COMMENTS ON THE BUREAU OF LAND MANAGEMENT'S PROPOSED RESOURCE MANAGEMENT PLANNING RULES

81 Fed. Reg. 9674 (Feb. 25, 2016)

Docket BLM-2016-0002

Submitted by:
Big Horn County, Wyoming; Chaves County, New Mexico; Custer County, Idaho;
Garfield County, Colorado; Kane County, Utah; Modoc County, California;
Doña Anna Soil and Water Conservation District, New Mexico;
Winkelman Natural Resource Conservation District, Arizona; _____

May 25, 2016

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The 2.0 Coalition[1] hereby submits its comments on Resource Management Planning Rules, 81 Fed. Reg. 9674 (Feb. 25, 2016), issued by the Bureau of Land Management (BLM) (the Proposed Rules). The 2.0 Coalition maintains that the Proposed Rules are defective and, if adopted, would violate the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq. In particular, the Proposed Rules would rewrite FLPMA Section 202(c)(9), codified at 43 U.S.C. § 1712(c)(9), and undermine the role of States and local governments in public land use inventory, planning and management. In short:

- Because of the importance of the public lands to western states and, in particular, rural areas and their economies, FLPMA Section 202(c)(9) requires meaningful **coordination** by the BLM with State and local governments with respect to land use inventory, planning, and management activities.

- In addition, FLPMA Section 202(c)(9) authorizes the elected and appointed officials of State and local governments to **furnish advice** to the BLM concerning the development and revision of land use guidelines, land use rules, and land use regulations for the public lands within their respective States.

- FLPMA Section 202(c)(9) also requires the BLM to provide State and local governments **meaningful involvement** in the development of BLM land use programs, land use regulations, and land use decisions for public lands.

- Finally, under FLPMA Section 202(c)(9), land use plans adopted by the BLM must be **consistent** with State and local plans to the maximum extent possible, unless FLPMA or other federal law requires otherwise. Furthermore, the BLM must assist in resolving, to the extent practical, inconsistencies between federal land use plans and State and local government plans.

As shown below, the Proposed Rules would marginalize these important requirements, essentially placing States and local governments in the same position as the general public. Thus, a person residing hundreds or even thousands of miles from the planning area would have

[1] The 2.0 Coalition is a coalition of western rural counties and special districts. Its members are: Big Horn County, Wyoming; Chaves County, New Mexico; Custer County, Idaho; Garfield County, Colorado; Kane County, Utah; Modoc County, California; Doña Anna Soil and Water Conservation District, New Mexico; Winkelman Natural Resource Conservation District, Arizona; _____.

essentially the same rights as local governments, whose citizens and economies depend on the use of public lands. Clearly this was not what Congress envisioned when it enacted FLPMA.

In addition, the BLM is proceeding to overhaul its rules governing land management planning in violation of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332, the rules implementing NEPA issued by the Council on Environmental Quality (CEQ), 40 C.F.R. § 1500.1 *et seq.*,, and the Department of the Interior, 43 C.F.R. § 46.10 *et seq.*, by purporting to rely on a categorical exclusion from NEPA. Thus, the BLM is refusing to prepare an environmental impact statement or even an environmental assessment. Instead, the agency claims that the Proposed Rules are "entirely procedural in nature" and are categorically excluded from NEPA review. This is nonsense. The Proposed Rules will significantly alter the manner in which the public lands are used and managed by, among other things, altering FLPMA's multiple use mandate and incorporating a panoply of secretarial orders, directives and policies (which themselves were not subject to NEPA review or public review and comment).

Remarkably, the BLM's sister agency, the U.S. Forest Service, recently issued a programmatic environmental impact statement prior to adopting its current planning rules for the National Forest System. *See* U.S. Department of Agriculture Forest Service, National Forest System Land Management Planning, Final Programmatic Environmental Impact Statement (2012).[2] The Forest Service recognized the significance of its planning rules and conducted an extensive and open public process, enhanced by a science forum, regional and national roundtables, national and regional tribal roundtables, Tribal consultation meetings, and national and regional public forums.[3] Here, by contrast, it is apparent that the BLM intends to ignore both the NEPA process and its legal obligation to coordinate under FLPMA Section 202(c)(9) in order to adopt the Proposed Rules as quickly as possible.

There are other aspects of the Proposed Rules that are defective and, in some cases, would effectively rewrite FLPMA. The BLM has proposed to eliminate several important and required components of land use plans and recast them as "implementation strategies" that will function as rules governing land uses and land management decisions without compliance with FLPMA, NEPA, and the Administrative Procedure Act. In addition, the BLM's proposed changes to the planning assessment process represent a significant shift away from State and local concerns and traditional multiple use principles, and instead would emphasize national policies of questionable validity and land preservation. The BLM also is proposing to allow land planning and management decisions to be based on questionable scientific information in violation of the Information Quality Act and the BLM's Information Quality Guidelines. Lastly, the BLM's proposed narrowing of the requirements for protesting a land use plan or plan amendment will limit the ability of the public to challenge the BLM on many issues involved in the development of land use plans. Each of these issues is discussed in greater detail in the comments below. But it is apparent that the Proposed Rules are intended to effectuate a dramatic

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[2] Available at http://www.fs.usda.gov/detail/planningrule/home/?cid=stelprdb5349164 (visited April 6, 2016).

[3] *See* Collaboration & Public Involvement webpage, available at http://www.fs.usda.gov/main/planningrule/collaboration (visited April 6, 2016).

change in how the public lands are managed and what uses will be permitted, while ignoring NEPA and coordination and consistency review under FLPMA Section 202(c)(9).

I. The Proposed Rules Conflict With FLPMA Section 202(c)(9).

A. The Requirements Imposed by FLPMA Section 202(c)(9).

FLPMA, among other things, requires that the Interior Secretary "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law." 43 U.S.C. § 1732(a). The requirements for the development of land use plans[4] are set forth in FLPMA Section 202, 43 C.F.R. § 1712. Subsection (c)(9) of this section imposes coordination and consistency requirements on the Interior Secretary. Specifically, this provision states:

> (9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, . . . and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, [1] to the extent he finds practical, keep apprised of State, local, and tribal land use plans; [2] assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; [3] assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and [4] shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

43 U.S.C. § 1712(c)(9) (reference to "statewide outdoor recreation plans" removed; numbering added for reference purposes).

[4] In its regulations, the BLM refers to "resource management plans" rather than "land use plans." In these comments, the 2.0 Coalition will use the term "land use plans" to be consistent with the terminology used in FLPMA, unless quoting a BLM regulation or other agency document.

On its face, this provision imposes a number of different and overlapping requirements and obligations on the Interior Secretary (and, therefore, the BLM) with respect to coordinating with State and local governments and maintaining consistency with plans, programs and policies of State and local governments. These obligations are far broader than acknowledged in the Proposed Rules and, as a result, the Proposed Rules, if adopted, would violate FLPMA Section 202(c)(9).

This provision is based on settled law recognizing that the States and local governments are "free to enforce [their] criminal and civil laws on federal land so long as those laws do not conflict with federal law." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)); *see also People ex rel. Deukmejian v. Cty. of Mendocino*, 36 Cal. 3d 476, 491, 683 P.2d 1150, 1160 (1984) (holding that county regulation of aerial spraying of pesticides was not preempted by federal law). Even though the public lands are owned by the United States, States and local governments have the authority to plan for and regulate activities occurring on the public lands, unless such regulation is preempted by a federal law. FLPMA Section 202(c)(9) explicitly recognizes and protects that authority in several different ways.

1. 43 U.S.C. § 1712(c)(9) (first sentence)—Duty to Coordinate.

First, the BLM must "coordinate" the agency's "land use inventory, planning, and management activities" with "the land use planning and management programs of the States and local governments within which the lands are located." 43 U.S.C. § 1712(c)(9) (first sentence). In coordinating, the BLM must consider the "policies of approved State and tribal land resource management programs." *Id.* The verb "coordinate" means "to put in the same order or rank" or, alternatively, "to bring into common action, movement, or condition: HARMONIZE." Merriam-Webster's Collegiate Dictionary 255 (10th ed. 2000). In other words, the requirement to "coordinate" requires that the BLM treat as the land use planning and management activities of State and local governments as equal in rank and *harmonize* its land use inventory, planning, and management activities with those the activities of State and local governments "to the extent consistent with the laws governing the administration of the public lands."

The plain language of FLPMA Section 202(c)(9) indicates that the requirement to coordinate is significantly broader than simply coordinating BLM and local land use plans. Instead, coordination should occur with respect to all BLM "land use inventory, planning, and management activities" and all State and local government "land use planning and management programs." *Id.* Thus, coordination is required, for example, in connection with assessing the resource, environmental, ecological, social, and economic conditions prior to developing land use plans and other land planning and management guidance; developing and identifying the policies, guidance, strategies and plans for consideration in developing land use plans; formulating land use and resource management alternatives; and developing management measures that are used to implement land use plans following their adoption (called "implementation strategies" in the Proposed Rules).

As noted, BLM inventory, planning, and management activities do not have to be coordinated with State and local governments if doing so would is inconsistent with "*the laws governing the administration of the public lands*." *Id.* (emphasis added). Thus, on its face, this

limitation applies when a federal *law* governing public land management, such as FLPMA, conflicts with a State or local government land use planning and management program. Federal laws that do not address the "administration of the public lands" are irrelevant to this limitation, however. Likewise, agency regulations, directives, policies, and guidance documents are irrelevant because they are not laws. Consequently, the existence of Secretarial orders, regulations, policies, directives, and similar agency guidance documents do not limit the BLM's obligation to coordinate, with the objective of resolving inconsistencies. Likewise, the existence of Secretarial and agency policies and directives do not serve as a basis to avoid ensuring consistency.

Finally, agency regulations, directives, policies, and guidance documents, such as the Proposed Rules, Secretarial orders and directives, the BLM Land Use Planning Handbook, the Interior Department Manual, and the Climate Change Adaptation Plan, are themselves subject to coordination under FLPMA Section 202(c)(9) to the extent such documents provide substantive direction for land use planning and management. Under proposed § 1610.4(a)(2), these documents will be identified as part of the planning assessment and used to develop the resource management plan. Coordination must occur in connection with developing these documents in order to comply with the requirements of FLPMA.

2. 43 U.S.C. § 1712(c)(9) (second sentence)—Implementation Requirements.

Second, "in implementing this directive," i.e., the requirement to coordinate, the BLM must do four things:

1. "to the extent [the Secretary] finds practical, keep apprised of State, local, and tribal land use plans;"

2. "assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands;"

3. "assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and"

4. "provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands."

43 U.S.C. § 1712(c)(9) (second sentence).

The first and third requirements are qualified by the phrase "to the extent [the Secretary] finds practical." The word "practical" has several meanings, but the one that makes sense in this context is "capable of being put to use or account: USEFUL." Merriam-Webster's Collegiate Dictionary 912 (10th ed.). In most cases, it will be useful to the BLM to perform requirements 1 and 3 because each requirement must be satisfied to properly complete the coordination process. Moreover, the performance of each requirement is necessary for the BLM to fulfill its obligation

to ensure that BLM land use plans are "consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act," which appears in the final sentence of FLPMA Section 202(c)(9).

Requirement 2—giving consideration to State, local, and tribal plans that are germane in the development of land use plans for public lands—logically follows from the basic obligation to coordinate as well as the consistency requirement in the final sentence of FLPMA Section 202(c)(9). Obviously, meaningful coordination requires that the BLM carefully consider State and local land use plans that pertain to public land uses or that may be impaired by a BLM land use plan containing conflicting resource use designations or implementation strategies. Consequently, this requirement is not subject to any limitation.

Additionally, Requirement 4—requiring that the BLM provide "meaningful public involvement" for State and local government officials "in the development of land use programs, land use regulations, and land use decisions for public lands"—is not qualified by the phrase "to the extent he finds practical." Requirement 4 also applies broadly to a range of BLM actions that affect the planning and management of public lands. Thus, State and local governments must be provided "meaningful public involvement . . . in the development of land use programs, land use regulations, and land use decisions for public lands." 43 U.S.C. § 1712(c)(9) (second sentence). Again, this includes agency directives, policies, and guidance documents (e.g., Interior Department and BLM handbooks and manuals), which, as discussed above, also are subject to coordination. Coordination must take place before these documents are used in connection with land use planning and management, including the development of land use plans.

3. 43 U.S.C. § 1712(c)(9) (third sentence)—Advice to the Secretary.

The next sentence of FLPMA Section 202(c)(9) specifically authorizes "such officials," i.e., "State and local government officials, both elected and appointed," to advise the Interior Secretary (and BLM as the Secretary's delegated authority) on the "development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State." This sentence requires government-to-government coordination between State and local officials and the Secretary (or the BLM Director) on land use plans, guidelines, and regulations affecting the management and use of the public lands, thereby ensuring that the concerns and recommendations of State and local governments are recognized and addressed. This process allows the BLM to coordinate its own planning and management activities and maintain consistency with State and local governments to the greatest extent possible, including the BLM's development of rules, policies, and guidelines that apply when land use plans are developed and implemented.

4. 43 U.S.C. § 1712(c)(9) (fourth sentence)—Consistency with State and Local Plans.

The fourth and concluding sentence of FLPMA Section 202(c)(9) is extremely important. This sentence mandates that BLM land use plans "be consistent with State and local plans *to the maximum extent* [the Secretary] finds consistent with Federal law and the purposes of this Act" (emphasis added). This obligation is called the "consistency requirement" and is intended to

ensure that BLM and local land use plans are consistent, unless a federal law or the purposes of FLPMA itself conflict with and, therefore, preempt the provision in the local land use plan.

The consistency requirement is related to and follows logically from the three previous sentences of this provision. As discussed, the BLM must coordinate its land use inventory, planning, and management activities with State and local governments and consider "the policies of approved State and tribal land resource management programs" (first sentence); keep apprised of State and local land use plans, assure that these plans are considered in the development of land use plans for public lands, and affirmatively assist in resolving inconsistencies between "Federal and non-Federal Government plans" to the extent practical (second sentence); and receive advice from State and local governments on "the development and revision of land use plans."

Based on this coordination, the BLM must identify and consider potential conflicts with State and local government planning documents, and ensure that these conflicts are avoided or resolved during the planning process to the maximum extent practical. This means that coordination should begin early in the land planning process so that potential conflicts and inconsistencies can be immediately identified and taken into account as the land use plan is developed. This ensures that consistency with State and local planning is maintained or, at worst, conflicts are minimized through coordination.

Boiled down, FLPMA Section 202(c)(9) imposes a number of specific requirements on the Secretary (i.e., the BLM) to ensure that State and local governments, as well as Indian tribes, play an important role in the planning and management of the public lands. Unfortunately, these requirements have been eliminated or marginalized in the Proposed Rules. The discussion that follows identifies portions of the Proposed Rules that conflict with FLPMA Section 202(c)(9) and, if adopted, would be unlawful.

