CONSERVATION AS MULTIPLE USE

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*The world is facing unprecedented species extinctions, wrought in large part by climate change. Slashing greenhouse gas emissions is one crucial response to the climate/biodiversity crisis. The conservation of intact ecosystems and the life-sustaining services they provide is another. This goal will be beyond reach if conservation commitments do not cover federal public lands, particularly multiple use lands. The Bureau of Land Management ("BLM") has recently proposed a pathbreaking new rule that explicitly defines conservation as a multiple use. In doing so, the Conservation and Landscape Health Public Lands Rule ("Conservation Rule") puts conservation on par with other statutorily listed uses and effectuates an underutilized statutory requirement to "protect certain public lands in their natural condition." Extractive resource users characterize the new rule as a violent break with past management practices and the BLM's statutory mandate. When the new rule is challenged, courts will either defer to the BLM's reasonable interpretation of the statute or review the rule de novo. This Article considers how recent Supreme Court precedent on judicial review of agency rulemaking (*Sackett v. EPA *and* West Virginia v. EPA*) may impact the fate of the Conservation Rule. Drawing upon the Property Clause and the concept of "multiple use" as deployed in federal statutes and a long line of precedent, this Article concludes that the Conservation Rule is not only timely and important, but that it is also well within statutory parameters and warrants deference from reviewing courts.*

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INTRODUCTION

The world is facing unprecedented species extinctions, wrought in large part by climate change. Slashing greenhouse gas emissions is one critical response to the climate/biodiversity crisis. Natural solutions—particularly the conservation of intact ecosystems and the life-sustaining services they provide—are another.

To address the twin challenges of climate change and biodiversity loss, the international community has agreed to conserve 30% of the world's lands and waters.[1] In the United States, the Biden Administration's 30 by 30 Initiative commits the Nation to placing 30% of its lands and waters in some kind of protected status by 2030.[2] This goal will be beyond reach if conservation commitments do not cover federal lands and resources. A substantial portion of the Nation's land base is owned by the federal government, and nearly 70% of federal lands are managed by the Bureau of Land Management ("BLM") and the U.S. Forest Service.[3] Existing law requires these two agencies to manage for "multiple use," including mining, energy development, grazing, timber, recreation, wildlife, and watersheds.[4]

The BLM has proposed a pathbreaking new rule that explicitly defines conservation as a multiple use, which puts conservation on par with other statutorily listed activities and resources. In doing so, the Conservation and Landscape Health Public Lands Proposed Rule ("Conservation Rule")[5] homes in on the underutilized

1. *The Biodiversity Plan for Life on Earth: Target 3*, CONVENTION ON BIOLOGICAL DIVERSITY, https://www.cbd.int/gbf/targets/[https://perma.cc/93SC-FVAZ] (last visited Mar. 22, 2024).

2. Exec. Order No. 14,008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619, 7627 (Jan. 27, 2021) [hereinafter 30 by 30 Order].

3. *See infra* Part II.

4. *See infra* Part III.

5. Conservation and Landscape Health, 88 Fed. Reg. 19583-01 (proposed Apr. 3, 2023) (to be codified at 43 C.F.R. pts. 1600 & 6100) [hereinafter Conservation Rule]. The Final Rule was issued on Apr. 18, 2024, just as this Article went to press. *See* Dep't of Interior,

statutory requirement to "protect the quality of the scientific, scenic, ecological, environmental, air and atmospheric, [and] water resources, . . . [and], where appropriate, preserve and protect certain public lands in their natural condition."[6]

Since the release of the BLM's proposed Conservation Rule, opponents of conservation-oriented management have raised fervent but wildly inaccurate claims that this approach is illegal and inconsistent with the BLM's statutory mission. This Article sets out to prove them wrong. Conservation of healthy landscapes is essential to achieving resilient ecosystems. Absent resilient ecosystems, many of the statutorily authorized multiple uses would be impossible.

Part I of this Article addresses climate change and its effect on BLM lands and resources. It also assesses the biodiversity crisis and the 30 by 30 Initiative. Part II analyzes the Conservation Rule's objectives and requirements. The concept of "multiple use" as deployed in federal public lands statutes is explored in Part III. Parts IV and V cover previous conservation efforts of the BLM and the Forest Service, respectively. These efforts, which protect roadless areas, old growth, and watersheds, provide political and legal precedent for the Conservation Rule. Part VI considers how recent Supreme Court jurisprudence on judicial review of agency rulemaking (*Sackett v. EPA* and *West Virginia v. EPA*) may impact the fate of the Conservation Rule. Drawing upon the Property Clause, as well as lessons learned within the context of federal Indian law and immigration law, this Article concludes that the Conservation Rule is not only timely and important, but that it is also well within statutory parameters and warrants deference from reviewing courts.

I. CLIMATE CHANGE AND THE BIODIVERSITY CRISIS

Federal public lands management has significant implications for climate change. According to the U.S. Geological Survey, one-quarter of total U.S. carbon emissions comes from the combustion of coal, oil, and gas extracted from federal public lands.[7] Meanwhile, federal forests, grasslands, and shrublands sequester an average of 195 million metric tons of CO_2 equivalent per year, offsetting approximately 15% of the emissions caused by the extraction and combustion of fossil fuels from public lands.[8]

Climate change is affecting BLM lands and resources as well. Average temperatures on the public lands managed by the BLM rose by more than 2° C between 1989 and 2018.[9] Climate-induced droughts and wildfires place further

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Bureau of Land Mgmt., Conservation and Landscape Health: Final Rule (Apr. 18, 2024), https://www.blm.gov/sites/default/files/docs/2024-04/BLM-Conservation-Landscape-Healt h-Final-Rule.pdf [https://perma.cc/997M-4L35]. The final rule continues to emphasize conservation as a multiple use and to place it on par with other multiple uses. *Id.* at 1–2, 38–39, 52.

6. 43 U.S.C. § 1701(a)(8).

7. MATTHEW D. MERRILL ET AL., U.S. GEOLOGICAL SURV., FEDERAL LANDS GREENHOUSE GAS EMISSIONS AND SEQUESTRATION IN THE UNITED STATES: ESTIMATES FOR 2005–14 1 (2018).

8. *Id.* at 13.

9. Elaine M. Brice et al., *Impacts of Climate Change on Multiple Use Management of Bureau of Land Management Land in the Intermountain West, USA*, 11

stress on already compromised animal and plant species.[10] As described in a previous article by this author and Robert Glicksman:

> Climate change will or may affect the public lands in a host of ways. Changes in vegetation composition may alter the suitability of lands for wildlife populations or render certain areas unsuitable for grazing. Wildlife populations will shift northward and toward higher elevations in pursuit of more hospitable habitat than that previously occupied that has become hotter, drier, or both . . . . Wildlife species . . . are at risk as they become exposed to invasive species threats, loss of ecosystem engineers, and anthropogenic land use changes.[11]

During his first week in office, President Biden issued an executive order establishing a national goal of conserving 30% of U.S. lands, water, and oceans by 2030 ("30 by 30 Order").[12] By then, a global movement was already underway to protect 30% of Earth's lands and waters from human exploitation by 2030, especially ecologically representative and well-connected systems of protected areas,[13] as a means of combatting climate change and slowing the pace of species extinction.[14]

Although the 30 by 30 Initiative transcends jurisdictional boundaries, it has major implications for public lands management, especially the multiple use lands. The sheer size of the multiple use lands is significant: 441 million acres, which amounts to about 70% of the federal lands.[15] Commonly accepted definitions of

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ECOSPHERE 1, 4 (2020), https://esajournals.onlinelibrary.wiley.com/doi/epdf/10.1002/ecs2.3286 [https://perma.cc/5TTL-NCPY].

10. Sandra B. Zellmer & Robert L. Glicksman, *A Critical 21st Century Role for Public Land Management: Conserving 30% of the Nation's Lands and Waters Beyond 2030*, 54 ARIZ. STATE L. J. 1313, 1326–27 (2023).

11. *Id.* at 1326.

12. 30 by 30 Order, *supra* note 2, at 7627. *See generally* Sandra B. Zellmer, *Charting a Course to Conserve 30% of Freshwaters by 2030*, 64 WM. & MARY L. REV. 169 (2022) (providing details on 30 by 30 as related to freshwater resources).

13. *See* COP15, *Nations Adopt Four Goals, 23 Targets for 2030 in Landmark UN Biodiversity Agreement*, CONVENTION ON BIOLOGICAL DIVERSITY (Dec. 19, 2022), https://www.cbd.int/article/cop15-cbd-press-release-final-19dec2022 [https://perma.cc/9ZT5-AMMF]. The United States is not a party to the Convention, but it claims to be making progress toward these goals nonetheless. Press Release, U.S. Dept. of State, Convention on Biological Diversity Adopts Landmark Global Biodiversity Framework to Protect Nature (Dec. 20, 2022), https://www.state.gov/convention-on-biological-diversity-adopts-landmark-global-biodiversity-framework-to-protect-nature/ [https://perma.cc/VUS7-7NLX].

14. *See* Masha Kalinina, *More Than 100 Countries Call for Protecting at Least 30% of the Global Ocean by 2030*, PEW CHARITABLE TRS. (Oct. 13, 2021), https://www.pewtrusts.org/en/research-and-analysis/articles/2021/09/22/more-than-100-countries-call-for-protecting-at-least-30-percent-of-the-global-ocean-by-2030 [https://perma.cc/GWS5-VBCS].

15. *See* CAROL HARDY VINCENT ET AL., CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020), https://sgp.fas.org/crs/misc/R42346.pdf [https://perma.cc/VJU5-E7M3] (reporting that multiple use lands managed by the BLM and Forest Service comprise 440 million acres of 607 million acres managed by the four public lands management agencies).

"conservation lands" exclude multiple use lands that are subject to extraction and that lack durable legal protections.[16]

Absent management changes, the Government Accountability Office warned that climate change may impair multiple use management on the federal public lands, thereby undermining or even defeating statutory goals, by exacerbating existing stressors that include wildfires, invasive species, and droughts.[17] The BLM has responded with the Conservation Rule, which explicitly acknowledges that "[c]limate change is creating new risks and exacerbating existing vulnerabilities."[18] By empowering conservation-oriented responses to climate-challenged lands and resources, the Conservation Rule is an important step toward realizing 30 by 30 goals and making public lands management more responsive and more resilient to climate change.

II. THE PUBLIC LANDS CONSERVATION RULE

Taking a page from the 30 by 30 playbook and more broadly, the Biden Administration's commitment to climate resilience, the BLM recently proposed a significant step forward in its approach to public lands management. Its Conservation Rule implements the directives of the 30 by 30 Order and several other executive and secretarial orders that call for the use of landscape-scale, science-based approaches to resource management and that emphasize the need to adapt to and mitigate the effects of climate change.[19] Whether or not the proposed rule is adopted in substantially similar form as a final rule, its treatment of conservation as a multiple use is significant enough to warrant close examination as a guidepost for future management approaches.[20]

By explicitly defining conservation as a multiple use, the Rule puts conservation on equal footing with other statutorily delineated multiple uses in the Federal Lands Policy and Management Act ("FLPMA").[21] According to the BLM, "'Conservation' is a shorthand for the direction in FLPMA's multiple use sustained yield mandates to manage public lands for resilience and future productivity."[22]

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16. U.S. GEOLOGICAL SURV., *PADUS by GAP Status*, https://www.sciencebase.gov/catalog/item/56bba50ce4b08d617f657956 [https://perma.cc/4X74-NM5A] (last visited Dec. 16, 2023).

17. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-253, CLIMATE CHANGE: VARIOUS ADAPTATION EFFORTS ARE UNDER WAY AT KEY NATURAL RESOURCES MANAGEMENT AGENCIES 16–17 (2013) (stating, for example, that droughts limit the areas suitable for grazing).

18. Conservation Rule, *supra* note 5, at 19585.

19. *Id.* at 19587 (citing, *inter alia*, Executive Order 13990: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis).

20. *See id.* The final rule was issued in April 2024, just as this article was going to press. *See supra* note 5. To peruse any of the 216,403 comments received, see *Proposed Rule: Conservation and Landscape Health*, REGULATIONS.GOV (Apr. 2, 2023), https://www.regulations.gov/document/BLM-2023-0001-0001/comment [https://perma.cc/U756-GF2Y].

21. *See* 43 U.S.C. §§ 1702(c), 1732(a).

22. Conservation Rule, *supra* note 5, at 19587.

At first blush, elevating conservation to the same status as other longstanding multiple uses such as mining, grazing, and energy development may appear to be a sea change for the public lands managed by this agency. For the first 50 years of its history, the BLM prioritized extractive industries.[23] At present, 90% of BLM lands (around 220 million acres) are open to oil and gas leasing.[24] Grazing is authorized on 155 million acres, and mining occurs on about 1 million acres.[25]

Historically, the BLM had been "a comparative laggard in developing the preservation resource."[26] But past need not be prologue.

Conservation gained a toehold with the BLM in the mid-1990s with President Clinton's designation of the Grand Staircase-Escalante National Monument.[27] Instead of shifting management of the new monument to the National Park Service, which had been the typical practice, Clinton placed the BLM in charge of conserving the monument's 1.7 million acres of extraordinary geological, archaeological, cultural, and biological resources.[28] This led to the National Landscape Conservation System, which encompasses over a dozen BLM-managed monuments[29] and "measurably advanced the transformation of BLM to a

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23. Robert L. Glicksman, *Wilderness Management by the Multiple Use Agencies: What Makes the Forest Service and the Bureau of Land Management Different?*, 44 ENV'T. L. 447, 467 (2014) (describing the BLM's bias in favor of extractive and consumptive uses, especially grazing and mineral resources).

