Comment Submitted to the Department of the Interior, Bureau of Land Management

Proposed Rule: Rescission of Conservation and Landscape Health Rule

Benjamin Zycher*
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This comment is submitted to the Department of the Interior, Bureau of Land Management (BLM) on its proposed rule ("2025 proposed rule") "to rescind the Conservation and Landscape Health Rule adopted on May 9, 2024" ("2024 final rule").[1] At a general level, the proposed rule is fully justified and should be finalized. This comment is organized as follows:

* Senior Fellow, American Enterprise Institute. The views expressed in this comment paper are solely those of the author. Contact: benjamin.zycher@aei.org.
[1] See the 2025 proposed rule at https://www.govinfo.gov/content/pkg/FR-2025-09-11/pdf/2025-17537.pdf, p. 43990. See the 2024 final rule at https://www.federalregister.gov/documents/2024/05/09/2024-08821/conservation-and-landscape-health, pp. 40308-40349. The 2025 proposed rule is at pp. 43990-43994.

Summary

BLM proposes "to rescind" the 2024 final "Conservation and Landscape Health Rule" adopted on May 9, 2024. Despite the promise in the 2024 final rule that it "defines the term 'ecosystem resilience,'" no such definition actually is presented in the 2024 final rule. Instead, there are numerous references to such concepts as ecosystem health, the delivery of clean air and water, food and fiber, renewable energy, wildlife habitat, habitat connectivity, and old-growth forests. The 2024 final rule does not offer a definition of ecosystem "health" or a methodology with which to measure it at a given point in time or changes in it over time. Instead, BLM asserts in several passages that the management of public lands will be based upon "the best available science," itself an obviously subjective metric even apart from the reality that "science" is not monolithic.

There always are alternative ways to measure physical parameters. Both the definition and use of "high-quality information" are subjective choice variables, and alternative data systems are likely to yield different conclusions. Accordingly, the implementation of the 2024 final rule inexorably would prove politicized, in particular because alternative approaches would further the interests of different groups with stakes in the analytic outcomes, and which would exert powerful political pressures that BLM would not be able to ignore. At the level of regulatory analysis and implementation, the choices among data measurements, the weights to be given alternatives, differing conclusions about "ecosystem health" and "ecosystem resilience" and the models needed to predict future outcomes of interest would prove subjective, and thus inexorably shaped by political pressures.

Because the BLM definition in the 2024 final rule of "ecosystem resilience" had multiple dimensions, there inevitably will exist conflicts — tradeoffs — among them. The 2024 final rule is silent about how such tradeoffs are to be valued, how different time patterns of the "delivery" of different ecosystem services will be valued and then discounted to present values, and a myriad of other parameters. Moreover, the absence in the 2024 final rule of minerals and energy resource development and production is glaring, and that rule offers no criteria for choices among the alternatives.

The 2024 final rule fails to specify a methodology with which the benefits and costs of alternative uses can be compared. BLM in 2024 attempted to circumvent this obvious problem by proposing a system of 10-year "restoration leases" and "mitigation leases." The 2024 final rule failed to delineate how competing proposals for such leases are to be evaluated, necessarily leading to an *ad hoc* decision process that, again, will be politicized. Because the "ecosystem resilience" framework is poorly defined, it will exacerbate uncertainty and therefore the ability of policymakers and agency administrators to allocate resources on the basis of political criteria.

The 2024 final rule states that "conservation is a use on par with other uses of the public lands." This requirement is inconsistent with the explicit language of the Federal Land Policy and Management Act of 1976, as amended. Moreover, the assertion in the 2024 final rule that "this rule does not meet the criteria" defining a Major Rule under the Congressional Review Act is clearly incorrect, in part because the assertion that the 2024 final rule "does not have an annual effect on the economy of $100 million or more" is almost certainly false.

The 2025 proposed rule is fully justified analytically and as a matter of sound policy, and should be finalized.

I. The Ambiguous Definition of "Ecosystem Resilience" In the 2024 Final Rule Would Politicize the Management of Public Lands

In the 2024 final rule, BLM claimed to have defined "ecosystem resilience," but no such actual definition can be found there. Instead, the 2024 final rule offers the following.[2]

> The final rule defines the term "ecosystem resilience" (whereas the proposed rule included a definition of "resilient ecosystem") in the context of the rule's foundational precept that the BLM's management of public lands on the basis of multiple use and sustained yield relies on resilient ecosystems. The definition is broad and mirrors Department guidance by including concepts of resistance, recovery, and adaptation. The BLM received comments that suggested removing this term, changing the definition to clarify that habitat connectivity is key to a resilient ecosystem, and changing the definition to better and more accurately describe the characteristics of a resilient ecosystem. The BLM changed the term to "ecosystem resilience" to match the usage of this term in the rule and defined ecosystem resilience to be consistent with existing DOI definitions of this term. DOI's definition of ecosystem resilience is inclusive of three commonly used terms in scientific literature: resistance (i.e., withstand disturbance), recovery (i.e., recover from disturbance, and adaptability (i.e., change/adapt to disturbance). The purpose of the rule is to facilitate the use of conservation as part of sustained yield, such that ecosystems on public lands can adapt to environmental change, resist disturbance, and maintain or regain their function following environmental stressors such as drought and wildfire.

Nor are "resistance," "recovery," or "adaptability" defined in any way that allows for measurement. Accordingly, the "definition above is useless analytically, a reality that creates substantial subjectivity and opportunity for politicized decisionmaking. BLM in the passage above claims that its definition of ecosystem resilience is "consistent with existing DOI definitions of this term," with a footnote reference to the Department of Interior 2021 Climate Action Plan.[3] The phrase "ecosystem resilience" appears five times in that document, again without any definition. Instead, the phrase is incorporated into various DoI commitments, an example of which is "fire preparedness and fuel management."

The 2024 final rule refers to such concepts as clean air and water, food and fiber, renewable energy, and wildlife habitat. The 2024 final rule does not offer a definition of ecosystem "health" or a methodology with which to measure it at a given point in time or changes in it over time. Instead, BLM asserts in several passages that the management of public lands will be based upon "the best available science," itself an obviously subjective metric; suppose, as is inevitable, that the peer-reviewed literature on a given topic reports conflicting findings.[4]

Because there always are alternative ways to measure physical parameters, because both the definition and use of data are subjective choice variables, and because alternative data systems are likely to yield different conclusions, the implementation of the 2024 final rule inexorably

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[2] See the 2024 final rule at p. 40317.
[3] The DoI 2021 Climate Action Plan is at https://www.doi.gov/sites/default/files/department-of-interior-climate-action-plan-final-signed-508-9.14.21.pdf.
[4] See the 2024 final rule at p. 40323 and p. 40334.

would prove politicized, in particular because the alternatives would further the interests of different interest groups with stakes in the analytic outcomes, and which would exert powerful political pressures that BLM would not be able to ignore. Moreover, any system of monitoring "ecosystem" outcomes will yield findings that obviously will vary with the application of alternative metrics, data, and indicators.

The use of conceptual models will prove far more than merely possible; it will be a requirement because BLM states as a "principle for ecosystem resilience" that the agency "must conserve renewable natural resources at a level that maintains or improves ecosystem resilience" so as to "to manage public lands on the basis of multiple use and sustained yield."[5] The maintenance or improvement of "ecosystem resilience," however defined, cannot be known in advance. Whether or not a given policy will "maintain or improve" them is a future policy outcome that must be estimated as projections. Only a model or combination of models could serve that function.

In short, under the 2024 final rule the choices among data measurements, the weights to be given alternatives, differing conclusions about "ecosystem health," and the models needed to predict future outcomes of interest would prove subjective, and thus inexorably shaped by political pressures. That regulatory outcome could not be avoided, literally, regardless of the implicit assumption in the 2024 final rule that the evaluation of "ecosystem resilience" or "health" parameters can be constrained with the application of "the best available science." Suppose that "the best available science" — however defined, and given the inevitable conflicts that "science" inexorably comprises — changes. Would regulatory policy change with it? Note that this is very different from the bidding processes associated with leasing of public lands for, say, energy production, in which the bids can be compared in a straightforward fashion.

Note also that the discussion in the 2024 final rule of "ecosystem resilience" has multiple dimensions: ecosystem "health," and the ability of the lands to deliver associated services, such as clean air and water, food and fiber, renewable energy, and wildlife habitat. Did BLM in the 2024 final rule actually assume that there would not emerge any conflicts (tradeoffs) among such goals? It is obvious for example that the delivery of "food and fiber" and "wildlife habitat" conflict, creating an unavoidable need to make choices. The 2024 final rule was silent about how such tradeoffs were to be valued, how different time patterns of the "delivery" of different goods would be valued and then discounted to present values, and a myriad of other parameters. Moreover, the absence from the list of "associated services" of minerals and energy resource development and production is glaring, and the 2024 final rule offered no criteria for choices among the alternatives. Note that minerals and energy development and production yields revenues for the federal and other governments, which can be used for environmental and other forms of "ecosystem resilience" protection, both direct and indirect, and the BLM analysis in the 2024 final rule ignored this dimension of the larger set of policy objectives.