B. § 1610.3–1 Coordination of Planning Efforts.

1. § 1610.3–1(a) Objectives of Coordination.

This proposed rule improperly narrows the scope of coordination under FLPMA Section 202(c)(9) by requiring coordination "to the extent consistent with Federal laws *and regulations applicable to public lands, and the purposes, policies and programs of such laws and regulations*." 43 C.F.R. § 1610.3–1 (proposed) (emphasis added). As explained above, FLPMA Section 202(c)(9) states that coordination is required "to the extent consistent with the laws governing the administration of the public lands." It does not refer to "regulations," or to the "purposes, policies and programs of such laws." Instead, regulations, policies and programs are themselves subject to coordination to the extent they affect the planning and management of the public lands. Consequently, the phrase "*and regulations applicable to public lands, and the purposes, policies and programs of such laws and regulations*" should be removed. The statutory language "to the extent consistent with the laws governing the administration of the public lands" should be used instead to comply with FLPMA.

Proposed § 1610.3–1 also identifies five "objectives" of coordination. These should not be identified as "objectives" and should instead be identified as ***requirements*** of coordination to comply with FLPMA Section 202(c)(9), as discussed above.

2. § 1610.3–1(b) Cooperating Agencies.

The next subsection of proposed §1610.3-1 is called "cooperating agencies" and addresses the participation of cooperating agencies in the NEPA process associated with adopting the land use plan. As a preliminary matter, the 2.0 Coalition supports the general policy reflected in this section (as well as in current §1610.3-1(b) and in the Interior Secretary's NEPA rules) to invite eligible governmental entities, including local governments, to participate in the NEPA process as cooperating agencies. Our concerns with this section relate the improper substitution of cooperating agency status for government-to-government coordination in accordance with FLPMA Section 202(c)(9).

Under NEPA, cooperating agencies work under the direction of the lead agency—here, the BLM—to satisfy the procedural requirements imposed by NEPA. *See*, *e.g.*, 40 C.F.R. § 1501.6(b) (describing the duties of cooperating agencies); CEQ Chairman James Connaughton, Memorandum for the Heads of Federal Agencies, Subject: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Jan. 30, 2002) (discussing factors to consider in determining whether State or local governments are capable of participating in the NEPA process as cooperating agencies and the circumstances under which they may be terminated).[5] Chairman Connaughton's Memorandum cautions that "cooperating agency status under NEPA is not equivalent to other requirements calling for an agency to engage in other governmental entity in a consultation or ***coordination*** process . . . ." *Id*. at p. 1, n. 1(emphasis added).

The Memorandum also contains a list of factors to be used in determining whether to invite, decline or end cooperating agency status. These factors include:

- Does the cooperating agency understand what cooperating agency status means and can it legally enter into an agreement to be a cooperating agency?
- Can the cooperating agency participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process?
- Can the cooperating agency provide resources to support scheduling and critical milestones?
- Does the cooperating agency provide adequate lead-time for review and do the other agencies provide adequate time for review of documents, issues and analyses?

[5] Available at http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-CoopAgenciesImplem.pdf (visited April 5, 2016).

- Can the cooperating agency(s) accept the lead agency's final decisionmaking authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action? For example, is an agency unable or unwilling to develop information/analysis of alternatives they favor and disfavor?

Thus, it apparent that the role and duties of a cooperating agency differ significantly from, and cannot be used as substitute for, the requirements for coordination (and plan consistency) imposed by FLPMA Section 202(c)(9).

The Interior Secretary has adopted regulations, codified at 43 C.F.R. part 46, to implement NEPA's procedural requirements as well as the Council on Environmental Quality's NEPA regulations. The Secretary's regulations also address the selection of cooperating agencies and their role in the NEPA process, and are generally consistent with Chairman Connaughton's Memorandum. *See* 43 C.F.R. §§ 46.225, 46.230. Among other things, these regulations require that the BLM "work with cooperating agencies to develop and adopt a memorandum of understanding that includes the respective roles, assignment of issues, schedules, and staff commitments so that the NEPA process remains on track and within the time schedule." 43 C.F.R. § 46.225(d).

Moreover, in the case of State and local governments, the memorandum of understanding "must include a commitment to maintain the confidentiality of documents and deliberations" prior to the release of any NEPA document. *Id*. This requirement is problematic. Many local governments cannot effectively coordinate with the BLM if their discussions and any documents exchanged are subject to a strict confidentiality requirement. Elected officials involved in coordination meetings (e.g., county commissioners and supervisors) are required by open meeting laws and similar requirements to coordinate in an open and transparent fashion, including conducting meetings that are open to the public. Furthermore, most States and local governments are subject to public records acts which require disclosure of documents.

The Secretary's regulations also provide that "throughout the development of an environmental document" the BLM will "collaborate, to the fullest extent possible, with all cooperating agencies concerning those issues relating to their jurisdiction and special expertise." 43 C.F.R. § 46.230. Section 46.230 goes on to identify activities that, with the BLM's agreement, cooperating may "help to do." *Id.* These activities are intended to assist the BLM in fulfilling its procedural obligations under NEPA, rather than coordinating on a government-to-government basis on BLM land use inventory, planning, and management activities.

Finally, the BLM's attempt to substitute cooperating agency status for meaningful coordination under FLPMA Section 202(a)(9) places an unfair burden on local governments. Some local governments may be unable to fulfill the obligations of a cooperating agency and decline to become a cooperating agency. In that case, the BLM would be excused from coordinating, which would violate FLPMA Section 202(a)(9). FLPMA does not require State and local governments to become a cooperating agency before the Secretary's obligations to coordinate are triggered.

For these reasons, it would be improper to combine coordination under FLPMA Section 202(c)(9) with the NEPA process. Certainly, local governments that elect to participate

in the NEPA process as cooperating agencies should be invited to do so in accordance with Council on Environmental Quality's guidance and the Interior Secretary's regulations. But participation in the NEPA process as a cooperating agency is not a substitute for government-to-government coordination under FLPMA Section 202(c)(9). Regardless of whether a State or local government participates in the NEPA process as a cooperating agency, the BLM must independently satisfy its obligation to coordinate with that unit of government under FLPMA.

Therefore, proposed § 1610.3-1(b) should be eliminated from proposed § 1610.3 and be renumbered and identified as a separate rule. This will ensure that there is no confusion concerning the BLM's obligation to coordinate with State and local governments land use on the BLM's inventory, planning, and management activities, regardless of whether they elect to participate in the NEPA process as a cooperating agency.

3. § 1610.3-1(c) Coordination Requirements.

Subsection (c) of proposed § 1610.3-1, entitled "coordination requirements," is also unlawful. This subsection begins with the general statement that the "BLM will provide Federal agencies, State and lower governments, and Indian tribes opportunity for review, advise, and suggestions on issues and topics which may affect or influence other agency or other government programs." However, the specific requirements imposed in the balance of this subsection are woefully inadequate and conflict with FLPMA Section 202(c)(9).

As discussed above, the BLM is required to coordinate its "land use inventory, planning, and management activities" pertaining to the public lands "with the land use and planning programs" of local governments. 43 U.S.C. § 1712(c)(9). Among other things, this statutory directive requires the BLM to "assure that consideration is given" to relevant local government plans and programs, to attempt to resolve conflicts and inconsistencies between BLM land use plans and local government land use plans, and to provide local governments with meaningful involvement "in the development of land use programs, land use regulations, and land use decisions for public lands." *Id*. In addition, the BLM must provide a vehicle by which local government officials may furnish advice "with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands."

None of these requirements are addressed in subsection (c). Instead, local governments would be "notified" of the BLM's intention to adopt or amend a land use plan and provided an opportunity to submit comments within the same time periods specified in proposed § 1610.2 for the general public. Thus, the "opportunity for review, advice, and suggestions on issues and topics which may affect or influence other agency or other government programs" is merely the opportunity to comment like members of the public, notwithstanding the plain language of FLPMA Section 202(c)(9).

Notably, the BLM's current rules contain a similar provision, except that it begins with the phrase "In addition to public involvement prescribed in § 1610.2, ..." 43 C.F.R. § 1610.3-1(a) (citing 43 C.F.R. § 1610.2, which governs public participation). Thus the agency's current rules appropriately recognize that more is required under FLPMA in coordinating on land use planning and management than an opportunity to comment like a member of the public. This

textual change clearly demonstrates the BLM's intention to marginalize coordination in violation of FLPMA.

In short, proposed § 1610.3-1, although entitled "coordination of planning efforts," largely ignores the coordination and consistency requirements imposed by FLPMA Section 202(c)(9). As proposed, this rule gives lip service to the objectives of coordination in subsection (a), while eliminating meaningful coordination in the remainder of the rule. Nor is coordination addressed in other portions of the Proposed Rules. These changes show that the BLM's assertions that State and local governments would be given more opportunities to coordinate are nonsense. The agency's goal is, instead, to avoid its coordination obligations in violation of FLPMA.

C. § 1610.3–2 Consistency Requirements.

Proposed § 1610.3–2, entitled "consistency requirements," suffers from the same basic flaw as proposed § 1610.3–1 and would significantly narrow the scope of consistency review. *Compare* 43 C.F.R. § 1610.3–2 (current version).

The proposed rule begins by stating:

> (a) Resource management plans will be consistent with officially approved or adopted land use plans of other Federal agencies, State and local governments, and Indian tribes to the maximum extent the BLM finds practical and consistent with the purposes of FLPMA and other Federal law *and regulations applicable to public lands, and the purposes, policies and programs of such laws and regulations*.

43 C.F.R. § 1610.3–2(a) (proposed) (emphasis added). FLPMA Section 202(c)(9), by contrast, states that BLM land use plans "shall be consistent with State and local plans to the maximum extent he finds consistent *with Federal law and the purposes of this Act*." 43 U.S.C. § 1712(c)(9) (final sentence; emphasis added). This statutory language is significantly narrower than the proposed rule, and does <u>no</u>t include agency regulations, the purposes of other federal laws, or the policies or programs of such laws and regulations. The apparent goal, once again, is to marginalize the requirement that BLM land use plans be consistent with State and local land use plans to the maximum extent permitted under FLPMA and other federal laws governing the administration of the public lands. Therefore, subsection (a) of the proposed rule should be revised to be consistent with FLPMA Section 202(c)(9).

Subsection (a)(1) of proposed § 1610.3–2, which states that the BLM will "to the extent practical" keep apprised of State, local government, and tribal land use plans and give consideration to plans that are germane in development of resource management plans," generally follows requirements 1 and 2 in the second sentence of FLPMA Section 202(c)(9). subsections (a)(2) and (a)(3), however, conflict with the plain language and purposes of FLPMA.

Contrary to the written notice requirement in subsection (a)(2), the BLM should be aware of potential inconsistencies if the agency complies with the requirements of FLPMA Section 202(c)(9). As explained above, the BLM must "coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs

of . . . the States and local governments within which the lands are located." 43 U.S.C. § 1712(c)(9) (first sentence). Furthermore, FLPMA Section 202(c)(9) requires the BLM to "keep apprised of State, local, and tribal land use plans." *Id.* (second sentence). Thus, coordination with State and local governments is an ongoing process. It includes, for example, the BLM's inventory of the planning area and the development of policies and guidelines that will be used in developing land use plans.

In other words, the BLM should be coordinating with State and local governments, as well as Indian tribes, *at the beginning of the planning process* so that the BLM is aware of the land use plans and programs of State and local governments and can take them into account *before* developing a land use plan, including formulating the purpose of statement and need, considering different land management strategies, and developing a reasonable range of alternatives. The BLM's current regulations contain requirements to ensure that this takes places.

For example, under current § 1610.4–4, the Field Manager (i.e., the Responsible Official) must conduct an analysis of the management situation (AMS). This planning step involves an analysis of "the inventory data and other information available to determine the ability of the resource area to respond to identified issues and opportunities." 43 C.F.R. § 1610.4–4. The AMS provides, "consistent with multiple use principles, the basis for formulating reasonable alternatives, including the types of resources for development or protection." *Id.* Notably, factors considered in preparing the AMS include: "Specific requirements and constraints to achieve consistency with policies, plans and programs of other Federal agencies, State and local government agencies and Indian tribes."

Similarly, under current § 1610.3–1(d), State Directors (i.e., the Deciding Officials), in developing guidance to Field Managers (i.e., the Responsible Officials) for the development of land use plans, must:

> (1) Ensure that [guidance to Responsible Officials] is as consistent as possible with existing officially adopted and approved resource related plans, policies or programs of other Federal agencies, State agencies, Indian tribes and local governments that may be affected, ..."
>
> (2) Identify areas where the proposed guidance is inconsistent with such policies, plans or programs and provide reasons why the inconsistencies exist and cannot be remedied; and
>
> (3) Notify the other Federal agencies, State agencies, Indian tribes or local governments with whom consistency is not achieved and indicate any appropriate methods, procedures, actions and/or programs which the State Director believes may lead to resolution of such inconsistencies.

43 C.F.R. § 1610.3–1(d)(1)-(3) (current). These requirements relate to current § 1610.1(a), which provides that Deciding Officials develop guidance for land use plan development "with necessary and appropriate governmental coordination as prescribed by § 1610.3 of this title." 43 C.F.R. § 1610.1(a)(3).

Under the Proposed Rules, by contrast, no coordination will occur during the early stages of the planning process, and with respect to the balance of the process, States and local governments are improperly treated as members of the public and are merely given an opportunity to submit comments. No opportunity for meaningful coordination is provided. This in turn means that the BLM will not consider whether Secretarial and agency policies and directives that are relevant to land use plan development are inconsistent with the land use plans and programs of State and local governments. Consequently, the BLM will not attempt to address these inconsistencies in developing the land use plan. It also means that the land use plans, policies, and programs of local governments will not be considered in subsequent planning steps.

Instead, the BLM is attempting to satisfy its consistency review obligations through the Governor's office, improperly bypassing local governments. Proposed § 1610.3–2(b), entitled "Governor's consistency review," provides that the Deciding Official "will submit to the Governor of the State(s) involved, the proposed resource management plan or plan amendment and will identify *any relevant known inconsistencies with the officially approved and adopted land use plans of State and local governments*" (emphasis added). Under FLPMA Section 202(c)(9), coordination must take place with local governments, and consistency review concerns the those governments' officially approved land use plans, policies, programs. The State's Governor is not authorized to act for counties and other units of local government, which act through their own duly elected officials, and the Governor's position may not be the same as the position of the local government. Indeed, the Governor may have little or no knowledge of the land use plans, policies, and programs of local governments as he does not administer those programs.

In short, this is yet another example of the BLM's attempt to eliminate its obligations under FLPMA Section 202(c)(9) and marginalize the role of local governments in the public land planning and management process. Coordination and consistency review must involve local governments, and cannot be shifted by rule to the Governor or another unit of State government.

