Comment on the Bureau of Land Management's Proposed Conservation and Landscape Health Rule, RIN 1004–AE–92

Property and Environment Research Center

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Main Points

- Allowing markets for voluntary conservation on public lands could reduce conflict, empower third parties to perform restorative work, and reward existing users for their role in improving conservation outcomes.
- For conservation leasing to produce these desirable results, existing rights, privileges, and leases must be honored.
- Markets, not politics, must set the price for conservation leases.
- Market mechanisms and voluntary negotiations should be used to resolve any conflicts between conservation leases and other uses.

Introduction

On both public and private lands, conservation and land management issues involve balancing a variety of competing uses of scarce natural resources. Should a parcel of land be developed for energy production, grazed by livestock, actively managed to enhance wildlife habitat, or passively set aside for conservation or other environmental values? In each case, decision-makers inevitably confront the question of how to resolve competing uses of public and private lands.

On private lands, landowners, conservation organizations, and others have developed innovative tools to resolve conflicts between environmental and other values while also encouraging and rewarding voluntary conservation. Unfortunately, these revenue-generating tools have largely been absent from federal lands due to "use it or lose it" policies with narrow definitions of "use" that preclude markets for voluntary conservation and stoke controversy over public land management decisions. Consequently, conservation advocates and users of federal lands often have no option other than to resort to legal and political conflict.

The Bureau of Land Management's (BLM) proposed Conservation and Landscape Health Rule could help to mitigate this conflict and facilitate voluntary conservation. The proposed rule would identify conservation as a valid "use" of federal land, put conservation on an equal footing with other uses, and authorize "conservation leases" as a tool to facilitate voluntary conservation on federal land. In a recent congressional hearing, Principal Deputy Director Nada Culver explained that the "key to the success" of the conservation proposal would be to unlock opportunities for conservation organizations to finance voluntary conservation performed by ranchers and other federal-land users and to generate a source of additional income for these existing users.[1]

To ensure the proposal achieves BLM's goals and reaches its potential, we encourage the agency to make sure that its final rule is consistent with three principles: 1) Existing rights and privileges will be honored; 2) Conservation leases will be available at a fair market price that reflects the value of potential future uses that the lease may preempt; and 3) Conflicts between a conservation lease and other uses will be resolved through voluntary negotiation rather than political edict.

I. The Need for Market Mechanisms to Encourage Voluntary Conservation on Federal Land

Market approaches to environmental conservation, which rely on property rights, prices, and voluntary contracts to encourage stewardship, have grown in prominence in recent decades.[2] According to the National Conservation Easement Database, landowners have voluntarily enrolled more than 33 million acres in conservation easements with land trusts to protect open space, wildlife habitat, and watersheds.[3] Other landowners have entered into habitat leases with conservation organizations, under which they may set areas aside for wildlife, manage their land to maximize its habitat value, or take other steps to benefit wildlife.[4] Conservation organizations have established incentive programs to encourage and reward voluntary conservation.[5] In still other cases, conservation organizations have

[1] See Legislative Hearing on H.R. 3397, House Committee on Natural Resources 3:44:03–3:44:30 (June 15, 2023), https://www.youtube.com/live/BPfxR86Ubes?feature=share&t=13443.
[2] *See generally* Terry L. Anderson & Gary D. Libecap, Environmental Markets: A Property Rights Approach 1-20 (2014)
[3] *See* Nat'l Conservation Easement Database, https://www.conservationeasement.us/ (last visited June 12, 2023). *See also* Dominic P. Parker & Walter N. Thurman, *Private Land Conservation and Public Policy*, 11 Ann. Rev. Res. Econ. 337 (2019).
[4] *See Big Idea–Habitat Leasing*, Western Landowners' All., https://westernlandowners.org/policy/habitat-lease/ (last visited June 12, 2023); *Elk Occupancy Agreement*, Prop. & Env't. Rsch. Ctr., https://www.perc.org/field-projects/elk- occupancy-agreements/ (last visited June 12, 2023).
[5] *See Grassbanking*, Univ. of Wyo.: Haub Sch. of Env't & Nat. Res., https://www.uwyo.edu/haub/ruckelshaus-institute/private-lands-stewardship/conservation-toolbox/grassbanking.html (last visited June 12, 2023) (describing how the Nature Conservancy's Matador Ranch grass bank rewards neighboring landowners who adopt conservation practices); Laura Huggins, *Contracting for Conservation*, 36 Prop. & Env't Rsch. Ctr. Reports 44, 44–45 (2017), https://www.perc.org/2017/09/14/contracting-for-conservation/ (describing American Prairie's "Wild Sky" program, which funds incentive payments to Montana ranchers who adopt wildlife-friendly practices).

voluntarily taken on the risks that wildlife creates for private landowners.[6] Despite the occasional controversy, these tools are broadly popular with landowners and conservation organizations alike.

