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## Opening the Range: Reforms to Allow Markets for Voluntary Conservation on Federal Grazing Lands

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# OPENING THE RANGE: REFORMS TO ALLOW MARKETS FOR VOLUNTARY CONSERVATION ON FEDERAL GRAZING LANDS

Shawn Regan,\* Temple Stoellinger\*\* & Jonathan Wood\*\*\*

## *Abstract*

*For nearly a century, the federal government has authorized ranchers to graze livestock on large areas of federal lands in the western United States. Federal-land grazing has generated substantial conflict in recent decades, as conservation interests and others have lobbied and litigated against what they view as inappropriate and destructive use of federal lands. This has produced a predictable backlash among ranching interests, including efforts to roll back the regulations relied on by environmental litigants and aggressive confrontations with federal regulators. But such conflict is not inevitable. Competing demands on these lands can be resolved through voluntary means and positive incentives for conservation practices, as they often are on private lands. On public lands, however, federal law erects substantial barriers to this market approach by imposing use-it-or-lose-it rules on federal grazing permits. In this Article, we discuss those barriers and offer statutory and regulatory reforms that would overcome them while facilitating markets for conservation on federal grazing lands.*

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## INTRODUCTION

For more than a century, ranchers have grazed livestock on vast amounts of public rangelands in the western United States.<sup>1</sup> In the 1870s and 1880s, cattlemen and shepherders began driving millions of cattle and sheep into the western Great Plains.<sup>2</sup> Settlers grazed livestock on large swaths of unclaimed public-domain lands to eke out a living and to earn title to their homestead claims.<sup>3</sup> By the early twentieth century, this informal practice evolved into a set of customary rights to grazing on the open rangelands of the public domain.<sup>4</sup> These customary rights were formalized in early U.S. Forest Service (Forest Service) regulations to manage grazing in national forests and later through enactment of the Taylor Grazing Act (TGA) of 1934, which established a regulated system of grazing districts, allotments, and permits to manage livestock grazing on federal rangelands that are today managed by the Bureau of Land Management (BLM).<sup>5</sup>

This basic structure remains largely in place today. Throughout much of the West, ranchers own title to relatively small private parcels (lands that were privatized during the homestead era) and graze livestock on larger parcels of nearby federal lands (often more arid or alpine lands that were not settled and thus never privatized).<sup>6</sup> Livestock grazing now occurs on more than 200 million acres of federal lands in the American West—an area twice the size of California—making it the

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<sup>1</sup> See generally PHILLIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* (1960); see also SAMUEL TRASK DANA & SALLY K. FAIRFAX, *FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES* 86–89 (2d ed. 1980); MARION CLAWSON, *THE FEDERAL LANDS REVISITED* 63–72 (1983).

<sup>2</sup> Gary D. Libecap, *The Assignment of Property Rights on the Western Frontier: Lessons for Contemporary Environmental and Resource Policy*, 67 J. ECON. HIST. 257, 271 (2007).

<sup>3</sup> *Id.* at 271–72.

<sup>4</sup> TERRY L. ANDERSON & PETER J. HILL, *THE NOT SO WILD, WILD WEST: PROPERTY RIGHTS ON THE FRONTIER* 159–67 (2004).

<sup>5</sup> Pub. L. No. 73-482, 48 Stat. 1269 (codified as amended at 43 U.S.C. §§ 315–315r).

<sup>6</sup> Libecap, *supra* note 2, at 271–74.

most prevalent use of federal land.<sup>7</sup> Consequently, federal-land grazing is significant to the economies and politics of many communities in the western United States.<sup>8</sup>

Federal grazing lands can also hold significant conservation value—including for open space, recreation, water quality, and habitat for fish and wildlife—that can be impacted by grazing.<sup>9</sup> Thus, the federal government’s system of allocating permits to ranchers to graze livestock on federal lands has often been the subject of controversy and acrimony as environmental values, economic realities, and scientific knowledge has evolved over the decades.<sup>10</sup> Some environmental organizations, for instance, have regularly sued to reduce or eliminate grazing on federal lands, claiming that this grazing is inconsistent with environmental

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<sup>7</sup> See CAROL HARDY VINCENT, CONG. RSCH. SERV., R44932, STATISTICS ON LIVESTOCK GRAZING ON FEDERAL LANDS: FY2002 TO FY2016, at 2 (2017), <https://crsreports.congress.gov/product/pdf/R/R44932/3> [<https://perma.cc/5UVM-E5K5>]; see also CLAWSON, *supra* note 1, at 63.

<sup>8</sup> Briana Swette & Eric F. Lambin, *Institutional Changes Drive Land Use Transitions on Rangelands: The Case of Grazing on Public Lands in the American West*, 66 GLOBAL ENV’T CHANGE 102220, at 2 (2021).

<sup>9</sup> The extent to which livestock grazing is incompatible with the natural amenity preservation, wildlife habitat, or the provision of certain ecosystem services is a matter of debate. See, e.g., Kris M. Havstad, Debra P.C. Peters, Rhonda Skaggs, Joel Brown, Brandon Bestelmeyer, Ed Fredrickson, Jeffrey Herrick & Jack Wright, *Ecological Services to and from Rangelands of the United States*, 64 ECOLOGICAL ECON. 261, 263–65 (2007); Jennifer M. Schieltz & Daniel I. