

Potential Impacts on the Mining Industry from the Conservation and Landscape Health Rulemaking by the Bureau of Land Management.

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Good morning. My name is Lori Lusty; I am the Senior Environmental Engineering Manager for the J.R. Simplot Company. In my role I am responsible for the permitting of Simplot's mining operations and working with both federal and state agencies in regards to environmental matters associated with these mining operations.

The Department of Interior, through the Bureau of Land Management (BLM) has proposed a very significant rulemaking entitled "Conservation and Landscape Health."¹ As we have examined this proposed rule, we have identified several aspects of the rule, which if implemented as proposed, will make it more difficult to access and mine minerals necessary for the American economy. This includes minerals needed for energy infrastructure and for national and food security purposes.

Background

First, a "primer" on the legal framework for the management federal lands that is fundamental to understand the context of this proposed rule.

The primary federal statute that governs federal lands is the Federal Land Policy and Management Act of 1976 (FLPMA). FLPMA requires the Secretary of Interior, acting through the BLM to conduct a land use planning process and the management of public lands on the basis of multiple use and sustained yield principles, and to balance the need for environmental protection against the need for domestic sources of minerals, food, timber and fiber. FLPMA also requires that priority be given to the protection of those lands that are determined to be of "critical environmental concern."

Essentially, FLPMA represents an effort to strike a balance between mineral development activities and other competing surface resources uses of BLM lands.

BLM has a multiple use mandate in the management of the public lands. This should also be understood within the broader context of all the vast land holdings of the federal government. This includes hundreds of millions of acres that have been withdrawn from the public domain for national parks, wildlife refuges, wilderness areas, national monuments, and many other special designations. Thus, the remaining lands were envisioned to be available for a vast range of uses, from mining, to oil and gas extraction, grazing and access for hunting, fishing, and other recreation.

¹ Federal Register. 2023. Vol 88(63), p.19583.

Claimed Rationale for the Proposed Rule

The proposed rule is built on the premise that there is an “imperative” to ensure resilient ecosystems, as BLM claims that public lands are “increasingly degraded and fragmented due to adverse impacts from climate change and a significant increase in authorized use.”

This rationale for the proposed rule deserves a rigorous examination. Also, the “leap” that BLM makes to argue that the definition of “multiple use” in FLPMA supports this proposed rule also warrants a critical analysis. For today’s discussion though, my testimony is focused on three aspects of the proposed rule that will impact mining.

Three Aspects of the Proposed Rule That Will Impact Mining

The proposed rule has three major elements:

- Establishes “conservation” as an use on par with other uses of the public lands under FLPMA’s multiple use and sustained-yield framework. The proposed rule establishes “conservation leases” to promote both protection and restoration on the public lands.
- Broadens the use of Areas of Critical Environmental Concern.
- Requires “compensatory mitigation” for uses or impacts to resources.

These elements, as described below, will result in additional limitations of accessing minerals on BLM land.

1. **Conservation Leasing:** BLM would impose a system in which third party conservation/environmental group(s) could propose areas for conservation leasing in which they would enter into agreements with BLM for land restoration activities. One of the core concerns here is that it seems completely implausible that an entity would invest in such lands only to see that multiple use activities (which they would likely find objectionable) permissible on those lands after the expiration of their lease. The long history of land management is that, with very few exceptions, once lands are designated for conservation purposes, they are no longer available for multiple use. This appears to be a “back-door” way to retire lands from multiple use, such as mining. At a minimum it is yet another avenue for those critical of the multiple use mandate to object to thoroughly vetted and approved projects further increasing uncertainty for domestic mining projects
2. **Use of Areas of Critical Environmental Concern (ACEC) for Precautionary Interim Management:** ACEC designations should be considered alongside all other resources when part of broader plan resource evaluations. Under the proposed rule, when a nomination is received outside the planning process, such as from an environmental group, “interim management” may ultimately be considered and implemented to protect the relevant values until the BLM completes a planning process to designate the area as an ACEC. This “interim management” scenario has striking similarities to the multiple use management limbo that has tied up “wilderness study areas” and “areas with wilderness characteristics.” Once again, the result is removing federal lands from multiple use, such as mining.

- 3. Compensatory Mitigation:** The concern is that an outlier practice exception will become the core expectation for authorizing uses of BLM managed lands. It has always been envisioned that BLM can and does authorize impacts to the land, while avoiding “unnecessary and undue degradation” utilizing the mitigation hierarchy. If an authorized officer can and does use the leverage of a permit or other authorization to attempt to compel the prospective project proponent, it introduces a significant new level of project permitting uncertainty as standards for what constitutes appropriate mitigation can vary widely across field, district, and state offices, as well as differing within the same sphere of resource impacts. This adds a new layer of complexity and difficulty for obtaining approvals for mining projects.

Conclusion

The concern is that conservation is becoming, and will be accelerated, as the predominant use of BLM lands. This proposed regulation would place conservation leasing “as a multiple use” on an equal “footing” (or perhaps with greater significance) than other multiple uses such as mineral extraction.

It should also be understood that the land use planning process, while certainly in need of changes, is a process through which land management decisions can be made on a landscape basis with all resources being considered and evaluated in tandem. Trade-offs are often balanced out through this process of leaving some lands more broadly open, for example, to extractive uses, while managing other resources for wildlife and recreation. It runs counter to the expectations of the public and their participation in this process when, upon completion, BLM then moves the goal posts to prioritize other non-use objectives.

BLM was given some management tools under the Federal Land Policy and Management Act to address resources that included conservation, *but its core mission was for the lands to be utilized for other multiple use management*. This proposed rule would upend the fundamental mission of the BLM.

In recent years, supply chain difficulties, such as minerals needed for the U.S. economy, have been very prominent. Unfortunately, the Biden Administration, rather than making regulatory changes that enable and encourage domestic sourcing of minerals, has instead taken actions (i.e., land withdrawals, policy directives, executive orders, etc.) to make it more difficult to access domestic minerals. Such an approach raises true environmental justice concerns by pushing mineral extraction overseas where there are lesser environmental and labor laws.

Though the proposed rule acknowledges valid existing rights, it is not clear how this regulation “meshes” with the 1872 Mining Law (such as any new mining claims) and also with known mineral extraction areas.

This proposed rule will further restrict access to domestic minerals and for those minerals that can be accessed, the rule will add an additional layer of permitting complexity, difficulty and uncertainty.

Authors

Lori Lusty, Senior Environmental Engineering Manager, J.R. Simplot Company. Lori is a former board member of the American Exploration and Mining Association. She has overseen mine permitting for Simplot for over 20 years, is an Idaho native and a graduate of Idaho State University.

Alan Prouty, Vice President of Environmental and Regulatory Affairs, J.R. Simplot Company. Alan is on the board of the Idaho Mining Association and the National Mining Association. He has worked in the natural resource area for over 30 years, is an Idaho native and attended Idaho State University and University of Idaho.