These tools have largely been limited to state and private land, however, because federal laws and regulations adopt narrow interpretations of what is a permissible "use" of federal land and impose "use it or lose it" policies that penalize users for voluntary conservation.[7] Suppose, for instance, a conservation group purchased a grazing permit from a retiring rancher in order to reduce carnivore conflict and operate a "grass bank" that made forage available to neighboring ranchers in times of drought or shortage in exchange for those ranchers adopting voluntary conservation practices. In that case, instead of allowing the conservation group to acquire a grazing permit to operate a grass bank, current BLM regulations provide for the cancellation of the permit, because the conservation group is not continuously using the maximum amount of forage available, and for the potential reallocation of the grazing permit to any nearby rancher who wants it.[8] Even if an existing permittee didn't sell their permit but merely agreed to graze fewer animals or entirely avoid a sensitive area, that too can be cause to cancel their permit and assign forage to someone else.[9]

With limited voluntary conservation options, environmental organizations often have no alternative to lobbying for political restrictions on the use of federal land or litigation against the BLM and other federal agencies' decisions permitting uses those environmental organizations object to.[10] This has provoked substantial and sustained conflict, and soured relationships between federal land managers, environmental organizations, and permittees. Yet it has produced at best only modest environmental benefits.[11] Even frequent litigants have recognized that litigation over federal land use is a "no-win for everyone" and that better means of resolving conflicts are needed.[12]

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[6] *See Brucellosis Compensation Fund*, PROP. & ENV'T RSCH. CTR., https://www.perc.org/field-projects/brucellosis-compensation-fund/ (last visited June 12, 2023). *See also* Terry L. Anderson & Dominic P. Parker, *Transaction Costs and Environmental Markets: The Role of Entrepreneurs*, 7 REV. ENVTL. ECON. & POL'Y 259 (2013) (describing conservationists' efforts to compensate ranchers whose livestock were killed by wolves and to negotiate with federal grazing permittees to move cattle to areas where they are less vulnerable to disease and predation).

[7] *See* Bryan Leonard, Shawn Regan, Christopher Costello, Suzi Kerr, Dominic P. Parker, Andrew J. Plantinga, James Salzman, V. Kerry Smith & Temple Stoellinger, *Allow "Nonuse Rights" to Conserve Natural Resources: "Use-it-or-lose-it" Requirements Should be Reconsidered*, 373 SCIENCE 958 (2021)

[8] 43 C.F.R. § 4140.1(a)(2); Shawn Regan, Temple Stoellinger & Jonathan Wood, *Opening the Range: Reforms to Allow Markets for Voluntary Conservation on Federal Grazing Lands*, 2023 UTAH L. REV. 197, 226–29 (2023); Bryan Leonard & Shawn Regan, *Legal and Institutional Barriers to Establishing Non-Use Rights to Natural Resources*, 59 NAT. RESOURCES J. 135 (2019).

[9] *See* Regan, et al., *Opening the Range*, *supra* n. 8 at 226–29.

[10] *See* Leonard, et al., *Allow "Nonuse Rights,"* *supra* n. 7 at 959.

[11] *See* Regan, et al., *Opening the Range*, *supra* n. 8 at 211-12.

[12] *See* Shawn Regan, *Why Don't Environmentalists Just Buy the Land They Want to Protect? Because It's Against the Rules*, REASON (Dec. 2019), https://www.perc.org/2020/12/16/why-dont-environmentalists-just-buy-what-they-want-to-protect/.

To mitigate this recurring conflict, federal agencies should recognize conservation as a valid use of federal land and provide a means for conservation groups and others to acquire resource rights for conservation purposes.[13] Under this approach, someone who purchases a grazing permit and opts not to graze livestock at or near the authorized level is still *using* the rights and privileges granted to them, only to conserve a migratory wildlife corridor or watershed rather than to graze livestock.[14] Likewise, if a conservation group and rancher negotiate to reduce grazing or change grazing practices to accommodate wildlife migration, minimize livestock-predator conflict, or protect a riparian area, they are not foregoing use of grazing rights but instead using them to benefit wildlife or other conservation interests.

Recognizing conservation as a valid use of federal land requires some mechanism to allocate resources between conservation and other uses. This should principally be done through market mechanisms.[15] Distributing rights to land or resources through an auction open to all competing users, for instance, would reveal the relative value of the different uses of those resources better than political processes.[16] Or, where existing resource rights or privileges are already allocated, allowing competing users to voluntarily negotiate with each other to acquire or modify those rights would ensure they are allocated to their highest-valued uses.[17]

There is ample evidence that conservation interests can and would participate in these markets, if given the opportunity.[18] As mentioned above, such groups already widely use market incentives to encourage voluntary conservation on private lands.[19] They also participate in the market for state trust lands, the uses of which must be allocated to the highest bidder under state constitutions and laws.[20] In many cases, conservation organizations have pushed for the right to conserve resources on these state lands, and later directly bid against other users to purchase those rights.[21] Despite existing "use it or lose it" policies that apply to federal lands and resources, numerous organizations have still

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[13] Leonard, et al., *Allow "Nonuse Rights," supra* n. 7 at 958.
[14] *See id.* at 959.
[15] *See id.* at 959–60. A market is, at its core, a set of rules. For a market associated with public lands to function, the services provided by those lands that are available for lease must first be defined. The rules must then specify: who can participate in obtaining those services, the services and responsibilities associated with "use," the time period for "using" those services, how participants can specify what they will pay for use, a decision rule that establishes who is selected from the eligible participants and what will be paid. As a result, the properties of the market-determined price depend on the rules used to define each market. For applications from a different market setting, *see* Daniel W. Elfenbein & Brian McManus, *A Greater Price for a Greater Good? Evidence that Consumers Pay More for Charity-Linked Products*, 2 AM. ECON. J.: ECON. POL'Y 28 (2010).
[16] *See* Leonard, et al., *Allow "Nonuse Rights," supra* n. 7.
[17] *See id.*
[18] *See id.*
[19] *See id.*
[20] *See* Temple Stoellinger, *Valuing Conservation of State Trust Lands*, AMERICAN BAR ASSOCIATION (March 3, 2023). *See also* Regan, et al., *Opening the Range*, *supra* n. 8 at 214–15.
[21] *See* Leonard, et al., *Allow "Nonuse Rights," supra* n. 7 at 959–60.

sought to acquire the rights to conserve resources, including in protest to the rules that forbid them from doing so.[22]

Recognizing secure rights to use public land for conservation purposes can also deliver more lasting conservation than political decisions. Policies can always be changed by a future administration with different priorities, which encourages continual conflict and risks conservation policies changing dramatically on a regular basis.[23] But when private rights are recognized, even the relatively insecure rights that generally exist on federal land, this gyration is less dramatic. And if those rights were more secure, market mechanisms could provide the sort of lasting conservation they routinely provide on private lands.[24]

Allocating resource-rights through market mechanisms also encourages users to adapt to changing conditions and values. For instance, at many times in the past, ranchers with federal grazing privileges might have been indifferent to the health of grizzly bear or other predator populations or, worse, viewed these populations as liabilities to their operations. But if they could be compensated to adapt their grazing practices to accommodate predators, without fear of losing their grazing privileges, they could come to see them as assets that contribute to their bottom lines.[25] Likewise, if a conservation organization acquired an oil and gas lease with the intent not to drill but to conserve the surrounding land, a future increase in the price of oil could cause them to reconsider and allow the oil to be extracted, perhaps with restrictions on where and how this is done, and in exchange for money that could produce better conservation outcomes elsewhere.[26]

II. The BLM's Proposed Conservation and Landscape Health Rule

The BLM proposes to recognize conservation as a valid use of federal land, put conservation on an equal footing with other uses, and make various regulatory changes to facilitate conservation uses. Our research supports the goals of the proposed rule and should inform the final form of the proposed "conservation leasing" program.[27] The proposed rule also covers topics unrelated to our research, including changes to how the BLM assesses the health of federal lands and administratively designates land to restrict certain uses. We don't take a position on those issues. However, we do encourage the BLM to consider separating the conservation leasing proposal from these other proposals and finalizing them

[22] *See id. See* Regan, *Why Don't Environmentalists Just Buy the Land They Want to Protect?*, *supra* n. 12.
[23] *See* Leonard, et al., *Allow "Nonuse Rights," supra* n. 7 at 960.
[24] *See id.*
[25] *See id. See also* Regan, *Opening the Range*, *supra* n. 8 at 218.
[26] *See* Leonard, et al., *Allow "Nonuse Rights," supra* n. 7 at 960. *See also* Shawn Regan, *Why Property Rights Matter*, PROP. & ENV'T RSCH. CTR., (July 26, 2017), https://www.perc.org/2017/07/26/why-property-rights-matter/ (noting that the Audubon Society entirely opposes oil and gas drilling on many federal lands yet routinely allows drilling on its private lands, with conditions to safeguard the environment).
[27] *See* Bryan Leonard, et al., *Allow "Nonuse Rights," supra* n. 7. *See also* Shawn Regan, et al., *Opening the Range*, *supra* n. 8; Stoellinger, *Valuing Conservation of State Trust Lands*, *supra* n. 20; Bryan Leonard & Shawn Regan, *Legal and Institutional Barriers, supra* n. 8.

independently. This would not only speed up the process for finalizing the conservation leasing proposal. But it could also help to distinguish conservation leasing from controversial elements in the other proposals and reduce litigation risk.

