After Chevron: Conservation Rule Already Faces Challenges

By **Stacey Bosshardt and Stephanie Regenold** (September 12, 2024)

On June 28, the U.S. Supreme Court overturned a decades-old precedent, known as Chevron deference, that favored federal agencies' rulemaking interpretations. In this Expert Analysis series, attorneys discuss the decision's likely impact on rulemaking and litigation across practice areas.

Just two months have passed since the U.S. Supreme Court's decision in Loper Bright Enterprises v. Raimondo, but litigants are already using it to challenge agency regulations in the field of environmental law and natural resource management to overturn and otherwise test the boundaries of that ruling.[1]

One regulation that is vulnerable under Loper Bright, and is now the subject of four newly filed lawsuits, is the Bureau of Land Management's May 2024 Conservation and Landscape Health Rule, which broadly interprets "uses" under the Federal Land Policy and Management Act of 1976 to include conservation easements — the first time the BLM has done so in a regulation.

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Without the tip of the scales that agency interpretations enjoyed before Loper Bright, the rule is on shaky footing because the text and structure of FLPMA, as well as the BLM's past interpretations of the term "use," suggest that the rule is not the best interpretation of the statute. How the courts treat the pending challenges to the rule is likely to further color the post-Chevron landscape.

FLPMA both authorizes and limits the BLM's management of public lands, including private uses of those lands.

The statute's multiple use mandate generally requires that unless "public land has been dedicated to specific uses according to any other provisions of law," the secretary of the U.S. Department of the Interior, through the BLM, must manage such lands "under principles of multiple use and sustained yield, in accordance with the land use plans developed by [the Secretary] under section 202 of this Act when they are available."[2]

The statute further defines "multiple use" broadly 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 ... and 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.[3]

The rule purports to clarify FLPMA's multiple use mandate provision to include conservation and creates restoration and mitigation leases to protect "intact landscapes" that are now classified under FLPMA.[4] The BLM intends that such leases can operate to restrict or prohibit other development or uses of the lands they cover. Four lawsuits now challenge the BLM's interpretation.

Although other arguments and claims asserted in these lawsuits could provide courts with alternative grounds for invalidating the rule, the interpretive claims under FLPMA in particular carry much greater force in the wake of Loper Bright than they would have previously. Before the decision, the BLM as the agency charged with administering FLPMA would have been accorded deference to its interpretation of any ambiguous statutory terms.

Promulgated in May, the rule preceded the Supreme Court's June decision in Loper Bright, but the agency can be presumed to have been finalizing the rule with the case and its potential outcome in mind.

In Loper Bright, of course, the Supreme Court overruled the Chevron doctrine long targeted for elimination by opponents of the administrative state. Under the doctrine, as articulated in Chevron USA Inc. v. Natural Resources Defense Council Inc.,[5] where statutory gaps create ambiguity about a statute's scope or effect, courts were required to defer to "permissible" interpretations of the statute by the federal agency charged with administering it — even when a reviewing court reads the statute differently.

In an opinion by Chief Justice John Roberts, the Supreme Court concluded that "[i]n the business of statutory interpretation, if it is not the best, it is not permissible."[6]

Because the rule's interpretation of FLPMA — when subjected to traditional tools courts use to interpret statutes and without Chevron's presumption — comes up short, it will be a revealing test case for how agency regulations fare in the post-Chevron world.

Challenges to the Rule

Lawsuits challenging the rule have been filed in U.S. district courts in four different states by state governments and industry groups, although the federal government has moved to transfer them all to Utah, where the first lawsuit was filed.

- Utah v. Haaland, filed in June in the U.S. District Court for the District of Utah;
- North Dakota v. Department of the Interior, filed in April in the U.S. District Court for the District of North Dakota;
- Alaska v. Haaland, filed in July in the U.S. District Court for the District of Alaska; and
- American Farm Bureau Federation v. U.S. Department of the Interior, filed in July in the U.S. District Court for the District of Wyoming.[7]

All four assert that the rule violates the National Environmental Policy Act by failing to

adequately assess the rule's full impacts. Three assert that the rule violates the Congressional Review Act because it is too similar to a rule the BLM promulgated in 2016 that was expressly rejected by Congress.