D. § 1601.0–5 Definitions.

The BLM has proposed significant definitional changes that would eliminate the definition of "consistency" and change the definition of "officially approved and adopted resource-related (land-use) plans." As explained below, these changes are inappropriate.

"Officially approved and adopted resource related plans" is currently defined as: "plans, policies, programs and processes prepared and approved pursuant to and in accordance with authorization provided by Federal, State or local constitutions, legislation or charters which have the force and effect of State law." 43 C.F.R. § 1601.05(j) (current). This definition is being changed to: "land use plans prepared and approved by other Federal agencies, State and local governments and Indian tribes pursuant to and in accordance with authorization provided by Federal, State or local constitutions, legislation, or charters which have the force and effect of State law." 43 C.F.R. § 1601.05 (proposed). Thus, the words "policies, programs, and processes" would be removed from the definition.

According to the BLM, the "existing definition is inconsistent with § 1610.3–2, which distinguishes between 'officially approved or adopted resource related plans' in existing § 1610.3–2(a) and 'officially approved or adopted resource related policies and programs' in existing § 1610.3–2(b), rather than combining them, such as in the existing definition." 81 Fed. Reg. 9686. The BLM also asserts that this change is consistent with Section 202(c)(9) of FLPMA. *Id*. Neither assertion is correct, however.

The current language in §§ 1610.3–2(a) and 1610.3–2(b) is different for a reason. The former rule provides that BLM "[g]uidance and resource management plans and amendments to management framework plans shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian tribes . . . ." 43 C.F.R. § 1610.3–2(a) (current). The latter rule provides that *"[i]n the absence of* officially approved or adopted resource-related plans of other Federal agencies, State and local governments and Indian tribes, [BLM] guidance and resource management plans shall, to the maximum extent practical, be consistent with officially approved and adopted resource related policies and programs of other Federal agencies, State and local governments and Indian tribes." 43 C.F.R. § 1610.3–2(b) (current) (emphasis added). In other words, § 1610.3–2(a) applies when there is an officially approved or adopted land use plan, while § 1610.3–2(b) applies in the absence of such a plan to officially approved and adopted policies and programs.

Thus, the current definition of "officially approved and adopted resource related plans" properly refers to "plans, policies, programs and processes," and is not limited to "plans." This is necessary to ensure that the coordination and consistency requirements of Section 202(c)(9) of FLPMA are satisfied. The BLM is not free to ignore policies and programs adopted by a State or local government, or by another federal agency or Indian tribe, simply because they are not labeled "land use plan." This would elevate form over substance: BLM land use plans should be consistent with officially approved and adopted policies and programs of State and local governments, as well as land use plans. Moreover, the change also ignores the broad language employed by Congress in Section 202(c)(9), which refers to coordination on "land use planning and management programs of other Federal departments and agencies and of the States and local governments" in its first sentence.

The BLM also would eliminate the definition of "consistent." Currently, "consistent" is defined at § 1601.05(c) as: "*Consistent* means that the Bureau of Land Management plans will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans, or in their absence, *with policies and programs*, subject to the qualifications in section 1615.2 of this title" (second emphasis added). Thus, the current definition of "consistent" dovetails with the definition of "officially approved and adopted resource related plans." The BLM's rationale for eliminating the definition of "consistent" is that the "definition is unnecessary as this is commonly used terminology." 81 Fed. Reg. 9685. In reality, however, this definition is being removed because it refers to "policies and programs."

Boiled down, by changing the definition of "officially approved and adopted resource related plans" and eliminating the definition of "consistency," the BLM would eliminate its existing obligation to consider in their planning process the "policies, programs and processes" of local governments and the requirement to adhere to the terms, conditions, and decisions of

local plans, or their policies and programs. Local governments frequently rely on policy resolutions, ordinances, and similar decision documents that are adopted and approved as a part of their governing process. Consequently, while a formal "plan" may not exist, there may be officially adopted policies and programs that apply to public lands within their jurisdiction. Under the Proposed Rules, the BLM would be free to ignore these duly adopted land use policies and programs, which would violate the purpose of Section 202(c)(9) of FLPMA.

In short, these proposed definitional changes indicate either that the BLM does not understand how local governments function, or that the agency is attempting to diminish its accountability during the coordination and consistency review process. Regardless, the current definitions should be retained to ensure that the purpose of FLPMA Section 202(c)(9) is properly effectuated.

E. Coordination and Consistency Review on Implementation Strategies.

One of the most significant changes in the Proposed Rules is the removal of "implementation strategies" from the land use plan. As explained in the Proposed Rules, the BLM "would distinguish between the planning-level management direction that guides all future management decisions (plan components) and the information that may be included with a resource management plan that describes how the BLM intends to implement future actions consistent with the planning-level management direction (implementation strategies)." 81 Fed Reg. 9682. The former—"plan components"—would be included in the land use plan and be subject to coordination and consistency review (as well as NEPA). The "implementation strategies," by contrast, may be mentioned in the land use plan but would not be part of the plan and could be revised without a plan amendment or any coordination. *See* 43 C.F.R. § 1610.1–3(c) (proposed).

Given that "implementation strategies" include "management measures," it would be unlawful to exempt them from coordination and consistency review. "Management measures" consist of "potential action(s) the BLM may take in order to achieve the goals and objectives of the resource management plan." 43 C.F.R. § 1610.1–3(a) (proposed). They are broadly defined as including "resource management practices, best management practices, standard operating procedures, provision for the preparation of more detailed and specific plans, or other measures as appropriate." *Id.* Therefore, "implementation strategies" are critical to the management of the public lands.

As explained above, FLPMA Section 202(c)(9) requires the BLM to "coordinate the land use inventory, planning, and ***management activities*** of or for such lands" with the "land use planning and management programs of . . . the States and local governments within which the lands are located." 43 U.S.C. § 1712(c)(9) (emphasis added). Clearly, "management measures" fall squarely within the scope of this requirement. The BLM also is required to "provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands." *Id.* This requirement applies to a broad range of BLM actions that affect the planning and management of public lands, including the implementation of particular management measures for particular land uses. In addition, State and local government officials "are authorized to furnish advice to the Secretary with respect to the development and revision of

land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State." *Id.* "Management measures" fall within this requirement to the extent that they establish requirements for future land uses on public lands.

Given this plain language, "implementation strategies" that affect land uses under the BLM's plan are subject to coordination and consistency review under FLPMA Section 202(c)(9). These requirements also apply to any updates or revisions. Coordination must take place before these implementation strategies may be used in connection with any land use management activities, and a consistency review must be conducted in the event of any potential conflicts with State and local government plans and programs. The separation of the "*management* measures" from the "resource *management* plan" they implement does not eliminate FLPMA's requirements. Once more, the BLM is attempting to marginalize its coordination and consistency obligations.

F. Additional Changes Needed to Comply with FLPMA Section 202(c)(9).

As the foregoing discussion indicates, the coordination and consistency requirements imposed by FLPMA Section 202(c)(9) would be significantly weakened under the Proposed Rules. The opportunities for coordination will be reduced, local governments will be reduced to commenting like members of public, and inconsistencies between land use plans and related planning guidance documents will be ignored until late in the planning process, if they are addressed at all. In short, as written, the Proposed Rules would violate FLPMA.

Consequently, a number of changes to the Proposed Rules are needed to comply with FLPMA Section 202(c)(9), in addition to those discussed above. This section will identify specific provisions and provide language that can used to ensure compliance with FLPMA.

1. Early Coordination with Affected State and Local Governments.

a. Early Identification of State and Local Land Use Plans and Programs, and Potential Conflicts.

As discussed above, coordination should occur at the beginning of the planning process to ensure early identification of State and local land use plans and programs and the potential for conflicts that may require consistency review. Conflicts between BLM and State and local government plans and programs can be avoided or minimized if these plans and programs are identified and considered at the beginning of the process. This is simply a matter of common sense, and is supported by the requirements imposed by FLPMA Section 202(c)(9), discussed above. This should occur after the selection of the Deciding Official (who would be responsible for coordinating and ensuring consistency) and in conjunction with the determination of the planning area, which may result in inconsistencies, particularly if the proposed planning area does not track existing resource area boundaries or includes a significant amount of additional public land (e.g., a cross-state planning area). Before determining the appropriate planning area, coordination with affected State and local governments should occur. This obvious requirement has been ignored in the Proposed Rules.

b. Coordination on Inventory and Related Information.

Early coordination should occur on the BLM's inventory to ensure its accuracy and consistency with State and local government planning information. Under FLPMA Section 201(a), the BLM is required to "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values . . . . This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values." 43 U.S.C. § 1711(a). Notably, FLPMA Section 202(c)(9) specifically mandates coordination on the inventory maintained by the BLM. This is an important process step because the inventory provides the underpinning for the development and amendment of land use plans under FLPMA Section 202.

For example, the preamble to the Proposed Rules explains that the BLM has developed "Rapid Ecoregional Assessments" (REAs) in the western United States. 81 Fed. Reg. 9680. As the BLM states, REAs are developed at a "landscape-scale" and cover "eco-regions" and other vast areas. Moreover, as their title indicates, REAs are by design prepared "rapidly," with little or no ground-truthing, by agglomerations of public and private entities—some of which have their own agendas for the management of the public lands.[6] Consequently, the use of REAs in the land planning process raises serious questions, such as whether REAs comply with FLPMA's express direction that *the Secretary* "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values."

In any case, if REAs and similar "landscape-scale" studies, reports, and documents are used as a basis for land use planning, coordination with State local governments is clearly necessary. State and local governments, particularly rural counties and districts whose citizens and economies depend on the use of public lands, may have superior information on local resource conditions and values and, in addition, can effectively critique more general, "landscape-scale" reports and information, which are likely to contain errors or produce distortions when applied on a local scale. Presumably, this is why Congress has required coordination on the BLM's inventory in FLPMA Section 202(c)(9). Under the Proposed Rules, however, there is no opportunity for coordination with State and local governments on the inventory in advance of land use plan development. This is a serious oversight that should be corrected.

c. Coordination on Secretarial and BLM Policies and Direction.

Early coordination is needed on agency policies, guidance, and similar direction that will be used in developing land use plans to avoid serious problems. As discussed above, the BLM's existing regulations require, in accordance with FLPMA, that land use plan guidance be "as

[6] According to the preamble, "Landscape Conservation Cooperatives" are a network of 22 public-private partnerships launched under Secretarial Order 3289 to improve the integration of science and management to address climate change and other landscape-scale issues." 81 Fed. Reg. 9681. To our knowledge, these entities, to which the Interior Secretary has delegated her inventory responsibilities under FLPMA Section 201(a), have not engaged in coordination with State and local governments in accordance with FLPMA Section 202(c)(9).

consistent as possible with existing officially adopted and approved resource related plans, policies or programs of other Federal agencies, State agencies, Indian tribes and local governments that may be affected." 43 C.F.R. § 1610.3–1(d)(1). Under the current regulations, the BLM is also required to identify "areas where the proposed guidance is inconsistent with such policies, plans or programs," explain why such inconsistencies exist, "and indicate any appropriate methods, procedures, actions and/or programs" that may resolve such inconsistencies. *Id.* at § 1610.3–1(d)(2)-(3).

Under the Proposed Rules, however, these requirements would be eliminated. This is particularly problematic because the Proposed Rules and the preamble discussion indicates that a plethora of recent policies, guidance, and direction will be used to develop land use plans. *See, e.g.*, 43 C.F.R. §§ 1601.4(a), 1601.1–1 (proposed); 81 Fed. Reg. 9678-79 (discussing "related executive and secretarial direction" and the "Planning 2.0 initiative"). It is apparent from the Proposed Rules that land use planning and management will be driven to a great extent by these policies and directives. These include, for example, "Secretarial Order 3289–Addressing the Impacts of Climate Change on America's Water, Land, and Other Natural and Cultural Resources" (issued Sept. 14, 2009; amended Feb. 22, 2010), the Interior Department Manual chapter on climate change policy (issued Dec. 20, 2012) (523 DM 1), and "The Department of the Interior Climate Change Adaptation Plan for 2014" (Climate Change Adaptation Plan), which provides guidance for implementing 523 DM 1. According to the preamble, the latter document "directs the DOI bureaus and agencies to strengthen existing landscape-level planning efforts; use well-defined and established approaches for managing through uncertainty, such as adaptive management; and maintain key ecosystem services, among other important directives." 81 Fed. Reg. 9679.

The preamble identifies other policies and guidance documents that affect land use planning and management, such "Secretarial Order 3330—Improving Mitigation Policies and Practices of the Department of the Interior" (issued Oct. 31, 2013), which ordered the development of an Interior Department-wide mitigation strategy, a report called "A Strategy for Improving the Mitigation Policies and Practices of The Department of the Interior" (April 2014), and the Interior Department Manual chapter on departmental mitigation policies and requirements (revised Oct. 2015) (600 DM 6).

According to the preamble, the Proposed Rules are being adopted in order to comply with these new policies and guidance documents and to facilitate their use in planning and management of the public lands. For example, the BLM states:

> Collectively, these directives identify the importance of science-based decision-making; landscape-scale management approaches; adaptive management techniques to manage for uncertainty; and active coordination and collaboration with partners and stakeholders. *The BLM believes that changes to the resource management planning process will assist in effectively implementing these directives.*

81 Fed. Reg. 9679 (emphasis added). And under proposed § 1610.4(a)(2), these documents will be identified as part of the planning assessment and used to develop the land use plan.

The Interior Secretary, BLM Director, and other senior officials are authorized to issue policies and direction to the BLM concerning the planning for and management of the public lands.[7] However, in doing so they are subject to the coordination and consistency requirements of FLPMA Section 202(c)(9). As discussed above, Secretarial and agency regulations, directives, policies, and guidance documents, such as the policies and directives discussed in the preamble to the Proposed Rules, are themselves subject to the requirements of FLPMA Section 202(c)(9) to the extent such documents provide substantive direction for public land planning and management. Under these circumstances, early coordination should occur in connection with these policies and directives to minimize conflicts with State and local government land use planning and management programs, and to ensure that the development of the land use plan is not undermined because the plan relies on policies and direction that violate FLPMA's coordination and consistency requirements.[8]

To address this problem, subsection (a)(1) of proposed § 1610.1-1(a) should be revised to add a new subsection (a)(3), as follows:

> *(3) Guidance provided by the Secretary, Director and deciding official is subject to section 202(c)(9) of FLPMA, including coordination with affected Federal agencies, State agencies, local governments, and Indian tribes. Such guidance will be as consistent as possible with officially approved and adopted land use plans, and the policies, and programs contained therein, of other Federal agencies, State agencies, local governments, and Indian tribes that may be affected. The Deciding Officer will identify areas where the guidance may be inconsistent with such plans, policies, and programs, notify the other Federal agencies, State agencies, local governments, and Indian tribes with whom consistency is not achieved, and indicate any appropriate methods, procedures, actions and/or programs by which the such inconsistencies may be resolved.*

This provision's language is modeled after current 43 C.F.R. §§ 1610.3–1(d) and 1610.3–2(d). It will ensure that policy and other direction established through Secretarial, Director, or Deciding Official approved documents comply with FLPMA Section 202(c)(9) at the beginning of the plan development process, avoiding later disputes, delays, and possible plan invalidity.

