proposed Rule's potential impacts on electricity service and the sectors of the economy, productivity, jobs, public health, and safety that depend on affordable and reliable electricity service in rural America.

*Impact of Effective Withdrawal of Public Lands from Principal and Major Uses*

The Proposed Rule states that it would "require the BLM to plan for and consider conservation as a use on par with other uses under FLMPA's multiple use and sustained yield framework and identify the practices that ensure conservation actions are effective in building resilient public lands."[33] Among the tools cited to accomplish this are expansion of BLM's authority to designate Areas of Critical Environmental Concern ("ACECs"); the creation of conservation leases; mandatory mitigation "to the maximum extent possible to address adverse impacts;" the imposition of land health standards on all permittees and authorized users; and the inclusion of conservation as a priority element in BLM land management decision-making.[34]

As a threshold matter, few details are provided about how each of these tools, authorities, or considerations would be implemented on the ground. Such a vague and nebulous Proposed Rule creates great uncertainty for stakeholders about the impact that this fundamental shift in land management will have on uses such as electricity rights-of-way, and oil, gas, and mineral development. NRECA requests significantly more detail about how BLM would implement all of these proposed programs and authorities. In the meantime, NRECA identifies the following concerns about each of the BLM's proposed actions based on the little information that has been provided in the Proposed Rule:

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[31] *See* OMB Memorandum 01-27 (2001) (included some instruction on implementation of Exec. Order No. 13211). *See also*, Elizabeth Glass Geltman et al., *Inquiry Into the Implementation of Bush's Executive Order 13211 and the Impact on Environmental and Public Health Regulation*, FORDHAM ENVTL. L. REV., 27 Fordham Envtl. L. Rev. 225 (2016) (discusses factors that trigger SEE analysis, and how federal agencies, including U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration examine the impacts that federal actions will have on kilowatt hour pricing, production, and distribution).

[32] *See* Executive Office of the President, *Memorandum for General Counsels et al Furthering Compliance with Exec. Order 13211, Titled 'Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use,'"* M-21-12 (Jan. 13, 2021) (Requires agencies to conduct two-prong analysis when determining whether to complete a SEE. Further clarifies a broader category of possible adverse effects requiring a SEE, including but not limited to adverse impacts on prices within a region; and increases on prices in the energy sector).

[33] 88 Fed. Reg. at 19585.

[34] *See*, 88 Fed. Reg 19583.

Areas of Critical Environmental Concern:

FLMPA already grants BLM the authority to designate Areas of Critical Environmental Concern ("ACEC") in order 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."[35] BLM now proposes to shift away from the resource protection focus of ACECs, to landscape-level ACEC designations that could preclude major or principal uses indefinitely. It proposes to expand its authority to make such designations by establishing procedures that:

> [R]equire consideration of ecosystem resilience, landscape-level needs, and rapidly changing landscape conditions in designating and managing ACECs [. . .] The BLM would thus provide additional guidance for how to incorporate ACECs into resource management decisions in a way that considers trade-offs among environmental, social, and economic values during land use planning.[36]

NRECA is concerned that this expanded use and scope of ACEC authority could preclude or limit transmission and distribution rights-of-way that provide electricity service to rural America. Any change to how co-ops plan, construct, operate, or manage their rights-of-way could increase costs and jeopardize affordability and reliability.

NRECA members also depend upon a stable supply of domestic oil, natural gas, and coal to fuel electricity generation; and upon a stable supply of domestically produced critical minerals for numerous technological and operation needs. NRECA requests information about how expanded use of ACEC designations under this proposal will impact right-of-way uses; domestic supplies of oil, gas, and mineral resources, and how such impacts may affect electricity affordability and reliability.