Several of the lawsuits assert that the rule conflicts with other statutes authorizing uses of BLM lands, such as the Taylor Grazing Act or the Mineral Leasing Act. A lawsuit brought by the state of Alaska asserts that the rule violates the Alaska National Interest Lands Conservation Act, a land use statute that specifically governs lands within Alaska.

Most relevant to Loper Bright, several of the lawsuits assert that the rule violates FLPMA, and two of the cases specifically invoke Loper Bright.[8] As the agency that administers FLPMA, the BLM's interpretation of ambiguous statutory terms — such as "use," if it is ambiguous — would have received the benefit of Chevron deference.

As discussed above, the rule purports to interpret the BLM's responsibilities for managing public lands under FLPMA. FLPMA prescribes a "multiple-use and sustained yield" framework for the BLM's management of public lands and sets forth a planning regime subject to public involvement to implement those values.[9]

FLPMA contemplates that BLM lands will and should be used in a way that recognizes and balances the needs of present and future generations for resources for "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values" as set forth in the statute's definition of its "multiple use" mandate.[10]

The agency must also manage its lands consistent with principles of sustained yield, which the statute defines 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."[11]

However, unlike national parks that must be protected from degradation under the administering agency's organic statute, under FLPMA the BLM is to manage areas within its jurisdiction to allow the productive use of those lands, not simply their preservation. As courts have said of the U.S. Forest Service — which, like the BLM, manages its lands under a multiple-use regime — "it has never been the case that 'the national forests were ... to be 'set aside for non-use.'"[12]

Based on traditional tools of statutory interpretation, several factors could render the rule vulnerable to a finding that it violates FLPMA in light of Loper Bright.

Statutory Definitions

The term "conservation" does not appear in FLPMA's multiple use mandate.[13] The statute does mention "natural scenic, scientific and historical values" in its discussion of multiple use,[14] but addresses those values not in its provisions authorizing use, occupancy or rights-of-way but principally through a provision enabling the agency to designate areas of critical environmental concern, or ACECs, that receive special treatment as part of the process of adopting management plans for large parcels.[15]

The BLM designates ACECs during the planning process, which must be transparent, participatory, and sensitive to the needs of local stakeholders.[16]

The agency's articulated need to clarify that "uses" can include conservation undermines any notion that the plain text is sufficient to support the rule's interpretation of the term,

and, as the rule's challengers contend, is more commonly understood to mean not the "use" of lands but their "non-use."

Thus, a court could find under the plain meaning rule that use does not include conservation, and therefore the rule fails on its face.

Statutory Provisions

The term "conservation" does not appear on the list of authorized purposes for which the BLM may grant rights-of-way, raising a structural argument on whether such authority was granted to the agency.[17] Nor is "conservation" a listed purpose for "instruments [including easements] ... to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concern."[18]

Thus, under the expressio unius est exclusio alterius doctrine, these tools should not be interpreted to include conservation.

Departure From Agency Past Practice

Although the rule purports to clarify that FLPMA's multiple use provision includes conservation as a "use on a par with other uses," there is a strong argument that the interpretation instead represents a departure from past practice, at least in some quarters of the agency.

A University of California, Davis School of Law Review article[19] discussing the viability of conservation rights-of-way noted that the agency's Interior Board of Land Appeals — the Department of the Interior's adjudicatory body — has not viewed conservation as one of FLPMA's authorized purposes:

In the past, the Interior Board of Land Appeals, which adjudicates administrative appeals of BLM decisions, has precluded the use of Title V rights-of-way for purposes it believed were "not among the purposes authorized under FLPMA." Moreover, the Board may find that conservation rights-of-way are impermissible where it views them as an end-run around other statutes.

The article's summary describes conservation rights-of-way as a "novel use of the authority of the [BLM] to issue rights-of-way under Title V of [FLPMA] over the vast public lands managed by the agency."[20]

Even under the Supreme Court's pre-Loper Bright jurisprudence, the novelty of an agency's interpretation of a long-standing statutory term would weigh against the new interpretation.[21] Here, the novelty of the agency's interpretation and its chilly reception by the agency's adjudicatory body both undercut the agency's characterization of the rule as clarification that conservation is a use.

