MOUNTAIN STATES LEGAL FOUNDATION
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VIA E-MAIL AND SUBMISSION THROUGH EPLANNING.BLM.GOV

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Dear Ms. Foster and others,

On behalf of Mountain States Legal Foundation, and joined by the Wyoming Legislators listed at the end of this letter, we write to comment on the Bureau of Land Management's proposed revisions to the Rock Springs Field Office's Resource Management Plan and the accompanying draft environmental impact statement.

Mountain States is a non-profit, public-interest law firm in Lakewood, Colorado. Since its founding in 1977, Mountain States has used *pro bono* litigation to fight for and restore the rights enshrined in the Constitution. We protect individual liberty, the right to own and use property, the principles of limited and ethical government, and the benefits of free enterprise. Mountain States has fought for farmers, mineral-interest owners, ranchers, recreationists, and others working the land against encroachments upon their rights by the federal government and non-government groups that advocate for a bigger, unlawful role for federal executive-branch actors. For decades, Mountain States has fought against the sorts of unlawful and otherwise unreasonable actions that the Bureau proposes to take in finalizing its revisions to the Rock Springs Plan.

While we understand that Congress requires the Secretary (through the Bureau) to make and revise land-use plans like the Rock Springs Plan, 43 U.S.C. § 1712, and directs the Bureau to consider conservation values among other values, *see, e.g.*, *id.* § 1701(a)(8), the Bureau has proposed revisions that are unlawful and otherwise unreasonable. Congress's requirement to consider conservation values does not justify what the Bureau is proposing to do here: elevate conservation values above all other values and public uses of the planning area, and contort "conservation" into a more stringent and unlawful form of "preservation" or "anti-use" action.

The Bureau proposes to select Alternative B—the "anti-use" alternative—as its preferred land-management pathway forward. *See* Notice of Availability, 88 Fed. Reg. 56,654, 56,654 (Aug. 18, 2023). But pristine preservation is different from conservation, and the Bureau's insistence on re-writing "conservation" as "anti-use," no matter the damage it inflicts on local communities and the Nation, is unlawful under the Federal Land Policy and Management Act—that is, FLPMA.

Unfortunately, the Bureau's insistence on disregarding the law is just one more front in the agency's assault on the public, adding to the Interior's and Bureau's proposals to create "conservation leases" and to revise the onshore oil and gas leasing process to end non-preservation "uses" of federal lands. The Bureau keeps trying to take public lands away from the public.

The proposed revisions to the Rock Springs Plan further the agency's unlawful and otherwise unreasonable approach to public-land management. *First*, the proposed revisions, including the massive expansion of "areas of critical environmental concern," would violate Congress's multiple-use requirement in FLPMA. *Second*, the Bureau has disregarded its duties to cooperate with local authorities. *Third*, the proposed selection of Alternative B relies on outdated information and otherwise violates the National Environmental Policy Act—*i.e.*, NEPA—because it is not a true analysis of competing alternatives. And *fourth*, due to the unique nature of the federal lands in Wyoming in relation to private lands, the proposed revisions to the Rock Springs Plan would also limit private activities on private lands.

The Bureau must end its attacks on Americans and American businesses, and it must stop its campaign to take public lands away from the public. We respectfully request that the Bureau and its Rock Springs Field Office withdraw the proposed revisions to the Rock Springs Plan and start from scratch, with meaningful inclusion of multiple uses on public land, and with real, transparent, and responsive collaboration with the local stakeholders.

The Proposed Revisions Would Violate the Multiple-Use Requirement in FLPMA.

In FLPMA, Congress ordered the Bureau to develop land-use plans that honored the concept of "multiple use." 43 U.S.C. §§ 1701(a)(7), 1712(c)(1). That means the Bureau must manage public lands in a way that is "balanced," and which considers Americans' needs for, among other things, rangeland and mineral development. *Id.* § 1702(c). It is true that balancing those needs with conservation-oriented values can be a "complicated task." *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 690 n.3 (10th Cir. 2009). But the Bureau does not get to ignore those needs.