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[7] A number of these policies and directives appear to constitute rules that were adopted without observance of the rulemaking procedures required by Administrative Procedures Act. Under that Act, a "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4). In such case, these policies and directives are unlawful.

[8] To the 2.0 Coalition's knowledge, in issuing these policies and directives the coordination requirements imposed by FLPMA Section 202(c)(9) have been ignored, which also raises serious questions about whether these documents can be considered in connection with developing land use plans and subsequent implementation strategies.

2. Coordination With State and Local Governments on Key Planning Steps.

Once the land use plan development process begins, government-to-government coordination should continue to comply with FLPMA Section 202(c)(9) and to ensure plan consistency to the maximum extent practical. Ideally, coordination should be an ongoing process, under which the authorized officials of affected States and local governments, as well other Federal agencies and Indian tribes, regularly communicate as the land use plan is developed. As discussed previously, FLPMA Section 202(c)(9) provides that the BLM "shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands," and further that State and local government officials "are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State." 43 U.S.C. § 1712(c)(9). As explained above, the Proposed Rules ignore these requirements.

To ensure that there is no confusion, the 2.0 Coalition believes that the coordination and consistency requirements imposed by FLPMA Section 202(c)(9) should be specifically recognized and addressed throughout the planning process. The changes provided below take the approach of incorporating the coordination and consistency requirements into the Proposed Rules where appropriate.

a. Proposed § 1610.1-2 Plan Components.

This section should be revised to add at its conclusion the following new subsection:

> *(d) The BLM will, to the extent consistent with the laws governing the administration of the public lands, coordinate the plan components, including any amendment or revision, with the land use planning and management programs of the States, local governments, and Indian tribes which may be affected by the resource management plan and will further ensure that the plan components will be as consistent as possible with officially approved and adopted land use plans, and the policies, and programs contained therein, of other Federal agencies, State agencies, local governments, and Indian tribes in accordance with section 202(c)(9) of FLPMA.*

The reasons for adding this provision are largely self-explanatory. It simply ensures that as land use plans are developed, the BLM will engage in coordination with affected States, local governments and Indian tribes, including coordination on important plan components such as (1) standards to mitigate undesirable effects to resource conditions; (2) consideration of resource, environmental, ecological, social, and economic factors; (3) planning designations; and (4) resource use determinations, with the goal of ensuring meaningful government-to-government communication on plan development issues and consistency with State and local land use plans.

b. Proposed § 1610.1–3 Implementation Strategies.

This section should be revised to add at its conclusion the following new subsection:

(d) The BLM will, to the extent consistent with the laws governing the administration of the public lands, coordinate the development and revision of implementation strategies, including, but not limited to, resource management practices, best management practices, and standard operating procedures, with the land use planning and management programs of other Federal agencies and States, local governments, and Indian tribes which may be affected thereby and will further ensure that the implementation strategy will be as consistent as possible with officially approved and adopted land use plans, and the policies, and programs contained therein, of other Federal agencies, State agencies, local governments, and Indian tribes in accordance with section 202(c)(9) of FLPMA.

Again, the rationale for adding this provision is largely self-explanatory. It will ensure that State and local governments are able to provide meaningful input on the development of strategies that govern land use plan implementation and ensure that the implementation of such strategies do not result in conflicts with State and local land use plans, thereby violating FLPMA Section 202(c)(9).

c. Proposed § 1610.4 Planning Assessment.

To ensure compliance with FLPMA Section 202(c)(9), several changes should be made to this section. First a new subsection (a)(5) should be added, as follows:

(5) Identify the land use planning and management programs of the other Federal agencies, States, local governments, and Indian tribes within the planning area, including existing officially approved and adopted land use plans, policies, and programs of other Federal agencies, States, local governments, and Indian tribes that may be affected, and any specific requirements and constraints that should be considered to achieve consistency with the policies, plans and programs of other Federal agencies, State and local government agencies, and Indian tribes.

In addition, subsection (d), entitled "planning assessment report," should be revised to state:

(d) *Planning assessment report.* The responsible official will document the planning assessment in a report made available for public review, which includes the identification and rationale for potential ACECs. To the extent practical, any non-sensitive geospatial information used in the planning assessment should be made available to the public on the BLM's Web site. *The report will include a discussion of the land use planning and management programs of the other Federal agencies, States, local governments, and Indian tribes within the planning area, including any officially approved and adopted land use plans, policies, and programs, and the manner in which the responsible official intends to address the coordination and consistency requirements in section 202(c)(9) of FLPMA in developing the resource management plan.*

These changes ensure that the requirements imposed by FLPMA Section 202(c)(9) are identified and addressed in the planning assessment, including the identification of State, local,

and tribal land use plans and programs, potential conflicts with such plans and programs, and requirements and constraints imposed by such plans. Language has been borrowed from current § 1610.4–4, which requires the BLM to identify "[s]pecific requirements and constraints to achieve consistency with policies, plans and programs of other Federal agencies, State and local government agencies and Indian tribes" in the AMS. This will ensure that as plan development progresses, the Deciding and Responsible Officials are aware of potential conflicts and inconsistencies, and are meaningfully coordinating with State and local governments on the land use plan in accordance with FLPMA. These changes also ensure broader public disclosure of any management constraints and potential conflicts that may limit or otherwise influence the BLM's land use plan.

d. Proposed § 1610.5–1 Identification of Planning Issues.

To ensure compliance with FLPMA Section 202(c)(9), subsection (b) of proposed (4) § 1610.5–1 should be revised to add the following:

> (b) The public, other Federal agencies, State and local governments, and Indian tribes will be given an opportunity to suggest concerns, needs, opportunities, conflicts or constraints related to resource management for consideration in the preparation of the resource management plan. The responsible official will analyze those suggestions and other available data and information, such as the planning assessment (see § 1610.4–1), and determine the planning issues to be addressed during the planning process. Planning issues may be modified during the planning process to incorporate new information. The identification of planning issues should be integrated with the scoping process required by regulations implementing the National Environmental Policy Act (40 C.F.R. 1501.7), *and with the coordination and consistency review process required by section 202(c)(9) of FLPMA.*

This revision addresses two different problems. First, it clarifies that the "opportunity to suggest concerns, needs, opportunities, conflicts or constraints related to resource management" is not a substitute for meaningful government-to-government coordination under FLPMA Section 202(c)(9). State and local governments, as well as affected Federal agencies and Indian tribes, certainly are free to submit comments like members of the public. As discussed previously, however, FLPMA Section 202(c)(9) requires far more than the ability to comment on a proposal concerning a BLM land use plan.

Second, the additional language ensures that the coordination and consistency requirements of Section 202(c)(9) of FLPMA are integrated with identification of planning issues and the NEPA scoping process. Thus, issues and concerns raised by State and local governments during coordination, including any constraints imposed by, and potential conflicts with, the policies, plans and programs of other Federal agencies, State and local governments, and Indian tribes will be identified prior to the formulation of resource management alternatives and the preparation of the draft resource management plan.

e. Proposed § 1610.5–2 Formulation of Resource Management Alternatives.

Subsection (a)(1) of proposed § 1610.5–2 should be revised as follows:

> (1) The alternatives developed will be informed by the Director and deciding official guidance (see § 1610.1(a)), the planning assessment (see § 1610.4), ~~*and*~~ the planning issues (see § 1610.5–1), *and coordination with other Federal agencies, States, local governments, and Indian tribes that may be affected by the resource management plan pursuant to section 202(c)(9) of FLPMA*.

Again, this change is intended to ensure that, in developing alternatives, the BLM takes into consideration any issues and concerns raised during coordination under Section 202(c)(9) of FLPMA, including any constraints imposed by, and potential conflicts with, the policies, plans and programs of other Federal agencies, State and local governments, and Indian tribes.

In addition, a new subpart should be added to subsection (b) of proposed § 1610.5–2:

> *(4) A description of the land use planning and management programs of the other Federal agencies, States, local governments, and Indian tribes within the planning area, including any officially approved and adopted land use plans, policies, and programs, and the manner in which the responsible official intends to resolve these inconsistencies in accordance with section 202(c)(9) of FLPMA.*

The addition of this subpart ensures that management constraints and potential conflicts are considered by the Responsible Official in connection with formulating reasonable resource management alternatives, and if any inconsistencies exist, how those inconsistencies will be avoided or minimized prior to final land use plan approval. This subpart also ensures broader public disclosure of any management constraints and potential conflicts that may limit or otherwise affect the BLM's land use plan.

f. Proposed § 1610.5–4 Preparation of the Draft Resource Management Plan and Selection of Preferred Alternatives.

Subsection (a) of proposed § 1610.5–4 should be revised to state:

> (a) The responsible official will prepare a draft resource management plan based on Director and deciding official guidance, the planning assessment, the planning issues, ~~*and*~~ the estimation of the effects of alternatives, *and coordination with affected Federal agencies, States, local governments, and Indian tribes*. The draft resource management plan and draft environmental impact statement will evaluate the alternatives, identify one or more preferred alternatives, ~~and~~ explain the rationale for the preference, *and identify any inconsistencies between the preferred alternative(s) and any officially approved and adopted land use plans, and the policies, and programs contained therein, of other Federal agencies, States, local governments, and Indian tribes*.

These revisions are largely self-explanatory. The first sentence has been revised to clarify that preparation of the draft resource management plan also will be informed by coordination with affected Federal agencies, States, local governments, and Indian tribes in accordance with FLPMA Section 202(c)(9). The second sentence has been revised to ensure that any inconsistencies between the preferred alternative(s) and the land use plans, policies, and programs of Federal agencies, States, local governments, and Indian tribes are identified and disclosed in the draft land management plan and draft environmental impact statement. Under FLPMA Section 202(c)(9), these inconsistencies must be resolved to the maximum extent practical before the final land use plan can be adopted.

In addition, subsection (b) of proposed § 1610.5–4 should be revised as follows:

> (b) The draft resource management plan and draft environmental impact statement will be provided ~~*for comment*~~ to the Governor(s) of the State(s) involved, and to officials of other Federal agencies, State and local governments, and Indian tribes with which the responsible official has been coordinating, as well as any other Federal agencies, State agencies, local governments, and Indian tribes the deciding official has reason to believe would be interested ~~(see § 1610.3–1(c))~~. This action constitutes compliance with the requirements of § 3420.1–7 of this title. *In the event that there are inconsistencies between the preferred alternative(s) and any officially approved and adopted land use plans, and the policies, and programs contained therein, of other Federal agencies, States, local governments, and Indian tribes, the responsible official will coordinate as may be necessary to ensure that such inconsistencies are resolved to the maximum extent practical before the resource management plan is finalized and approved in accordance with section 202(c)(9) of FLPMA.*

The foregoing revisions are needed for several reasons. First, the use of the phrase "for comment" erroneously suggests that the roles of States and local governments, as well as other Federal agencies and Indian tribes, are limited to commenting on the draft land use plan. As discussed above, coordination under FLPMA Section 202(c)(9) is a much broader concept, and includes, for example, "meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands," as well as furnishing "advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State." 43 U.S.C. § 1712(c)(9).

Second, and for much same reason, the reference to § 1610.3–1(c) is inappropriate. As discussed above, this provision, entitled "coordination requirements," requires the Responsible Official to provide notice to local governments and allows them same time period to review and comment on land use plans and plan amendments as members of the general public. Thus, this proposed rule effectively eliminates any meaningful coordination with local governments. Consequently, this provision, which violates FLPMA Section 202(c)(9), should not be referenced.

Third, a sentence has been added to confirm that to the extent that there are inconsistencies between the preferred alternative(s) and the land use plans, policies, and

programs of other Federal agencies, States, local governments, and Indian tribes, those inconsistencies will be addressed and resolved to the maximum extent practical before the final land use plan is adopted, as required by FLPMA Section 202(c)(9).

g. Proposed § 1610.6–1 Resource management plan approval and implementation.

The second sentence of subsection (b) of proposed § 1610.6–1 addresses the BLM's selection of an alternative that is generally encompassed by the range of alternatives in the final environmental impact statement or environmental assessment, but is substantially different than the proposed resource management plan or plan amendment. To ensure compliance with Section 202(c)(9) of FLPMA in this circumstances, the following sentence should be inserted at the conclusion of subsection (b) as shown below:

> (b) Approval will be withheld on any portion of a resource management plan or plan amendment being protested (see § 1610.6–2) until final action has been completed on such protest. If, after publication of a proposed resource management plan or plan amendment, the BLM intends to select an alternative that is encompassed by the range of alternatives in the final environmental impact statement or environmental assessment, but is substantially different than the proposed resource management plan or plan amendment, the BLM will notify the public and request written comments on the change before the resource management plan or plan amendment is approved. *In addition, the BLM will coordinate with affected Federal agencies, States, local governments, and Indian tribes as may be required, and will ensure that any inconsistencies between the alternative selected and any officially approved and adopted land use plans, and the policies, and programs contained therein, of other Federal agencies, States, local governments, and Indian tribes, are resolved to the maximum extent practical before the resource management plan is approved in accordance with section 202(c)(9) of FLPMA.*

This change is also self-explanatory. Obviously, if a new alternative, not previously considered in detail, is ultimately selected by the BLM, the BLM must comply with the coordination and consistency requirements of FLPMA Section 202(c)(9) before the final land use plan may be approved.

II. The Proposed Rules Cannot Be Categorically Excluded from Analysis under NEPA.

The preamble to the Proposed Rules states that the BLM has determined that the rule is categorically excluded from further review because the rule is "entirely procedural in nature" and "does not involve any of the extraordinary circumstances listed in [the BLM's NEPA regulations at] 43 C.F.R. § 46.215." *See* 81 Fed. Reg. 9724. The BLM has prepared a document entitled "Preliminary Categorical Exclusion Documentation 2016 Proposed Rules 43 C.F.R. Part 1600" to support its determination that the Proposed Rules is categorically excluded from NEPA review.

For the reasons explained below, the 2.0 Coalition believes that the BLM has erred in determining the Proposed Rules is categorically excluded from NEPA review. Facially, it is apparent that manner in which the public lands are managed will have significant impacts that trigger the preparation of an Environmental Impact Statement (EIS). The BLM administers 247.3 million acres of land—more land in the United States than any other agency, of which 99 percent is located in 11 western States and Alaska *See* Congressional Research Service, *Federal Land Ownership: Overview and Data* Table 2 (Dec. 29, 2014).[9] The following table shows the staggering amount of land managed by the BLM in those States.

