Agencies Changing Course: Conservation as a Land Use in BLM's Public Lands Rule

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INTRODUCTION

2024 may one day be remembered as "The Year of Regulatory Anxiety."[1] A perception of "regulatory discord" has prevailed in the United States in recent years, stemming in part from turbulence in the executive branch as different presidents take office.[2] Each transition to a new chief executive and cabinet induces change in regulation and enforcement as the executive brings their own policies to the forefront.[3] Apprehension about cumbersome regulation was a focus in 2024 presidential campaigns[4] and has been a regular topic in the news.[5] With heightened public attention on regulators, the validity

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1. KPMG, TEN KEY REGULATORY CHALLENGES OF 2024: MID-YEAR LOOK FORWARD 3 (2024), https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2024/ten-key-regulatory-challenges-2024-mid-year-look-forward.pdf [https://perma.cc/HB9M-4N9D].

2. *Id.*

3. KPMG, THREE REGULATORY TAKEAWAYS: POST-ELECTION SHIFTS 1 (2024), https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2024/three-regulatory-takeaways-post-election-shifts.pdf [https://perma.cc/65QS-EC7R].

4. Tami Luhby & Katie Lobosco, *Here's What Harris Is Proposing for the Economy*, CNN (Sept. 4, 2024), https://www.cnn.com/2024/09/03/politics/harris-economic-proposals [https://perma.cc/X725-9PVZ] (prioritizing "cut[ting] red tape" and updating convoluted regulatory schemes); 2024 GOP PLATFORM MAKE AMERICA GREAT AGAIN 9, https://rncplatform.donaldjtrump.com/?_gl=1*1vzg0fp*_gcl_au*MjQ3MjYxMDcyLjE3MzA2NzE2NjM.&_ga=2.130201544.611526004.1730671664-1378222787.1730671664 [https://perma.cc/4DFV-P3MB] (referring to the candidate's goal of "slashing" burdensome and unnecessary regulation).

5. *See* Erica L. Green et al., *Trump's Moves to Upend Federal Bureaucracy Touch Off Fear and Confusion*, N.Y. TIMES (Jan. 25, 2025), https://www.nytimes.com/2025/01/25/us/politics/trump-federal-workers.html; *Fact Sheet: President Donald J. Trump Launches Massive 10-to-1 Deregulation Initiative*, WHITE HOUSE (Jan. 31, 2025), https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-launches-massive-10-to-1-deregulation-initiative [https://perma.cc/DSQ6-8WUF]; *see also* Zhoudan Xie, *A Midyear Review of Regulatory Sentiment and Uncertainty*, GEO. WASH. UNIV. (Aug. 18, 2021), https://regulatorystudies.columbian.gwu.edu/midyear-review-regulatory-sentiment-and-uncertainty [https://perma.cc/U9LP-NUH2].

of federal agency actions has become the subject of extensive discourse and legal challenge in the past few years.[6] As a result, thoughtful analysis of agency action, particularly when an agency is changing course, has never been more vital.

In May of 2024, the Bureau of Land Management ("BLM") promulgated a final rule entitled "Conservation and Landscape Health," also known as the Public Lands Rule (the "Rule"), to prioritize restoring and conserving natural resources on federal land.[7] The Rule defines conservation as a land use on par with other uses like mining and grazing.[8] This departs from the BLM's prior treatment of conservation as a priority to be balanced with others values like economic growth in identifying appropriate land uses, not as a land use itself.[9] Reactions from the public,[10] numerous scholars,[11] and other interested parties, including a group of plaintiffs that challenged the Rule in federal court immediately after its promulgation,[12] suggest that the Rule may be a landmark change in public land policy.

The Rule and the lawsuit challenging it present an opportunity to take a close look at administrative agency authority, judicial review of agency course changing, and the broad implications these legal questions can have on the public. This Comment argues that the Rule is legally permissible because it brings the BLM's practices closer to its statutory directives amidst changing circumstances. It argues that agencies must adapt practices to

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6. *See, e.g.*, Ross A. Stansberry, Comment, *The APA as an Environmental Law*, 49 ENV'T L. 805 (2019); Matthew D. Levitt et al., *A New Age of Agency Rulemaking and Enforcement*, MINTZ (Sept. 18, 2024), https://www.mintz.com/insights-center/viewpoints/2371/2024-09-18-new-age-agency-rulemaking-and-enforcement [https://perma.cc/G52D-NGYE].

7. Conservation and Landscape Health, 89 Fed. Reg. 40308 (May 9, 2024) (codified at 43 C.F.R. §§ 1610.7-2, 6101.1–6103.2).

8. *Id.* at 40308.

9. *See infra* Section II.B.

10. *See, e.g.*, AZ Bus. Mag., *Here's Why Arizonans See BLM Rule as Key to Future for Public Lands*, AZ BIG MEDIA (Apr. 29, 2024), https://azbigmedia.com/real-estate/heres-why-arizonans-see-blm-rule-as-key-to-future-for-public-lands [https://perma.cc/5SE5-BUBV]; *Analysis: Public Comments Overwhelmingly Support BLM Public Lands Rule*, CTR. FOR W. PRIORITIES (July 5, 2023), https://westernpriorities.org/2023/07/analysis-public-comments-overwhelmingly-support-blm-public-lands-rule [https://perma.cc/8ZZL-VBXP].

11. *See, e.g.*, Sandra B. Zellmer, *Conservation as Multiple Use*, 66 ARIZ. L. REV. 467 (2024); Jamie Pleune, *BLM's Conservation Rule and Conservation as a "Use"*, 53 ENV'T L. REP. 10824 (2023); Robert L. Glicksman & Sandra B. Zellmer, *A Critical 21st Century Role for Public Land Management: Conserving 30% of the Nation's Lands and Waters Beyond 2030*, GEO. WASH. L. FAC. PUBL'NS & OTHER WORKS (2022), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2885&context=faculty_publications.

12. Complaint, Am. Farm Bureau Fed'n v. U.S. Dep't of Interior, No. 2:24-cv-00136-ABJ (D. Wyo. July 12, 2024).

current conditions as necessary to carry out the law and therefore are not bound to an earlier executive branch's management decisions.

Part I of this Comment sets the stage for analyzing the Rule and the legal challenge against it by providing background on how courts review agency position changes. Part II examines the BLM's history, statutory authority, and prior interpretations of key terms in the statute. Part III analyzes whether the Rule is a permissible action for the BLM to take and concludes that the Rule is a valid exercise of the agency's authority.

I. JUDICIAL REVIEW OF AGENCY COURSE CHANGING

Most agencies function as arms of the executive that enable the branch to fulfill its responsibility to implement the law.[13] However, they derive their power from statutory delegation by the legislature.[14] In a statute conferring power on an agency, Congress sets out the agency's responsibilities and authority related to implementing the statute.[15] Congress may, explicitly or implicitly, authorize an agency to exercise discretionary power—power, for example, to handle situations and details unanticipated by the legislature.[16] Delegating this power allows agency officials, who have the time and expertise necessary to iron out "regulatory details," to more efficiently and effectively carry out the law.[17]

Even when Congress explicitly delegates discretionary authority to an agency, an agency's ability to act or change course is limited.[18] The agency must follow the letter of its statutory authority, and must meet the procedural and substantive requirements set out by the Administrative Procedure Act ("APA").[19] Congress passed the APA to increase administrative fairness and consistency by placing guard rails on agency action.[20] The APA codifies procedural requirements for agency rulemaking and sets basic standards for judicial review that help clarify the substantive legal requirements for agency

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13. *See* Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 942 (2000); U.S. CONST., art. II, § 2, cl. 2 (authorizing the President to nominate and appoint "Officers of the United States").

14. *See* Adam Littlestone-Luria, *Nondelegation's Two Faces*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 397, 406–07 (2024).

15. *See id.* at 413.

16. *See id.*

17. Zellmer, *supra* note 13, at 943, 951.

18. *See id.* at 963; William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1390–412 (2018).