Of course, rights-of-way are governed by a different provision of FLPMA (Title V) than easements (Title III). The provision on easements, titled "Management of use, occupancy, and development of public lands," also states that "[i]n managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."[22]

But given the placement of this authority at the end of a provision authorizing specific permissible types of instruments, the better read is that it is intended to qualify that

authority — i.e., by allowing the agency to place conditions on the enumerated types of permits — not to augment the types of instruments the agency can grant.

Inconsistency With Other Provisions of FLPMA

The plaintiffs in these challenges also assert that the rule would supplant the standards FLPMA prescribes for withdrawals of public lands.[23]

Withdrawals are defined as "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."[24]

The statute prescribes the public process the BLM must use for withdrawals, including notification of Congress for any withdrawals of land larger than 5,000 acres. The statute further states that, unlike most other functions within the Department of the Interior, authority to authorize withdrawals can be delegated by the secretary only to other presidentially appointed, U.S. Senate-confirmed officials.[25]

Another limitation is the requirement that any withdrawal is "subject to valid existing rights."[26] An interpretation that would allow an end-run around restrictions on withdrawals should not be upheld.[27]

Conclusion

Taken together, the BLM's interpretation of land "use" under FLPMA in a manner contrary to the agency's past practice and its failure to consider the relationship of its proposed interpretation with other important provisions of the same statute (such as the withdrawal authority) suggest that the rule's interpretation of FLPMA's term "use" is not "the best" one — and therefore, under Loper Bright, "not permissible."

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[1] No. 22-451, slip op. (U.S. June 28, 2024).

[2] 43 U.S.C. § 1732(a).

[3] Id. § 1702(c).

[4] Conservation and Landscape Health, 89 FR 40308-01, 40308 (May 9, 2024).

[5] 467 U.S. 837, 843 (1984).

[6] Loper Bright, No. 22-451, slip op. at 23 (U.S. June 28, 2024).

[7] Utah v. Haaland, No. 2:24-cv-00438 (D. Utah June 18, 2024); North Dakota v. Dep't of the Interior, No. 1:24-cv-124 (D.N.D. June 21, 2024); Alaska v. Haaland, No. 3:24-cv-00161 (D. Alaska July 24, 2024); Am. Farm Bureau Fed'n v. U.S. Dep't of the Interior, 2:24-cv-00136 (D. Wy. July 12, 2024). The Utah and North Dakota cases were filed before the Supreme Court's Loper Bright decision, and the others after it.

[8] Two of the cases also cite the Supreme Court's "major questions" doctrine, under which courts will require a clear statement from Congress to conclude that a statute authorizes executive branch agencies to issue regulations that will result in significant economic dislocation. West Virginia v. U.S. EPA, 2024 WL 103754.

[9] 43 U.S.C. § 1732(a); id. § 1712(c)(9) (requiring coordination with state and local governments).

[10] Id. § 1702(c).

[11] 43 U.S.C. § 1702(h).

[12] The Lands Council v. McNair, 537 F.3d 981, 990 (9th Cir. 2008).

[13] 43 U.S.C. § 1702(c).

[14] Id. § 1702.

[15] Id. § 1702(a).

[16] Id. § 1712(c).

[17] Id. § 1761(a).

[18] Id. § 1732(a), (b).

[19] Ezekiel A. Peterson and Justin R. Pidot, Conservation Rights of Way on Public Lands, 55 U.C. Davis L. Rev. 89, 136
(2021), https://lawreview.law.ucdavis.edu/archives/55/1/conservation-rights-way-public-lands.

[20] Id. at 1.

[21] Loper Bright, slip op. at 8 (respect for agency interpretations "was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time"); id. at 17 ("[I]nterpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.").

[22] 43 U.S.C. § 1732(b).

[23] See id. § 1714 (granting authority "to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section") (emphasis

added).

[24] Id. § 1702(j).

[25] Id. § 1714(a).

[26] Havasupai Tribe v. Provencio, 906 F.3d 1155, 1166 (9th Cir. 2018).

[27] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 485 (2001) (Agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.").