The BLM's conservation leasing proposal would make several significant changes. First, it would explicitly recognize conservation as a valid use of federal land. We agree with the BLM that this is not only a good policy change but is also lawful under the Federal Land Policy and Management Act (FLPMA). That Act charges the BLM with "regulat[ing] . . . the use, occupancy, and development of the public lands," without limiting that authority to particular uses.[28] Critics of the proposal have pointed to the definition of "principal or major uses," which lists specific uses not including conservation, to argue that conservation isn't a valid use under the Act.[29] But this errantly conflates "principal or major uses" with the broader term "use" and ignores that the phrase "principal or major uses" does not appear in the relevant provision of the statute delineating the BLM's authority to regulate the use, occupancy, and development of public land.[30] Moreover, by using the general term "regulate" rather than a more specific term, FLPMA does not implicitly limit the allowable uses as other statutes have been interpreted.[31]

Second, the proposed rule would put conservation on an equal footing with other authorized uses of public lands. This change, too, makes sense. FLPMA does not set hierarchies of competing uses but charges the BLM with managing public lands for multiple uses and sustained yield of renewable resources.[32] Indeed, the Act's definition of "multiple use" explicitly incorporates nonuse and conservation concepts.[33] The Act also explicitly identifies a wide variety of conservation values that the BLM is directed to advance through its regulation of the use, occupancy, and development of public lands.[34]

Third, the proposed rule would establish a new conservation leasing program. Under this program, a third party could propose potential leases to the BLM that would give that party the right to pursue conservation on specified parcels of public lands. The holder of a conservation lease would be charged a fair market rent and have a right to renew the lease at the end of its 10-year term. A conservation lease could not interfere with existing uses

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[28] 43 U.S.C. § 1732(b).
[29] 42 U.S.C. § 1702(l).
[30] FLPMA uses the phrase "principal or major use" in only one operative section, which establishes procedures for the "total elimination" of these uses from public lands by the BLM *See* Regan, et al., *Opening the Range*, *supra* n. 8 at 233–34.
[31] *Compare* 43 U.S.C. § 1732(b) *with* 43 U.S.C. § 315b. *See Public Lands Council v. Babbitt*, 167 F.3d 1287 (10th Cir. 1999) (holding that the Taylor Grazing Act's authorization to issue "permits to graze livestock" did not authorize a permit explicitly forbidding livestock grazing).
[32] 43 U.S.C. § 1701(7).
[33] 43 U.S.C. § 1702(c) (defining multiple use, in part, as the use of land "for less than all of [its] resources" to account for "watershed, wildlife and fish, and natural scenic, scientific and historical values").
[34] 43 U.S.C. § 1701.

but could potentially preempt later uses that might conflict with the goals of the conservation lease.

III. Three Principles to Guide Conservation Leasing

While these changes would facilitate additional conservation on public lands, the proposal also includes several restrictions that may limit its potential to reduce conflict and employ market mechanisms for voluntary conservation. As the BLM considers the proposal and public comments, we offer three principles that should guide the agency's finalization and implementation of a conservation leasing program.

A. Honor Existing Rights

First, and foremost, the BLM must honor existing rights and privileges. We applaud the BLM for including this commitment in the proposed rule and Department of the Interior and BLM officials for repeatedly affirming it in their public statements. Nonetheless, much of the criticism of the proposed rule has focused on this issue.

The problem with grazing privileges and other private rights on public land is not that they're too insecure.[35] If these rights were more like true property rights, it would be easier for the tools that solve conservation conflicts on private lands to operate on public lands as well.[36] Eroding these rights further by not honoring existing rights and privileges would surely provoke more conflict. It may also backfire from a conservation perspective, by leading to a similar future erosion of any private rights created under conservation leases.[37] Therefore, the BLM should ensure that its final conservation leasing rule includes explicit protections for existing rights and privileges.

The BLM should not, however, entirely preclude the issuance of conservation leases in areas subject to existing rights and privileges, which would confine the tool to a potentially small subset of public lands without existing uses. Similarly, it should not limit conservation leases to only those lands identified by the BLM in advance. This would

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[35] *See* Leonard, et al., *Allow "Nonuse Rights," supra* n. 7 at 960. *See also* Regan, et al., *Opening the Range*, *supra* n. 8 at 245–46.

[36] See Lorraine M. Egan & Myles J. Watts, *Some Costs of Incomplete Property Rights with Regard to Federal Grazing Permits*, 74 LAND ECON. 171, 183 (1998) (describing how, if rights to grazing permits were more secure and transferable, permit values would increase as conservation uses became more highly valued).

[37] *See* John Leshy, *A Trump Plan Breaks a Great Deal for Ranchers and Park Lovers*, N.Y. TIMES (Mar. 3, 2020), https://www.nytimes.com/2020/03/03/opinion/environment-ranchers-trump.html (describing the Trump administration's efforts to open an area to grazing that had previously been closed through voluntary buyouts and retirements negotiated by ranchers and conservation organizations).

undermine the potential for conservation leases to reveal which lands are most highly prized for their conservation value.[38]

Instead, it should provide that existing rights take precedence over any subsequent conservation leases and that a conservation lease cannot limit or otherwise conflict with the existing right absent the current rights-holder's consent. This would ensure that conservation leases are not a means of imposing additional restrictions on ranchers with federal grazing permits, for example, addressing ranchers' chief concerns about the proposal. On the other hand, it would still allow conservation leases on grazing lands where there is no conflict with existing grazing practices or where the rancher voluntarily consents to any changes that might be required to accommodate the conservation lease.