24. Laurel Williams, *How the U.S. Can Better Protect Millions of Acres of Public Land*, PEW (June 8, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/06/08/how-the-us-can-better-protect-millions-of-acres-of-public-land [https://perma.cc/7QVX-2PES]; *Acreage Open to Leasing – BLM Plans Around the West*, THE WILDERNESS SOC'Y, https://www.wilderness.org/sites/default/files/media/file/TWS%20Acreage%20Open%20to%20Leasing%20June%202016.pdf [https://perma.cc/PNW6-PPW9] (last visited Mar. 22, 2024). The BLM manages 245 million acres of land. *See id.*

25. U.S. GOV'T ACCOUNTABILITY OFF., MINING ON FEDERAL LANDS: MORE THAN 800 OPERATIONS AUTHORIZED TO MINE AND TOTAL MINERAL PRODUCTION IS UNKNOWN (2020), https://www.gao.gov/products/gao-20-461r [https://perma.cc/2NCQ-QPVQ].

26. George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENV'T L. 1, 97 (1982) (comparing the BLM to the Forest Service).

27. *See generally* Proclamation No. 6920, 61 Fed. Reg. 50223 (1996).

28. John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 31 ENV'T L. 199, 216–17, 219 (2001). *See* Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENV'T L. REV. 535, 538 (2001).

29. The NLCS was created by a secretarial order and subsequently codified by Congress in the Omnibus Public Land Management Act of 2009 in order "to conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations." 16 U.S.C. § 7202(a). Today, the NLCS covers some 36 million acres and includes national monuments as well as national conservation areas, wilderness study areas, trails within the National Trails System, and lands within the National Wild and Scenic Rivers System and the National Wilderness Preservation System. BUREAU OF LAND MGMT., *National Conservation Lands*, https://www.blm.gov/programs/national-conservation-lands [https://perma.cc/T7AN-QTE8] (last visited Aug. 3, 2023).

conservation-oriented agency."[30] The Obama Administration built on this legacy by creating the Bears Ears National Monument and delegating management responsibility to the BLM, and also by issuing amendments to the BLM's planning rules to foster landscape-scale ecosystem management.[31]

FLPMA authorizes the Secretary to promulgate implementing regulations necessary "to carry out the purposes" of the Act.[32] The Conservation Rule does so by homing in on the statutory requirement to "protect the quality of the scientific, scenic, ecological, environmental, air and atmospheric, [and] water resources, . . . [and], where appropriate, preserve and protect certain public lands in their natural condition."[33]

The Rule's reliance on resilient ecosystems as a centerpiece of multiple use and sustained yield management is long overdue. The BLM's rationale for the Rule is persuasive:[34]

> To address these threats [posed by climate change], it is imperative for the BLM to steward public lands to maintain functioning and productive ecosystems and work to ensure their resilience, that is, to ensure that ecosystems and their components can absorb, or recover from, the effects of disturbances and environmental change. This proposed rule would pursue that goal through protection, restoration, or improvement of essential ecological structures and functions.[35]

In short, conservation of healthy landscapes is essential to achieving resilient ecosystems. Absent resilient ecosystems, at least some of the authorized multiple uses would be impaired[36] and sustained yields would not be possible.[37]

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30. Robert B. Keiter, *Breaking Faith with Nature: The Bush Administration and Public Land Policy*, 27 J. LAND RES. & ENV'T L. 195, 243 (2007); Leshy, *supra* note 28, at 219.

31. Robert Glicksman & Sandra B. Zellmer, *30 × 30—Conservation and the Multiple-Use Agencies*, 68 FOUND. FOR NAT. RES. ENERGY L. 34, 34–22 (2022). These rules, known as Planning 2.0, are discussed *infra* Section IV.B.

32. 43 U.S.C. § 1740.

33. § 1701(a)(8). By including "atmospheric values," Congress demonstrated concern for anthropogenic climate change. Almost a decade before FLPMA was passed, President Johnson's Science Advisory Committee issued a report on the risk of global warming caused by fossil fuel emissions. Jamie Gibbs Pleune et al., *A Road Map to Net-Zero Emissions for Fossil Fuel Development on Public Lands*, 50 ENV'T L. REP. 10734, 10736 (2020) (citing ENVIRONMENTAL POLLUTION PANEL, PRESIDENT'S SCIENCE ADVISORY COMMITTEE, THE WHITE HOUSE, RESTORING THE QUALITY OF OUR ENVIRONMENT app. Y4, at 123–26 (1965)).

34. *See supra* Part I.

35. Conservation Rule, *supra* note 5, at 19585.

36. GAO-13-253, *supra* note 17, at 3, 30–31; *see infra* Section V.A (discussing the impetus for the Northwest Forest Plan and the Roadless Rule); Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENV'T L. 721, 764 n.305 (2005) (stating that grazing on BLM lands "has caused irreversible changes to soil and water conditions and to native biota," thereby destroying the possibility of future uses, including grazing itself).

37. *See* Conservation Rule, *supra* note 5, at 19599 ("Ecosystem resilience is essential to BLM's ability to manage for sustained yield.").

The Rule defines "conservation" as "maintaining resilient, functioning ecosystems by protecting or restoring natural habitats and ecological functions."[38] It aims to accomplish its conservation purposes through specified Principles for Ecosystem Resilience.[39] In particular, the Principles track the statutory language by requiring the following:

> (a) To ensure multiple use and sustained yield, the BLM's management must conserve the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; preserve and protect certain public lands in their natural condition (including ecological and environmental values); maintain the productivity of renewable natural resources in perpetuity; and consider the long-term needs of future generations, without permanent impairment of the productivity of the land.
>
> (b) The BLM must conserve renewable natural resources at a level that maintains or improves future resource availability and ecosystem resilience.[40]

The Rule directs BLM officers to implement the Principles through decision-making, authorizations, and planning processes that recognize conservation as a land use within the multiple use framework.[41]

To achieve its conservation objective, the Rule relies on a number of management tools, most notably detailed resource inventories; mitigation hierarchies to avoid or minimize adverse impacts to species, habitats, and ecosystems from land use authorizations; prevention of unnecessary or undue degradation of lands and resources; and prioritization of Areas of Critical Environmental Concern ("ACECs").[42] To elaborate on these four concepts:

1) Before approving any development proposal, the BLM must inventory intact natural landscapes, like lands with wilderness characteristics, and ensure that any such proposal will not degrade those landscapes.[43] For important, scarce, or sensitive resources, if degradation is possible, the Rule adopts a mitigation hierarchy

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38. *Id.* at 19598. Resilient ecosystems are "ecosystems that have the capacity to maintain and regain their fundamental structure, processes, and function when altered by environmental stressors such as drought, wildfire, nonnative invasive species, insects, and other disturbances." *Id.* at 19599.

39. *Id.* at 19590.

40. *Id.* at 19599 (to be codified at 43 C.F.R. § 6101.5).

41. *Id.* (to be codified at 43 C.F.R. § 6101.5(c)(1)).

42. *Id.* at 19586, 19599.

43. An intact landscape is "an unfragmented ecosystem that is free of local conditions that could permanently or significantly disrupt, impair, or degrade the landscape's structure or ecosystem resilience, and that is large enough to maintain native biological diversity, including viable populations of wide-ranging species." *Id.* at 19598.

that emphasizes avoiding adverse effects first, then, if avoidance is not possible, minimizing adverse effects and compensating for remaining adverse effects.[44]

2) The Rule clarifies that FLPMA's mandate to prevent unnecessary or undue degradation ("UUD") applies across agency programs, plans, and decisions, not just in the hardrock mining context.[45] It defines UUD as "harm to land resources or values that is not needed to accomplish a use's goals or is excessive or disproportionate."[46] In the past, the BLM had limited its application of UUD to activities that were not necessary for mining; the Rule gives effect to both terms by characterizing undue degradation as "excessive or disproportionate" harm.[47]

3) The Rule is the BLM's first substantive regulation on ACECs.[48] FLPMA requires the Secretary to "give priority to the designation and protection of areas of critical environmental concern" in developing and revising land use plans.[49] ACECs are defined as "areas within the public lands where special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards."[50] The Rule would codify the existing hodgepodge of procedures for considering and designating ACECs, some of which are partially described in regulation and partially in agency policy.[51] The Rule establishes procedures for identifying ACECs early in the planning process, with "consideration of ecosystem resilience, landscape-level

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44. *Id.* at 19586. Mitigation is commonly used in a variety of other contexts to avoid or minimize adverse effects to resources. *See, e.g.*, Daniel J. Rohlf & Colin Reynolds, *Restoring the Emergency Room: How to Fix Section 7(a)(2) of the Endangered Species Act*, 52 ENV'T L. 685, 730–31, 741 (2022) (discussing the use of mitigation to offset site-specific impacts to critical habitat and recommending expansion of its use to species' recovery plans); J.B. Ruhl & James Salzman, *No Net Loss? The Past, Present, and Future of Wetlands Mitigation Banking*, 73 CASE W. RSRV. L. REV. 411, 413 (2022) (describing how agencies have used compensatory mitigation in the context of wetlands).

45. Conservation Rule, *supra* note 5, at 19590. The UUD mandate is found at 43 U.S.C. § 1732(b), which states that "the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." On its face, the phrase applies to all activities, but existing regulations define it only with regard to hardrock mining. *See* 43 C.F.R. § 3809.1.

46. Conservation Rule, *supra* note 5, at 19599 (to be codified at 43 C.F.R. § 6101.4).

47. The current regulation, which bars activities that are not "reasonably incident" to mining but addresses "undue" degradation on a case-by-case basis through other statutory regimes, was upheld in *Min. Pol'y Ctr. v. Norton*, 292 F. Supp. 2d 30, 35–36, 44–45 (D.D.C. 2003).

48. ACEC regulations were proposed in 1980 but were not finalized. Karin P. Sheldon & Pamela Baldwin, *Areas of Critical Environmental Concern: FLPMA's Unfulfilled Conservation Mandate*, 28 COLO. NAT. RES., ENERGY & ENV'T L. REV. 1, 30–31 (2017) (citing 45 Fed. Reg. 82679 (1980)).

49. 43 U.S.C. § 1712(c)(3).

50. § 1702(a).

51. Conservation Rule, *supra* note 5, at 19595–96.

needs, and rapidly changing landscape conditions."[52] It states that "ACECs shall be managed to protect the relevant and important resources for which they are designated," but it does not delineate specific management standards or criteria.[53] Instead, it directs the BLM to "provide additional guidance for how to incorporate ACECs into resource management decisions in a way that considers trade-offs among environmental, social, and economic values during land use planning."[54] The Rule falls short of ensuring that the designation and management of ACECs will actually prevent irreparable harm to protected resources, but it is a meaningful step toward conservation of ACECs and more broadly, the ecosystems within which they exist.[55]

4) The Rule attempts to harness market forces by authorizing conservation leases "for the purpose of ensuring ecosystem resilience through protecting, managing, or restoring natural environments, cultural or historic resources, and ecological communities, including species and their habitats."[56] Leases may be granted for restoration, land enhancement, or mitigation for renewable periods of up to ten years.[57] During the lease term, no inconsistent uses may occur on the leased lands.[58] The BLM attempted something similar during the Clinton Administration with a rangeland reform regulation that authorized grazing permits for "conservation use."[59] By excluding livestock grazing for a period of time, these permits were designed for "protecting the land and its resources . . . improving rangeland conditions, or enhancing resource values."[60] The regulation was invalidated, however, on the grounds that the BLM lacked the statutory authority to issue "grazing permits" exclusively for conservation use on land that had been designated for grazing.[61] Beyond the grazing context, FLPMA authorizes the Secretary to issue

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52. *Id.* at 19587. It explicitly recognizes that a wide variety of areas can qualify by contributing to ecosystem resilience. *Id.* at 19587. "[R]esources, values, systems, or processes may meet the importance criterion if they contribute to ecosystem resilience, including by protecting landscape intactness and habitat connectivity." *Id.* at 19593.

53. *Id.* at 19593–94.

54. *Id.* at 19587. This will likely occur through revisions of the ACEC manual and development of a new ACEC handbook. *Id.*

55. Professor Michael Blumm has observed that "ACECs are currently an uncoordinated mess, leaving unprotected many acres of lands to which Congress intended BLM to give special management attention." Michael C. Blumm & Gregory A. Allen, *30 by 30, Areas of Critical Environmental Concern, and Tribal Cultural Lands*, 52 ENV'T L. REP. 10366, 10370 (2022). Field managers rarely prioritize designating ACECs, and many of the existing Resource Management Plans allow incompatible uses within ACECs. *Id.*

56. Conservation Rule, *supra* note 5, at 19600 (to be codified at 43 C.F.R. § 6102.4).

57. *Id.*

58. *Id.* This prohibition is subject to valid existing rights and casual recreational use ("short-term, noncommercial activity that does not cause appreciable damage or disturbance to the public lands or their resources or improvements"). *Id.* at 19598.

59. 43 C.F.R. § 4100.0-5 (1995), *invalidated by* Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1308 (10th Cir. 1999).