19. Administrative Procedure Act, 5 U.S.C. §§ 500–596.

20. *See* Aditya Bamzai, *On the Interpretive Foundations of the Administrative Procedure Act*, 31 GEO. MASON L. REV. 439, 457–59 (2024).

action.[21] The APA seeks to ensure that an agency's action adheres to its statutory authority and to the Constitution, and is not arbitrary, capricious, an abuse of discretion, or unsupported by the agency's factual findings.[22]

The APA also clarifies the judiciary's role in reviewing agency action.[23] Courts look to the APA's requirements to determine whether an agency took the proper steps to adequately document findings, offer notice and comment stages for proposed rules, and support actions with factual findings and reasoning.[24] According to the APA, it is up to courts to determine questions of law concerning statutory interpretation, "the meaning or applicability of the terms of an agency action," and ultimately whether an agency action is lawful under the APA and the agency's statutory authority.[25]

The Sections that follow examine precedent cases and legal principles that guide courts' review of agency action. Section A discusses the extent to which courts might factor in an agency's own interpretation of a law. Section B assesses how courts balance the competing values of flexibility and consistency in analyzing agency change.

A. Judicial Respect for Agency Interpretations

When an agency action is challenged by an interested party, it is the court's job to settle the controversy by determining whether the agency acted lawfully.[26] The Supreme Court has made it clear that courts are the ultimate arbiters of questions of law, including determination of a statute's meaning and whether an agency has adhered to it.[27] Recently and notably, the Court updated its stance on analyzing agency action in *Loper Bright Enterprises v. Raimondo*.[28] Some saw *Loper Bright* as a massive upheaval because it did away with *Chevron* deference, which required courts to defer to permissible agency interpretations of their statutory authority.[29] However, significant change in how courts analyze agency action after *Loper Bright* is unlikely

21. *See id.*
22. *See id.* at 441; Zellmer, *supra* note 13, at 944; 5 U.S.C. § 706.
23. 5 U.S.C. § 706.
24. 5 U.S.C. §§ 553, 706(2)(D), (E), (F).
25. 5 U.S.C. § 706.
26. U.S. CONST. art. III, § 2, cl. 1.
27. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 384–85 (2024).
28. *Id.* at 384–413.
29. Chevron U.S.A, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

because of the enduring pre-*Chevron* principle that some executive branch actions are entitled to respect.[30]

The Supreme Court reiterated in *Loper Bright* that despite the judiciary's independent judgment on "what the law is," the Court has "recognized from the outset" that it will give executive branch interpretations of statutes "due respect."[31] Respect is due, according to the Court, when an agency interpretation is formed "roughly contemporaneously with enactment of the statute" and if it remains "consistent over time."[32] Courts respect such longstanding agency interpretations because they indicate the established practice of the experts tasked with enforcing the statute, and are also likely to reflect the intent of the drafting Congress.[33]

Giving certain executive agency findings a degree of respect is consistent with courts' historical practice.[34] The reasoning is that Congress typically intends to give the implementors of law at least some discretion to execute statutes according to their expertise and greater ability to respond to conditions that vary across time and space.[35] Agencies are always bound by their statutory authority, but statutes often expressly confer on an agency some discretionary authority to carry out the law.[36] Discretion can also be implicit in other responsibilities a statute assigns, but the *Chevron* presumption that ambiguity in a statute indicates an implied delegation of

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30. Jory Heckman, *Agencies 'Knew This Was Coming.' What Does — and Doesn't — Change After Supreme Court's* Chevron *Ruling*, FED. NEWS NETWORK (July 8, 2024), https://federalnewsnetwork.com/agency-oversight/2024/07/agencies-knew-this-was-coming-what-does-and-doesnt-change-after-supreme-courts-chevron-ruling [https://perma.cc/2NZ8-7VXR] (noting that the Supreme Court had not invoked *Chevron* in any decisions since 2016).

31. *Loper Bright*, 603 U.S. at 385–86.

32. *Id.* (citing Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827)) ("[I]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.").

33. *Id.* at 386

34. *Id.* at 385 ("This Court embraced the Framer's understanding of the judicial function early on . . . . The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes.").

35. *See* Littlestone-Luria, *supra* note 14, at 463–64.

36. *See id.* at 460. Footnote 5 of the majority opinion in *Loper Bright* cites examples of statutes that explicitly delegate to an agency "the authority to give meaning to a particular statutory term." *Loper Bright*, 603 U.S. at 394–95, n.5. Footnote 6 of the opinion cites examples of statutes that authorize agencies to fill in details or to make decisions within a flexible standard of appropriateness or reasonableness. *Id.* at 395, n.6.

authority was rejected by the Court in *Loper Bright*.[37] Going forward, ambiguity in a statute will not be read as an implied delegation or a license for "an agency to change positions as much as it likes" without explanation.[38]

This language in *Loper Bright* underscores a trend toward emphasizing a requirement of consistency in agency action and restriction of agency discretion to that explicitly granted.[39] The Supreme Court reasoned that overruling *Chevron* was necessary to "safeguard[] reliance interests" and "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion."[40] In other words, it held that the role of the courts is to check agency flexibility and discretion, and to ensure consistency in the implementation of law across time.[41]

The concern about consistency in agency action may be well-founded.[42] The public relies on some degree of consistency in law and regulation across time to enable them to conform their actions to the requirements of law, a principle which arbitrary change would upset.[43] Furthermore, the rights and dollars of millions of interested parties are impacted by regulatory change.[44] Constant change would be costly, unfair, and counterproductive.[45]

Another concern with too much flexibility is that an agency will, over time, drift away from congressional intent in its interpretation and

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37. *See* Dena Adler & Max Sarinsky, *With or Without* Chevron *Deference, Agencies Have Extensive Rulemaking Authority*, YALE J. ON REGUL.: NOTICE & COMMENT (May 13, 2024), https://www.yalejreg.com/nc/with-or-without-chevron-deference-agencies-have-extensive-rulemaking-authority [https://perma.cc/KVL2-LF6X]; Adrian Vermeule, *Implied Delegations After* Loper, YALE J. ON REGUL.: NOTICE & COMMENT (July 9, 2024), https://www.yalejreg.com/nc/implied-delegations-after-loper-by-adrian-vermeule [https://perma.cc/ZU3S-CVK5].

38. *Loper Bright*, 603 U.S. at 410–11.

39. *Id.* at 370 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); Rachael Totz, *Judicial Constraints on Agency Action*, REGUL. REV. (Feb. 9, 2025), https://www.theregreview.org/2025/02/09/spotlight-judicial-constraints-on-agency-action [https://perma.cc/2CC5-22Y3].

40. *Loper Bright*, 603 U.S. at 375–76.

41. Totz, *supra* note 39.

42. *See, e.g.*, VComply Editorial Team, *How to Stay on Top of Regulatory Changes (2025)*, VCOMPLY (July 3, 2024), https://www.v-comply.com/blog/how-to-stay-on-top-of-regulatory-changes-in-2023 [https://perma.cc/7RJC-C3JF] (discussing the challenge of keeping abreast of regulatory changes and advertising a "comprehensive regulatory change management solution").

43. *See* Gary M. Bridgens, *Demystifying Reliance Interests in Judicial Review of Regulatory Change*, 29 GEO. MASON L. REV. 411, 413–14 (2021).

44. *Id.* at 446.