Emphasis on Intact Landscapes:

BLM prioritizes the preservation of "intact landscapes" throughout the Proposed Rule. These landscapes are free of conditions that could "permanently or significantly disrupt, impair, or degrade the landscape's structure or ecosystem resilience, and that [are] large enough to maintain native biological diversity, including viable populations of wide-ranging species."[37] BLM suggests that it would "require officers to prioritize acquisition of lands or interests in lands that would further protect and connect intact landscapes and functioning ecosystems" in land and resource management planning and decision-making.[38]

NRECA requests clarification on how designation of intact landscapes would occur during the land and resource management planning process; and what uses in designated landscapes may be precluded or altered. For example, would BLM permit electricity rights-of-way on designated intact landscapes or would those

[35] 43 U.S.C. § 1702(a) (FLMPA defines Areas of Critical Environmental Concern as "areas within the public lands 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, or to protect life and safety from natural hazards.")
[36] 88 Fed. Reg. at 19587.
[37] *Id.*. at 19598-99.
[38] *Id.* at 19590.

violate BLM's emphasis on scenic values and intact ecosystems? If so, would maintenance, upgrades, or other activities be required to undergo additional processes? If not, how will BLM rectify its desire to maintain intact landscapes with the nation's need for reliable electricity? Could BLM designate intact landscapes on lands already used for electricity rights-of-way, and if so, what impact would the designation have on the current use? How would conservation leases and other components of this Proposed Rule factor into intact landscape designations? Would intact landscape definitions last indefinitely or be subject to termination?

More clarification and explanation about intact landscapes and the methods by which BLM would designate and manage them is necessary for stakeholders to understand how they may be impacted. Should BLM move forward with this rulemaking, NRECA urges BLM to clearly and concisely detail how major and principal uses will be managed on lands designated as intact landscapes, and to limit the duration of such designations to a short, definite, predictable time frame.

Restoration Planning:

BLM emphasizes "active management to promote restoration" of public lands to "achieve recovery of ecosystems" as a primary goal of its conservation use scheme.[39] While details are thin in the Proposed Rule about what types of public lands and ecosystems must be restored, it includes a mandate that BLM prioritizes the identification of said new landscapes for restoration at least every five years, and that all resource management plans include restoration planning going forward.[40] To achieve this end, BLM will require seemingly arduous land health assessments, watershed condition classifications, discretionary determinations about social, economic, and environmental justice considerations and the likelihood of success in informing such identifications.[41]

The aggressive 5-year identification and resource management plan requirements indicate that all public lands may be subject to restoration planning at some point.[42] BLM also indicates that such planning will incorporate and interweave conservation leasing, landscape health standards, ACECs, and other conservation prioritization under this Proposed Rule.[43] NRECA requests clarification about how all of these conservation efforts fit together within the restoration planning rubric.

NRECA notes that FLPMA tasks BLM with the management of the resources available on our public lands, so that they can be used by multiple sectors, and yield sustainable products. In this, and other sections of the Proposed Rule, BLM seemingly loses sight of its duty to focus on managing productive uses and sustained yields of our public lands, and instead continually discusses its new priority, conservation and the restoration of "landscapes." As discussed above, FLPMA is not a conservation statute, and conservation is not a congressionally recognized major or principal use of our public lands. Indeed, within the context of this Proposed Rule, conservation is not a *use* of public lands at all, it is a *non-use*.

[39] *Id.* at 19599-600.
[40] *Id.* at 19600.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 19600-601

BLM should focus its management and any "restoration" efforts toward ensuring that public lands are managed to provide for the sustained yield of the major and principal uses as designated by Congress. Restoration of damaged ecosystems is already achievable through other statutory authorities and agency processes.

NRECA requests more information about the factors BLM will use to designate landscapes as priorities for restoration planning; and what actions on the part of right-of-way permittees and other electricity stakeholders will be required to meet BLM's restoration planning requirements.[44] NRECA further requests clarity about what uses may be allowed and/or precluded on landscapes identified for restoration. Should BLM move forward with this rulemaking, it should clearly and concisely define restoration planning, its associated activities, and goals and milestones that will be used to measure restoration progress and achievement. NRECA also suggests that BLM limit the effective timeframe for restoration activities on designated lands to only the amount of time necessary to achieve the aforementioned clearly defined restoration goals and milestones.

Conservation Leasing:

BLM proposes to create a conservation lease program "for the purpose of pursuing ecosystem resilience through mitigation and restoration."[45] Beyond vague statements about conservation leasing, it appears that BLM has not undertaken substantive thought or planning about how, exactly, conservation leasing will work. This lack of practical examination of its idea by the Bureau is evidenced by the vast array of conservation lease topics about which BLM has asked the public for feedback. These include:

> What would be the appropriate duration for conservation leases; and whether conservation leases should be used to generate carbon offsets; and how conservation lease lands should be identified in the RMP process or otherwise; and whether conservation leases should be limited to protecting and restoring specific resources such as wildlife, habitat, public water supply watersheds, or cultural resources.[46]

Ultimately conservation as envisioned by this Proposed Rule is not a "use," it is a lack of use. NRECA reiterates its above explained concern that designating conservation as a use eligible for leasing would be inconsistent with BLM's authority under FLPMA and urges BLM to refrain from implementing such a program.[47] Should BLM wish to withdraw lands from principal or major uses with the purpose of conserving or restoring them, it can utilize existing processes as outlined in FLPMA and other statutes.