60. *Id.*

61. Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1308 (10th Cir. 1999). The court found that the Taylor Grazing Act only authorizes "permits to graze livestock on . . . grazing districts." *Id.* at 1307 (quoting 43 U.S.C. § 315b).

other types of permits and leases on federal land,[62] which would likely include "conservation use" leases throughout the system, including lands designated for grazing.[63]

These provisions of the Rule will be implemented through planning processes and project-level decision-making.[64] Throughout the text of the Rule, the BLM emphasizes that all of these principles and requirements are expected to occur "within the multiple use framework."[65]

Since the release of the BLM's proposed rule, opponents of a conservation-oriented management approach have raised fervent but inaccurate claims that such an approach is illegal and inconsistent with the BLM's statutory mission.[66] These allegations are misguided. The Conservation Rule is pathbreaking, but it is not unprecedented. Previous efforts by the BLM and the Forest Service have emphasized conservation of public lands and resources within the multiple use framework. By and large, courts have upheld these efforts, as described in the next Part.

III. THE MEANING OF "MULTIPLE USE"

The BLM's Conservation Rule rests on the premise that conservation fits within the multiple use paradigm. For much of its history, the multiple use requirement in FLPMA and other public lands statutes has been wielded more often than not to legitimize extractive uses. This Part examines the concept as used in both BLM and Forest Service statutes and concludes that conservation of public lands and resources is grounded in history and compatible with multiple use.

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62. 43 U.S.C. § 1732(b).

63. Jamie Pleune, *BLM's Conservation Rule and Conservation as a "Use,"* 53 ENV'T L. REP. 10824, 10835 (2023) ("The creation of 'conservation leases' is a specific exercise of BLM's authority to regulate the use of public lands through a variety of instruments, including leases."); David G. Alderson, *Buyouts and Conservation Permits: A Market Approach to Address the Federal Public Land Grazing Problem*, 12 N.Y.U. ENV'T L. J. 903, 945 (2005); *see also* Greater Yellowstone Coal. v. Tidwell, 572 F.3d 1115, 1126–27 (10th Cir. 2009) (stating that the authority granted in § 1732(b) is "considerably broader" than other statutory permitting authorities).

64. Conservation Rule, *supra* note 5, at 19599 (to be codified at 43 C.F.R. § 6101.5); *see id.* at 19590 (stating that the BLM "implements this mandate in other decision-making and management actions by promoting conservation use, limiting subsequent authorizations when incompatible with conservation use, and mitigating impacts to natural resources on public lands").

65. *Id.* at 19590, 19599.

66. *See, e.g.*, Jonathon Thompson, *Public Lands Rule Rhetoric Gets Wacky*, HIGH COUNTRY NEWS (June 29, 2023), https://www.hcn.org/articles/south-landline-public-lands-rule-rhetoric-gets-wacky/ [https://perma.cc/Q6ER-C7SM] (citing *Legislative Hearing on H.R. 3397: To require the Director of the Bureau of Land Management to withdraw a rule of the Bureau of Land Management relating to conservation and landscape health*, 118th Cong. (2023)).

A. "Multiple Use" Prior to FLPMA

The notion of "multiple use" management on the federal public lands has been around since the early 1900s,[67] but Congress first codified it as a management edict in the Multiple-Use Sustained-Yield Act of 1960 ("MUSYA").[68] Under MUSYA, surface resources of the national forests are to be managed "for multiple use and sustained yield of the several products and services obtained therefrom . . . so that they are utilized in the combination that will best meet the needs of the American people."[69] In MUSYA, Congress specifically recognized a broad range of uses and resources, including "outdoor recreation, range, timber, watershed, and wildlife and fish purposes."[70] This list is not exclusive, and the statute does not prioritize any of the enumerated items; rather, the Forest Service must give "due consideration" to the "relative values of the various resources in particular areas."[71]

The early history of the BLM and the origins of FLPMA are described in detail elsewhere and will not be repeated here.[72] Two events are notable for purposes of this Article. First, Congress passed the Classification and Multiple Use Act of

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67. *See* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENV'T L. REV. 405, 413–14 (1994) (stating that multiple use "has been a dominant force in the management of the national forests at least since 1905, when Gifford Pinchot was made Chief Forester"). For greater depth and context, see JOHN D. LESHY, OUR COMMON GROUND 346–47, 351–55, 372–73, 404, 429–36, 446–49 (2022).

68. *See* George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENV'T L. 1, 35 (1983) (identifying MUSYA as the "first complete legislative expression of the multiple use philosophy"); *see also* Charles Wilkinson, *"The Greatest Good of the Greatest Number in the Long Run": TR, Pinchot, and the Origins of Sustainability in America*, 26 COLO. NAT. RES., ENERGY & ENV'T L. REV. 69, 71–72 (2015); Sandra B. Zellmer, *Mitigating Malheur's Misfortunes: The Public Interest in the Public's Public Lands*, 31 GEO. ENV'T L. REV. 509, 559 (2019).

69. 16 U.S.C. §§ 529, 531(a).

70. 16 U.S.C. § 528. The MUSYA mandate is supplemental to the timber and watershed purposes for which the national forests were created under the 1897 Forest Reserve Act. United States v. New Mexico, 438 U.S. 696, 713 (1978).

71. *Id.* § 529. Congress seems to have used the terms "use" and "resource" interchangeably. George Cameron Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. COLO. L. REV. 229, 230, 253–54 (1982). Moreover, multiple use "does not contemplate that every acre be managed for every multiple use; Congress recognized that 'some land will be used for less than all of the resources.'" GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 30.3 (2d ed. 2024); *see also* PUB. LAND L. REV. COMM'N, ONE-THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION 51 (1970), https://leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Meetings/September-2013/one-third-of-nation.pdf [https://perma.cc/5GCC-3EYR] (recognizing and affirming the practice of zoning within forests for a dominant use rather than all uses at all times). The Forest Service has discretion in deciding which uses to allow and to what extent, so long as it considers all of the specified uses in its decisions. *See, e.g.*, Nat'l Wildlife Fed'n v. U.S. Forest Serv., 592 F. Supp. 931, 938 (D. Or. 1984), *amended by* 643 F. Supp. 653 (D. Or. 1984); Dorothy Thomas Found., Inc. v. Hardin, 317 F. Supp. 1072, 1076 (W.D.N.C. 1970).

72. *See* Zellmer & Glicksman, *supra* note 10, at 1318.

1964,[73] which authorized multiple use management for rangelands managed by the BLM.[74] Importantly, alongside multiple use management, the Act declared a goal of "preservation of public values."[75]

Second, the Public Land Law Review Commission's ("PLLRC") iconic report in 1970, *One-Third of the Nation's Land*, played a significant role in shaping the modern management provisions governing both the Forest Service and the BLM.[76] The report sounded the alarm about the degradation of the public lands—both national forests and rangelands—due to poor management, inadequate planning, and overuse. As for multiple use, the Commission identified its lack of a "clear set of goals for the management and use of the public lands" as a problem.[77] Among other things, the Commission recommended a commitment to "[p]roviding responsible stewardship of the public lands and their resources" and insisted that "[e]nvironmental values must be protected as major elements of public land policy."[78]

Congress responded by adopting both FLPMA and the National Forest Management Act ("NFMA") in 1976.[79] Both statutes include many of the PLLRC's recommendations on resource protection, and both require management for sustained yields of renewable resources.[80] Both are multiple use statutes, but FLPMA's statutory definition of "multiple use" is decidedly forward-looking, with an array of provisions that specify conservation-oriented goals and requirements for the management of the public lands, as discussed below.

B. Support for Conservation Within "Multiple Use"

FLPMA defines multiple use as "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values."[81] Many of the items in this list embrace conservation,

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73. 43 U.S.C. §§ 1411–18 (repealed 1970).

74. The BLM was established by President Harry Truman's Reorganization Plan. Reorganization Plan No. 3 of 1946, 11 Fed. Reg. 7875, § 403 (1946), *reprinted in* 5 U.S.C. app. 1. The Plan transferred the functions of the General Land Office and Grazing Service to the newly created BLM. § 403(a), (d).

75. Coggins & Lindberg-Johnson, *supra* note 26, at 99 (citing 43 U.S.C. § 1411 (repealed 1970)).

76. *See* PUB. LAND L. REV. COMM'N, *supra* note 71, at 41.

77. *Id.*

78. *Id.* at 7; *see also id.* at 10 ("Environmental quality should be recognized by law as an important objective of public land management, and public land policy should be designed to enhance and maintain a high-quality environment both on and off the public lands.").

79. 16 U.S.C. § 1601; 43 U.S.C § 1701.

80. Coggins & Lindberg-Johnson, *supra* note 26, at 100.

81. 43 U.S.C. § 1702(c). Like MUSYA, *supra* note 68, FLPMA lists uses and resources interchangeably, e.g., recreation (a use) and range and timber (resources), but it adds "natural scenic, scientific and historical values" to the list of uses and resources found in MUSYA's definition. *See* Norton v. S. Utah Wilderness All., 542 U.S. 55, 58 (2004).

specifically fish and wildlife; watershed; and natural scenic, scientific, and historical values.

Congress recognized that the BLM would face pressure to maximize economic output and requires the Agency to resist this pressure and instead strive for

> harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.[82]

FLPMA also requires management that reflects "periodic adjustments in use to conform to changing needs and conditions."[83]

Together, these provisions appear to authorize, and perhaps even require, the BLM to adapt its management approaches in the face of climate change and biodiversity loss, both of which destroy opportunities for future generations by causing permanent impairment of the productivity of the land and the quality of the environment.[84] Yet striking an appropriate balance through "harmonious and coordinated management" has proven to be an incredibly difficult task. As the. Supreme Court observed in *Norton v. Southern Utah Wilderness Alliance* (*SUWA*), "'[m]ultiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'"[85] Professor John Ruple explained it in more pointed terms: "The balance that the BLM is charged with finding is as elusive as a universally acceptable definition of pornography: we all believe that we recognize it when we see it, but . . . we have no common definition of what 'it' is . . . ."[86]

Striking a balance has, more often than not, come down to agency discretion.[87] According to Professors Coggins and Glicksman, "No court has remanded an administrative decision solely because of limitations derived from the

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82. 43 U.S.C. § 1702(c).

83. *Id.*

84. *See* Pleune, *supra* note 63, at 18208 (arguing that "recognizing conservation as an appropriate use of land . . . is consistent with the multigenerational management horizon imposed by the definition of 'sustained yield'").

85. *Norton*, 542 U.S. at 58.

86. John C. Ruple, *The Rise and Fall of Planning 2.0 and Other Developments in BLM Land Management Planning*, 63 ROCKY MT. MIN. L. INST. 22-1, 19 (2017).

87. *See* Coggins, *supra* note 71, at 230, 280 (stating that "[m]any managers believe that the management authority delegated to the agencies by Congress amounts to little more than a request to them to 'go forth and make wise, balanced decisions,'" but finding provisions that afford effective judicial review, which in turn means "more protection for users, less reliance on questionable economic theory, and more conservatism in management practice").

multiple use statutes."[88] Some have found that the multiple use mandate is satisfied so long as the agency gives some consideration to the various resources that may be affected by a decision.[89]

The D.C. Circuit fleshed out the analysis to a slightly greater degree in *Theodore Roosevelt Conservation Partnership v. Salazar*, where it found that the BLM's approval of a natural gas project satisfied multiple use principles because the approved project was "a product of compromise among competing goals."[90] The court rejected the opponents' argument that a decision to allow natural gas development failed to effectuate "FLPMA's intent to balance resource uses on the public lands" and held that not only did the chosen development alternative not have to protect all current and possible uses, it could proceed "to the permanent detriment of other uses."[91]

On the other side of the coin, the broad discretion afforded by the multiple use mandate broke in favor of conservation in *National Mining Association v. Zinke*.[92] There, the Ninth Circuit found that the BLM's withdrawal of more than one million acres of land from mining was "fully consonant with the multiple-use principle" where the BLM engaged in a reasoned balancing of potential economic benefits against possible risks to environmental and cultural resources.[93] The Ninth Circuit explained:

> "[M]ultiple use" does not . . . require the agency to promote one use above others. *Nor does it preclude the agency from taking a cautious approach to assure preservation of natural and cultural resources.* The agency must weigh competing interests and, where necessary, make judgments about incompatible uses; a particular parcel need not be put to all feasible uses or to any particular use.[94]

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88. COGGINS & GLICKSMAN, *supra* note 71, at § 30:5. The authors describe the reported decisions as "few, shallow, and indefinite." *Id.*

89. *See, e.g.*, Dorothy Thomas Found, Inc. v. Hardin, 317 F. Supp. 1072, 1076 (W.D.N.C. 1970); Perkins v. Bergland, 608 F.2d 803, 807 (9th Cir. 1979); Headwaters, Inc. v. Bureau of Land Mgmt., 684 F. Supp. 1053, 1056 (D. Or. 1988), *vacated as moot*, 893 F.2d 1012 (9th Cir. 1989); *see also* Min. Pol'y Ctr. v. Norton, 292 F. Supp. 2d 30, 49 (D.D.C. 2003) (finding BLM's definition of "unnecessary or undue degradation" sufficient to satisfy multiple use).

90. 616 F.3d 497, 518 (D.C. Cir. 2010). It added that the BLM "has wide discretion to determine how these principles should be applied." *Id.*

91. *Id.* at 517–18.