B. Charge Market Prices

Second, market mechanisms, not politics, must determine the price of conservation leases. The Federal Land Policy and Management Act adopts a policy that, except where otherwise precluded by statute, the United States must "receive fair market value of the use of the public lands and their resources."[39] If conservation is a valid use of federal lands, which we agree with the BLM that it is, then it is a use subject to this policy. No other statute forbids the BLM from charging market prices for conservation leases.

Setting a competitive market price for a conservation lease will require the BLM to account for both the immediate use value of a particular parcel and the opportunity costs of uses that might be preempted by the lease. One model for applying this principle to conservation leases is the administration of state trust lands in the western United States.[40] These lands were given to western states at statehood to be used to finance public services, especially public education.[41] While there have been conflicts over and missteps in the administration of these lands,[42] the requirement that state land managers maximize long-term value for public beneficiaries has encouraged many states to incorporate conservation into programs that traditionally prioritized grazing, timber harvesting, energy development, and similar uses.[43] Where a conservation user is willing to outbid other users, that higher bid must be

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[38] *See* Leonard, et al., *Allow "Nonuse Rights," supra* n. 7 at 959 (identifying the discovery of this information as one of the chief benefits of allocating rights to use or conserve resources through markets).
[39] 43 U.S.C. § 1701(9).
[40] *See* Stoellinger, *Valuing Conservation of State Trust Lands*, *supra* n. 20.
[41] *See* Peter W. Culp, et al., *State Trust Lands in the West: Fiduciary Duty in a Changing Landscape*, LINCOLN INSTITUTE OF LAND POLICY REPORT (2015), https://go.lincolninst.edu/l/153411/2022-11-02/pqbzgm/153411/1667421543vWRz1v6m/state_trust_lands_in_the_west_updated_full.pdf?_ga=2.223758555.1366427290.1686700202-898744316.1686700202.
[42] *See, e.g., Forest Guardians v. Wells*, 34 P.3d 364, 370–71 (Ariz. 2001); *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 982 P.2d 371 (Idaho 1999).
[43] *See* Leonard & Regan, *Legal and Institutional Barriers*, *supra* n. 8 at 156–59.

accepted under trust principles because it increases the return for the trust beneficiaries and adds to the diversification and preservation of state land assets.[44]

State trust lands have fostered many innovative ways to identify and generate value from the conservation of public land. Near Montana's Flathead Lake, conservation organizations have held a conservation lease protecting bird and wildlife habitat on a state trust land parcel known as Owen Sowerwine for the last 50 years, and the state is currently considering selling a permanent conservation easement for the parcel.[45] In Utah, the state has established conservation banks on state trust lands that restore endangered and threatened species habitat, generating credits that can be sold to nearby developers.[46] In Colorado, the state has created ecosystem service leases and incorporated conservation benefits into its evaluation of grazing leases, awarding longer leases to ranchers who commit to improving land and, thereby, increasing the future value of it to the trust.[47] In Wyoming, conservation organizations are pursuing conservation leases in migratory corridors to conserve wildlife while also ensuring sustainable revenue generation.[48] And, in Idaho, the Department of Lands has 23 conservation leases protecting recreation, big game, and wildlife habitat on state trust lands.[49]

State trust lands offer important lessons for how to determine the fair market value of a conservation lease in areas that are also available for other more traditional forms of leasing.[50] First is to account for the opportunity cost of choosing one use over another. When a state issues a conservation lease that precludes grazing, timber harvesting, or energy development, the price of the conservation lease must reflect (and replace) that foregone

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[44] *See* Memorandum from Tobin Follenweider, WSLCA Asset Management Comm. Chair, to WSLCA Members, *Principles of State Trust Portfolio Management* (Sept. 14, 2016), https://www.statetrustland.org/uploads/1/2/0/9/120909261/wslca-principles-of-state-trust-portfolio-management.pdf

[45] *See* Flathead Audubon Society, Flathead Land Trust Proposes Purchase of Conservation Easement on Owen Sowerwine!, https://flatheadaudubon.org/news/flathead-land-trust-proposes-purchase-of-conservation-easement-on-owen-sowerwine/.

[46] *See* Susan Culp & Joe Marlow, *Conserving State Trust Lands: Strategies for the Intermountain West*, Lincoln Institute of Land Policy Report (2015), http://www.lincolninst.edu/pubs/2500_Conserving-State-Trust-Lands.

[47] *See id.* at 20. *See also* Stoellinger, *Valuing Conservation of State Trust Lands*, *supra* n. 20.

[48] *See* Birch Malotky, *A New Lease on State Land*, Western Confluence (March 24, 2022), https://westernconfluence.org/a-new-lease-on-state-land/. *See also* Shawn Regan & Bryan Leonard, *Conservation Groups Should Be Able to Lease Land to Protect It,* High Country News (January 25, 2022), https://www.hcn.org/articles/public-lands-conservation-groups-want-to-buy-land-to-protect-it-one-problem-its-often-illegal.