In its proposed revisions to the Rock Springs Plan, the Bureau acknowledges that it owes a legal duty to incorporate multiple uses. *See, e.g.*, Draft Rock Springs Plan ES-2, 1-1, 2-2, 2-3. Yet in proposing to select Alternative B, which the Bureau concedes will write important uses out of FLPMA and out of the planning area, *see id.* at 4-262, the Bureau announces that it hopes to disregard this legal obligation. The Bureau cannot do that. *E.g.*, 43 U.S.C. § 1701(a)(12). If the Bureau persists in writing multiple uses out of FLPMA and the Rock Springs Plan, then a reviewing court would have to set the revisions aside. *See* 5 U.S.C. § 706(2).

Not satisfied with merely eliminating mining, oil and gas, ranching, renewable energy, and other uses, the Bureau has proposed to greatly increase its use of "areas of critical environmental concern"—or ACECs—to take more lands away. Yes, Congress did authorize the Bureau to prioritize protecting these areas. *See* 43 U.S.C. §§ 1701(a)(11), 1712(c)(3). But in the same breath, Congress also ordered the Bureau to manage "public lands . . . in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands." *Id.* § 1701(a)(12). It may be a "complicated task," *see Richardson*, 565 F.3d at 690 n.3, but that does not give the Bureau *carte blanche* to widely increase ACEC designations as a pretext for ending

the public's uses of federal lands. The designations are not supposed to "change . . . the management or use of public lands." *Id.* § 1711(a). Yet that is what the Bureau is doing.

The Bureau's proposal to make massively larger ACEC designations is a means to take public lands away from the public. The Bureau proposes to designate more than 1.6 million acres (about the same area as the State of Delaware) of public lands as ACECs, which is ***an increase of 1.3 million more acres*** more than the Bureau has designated under the status quo. *See* Draft Rock Springs Plan 4-159. This sweeping proposal would be a complete overhaul and replacement of the current and workable "balanced" approach to multiple uses in the planning area.

The rigidity of ACEC designations adds injury to the public because they are not truly reversible—public land that is designated as an ACEC has a history of staying an ACEC. *See* Karin P. Sheldon & Pamela Baldwin, *Areas of Critical Environmental Concern: FLPMA's Unfulfilled Conservation Mandate*, 28:1 Colo. Nat. Resources, Energy & Envtl. L. Rev. 1, 32 (2017) (analysis of then-current BLM planning regulations). Such a drastic move, especially as a means for writing "multiple use" out of FLPMA, would again require a reviewing court to set the revisions aside. *See* 5 U.S.C. § 706(2); 43 U.S.C. § 1712(c).

Why is the Bureau proposing to do this? The Bureau acknowledges that the status quo, Alternative A, "balances protection of resource values with the use and development of resources." Draft Rock Springs Plan ES-3, 2-3. And there is a workable re-balancing choice, Alternative D, that supports even "greater conservation" than the status quo. *Id.* at ES-3, 2-4. How can the Bureau really justify choosing, for example, ***to eliminate 74% of the oil and gas revenue*** from the planning area, *see id.*at 4-259, when the status quo already protects conservation values?

The Bureau knows that this move would devastate local communities. *See id.* at 4-262. And it will unlawfully write multiple uses out of FLPMA for the planning area. *See* 43 U.S.C. § 1701(a)(12). Yet it appears that the current Administration—through the Bureau, and in defiance of Congress—wants to take a ***Delaware-sized*** piece of public lands away from the public and take needed domestic resources away from the Nation.

The Bureau Has Disregarded Its Duty to Cooperate with Local Authorities.

Congress requires the Bureau to consult with local stakeholders when revising land-use plans and assessing the impacts of its proposed actions. *See, e.g.*, 43 U.S.C. §§ 1701(a)(2), 1712(c)(9). And when local stakeholders supply input, the Bureau "must consider this input." *Richardson*, 565 F.3d at 719. The Bureau says that it has made consultation and coordination efforts "throughout the planning process." Draft Rock Springs Plan ES-7. But that is wrong, and it is no wonder why local stakeholders are bewildered by the Bureau's sudden decision to deviate from the status quo in a way that will devastate local businesses and communities.

The Bureau's cooperation table tells a story that belies the agency's cooperation narrative: starting in 2011 and into July 2020, the Bureau engaged in consultation with local stakeholders and the public, but then the Bureau went silent ***for the past three years***. *See* Draft Rock Springs Plan 5-1–5-2. When the Bureau broke its silence, its new proposal to select Alternative B shocked local stakeholders because it diverged greatly from the prior decade of discussions, *see* Notice of Availability, 88 Fed. Reg. 56,654 (Aug. 18, 2023).

The Bureau's sudden "anti-use" proposal after years of silence, which ignored the prior decade of consultation, raised a public outcry, leading, for example, to the rapid creation by the Wyoming Governor of a task force to consider the proposal. Stakeholders in the planning area and greater Wyoming have "grave concerns" about, among other things, the massive expansion of ACEC lands in Alternative B, because of the negative impacts that the proposal would have on the economy, customs, and culture in the planning area. *See, e.g.*, Governor's Task Force on the Rock Springs Resource Management Plan 20 (Jan. 10, 2024).[1]

Despite the outcry, the Bureau chose to conduct public meetings where it would take no public comment or other input. *See, e.g.*, Wyo. Sec'y of State C. Gray letter to Project Manager 2 (Oct. 3, 2023).[2] To make matters worse—or just to reinforce that local input would go unheeded—the Bureau told the Wyoming Legislature that it was unlikely to change its preferred alternative despite local outcry because the Bureau was beholden to the current Administration's preferences in Washington, D.C. *See* Joint Agric., State & Pub. Lands & Water Res./Select Water Meeting at 35:43–36:04 (min:sec) (Sept. 12, 2023) (as used below, the Legislature Meeting).[3]

Among the listed alternatives, stakeholders in Wyoming overwhelmingly have preferred the status quo—Alternative A—or at most the re-balancing in Alternative D, over the extreme "anti-use" position in Alternative B. *See, e.g.*, Governor's Task Force at 21–40. But the Bureau is not listening. The agency's approach is unlawful and otherwise unreasonable, and it would again require a reviewing court to set the proposed revisions aside. *See* 5 U.S.C. § 706(2); 43 U.S.C. § 1712(c); *Richardson*, 565 F.3d at 719.

The Alternatives Analysis Is Unreasonable and Would Violate NEPA.

When revising land-use plans like the Rock Springs Plan and selecting among alternatives, the Bureau must always act reasonably. *See* 5 U.S.C. § 706(2); *Richardson*, 565 F.3d at 709. To meet that standard, the Bureau must rely on the best available information reasonably available at the time, rather than outdated information. *Colo. Env't Coal. v. Dombeck*, 185 F.3d 1162, 1171–72 (10th Cir. 1999).

Here, however, the Bureau is proposing to take a drastic, sudden, and unpopular approach based on data and information that are at least a decade old. The Bureau admits that it is basing its analysis of alternatives on data collected in 2013. *See* Draft Rock Springs Plan ES-1. Sometimes, the Bureau admits that it is relying on even older data. *See id.* at 3-1 (meteorological data from 2009), 3-7 (wildlife data from 2005). And the Bureau has chosen to keep the data "static" despite the passing decade. *Id.*

The decision is not reasonable. Instead, the Bureau must start over and use more recent data. This is not to say that the Bureau must update the Rock Springs Plan every time that new

[1] The task force says online that it is filing its report as a comment to the proposed revisions.

[2] The Secretary of State has said publicly that it has also submitted this letter as a comment to the proposed revisions.