45. *See id.* at 430.

enforcement of the law; this phenomenon is called "bureaucratic drift."[46] According to this principle, agency interpretations formed at or near the time of a statute's creation are more likely to reflect congressional intent and therefore deserve greater weight.[47] New interpretations are not given the same respect because they may be the result of bureaucratic drift.[48] Particularly if not identified, reconciled with statutory language, or justified by the agency's discretion and expertise, sudden or even gradual change may indicate arbitrariness or drift away from the authority explicitly afforded by Congress.[49]

Going forward, and consistent with the historical rationale for respecting some agency actions, courts will likely apply the multi-factor standard from *Skidmore v. Swift & Co.* in assessing how much weight to give an agency interpretation.[50] In *Skidmore*, a pre-*Chevron* case, the Supreme Court stated that agency "rulings, interpretations and opinions . . . while not controlling upon the courts . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[51] The weight to be given to a particular agency position depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[52]

Historical applications of *Skidmore* consider these factors in determining whether an agency interpretation is "sufficiently persuasive to prevail over a proposed alternative."[53] Most courts apply *Skidmore* as a sliding scale to

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46. *See* Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 671–72 (1992) ("The goal of Congress is to ensure that administrative agencies generate outcomes that are consistent with the original understanding that existed between Congress and the various interest groups that were parties to the initial political compromise. The problem facing Congress can be described as bureaucratic drift, which refers to changes in administrative agency policies that lead to outcomes inconsistent with the original expectations of the legislation's intended beneficiaries."); Adam S. Zimmerman, *Ghostwriting Federalism*, 133 YALE L.J. 1802, 1862–63 (2024) ("When agencies help states adopt rules, the policies that agencies encourage states to adopt are not reviewed directly in federal court. Rather, those policies will be mostly challenged in state courts, under state law, aggravating opportunities for 'bureaucratic drift' – the idea that agencies will diverge from their missions, particularly without oversight by federal courts, who supposedly act as 'faithful agents' of Congress's will.").

47. *See* sources cited *supra* note 46.

48. *See id.*

49. *See id.*

50. 323 U.S. 134, 140 (1944); Kristen E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, 74 DUKE L.J. ONLINE 111, 112–13 (2025).

51. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

52. *Id.*

53. Hickman, *supra* note 50, at 117.

consider alongside traditional tools of interpretation, where agency interpretations may be afforded different weight depending on which of the contextual factors listed above are present.[54] Post-*Loper Bright* application of *Skidmore* will likely attribute more weight to an agency's position when the consistency and contemporaneity factors in particular are met.[55] Courts will ultimately apply their independent judgment in determining the meaning of a statute, but may consider an agency's interpretation in pursuing the "best reading" of the statute.[56]

Going forward, courts will likely continue the practice of giving more weight to agency action that is "reasonable," "well within the scope of its delegated authority," and, perhaps most importantly, based on a "contemporaneous interpretation of the statute it [was] entrusted to administer."[57] A contemporaneous, long-held agency interpretation might be particularly entitled to respect if Congress has subsequently amended or reenacted a statute and left the agency interpretation intact.[58] Courts might also consider the agency's expertise, its daily interactions with problems in the real world, involvement with drafting the statute, or specific knowledge of terms of art the statute uses.[59]

Despite the emphasis on consistency in weighing how much respect an agency action is entitled to, the Court has also clearly stated that there is "no basis in the Administrative Procedure Act or in [] opinions" interpreting it to subject agency *change* "to more searching review" than other agency actions.[60] The standard, then, is that rule changes need not be accompanied by more substantial justification than an initial rule adoption.[61] Accordingly, a court can afford respect to an agency action in general if it is "rational, based on consideration of the relevant factors and within the scope of the

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54. *Id.* at 119–20.
55. *Id.* at 125–26.
56. *Id.* at 126.
57. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 834, 844 (1986).
58. *Id.* at 834. The Court stated "[i]t is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Id.* at 846 (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 274–75 (1974)).
59. *See* Eli Nachmany, *Deference to Agency Expertise in Statutory Interpretation*, 31 GEO. MASON L. REV. 587, 588–89, 594–95 (2024) (concluding that "interpretive expertise" in particular is the expertise courts should look for before deferring to an agency interpretation because this expertise either comes from an agency's involvement in drafting the statute or from its specific knowledge of terms of art the statute uses).
60. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009).
61. *Id.*

authority delegated to the agency by the statute," even if it is a change from the agency's prior position.[62]

B. Judicial Review of Agency-Acknowledged Agency Change

When an agency's action is challenged, the judiciary reviews it for procedural and substantive validity, including constitutionality, conformity with statutorily-granted authority, and arbitrary and capriciousness.[63] This requires courts to review and interpret the statutory authority and determine whether the agency action is consistent with the law, as discussed in the Section above.[64] While many of the issues raised above are directly related, the paragraphs that follow address considerations that are in some way unique to judicial review of an agency change in course.

As an initial step in interpreting an agency action, courts identify whether an action is a change.[65] Sometimes, agencies clearly announce that they are departing from a prior policy.[66] In these cases, an agency must acknowledge the change it is making and demonstrate "good reasons for the new policy"; it may not silently depart from prior policy or merely disregard its current rules.[67] If the agency identifies and justifies its change, the court moves on to assess substantive issues the change might imply such as arbitrariness and constitutionality.[68]

When courts review agency changes such as newly promulgated rules that differ from prior regulations, they balance the conflicting principles of regulatory *flexibility* and *consistency*.[69] Agencies need flexibility to occasionally adjust their implementation means for proper functioning and application as external conditions change.[70] However, consistent execution of law across space and time is critical to provide notice to regulated parties and protect reliance interests.[71]

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62. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983).

63. 5 U.S.C. § 706(2)(A)–(C).

64. *See supra* Section I.A.

65. Note, *Judicial Review of Agency Change*, 127 HARV. L. REV. 2070, 2073 (2014) (naming "change identification" as a preliminary step of judicial review of agency action).

66. *Id.*

67. *Id.* (quoting FCC v. Fox Television Stations, 556 U.S. 502, 515 (2009)).

68. *Id.*

69. Note, *supra* note 65, at 2070.

70. *See* Littlestone-Luria, *supra* note 14, at 435.

71. Bridgens, *supra* note 43, at 445–46. *But see* Haiyun Damon-Feng, *Administrative Reliance*, 73 DUKE L.J. 1743, 1760 (2024).

One standard that furthers consistency is that an agency is required to provide a reasoned explanation for its actions, which, if it is changing course, encompasses an "awareness that it *is* changing position."[72] It must also provide "good reasons for the new policy," but the reasons need not necessarily be better in the court's eyes than the reasons for the prior policy.[73] Furthermore, an agency must provide reasoning for a decision based on relevant factfinding.[74] When a new policy is based on the same factual findings that underlie prior policies, or when a prior policy induced "serious reliance interests," more detailed justification is required.[75]

To preserve flexibility, the Court has noted that while long-standing agency interpretations are more likely reasonable because "it is rare that error would long persist," it clarified that "neither antiquity nor contemporaneity with the statute is a condition of validity."[76] An agency can take a new position that contradicts its prior interpretations if the agency ensures that the new stance is clearly within the letter of the statute and avoids certain pitfalls like failing to identify and explain the change sufficiently.[77] For example, an agency may be justified in changing its position when the industry it regulates changes, meaning there is "no longer a basis for reliably predicting" that a previous regulation would be effective in accomplishing the agency's goals.[78]

Similarly, courts do not afford respect to an agency position that is consistent with its long-standing policy but contrary to congressional intent.[79] Although the Bureau of Indian Affairs argued in *Morton v. Ruiz* that its position was consistent with the "long-established policy of the Secretary and of the Bureau," the Court invalidated the agency's action because it was contrary to congressional intent and the meaning of the statutory authority.[80] The Court was not persuaded by the agency's interpretation despite it being "the agency best suited" to interpret the statute.[81] Unlike in *Griggs v. Duke*

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72. Damon-Feng, *supra* note 71, at 1779.

73. *Id.*; Bridgens, *supra* note 43, at 423 n. 97 ("[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.").

74. Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016).

75. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (citing Smiley v. Citibank, N.A., 517 U.S. 735, 742 (1996)).

76. *Smiley*, 517 U.S. at 740.

77. *See id.* at 742; David H. Becker, *Changing Direction in Administrative Agency Rulemaking: "Reasoned Analysis," the Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, 30 ENVIRONS ENV'T L. & POL'Y J. 65, 77 (2006).

78. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 38–39 (1983).

79. Morton v. Ruiz, 415 U.S. 199, 237 (1974).

80. *Id.* at 202, 236.

81. *Id.* at 236.