In short, the 2024 final rule failed to specify a methodology with which the benefits and costs of alternative uses can be compared. BLM attempted to circumvent this obvious problem by proposing a system of 10-year "restoration leases" and "mitigation leases" that would allow qualified entities to directly support efforts to build and maintain resilient public lands."[6] A "qualified entity" is one that "can demonstrate" to an "authorized officer" the "capacity for implementing restoration or mitigation projects (as appropriate) and meets the lease

[5] See the 2024 final rule at p. 40320.
[6] See the 2024 final rule at p. 40311.

requirements."[7] Can anyone believe that any such process would not prove inexorably politicized?

The 2024 final rule failed to delineate how competing proposals for restoration or mitigation leases were to be evaluated. Would the "entities" seeking such leases be allowed in effect to collude geographically for the award of the leases across federal lands? Would there be a competitive bidding process, or would applications be evaluated on the basis of administrative criteria to be established in subsequent rulemakings? Would the leases apply only to surface conditions and efforts, or would subsurface rights and impacts also be awarded and evaluated? How would BLM address conflicting objectives across "entities?"

None of these issues are trivial, none can avoid subjectivity and political pressures, and none were addressed in the 2024 final rule. Because the 2024 final rule was silent on the evaluation methodologies for restoration and mitigation lease proposals, no one could know how the process would be implemented. That means that the process would be largely *ad hoc*, and therefore heavily political. The "ecosystem resilience" framework is poorly defined and thus will exacerbate uncertainty and therefore the ability of policymakers and agency administrators to allocate resources on the basis of political criteria, not an outcome that can be predicted to prove consistent with efficient economic outcomes, with "ecosystem resilience" however defined, or with the legal requirement that BLM "provide for the management, protection, development, and enhancement of the public lands."[8]

II. The 2024 Final Rule Fails to Identify Any Relationship Between Leasing for Minerals or Fossil Energy Production and "Ecosystem Resilience"

Because the definition of "ecosystem resilience" in the 2024 final rule is useless analytically, BLM in essence created a tautological system in which "ecosystem resilience" will be assumed to be enhanced by certain activities — the listed "associated services" — and, presumably, not by others. It is obvious that the choices among services assumed respectively to be consistent and inconsistent with "ecosystem resilience" would be politicized.

No other outcome is possible even conceptually. Because the central purpose of the 2024 final rule is to expand the range of public lands "uses" beyond those specified in the law, the implicit assumption is that the uses already specified by statute somehow are not consistent with "ecosystem resilience." That is the clear meaning of the statement in the 2024 final rule that it "clarifies that conservation is a use on par with other uses of the public lands under FLPMA's multiple-use and sustained-yield mandate."[9]

But nowhere in the 2024 final rule did BLM identify the nature of that purported inconsistency. Precisely how are the traditional uses of federal lands, for the management of which BLM is responsible, inconsistent with the advancement of "ecosystem resilience?" BLM did not tell us, certainly in part because "ecosystem resilience" was defined so poorly in the 2024 final rule.

BLM in the 2024 final rule again attempted to circumvent this obvious problem by asserting that "conservation" is a "use" of federal lands under the FLPMA "multiple use framework" "on par with other uses." This is not correct: the FLPMA defines the "principal or

[7] See the 2024 final rule at p. 40342.
[8] See https://www.blm.gov/sites/default/files/AboutUs_LawsandRegs_FLPMA.pdf.
[9] See the 2024 final rule at p. 40308.

major uses" of the public lands as follows.[10]

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

The FLPMA defines "multiple use" as follows.[11]

> The term ''multiple use'' means the management of the public lands and their various resource values so that they are utilized to the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the longterm *(sic)* needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

It is clear that these provisions of the FLPMA allow "conservation" as a management goal, but not "on par" with the "principal or major uses" "limited to" those delineated above.