[49] *See* Dept. of Lands, Grazing, Farming and Conservation Leasing, https://www.idl.idaho.gov/leasing/grazing-farming-conservation-program/.

[50] Considering the states' experience with trust lands, conservation leases should also be available to them, in addition to tribes and private parties.

revenue. Otherwise, the state would not be receiving fair market value for the lease but instead subsidizing a favored use.[51]

For the BLM's proposed rule, the fair market price of a conservation lease should account for the value of any future uses that the lease might preclude. In areas that are available for other forms of leasing, the BLM is correct that charging fair market value may make some "lands with valuable alternative land uses [] prohibitively expensive for conservation use."[52] But this is a feature, not a bug, of using markets to inform decisions, since they reveal which lands are most highly valued for conservation and which for other uses. Putting a thumb on the scale, as an amorphous "public benefit component" might do, would conflict with FLPMA's fair market value policy and could call into question the legality of conservation leases. And, importantly, it would invite future administrations to put a heavy thumb on the scale against conservation by assigning vague public benefits to other uses.

If the BLM is concerned about the price of conservation leases under FLPMA's fair market value policy in areas with lucrative alternative uses, there are other ways to address that concern. It could offer cheaper conservation leases to groups willing to accept less ability to preempt future conflicting uses. A conservation organization interested in a lease to remediate an abandoned mine and restore a stream affected by that mine, for instance, might have little concern that future grazing will affect their work.[53] In that case, the cost of the conservation lease might be limited to the direct value of the group occupying federal land while performing its work.

Or the BLM could limit the length of time in which a conservation lease would preempt other uses. Montana, for instance, recently issued a conservation lease on forested state trust land that would expire while the timber still retained commercial value, thereby avoiding the need to impose on the conservation lessee the cost of entirely foregoing harvest.[54] If the BLM took this approach, it could still offer conservation lessees the opportunity to later renew their lease, and at that point pay for any additional preemptive effect on other uses.

Additionally, where a conservation lease authorizes active restoration that will increase the value or future revenues from public land, the price could be reduced to reflect that value. But it is essential that these activities actually increase the value of the land and revenue from future uses. Otherwise, as discussed above, discounting the cost of a lease will be perceived as putting a thumb on the scale to benefit a favored use, which will only stir up further conflict.

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[51] *See Nat'l Parks and Conservation Ass'n v. Bd. of State Lands*, 869 P.2d 909, 920–21 (Utah 1993) (holding that the state's trust obligation allows it to neither favor nor disfavor conservation or any other use).

[52] *See* 88 Fed. Reg. 19,583, 19,591 (Apr. 3, 2023).

[53] *See, e.g.,* Jonathan Wood, *Prospecting for Pollution: The Need for Better Incentives to Clean Up Abandoned Mines*, PERC PUBLIC LANDS REP. (2020), https://www.perc.org/2020/02/11/prospecting-for-pollution-the-need-for-better-incentives-to-clean-up-abandoned-mines/.

[54] *See* Regan, *Why Don't Environmentalists Just Buy the Land They Want to Protect?*, *supra* n. 12.

Pricing conservation leases through a well-defined market process would also have salutary incentive effects. Conservation groups would be encouraged to identify lands where conservation could be pursued at relatively little cost to the United States and competing users. For lands with no existing uses, for instance, low-cost or inexpensive conservation leases might encourage significant investments in stream restoration, habitat improvements for migratory wildlife, and other restorative efforts, while also generating some new revenue for the United States.

And in areas where some degree of conflict is inevitable (as discussed in more detail in the following section), charging a fair market price for a conservation lease will help the BLM justify its choice to favor conservation over competing uses. In 2021, for instance, an auction for drilling rights on more than half a million acres in the Alaska National Wildlife Refuge fetched only $14.4 million, with most tracts going for the minimum bid of $25 per acre.[55] Considering how much environmental organizations spent on political, administrative, and legal fights over ANWR during the past 40 years, it's highly likely that conservation leases would have fetched substantially more.[56] And in situations where conservationists are empowered to directly negotiate to acquire such rights, they routinely demonstrate a willingness and ability to pay significant sums to protect such areas.[57]

Therefore, we encourage the BLM to adopt the standard that conservation lessees will be charged fair market value for their leases, including the opportunity cost of foregone conflicting uses that might be precluded by them. Applying this standard in practice will require the BLM to also develop policies to account for uncertainty over what future conflicts might arise, what revenues conflicting uses might have generated, and the future benefits of proactive restoration of public lands. Since this would be a new exercise for the BLM, we encourage the agency to take an experimental approach, developing policy elaborating on the fair market value standard for conservation leases through guidance

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[55] *See* Shawn Regan, *The Case for Conservation Leasing*, GRIST (Feb. 2, 2021), https://www.perc.org/2021/02/02/the-case-for-conservation-leasing/. Conservation leasing may not be a feasible means to protect certain unique natural landscapes due to the incentives for free riding, which could limit groups' ability to raise funding to purchase such leases. Our vision of market-determined pricing for conservation leases is most applicable in areas that are currently open to grazing, mining, or drilling. Outside of those areas, conservation leases should be inexpensive because the conservation lessee would not have to cover the foregone value of another use. And if the BLM were to dramatically expand the areas open to drilling, mining, and grazing, the conservation lessee might fairly perceive that as punishing their participation in this voluntary, market solution.