Power Co., where an agency interpretation was treated as "expressing the will of Congress," because it was supported by the statute's language and legislative history,[82] the Court held in *Morton* that the statute itself and the legislative history did not support the agency's interpretation.[83] The bottom line is that an agency's position, even if longstanding, is only given weight when it reflects the statute and congressional intent.[84]

Again, courts look to agency interpretations as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance" that are persuasive, not controlling.[85] The weight assigned to an agency interpretation depends on case-by-case analysis of the *Skidmore* factors: thoroughness, validity of reasoning, consistency, contemporaneity, and any other context that influences the interpretation's persuasive value.[86]

Ultimately, although courts acknowledge a need for flexibility, the trend in recent cases is affording greater respect for consistency.[87] Courts tend to approve of an agency position when it is longstanding and therefore more likely to be indicative of legislative intent and less disruptive to reliance interests.[88] If an agency changes course, going against a longstanding position, courts may view its new policy with skepticism.[89] Therefore, for an agency to change course without the courts invalidating the new rule, the agency must have the statutory grant of discretion to change course, acknowledge the change, and explain it thoroughly to make clear that its new position is within the scope of the statute and consistent with legislative intent.[90] An agency's case for changing courses might also be stronger when overturning a longstanding position and adopting a new approach is necessary to accomplish the agency's statutory goals and responsibilities.[91]

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82. 401 U.S. 424, 433–34 (1971) (first citing United States v. City of Chicago, 400 U.S. 8 (1970); then citing Udall v. Tallman, 380 U.S. 1 (1965); and then citing Power Reactor Dev. Co. v. Electricians, 367 U.S. 396 (1961)).

83. *Morton*, 415 U.S. at 237 ("As we have already noted, however, the [agency], through its own practices and representations, has led Congress to believe that these appropriations covered Indians 'on or near' the reservations, and it is too late now to argue that the words 'on reservations' in the Manual mean something different from 'on or near' when, in fact, the two have been continuously equated by the [agency] to Congress.").

84. *See id.*

85. *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

86. *Skidmore*, 323 U.S. at 140.

87. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 386 (2024).

88. *See supra* Section I.A.

89. *See id.*

90. *See id.*

91. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 38–39 (1983).

The Part that follows introduces the BLM and its statutory authority as background for applying the analysis above to the agency's recent Rule.

II. THE BLM'S HISTORY, AUTHORITY, AND PRIOR STANCES ON CONSERVATION

How an agency implements law is vital to how the whole country functions because statutes often delegate significant authority to agencies. For example, Congress delegated considerable control over federal lands to the BLM, making it an immensely powerful agency that impacts thousands of people with each rule it makes. Congress tasked the agency with making land use decisions for the land of the United States by balancing a variety of competing uses and demands on it.[92] As of 2025, the BLM manages 245 million acres of public land—around ten percent of the country's total area.[93] Much of that land is rangeland: resource-rich spaces concentrated in western states that are vital to millions of people and animals for grazing, natural resources, and recreation.[94] The BLM's decisions determine the availability of expansive rangeland and valuable resources to the American people.[95]

The following Sections discuss the BLM's authority and its previous definitions of conservation and land use, as a precursor to assessing whether the BLM is changing course and whether the Public Lands Rule is valid.

A. History and Authority of the BLM

Like any federal administrative agency, the BLM must navigate a structure of intertwined legal and governmental constituencies.[96] Its location within the complex structure of the federal government has great implications for its authority, discretion, and control.[97] The BLM is an agency of the executive

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92. 43 U.S.C. § 1701; *Our Mission*, BUREAU LAND MGMT., https://www.blm.gov/about/our-mission [https://perma.cc/4XD6-BU5Y].

93. *What We Manage*, BUREAU LAND MGMT., https://www.blm.gov/about/what-we-manage/national [https://perma.cc/GD2N-J4UN].

94. *See Rangelands and Grazing*, BUREAU LAND MGMT., https://www.blm.gov/programs/natural-resources/rangelands-and-grazing [https://perma.cc/789F-BCD6].

95. *Id.*

96. *See* BUREAU LAND MGMT., *supra* note 92.

97. "Agencies exist in many forms . . . . These variations in structure can have important ramifications for issues of control and discretion. To some extent, functioning will follow form, and analysis of a particular agency's operations should take this into account." James V. DeLong, *New Wine for A New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 401 (1986).

branch, but it derives its authority from the legislature.[98] It is a bureau within the larger Department of the Interior, which is headed by the Secretary of the Interior.[99]

As an arm of the federal government, the agency is also governed by the U.S. Constitution. Importantly, Article II defines the power of the executive branch and Article IV places boundaries on the relationships between states and between the federal government and the states.[100] Relevant to the BLM in particular, Article IV Section 3 states: "The 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."[101] According to this provision, known as the Property Clause, the powers to regulate and dispose of federal land lie exclusively with Congress.[102] Notwithstanding this Constitutional provision, Congress created an agency with significant authority to regulate federal land.[103] However, as discussed more thoroughly in Section III.C, Congress retains from the Property Clause the sole authority to withdraw land from the Department of Interior's jurisdiction and to allocate it for specific purposes, such as for the creation of a national park.[104]

In addition to paying attention to constitutional restrictions, agencies must also be intimately familiar with their statutory authority—the laws passed by Congress to establish an agency and define its roles, responsibilities, and purpose. As all agency regulations must rely on their statutory authority for validity, it is important to review the source of the BLM's authority. Exploring the history of the BLM and its statutory authority lends insight into the power it now possesses.

BLM's roots lie in 1812 with the creation of its predecessor agency, the General Land Office ("GLO"), as part of the Department of the Treasury.[105] Congress passed several acts concerning different uses of federal land in the subsequent decades.[106] In 1934, the Taylor Grazing Act established the BLM's other predecessor, the U.S. Grazing Service (contained in the Department of Interior).[107] Finally, the Federal Land Policy and Management

98. *See* 43 U.S.C. § 2.

99. DEP'T OF INTERIOR, 135 DM 2, DEPARTMENTAL MANUAL (2016); 43 U.S.C. § 1451.

100. *See* U.S. CONST. art. II, IV.

101. U.S. CONST. art. IV, § 3, cl. 2.

102. *Id.*

103. *Id.*; 43 U.S.C. § 1701.

104. CONG. RSCH. SERV., R45340, FEDERAL LAND DESIGNATIONS: A BRIEF GUIDE 11 (2023).

105. *National Timeline*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., https://www.blm.gov/about/history/timeline [https://perma.cc/E46W-KHNN].

106. These acts concerned homesteading, railroads, mining, use of minerals and timber, protection of culturally significant areas and artifacts, and recreation. *See id.*

107. Taylor Grazing Act of 1934, 43 U.S.C. §§ 315–316.

Act of 1976 ("FLPMA") created the BLM, a new Department of Interior agency and a consolidation of the GLO and Grazing Service, and directed it to manage federal lands.[108] The question then becomes: what power did Congress grant to the BLM under FLPMA, and what principles did Congress hand down to guide the BLM's management of federal land?

Four critical principles behind the drafting of FLPMA are evident in Senate committee reports:

First, the committee intended conservation to be a goal, although it thought it necessary to balance this goal with continued land and resource use.[109] FLPMA was developed in response to a need for a more comprehensive federal land management scheme—the then-existing hodge-podge of land use laws was inadequately managing resources "in light of modern demands and uses."[110] Before the details of this new scheme were fleshed out, it became clear that the conservation of resources for future use would be one priority.[111] Still, the committee expressed a desire for the scheme to "redirect" rather than terminate activities altogether to protect the environment and reach conservation goals.[112]

Second, the committee anticipated the framework to incorporate a balance of power between levels of government.[113] The committee anticipated that FLPMA would integrate the interests of local, tribal, state, and federal governments "into a coherent nationwide mechanism," ultimately creating "a unified national approach" to land management.[114]

Third, the committee also intended FLPMA to be "flexible enough to respond to changing conditions and priorities."[115] The committee anticipated a need for land use decisions to adapt both to changing external, environmental conditions and to fluctuation in policy goals.[116]

Finally, the committee expected those policies to arise out of national consensus. It intended for the land use management values and goals to be established by the people (in other words, by the elected representatives in

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108. Federal Land Policy Management Act (FLPMA) of 1976, 43 U.S.C. §§ 1700–1787.