Alaska:	72.4 million acres (19.8% of total land in the state)
Arizona:	12.2 million acres (16.8%)
California:	15.2 million acres (15.3%)
Colorado:	8.4 million acres (12.5%)
Idaho:	11.9 million acres (21.9%)
Montana:	8.0 million acres (8.6%)
Nevada:	47.8 million acres (68.0%)
New Mexico:	13.5 million acres (17.3%)
Oregon:	16.1 million acres (26.2%)
Utah:	22.8 million acres (43.4%)
Washington:	0.4 million acres (1%)
Wyoming:	18.4 million acres (29.4%)
Total 11 Western States:	**174.5 million acres**
Total 11 Western States plus Alaska:	**246.9 million acres**

Id. at Tables 1 and 2. Obviously, how the BLM manages these public lands has tremendous impacts on the western States and, in particular, rural areas and communities whose citizens depend on the use of public lands for livestock grazing, mineral exploration and production, timber production, outdoor recreation, and other purposes. The members of the 2.0 Coalition represent such rural areas and communities in the western States, and can attest to the significant impact that the BLM's land use planning and management programs have on their local economies and their citizens.

At a minimum, the BLM is required to prepare an environmental assessment (EA) to consider the potential environmental effects of the Proposed Rules on the human environment. The BLM's failure to comply with its obligations under NEPA will serve as a basis to vacate and remand any final rule for further analysis under NEPA. Accordingly, the 2.0 Coalition strongly urges the BLM to reconsider its decision to apply a categorical exclusion (CE) to the Proposed Rules and initiate the NEPA review process with a proper scoping of potential effects to be considered by the BLM

[9] Available at https://www.fas.org/sgp/crs/misc/R42346.pdf (viewed April 13, 2016).

A. NEPA Background.

The purpose of NEPA is to promote informed decision-making by ensuring "that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). "Major federal actions" subject to review under NEPA include, among other things, "new or revised agency rules, regulations, plans, policies or procedures, and legislative proposals." 40 C.F.R. § 1508.18(a). The Council on Environmental Quality's (CEQ's) regulations define the "effects" that must be considered under NEPA to include ecological, aesthetic, historic, cultural, economic, social, and/or health effects, whether direct, indirect, or cumulative. 40 C.F.R. § 1508.8. "NEPA itself does not mandate particular results." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004). However, NEPA does impose "procedural requirements to ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 23 (2008).

A proposed federal agency action may be categorically excluded from analysis under NEPA in very limited circumstances. The CEQ's regulations allow federal agencies to adopt procedures to categorically exclude certain actions "which have been found to have no [significant] effect" on the human environment. 40 C.F.R. § 1508.4. By definition, these CEs are intended to be limited "to situations where there is an insignificant or minor effect on the environment." *Alaska Ctr. for the Env't v. U.S. Forest Service*, 189 F.3d 851, 859 (9th Cir. 1999).

Furthermore, even if a proposed action appears to fit the CE involved, an agency may not use a CE when "extraordinary circumstances" exist. *California v. Norton*, 311 F.3d 1162, 1168 (9th Cir. 2002) (citing 40 C.F.R. § 1508.4). "Extraordinary circumstances has been defined as those "in which a normally excluded action *may* have significant environmental effect." *Norton*, 311 F.3d at 1168 (emphasis added). The CEQ's and BLM's regulations enumerate several factors that must be considered by the BLM in determining whether extraordinary circumstance exist that preclude application of a CE to a particular agency decision. *See* 40 C.F.R. § 1508.27(b); 43 C.F.R § 46.215.

B. The BLM Should Not Have Applied a Categorical Exclusion to the Proposed Rules.

The BLM has relied upon the following CE to justify its decision not to conduct further NEPA analysis for the Proposed Rule:

> Policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

Preliminary Categorical Exclusion, p. 2 (quoting 43 C.F.R. § 46.210(i)). The BLM has asserted that this CE is applicable because "the proposed modifications of [the Proposed Rule] are

entirely procedural" and future planning decisions will be subject to compliance with NEPA. *Id*.; *see also* 81 Fed. Reg. 9724. For the reasons explained below, the BLM's application of a CE to the Proposed Rule is both inconsistent with the BLM's prior practice for planning rules of this magnitude and a violation the its obligations under NEPA.

1. The BLM's Reliance on a CE Is a Significant Departure From Prior Agency Practice.

The BLM has engaged in three prior rulemakings relating to these rules. The BLM first adopted its planning rules in 1979. *See* Final Rulemaking: Public Lands and Resources; Planning, Programming, and Budgeting, 44 Fed. Reg. 46386 (Aug. 7, 1979). In 1983, the BLM promulgated major amendments to its planning regulations to enhance and clarify the planning process and eliminate unneeded provisions. *See* Final Rulemaking: Planning Programming, Budgeting; Amendments to the Planning Regulations; Elimination of Unneeded Provisions, 48 Fed. Reg. 20364 (May 5, 1983). In 2005, the BLM promulgated a more minor amendment to its planning rules regarding cooperating agencies and cooperating agency status. *See* Final Rule: Land Use Planning, 70 Fed. Reg. 14561 (March 23, 2005).

In the case of both the 1979 original rules and the 1983 major amendment, the BLM prepared an EA to evaluate the potential environmental effects of the rules. It was only with the minor amendment to the planning rules in 2005 that the BLM applied a CE to avoid NEPA analysis.

In deciding to apply a CE to the Proposed Rule, the BLM is clearly breaking with its prior practice to prepare at least an EA for major changes in its planning rules. The Proposed Rule represents the most dramatic overhaul of the BLM's land planning process since the BLM's original adoption of its planning rules in 1979. Given the significant changes in the land use planning process that will occur if the Proposed Rule is adopted, the BLM should have followed the approach taken for the 1979 and 1983 rules and prepared a programmatic EA to assess the potential environmental impacts of the Proposed Rule.

2. "Major Federal Actions" Include Programmatic Regulations for the Management of the Public Lands.

The BLM's assertion that major programmatic regulations that establish the process for future agency land use decisions may be exempted from NEPA review because they are "procedural in nature" is contrary to the requirements of NEPA. As noted above, CEQ's regulations specifically define "major federal actions" under NEPA to include "new or revised agency rules, *regulations*, plans, policies, or *procedures*." 40 C.F.R. § 1508.18(a) (emphasis added). The CEQ's regulations also state that federal actions subject to NEPA may include "formal documents establishing an agency's policies which will result in or substantially alter agency programs" and "plans . . . which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based." *Id*. at § 1508.18(b)(1)-(2). Furthermore, the regulations provide that EISs "may be prepared, and are sometimes required, for broad federal actions such as the adoption of new agency programs or regulations." *Id*. at § 1502.4. The Proposed Rules, which substantially alter the process to be followed and the issues that will be

considered by the BLM in adopting and amending land use plans, clearly fall within the scope of the types of actions subject to review under NEPA.

The case of *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007) (*Citizens*), which involved facts very similar to this rulemaking, is instructive regarding the applicability of NEPA to programmatic planning rules like the Proposed Rules. In that case, notwithstanding the Department of Agriculture's (USDA's) completion of an EA for earlier versions of its National Forest System planning rules, the USDA applied a CE to the 2005 amendments to the planning rules. *Id*. at 1068. Like the CE the BLM relies on here, the CE at issue in the *Citizens* case excluded "rules, regulations, and policies to establish Service-wide, administrative procedures, program processes, or instruction." *Id*. (quoting 70 Fed. Reg. 1023, 1053-54). The USDA also found that "no extraordinary circumstances exist[ed] that would require preparation of an EA or EIS. *Id*.

Also similar to the BLM's argument in support of its use of a CE for the Proposed Rule, the Forest Service argued that its 2005 planning rule fit into its "rules, regulations, and policies" CE because "it merely identifies the procedures and standards for later development of forest plans, plan amendments, and plan revisions," and "does not change the physical environment in any way, and that there will be no direct environmental impacts." *Id*. at 1083. The plaintiffs, on the other hand, argued that the Forest Service's 2005 planning rule did much more than establish procedures, asserting that the rule established requirements for sustainability of social, economic and ecological systems, described the nature and scope of plans, and set forth required plan components. *Id*. at 1083-84.

Agreeing with the plaintiffs, the court stated that "NEPA requires *some* type of procedural due diligence—even in cases involving broad, programmatic changes." *Id*. at 1085 (emphasis in original). It also concluded that "NEPA does indeed contemplate preparation of EAs and EISs in the case of programmatic rules and changes." *Id*. Ultimately, the court held that the USDA violated NEPA when it "determined that the 2005 Rule satisfied a CE never before invoked for such large scale actions, and concluded that no further NEPA analysis was required." *Id*. at 1086.

The court further held that application of the CE was inappropriate because there was a possibility that the action may have significant environmental effects. First, the court explained that the rule could impact future site-specific plans. *Id*. at 1087. Second, applying the CEQ's regulations, the court determined that the 2005 rule may have significant environmental effects because it was "highly controversial," set "precedent for future action with significant effects," and "may be related to other action which has individually insignificant, but cumulatively significant impacts." *Id*. at 1089 (citing 40 C.F.R. § 1508.27(b)). Accordingly, the court determined that the USDA, at a minimum, should have prepared an EA and remanded the matter to the USDA for further consideration.

As with the 2005 forest planning rules at issue in *Citizens*, the Proposed Rules clearly have the potential to cause a significant effect on the human environment. For example, the Proposed Rules not only completely overhaul the process for adopting and amending land use plans, but also dramatically change the required plan components and standards under which public lands will be managed in the future. The BLM's proposal to limit the required

components of a land use plan and use separate, non-plan "implementation strategies" that may be changed at any time without public involvement or inter-governmental coordination (in violation of FLPMA Section 202(c)(9), as discussed above) will undoubtedly have a significant impact on the future management of public lands, the communities in the vicinity of those lands, and the environment. *See* 81 Fed. Reg. 9726-27 (providing text for proposed revision to definition of "resource management plan" that eliminates current plan component requirements (§ 1601.0-5), new "plan components" section (§ 1610.1-2), and new "implementation strategies" section (§ 1610.1-3)).

3. The Proposed Rules Are Intended to Implement Substantive Changes in the Manner the Public Lands Are Managed and Used.

Notwithstanding the BLM's repeated assertion that the Proposed Rule is only procedural in nature, the BLM clearly intends the Proposed Rule to have a ***substantive*** impact on the management and use of the public lands. For example, the preamble to the Proposed Rule and the Preliminary Categorical Exclusion Document acknowledge that the purpose of the rule is to improve the BLM's ability to address "landscape-scale" resource issues, such as wildfire, habitat connectivity, and the demand for renewable and non-renewable energy resources, and to respond more effectively to environmental and social changes. *See* 81 Fed. Reg. 9674; Preliminary Categorical Exclusion Document, p. 1.

In addition, the preamble to the Proposed Rule explains that the BLM's proposal to implement "landscape-scale" land use planning areas that would span BLM Field Offices and cross State lines is intended to facilitate the implementation of numerous environmental and energy policy directives (none of which have themselves undergone NEPA review). These include:

- Executive Order No. 13653–Preparing the United States for the Impacts of Climate Change (76 Fed. Reg. 66819) (directing Interior Department bureaus and agencies to strengthen existing landscape-level planning efforts);

- Secretarial Order 3289–Addressing the Impacts of Climate Change on America's Water, Land, and Other Natural Resources (issued Sept. 14, 2009; amended Feb. 22, 2010) (directing Interior Department bureaus to develop landscape-scale strategies for understanding and responding to climate change impacts);

- Interior Department Manual chapter entitled "Climate Change Policy" (523 DM 1) (effective Dec. 20, 2012) (directing Interior Department bureaus and agencies to promote landscape-scale, ecosystem-based management approaches to enhance the resilience and sustainability of linked human and natural system);

- Secretarial Order 3286–Renewable Energy Development by the Department of the Interior (issued March 11, 2009; amended Feb. 22, 2010) (identifying renewable energy production as one of the Interior Department's highest priorities and explaining need to identify locations suitable for landscape-scale renewable energy production);

- Secretary Order 3330–Improving Mitigation Policies and Practices of the Department of the Interior (issued Oct. 31, 2013) (calling for development of Interior Department -wide mitigation strategy that would use a landscape-scale approach); and

- Interior Department Manual chapter entitled "Implementing Mitigation at the Landscape-scale" (600 DM 6) (effective October 23, 2015).

See 81 Fed. Reg. 9678-79. Similarly, the BLM has undertaken to prepare "Rapid Ecoregional Assessments" (REAs) for vast areas in the western United States, which group public and other lands into so-called "eco-regions." The BLM has identified REAs as "an important step in support of adaptive, landscape-scale management approaches." 81 Fed. Reg. 9680.

Given that the BLM has emphasized that implementation of these directives is a primary reason for adopting the Proposed Rules, *see, e.g.*, 81 Fed. Reg. 9679, it is imperative that the BLM conduct some review under NEPA to determine how adopting the Proposed Rules will facilitate implementation of these directives and the effect that these new land management policies and direction will have on the human environment.

In light of *Citizens*, and the potential significant impacts of the Proposed Rules, the BLM should not have applied a CE to an agency action that is as large in scale as the Proposed Rules. Instead, given the dramatic departure from the current planning rules, the BLM should have followed the lead of the Forest Service, which for its 2012 National Forest System planning rules engaged in one of the most collaborative rulemaking efforts in the agency's history and prepared a programmatic EIS to comply with its obligations under NEPA. *See* Final Rule and Record of Decision, National Forest System Land Management Planning, 77 Fed. Reg. 21162 (April 9, 2012); *see also* U.S. Forest Service Planning Rule Revision webpage.[10] Similarly, the BLM should, at a minimum, prepare a programmatic EA to assess the environmental impacts of the Proposed Rules. Because all future land use plans and amendments will be required to comply with the provisions of the Proposed Rules, now is the time for the BLM to consider the impacts of its proposed changes to its land planning rules. Failure of the BLM to do so will very likely subject any final rule to unnecessary and avoidable litigation over the BLM's failure to comply with NEPA.

C. Extraordinary Circumstances Prevent Application of a Categorical Exclusion to Proposed Rules.

Even where an action falls into a CE, an agency must nevertheless provide procedures for determining whether "extraordinary circumstances' exist, such that the action, though "normally excluded" from full NEPA analysis, "may have a significant environmental effect." *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1096 (9th Circ. 2013) (quoting 40 C.F.R. § 1508.4). "When there is substantial evidence in the record that exceptions to the categorical exclusion may apply, the agency must at the very least explain why the action does not fall within one of the exceptions." *California v. Norton*, 311 (9th Cir. 2002).

[10] Available at http://www.fs.usda.gov/planningrule (visited April 7, 2016).

For the reasons explain above, the 2.0 Coalition believes it was improper for the BLM to apply the CE for policies, regulations, directives and guidelines of a "procedural nature" to the Proposed Rules. However, even assuming that CE does apply, there are several "extraordinary circumstances" that preclude the BLM from categorically excluding the Proposed Rules from review under NEPA. The BLM's conclusory statement in the Preliminary Categorical Exclusion Document that none of the extraordinary circumstances under DOI NEPA regulations apply because the Proposed Rules are "procedural in nature" and future actions will be subject to future NEPA review are inadequate to explain and justify the BLM's failure to conduct further NEPA review.