92. 877 F.3d 845, 872–73 (9th Cir. 2017).

93. *Id.*

94. *Id.* at 872 (emphasis added). The court reached its conclusion despite a provision of FLPMA, 43 U.S.C. § 1701(l), that defines "primary or major uses" as "mineral exploration and development" (along with grazing, timber, fish and wildlife development, rights-of-way, and outdoor recreation). *Id.* at 871. That provision seems to lack any independent meaning, other than as a consideration in land use plans. *See* 43 U.S.C. § 1712(e)(1) (stating that management decisions implementing land use plans, including but not limited to decisions eliminating a principal or major use, are subject to revision). The only published opinion that mentions § 1701(l) remanded a leasing decision to the BLM for failure to analyze GHGs. WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41 (D.D.C. 2019).

The broad-brush parameters of FLPMA's multiple use requirement give the BLM plenty of latitude to include conservation. Moreover, other provisions of FLPMA authorize and even require the BLM to conserve natural resources in ways that support the BLM's Conservation Rule.[95]

IV. THE BLM'S PREVIOUS CONSERVATION EFFORTS

Since the mid-1990s, the BLM has adopted a variety of conservation-oriented measures within the multiple use framework of FLPMA, including the Landscape Conservation System described above.[96] This Part covers additional measures that relate most directly to climate resilience and biodiversity—in particular, rangeland health and landscape-scale management planning. These efforts have paved the way for the Conservation Rule.

A. Fundamentals of Rangeland Health

Livestock grazing has had pervasive effects on BLM lands. Adverse impacts are both direct and indirect. Direct effects include loss of native perennial grasses, soil erosion and desertification, sedimentation, and water pollution.[97] Indirect but no less important effects include proliferation of invasive species, destruction of stream channels and riparian areas, and degradation of prairies, meadows, and forest habitat.[98]

In 1995, the BLM adopted regulations called Fundamentals of Rangeland Health and Standards for Grazing Administration ("Fundamentals")[99] to "promote healthy sustainable rangeland ecosystems" and "accelerate restoration and improvement of public rangelands to properly functioning conditions."[100] The BLM described these changes as "part of an overall effort to improve the management of the Nation's public rangeland resources."[101]

The regulations required BLM directors to adopt standards and guidelines that would follow the Fundamentals, including those that restored or maintained habitats for imperiled species and that ensured that watersheds are in "properly functioning physical condition" and that ecological processes are maintained "in order to support healthy biotic populations and communities."[102] If the standards were not being met, the BLM was directed to "take appropriate action" to modify

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95. *See* 43 U.S.C. §§ 1701(a)(8), 1702(c), 1712(c)(3), 1732(b).

96. *See supra* text accompanying notes 29–30.

97. Joseph M. Feller, *Ride 'Em Cowboy: A Critical Look at BLM's Proposed New Grazing Regulations*, 34 ENV'T L. 1123, 1128 (2004).

98. *Id.*; *see* Pub. Lands Council v. Babbitt, 529 U.S. 728, 731 (2000) (attributing "serious and apparent" consequences to "[p]opulation growth, forage competition, and inadequate range control").

99. 60 Fed. Reg. 9894, 9969–70 (Feb. 22, 1995) (codified at 43 C.F.R. pts. 4, 1780, 4100).

100. 43 C.F.R. § 4100.0–2(a) (1995).

101. 59 Fed. Reg. 14314, 14314 (Mar. 25, 1994) (proposed rule) (codified at 43 C.F.R. pts. 4, 1780, 4100).

102. 43 C.F.R. §§ 4180.1–.2(a), (b) (1995).

grazing practices by reductions in livestock grazing, adjustments to the grazing season, development of alternative water sources, or other measures.[103]

Pro-ranching organizations challenged the Fundamentals as promoting conservation at the expense of other multiple uses, in particular, grazing.[104] The Supreme Court rejected those arguments and found that the Fundamentals were within the BLM's authority under FLPMA and the Taylor Grazing Act.[105]

B. Planning 2.0

Prior to 2016, there was not a single reference to climate change within the BLM's regulations.[106] In 2016, the Obama Administration's BLM revised its planning regulations in a rule known as "Planning 2.0."[107] Planning 2.0 was intended to enhance public participation in planning and, most relevant to the topic of this Article, foster landscape-scale approaches to resource management by enabling the BLM to (1) "more readily address landscape-scale resource issues, such as wildfire, habitat connectivity, or the demand for renewable and non-renewable energy sources and to respond more effectively to environmental and social changes" and (2) "further emphasize the role of science in the planning process and the importance of evaluating the resource, environmental, ecological, social, and economic conditions at the onset of planning."[108] In furtherance of these goals, Planning 2.0 addressed climate-related considerations[109] and included several conservation-oriented reforms, such as a requirement to identify important migratory corridors for fish and wildlife in the plan-development process and to avoid or minimize conflicts with other land uses.[110]

Planning 2.0 was short-lived. Less than two months after its adoption, the House of Representatives passed a Congressional Review Act ("CRA") resolution

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103. *Id.* § 4180.2(c)(1)–(3).

104. *See* Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1293 (10th Cir. 1999), *aff'd*, 529 U.S. 728 (2000).

105. Pub. Lands Council v. Babbitt, 529 U.S. at 728, 742–43, 748, 750 (2000). The conservation permit provisions were invalidated by the Tenth Circuit, and that decision was not appealed. *Id.* at 747 (citing *Babbitt*, 167 F.3d at 1307–08). This aspect of the Fundamentals is discussed *supra* notes 59–61. In 2006, pro-development revisions to the regulations were issued "to improve the working relationships with permittees and lessees," but the 2006 regulations were invalidated in *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 476–77, 493 (9th Cir. 2011).

106. Zellmer & Glicksman, *supra* note 10, at 1354.

107. Resource Management Planning, 81 Fed. Reg. 89580 (Dec. 12, 2016) (to be codified at 43 C.F.R. pt. 1600).

108. *Id.*

109. *See id.* at 89626 (describing the Rule's inclusion of "areas of ecological importance, such as . . . refugia or migratory corridors" as a means "to help sensitive species respond to the effects of climate change"); *id.* at 89663 (requiring planners to "consider the impacts of resource management plans on resource, environmental, ecological, social, and economic conditions at relevant scales").

110. *See id.* at 89626 ("The identification of these areas is important at the onset of planning because fish and wildlife habitat often crosses jurisdictional boundaries and conservation of such habitat will often require landscape-scale management approaches.").

disapproving of the rule.[111] The Senate approved the resolution and President Trump signed it into law, thereby rescinding the rule.[112]

The CRA requires federal agencies to submit administrative rules to Congress for review.[113] For major rules, either the House or the Senate may introduce and pass a disapproval resolution within 60 days of submission.[114] Upon passage by both bodies, the resolution is sent to the President; if the President signs the resolution, the rule is rescinded and "treated as though such rule had never taken effect."[115]

Importantly for purposes of the new Conservation Rule:

> A rule that does not take effect . . . may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the rule disapproving the original rule.[116]

The phrase "substantially the same" is not defined in the CRA.[117] The Congressional Research Service has opined that "sameness could be determined by scope, penalty level, textual similarity, or administrative policy, among other factors."[118] While there is no definitive judicial precedent on point,[119] the Ninth Circuit rejected an argument that a rule that prohibited bear-baiting in one wildlife refuge in Alaska and also prohibited the hunting of coyotes, lynx, and wolves within another, was not "substantially the same" as a blanket rule that had prohibited bear-baiting and state predator control programs in all national wildlife refuges in Alaska.[120]

The Conservation Rule cannot reinstate Planning 2.0, and it does not attempt to do so. Planning 2.0 was aimed primarily at improving planning processes and public involvement, and there are significant differences throughout the text of

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111. 5 U.S.C. § 801(a)(1)(A).

112. Pub. L. No. 115-12, 131 Stat. 76 (2017). For discussion of the repeal, see Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining "The Public" in Public Land Law*, 48 ENV'T L. 311, 337–41 (2018).

113. 5 U.S.C. § 801(a)(1)(A).

114. § 801(a)(3).

115. § 801(f)(2). As a result, rules previously in existence control the agency's actions. § 801(e)(3).

116. § 801(b)(2).

117. *Id.*

118. MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 17 (2016).

119. Ruple, *supra* note 86, at 157; Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the 'Substantially Similar' Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 732–33 (2011).

120. Safari Club Int'l v. Haaland, 31 F.4th 1157, 1170 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1002 (2023).

the two initiatives.[121] The Conservation Rule is not a planning rule and thus is not "substantially the same" as Planning 2.0.[122] The scope of the Rule is also different, as it will be implemented through project-level decision-making as well as through planning.[123]

Avoiding a CRA problem does not require the BLM to ignore the findings within the Planning 2.0 preamble, which stated that "landscape-scale environmental change agents such as climate change, wildfire, and invasive species create challenges that require the BLM to develop new strategies and approaches to effectively manage the public lands."[124] The new Rule recognizes these challenges, and it proposes a new strategy and a variety of new approaches to address them.[125]

In the end, regardless of the congressional resolution on Planning 2.0, the fundamental requirements of FLPMA remain intact.[126] This means that, unless Congress amends FLPMA, the BLM remains bound by statute to engage in multiple use sustained-yield management and to prevent UUD and to do so in large part through planning but also through a variety of other measures, such as those specified in the Conservation Rule.[127]

V. THE FOREST SERVICE'S CONSERVATION EFFORTS AS PRECEDENT

The BLM's Conservation Rule is in keeping with previous conservation-oriented measures adopted by its sister multiple use agency, the Forest Service.

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121. *See* Resource Management Planning, 81 Fed. Reg. 89580, 89580 (Dec. 12, 2016) (to be codified at 43 C.F.R. pt. 1600) ("The final rule affirms the important role of other Federal agencies, State and local governments, Indian tribes, and the public during the planning process and enhances opportunities for public involvement and transparency during the preparation of resource management plans.").

122. The Rule explicitly disclaims any impact on planning. *See* BUREAU OF LAND MGMT., *Public Lands Rule FAQs*, U.S. DEP'T OF THE INTERIOR, https://www.blm.gov/public-lands-rule [https://perma.cc/3HPL-J2UT] (last visited June 26, 2023) ("The proposal does not change the existing land management planning process . . . . ").

123. 88 Fed. Reg. 19583, 19599 (Apr. 3, 2023) (to be codified at 43 C.F.R. pt. 1600); *see id.* at 19590 (discussing how the BLM will implement the new rule through decision-making and management actions, limitations on incompatible authorizations, conservation leases, and other measures).

124. 81 Fed. Reg. at 89584; *see* Alaska Wildlife All. v. Haaland, 632 F. Supp. 3d 974, 1001 (D. Alaska 2022) (citing *Safari Club Int'l*, 31 F.4th at 1169–70) ("[T]he scope of a joint resolution is narrow: it only cancels the rule at issue in the resolution.").

125. These new strategies and approaches are discussed *supra* Part II.

126. *Haaland*, 632 F. Supp. 3d at 1001 (citing *Safari Club Int'l*, 31 F.4th at 1169–70) (stating that a congressional joint resolution that cancels one agency rule cannot substantively amend federal law and thus cannot repeal by implication a different rule with a similar subject).

127. 43 U.S.C. § 1732(a); *see* § 1732(b) ("In managing the public lands, the Secretary shall . . . regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands."); Ruple, *supra* note 86, at 22–25 (citing §§ 1712, 1740) (remarking that "FLPMA's detailed requirements, including its multiple-use and sustained yield mandate, coordinated planning requirement, and public involvement procedures also remain in effect").

These efforts have played out through landscape-scale conservation strategies as well as comprehensive planning rules. This Part assesses two major landscape-scale management plans—the Northwest Forest Plan and the Roadless Rule—and the 2012 Forest Planning Rules.

A. The 1994 Northwest Forest Plan and the 2001 Roadless Rule

In the past few decades, the Forest Service has engaged in two noteworthy landscape-scale conservation initiatives designed to mitigate the effects of human development and climate change on biodiversity and on landscape integrity. Both have survived judicial review.

The first conservation initiative, the Northwest Forest Plan, was adopted in 1994 in an effort to conserve imperiled northern spotted owls, salmon, and other species on 24 million acres of federal lands.[128] The Plan was a joint effort of the Forest Service and the BLM, with the Forest Service as the lead agency.[129]

The Plan protects and restores old growth habitats and watersheds through four main components. First, the Plan identifies and designates "reserves" in which logging is prohibited to protect the ecosystem.[130] Second, it designates unreserved areas as "matrix," where timber harvest can proceed subject to environmental requirements.[131] Third, the Plan adopts an aquatic conservation strategy which overlays both the reserves and the matrix areas with a system of key watersheds where activities are restricted to conserve aquatic species.[132] Fourth, it calls for adaptive management in conjunction with a monitoring and evaluation program.[133] The Plan was expected to result in a 73% reduction from previous timber sale levels on the multiple use lands of the Pacific Northwest.[134] Nonetheless, the courts upheld the agencies' authority to adopt the Plan as consistent with the multiple use mandate of MUSYA, NFMA, and FLPMA.[135] In upholding the Plan, the district court opined that "[g]iven the current condition of the forests, there is no way the agencies could comply with the environmental laws *without* planning on an ecosystem basis."[136]

As the first major federal ecosystem management plan, the Northwest Forest Plan deserves landmark status. Not only has it received judicial approval, but

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128. *See* Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wildness*, 34 ENV'T L. 1015, 1073 (2004) (describing the Plan, which amended individual plans for 19 forests and 7 BLM districts).