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[44] *Id.* at 19590-91.
[45] *Id.* at 19591-92.
[46] *Id.*
[47] BLM cites *Greater Yellowstone Coal v. Tidwell,* as the basis for its authority to create a conservation leasing program. 572 F.3d 1115, 1126-27 (10th Cir. 2009). That case, however, relates to U.S. Forest Service and BLM authority to enter into agreements that facilitate elk feeding grounds on federal lands without environmental assessments. While the case in question does discuss public land management agencies' authority to enter into contracts and cooperative agreements for some uses of public lands, the case in question does not appear to extend the broad grant of power to fundamentally alter public land management practices under FLPMA which BLM claims; *See also, Public Lands Council v. Babbitt*, 167 F.3d 1287, 1289, 1292 (10th Cir 1999) (the Tenth Circuit struck down a 1995 rule that would have allowed conservation permits under FLPMA that share substantial characteristics to the proposed conservation lease program contained in this Proposed Rule.)

Should BLM move forward with this ill-advised program, it will preclude major or principal uses on conservation leased lands that are not compatible with conservation.[48] This has the potential to withdraw countless acres of public lands from major or principal uses for an indefinite period of time and raises numerous questions and concerns. To enable better stakeholder decision making and greater regulatory certainty, BLM should address the following concerns and suggestions:

NRECA requests clarification about how BLM will determine compatibility of uses with conservation leases. BLM should explain how conservation leases will affect existing and prospective major or principal uses, and if such uses will be barred from lands subject to conservation leases. To help stakeholders better understand how much public land may be involved in a conservation lease program, BLM also should provide estimates about the anticipated number of acres, the number of leases, and the locations of such leases that will be utilized in a conservation lease program.

NRECA also urges the Bureau to limit conservation leases in scope, duration, and size to only what is necessary to achieve restoration or enhancement of the land in question. Quantifiable, clear goals and milestones related to the restoration or enhancement purpose of a conservation lease should be included in the lease terms. Upon achievement of those restoration or enhancement goals or milestones, the lease should be terminated and not subject to renewal. Any major or principal uses that were precluded by the conservation lease should resume immediately upon termination of the lease.

BLM also should explain how conservation leases will work in conjunction with the rigorous mitigation requirements it included in the Proposed Rule and with efforts by other agencies to reduce carbon emissions and other environmental impacts of electricity generation and related activities. More detailed information about how carbon offset and other mitigation will be incorporated and valued with such leases could help inform stakeholder project planning and budgeting.

NRECA also requests clarification about how BLM will determine cost recovery, rents, and fees for conservation leases, as fair market value determinations used for grazing leases will not be appropriate for conservation lease purposes. BLM suggests that it may include a public benefit component into the calculation, how would such benefits be determined?

NRECA urges BLM to allow major and principal uses to occur concurrently on conservation leased lands throughout the duration of a conservation lease, particularly those such as electricity infrastructure and rights-of-way.

Electric utilities, residents, communities, and local industries all may be impacted by BLM's withdrawal of public land for conservation leases. NRECA urges BLM to allow for public comment and/or involved stakeholder outreach when entering into conservation leases. Conservation leasing as a general matter should be included in the resource management plan process, and subject to public comment.

[48] 88 Fed. Reg. at 19600.