109. S. REP. NO. 91-1001, at 3 (1970).

110. *Id.* at 1–2.

111. "It has become crystal clear that if future generations are to enjoy a quality environment, the present generation must modify its present attitudes and approaches to natural resources, open space, and the integrity of the environment. Heedless exploitation of resources and headlong modification of ecological relationships, it is now recognized, have taken place." *Id.* at 3.

112. *Id.*

113. *Id.* at 19.

114. *Id.*

115. *Id.*

116. *Id.*

Congress).[117] Although the federal agency and state-level actors would inevitably influence and promote certain goals, the goal was ultimately to reach widespread agreement that would guide agency enforcement of FLPMA.[118]

As enacted, FLPMA assigns the BLM jurisdiction over federal public land.[119] It sets out some guiding principles for the management of the public land, but leaves the BLM significant discretion to implement land management according to the general goals.[120] It states that the Department of the Interior, including the BLM, must manage land based on the principles of multiple use and sustained yield.[121] It defines multiple use in part as "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people."[122] Sustained yield is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."[123] The BLM promulgates rules and regulations to manage extensive tracts of land through various methods including leases, permits, restoration efforts, and other tools aimed at achieving multiple use and sustained yield.[124]

The primary mechanism available to the BLM to manage land is through executing land use plans.[125] FLPMA charges the Secretary of the Interior with developing and maintaining land use plans.[126] These land use plans are to be created under the multiple use and sustained yield principles, as well as with a "systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences," consideration of "present and potential uses of the public lands," and by weighing "long-term benefits to the public against short-term benefits," among other factors.[127]

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117. *Id.*

118. *Id.*

119. 43 U.S.C. §§ 1701–1787.

120. 43 U.S.C. § 1732.

121. "The Congress declares that it is the policy of the United States that . . . management be on the basis of multiple use and sustained yield unless otherwise specified by law." 43 U.S.C. § 1701(a)(7).

122. 43 U.S.C. § 1702(c).

123. 43 U.S.C. § 1702(h).

124. 43 U.S.C. §§ 1732(b), 1761.

125. 43 U.S.C. § 1732(a); BUREAU OF LAND MGMT., DEP'T OF INTERIOR, MANUAL TRANSMITTAL SHEET No. 1-1666, 1601—LAND USE PLANNING (2000).

126. 43 U.S.C. § 1712(a).

127. 43 U.S.C. § 1712(c).

The Section below discusses how the BLM has previously interacted with these definitions in FLPMA in order to set out the agency's stance on conservation and land use prior to promulgating its recent Rule.

B. BLM's Historical Definitions of Conservation and Land Use

Before 2024, the BLM apparently relied on FLPMA's lists of "uses" to determine what qualified as a land use that could be the basis of permitting or leasing.[128] This meant that the BLM included in its definition the use of resources including "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values."[129] The statute makes explicit that this is not an exhaustive list: the BLM is authorized to allocate land and resources for uses "including, but not limited to" those listed.[130] The BLM may also use "some land for less than all of [its] resources."[131] FLPMA clearly defines "principal or major uses" as grazing, fish and wildlife development, mineral exploration, rights-of-way, outdoor recreation, and timber production.[132]

Notably, neither the statute nor the agency in subsequent regulations or guidance defined the relationship between land use and conservation exactly.[133] In FLPMA, conservation appears only by implication, and as a goal in the planning process and a priority to be balanced with other interests in use of public land, not as a "use" in and of itself.[134] However, the terms appear to be used for their plain meanings: conservation as a process through which resources are preserved for future use (rather than being used now),[135] and land use as human activity in a particular place.[136] This does not make the two terms mutually exclusive; human activity on land may be involved in

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128. 43 U.S.C. § 1702(c).

129. *Id.*

130. *Id.*

131. *Id.*

132. 43 U.S.C. § 1702(l).

133. See, for example, a BLM regulation of rangeland under FLPMA: Grazing Administration—Exclusive of Alaska, 43 C.F.R. § 4100 (2024); and the BLM handbook: BUREAU OF LAND MGMT., U.S. DEP'T OF INTERIOR, MANUAL TRANSMITTAL SHEET No. 4-107, H-4180-1—RANGELAND HEALTH STANDARDS (2001).

134. *See* 43 U.S.C. § 1701.

135. *See, e.g.*, *Conservation*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/conservation_n?tab=meaning_and_use#8587235 [https://perma.cc/Z422-Y8AJ] (2010) (definitions 1.a, 1.e).

136. *See, e.g.*, *Land Use*, ENV'T PROT. AGENCY, https://www.epa.gov/report-environment/land-use [https://perma.cc/H754-FQ27] (Feb. 5, 2025).

preserving resources for future use, although the resources themselves are not expended.

The BLM has treated "conservation" in past regulations and guidance mainly as a goal, not as a land use, but with varying degrees of crossover.[137] For example, a BLM Land Use Planning handbook describes conservation as a "use allocation" because it reserves land and resources for "future use."[138] There is contradiction within this definition: conservation functions both as a use allocation and a non-use that maintains an area for future use.

On the agency's website, the BLM declares that its mission is "to sustain the health, diversity, and productivity of public lands for the use and enjoyment of present and future generations."[139] The agency states that "Congress tasked the BLM with a mandate of managing public lands for a variety of uses such as energy development, livestock grazing, recreation, and timber harvesting while ensuring natural, cultural, and historic resources are maintained for present and future use."[140] This language reflects that, in an informal setting, the agency delineates between uses (energy development, livestock grazing, recreation, and timber harvesting) and conservation (which ensures that resources are maintained while uses are managed).[141]

Again different, in an earlier regulation, the BLM defines "resource use" as "a land use having as its primary objective the preservation, conservation, enhancement or development of" a resource indigenous to the area.[142] "Resource" encompasses physical resources (such as "mineral, timber, forage, water, fish or wildlife") and values tied to the land (including "watershed, power, scenic, wilderness, clean air or recreational values").[143] In this description of what constitutes resource use, the BLM accounts for future demands on resources and land as if a current use. This example is analogous to the definition of conservation in the Rule.

Overall, the BLM's past treatment of conservation suggests that conservation was a critical element of land use decision-making, and a designation inextricably linked to current and future land use. However,

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137. The 1970 Senate report explicitly delineates between conservation and utilization of land and resources, stating that the statute's goals are "the encouragement of the conservation, development, and utilization of land and water resources." S. REP. NO. 91-1435, at 44 (1970).

138. *See* BUREAU OF LAND MGMT., U.S. DEP'T OF INTERIOR, H-1601-1—LAND USE PLANNING HANDBOOK 42–44 (2005).

139. BUREAU LAND MGMT., https://www.blm.gov/ [https://perma.cc/A8GK-U6P9].

140. *Our Mission*, BUREAU LAND MGMT., https://www.blm.gov/about/our-mission [https://perma.cc/5LR5-4ZWS].

141. *Id.*

142. 43 C.F.R. § 2300.0–5(g) (2024).

143. *Id.*

conservation was not equivalent to or a distinct subcategory of land use. The agency declined to explicitly define conservation or to enumerate all recognized land uses, using the terms for their ordinary meanings even while overlapping them somewhat, until finally stating in the Rule that conservation is a use distinct from and on par with other uses.[144]

III. AGENCY CHANGE IN ACTION: VALIDITY OF THE BLM'S PUBLIC LANDS RULE

The Public Lands Rule, which the BLM initially posted for public comment in the Federal Register in April of 2023, received considerable attention from scholars and interested parties.[145] Immediately following the BLM's publication of the final Rule in May 2024, a conglomerate of farming and mining groups filed a lawsuit against the BLM in the U.S. District of Wyoming.[146] The resolution of this case will require the court to analyze the agency's change in course and speak to how courts should treat changes in an agency's interpretation of its statutory authority. Resolving this issue not only is relevant to the validity of the Rule and to how the BLM can make decisions about conservation and management of federal land, but it will also illuminate agency authority to change course and the role of judicial review when they do.