1. The Proposed Rules Have Highly Controversial Effects on the Human Environment.

A proposed action is "highly controversial" for purposes of NEPA when there is a "substantial dispute about the size, nature, or effect of the major Federal action." *Id*. (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)). "A substantial dispute exists when evidence . . . casts serious doubt upon the reasonableness of an agency's conclusions." *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1057 (9th Cir. 2010).

As acknowledged in the Preliminary Categorical Exclusion Document, the BLM has already received over 6,000 group and individual comments on the Planning 2.0 initiative, and the comments regarding the Proposed Rules are certain to greatly exceed that number. There are numerous aspects of the Proposed Rules for which a substantial dispute exists between the BLM and stakeholders regarding the impacts of the Proposed Rules on various aspects of the environment. Examples of aspects of the Proposed Rules that will have a significant effect on the human environment and must be further analyzed by the BLM include:

- The BLM's shift to landscape-scale land use planning;
- The BLM's use of new and untested "eco-regional" planning;
- The BLM's reliance on controversial Secretarial and agency policy directives and guidance documents, which themselves have not undergone NEPA review or public comment, to justify its action and dictate future land use planning and management;
- The BLM's elimination of the requirement that "the impact on local economies" be considered and instead allowing the "impacts of resource management plans on resource, environmental, ecological, social, and economic conditions" to be evaluated "at appropriate scales" in 43 C.F.R. § 1601.0-8.
- The BLM's proposal to allow the land use plans to be amended without further NEPA review, coordination and consistency review, and public comment through the use of "implementation strategies," which will establish standards and guidelines for future land and resource uses yet not be part of the land use plan (discussed below);
- The BLM's proposed modification of required land use plan components;

- The BLM's shift in focus from traditional public land uses, including the "principal or major uses" identified in FLPMA, to ecosystem and land preservation (discussed below);

- The BLM's use of scientific information of questionable validity and integrity, in violation of the Information Quality Act (discussed below); and

- The BLM's dramatic changes in the requirements governing coordination with State and local governments and consistency review (discussed at length in the initial section of these comments).

Each of these proposed changes has the potential to significantly impact the human environment within future planning areas by causing dramatic shifts in management direction and project-level decision-making. The impact of these planning and management changes is exacerbated by the fact, discussed above, that the BLM is the largest land manager in the United States, managing almost 247 million acres of land in the 11 western States and Alaska. Under these circumstances, the BLM must perform some level of programmatic NEPA review to consider the potential environmental effects of these changes to the rules that govern public land planning and management.

2. The Proposed Rules Involve Potentially Significant Environmental Effects and Unique and Unknown Environmental Risks.

As discussed in the comments above, the preamble of the Proposed Rules explains that the BLM's proposed landscape-scale planning approach is the direct result of, and intended to implement, numerous environmental and energy policy directives and initiatives issued by the current administration. In effect, the Interior Secretary and the BLM Director are proposing to make wholesale changes to the manner in which the public lands are managed and what land uses are acceptable through administrative fiat. However, neither the environmental impacts of the implementation of these policies and directives, nor the shift from current planning process to landscape-scale, eco-regional planning to implement the policies and directives, have been evaluated by the BLM under NEPA or in any other public context.

While it is the 2.0 Coalition's position that the existence of these potential environmental impacts prevents the BLM from applying a CE to the Proposed Rules, even if the CE relied on by the BLM were applicable, these potential significant environmental effects clearly represent extraordinary circumstances obligating the BLM to conduct some level of NEPA review.

3. The Proposed Rules Establish Precedent for Future Actions and Represent a Decision In Principle About Future Actions With Potentially Significant Environmental Effects.

One of the BLM's principal justifications for not conducting a NEPA analysis for the Proposed Rules is that future land use plans and plan amendments will be subject to NEPA. However, the Proposed Rules, if adopted, will control the process, criteria, requirements and outcome of land use plans that affect some 247 million acres of public lands. BLM Deciding and Responsible Officials will be required to follow the Proposed Rules, rather than evaluating, for

example whether landscape-scale, eco-regional planning improperly marginalizes the impacts on local economies and the communities they support. Further, any NEPA review on an individual land use plan will be limited to selected alternatives and the impacts of those alternatives within the planning area, and not on the wider impacts of the dramatic changes to public land planning and management that adoption of the Proposed Rules will facilitate. That being the case, it is imperative that the BLM conduct a programmatic NEPA analysis now to assess how the Proposed Rules may impact those future land use planning and management decisions.

4. The Proposed Rules Will Have Significant Impacts on Public Health and Safety.

The Proposed Rules remove important language from the current planning rules (43 C.F.R. § 1610.3-2) that expressly requires BLM guidance and land use plans to be consistent with federal and state pollution control laws, as implemented by applicable federal and state air, water, noise, and other pollution standards. The inclusion of this language in the existing rules ensures the BLM's compliance with Congress's mandate that the BLM, in approving and amending land use plans, "shall . . . provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." 43 U.S.C. § 1712(c)(8). The removal of this language could lead to the failure of BLM officials to adequately consult and coordinate with State and local governments during the planning process regarding applicable pollution control laws necessary to protect the public health and safety. As a result, the Proposed Rules could have a significant impact on the public health and safety.

Furthermore, the BLM's proposal to shift to landscape-scale planning within eco-regions that span multiple BLM districts and possibly State lines will inevitably result in many more State and local governmental bodies vying to have their issues acknowledged and addressed in connection with any particular planning decision. This will dilute the ability of the BLM to coordinate with State and local governments to address local land use and public health and safety issues that should be taken into consideration by the BLM during the planning process. The potential for the BLM's new planning approach to significantly affect local health and safety issues is sufficient to require the BLM to consider this issue in the NEPA review process.

The bottom line is that the Proposed Rules represent a major shift from ensuring that State and local issues are considered during the planning process to implementing national policies and dictates, under which local issues and concerns are irrelevant. The impacts of using an approach that marginalizes State and local governments (as shown, for example, by the changes to coordination and consistency review discussed above) and emphasizes centralized, top-down control from Washington, D.C., are likely to be significant and should be fully evaluated.

D. The Proposed Rules Are Part of a Larger Interior Department Program, the Effects of Which Should Be Evaluated and Disclosed to the Public Pursuant to NEPA.

III. Additional Comments on the Proposed Rules.

Additional aspects of the Proposed Rules are highly problematic and will significantly change how the public lands are managed. First, the BLM proposes to eliminate several important and required components of land use plans and recast them as "implementation strategies" that will function as agency rules and/or extensions of the land use plan without compliance with FLPMA, NEPA, and the Administrative Procedure Act. Second, the BLM's proposed changes to the planning assessment process constitute a significant shift away from the current planning rules' focus on identification of issues and traditional land uses within the planning area to a focus on national priorities centered on environmental and ecological considerations. Third, the BLM's proposed definition of "high quality information" would relax the agency's existing information quality standards and allow information of questionable accuracy and integrity to be used to develop land use plans. Fourth, the BLM's proposed narrowing of the protest standards will effectively eliminate the ability of the public to protest many issues involved in the development of land use plans. These problems are addressed in more detail below.

A. Removal of "Implementation Strategies" from Land Use Plan.

Under the BLM's current planning rules, there are eight elements that a land use plan generally establishes:

> (1) Land areas for limited, restricted or exclusive use; designation, including ACEC designation; and transfer from Bureau of Land Management Administration;
>
> (2) Allowable resource uses (either singly or in combination) and related levels of production or use to be maintained;
>
> (3) Resource condition goals and objectives to be attained;
>
> *(4) Program constraints and general management practices needed to achieve the above items;*
>
> *(5) Need for an area to be covered by more detailed and specific plans;*
>
> *(6) Support action, including such measures as resource protection, access development, realty action, cadastral survey, etc., as necessary to achieve the above;*

> *(7) General implementation sequences, where carrying out a planned action is dependent upon prior accomplishment of another planned action;* and
>
> (8) Intervals and standards for monitoring and evaluating the plan to determine the effectiveness of the plan and the need for amendment or revision.

43 C.F.R. § 1601.0–5(n) (definition of "resource management plan"; italics added). The Proposed Rules remove elements (4) through (7) from the plan (italicized above), and turn them into "implementation strategies." *See* 81 Fed. Reg. 9689-94 (discussing changes to land use plan components).

This division of plan components has important consequences because implementation strategies (i) will be developed solely by the BLM after publication of the draft plan and the draft NEPA document; (ii) will not be subject to NEPA; (iii) will not be subject to public notice and comment; (iv) will not be subject to coordination and consistency review under FLPMA Section 202(c)(9); (v) will not be subject to protest; and (vi) can be modified at any time in BLM's sole discretion, again without complying with NEPA, public notice and comment, coordination and consistency review, or the opportunity to protest. *See* 43 C.F.R. § 1610.1–3 (proposed rule describing implementation strategies).

However, it is uncertain exactly what implementation strategies actually are and how they will be used. On the one hand, they are not part of the land use plan and, as stated, can be adopted (and changed) without complying with the requirements needed to adopt or amend a land use plan. On the other hand, they are not a project-level determination (which are also generally subject to procedural requirements such as NEPA and public notice-and-comment, and may be administratively appealed), but they may "assist" in making project-level determinations.

The Proposed Rule defines "implementation strategies" as "strategies that assist in implementing future actions consistent with the plan component of the approved resource management plan." 43 C.F.R. § 1610.1–3 (proposed rule defining "implementation strategies"). This definition provides little guidance, as there are many things could assist in "implementing future actions." More information is provided in § 1610.1–3, called "implementation strategies. This proposed rule states: "Implementation strategies are not a plan component. Implementation strategies are intended to assist the BLM to carry out the plan components." Again, it uncertain what this means—many things could "assist the BLM to carry out the plan components."

Proposed § 1610.1–3 also indicates that implementation strategies include "management measures" and "monitoring procedures" (although other types of implementations strategies are apparently permitted as well). A "management measure is one or more potential action(s) the BLM may take in order to achieve the goals and objectives of the resource management plan." 43 C.F.R. § 1610.1–3 (proposed). This statement indicates that management measures are the equivalent of project-level decisions that are issued by BLM officials to implement land use plan objectives, such as a program to eliminate invasive species and improve range conditions or a prescribed burn program to eliminate overgrown timber with significant fuel loads and reduce wildfire risk. These sorts of actions are subject to their own decision-making process, including NEPA compliance, compliance with other applicable laws (e.g., the Endangered Species Act),

are subject to administrative appeal. They cannot be insulated from the normal decision-making process by calling them implementation strategies.

Proposed § 1610.1–3 goes on to state: "Management measures may include, but are not limited to, resource management practices, best management practices, standard operating procedures, provision for the preparation of more detailed and specific plans, or other measures as appropriate." This sentence suggests that implementation strategies are actually standards and guidelines that will prescribe and control land and resources uses. Thus, if a miner seeks approval of a plan of operations under the BLM's Subpart 3809 rules, he will be subject to specific standards and requirements adopted by the BLM as an implementation strategy. Similarly, if a rancher seeks renewal of his grazing permit, his allotment will be subject to implementation strategies that limit forage use, prescribe monitoring requirements, restrict access to water, and so forth. If so, then an implementation strategy is the equivalent of a rule and would have to be adopted as part of the land use plan or properly promulgated as a rule under the Administrative Procedure Act.

The preamble's justification of why implementation strategies do not rise to the level of plan components and are exempt from any procedural requirements is also confusing. *See* 81 Fed. Reg. 9691-93. With respect to management measures, the BLM states that such measures "could include resource management practices, best management practices, standard operating procedures, the preparation of other more detailed and specific plans, or other measures as appropriate." *Id.* at 9693. Notwithstanding that explanation, BLM then states that implementation strategies "do not provide planning-level management direction and [are] therefore not a component of the resource management plan." If management measures, resource management practices, best management practices, and standard operating procedures are not "management direction," what are they? Evidently, the answer is they are nothing more than a "forecast" of what actions the agency might elect to take or otherwise require of permitted activities. If that is what BLM intends, it defeats the fundamental purpose of planning and provides no certainty whatsoever for land and resource users.

The BLM also explains in the preamble:

> Nor do [implementation strategies] represent a commitment or a decision to implement the potential actions described in the implementation strategy. A future implementation decision occurs after adoption of a plan. As a result, future actions associated with, or incorporating an implementation strategy, would not occur until the implementation stage and would therefore require site-specific NEPA analysis and compliance with other relevant laws before a final decision is made and any action is taken.

Id. at 9692. This discussion suggests, on the one hand, that there will be a process by which a particular implementation strategy will be adopted, i.e., there will be a "future implementation decision," following which the strategy will become effective. It also suggests, however, that the implementation strategy itself will not be formally approved. The implementation strategy instead will be applied in the context of a particular project-level decision, such as a permit application or other land use authorization request (e.g., a right-of-way application). If that is the case, there will be no "future implementation decision." The "NEPA analysis and compliance

with other relevant laws" will pertain to the permit application and not to the adoption of the implementation strategy. The implementation strategy would evade formal adoption, NEPA compliance, compliance with other federal laws, and coordination and consistency review under FLPMA Section 202(c)(9).

Similar confusion exists with respect to monitoring. The Proposed Rule categorizes "monitoring procedures" as implementation strategies (*see* 43 C.F.R. § 1610.1-3(a)(2)), but also includes "monitoring and evaluation standards" as plan components (*see* 43 C.F.R. § 1610.1-2(b)(3)). Which is correct? Or, perhaps, do monitoring requirements become an implementation strategy if the BLM decides to adopt additional or new monitoring requirements and wants to avoid amending the land use plan?

The BLM also explains that "monitoring procedures" would "describe methods for monitoring the resource management plan" while "monitoring standards" include "indicators and intervals for monitoring and evaluation to determine whether the objectives are being met or there is relevant new information that may warrant amendment or revision of the resource management plan." *Id.* at 9692. The distinction between these two categories is not at all apparent, and there is no justification for the former being a plan component while the latter is excluded.

The bottom line is that it is unclear—presumably by design—what an implementation strategy is and how it will apply to future land and resources users. Is it simply non-binding guidance? Is it prescriptive and must be followed by BLM officials? How will it affect future land and resource uses? And what other types of implementation strategies are permissible? Frankly. this is one of the murkiest rules ever proposed by a federal agency. And even worse, the Proposed Rules would allow the BLM unfettered discretion to create, impose, and modify the implementation strategies without any coordination, public comment, NEPA analysis or compliance with other laws applicable to agency decision-making. This regulatory sleight of hand should be eliminated from the Proposed Rules.