Management Prioritization of Conservation:

BLM also proposes to fundamentally alter how land management decision making is conducted by prioritizing conservation in all agency actions. It emphasizes that management decisions should shift to a landscape-scale focus, and BLM actions should "take concrete steps to adapt to and mitigate climate-change impacts on its resources."[49] To achieve this aim, BLM would "prioritize conservation use, limiting subsequent authorizations when incompatible with conservation use, and mitigating impacts to natural resources on public lands."[50] When impacts are unknown, BLM would be required to use a "precautionary approach" in granting use authorizations.[51]

Incorporating conservation as a priority focus in agency decision making in this manner may be incompatible with MUSY, as it could foreseeably preclude major and principal uses if BLM deems they are inconsistent with conservation. Such a departure from FLPMA's MUSY mandate is well beyond BLM's scope of authority. Should BLM move forward with prioritizing conservation in all management decisions, it should include more information about how it will determine whether uses are compatible with conservation. For example, BLM would be required to "avoid authorizing any use of the public lands that permanently impairs ecosystem resilience.[52] More information about how BLM will define and determine impairment, impacts, and ecosystem resilience is necessary for stakeholders to understand how their current and prospective uses will be evaluated by BLM going forward.

BLM also suggests that it will place a greater emphasis on indigenous knowledge when making management decisions and when developing alternatives in environmental assessments.[53] NRECA values our nation's tribal communities and the knowledge they contribute to the stewardship of our lands and resources and appreciates that tribal consultation is already a required component of NEPA and other environmental statutes. NRECA requests more information about why BLM feels current consultation and public comment processes are insufficient; and how this expansion of indigenous knowledge into BLM decision making would work in practice. In particular, BLM should explain whether emphasizing the contributions of one type of stakeholder and/or allowing greater contribution of one type of stakeholder is compatible with public comment procedures that require equal access for stakeholders.[54]

Mitigation:

The Proposed Rule would require mitigation to the "maximum extent possible" in order to "avoid, minimize, and compensate for all impacts to public land resources" and it would require mitigation to "address adverse impacts in the case of important, scarce, or sensitive resources, to the maximum extent possible."[55] While BLM explains how third party mitigation accounts would work under this scheme, it does not provide detail on what activities will require mitigation.

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[49] *Id.* at 19587.
[50] *Id.* at 19590.
[51] *Id.*
[52] *Id.* at 19590; 19602.
[53] *Id.* at 19602. "BLM will encourage Tribes to suggest ways in which Indigenous Knowledge can be used to inform the development of alternatives, analysis of effects, and identification of mitigation measures."
[54] *See* The Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.*
[55] 88 Fed. Reg. at 19603.

Rural electric co-ops use countless acres of public lands to deliver electricity to communities throughout our nation. They pride themselves on the stewardship of their rights-of-way, and they value the lands they live and operate. They also are working hard to accommodate new and renewable sources of energy, and to expand the electric grid to accommodate increased demand from the electrification of our daily lives.

Any mitigation requirements for electricity rights-of-way, operations, or generation will necessarily add costs to co-op operation and project budgets. Because of co-op's unique business structure and thin operating margins, additional mitigation costs may result in increased rates that must be shouldered by electric co-operative members—many of whom live in persistent poverty counties. They also may chill grid expansion and hardening projects which is particularly concerning as co-ops navigate supply chain shortages, increased electricity demand, and the need for expanded and hardened electric infrastructure.

In order to help safeguard electric affordability and reliability, NRECA urges BLM to refrain from requiring mitigation for electricity rights-of-way, operations, or generation activities. In lieu of such an exemption, BLM should clarify what activities will require mitigation, and how such mitigation requirements will be assessed.

Land Health Standards:

The Proposed Rule would require the imposition of land health standards on all BLM lands and program areas.[56] This includes expansion of land health standard requirements from the current grazing leases to all uses and would require BLM to incorporate land health assessments, conditions, and monitoring data into management decisions and land use planning processes.

Electric co-op rights-of-way operate across thousands of miles of BLM managed lands and co-ops already dedicate significant funding and effort in maintaining their rights-of-way and infrastructure via vegetation management operations and regular maintenance and upgrades. While BLM discussed management actions related to land health standards, it did not clarify what is expected of major or principal users of BLM managed lands to conform to such land health standards.

NRECA requests detailed information about how landscape health standards would apply to electricity rights-of-way? Whether co-ops would be required to implement new vegetation management, construction, and maintenance procedures in rights-of-way? And whether such standards would require additional NEPA or other analyses for routine maintenance or operational actions in and around electric utility rights-of-way.

NRECA reminds BLM that any additional costs or liabilities to electricity transmission, distribution, and generation may result in increased electricity costs for communities across America. It urges BLM to be mindful of any costs or requirements that it imposes upon stakeholders to conform with land health standards.