The BLM's Rule declares that going forward, the agency will consider conservation as a land use on par with other previously recognized uses (such as the established principal uses—including grazing, mining, and recreation).[147] Therefore, under the new Rule, the BLM may designate conservation as the sole use on certain areas of federal land by issuing

144. Conservation and Landscape Health, 89 Fed. Reg. 40308, 40320 (May 9, 2024) (codified at 43 C.F.R. §§ 1610.7-2, 6101.1–6103.2).

145. *See* sources cited *supra* notes 10–12. The quantity of comments made on the proposed rule is also telling of the amount of interest the Rule garnered, both in the form of support and criticism. Rulemaking Docket: Conservation and Landscape Health, REGULATIONS.GOV, https://www.regulations.gov/docket/BLM-2023-0001/comments [https://perma.cc/WK7H-PNGG] (indicating that 152.67K comments were made on the docket); *see also BLM Rule Threatens Multiple Use Management of Public Lands*, NAT'L CATTLEMEN'S BEEF ASS'N (Apr. 18, 2024), https://www.ncba.org/news-media/news/details/41227/blm-rule-threatens-multiple-use-management-of-public-lands [https://perma.cc/5AGB-FYKL].

146. Complaint, Am. Farm Bureau Fed'n v. U.S. Dep't of Interior, No. 2:24-cv-00136-ABJ (D. Wyo. July 12, 2024). The lawsuit was transferred to the U.S. District of Utah in September. Order, Am. Farm Bureau Fed'n v. U.S. Dep't of Interior, No. 2:24-cv-00136-ABJ (D. Wyo. Sept. 10, 2024).

147. 43 C.F.R. § 1601.0–5(i) (2024).

restoration and mitigation leases.[148] Various groups such as "[c]onservationists, hunting and fishing groups, and Native American tribes could lease BLM lands for restoration, habitat protection, or protection of traditionally important areas," or to offset development or exploitation of natural resources elsewhere.[149] Although the Rule itself claims that the governing statute "has always encompassed conservation as a land use," the statutory language on this point is vague.[150] Prior BLM actions, rules, and guidance suggest that the agency has not previously considered conservation as a land use.[151]

The plaintiffs challenging the Rule object to the BLM's promotion of conservation, a "non-use" in the plaintiffs' language, to the same standing as the land uses explicitly set forth in the statute and previous regulations.[152] They argue that defining conservation as a land use is inconsistent both with the BLM's prior positions and with the governing statute, and that the Rule should be invalidated accordingly.[153]

The following Sections assess whether the Rule is a change in course for the BLM and analyze the validity of the Rule by anticipating how the court will review the lawsuit. The discussion addresses various arguments advanced in the complaint[154] that challenge the Rule's validity, inspects the

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148. *Id.* § 6102.4. Note that the proposed rule referred to such leases as "conservation leases," while the final rule adopted the "restoration and mitigation leases" language. Conservation and Landscape Health, 89 Fed. Reg. 40308, 40310 (May 9, 2024) (codified at 43 C.F.R. §§ 1610.7-2, 6101.1–6103.2).

149. *Tracking Regulatory Changes in the Second Trump Administration,* BROOKINGS INST., https://www.brookings.edu/articles/tracking-regulatory-changes-in-the-second-trump-administration/ [https://perma.cc/L8TQ-Z9GX] (filter "Rulemaking – Overturning Biden" as the Nature of Action, "Environment" as the Category, "BLM" as the Agency, and select the box to Include Archives for "Biden," then click the plus sign next to "Conservation on public lands") (note that this website refers to "restoration and mitigation leases" as "conservation leases" despite the BLM's decision to rename them in the final rule).

150. *See infra* Section III.C.

151. *See infra* Section II.B.

152. Complaint at 34–36, Am. Farm Bureau Fed'n v. U.S. Dep't of Interior, No. 2:24-cv-00136-ABJ (D. Wyo. July 12, 2024).

153. *Id.* at 34–37.

154. I focus on the complaint as the most concrete summary of interested parties' concerns. It is important to note, however, that many parties (including the plaintiffs) raised additional concerns in comments on the proposed rule. *See, e.g.*, Grazing Coal., Comment Letter on BLM Conservation and Landscape Health Proposed Rule (July 5, 2023), https://www.regulations.gov/comment/BLM-2023-0001-153870 [https://perma.cc/2HGZ-ZH99] (download comments to read concerns); Am. Expl. & Mining Ass'n, Comment Letter on BLM Conservation and Landscape Health Proposed Rule (June 30, 2023), https://www.regulations.gov/comment/BLM-2023-0001-148403 [https://perma.cc/QFL2-BWH8] (download comments to read concerns).

BLM's language in the Rule, and independently assesses whether the Rule is consistent with FLPMA and whether the court should uphold or invalidate it. The BLM's Rule is significant on its own and for the impact it will have on federal land management, but the analysis in the Sections below also brings light to issues in administrative law at large. The Rule is a case study through which the present uncertainty in judicial review and the need for a balance between agency flexibility and consistency can be inspected.

A. The Rule as a Change in Course

Public reception of the Rule strongly suggests that conservation was not previously thought of as a land use under FLPMA and prior BLM regulations. The plaintiffs challenging the Rule argue that the change in land use policy it causes is "seismic," "titanic," and a sharp departure from "nearly 50 years of settled practice and policy."[155] The complaint forms a distinction between "productive" uses (which the plaintiffs align with FLPMA's list of "major and principal uses") and conservation as a "non-use" or limitation on use.[156] While the Rule purports to build on prior consistent rules that include conservation as a use, the plaintiffs contend that Congress never intended the agency to consider conservation a use under FLPMA, and they deny that the BLM has previously treated it as such.[157] The Rule, they conclude, represents a significant change in the BLM's policy.[158]

On the other hand, the BLM claims in the Rule that "FLPMA has always encompassed conservation as a land use" and that "the BLM has been practicing conservation of the public lands throughout the agency's history."[159] Essentially, the Rule purports to strengthen an existing agency practice, not institute a new one. In the next breath, however, the Rule identifies "the change this rule aims to achieve" as the provision of public direction "for conservation use to be implemented on the public lands in support of ecosystem resilience."[160] It brings attention to the fact that FLPMA not only authorizes but requires the BLM to protect resources, preserve land, and provide wildlife habitats, all of which are "conservation measures."[161]

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155. Complaint at 45–46, *Am. Farm Bureau Fed'n*, No. 2:24-cv-00136-ABJ.

156. *Id.* at 46.

157. *See id.* at 34.

158. *Id.*

159. Conservation and Landscape Health, 89 Fed. Reg. 40308, 40310 (May 9, 2024) (codified at 43 C.F.R. §§ 1610.7-2, 6101.1–6103.2).

160. *Id.*

161. *Id.*

Informed by both the Rule and the complaint, the Rule likely constitutes a change from the agency's past positions for the purpose of judicial review. A report from the Brookings Institute supports this conclusion; it describes the Rule as one that "add[s] conservation to the mandate" of the BLM.[162] Prior to the Rule, the BLM leased land and issued permits for various, but limited, purposes in accordance with FLPMA's goals of multiple use and sustained yield.[163] Critically, FLPMA only authorizes the BLM to "set aside" land for the exclusive purpose of conserving resources when it obtains a special land use designation—a process distinct from the usual procedures for issuing leases or permits.[164]

The Rule constitutes three main changes to the BLM's regulatory structure. First, it enables BLM to treat conservation as a qualified use under FLPMA, allowing the issuance of restoration and mitigation leases rather than requiring the agency to complete a more arduous process of gaining a special land use designation or having Congress officially "withdraw" land from use.[165] Second, it elevates the importance of conservation for the BLM because the Rule revises the process for establishing "Areas of Critical Environmental Concern."[166] Third, the Rule requires new land health assessments on all public land uses.[167] Ultimately, the effect of the Rule is one of a "new tool" to enable the BLM to designate more public land for conservation and prioritize conservation over those uses explicitly included in FLPMA and previously identified by the BLM.[168]

The BLM justifies the Rule and the change, whether or not explicitly recognizing it as such, by drawing on the language of FLPMA and by identifying changes in the environment as demanding a new system for conservation.[169] The Rule frequently mentions impending climate change as a reason for requiring more conservation of resources and maintenance of habitats.[170] It points to the problems with current enforcement of FLPMA that prioritizes resource use over longevity, ultimately meaning that the agency is not fulfilling its statutory obligations to reach sustained yield and to preserve

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162. *Tracking Regulatory Changes in the Second Trump Administration*, *supra* note 149.