B. The Proposed Planning Assessment Process Is Unwieldy and Biased Against Traditional Public Lands Uses.

The initial phase of the BLM's current plan development process proceeds very logically. First, at the beginning of the process, the Field Manager identifies issues that affect the planning area, with input from cooperating agencies and, moreover, from other federal agencies, State and local governments, and Indian tribes (in accordance with FLPMA Section 202(c)(9)) as well as the public, and analyzes those suggestions along with data and information, to select topics and determine the issues to be addressed during the planning process. 43 C.F.R. §1610.4-1 (current).

Second, the Field Manager develops criteria to guide development of the resource management plan or revision, to ensure:

(1) It is tailored to the issues previously identified; and

(2) That BLM avoids unnecessary data collection and analyses.

Id. at §1610.4-2(a) (current). Notably, these criteria will be based on "applicable law, Director and State Director guidance, the results of public participation, and coordination with any cooperating agencies and other Federal agencies, State and local governments, and federally recognized Indian tribes." *Id.* at §1610.4-2(b) (current). Again, coordination with other federal agencies, State and local governments, and Indian tribes must occur in accordance with FLPMA Section 202(c)(9).

Third, the Field Manager, in collaboration with any cooperating agencies, collects and assembles resource, environmental, social, economic and institutional data and information, notably emphasizing "significant issues and decisions with the greatest potential impact." *Id.* at §1610.4-3 (current).

Finally, the Field Manager, in collaboration with any cooperating agencies, conducts an analysis of the current management situation. *Id.* at §1610.4-4 (current). "The analysis of the management situation shall provide, consistent with multiple use principles, the basis for formulating reasonable alternatives, including the types of resources for development or protection." *Id.* This rule identifies nine non-exclusive elements to be considered during this step. *Id.* at §1610.4-4(a)-(i) (current).

Notably, element (e) consists of "[s]pecific requirements and constraints to achieve consistency with policies, plans and programs of other Federal agencies, State and local government agencies and Indian tribes." Thus, at the outset of the current planning process, coordination with other federal agencies, State and local governments, and Indian tribes takes place, and specific requirements and constraints are identified to ensure that the consistency requirement of FLPMA Section 202(c)(9) will be considered and ultimately satisfied.

The Proposed Rules, by contrast, would dramatically alter these initial plan development steps. As discussed in Section I of these comments, early coordination and consistency review would be eliminated, as part of the BLM's effort to marginalize the roles of State and local governments in the planning process and reduce consistency review to a post-plan development afterthought. These comments will not be repeated here.

In addition, the Proposed Rules would collapse the four plan development steps summarized above into a single step called "planning assessment." 43 C.F.R. § 1610.4 (proposed). At bottom, this new step consists primarily of a "call to the public" "to provide existing data and information or suggest other policies, guidance, strategies, or plans described under paragraph (a)(2) of this section, for the BLM's consideration in the planning assessment." *Id.* at § 1610.4(a)(3) (proposed). Proposed § 1610.4(a)(2) refers broadly to the identification of various secretarial and agency orders, directives and policies (which, as discussed, have not been subject to NEPA review, coordination and consistency review, or public review and comment):

> Identify relevant national, regional, or local policies, guidance, strategies or plans for consideration in the planning assessment. These may include, but are not limited to, executive or Secretarial orders, Departmental or BLM policy, Director or deciding official guidance, mitigation strategies, interagency initiatives, and State or multi-state resource plans[.]

Thus, the proposed planning assessment rule would shift the planning focus away from identifying and addressing significant local and State issues and concerns to the implementation of national policies and strategies, notwithstanding their impact on local communities and their citizens.

At the same time, the BLM has proposed to revise 43 C.F.R. § 1601.0-8, called "principles." The current version of § 1601.0-8 requires that "*the impact on local economies*" be considered. Under the Proposed Rules, this requirement would be eliminated. Instead, the BLM would "consider the impacts of resource management plans on resource, environmental, ecological, social, and economic conditions *at appropriate scales*." 43 C.F.R. § 1601.0-8 (proposed; emphasis added). This provision would allow the BLM to disregard the impacts of land use plans at a local level, and support the shift in land use planning to national policies and goals.

This major policy shift is readily apparent when the elements that are addressed in conducting the analysis of the management situation under current § 1610.4-4 are compared to the elements that would be addressed under proposed § 1610.4(c). This proposed section requires the Responsible Official to "consider and document" seven elements (with a number of subparts), virtually all of which ignore the degree of local importance/dependence on use of resources in the planning area. Among other things, these new elements eliminate references to land and resources *uses*, substituting the term "goods and services," which includes "ecological services"—an inherently vague and undefined term that invites arbitrary decision-making.

Further, the proposed rule, in a redundant fashion, focuses almost exclusively on a variety of environmental and ecological elements, while ignoring traditional public land uses. These changes are one-sided and biased against the principal or major land uses identified in FLPMA, such as grazing, mineral exploration and development, rights-of-way, timber production, and outdoor recreation. *See* 43 U.S.C. § 1702(l) (defining "principal or major uses"). The elements chosen by the BLM appear designed to justify the exclusion of these land and resource uses.

Detailed comments are provided in Table 1, entitled Comparison of Current § 1610.4-4 and Proposed § 1610.4(c) Planning Elements, which is attached hereto and incorporated by reference. As discussed in Table 1, a number of the changes in the planning elements are inappropriate and highlight the BLM's attempt to alter the focus of land use planning under FLPMA Section 202 from multiple use to land preservation. This is a significant, substantive policy change, which undermines the BLM's assertion (in claiming that the Proposed Rules are categorically excluded from NEPA) that these rules "entirely procedural in nature."

The most obvious example of the BLM's policy shift is the agency dismissal of the Mining and Minerals Policy Act in the Proposed Rules, including the new planning elements. As explained in attached Table 1, FLPMA states as a policy that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands." 43 U.S.C. § 1701(a)(12). Yet the BLM has omitted this statute.

In the Mining and Mineral Policy Act, Congress declared:

> [I]t is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in
>
> (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries,
>
> (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs,
>
> (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and
>
> (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.

30 U.S.C. § 21a (additional spacing added for clarity). The Mining and Mineral Policy Act also provides: "*It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section*." *Id.* (emphasis added). By expressly referencing the Act six years later in FLPMA, Congress clearly intended that the Act be emphasized in connection with public land planning and management.

Moreover, in 1980, Congress enacted the National Materials and Minerals Policy, Research and Development Act, codified at 30 U.S.C. 1601 *et seq*. In that Act, Congress declared:

> [I]t is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well-being and industrial production, with appropriate attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs.

30 U.S.C. § 1602. The term "materials" is defined as "substances, including minerals, of current or potential use that will be needed to supply the industrial, military, and essential civilian needs of the United States in the production of goods or services." Among other things, the Act directs the President to

- "identify materials needs and assist in the pursuit of measures that would assure the availability of materials critical to commerce, the economy, and national security;"
- "promote and encourage private enterprise in the development of economically sound and stable domestic materials industries;" and

- "encourage Federal agencies to facilitate availability and development of domestic resources to meet critical materials needs."

Id. at § 1602(1), (6), (7). To accomplish these purpose, the Act directs the President to coordinate the responsible executive departments and agencies and requires the President to "direct that the responsible departments and agencies identify, assist, and make recommendations for carrying out appropriate policies and programs to ensure adequate, stable, and economical materials supplies essential to national security, economic well-being, and industrial production," in addition to taking other action to further the Act's policies. *Id.* at § 1603(1).

Finally, the Act concludes by again emphasizing the Interior Department's obligation to comply with and implement the Mining and Minerals Policy Act of 1970, stating:

> Nothing in this Act shall be interpreted as changing in any manner or degree the provisions of and requirements of the Mining and Minerals Policy Act of 1970 (30 U.S.C. 21a). For the purposes of achieving the objectives set forth in section 3 of this Act, the Congress declares that *the President shall direct (1) the Secretary of the Interior to act immediately within the Department's statutory authority to attain the goals contained in the Mining and Minerals Policy Act of 1970 (30 U.S.C. 21a)* and (2) the Executive Office of the President to act immediately to promote the goals contained in the Mining and Minerals Policy Act of 1970 (30 U.S.C. 21a) among the various departments and agencies.

30 U.S.C. § 1605 (emphasis added).

Despite the plain language of the Mining and Minerals Policy Act, the enactment of two subsequent laws—one of which is FLPMA itself—emphasizing the Act, the BLM has ignored it in the Proposed Rules. Moreover, it is apparent that this was done deliberately.

In the preamble to the Proposed Rules, the BLM stated that it is proposing changes to current § 1601.0–2, called "objectives," "to revise the stated objectives of resource management planning to reflect FLPMA and remove vague or inaccurate language." 81 Fed. Reg. 9683. The BLM claimed that it is eliminating vague and inappropriate language from the current § 1601.0–2 and substituting language "to be consistent with FLPMA," in many cases directly quoting from FLPMA. The BLM explained:

> The BLM proposes to add an additional objective of resource management planning to the regulations, which is to "ensure that the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide for outdoor recreation and human use, *and which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands*." This proposed change would incorporate

> language from FLPMA (see 43 U.S.C. 1701(a)(8) and (a)(12)) to identify in the planning regulations the general management objectives that apply to the public lands and therefore apply to all resource management plans. While this is a change in the regulations, it would simply affirm statutory direction and not change existing practice or policy.

81 Fed. Reg. 9684 (emphasis added). The italicized phrase "and which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands" comes directly from FLMPA Section 102(a)(12), as stated by the BLM. However, this provision, in its entirety, states:

> The Congress declares that it is the policy of the United States that—
>
> . . .
>
> (12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands *including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands*; . . . . [Emphasis added.]

Thus, the BLM has ignored the second half of FLMPA Section 102(a)(12) because it requires implementation of the Mining and Minerals Policy Act.

In short, Congress deliberately and specifically referred to the Mining and Minerals Policy Act in its declaration of policy in FLPMA. The Act requires the Interior Secretary "to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries," and to promote "the orderly and economic development of domestic mineral resources [and] reserves." These requirements were reinforced in the Minerals Policy, Research and Development Act of 1980, which required the Interior Secretary "to act immediately within the Department's statutory authority to attain the goals contained in the Mining and Minerals Policy Act." Yet the BLM has deliberately ignored the Mining and Minerals Policy Act in the Proposed Rules. This is a telling omission, highlighting the BLM's shift away from traditional land and resource uses on the public lands, notwithstanding clear statutory direction to promote mining and mineral development. Instead, the planning assessment rule emphasizes "areas that increase the ability of terrestrial and aquatic ecosystems within the planning area to adapt to, resist, or recover from change" —whatever that means—and focus on "ecological services" rather than mining, oil and gas production, grazing, and other traditional public land uses.

C. BLM's Definition of "High Quality Information" Conflicts with BLM Policy and Would Allow the Use of Questionable Data.

Information is critical to sound land use planning and management. For that reason, Congress has required the Secretary of the Interior:

> . . . to prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values) giving priority to areas of critical

> environmental concern. This inventory shall be keep current so as to reflect changes in conditions and to identify new and emerging resource and other values. The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands.

43 U.S.C. § 1711(a). This ongoing inventory provides the baseline information that is utilized in public land use planning and management, evidenced by Congress' placement of the statute at the outset of Title II, Land Use Planning, Land Acquisition and Disposition, of FLPMA. In addition to preparing and maintaining an inventory on continuing basis, BLM has an obligation to coordinate the land use inventory with the land use planning and management programs of State and local governments. *Id*. at § 1712(c)(9).

The Proposed Rule fails to reference inventory data and simply provides that the "BLM will use high quality information to inform the preparation, amendment, and maintenance of resource management plans." 43 C.F.R. § 1610.1-1(c) (proposed). The BLM defines "high quality information" as:

> . . . any representation of knowledge such as facts or data, including the best available scientific information, which is accurate, reliable, and unbiased, is not compromised through corruption or falsification, and is useful to its intended user.

43 C.F.R. § 1601.0-5 (proposed). This vague and open-ended definition is not consistent with FLPMA, other existing laws, or BLM policy, as explained below. The outcome will be that "citizen science" will be allowed to play an improper role in agency decision-making. Essentially, what the BLM has done in crafting this definition is to borrow a perfectly sound term of art from NEPA (i.e., "high quality information") and water it down to include suspect representations of knowledge (e.g., "gray" literature and "traditional ecological knowledge") for use in land use planning by picking and choosing select elements of policies developed in conjunction with the Information Quality Act (IQA), codified at 44 U.S.C. §§ 3504(d)(1) and 3516.

Existing federal laws governing data quality include the IQA (also known as the Data Quality Act) and NEPA. The BLM's Proposed Rules fall short of complying with either. The IQA required the Office of Management and Budget (OMB) to issue guidance to federal agencies designed to ensure the "quality, objectivity, utility, and integrity" of information disseminated to the public. It also required agencies to issue their own information quality guidelines, and to establish administrative mechanisms that allow affected persons to seek correction of information maintained and disseminated by the agencies that does not comply with the OMB guidance.

The OMB guidelines were published in 2002. *See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information and Disseminated by Federal Agencies*, 67 Fed. Reg. 8452 (Feb. 22, 2002). Among other things, the OMB Guidelines define "quality" as an "encompassing term" comprised of "comprising utility, objectivity, and integrity." *Id.* at 8459. The term "utility" refers to the usefulness of the information "to its

intended users, including the public," ensuring that "the agency take care to ensure that transparency has been addressed in its review of the information." *Id.* "Integrity" means the "security of the information—protection of the information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification." *Id.* Finally, the term "objectivity" "involves a focus on ensuring accurate, reliable, and unbiased information." In a scientific context, "the original and supporting data shall be generated, and the analytic results shall be developed, using sound statistical and research methods." *Id.*

Notably, where information being disseminated by an agency is determined to be "influential," i.e., "the information will have or does have a clear and substantial impact on important public policies or important private sector decisions," these standards are heightened, requiring a "reproducibility by qualified third parties." *Id.* at 8460. This heightened standard will apply, for example, to landscape-scale REAs, which focus on "ecoregions" and are prepared by "Landscape Conservation Cooperatives" whose members are likely to be biased against traditional public land uses.

Consistent with the IQA and OMB direction, the BLM has adopted its own information quality guidelines. *See U.S. Bureau of Land Management, Information Quality Guidelines* (updated 2012) (hereafter BLM Guidelines).[11] The BLM's definition of "high quality information" in the Proposed Rules must be consistent with these data quality requirements.

The BLM Guidelines adopt the principle of using the "best available" information in decision-making, which includes "considering the data available weighted against needed resources and delay to collect new information and the value of newer information" BLM Guidelines at § 2(c). The BLM Guidelines also clarify that where information is voluntarily submitted in hopes of "influencing a decision or that BLM obtains for use in developing a policy or regulatory decision, BLM will disclose what it knows of the quality of this type of information and why it is being relied on." *Id*. at § 2(d).

