

**Memo: Conservation leasing could expand voluntary conservation on federal land if conflicts between existing uses and conservation use are resolved through markets rather than politics**

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Conservation leasing holds significant potential to improve federal-land management, reduce conflict, and facilitate voluntary conservation. Providing a means for conservation groups and others to reward ranchers and others for voluntary conservation activities on public land is, according to Principal Deputy Director Nada Culver, “key to the success” of the proposal.<sup>1</sup>

PERC has long been a leader in advancing the idea of conservation leasing.<sup>2</sup> In 2020, PERC convened a group of leading scholars to explore how restrictions on conservation uses and “use it or lose it” policies stoke conflict over public land and preclude markets for voluntary conservation of that land, the findings of which were published in the journal *Science*.<sup>3</sup> Building on that work, our scholars have explored ways in which conservation leasing could be implemented on federal land.<sup>4</sup> And PERC has forthcoming research exploring how to properly price conservation leases according to fair market concepts. Our research identifies three principles that must be respected for conservation leasing to achieve its potential.

**Existing rights and privileges must be honored**

We applaud the BLM for including the commitment to existing rights and privileges in the proposed rule and DOI and BLM officials for repeatedly affirming it in their public statements. If conservation leasing is perceived as a political or administrative tool for imposing costs on existing rights-holders without their consent, it will simply provoke more conflict. Moreover, any erosion in the security of grazing privileges and other existing rights may motivate future efforts to undermine the rights or privileges created by conservation leases.

**Markets, not politics, must set the price for conservation leases**

As a “use” of federal lands, the Federal Land Policy and Management Act requires the BLM to secure “fair market value” for conservation use.<sup>5</sup> Determining fair market value requires consideration not only of the price generally charged for a comparable use, but also the opportunity cost of a conservation use. FLPMA likely forbids the BLM from putting a thumb on the scale to favor conservation at the expense of other uses.

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<sup>1</sup> See [Legislative Hearing on H.R. 3397](#), House Committee on Natural Resources 3:44:03–3:44:30 (June 15, 2023)..

<sup>2</sup> See Bryan Leonard & Shawn Regan, *Legal and Institutional Barriers to Establishing Non-Use Rights to Natural Resources*, 59 Nat. Res. J. 135 (2019); Shawn Regan, *DeChristopher Case Begs Question: What If Enviros Were Allowed to Bid on Oil Leases?*, GRIST (July 29, 2011).

<sup>3</sup> See Bryan Leonard, et al., *Allow “Nonuse Rights” to Conserve Natural Resources: “Use-it-or-lose-it” Requirements Should be Reconsidered*, 373 Science 958 (2021).

<sup>4</sup> See 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 (2023); Temple Stoellinger, *Valuing conservation of state trust lands*, American Bar Association (March 3, 2023).

<sup>5</sup> 43 U.S.C. § 1701(9).

But even if favoritism were legally permissible, it should be avoided. Introducing an amorphous “public benefit component” to adjust prices, for instance, would invite mischief, since a future administration might use the same rationale to disfavor conservation by penalizing it for negatively affecting local economies, jobs, or other considerations.<sup>6</sup> Likewise, one might argue that conservation groups should be charged less because they don’t profit from the use of federal land like a mining, ranching, or timber company does; but an opponent would argue that conservation groups already get an unfair advantage because of the tax exemption they receive due to their non-profit status.<sup>7</sup> Once the subjectivity of politics is introduced to the pricing of conservation leases, it will be difficult to stop future administrations with other priorities from imposing their own subjective preferences on the process.

There’s also little to be gained from departing from fair market value as the guiding principle for pricing conservation leases. A conservation lessee that performs substantial restoration work, for instance, can be credited with the value they’re creating to lower the price they would otherwise be charged for a lease. Federal agencies already do this implicitly under stewardship contracts for forest products, by accepting a lower price in exchange for restoration work. State trust lands present another example of how to account for the long-term value that conservation can create.<sup>8</sup> Of course, a conservation lease must actually produce marketable value for the federal lands on which they work to receive credit. But that’s a feature—not a bug—of the fair market value standard.

Conservation leases that block other lucrative uses may have high costs. If a conservation lease to improve wildlife habitat would block energy development, fair market value would require the conservation lessee to compensate the United States for the foregone revenue of that development. This could be mitigated by limiting the length of time that a conservation lease would preclude the other use and by crediting the conservation lease with the option value of future uses of energy resources after the lease expires.<sup>9</sup> Even with these considerations, the cost of some conservation leases may be significant, but conservation groups have repeatedly shown they can pay such costs when the conservation benefits are worth it.<sup>10</sup>

### **Conflicts with existing uses should be resolved through voluntary negotiation**

Finally, the rule should allow conflicts between conservation leases and existing leases to be resolved through voluntary negotiation. There is substantial interest among conservation groups to compensate ranchers for retiring or modifying grazing permits to benefit wildlife,<sup>11</sup> but no clear mechanism to allow those agreements or to protect them from “use it or lose it” policies. Conservation leasing could be that mechanism.

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<sup>6</sup> See, e.g., [Letter from Raul Labrador, Idaho Attorney General, to Tracy Stone-Manning, BLM Director](#) (June 20, 2023) (opposing the rule because conservation leases would negatively impact state and local economies).

<sup>7</sup> See, e.g., Dan Bartel, [How We Stop APR from Abusing Montana’s Tax Code](#), Northern Ag Network (Mar. 22, 2021). See also Shawn Regan, [Where the Buffalo Roam](#), 10 Breakthrough J. 66 (2019).

<sup>8</sup> See Temple Stoellinger, *Valuing Conservation of State Trust Lands*, American Bar Association (March 3, 2023).

<sup>9</sup> See PERC, [Comment Supporting the Proposed Conservation and Landscape Health Rule](#) (July 5, 2023).

<sup>10</sup> See Brett French, [Gold mine near Yellowstone purchased to avoid development](#), Spokesman-Review (Oct. 5, 2023). See also Leonard & Regan, *supra* n. 2.

<sup>11</sup> See, e.g., PERC, [Grizzly Conflict Reduction Grazing Agreement](#) (2023).