129. *See* Availability of Final Supplemental Environmental Impact Statement, 59 Fed. Reg. 9992-03, 9992 (Mar. 2, 1994).

130. Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1304–05 (W.D. Wash. 1994), *aff'd sub nom. Seattle Audubon Soc. V. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

131. *Id.* at 1305.

132. *Id.*

133. *Id.*

134. *Id.* at 1305–06.

135. *Id.* at 1311 (finding that the Forest Service has a duty to "plan[] for the entire biological community").

136. *Id.*

there is also credible evidence that it has made headway in preventing degradation of old growth forests and aquatic ecosystems.[137]

The second conservation initiative, adopted in 2001, came in the form of a rule prohibiting road construction on 58 million acres of National Forest lands.[138] Its purpose was to conserve "ecological values and characteristics of inventoried roadless areas," including high quality air, water, and soils, and habitat for wildlife and fish species.[139] In light of its immense scope, and the range of activities that are not possible without roads, the Roadless Rule has been characterized as the "most significant land conservation initiative in nearly a century."[140]

Like the Northwest Forest Plan, the Roadless Rule was upheld in the face of numerous legal challenges.[141] The Tenth Circuit concluded that the rule did not preclude administration of resources for multiple uses despite the fact that it prohibited road construction and commercial timber harvesting in roadless areas because the rule enhanced other multiple uses, including "outdoor recreation," "watershed," and "wildlife and fish purposes."[142] It stated that the Forest Service has discretion under MUSYA to determine the proper mix of uses for Forest Service lands and reasoned that, "[i]n defining 'multiple use,' Congress acknowledged that some land will be used for less than all of the resources identified."[143]

B. 2012 Planning Rule: Ecological Integrity

The Forest Service embraced ecosystem management in its 2012 Planning Rule, building on its work on the Northwest Forest Plan and the Roadless Rule.[144]

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137. Michael C. Blumm et al., *The World's Largest Ecosystem Management Plan: The Northwest Forest Plan After a Quarter-Century*, 52 ENV'T L. 151, 152 (2022); Robert B. Keiter, *Breaking Faith with Nature: The Bush Administration and Public Land Policy*, 27 J. LAND RES. & ENV'T L. 195, 225 (2007) (citing Jack Ward Thomas et al., *The Northwest Forest Plan: Origins, Components, Implementation Experience, and Suggestions for Change*, 20 CONSERVATION BIOLOGY 277, 283 (2006)). Some argue that the Plan has been less effective at "promoting active restoration and adaptive management." *Id.*

138. *See* Roadless Area Conservation Rule, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294). At 58.5 million acres, the Roadless Rule covers one-third of the National Forest System. *Id.*

139. *Id.* at 3247.

140. Zellmer, *supra* note 128, at 1065; *see also* Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENV'T L. 1143, 1143 (2004).

141. *See* Robert L. Glicksman, *Wilderness Management by the Multiple Use Agencies: What Makes the Forest Service and the Bureau of Land Management Different?*, 44 ENV'T L. 447, 488–89 (2014) (citing Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1220 (10th Cir. 2011)).

142. *Wyoming*, 661 F.3d at 1267–68.

143. *Id.* at 1268. The court also found that "the Forest Service adequately considered the 'relative values of the various resources'" as required by MUSYA. *Id.* (citing 16 U.S.C. § 529).

144. National Forest System Land Management Planning, 77 Fed. Reg. 21162, 21162–64 (Apr. 9, 2012) (to be codified at 36 C.F.R. pt. 219); *see* J.B. Ruhl & James Salzman, *Ecosystem Services and Federal Public Lands: A Quiet Revolution in Natural Resources Management*, 91 U. COLO. L. REV. 677, 699 (2020) (concluding that the Planning Rule's emphasis on "forest health" and "sustainability" was supported by the multiple use mandate).

The Planning Rule announces an overarching goal of ecological integrity.[145] The definition of ecological integrity encompasses structure, function, and connectivity "within the natural range of variation" that "can withstand and recover from most perturbations imposed by natural environmental dynamics or human influence."[146]

The Planning Rule emphasizes restoration of natural resources to improve forest health through planning and plan revisions.[147] It strives to promote species conservation by keeping "common native species common" and contributing "to the recovery of threatened and endangered species."[148] To do so, the rule adopts both an ecosystem- and species-specific approach to providing diversity. It states that plan components must address ecological integrity by maintaining "a viable population of each species of conservation concern in the plan area."[149] Finally, as relevant to the topic of this Article, the rule provides that forest plans should be responsive and resilient to the challenges of climate change.[150]

The 2012 Planning Rule has withstood a facial challenge by industry groups.[151] Courts have held that the new planning provisions must be incorporated in revised forest plans,[152] which is where future challenges will lie.[153]

Like the 2012 Planning Rule, the BLM's Conservation Rule is consistent with multiple use management principles. Both include provisions designed to maintain or restore ecological integrity, conserve wildlife species, and enhance climate resilience at the landscape scale. Both agencies have deployed their delegated authorities to determine the proper mix of uses for lands under their jurisdiction, even if, as a result, "some land will be used for less than all of the resources identified" in the respective definitions of multiple use.[154] Moreover, as the district court observed in the litigation over the Northwest Forest Plan, given the

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145. 36 C.F.R. §§ 219.1(c), 219.19. For discussion, see Sandra Zellmer et al., *Restoring Beavers to Enhance Ecological Integrity in National Forest Planning*, 33 NAT. RES. & ENV'T 43, 44 (Winter 2019).

146. 36 C.F.R. § 219.19.

147. § 219.1(c).

148. § 219.9(b)(1).

149. *Id.*

150. *Id.*

151. *See* Fed. Forest Res. Coal. v. Vilsack, 100 F. Supp. 3d 21, 47 (D.D.C. 2015) (concluding that plaintiffs failed to show that the 2012 Rule threatens an injury-in-fact that is imminent, particularized, and traceable to the challenged action, and thus, plaintiffs lacked standing).

152. *See* Sierra Club, Inc. v. U.S. Forest Serv., 897 F.3d 582 (4th Cir. 2018) (holding that the Forest Service violated the 2012 Planning Rule in amending the Jefferson Forest Plan to exempt a pipeline from plan components).

153. *See* Susan Jane M. Brown & Martin Nie, *Making Forest Planning Great Again? Early Implementation of the Forest Service's 2012 National Forest Planning Rule*, 33 NAT. RES. & ENV'T 3, 7 (Winter 2019) (stating that "many stakeholders across the interest spectrum will likely seek to challenge aspects of a particular National Forest plan . . . with which they disagree"). As forest plans are revised to implement the requirements of the 2012 Rule, challenges to projects that implement provisions of those plans may also be raised. *See* Ohio Forestry v. Sierra Club, 523 U.S. 726, 728 (1998) (holding that, absent on-the-ground activities, forest plans are not ripe for review).

154. Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1235 (10th Cir. 2011).

current degraded condition of the land in question, there is no way the multiple use agencies could comply with their statutory mandates *without* utilizing an ecosystem approach.[155]

There are several distinctions between NFMA and FLPMA. For its part, NFMA requires the Forest Service to maintain diversity of species through its forest plans, which may not be possible without initiatives like the Roadless Rule, the Northwest Forest Plan, and the 2012 Planning Rule.[156] FLPMA has no equivalent provision. However, FLPMA contains three unique provisions that strengthen the BLM's hand in this regard: (1) the BLM *shall* prevent undue or unnecessary degradation of resources; (2) management approaches are to avoid permanent impairment of the productivity of the land and the quality of the environment; and (3) the BLM must prioritize ACECs.[157] It is fair to ask whether these provisions will be enough to provide safe harbor to the Conservation Rule.

VI. JUDICIAL DEFERENCE TO THE PUBLIC LANDS CONSERVATION RULE

It seems inevitable that the BLM's Conservation Rule, when finalized, will be challenged in court. When a court reaches the merits of the rule, will it defer to the BLM's interpretation of "multiple use"? The rule's consistency with FLPMA is discussed above in Part III, but that is only one aspect of the deference issue. Supporting precedents are provided in Parts V and VI, but those, too, must be found sufficiently analogous and worthy of following for the Conservation Rule to be upheld. This Part addresses the erosion of judicial deference, which has been palpable in the Commerce Clause context, and provides a rationale for continued deference in the Property Clause context.

A. Judicial Deference Under Chevron

For four decades, courts have applied the two-step test of *Chevron v. NRDC*[158] to review agencies' interpretations of statutes.[159] When an agency engages

155. *See* Blumm et al., *supra* note 137, at 172 (citing Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1311 (W.D. Wash. 1994)).

156. 16 U.S.C. § 1604(g)(3)(C).

157. 43 U.S.C. §§ 1702(c), 1712(c)(3), 1732(b).

158. 467 U.S. 837 (1984). *Chevron* applies when the agency administers the statute in question. *Compare* Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1294 (10th Cir.1999), *aff'd in relevant part*, 529 U.S. 728 (2000) (applying *Chevron* to Department of Interior regulations governing livestock grazing on public lands), *with* Sierra Club v. U.S. Dep't of Interior, 899 F.3d 260, 286 n.12 (4th Cir. 2018) (refusing to defer to the Park Service's interpretation of the Mineral Leasing Act); North Carolina Dep't of Env't Quality v. Fed. Energy Regul. Comm'n, 3 F.4th 655, 667 n.4 (4th Cir. 2021) (finding *Chevron* inapplicable to a review of FERC's certification requirements under the CWA). *See also* WildEarth Guardians v. U.S. Fish & Wildlife Serv., 784 F.3d 677, 683 (10th Cir. 2015) (stating that *Chevron* applies to interpretations of statutes that are "administered" by the agency as well as those that "regulate" the agency).

159. U.S. v. Mead Corp., 533 U.S. 218, 226–27 (2001).

in rulemaking to interpret a statutory provision that Congress has delegated to it,[160] reviewing courts must first determine whether "Congress has directly spoken to the precise question at issue" in the statute.[161] If so, the court honors Congress's "unambiguously expressed intent" and sets aside inconsistent agency interpretations.[162] If Congress has not directly spoken to the question, *Chevron* step two requires the court to defer to the agency's reasonable interpretation.[163] In *Chevron*, the Supreme Court deferred to the EPA's interpretation of the Clean Air Act because the "interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies" which are better left to the political branches of government.[164]

The rationale for *Chevron* is fourfold.[165] First, Congress lacks the ability to consider every possible implication of a statute and therefore delegates authority to the agency to fill in the gaps.[166] Second, the courts should not second-guess the judgment of agencies due to the agencies' scientific, technical, and policy expertise.[167] Third, agencies, which operate under the auspices of the President, are accountable to the Chief Executive, who is in turn accountable to the people in a way that federal judges are not.[168] Finally, *Chevron* deference provides stability and

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160. *Id.* A precondition to *Chevron* deference is the delegation of administrative authority, i.e., whether Congress has given this agency authority to interpret the statute in question. S. Ute Indian Tribe v. Amoco Prod. Co., 119 F.3d 816, 831 (10th Cir. 1997) (citing Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990)), *rev'd on other grounds*, 526 U.S. 865 (1999). Another precondition is whether the agency's interpretation appears in regulations with the force of law; if not, some diminished form of deference may (or may not) apply. These preconditions are sometimes called *Chevron* Step Zero. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 193 (2006) (citing *Mead Corp*., 533 U.S. at 226–27).

161. *Chevron*, 467 U.S. at 843.

162. *Id.* at 842–43.

163. *Id.* at 43. The *Chevron* framework applies only if Congress has either expressly or implicitly (but actually) delegated interpretive authority to an agency to resolve the statutory gap or ambiguity. *Mead Corp*., 533 U.S. at 226–27.

164. 467 U.S. at 865.

165. Kent Barnett et al., *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1475–82 (2018) (stating that *Chevron* deference turns on agency expertise, deliberative process, political accountability, and national uniformity of law).

166. *See id.*; *Chevron*, 467 U.S. at 865–66; *see also* U.S. v. Grimaud, 220 U.S. 506, 517 (1911) (rejecting a nondelegation challenge to Forest Service regulations and stating that Congress could enact general provisions and give agencies the "'power to fill up the details' by the establishment of administrative rules and regulations"); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468, 472 (2001) (rejecting a nondelegation challenge and giving *Chevron* deference to the EPA's method of enforcing ozone standards in nonattainment areas under the Clean Air Act).

167. *Chevron*, 467 U.S. at 865–66; Benjamin C. Skillin, *Major Questions Require Major Coordination: Enhancing Regulatory Coordination to Combat Nondelegation and Anti-Deference Judicial Scrutiny*, 64 B.C. L. REV. 1283, 1310–11 (2023).