III. The Assertion In the 2024 Final Rule That "This Rule Does Not Meet the Criteria" Defining a Major Rule Under the Congressional Review Act" Is Almost Certainly False

The assertion in the 2024 final rule that "This rule does not meet the criteria" defining a major rule under the Congressional Review Act is clearly incorrect, in part because the assertion that the 2024 final rule "does not have an annual effect on the economy of $100 million or more" is almost certainly false.[12]

BLM "did not estimate the annual benefits that this rule would provide to the economy." Accordingly, the basis upon which BLM asserted that it "Does not have an annual effect on the economy of $100 million or more" is wholly unclear. Because the proposed rule purports to elevate "conservation" to "a use on par with other uses under FLPMA's multiple use framework," it is necessarily the case that "conservation," however defined, will replace other uses, prominent

[10] See https://www.blm.gov/sites/default/files/AboutUs_LawsandRegs_FLPMA.pdf, at p. 3.
[11] See *Ibid.* at p. 2.
[12] See the 2024 final rule at p. 40334. BLM in the 2024 final rule added that it "did not estimate the annual benefits that this rule would provide to the economy." See the 2024 final rule at p. 40334, and the Economic and Threshold Analysis at https://www.regulations.gov/document/BLM-2023-0001-0002.

among which is exploration, development, and production of minerals and conventional energy resources.

Consider only the production of fossil energy resources on federal lands. BLM reports that "About 23 million Federal acres were under lease to oil and gas developers at the end of FY 2022. Of that, about 12.4 million acres are producing oil and gas in economic quantities. This activity came from over 89,000 wells on over 23,500 producing oil and gas leases."[13] For 2019, onshore oil production on federal lands was 381 million barrels, while onshore natural gas production on federal lands was 3730 billion cubic feet.[14] If we assume $70 per barrel of oil and $2.70 per million cubic feet of natural gas, the total value of onshore oil and gas production on federal lands is, roughly, $26.7 billion.

Assume for simplicity that the oil and gas production numbers cited above are a "steady-state" level of output from onshore federal lands, that is, the production levels to be observed over the long term in the absence of policy shifts. If the 2024 final rule is implemented, "conservation" would be elevated to "a use on par with other uses under FLPMA's multiple use framework." Suppose that were to yield a reduction in onshore oil and gas production on federal lands by a mere 5 percent. The effect would be a reduction in the value of that fossil energy output by about $1.3 billion, an order of magnitude greater than the $100 million threshold required for a rule to be classified as "major" under the CRA. Obviously, this ignores the value of other resource production — minerals, timber, grazing, etc. — that might be displaced by "conservation" as an alternative use. There is no basis upon which the 2024 final rule can be asserted not to be a major rule under the CRA.

IV. Conclusions

The 2024 final rule fails to offer a definition of "ecosystem resilience" or "health" or a methodology with which to measure such parameters at a given point in time or changes in them over time. Instead, BLM asserted that the management of public lands will be based upon "the best available science," itself an obviously subjective metric even apart from the reality that "science" is not monolithic.

There always are alternative ways to measure physical parameters. Both the definition and use of "high-quality information" are subjective choice variables, and alternative data systems are likely to yield different conclusions. Accordingly, the implementation of the 2024 final rule inexorably would prove politicized, in particular because the alternatives will further the interests of different groups with stakes in the analytic outcomes and that will exert powerful political pressures that BLM would not be able to ignore.

Because the BLM definition of "ecosystem resilience" in the 2024 final rule had multiple dimensions, there inevitably would exist conflicts — tradeoffs — among them. The 2024 final rule was silent about how such tradeoffs are to be valued, how different time patterns of the "delivery" of different goods would be valued and then discounted to present values, and a myriad of other parameters. Moreover, the absence from the list of "associated services" of minerals and energy

[13] See https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about#:~:text=About%2023%20million%20Federal%20acres,producing%20oil%20and%20gas%20leases.
[14] See https://crsreports.congress.gov/product/pdf/R/R46537.

resource development and production is glaring; the 2024 final rule offers no criteria for choices among the alternatives.

The 2024 final rule fails to specify a methodology with which the benefits and costs of alternative uses can be compared. The restoration and mitigation lease process is almost explicitly political. The statement in the 2024 final rule that conservation is a use on par with other uses under FLPMA's multiple use framework is inconsistent with the explicit language of the FLPM. The assertion in the 2024 final rule that "this rule is not a major rule under … the Congressional Review Act" in part because it "Does not have an annual effect on the economy of $100 million or more" is almost certainly false.

The 2025 proposed rule is fully justified analytically and as a matter of sound public policy, and should be finalized.