163. *Id.*

164. *Id.*; 43 U.S.C. § 1712.

165. 43 U.S.C. § 1712; *Tracking Regulatory Changes in the Second Trump Administration*, *supra* note 149.

166. *Tracking Regulatory Changes in the Second Trump Administration*, *supra* note 149; 43 C.F.R. § 1610.7-2.

167. *Tracking Regulatory Changes in the Second Trump Administration*, *supra* note 149.

168. *Id.*

169. Conservation and Landscape Health, 89 Fed. Reg. 40308, 40310–12 (May 9, 2024) (codified at 43 C.F.R. §§ 1610.7-2, 6101.1–6103.2).

170. *Id.*

resources for future generations.[171] While these justifications weigh in favor of the Rule's validity, particularly if they are considered to be new factual findings, they also serve as proof of the fact that the Rule is a change in how the agency plans to manage public lands, deny change as the agency might.

On the whole, the Rule appears to be a change in course from how the BLM has previously executed FLPMA. As a change, not a long-standing agency interpretation of statute, the Rule is unlikely to receive a high level of respect under the *Skidmore* standard's consistency or contemporaneity factors. However, the BLM's interpretation in the Rule may still receive due respect because of the thoroughness and validity of reasoning factors, as well as the fact that the agency is an expert on FLPMA and on federal land use planning. Even without relying on *Skidmore* deference, the Rule may nonetheless be permissible if it is within the bounds of the BLM's authority under FLPMA.

Accordingly, the validity of the BLM's Rule or the success of the plaintiffs' challenge turns on the court's resolution of the issues discussed in Part I. The court will weigh the agency's action on the opposing values of consistency and the need for agency flexibility. But, before assessing the Rule's substantive legality, the court will determine if the BLM followed the procedural requirements for rulemaking.

B. The Rule's Procedural Validity

To promulgate a valid rule, agencies must follow the requirements in the APA and adhere to common law principles of agency review.[172] In general, to satisfy this initial level of inquiry, the Rule must have been announced, opened for public comment, rewritten where needed to address the public input, and finally published in the Federal Register.[173] The BLM met these basic requirements in issuing the Rule.[174]

If an action is considered a change from a prior agency position, courts also look to the agency's identification and justification of the change. The burden of justifying a rule change is no higher than the reasoning required for an initial rule.[175] Despite some equivocal language in the Rule, the BLM appears to have identified the changes instituted by the Rule and recognized that the definition of conservation as a land use on par with other uses was a

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171. *Id.* at 40308–09.
172. 5 U.S.C. §§ 553, 706.
173. 5 U.S.C. §§ 553(b)–(d).
174. *See* Conservation and Landscape Health, 89 Fed. Reg. at 40310.
175. 5 U.S.C. § 706(2)(A); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009).

new one.[176] This requirement appears to be satisfied because the BLM sufficiently explained the factual findings behind the policy change.[177] The Rule rests on new factual findings from developing circumstances of climate change; it is not a different agency conclusion resting on the same facts, which would require more explanation.[178]

While the plaintiffs challenging the Rule assert that the Rule harms their substantial reliance interests and that the BLM insufficiently justified upsetting this reliance, the court may find that the BLM satisfied its burden in explaining its rule. However, this conclusion overlaps with the court's determination that the Rule itself is valid, because the permissibility of BLM's disruption of reliance interests weighs on whether its explanation for doing so was sufficient.

C. The Rule's Consistency with FLPMA

If the court finds that the BLM met procedural standards in promulgating the Rule, it will move on to substantive review. The question then becomes whether the Rule is legally valid because it falls within the agency's legislatively anticipated scope of power. Courts will look first to the language of the statutory authority, then to the character of the agency action.[179] Then, the court will reconcile them to determine whether the agency's action is consistent with the statute and therefore legally valid and constitutional.[180]

As discussed above, BLM's statutory authority FLPMA is vague about what constitutes land use and whether conservation may itself be a land use.[181] However, the statute is clear but broad about the BLM's purpose and goals, as well as in granting the agency discretion to carry out land management as it deems necessary.[182] With ambiguity and broad delegations comes the difficulty of discerning what actions Congress intended to fall within the agency's purview. Accordingly, it is necessary to assess, as the court will, FLPMA and the Rule's plain language, purposes, and policies. The next step is to analyze the BLM's justifications for the Rule, and finally consider the agency's and the plaintiffs' desired readings of FLPMA. The court will only

176. Conservation and Landscape Health, 89 Fed. Reg. at 40308.
177. *Id.* at 40309–13.
178. *Id.* at 40309.
179. *See supra* Part I.
180. *See supra* Part I.
181. *See supra* Section II.B.
182. 43 U.S.C. § 1701(a)(5).

adopt the BLM's interpretation of FLPMA if it believes that is the best reading.[183]

One major issue is whether designating areas for conservation exclusively, as the Rule would enable the BLM to do, constitutes impermissible "withdrawal" of land by the agency. In FLPMA, Congress explicitly reserves its authority "to withdraw or otherwise designate or dedicate Federal lands for specified purposes," and to "delineate the extent to which the Executive may withdraw lands without legislative action."[184] "Withdrawal" is defined as the "withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program."[185] This provision is consistent with the Constitution's Property Clause and with the legislative intent of enabling the agency to manage land, but leaving to Congress the ultimate decisions about what land to keep in their jurisdiction.

However, it is unclear whether the withdrawal restriction prevents BLM from unilaterally establishing an area of land for solely conservation purposes. The groups challenging the Rule argue that setting land aside for conservation constitutes withdrawal, and therefore that the BLM would be exceeding its authority by issuing conservation leases.[186] The challengers liken a conservation lease to the formation of national parks, which only Congress can do.[187] Although the Rule does not respond directly to this concern, the BLM impliedly asserts that conservation leases are not withdrawals because they are merely land use designations, which the BLM does not need Congressional authorization to make.[188]

In the Rule, the BLM also claims that conservation has always been a use under FLPMA, and that this Rule is merely the first instance where this principle has been explicitly stated.[189] Is the fuss over the new definition of conservation as a use merely a debate over semantics, while the underlying facts and meaning have always been the same? The BLM argues that its

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183. *See supra* Section I.A.

184. 43 U.S.C. § 1701(a)(4).

185. 43 U.S.C. § 1702(j).

186. Complaint at 39, Am. Farm Bureau Fed'n. v. U.S. Dep't of Interior, No. 2:24-cv-00136-ABJ (D. Wyo. July 12, 2024).

187. *Id.* at 45.

188. Conservation and Landscape Health, 89 Fed. Reg. 40308, 40327 (May 9, 2024) (codified at 43 C.F.R. §§ 1610.7-2, 6101.1–6103.2). Again, note that the BLM renamed what were called "conservation leases" in the proposed rule; in the final rule, the leases are designated mitigation or restoration leases. *Id.* at 40310, 40314.

189. *Id.* at 40310.

intention in the Rule is consistent with what it has always done and what it is required to do by FLPMA.[190] Some language in FLPMA supports the conclusion that conservation may, in fact, be considered a land use.[191] Regardless of whether the statutory authority supports the BLM's declaration that conservation is a land use, previous BLM rules and guidance further support the conclusion that the Rule is a change from the agency's historical stance on conservation.