168. *See Chevron*, 467 U.S. at 865–66 ("[I]t is entirely appropriate for th[e] political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

predictability and thus more uniformity in federal law than would otherwise be seen if the federal courts reviewed ambiguous statutory provisions de novo.[169]

In 2006, Cass Sunstein, who later became the Administrator of the White House Office of Information and Regulatory Affairs,[170] wrote that *Chevron* "shows no sign of losing its influence." He opined that "the decision has become foundational, even a quasi-constitutional text—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies."[171]

In the years since 2006, however, the judicial pendulum has swung away from *Chevron* deference.[172] Administrative law experts, including Sunstein,[173] have taken note of the "erosion of *Chevron* deference"[174] while at least one Supreme Court Justice has predicted the death of *Chevron* altogether.[175] Most recently, in a pair of blockbuster cases—*West Virginia v. EPA*[176] and *Sackett v. EPA*[177]—the Court

169. City of Arlington v. FCC, 569 U.S. 290, 307 (2013).

170. *See Information and Regulatory Affairs*, THE WHITE HOUSE, https://www.whitehouse.gov/omb/information-regulatory-affairs/ [https://perma.cc/9TJ2-9QK9] (last visited July 28, 2023).

171. Sunstein, *supra* note 160, at 188.

172. Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1160 n.159 (2022); *see* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 535 (2022) (opining that "the conservative turn against deference reflects a backlash to Obama-era administrative governance"); Kent Barnett, *How Chevron Deference Fits into Article III*, 89 GEO. WASH. L. REV. 1143, 1151–52 (2021) (noting that two justices—Clarence Thomas and Neil Gorsuch—believe *Chevron* violates Article III); Baldwin v. United States, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting), *denying cert. to* 921 F.3d 836 (9th Cir. 2019) ("*Chevron* compels judges to abdicate the judicial power without constitutional sanction."); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

173. Cass R. Sunstein, *Zombie Chevron: A Celebration*, 82 OHIO ST. L. J. 565, 566 (2021) ("Chevron is now under siege. Its days might well be numbered.").

174. Glicksman & Levy, *supra* note 172, at 1160; *see* Nicholas Ohanesian, *Administrative Deference and the Social Security Administration*, 30 J. L. & POL'Y 337, 338 (2022) (noting "a growing chorus calling to re-examine or outright roll back [*Chevron*] deference"); Keith W. Rizzardi, *From Four Horsemen to the Rule of Six: The Deconstruction of Judicial Deference*, 12 MICH. J. ENV'T & ADMIN. L. 63, 101 n.206 (2022) (citing Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990)); Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015).

175. Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting), *denying cert. to* 7 F.4th 1361 (Fed. Cir. 2021) ("Maybe *Chevron* maximalism has died of its own weight and is already effectively buried . . . . [It] deserves a tombstone no one can miss."). *See* Pamela King, *How SCOTUS Gutting Chevron Could Haunt Republicans*, GREENWIRE (May 16, 2023), https://www.eenews.net/articles/how-scotus-gutting-chevron-could-haunt-republicans/ [https://perma.cc/YS8J-GRLU] (stating that Gorsuch, Thomas, and Alito "have signaled that they want to kick *Chevron* to the curb").

176. 142 S. Ct. 2587 (2022).

177. 143 S. Ct. 1322 (2023).

ignored *Chevron* completely and refused to defer to agency interpretations of the Clean Air Act ("CAA") and the Clean Water Act ("CWA"), respectively.[178]

West Virginia struck down the Clean Power Plan, a CAA regulation that required electric utilities to cut greenhouse gas emissions by restructuring the Nation's overall mix of electricity generation away from coal toward cleaner sources of power.[179] According to the Court, the EPA's interpretation was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation" into an entirely different kind. The Court stated that, in "extraordinary cases," regulations that (1) assert a vast economic reach over the entire nation (for example, over utilities and consumers, i.e., almost everyone in the entire country)[180] and (2) invoke an "unheralded power representing a transformative expansion of . . . regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler"[181] must be explicitly authorized by Congress. The Court side-stepped *Chevron* altogether and refused to give the EPA any deference under a concept it dubbed the "major questions doctrine."[182]

Sackett involved what the Court deemed an "overly broad" definition of "waters of the United States" issued by the EPA and the Army Corps of Engineers under the CWA.[183] The Court found that the agencies' definition clashed with "background principles of construction"[184] and held that Congress must "enact exceedingly clear language" when it intends "to significantly alter" (1) federal versus state power, or (2) the reach of federal power over private

178. There was no mention of *Chevron* in the *Sackett* opinion, and it was only raised by the dissent in *West Virginia*. *See* 142 S. Ct. at 2635 (Kagan, J., dissenting) (stating that the case should have been resolved by applying *Chevron*'s first step, *i.e.*, whether "Congress has directly spoken to the issue and precluded" the EPA's assertion of power) (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

179. *See id.* at 2603 (discussing EPA's decision that generation-shifting was the "best system of emission reduction" for power plants emitting carbon dioxide under § 111(d)); *id.* at 2611–12 (citing 80 Fed. Reg. 64726) ("Rather than focus on improving the performance of individual sources, [the EPA's new rule] would improve the overall power system by lowering the carbon intensity of power generation," thereby "forcing a shift throughout the power grid from one type of energy source to another.").

180. *Id.* at 2613 ("We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.") (citing *Brown & Williamson*, 529 U.S. at 160); *see id.* at 2616 (Gorsuch, J., concurring) (characterizing the Clean Power Plan as a regulation with a vast economic reach over the entire nation (electric utilities and consumers)).

181. *Id.* at 2622 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (agencies may not hide "elephants in mouseholes")).

182. *See id.* at 2605 (Kagan, J., dissenting) (noting that the Court had never used the phrase "major questions doctrine" before, and invoking *Chevron*).

183. 143 S. Ct. at 1341–42 (citing 33 U.S.C. § 1251).

184. *Id.* at 1341. The rule covered adjacent wetlands that had a "significant nexus" to traditional navigable waters. *Id.* (citing Conservation Rule, *supra* note 5).

property.[185] According to the Court, "[r]egulation of land and water use lies at the core of traditional state authority"; moreover, it characterized the "vast territory" covered by the agencies' definition as "truly staggering."[186]

> Justice Kagan criticized both opinions in her concurrence in *Sackett*:
>
> > Today's pop-up clear-statement rule is explicable only as a reflexive response to Congress's enactment of an ambitious scheme of environmental regulation. And that, too, recalls last Term, when I remarked on special canons "magically appearing as get-out-of-text-free cards" to stop the EPA from taking the [anti-pollution] measures Congress told it to . . . .[187]

As Kagan noted, "The vice in both instances is the same: the Court's appointment of itself as the national decision-maker on environmental policy."[188]

The continued viability of the *Chevron* doctrine may be resolved by *Loper Bright Enterprises v. Raimondo*,[189] a challenge to a federal fisheries rule. The rule, issued by the Department of Commerce's National Marine Fisheries Service, establishes an industry-funded at-sea onboard monitoring program for the Atlantic herring fishery.[190] The D.C. Circuit gave *Chevron* deference to the Agency's determination that industry-funded monitoring would best serve the statute's conservation and management goals and was consistent with other provisions that

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185. *Id.* (citing U.S. Forest Serv. v. Cowpasture River Preservation Ass'n, 140 S. Ct. 1837, 1849–50 (2020); Bond v. United States, 572 U.S. 844, 858 (2014)). In *Cowpasture*, the Court stated, "Under our precedents, when Congress wishes to 'alter the fundamental details of a regulatory scheme,' as respondents contend it did here through delegation, we would expect it to speak with the requisite clarity to place that intent beyond dispute." 140 S. Ct. at 1849 (citing Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1617 (2018) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)). *Cowpasture* involved NFMA, NEPA, and Mineral Leasing Act challenges to Atlantic Coast Pipeline's plan to construct a pipeline under the Appalachian Trail, which, in addition to federal land, "comprises 58,110.94 acres of Non-Federal land, including 8,815.98 acres of Private land." *Id.* at 1842, 1849.

186. *Sackett*, 143 S. Ct. at 1341. In *Sackett*, the Court articulated a third reason for denying deference—the EPA's definition raised "serious vagueness concerns in light of the CWA's criminal penalties." *Id.* at 1341–42.

187. *Id.* at 1361–62 (Kagan, J., concurring) (citing *West Virginia*, 142 S. Ct. at 2641–42).

188. *Id.*; *see* Evan George, Sackett *and the Dangers of a New "Clear-Statement Rule,"* LEGAL PLANET (May 30, 2023), https://legal-planet.org/2023/05/30/sackett-and-the-dangers-of-a-new-clear-statement-rule/ [https://perma.cc/6P9V-TPGK] (quoting Julia Stein) ("*Sackett* builds on the Court's recent pattern of ghosting *Chevron* deference . . . creating an opportunity for the Court to override agency judgment rather than deferring to it."); *id.* (these two decisions "portend increasingly serious constraints on federal environmental regulation"; they are "consistent with—and expand[]—the general trend of this Court to shift power to itself at the expense of expert agencies").

189. 143 S. Ct. 2429 (2023).

190. 85 Fed. Reg. 7414, 7414–17 (Feb. 7, 2020) (to be codified at 50 C.F.R. pt. 648).

imposed compliance costs on the industry.[191] The Supreme Court accepted certiorari on the limited question of *Chevron*'s continued viability.[192]

To overturn *Chevron* would have a destabilizing effect on agency rulemaking and the federal judiciary, as well as entities who rely on consistency in the laws governing their legal interests.[193] It would inhibit agencies' ability to respond to complex problems or novel threats.[194] For these reasons, when the Court had an opportunity to overrule *Chevron*'s counterpart for agency interpretations of regulations (rather than statutes) in 2019, it declined.[195]

Rather than attempting to "read the tea leaves" on *Chevron*'s longevity, it is fair to say that even if *Loper Bright* were to toss *Chevron* into the dustbin, it would not defeat the BLM's Conservation Rule. For one thing, a de novo review of FLPMA supports—and arguably compels—the inclusion of conservation as a multiple use, making deference less critical for this rule.[196] For another, there are important reasons why courts should continue to afford deference to agencies' decisions that implement public lands statutes.

One reason for continuing to give deference to public land management agencies' interpretations of the statutes they administer is that they are quite different from those at issue in *West Virginia* and *Sackett*. Both of those cases involved regulations of "vast economic and political significance"[197] that affected

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191. Loper Bright Enters. v. Raimondo, 45 F.4th 359, 369 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023).

192. *Id.* The question presented is "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." Brief for Petitioner at i, Loper Bright Enters.v. Raimondo, 143 S. Ct. 2429 (2023) (No. 22-451). The regulation at issue should not trigger the major questions doctrine because it did not even meet the threshold of a "significant regulatory action" that would trigger a detailed cost-benefit analysis. *See* 85 Fed. Reg. at 7427 (2020) (concluding that it would not impose "an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities" under EO 12866).

193. Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1460 (2017); Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 278, 282–83 (2014).

194. *Cf.* David B. Spence, *Naïve Administrative Law: Complexity, Delegation and Climate Policy*, 39 YALE J. ON REGUL. 964, 1011 (2022) (describing how a revival of the nondelegation doctrine would "represent an unnecessary tragedy for national climate policy and (more generally) for governance during this unusually trying moment in American political history").

195. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (finding that stare decisis cut strongly against overruling *Auer* deference to agencies' reasonable readings of ambiguous regulations) (citing Auer v. Robbins, 519 U.S. 452, 462 (1997)).

196. *See supra* Section III.B.

197. *West Virginia*, 142 S. Ct. at 2605; *Sackett*, 143 S. Ct. at 1341–42; *see id.* at 1360 (Kagan, J., concurring) (stating the rule would wreak untold havoc on "a staggering array of landowners"); *see also* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661,

private industries, developers, landowners, and consumers all across the country.[198] Property Clause statutes and regulations primarily affect public lands and resources, whose management generally does not impact private property rights[199] or vast sectors of the economy.[200] Public lands decisions can have implications for industry, private interests, tribes, and states, but they do not rise to the level of "vast" economic reach and national political significance.[201]

Not only do Property Clause regulations assert a relatively modest effect on the national economic and political landscape, but the BLM's Conservation Rule is anything but an "unheralded power representing a transformative expansion of [] regulatory authority in the vague language of a long-extant, but rarely used, statute

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667 (2022) (Gorsuch, J., concurring) (characterizing a regulation that would "force 84 million Americans to receive a vaccine or undergo regular [COVID] testing" as a matter of "vast national significance" and applying the "major question doctrine"); Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–61 (2000) (refusing to defer to the FDA's construction of the Food, Drug, and Cosmetic Act as providing jurisdiction over tobacco where Congress had created a distinct regulatory scheme for it and had rejected proposals to give the Agency any significant policymaking authority over it).

198. *Loper Bright* is more limited than either *West Virginia* or *Sackett*, as its impacts are felt by a relatively narrow sector of the economy (the fishing industry). Loper Bright Enters. v. Raimondo, 45 F.4th 359, 369 (D.C. Cir. 2022).

199. *See* Zellmer, *supra* note 68, at 509–10 (examining laws governing private interests in federal grazing permits and mineral leases). *See also* Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917) (rejecting utility's assertion of a right to maintain unpermitted facilities on national forest land; "the power of Congress is exclusive and . . . only through its exercise . . . can rights in lands belonging to the U.S. be acquired"); United States v. Fuller, 409 U.S. 488, 494 (1973) (grazing permits do not create property rights on federal land); United States v. Locke, 471 U.S. 84, 104–05 (1985) (noting that mining claims are held with knowledge of the government's "substantial" regulatory power; thus, no reasonable expectation had been impaired when Congress exercised that power by requiring that claims be filed). When valid existing property rights do exist, they are recognized by federal law. James N. Barkeley & Lawrence V. Albert, *A Survey of Case Law Interpreting 'Valid Existing Rights'—Implications for Unpatented Mining Claims*, 34 ROCKY MOUNTAIN MIN. L. FOUND. INST. 9, § 9.02 (1988).

200. Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. STATE L. J. 941, 1022, 1024 (2000). "The regulatory impacts of Property Clause delegations are generally felt . . . by a handful of local communities and specialized industries, such as logging companies, sawmills and mining companies." *Id.* at 1024.

201. *See* Zellmer, *supra* note 68, at 509; Jennifer Morales & Megan E. Jenkins, *How Do Federal Lands Impact Local Economies?*, CGO (July 9, 2020), https://www.thecgo.org/research/how-do-federal-lands-impact-local-economies/ [https://perma.cc/HM4B-KA49] (finding a lack of consensus regarding the impact of federal lands management on local economies). The BLM found that, for FY2021, "BLM-administered lands supported $201 billion in economic output." *The BLM: A Sound Investment for America 2022*, BUREAU OF LAND MGMT., https://www.blm.gov/about/data/socioeconomic-impact-report-2022 [https://perma.cc/54UQ-VXQ4] (last visited Aug. 7, 2023). This is about 1% of the U.S. gross domestic product ("GDP") for 2021, which was $24 trillion. *Gross Domestic Product, Fourth Quarter and Year 2021 (Advance Estimate)*, BUREAU OF ECON. ANALYSIS (Jan. 27, 2022), https://www.bea.gov/news/2022/gross-domestic-product-fourth-quarter-and-year-2021-advance-estimate [https://perma.cc/RP7E-ZKNN].

designed as a gap filler."[202] FLPMA has governed the BLM's management of lands under its jurisdiction since 1976, and over the past three decades, the BLM has implemented the relevant statutory provisions in question in ways that promote conservation, albeit not always consistently.[203]

Another reason for continuing to give deference to public land management agencies is the context in which their decisions arise. *Loper Bright*, *West Virginia*, and *Sackett* deal with statutes issued under the Commerce Clause power,[204] which has seen significant contraction by the Court in recent years.[205] Even if the Court dismantles the *Chevron* doctrine in the Commerce Clause context, *Chevron* deference or something like it should continue to apply to public lands decisions arising under the Property Clause.[206] The Property Clause power is different, as explained in the next Section, and the difference warrants greater deference to agencies issuing conservation-based interpretations of the provisions of statutes that Congress has delegated to them.[207]

The rest of this Section addresses an intriguing question: whether context counts in the application of *Chevron*.[208]

Professor Cloverdale points out that "although courts enunciate broad principles of statutory interpretation theoretically applicable to all substantive statutes, they consciously or unconsciously take into account the peculiar features of particular substantive areas of law in devising practical rules of deference."[209] Two substantive areas of the law serve as examples that the application of

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202. *West Virginia*, 142 S. Ct. at 2595.

203. *See supra* Section IV.A (discussing BLM's previous conservation initiatives).

204. *See* Sackett v. EPA, 143 S. Ct. 1322, 1345 (2023) (Thomas, J., concurring) ("The Federal Government's authority over certain navigable waters is granted and limited by the Commerce Clause . . . .") (applying 33 U.S.C. § 1362(7)); *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (discussing Commerce Clause limitations on "areas traditionally regulated by the States") (applying 42 U.S.C. § 7411(d)). Likewise, *Loper Bright* involves a regulation issued under the Magnuson-Stevens Fishery Act, which arises under the Commerce Clause. *See* 16 U.S.C. § 1801(b); Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 281–82 (1977).

205. Robert J. Pushaw, Jr., *The Paradox of the Obamacare Decision: How Can the Federal Government Have Limited Unlimited Power?*, 65 FLA. L. REV. 1993, 2015 (2013).

206. The Court accepts certiorari in relatively few Property Clause cases; when it does, it applies *Chevron* sporadically. *Compare* Sturgeon v. Frost, 139 S. Ct. 1066, 1080 (2019) (recognizing *Chevron*'s relevance but finding no ambiguity in the statute and thus giving no deference to the Park Service), *with* Pub. Lands Council v. Babbitt, 529 U.S. 728, 750 (2000) (upholding the BLM's regulations governing grazing on public lands without citing *Chevron*).

207. *See infra* Section VI.B.

208. Christopher J. Walker, *Toward A Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095, 1100 (2016); Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 55 (2017); *see also* Connor N. Raso & William N. Eskridge, Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1765 (2010) (concluding that the application of *Chevron* varies depending on context and moral suasion).

209. John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 GEO. WASH. L. REV. 35, 89 (1995).

Chevron—and, more generally, judicial review of agency interpretations—may vary depending on context: federal Indian law and immigration law.[210] A third area, tax law, stands apart as an area where the Court resoundingly rejected a unique multi-factor standard of review in favor of *Chevron*, citing the need for uniformity in federal administrative law.[211] Each of these areas warrants a closer look.

With respect to matters that affect Indian tribes, Congress's power is said to flow from either the Indian Commerce Clause "or from a plenary power that transcends any constitutional grounding."[212] Courts have given substantial deference to Congress's assertion of authority over Indian affairs.[213] By contrast, courts have given far less deference to *agencies* when it comes to the interpretation of federal Indian law,[214] despite explicit congressional delegations of authority to the executive branch.[215] Cases involving Indian affairs trigger a unique canon of construction that requires courts to construe ambiguous provisions affecting Indian treaties and trust responsibilities in a light most favorable to tribes and as tribes would understand them.[216] Whether the canons protective of Indian interests displace *Chevron* deference to agencies is a fair question. Although the Supreme Court has not yet addressed this issue, all but one of the circuit courts of appeals to reach it have said yes.[217] In cases involving federal Indian law, it appears that context counts.

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210. *See* Zellmer, *supra* note 200, at 1031 (noting that powers over immigration, Indian affairs, and taxation have been "described as plenary in nature") (citations omitted).

211. *See infra* notes 226–33 and accompanying text.

212. Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 271 n.4 (2003). Pommersheim notes that "scholars consistently have questioned the purported doctrine of plenary federal authority over Indians because of the lack of any textual roots for the doctrine in the Constitution, the breadth of its implications, and the lack of any tribal consent to such broad federal authority." *Id.*

213. *See id.* at 272 n.4 (observing that Congress's "plenary" acts are subject to a "minimal at best" rational basis test).

214. *See* 25 U.S.C. §§ 2, 9.

215. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1508, 1513–14 (arguing that the trust doctrine plays an important role as a check on executive power but that attempts to use the doctrine to check congressional power has been a "retreating mirage"); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 232–33 (1984) (saying the trust doctrine is "not constitutionally based and thus not enforceable against Congress").

216. Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992); Cobell v. Salazar, 573 F.3d 808, 812 (D.C. Cir. 2009).

217. Diane P. Wood, *Indian Sovereignty in Context*, 2022 WIS. L. REV. 211, 221 (2022); *see also* Procopio v. Wilkie, 913 F.3d 1371, 1386 (Fed. Cir. 2019) (O'Malley, J., concurring) (applying a pro-Indian canon exception to *Chevron* deference); E.E.O.C. v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989) ("[N]ormal rules of construction do not apply when Indian treaty rights, or even nontreaty matters involving Indians, are at issue."); *Cobell*, 573 F.3d at 812 (stating that *Chevron* applies "with muted effect" to interpretations of legislation affecting tribes). *But see* Haynes v. United States, 891 F.2d 235, 239 (9th Cir. 1989) (favoring *Chevron* over Indian canons of construction). The First Circuit sidestepped the issue in *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 40 (1st Cir. 2020),

Immigration issues represent the other side of the coin, where courts have given heightened *Chevron* deference to the political branches' exercises of "plenary" power, citing national security and foreign affairs powers as rationales.[218] The Supreme Court has stated that deference to the Board of Immigration Appeals, the Immigration and Naturalization Service ("INS"), and the Attorney General in immigration matters "is of special importance."[219] The Court explained that executive officials "exercise especially sensitive political functions that implicate questions of foreign relations"; conversely, "[t]he judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions."[220] Whether special deference is truly warranted for these entities is another question,[221] but the immigration cases support the theory that the level of deference provided in any given case may be contextual.[222]

Finally, federal tax law cuts against the notion that deference is contextual. Article I of the Constitution gives Congress the power "to lay and collect

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where it found that there was no textual ambiguity in the statute and thus no need to apply the Indian canons of statutory interpretation.

218. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 764–66 (1972); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215–16 (1953); *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.").

219. Negusie v. Holder, 555 U.S. 511, 516–17 (2009) (applying 8 U.S.C. § 1101); *see* I.N.S. v. Orlando Ventura, 537 U.S. 12 (2002) (deferring to INS on asylum issues). The BIA is an appellate immigration agency within the Department of Justice. *Board of Immigration Appeals*, EXEC. OFF. FOR IMMIGR. REV.: U.S. DEPT OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/M6D3-LEP2] (Mar. 11, 2024).

220. *Negusie*, 555 U.S. at 517 (first quoting I.N.S. v. Abudu, 485 U.S. 94, 110 (1988); then citing INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)). Despite heightened deference, the Court remanded because the BIA had erroneously believed that Congress's intent had been clearly expressed, while the Court found ambiguity in the statute. *Id.* at 523. One panel of the Eleventh Circuit has construed the *Negusie* remand as warranting only "plain old" deference to the BIA's interpretations of immigration-related statutes, Ruiz v. U.S. Att'y Gen., 73 F.4th 852, 862 (11th Cir. 2023), while a different panel applied deference under *Negusie* and *Aguirre-Aguirre*. Edwards v. U.S. Att'y Gen., 56 F.4th 951, 960, 962 (11th Cir. 2022).

221. For critiques, see Faiza W. Sayed, *The Immigration Shadow Docket*, 117 NW. U. L. REV. 893, 919 (2023) ("The modern BIA is a backlogged, politically influenced body subject to minimal review that often operates in the shadow of the law."); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L. J. 1197, 1214–15 (2021) (arguing that the rationale for *Chevron* deference is "perhaps most precarious with respect to immigration adjudication," which lacks two of the four reasons for deference: "comparative expertise and deliberative process").

222. *See* Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 IND. L. J. 653, 654 (2018) (arguing that basing the immigration power in the Commerce Clause "would put a thumb on the scale in favor of ordinary judicial review for immigration statutes, rules, and policies"). Gordon makes a persuasive case that, if the Court were to accept the Commerce Clause as a source of power, it would engage in more probing review of immigration-related laws and policies. *See id.* at 659, 712.

taxes . . . for the common Defence and general Welfare."[223] Congress has provided very detailed and explicit delegations to the Treasury Department, through the Internal Revenue Service ("IRS"), to enforce the Internal Revenue Code.[224] It has also given the IRS residual power through a broad statutory delegation within the Code—the authority to "prescribe all needful rules and regulations."[225]

For several decades, tax disputes triggered a distinct brand of deference.[226] The standard of review seemed to have been "developed specifically for the field of tax,"[227] in part because the highly complex Internal Revenue Code required an exceptional level of agency expertise.[228] The Supreme Court ultimately curtailed this exceptionalism in 2011, when it found "no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations."[229] The Court emphasized "the importance of maintaining a uniform approach to judicial review of administrative action."[230] In doing so, the Court effectively put its thumb on the scale of the "reasonableness" of the IRS's interpretations of ambiguous provisions of the Code.[231] As in other

223. U.S. CONST. art. I, § 8, cl. 1. The Sixteenth Amendment authorizes the taxation of income. *Id.* amend. XVI.

224. Coverdale, *supra* note 209, at 36.

225. 26 U.S.C. § 7805(a). Despite the breadth of this provision, some scholars have argued that, unlike the "broad policymaking discretion that Congress regularly delegates to agencies in other areas of law," Congress "rarely enacts tax statutes that set out broad tax policy principles and authorize the Treasury Department or some other regulatory agency to fill in the details." James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 237 (2015); *see* Coverdale, *supra* note 209, at 73 ("Although Congress has, on occasion, made sweeping delegations of authority to the Treasury, . . . the sheer length and complexity of the Internal Revenue Code stand as testimony to the fact that in the tax area Congress has shown a strong preference for working out the details of policies itself.").

226. *See, e.g.*, Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477 (1979); Bob Jones Univ. v. United States, 461 U.S. 574, 596 (1983); Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011). In *National Muffler Dealers*, the Court stated that, in "harmonizing" a regulation with the statute, courts should consider "the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute." 440 U.S. at 477.

227. Coverdale, *supra* note 209, at 35.

228. *See Bob Jones Univ.*, 461 U.S. at 596 (stating that, given the complexity of the tax system, the agency vested with administrative responsibility must be able to exercise authority to meet changing conditions and novel issues); *see also* Andrew Flynn, *Restoring the Conservation Purpose in Conservation Easements: Ensuring Effective and Equitable Land Protection Through Internal Revenue Code Section 170(h)*, 40 STAN. ENV'T L. J. 3, 53 (2021) ("[F]ederal tax law is recognized as the most complicated of all legislative schemes."); Lawrence Zelenak, *Maybe Just A Little Bit Special, After All?*, 63 DUKE L. J. 1897, 1919 (2014) ("It is special . . . not only for its complexity but also for its function of financing the operations of the federal government, and for its direct impact on the personal finances of the vast majority of the American population.").

229. *Mayo Found.*, 562 U.S. at 55–56.