NRECA further reiterates that its members pride themselves on understanding and stewarding the lands upon which they operate. They possess unique expertise in land management practices from which BLM could benefit as it assesses land health standards and determines next steps. NRECA encourages BLM to work with rural electric co-ops on this process should this Proposed Rule move forward.

[56] *Id.* at 19592, 19604.

Definitions:

BLM's definition section lacks clarity and creates uncertainty for public lands stakeholders. More explicit, explanatory definitions are required to grant stakeholders a firm understanding of how this Proposed Rule would be implemented.

For example, the term "conservation" around which the entire Proposed Rule is based, lacks a clear or concise definition. BLM states that "conservation" means "maintaining resilient, functioning ecosystems by protecting or restoring natural habitats and ecological functions" it then states that "'protection' and 'restoration' together constitute conservation."[57] None of the terms within that definition are defined, and BLM provides no explanation of how it will determine the resilience or functionality of an ecosystem.

The Proposed Rule also defines "best management practices" as "state of the art, efficient, appropriate, and practicable measures for avoiding, minimizing, rectifying, reducing, compensating for, or eliminating impacts over time."[58] Again, this vague definition does not give stakeholders enough information to predict or anticipate what will be required of them in operating or managing their presence on public lands.[59]

Should BLM move forward with this rulemaking, NRECA encourages it to include a more thorough, explanatory definition section which can provide stakeholders with a clear, certain understanding of the terms.

## *Staffing*

Improved BLM staffing and more timely responses and approvals is a top concern for NRECA members across the nation. Delayed BLM processing and approvals for special use authorizations, vegetation management, grid enhancement, expansion, and hardening projects, and other activities on BLM rights-of-way has delayed the delivery of electricity and broadband service to some parts of rural America; has increased risk of disasters such as wildfire; and can increase project costs and safety concerns. Increasing the regulatory burden on stakeholders and staff, via this Proposed Rule, is unlikely to alleviate our concerns about BLM's staffing and workload capacity, and may indeed exacerbate existing problems.

NRECA notes that several provisions in the Proposed Rule require BLM staff to create reports, gather data, prepare assessments, alter land use planning processes, and assess areas for conservation leases, ACECs, and other uses.[60] Such requirements will add a substantial administrative load to an already strained BLM staff. NRECA requests explanation and clarification about the anticipated impacts that this Proposed Rule will have on BLM operations and processing times in its state and field offices.

NRECA encourages BLM to focus on improving its existent processes rather than burdening its team with new, arduous requirements.

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[57] *Id.* at 19588.
[58] *Id.* at 19588.
[59] *Id.*
[60] *Id.* at 19593; 19596 (For example, the new procedures would require BLM to prioritize the designation of ACECs in the land use planning process, and commit staff and resources to significantly more arduous studies, inventories, and scoping processes.)

## CONCLUSION

Reliable and affordable electric service is a foundation for rural economic prosperity and development across industries. Congress understood this need, and purposely designated electric rights-of-way as a primary or major use under FLPMA.[61] Congress recognized that rural electrification was so important to the nation, that "prompt action in the processing of applications" is necessary and it even cautioned BLM, "for the sake of economical operations and avoidance of undue burdens on [. . .] applicants [. . . ] to be cautious in their demands for information [from electric utilities]."[62] This Proposed Rule, in direct opposition to that directive, would require even more information, action, and resources from electric co-operatives as they strive to deliver safe, affordable, and reliable electricity to rural America.

NRECA urges BLM to withdraw this flawed and ill-advised Proposed Rule, rather than withdrawing public lands from principal or major uses. Should BLM choose to move forward with this rulemaking, NRECA urges it to recognize and mitigate for the increased costs, liabilities, and disproportionate impact that this Proposed Rule may have on rural electric services throughout our nation.

NRECA appreciates the opportunity to provide these comments to inform the BLM on its proposed changes to how it manages public lands under FLPMA. We welcome the opportunity to work with you and to discuss our comments. Please contact Megan.Olmstead@nreca.coop if you have any questions.

Respectfully,

Megan A. Olmstead, Esq.
Regulatory Affairs Director
National Rural Electric Cooperative Association

[61] 43 U.S.C. § 1761.
[62] H.R. Rep. No. 94-1163 at § 501.