The plaintiffs' central argument is that FLPMA does not permit the BLM's definition of conservation as a land use.[192] The parties argue that the BLM is not authorized by the statute, expressly or through a grant of discretionary power, to lease land exclusively for conservation as the Rule proposes the agency will do, because to do so is "withdrawal" of land from BLM jurisdiction for which FLPMA requires Congressional authorization.[193] The parties also state that the Rule is opposed to the purpose of FLPMA because it deprioritizes certain uses, such as those that the plaintiffs are involved in, like mining and cattle grazing, in order to elevate conservation.[194] The complaint argues that this runs contrary to FLPMA's express goal of furthering multiple use and sustained yield.[195]

It is feasible that, as the plaintiffs argue, conservation may be a "non-use" because the goal is non-disturbance of land and resources, in contrast with the many possible uses of land which may disturb and deplete resources (but nonetheless be compatible with the goals of sustained yield and conservation).[196] The definition of "multiple use" anticipates and permits the BLM to exercise discretion in "making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions."[197]Although this language seems to give the BLM latitude to adapt the amount and type of use along with changing conditions, it still does so in the context of making use of at least some of the land use rather than merely maintaining resources.

Meanwhile, the BLM supports a wider reading of the language of FLPMA. In the Rule, the agency argues that the goals and purposes of FLPMA almost necessitate, rather than merely allow, the BLM to treat conservation as a land

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190. *Id.* at 40314.
191. *See supra* Section II.B.
192. *See* Complaint at 45–46, *Am. Farm Bureau Fed'n.* (No. 2:24-cv-00136-ABJ).
193. *Id.*; 43 U.S.C. § 1714.
194. Complaint at 45–46, *Am. Farm Bureau Fed'n.* (No. 2:24-cv-00136-ABJ).
195. *Id.*
196. *See id.*
197. 43 U.S.C. § 1702(c).

use.[198] The agency interprets FLPMA's mandate to achieve multiple use and sustained yield and the responsibilities it gives the agency, taken together, to permit and require the agency to treat conservation as a use and otherwise behave as the Rule outlines.[199] It acknowledges the language of the statute that authorizes the BLM to "take any action to prevent unnecessary or undue degradation of the lands."[200] The agency argues that FLPMA encompasses conservation as a land use.[201] However, the Rule primarily rests on an assertion that the agency acts within its discretionary authority to carry out the purpose of FLPMA, which indisputably includes some rulemaking to further the goal of conservation for future use.[202]

Primarily, the agency's land use planning and executing authority enables it to "consider present and potential uses of the public lands" and to "weigh long-term benefits to the public against short-term benefits."[203] An ability to decide that some land should be used for less than all of its resources, preserving more resources and establishing ecological stability for future generations' use of the land, seems to fall squarely within the BLM's authority under FLPMA.

Ultimately, while it is impossible to predict the district court's ruling, the Rule may be consistent with the statute, although it is a change deserving of some scrutiny. The Rule is an authorized means (land use planning according to the principles of FLPMA) to the required ends (maintenance of land for future use) that the statute prescribes for the agency. The language of FLPMA is sweeping in its goals and its grants of authority to the BLM to achieve those ends.[204] The statute does not prescribe an exact plan or methodology for the agency to operate under. In the areas it does limit agency authority, such as the legislative check it places on land withdrawals, the limitations are specific and not applicable to the scenarios the Rule anticipates. Furthermore, to

198. Conservation and Landscape Health, 89 Fed. Reg. 40308, 40309 (May 9, 2024) (codified at 43 C.F.R. §§ 1610.7-2, 6101.1–6103.2).

199. *Id.*

200. *Id.*

201. *Id.* at 40310. Although the agency's reasoning about how FLPMA permits an interpretation that conservation is a land use is not fully explained in the Rule, it seems to rest in part on the fact that FLPMA's list of uses is not meant to be comprehensive and that the definition of "multiple use" allows treating conservation as a land use. *Id.* at 40313 (citing New Mexico *ex rel.* Richardson v. BLM, 565 F.3d 683, 710 (10th Cir. 2009)) ("It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses . . . . BLM's obligation to manage for multiple use does not mean that development must be allowed . . . . Development is a possible use, which BLM must weigh against other possible uses—including conservation to protect environmental values.").

202. *Id.*

203. 43 U.S.C. § 1712(c)(5), (c)(7).

204. 43 U.S.C. § 1701.

prevent an interpretation of FLPMA that would disable the agency tasked with carrying it out from doing its job, the BLM's promulgation of the Rule may be permissible despite being on the outer edge of the agency's authority.

The BLM argues that the modern state of the environment as impacted by climate change requires the BLM to take actions different than those contemplated at the origination of FLPMA.[205] With the mandate of multiple use and sustained yield remaining consistent, the means to that end must change to account for recently acquired and constantly developing knowledge and expertise about how environments are impacted on longer timescales by climate change and other global systems. By acknowledging the principles of FLPMA, changing management methods to adapt to this growing expertise is not only permissible but compulsory. There is a compelling argument that in order for the BLM to do its duties and work toward sustained yield while enabling multiple use, the Rule must be upheld.

IV. CONCLUSION

The BLM is an immensely powerful agency; its decisions have vast implications.[206] Its decisions and the actions of numerous similarly powerful agencies may and should be heavily scrutinized to avoid arbitrary policy change and to ensure that agencies do not exceed their statutory authority. Significant policy changes should be left to the legislature. However, there is also a strong interest in allowing agencies like the BLM to change course in executing a statutory scheme as circumstances require.

As a case study for judicial review of agency change at large, the BLM's Rule demonstrates problems that might arise when an agency takes action to address its perception of a change in context. The Rule appears to fall within the BLM's statutory scope of authority and may even bring it closer to genuinely acting in accordance with FLPMA's purpose in light of current environmental conditions. Nonetheless, the Rule may appear to be a jarring change in the course of public land policy to some.

In a constantly changing world, there may be a case for authorizing agencies to make significant management changes across time, even when the outcomes are politically charged. The land of the United States has

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205. 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, 6 (2017); Karl N. Arruda & Christopher Watson, *The Rise and Fall of Grazing Reform*, 32 LAND & WATER L. REV. 413, 423 (1997).

206. *See* Helen Lober, *Constraining Federal Policy Whiplash on Public Lands*, 50 ECOLOGY L.Q. 449, 479 (2023).

undergone massive change since (and before) the country's birth. Land use decisions made on political grounds have not reaped success for the long-term viability of the values FLPMA sets out.[207] Although the legislature must be the primary policymaker, an agency is better equipped to carry out particular goals for public lands after enactment. Agencies have flexibility and expertise that the legislature lacks. They can more constantly and effectively monitor and react to changes, particularly when it comes to subjects like the environment and vast and diverse swaths of land that make up the United States' public lands.

Judicial review of agency action, while responsible for holding agencies to the limits of their statutory authority, should acknowledge this reality. In light of new and changing circumstances and knowledge, agency change that is consistent with statutory authority and furthers the agency's ability to meet its directives should be upheld. Agencies should be expected to carry out the letter of the law as it applies to current conditions, rather than be bound to an original legislative intent as applied by predecessors in the agency according to a historical context.

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207. *See* JOHN D. LESHY, OUR COMMON GROUND: A HISTORY OF AMERICA'S PUBLIC LANDS, 498, 501 (2022) (noting that political figures have referred to the BLM as the "Bureau of Livestock and Mining," or, alternatively, the "Bureau of Landscapes and Monuments"); Eric Biber, *Looking Toward the Future of Judicial Review for the Public Lands*, 32 J. LAND USE & ENV'T. L. 359, 368 (2017); JAMES MORTON TURNER & ANDREW C. ISENBERG, THE REPUBLICAN REVERSAL: CONSERVATIVES AND THE ENVIRONMENT FROM NIXON TO TRUMP (2018).