[3] The video of the meeting is available at https://www.youtube.com/watch?v=HF3JJ8lCgXA, and last visited Jan. 13, 2024.

data become available. *See Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 373 (1989). But the Bureau is proposing to use an unreasonable evidentiary platform to support its choice to devastate local communities. And it is writing important uses, such as oil and gas, mining, ranching, and renewable energy, out of FLPMA and the planning area. Again, the agency's approach would require a reviewing court to set the proposed revisions aside as an unreasonable analysis of the alternatives. *See* 5 U.S.C. § 706(2).

The Bureau's approach goes beyond being unreasonable. None of the businesses threatened by the Bureau's "anti-use" approach would rely similarly on static, decade-old data when trying to make a reasonable business decision. So why persist down this path?

It seems clear what has happened: despite a decade of planning and the State and local stakeholders' clear preference for the status quo or something similar, and based on no new data, the Bureau—once it went under control of appointees in the current Administration—went silent on the stakeholders because it had predetermined the outcome of its alternatives analysis. In the preceding decade, between 2011 and 2020, the Bureau did not once suggest a preference for Alternative B. *See* Legislature Meeting 42:22–42:50 (min:sec). But the Bureau now views its analysis as beholden to a decision that has already been made in Washington, D.C., not even in Wyoming, much less in the Rock Springs Field Office. *See id.* at 35:43–36:04 (min:sec) (Field Office must defer to the Administration), 1:04:40–1:05:19 (hr:min:sec) (decision to deviate from the status quo "wasn't really in the hands of BLM Wyoming").

We understand that in analyzing alternatives, as required by NEPA, federal regulators are allowed to have biases. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1263 (10th Cir. 2011). But when an agency like the Bureau predetermines the outcome of an alternatives analysis, it cannot take a "hard look" at the consequences of its actions. *Id.* at 1264. And a challenge to the course of action here would involve an exhaustive examination of the administrative record, including discovery—even in an administrative-record case—and a court's review of "intra-agency comments, e-mail correspondence, or meeting minutes regarding the proposed action." *See id.* The Bureau's failure to take an honest "hard look" at the alternatives would require setting its proposed revisions aside. *See* 5 U.S.C. § 706(2). If the Bureau finishes its proposed revisions as-is, it would only forestall the inevitable need to start the process from scratch.

The Proposed Revisions Unlawfully Limit Private Actions on Private Property.

There is another issue unique to Western lands, including the planning area, that amplifies the harms posed by the Bureau's proposed revisions. As the Bureau knows, land in this part of the West is often owned in a federal/state/private "checkerboard land pattern," rather than as homogeneously owned expanses in all instances. *See, e.g.*, Draft Rock Springs Plan ES-2, GL-4. The Bureau is sufficiently aware of this phenomenon to define the term "Checkerboard" as "a land ownership pattern of alternating sections of federal-owned lands with private or state-owned lands for 20 miles on either side of a land grant railroad." *Id.* at GL-4. "The checkerboard land ownership pattern . . . creates challenges and concerns for both the BLM and private landowners." *Id.* at 3-32. It has important impacts for businesses engaged, for example, in mineral production, where deposits might be found on differently owned portions of the "checkerboard lands," and access to deposits means crossing ownership boundaries. *See id.* at 3-19.

The result is that stringent "anti-use" actions by the Bureau have an intensifying effect, cutting off access and pragmatic development and operation of uses on private lands within or otherwise neighboring federal lands. That includes the collectively Delaware-sized assembly of lands that the Bureau is proposing to take away from the public as ACECs. The Bureau does not have authority to prohibit private uses on private lands, again showing that the agency's approach would require a reviewing court to set the proposed revisions aside. *See* 5 U.S.C. § 706(2).

Conclusion

Considering these deficiencies, we respectfully ask the Bureau to stop its current proposed actions and start over on the revisions to the Rock Springs Plan. By starting from scratch, the Bureau can better take actual account of local priorities and—hopefully—avoid the devastating, unlawful, and unreasonable effects that the proposal would have on businesses, local communities, and the resource needs of the Nation.

We thank you for the opportunity to comment on this important matter.

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