BLM's Guidelines also define "influential information" as "information that which is expected to have a clear and substantial impact at the national level for major public and private policy decisions as they relate to Federal public lands and resource issues." *Id*. at § 2(b). Examples of "influential information" include "information disseminated in support of top BLM actions (i.e., substantive notices, policy documents, studies, guidance) that demand the ongoing involvement of the Director's office" and "information used in cross-bureau issues that have the potential to result in major cross-bureau policies and highly controversial information that is used to advance the BLM's priorities." *Id*.

The BLM is subject to these requirements in conducting and maintaining its inventory of the public lands and their resources pursuant to FLPMA Section 201. Moreover, any data and information received by the BLM in connection with developing and implementing land use plans pursuant to FLPMA Section 202 are also subject to these requirements, including the

[11] Available at http://www.blm.gov/style/medialib/blm/national/national_page.Par.7549.File.dat/guidelines.pdf (visited April 10, 2016).

BLM's "best available" information standard. Land use plans and amendments clearly have a substantial impact on decisions regarding the use of public lands by other federal agencies and private parties. Accordingly, land use plans contain "influential information" and should be subject to the heightened standard of replicability applicable to such information.

Data quality standards are similar under NEPA. The CEQ regulations refer to the "scientific integrity" of information that agencies use in an EIS, for example. Specifically, the CEQ regulations direct that:

> Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in an EIS. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.

40 C.F.R. § 1502.24. Under NEPA, federal agencies are also required to use a "systematic, interdisciplinary approach" to ensure "the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment." 42 U.S.C. § 43332(2)(A). Information included in an EIS must "be of high quality" and allow for "[a]ccurate scientific analysis, expert agency comments, and public scrutiny." 40 C.F.R. § 1500(1)(b). The BLM must utilize these standards, in conjunction with the OMB and BLM Guidelines, to ensure compliance with NEPA in land use planning and management, including the adoption of land use plans and implementation strategies.

To comply with the foregoing requirements, the following definition of "high quality information" should be substituted for the proposed definition in § 1601.0-5 of the Proposed Rules:

> *High quality information means data and other information that is comprised of the best available scientific and commercial data; is of high quality, accurate, reliable, complete, unbiased, and is not compromised through corruption or falsification; is useful to its intended user; and can be replicated by qualified third parties. High quality information may include information voluntarily submitted by Federal agencies, State and local governments, Indian tribes, and the public which satisfies the forgoing criteria and is subject to the Deciding Official's transparent disclosure of the quality of the information and justification for reliance thereon.*

This definition incorporates the "best scientific and commercial data available" standard used in the Endangered Species Act (*see*, *e.g.*, 16 U.S.C. §§ 1533(b)(1)(A), 15533(b), and 1536(a)(2)) and includes all relevant concepts from the IQA and the OMB and BLM Guidelines on information quality.

D. The Protest Standard is Being Improperly Narrowed

Presently, any person who participates in the preparation of a land use plan or amendment and has an interest which may be adversely affected by its approval or amendment

may protest an approved plan or amendment. *See* 43 CFR § 1610.5-2.(a). This will not change under the Proposed Rule. What will change, however, is what constitutes a valid protest.

Under the current rule, filed protests can include "any issue or issues that were submitted during the planning process by the protesting party" and must include "a concise statement explaining what the State Director's decision is believed to be wrong." 43 CFR § 1610.5-2 (a)(2)(v). In contrast, under the Proposed Rule, protests must "identify *the plan component(s)* believed to be inconsistent with Federal laws or regulations applicable to public lands, or the purposes, policies and programs of such laws and regulations." 43 C.F.R. § 1610.6–2 Unbelievably, the BLM contends this is "not a change from existing practice or policy." 81 Fed. Reg. 9715.

Plans and amendments under the Proposed Rules will be comprised of plan components (including goals, objectives, designations, resource use determinations, monitoring and evaluation standards, and lands identified for disposal). The narrowing of the protest criteria to "plan components" apparently eliminates the ability of the public to protest: (i) the planning area boundary determination; (ii) factors and information deemed relevant in the planning assessment; (iii) the BLM's compliance with its own procedural rules in conjunction with carrying out the planning process; (iv) the BLM's compliance with federal laws such as FLPMA itself, NEPA, the Endangered Species Act, and the National Historic Preservation Act; and (v) the implementation strategies, which, as discussed above, may dictate how future land uses are conducted. Even more disconcerting is the fact that these new protest criteria will increase the likelihood of dismissal. The BLM Director will simply be able to assert any purpose, policy or program adopted by the BLM outside of a formal rulemaking process as justification for denial.

The BLM claims the purpose of these changes are to "help the BLM to identify, understand, and respond thoughtfully to valid protest issues," and to "focus the BLM Director's attention on aspects of a proposed resource management plan that may be inconsistent with legal requirements or policies." *Id*. This assertion is nothing more than a rationalization for limiting the ability of aggrieved parties to challenge flawed land use plans, while simultaneously increasing agency discretion. Furthermore, the new protest standard is inconsistent with Congress' policy statement that the Secretary must "structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking." 43 U.S.C. § 1701(a)(5).

In short, the new protest standard should be removed from the final rule. If not removed, then the BLM should clarify that all of the above referenced agency actions are final and that there is no attendant requirement to exhaust administrative remedies before pursuing judicial review under the Administrative Procedure Act (we strongly suspect that the BLM will argue otherwise if a legal challenge is made). *See* 43 U.S.C. § 1701(a)(6) (stating that it is the policy of the United States that "judicial review of public land adjudication decisions be provided by law"). In the alternative, the protest procedures existing in the current rule should be restored.

Table 1

Comparison of Current § 1610.4-4 and Proposed § 1610.4(c) Planning Elements

COMMENTS ON THE BUREAU OF LAND MANAGEMENT'S PROPOSED RESOURCE MANAGEMENT PLANNING RULES

Table 1—Comparison of Current § 1610.4-4 and Proposed § 1610.4(c) Planning Elements

Analysis of Management Situation Current Rules – 1610.4-4	Planning Assessment Proposed Rules – 1610.4(c)	Comments
(a) The types of resource use and protection authorized by the Federal Land Policy and Management Act and other relevant legislation.	(1) Resource management authorized by FLPMA and other relevant authorities.	The meaning of "other relevant authorities" is vague and significantly changes the meaning of the existing rule, allowing directives and guidance documents to be considered. As discussed in the comments, these directives are often of questionable validity because they have not undergone NEPA review and coordination and consistency review under FLPMA § 202(c)(9), and may constitute "rules" that were adopted without compliance with the Administrative Procedure Act. At a minimum, "other relevant authorities" should be specifically identified so that these authorities are disclosed to the public.
(b) Opportunities to meet goals and objectives defined in national and State Director guidance.	Eliminated	This change is inappropriate. As noted in the preamble, under proposed § 1610.4(a)(2), the Responsible Official must "[i]dentify relevant national, regional, or local policies, guidance, strategies or plans for consideration in the planning assessment." Given that these policies and guidance must be considered in the planning assessment, there is no reason not to address opportunities to meet their goals and objectives. This will foster full disclosure to the public and ensure transparent process.

Analysis of Management Situation Current Rules – 1610.4-4	Planning Assessment Proposed Rules – 1610.4(c)	Comments
(c) Resource demand forecasts and analyses relevant to the resource area.	Substantially eliminated—see discussion below on new element (c)(7).	See comments below on new element (c)(7).

Analysis of Management Situation Current Rules – 1610.4-4	Planning Assessment Proposed Rules – 1610.4(c)	Comments
(d) The estimated sustained levels of the various goods, services and uses that may be attained under existing biological and physical conditions and under differing management practices and degrees of management intensity which are economically viable under benefit cost or cost effectiveness standards prescribed in national or State Director guidance.	(7) The various goods and services, including ecological services, that people obtain from the planning area such as: (i) The degree of local, regional, national, or international importance of these goods and services; (ii) Available forecasts and analyses related to the supply and demand for these goods and services; and (iii) The estimated levels of these goods and services that may be produced on a sustained yield basis.	These changes are inappropriate. First, they improperly marginalize the degree of local importance/dependence on use of resources in the planning area. This change is consistent with the agency's improper de-emphasis on the "principal or major uses" of the public lands, as reflected in FLPMA. *See* 43 U.S.C. § 1702(*l*). As written, the local or regional importance of resource uses in the planning area can be ignored in favor of national or even international considerations (as evidenced by the use of "or") in the element (c)(7)(i). Second, the BLM is deliberately confusing the public by eliminating "use" and "uses" and instead using "goods and services." Throughout FLPMA, Congress referred to land uses and "land use plans," not "goods and services" or "goods and services plans." The preamble's discussion that land uses are subsumed in the phrase "goods and services" (*see* pp. 9708) is nonsense. Very few persons would regard "goods and services" as a reference to land uses. Rather than being more precise, the BLM is making the planning process vaguer and more difficult to understand. This in turn invites agency employees to downplay traditional land and resources uses, and focus on murky concepts such as "ecosystem services," which are poorly understood and impossible to accurately quantify, inviting arbitrary decision-making.

Analysis of Management Situation Current Rules – 1610.4-4	Planning Assessment Proposed Rules – 1610.4(c)	Comments
(e) Specific requirements and constraints to achieve consistency with policies, plans and programs of other Federal agencies, State and local government agencies and Indian tribes.	Eliminated	This change is inappropriate. As discussed in the first section of the comments, it is important, through coordination, to identify the land use plans, policies and programs of Federal agencies, State and local government agencies and Indian tribes at the outset of the planning process, and to identify any constrains and limitation they may impose to comply with FLPMA § 202(c)(9). Presumably, for this reason, proposed § 1610.4(a)(1) *requires* the BLM to "[i]dentify relevant national, regional, or local policies, guidance, strategies or plans for consideration in the planning assessment" (emphasis added). Thus, the BLM would be required to identify "policies, guidance, strategies or plans" of State and local governments. There is no point in identifying these State and local policies, strategies and plans if they are then ignored. The preamble states that this element is not necessary because the BLM will not be developing resource management alternatives at this stage of the process (p. 9709). This assertion is illogical; it is important to be aware of other land use plans, policies, and programs that may impact the BLM's planning process so that when alternatives are developed, conflicts can be avoided or minimized to the maximum extent practical.

Analysis of Management Situation Current Rules – 1610.4-4	Planning Assessment Proposed Rules – 1610.4(c)	Comments
(f) Opportunities to resolve public issues and management concerns.	Eliminated	This change is inappropriate. Presumably, the BLM, by virtue of its continuing inventory and other management activities, is aware of certain public issues and concerns. Current §1610.4-4 states: "The Field Manager, in collaboration with any cooperating agencies, will analyze the inventory data and other information available to determine the ability of the resource area to respond to identified issues and opportunities." Thus, under the current rules, opportunities to address these issues and concerns are disclosed. By eliminating this information from the planning assessment, the BLM is making the process less open. The public should be advised of important issues and concerns at the beginning of the process. Moreover, addressing issues and concerns in the planning assessment will ensure that they are addressed during the development of alternatives.
(g) Degree of local dependence on resources from public lands.	Eliminated	This change is inappropriate. See comment above on new element (c)(7).
(h) The extent of coal lands which may be further considered under provisions of §3420.2-3(a) of this title.	Eliminated	This change is appropriate as this information in not needed.

Analysis of Management Situation Current Rules – 1610.4-4	Planning Assessment Proposed Rules – 1610.4(c)	Comments
(i) Critical threshold levels which should be considered in the formulation of planned alternatives	(4) Known resource thresholds, constraints, or limitations.	On its face, this change does not appear to add anything. However, the preamble discussion (pp. 9707-08) suggests that the change in language is intended to restrict or limit the principal or major land uses identified in FLPMA, such as grazing, mineral exploration and development, rights-of-way, timber production, and outdoor recreation. *See* 43 U.S.C. § 1702(*l*) (defining "principal or major uses"). Similarly, FLPMA states as a policy that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands." 43 U.S.C. § 1701(a)(12). The preamble discussion is clearly one-sided and biased against traditional resources uses, evidencing a significant substantive shift in BLM land use planning and management.
Not in current rule.	(2) Land status and ownership, existing resource uses, infrastructure, and access patterns in the planning area.	This change is appropriate as this information is necessary to develop the plan.
Not in current rule.	(3) Current resource, environmental, ecological, social, and economic conditions, and any known trends related to these conditions	This change is also appropriate as this information is necessary to develop the plan.

Analysis of Management Situation Current Rules – 1610.4-4	Planning Assessment Proposed Rules – 1610.4(c)	Comments
Not in current rule.	(5) Areas of potential importance within the planning area, including: (i) Areas of tribal, traditional, or cultural importance; (ii) Habitat for special status species, including State and/or federally-listed threatened and endangered species; (iii) Other areas of key fish and wildlife habitat such as big game wintering and summer areas, bird nesting and feeding areas, habitat connectivity or wildlife migration corridors, and areas of large and intact habitat; (iv) Areas of ecological importance, such as areas that increase the ability of terrestrial and aquatic ecosystems within the planning area to adapt to, resist, or recover from change; (v) Lands with wilderness characteristics, candidate wild and scenic rivers, or areas of significant scenic value; (vi) Areas of significant historical value, including paleontological sites; (vii) Existing designations located in the planning area, such as wilderness, wilderness study areas, wild and scenic rivers, national scenic or historic trails, or ACECs; (viii) Areas with potential for renewable or	These changes are one-sided and biased against the principal or major land uses identified in FLPMA, such as grazing, mineral exploration and development, rights-of-way, timber production, and outdoor recreation. *See* 43 U.S.C. § 1702(l) (defining "principal or major uses"). FLPMA states as a policy that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands." 43 U.S.C. § 1701(a)(12). While it is appropriate to identify, for example, areas of tribal or cultural importance, existing designations (e.g., wilderness), areas with energy development potential, and recreational areas in the planning area, many of the elements are duplicative and serve to emphasize certain preferred land uses (e.g., wildlife) while marginalizing traditional lands uses. As such, these changes evidence a significant substantive shift in BLM land use planning and management. The following should be added: 1. Areas used or capable of being used for domestic livestock grazing, including range condition and carrying capacity, and programs that can be undertaken to increase forage production and improve range conditions. 2. Areas with active mineral exploration and production, areas with known mineral reserves, and areas with mineral development potential, and steps that can be taken to facilitate or increase mineral production. 3. Areas with active oil and gas exploration and production, and areas with known and potential reserves, and steps that

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	non-renewable energy development or energy transmission; (ix) Areas of importance for recreation activities or access; (x) Areas of importance for public health and safety, such as abandoned mine lands or natural hazards;	can be taken to facilitate or increase oil and gas production. 4. Areas with commercial- grade timber, including areas with current or historic timber production, and steps that can be taken to facilitate or increase timber production.
Not in current rule.	(6) Dominant ecological processes, disturbance regimes, and stressors, such as drought, wildland fire, invasive species, and climate change.	This element is vague and redundant. An evaluation of current ecological trends and conditions is required under element (c)(3), which necessarily requires consideration of ecological processes.