[56] *See id.* (The auction price doesn't include future royalties from the development of these leases, which would have to be incorporated into the fair market price of a conservation lease).

[57] *See, e.g.,* Bryan Leonard & Shawn Regan, *Legal and Institutional Barriers, supra* n. 8, at 164-166 (noting that the nonprofit Trust for Public Land led an effort in 2013 to purchase and retire 58,000 acres of energy leases in Wyoming for $8.75 million, enabled by region-specific federal legislation that authorized such voluntary negotiations in Wyoming); Cooper McKim, *More Land in Wyoming Range Retired From Oil and Gas,* WYOMING PUBLIC RADIO (July 13, 2018) https://www.wyomingpublicmedia.org/open-spaces/2018-07-13/more-land-in-wyoming-range-retired-from-oil-and-gas (summarizing another deal led by the Trust for Public Land to voluntarily acquire and relinquish 24,000 acres of energy leases in Wyoming for an undisclosed payment amount.)

that could be changed as the BLM learns how it operates in practice. BLM may also want to initially prioritize conservation leases on lands with no or predictable future uses and leases with shorter terms that don't require extended cost projections.

C. Mediate Conflict Through Market Mechanisms

Finally, the BLM should allow conservation leases to be used to facilitate voluntary resolution of conflicts between conservation and other uses. Consistent with the commitment to honor existing rights, privileges, and leases, the BLM should allow existing rights-holders to consent to modifications to their existing activities to accommodate a new conservation lease on the same parcel, in exchange for compensation or other consideration from the conservation lessee. This would allow conservation groups and others to create incentives for existing rights-holders to perform voluntary conservation.

Such a policy would provide a mechanism for the buyout of established grazing privileges, a practice that already exists but lacks a clear framework.[58] But the most interesting and promising agreements may focus on more marginal changes, such as third parties contracting with ranchers to modify their grazing, change the duration or timing of grazing, or otherwise alter grazing practices to benefit migratory wildlife, reduce predator conflicts, or restore riparian areas.[59] Compromise solutions are the norm on private lands, where both environmental groups and federal agencies routinely contract with landowners to promote practices that generate conservation benefits while allowing continued grazing and other land uses.[60] Unfortunately, compromise solutions such as these have been prohibited or rendered unnecessarily difficult on public land, making all-or-nothing buyouts an (often resented) last-resort for ranchers exhausted from legal and political conflict.

A better, less contentious outcome would be a conservation organization, concerned about the lethal removal of grizzly bears due to conflicts with livestock, compensating a rancher to use range riders, adopt virtual fencing, or move cattle out of harm's way during times of year where conflicts are most likely.[61] With the ranchers' consent, these commitments could be incorporated into a conservation lease. Stacking compatible leases concerning the same land in this way would also help to advance the BLM's "multiple use" mandate, by demonstrating the agency's willingness to satisfy and balance as many uses as possible on its lands rather than picking a single, preferred one for each parcel.

As the above examples suggest, we anticipate that many of these agreements would concern grazing privileges, since grazing is the most prevalent use of federal land and these

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[58] *See* Leonard, et al., *Allow "Nonuse Rights," supra* n. 7.
[59] *See* Regan, et al. *Opening the Range*, *supra* n. 8.
[60] The U.S. Department of Agriculture, for instance, administers a variety of voluntary programs that use market mechanisms and incentive payments to promote conservation on farms and ranchlands. See, e.g., Roger Claassen, Andrea Cattaneo, & Robert Johansson, *Cost-effective Design of Agri-environmental Payment Programs: US Experience in Theory and Practice*, 65 ECOLOGICAL ECON. 737 (2008).
[61] *See id.* at 217–18.

privileges are long established rather than periodically issued through auctions. But similar win-win scenarios might be achieved by allowing negotiations between conservation organizations, on the one hand, and timber contractors, miners, drillers, and renewable energy developers, on the other. Accommodating such negotiations, however, may require changes to the terms of leases offered by the BLM and to analyses of these leases under the National Environmental Policy Act, among other potential issues. After issuing the conservation leasing rule, the BLM should issue guidance analyzing how these negotiations might be accommodated.