230. *Id.* at 55.

231. *See id.* at 55, 58.

contexts, however, deference has not been given to the IRS's interpretations of statutes administered by *other* agencies.[232]

The jurisprudence in tax cases differs from that found in Indian affairs and immigration cases. Each subject area arises in a distinct context, and courts have found that context counts in the latter two areas but not in the former. The need for a "uniform approach to judicial review of administrative action"[233] is no greater in the tax arena than in Indian affairs or immigration, nor is it any greater (or, for that matter, less) in the environmental context of *West Virginia* and *Sackett*. The most that can be drawn from this set of cases is that context counts sometimes when it comes to judicial review and *Chevron* deference. Whether it counts in public lands decision-making, and if so, how, is examined in the next Section.

B. The Uniqueness of Property Clause Regulations

The power to manage public lands and resources flows from the Property Clause, which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[234] Congress's authority to make all "needful" rules respecting the public lands has been described as "plenary" and "without limitations."[235]

The precise parameters of the Property Clause power have not been well defined, but the Clause grants both the powers of a proprietor of land as well as sovereign police powers.[236] The scope of judicial review in public lands cases has been "sharply circumscribed on the grounds that agencies had wide latitude in their roles as proprietors."[237]

As I wrote in a previous article, "[t]he concept of proprietorship as a basis for authority over public lands and resources remains a viable analytical tool for distinguishing Property Clause power from other governmental powers."[238] Other scholars have agreed that "property management is not necessarily analogous to other types of lawmaking, and more leeway might be afforded executive agencies,

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232. *See* King v. Burwell, 576 U.S. 473, 486 (2015) (denying *Chevron* deference to the IRS's interpretation of a tax credit provision of the Affordable Care Act because (1) whether credits were available for insurance purchased on federally established exchanges was a question of deep economic and political significance, and (2) it was unlikely that Congress would have delegated the decision to IRS, which had no expertise in crafting health insurance policy).

233. *Mayo Found.*, 562 U.S. at 55.

234. U.S. CONST. art. IV, § 3, cl. 2. Portions of this Part draw upon Zellmer, *supra* note 200, at 943, and Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wildness*, 34 ENV'T L. 1015, 1028–29 (2004).

235. United States v. San Francisco, 310 U.S. 16, 29 (1940); *see* Kleppe v. New Mexico, 426 U.S. 529, 539–40 (1976) (describing Congress's broad powers under the Property Clause); Camfield v. United States, 167 U.S. 518, 525 (1897) (noting that the power over public property was at least as extensive as "the police power of the several States").

236. *Kleppe*, 426 U.S. at 540–41.

237. Zellmer, *supra* note 200, at 1026.

238. *Id.* at 1025; *see* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land La*, 14 U.C. DAVIS L. REV. 269, 303 (1980) ("[P]ublic land management was [merely] an internal affair.") (citing U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 27 (1947)).

acting not only as instruments of a tripartite government but also as proprietors, when public property is implicated."[239]

Because the Property Clause power is plenary in nature, with both proprietary and sovereign attributes, it is more sweeping, at least with respect to the resources it covers, than the Commerce Clause powers at issue in *West Virginia* and *Sackett*.[240] In *Kleppe v. New Mexico*, the Court explained that the Property Clause, "in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands," and thus should receive an "expansive reading."[241] The extent to which the federal government may exercise its Property Clause power is "measured by the exigencies of the particular case."[242]

In a previous article, I distinguished the Property Clause from the Commerce Clause and argued that "even if the dubious trend toward strict nondelegation review continues in the Commerce Clause context, it should not become a significant restraint on the exercise of Property Clause powers."[243] The same goes for judicial review. *Chevron* and the major questions doctrine are closely related to the nondelegation doctrine, for *Chevron* deference is based on a delegation of authority to the agency to fill in the details of an ambiguous statute.[244]

Like Congress, courts have held that federal land management agencies possess "plenary authority over the administration of public lands."[245] This is not to

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239. *See* David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1265–69 (1985) (explaining that mere expectations to use public property, such as public lands and even government contracts and broadcast signals, have not been treated as protected property interests by the Takings and Due Process Clauses under the Fifth and Fourteenth amendments; these expectations have "special feature[s]" and should be subject to less stringent review); *see also* Louis L. Jaffe, *An Essay on Delegation of Legislative Power II*, 47 COLUM. L. REV. 561, 567–68 (1947) (noting that property management is not law-making).

240. Zellmer, *supra* note 200, at 1022. *See generally* Peter Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001) (endorsing a broad, conservation-oriented interpretation of the Property Clause); Anthony Moffa, *Constitutional Authority, Common Resources, and the Climate*, 2022 UTAH L. REV. 169 (drawing upon constitutional history, text, and precedent to support expansive, preservation-oriented Property Clause power).

241. 426 U.S. at 539.

242. Camfield v. United States, 167 U.S. 518, 525 (1897); *see* United States v. Alford, 274 U.S. 264, 267 (1927) (citing *Camfield* in upholding indictment for building fire adjacent to federal lands).

243. Zellmer, *supra* note 200, at 947. "For Congress to manage public property through agents having broad discretion rather than through narrowly legislated rules is not just convenient but necessary." *Id.* at 1029 (quoting Schoenbrod, *supra* note 239, at 1268).

244. *Id.* at 945 (citing Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)); *see* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (*Chevron* requires an initial determination that Congress has actually delegated authority to the agency with respect to the matter at hand).

245. Zellmer, *supra* note 200, at 1029 (quoting Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963)); *see* Sabin v. Berglund, 585 F.2d 955, 958 (10th Cir. 1978); *see also Kleppe*, 426 U.S. at 540–41 (noting that Congress, as both proprietor and sovereign,

say that agency actions under the Property Clause are unreviewable, though some scholars have argued that public rights, such as rights to use public lands and resources,[246] are rights "which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[247] Congress has *not* chosen to immunize public lands issues from judicial consideration—far from it. FLPMA and NFMA both encourage broad public participation in public lands management decisions, including administrative and judicial appeals,[248] and public lands decisions are subject to judicial review under the Administrative Procedure Act.[249]

Not all agency decisions made under the auspices of the Property Clause are entitled to judicial deference, however. Decisions that dispose of or destroy the federal public lands and resources foreclose future options for Congress and should be probed for strict compliance with the mandates of FLPMA, NFMA, and other applicable statutes.[250] So long as the agency's decision does not irreparably damage

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has "complete power" to protect public lands and resources, including wildlife); Safari Club Int'l v. Haaland, 31 F.4th 1157, 1169 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1002 (2023) (quoting Sturgeon v. Frost, 587 U.S. 28, 57 (2019)) ("[T]he Secretary of the Interior [is vested] with plenary authority to protect—if need be, through expansive regulation—'the national interest in the scenic, natural, cultural and environmental values on the public lands.'").

246. Although "the distinction between public rights and private rights has not been definitively explained in our precedents," public rights generally involve matters between the government and others, such as immigration, postal services, payments to veterans, bankruptcy, and public lands management. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 n.22 (1982) (citing Crowell v. Benson, 285 U.S. 22, 51 (1932); *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)). Regarding public lands, "Art. IV bestowed upon Congress alone a complete power of government over territories, and thus gave Congress authority to create courts for those territories that were not in conformity with Art. III." *Id.* at 64–65 (citing Am. Ins. Co. v. Canter, 26 U.S. 511 (1828)). Immigration is discussed in *supra* notes 218–22.

247. Barnett, *supra* note 172, at 1162. Barnett argues that Congress can insulate public rights from judicial review altogether. *See id.* (citing *Ex parte Bakelite Corp.*, 279 U.S. at 451 (stating that, with respect to public rights, "Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals")). *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 632 (1984) ("[T]he whole point of the 'public rights' analysis was that no judicial involvement at all was required—executive determination alone would suffice.").

248. *See* George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENV'T L. 1, 18 (1983) (citing 43 U.S.C. §§ 1701(a)(5)–(6), 1702(d)); Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, the Twenty Years Ahead*, 68 U. COLO. L. REV. 659, 667 (1997) (stating that "forest plans were intended to be truly public documents, with wholesale public participation from the earliest scoping sessions").

249. 5 U.S.C. § 706. As with other agency actions, judicial challenges must run the gamut of jurisdictional obstacles, including ripeness, standing, and finality. *See, e.g.*, Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004).

250. *See* Eric Biber, *The Property Clause, Article IV, and Constitutional Structure*, 71 EMORY L. J. 739, 739–40 (2022) (indicating that a structural interpretation, based on the

or dispose of the public lands or resources,[251] "Congress can change course by stepping in with legislation to specify its intentions and constrain agency discretion in a particular area."[252]

In a long line of cases going back well over a century, the Court has repeatedly held that "the power of the United States . . . *to protect* its lands and property does not admit of doubt."[253] It has gone so far as to describe executive powers to withdraw the public lands from development as being wholly consistent with the executive's duties as "guardian of the people."[254]

As Professor and former Solicitor John Leshy explains, "the Court demands that Congress express itself more clearly when it wants to dispose of federal lands than when it retains them."[255] In *United States v. Midwest Oil*, the Court found "a much stronger reason" to uphold implied grants of power "to preserve" than implied grants of power to dispose.[256] For this reason, no rights to acquire or use federal public lands and resources can arise by implication.[257] In *United States v. City of San Francisco*, the Supreme Court recognized the federal government's plenary power to impose conditions on the disposal of public lands, but only for the "benefit of the people."[258]

Unlike disposals, Property Clause decisions that protect the public lands and resources by promoting ecological integrity, climate resilience, and biodiversity, especially regulations like the BLM's Conservation Rule, should be given judicial deference.[259] As I wrote previously, "Congress presumptively delegated extensive

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placement of the Property Clause in art. IV, supports both an executive role in managing federal lands and federal power to retain public lands despite objections of host states).

251. Light v. United States, 220 U.S. 223, 536 (1911) (quoting United States v. Beebee, 127 U.S. 338, 342 (1888)); *see* Safari Club Int'l v. Haaland, 31 F.4th 1157, 1170 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1002 (2023) (rejecting challenges to FWS's ban on bear baiting, particularly its reliance on a "conservation basis" to support the ban, as "inapt").

252. Zellmer, *supra* note 190, at 1036–37.

253. Hunt v. United States, 278 U.S. 96, 100 (1928) (emphasis added); *see also* Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917) (stating that the Property Clause gives "full power in the United States to protect its lands"); United States v. Midwest Oil, 236 U.S. 459, 459 (1915) (finding an implied grant of executive power to preserve resources on public lands); *Light*, 220 U.S. at 527 ("[P]ublic lands . . . are held in trust for the people of the whole country . . . . and it is not for the courts to say how that trust shall be administered"); United States v. Gratiot, 39 U.S. 526, 537 (1840) (declaring Congress's Property Clause power as "without limitations").

254. United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414, 419 (1931); *see also Midwest Oil*, 236 U.S. at 471 ("[W]hen it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the Government already owned.").

255. John D. Leshy, *A Property Clause for the Twenty-First Century*, 75 U. COLO. L. REV 1101, 1110 (2004).

256. 236 U.S. at 459.

257. *See generally Utah Power & Light*, 243 U.S. 389; *Light*, 220 U.S. at 523.

258. 310 U.S. 16, 23, 30–31 (1940).

259. Moffa, *supra* note 240, at 194. Moffa makes a compelling argument that a "purpose-driven understanding of . . . the Property Clause's reach comports with the

powers to the executive branch to accomplish preservation-oriented objectives,"[260] and the multiple use statutes are replete with provisions that authorize and even compel the agencies to do so.[261] Continuing to provide *Chevron* deference to public lands regulations promotes uniformity and certainty in administrative law, and conservation decisions under multiple use statutes should be found reasonable under *Chevron* step two.[262] That said, even without *Chevron* deference, protective measures like the Conservation Public Lands Rule should be upheld as coming well within the plain language of FLPMA.

CONCLUSION

The Conservation Rule puts conservation on par with other multiple uses by explicitly defining conservation as a multiple use. "Conservation" is shorthand for FLPMA's mandate to manage public lands for a multitude of public uses, including mining, energy production, and grazing, as well as watersheds, wildlife, and recreation, without impairing them such that these uses cannot be sustained into a future jeopardized by climate change.

By protecting or restoring natural habitats and ecological functions, the Conservation Rule promotes FLPMA's underutilized statutory requirement to "preserve and protect certain public lands in their natural condition."[263] Moreover, treating conservation as a multiple use supports sustained yields, which is an equally important requirement of FLPMA. Absent conservation, neither the multiple use nor the sustained yield mandate can be met, at least not for renewable resources.

Whether *Chevron* deference survives in other constitutional contexts, strong judicial deference should continue to be given to regulations that promote public lands conservation. A conservation-oriented approach under multiple use statutes is supported by precedent on both Forest Service and BLM lands. The Property Clause firmly supports conservation-oriented approaches that leave options open for Congress and for future generations.

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constitution" and "with common sense and the Founders' natural law perspectives on stewardship of common resources." *Id.* at 193–94. He adds, "[T]he Supreme Court's federal lands jurisprudence could be read to endorse three approaches: retention, nationalization, and conservation." *Id.* at 194.

260. Zellmer, *supra* note 200, at 948.

261. *See supra* Parts II–III.

262. *See supra* note 163 and accompanying text.

263. 43 U.S.C. § 1701(a)(8).