Equally important are opportunities for conservation lessees to negotiate with, and receive compensation from, future users to resolve conflicts. As with grazing-lease buyouts, this might be an agreement for conservation lessees to give up their preemptive rights and allow another use to go forward. This would allow conservation priorities to adapt to evolving market and environmental conditions. If a parcel under a conservation lease later proved extremely valuable for renewable energy development and relatively less valuable for conservation, a conservation group may prefer to retire their conservation lease early in exchange for compensation from the developer (and the conservation that money would allow the group to perform elsewhere) over blocking the development. Then, the BLM could invoke the normal practices for renewable energy development consideration on federal land. Conservation organizations frequently make such tradeoffs on their own private land.[62] Again, however, the most common and interesting solutions that these negotiations would facilitate are on the margin, such as conservation lessees agreeing to accommodate future uses in exchange for influence on the siting of those uses and other conditions to minimize any negative impacts on conservation.

There is substantial precedent for using compensation to transition public lands from one use to another. FLPMA expressly requires the BLM to compensate ranchers when it cancels a grazing permit to devote the land to conservation or another use.[63] President Biden, in his proclamation restoring the boundaries of Grand Staircase-Escalante National Monument, established a framework for conservation groups to acquire, through voluntary exchange, grazing privileges from ranchers operating within the monument and transfer those privileges to the BLM to retire them rather than reallocating the forage to others.[64]

To avoid penalizing existing rights-holders for their participation in such voluntary conservation agreements, the BLM should commit not to enforce "use it or lose it" rules

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[62] *See* Shawn Regan, *Why Property Rights Matter*, *supra* n. 26.

[63] *See* 43 U.S.C. § 1752(g). In many cases, a statute's inclusion of a policy in one section but not others would imply that the policy cannot apply to other sections. But that implication does not arise here because the statute provides that this compensation "shall" be given in this context, suggesting that it may be optional in others. Moreover, the compensation discussed here would be from private parties to private parties, rather than involving government funds.

[64] *See A Proclamation on Grand Staircase-Escalante National Monument*, The White House (Oct. 8, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/08/a-proclamation-on-grand-staircase-escalante-national-monument/.

against permittees for activities consistent with a conservation lease or against conservation lessees who agree to modify their leases to facilitate future uses. For some resources, this could be accomplished through the repeal or modification of "use it or lose it" rules that exist only by regulation. For example, the BLM's "substantial use" requirement in its existing grazing regulations, which threatens ranchers who use less than the maximum permitted forage with the full or partial loss of their grazing privileges, is required by no statute.[65] Rescinding these regulations would benefit both ranchers and conservation.[66] For resources where the "use it or lose it" policy is established by statute, the BLM has less leeway to provide these assurances, but it still may be able to issue enforcement guidance deemphasizing efforts to void permits and leases for activities that accommodate a conservation lease.

To facilitate more such arrangements, the final rule should allow conservation leases not only for proactive restoration and mitigation activities, as currently proposed, but also more passive conservation uses. On private land, numerous tools have been developed to facilitate passive conservation, such as conservation easements, habitat leases, payments for ecosystem services, conservation or mitigation banks, or even fee-simple acquisition.[67] Allowing similar tools to be applied on public land would both expand the impact of the program and make conservation a source of value for these lands that has previously been overlooked. Moreover, limiting conservation leasing to proactive restoration and mitigation is likely to encourage gamesmanship, such as groups proposing some marginal restoration project to qualify for a lease when their true goal is to protect existing public resources from degradation by conflicting uses. This concern is likely to encourage other users to question the sincerity of restoration projects carried out under conservation leases and whether they should really entitle the lessee to preempt future conflicting uses.

If the BLM declines to expand conservation leasing to include passive conservation, it should consider renaming the program to reflect the fact that it is allowing only a subset of the leases encompassed by the broader category of conservation leases. "Restoration leases" and "mitigation leases" might be more apt descriptors for the tools described in the proposal.

Conclusion

Public lands should unite, not divide, Americans. Unfortunately, the institutions governing those lands have long encouraged conflict by prohibiting collaboration on voluntary

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[65] *See id.* at 231–36.

[66] *See id. See also* Jonathan Wood, *Promoting Innovation and Diffusing Conflict Over Federal Grazing Lands*, PERC.org (Sept. 20, 2022), https://www.perc.org/2022/09/20/promoting-innovation-and-diffusing-conflict-over-federal-grazing-lands/ (discussing PERC's rulemaking petition urging the Forest Service to rescind its similar substantial use regulation).

[67] *See* Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RES. J. 483 (2004). *See also* James Salzman et al., *The Global Status and Trends of Payments for Ecosystem Services*, 1 NATURE SUSTAIN. 136 (2018)

conservation. Recognizing conservation as a valid use of federal land and putting it on par with other uses, as the BLM proposes, would be a positive step. If properly amended and implemented, conservation leasing could reduce conflict and facilitate markets for voluntary conservation on federal lands. It could also help the BLM more fully realize its multiple use mandate by accommodating multiple leases authorizing compatible extractive and conservation uses on the same parcel. We hope the principles and specific recommendations in this comment will help guide the BLM as it revises and finalizes its proposal.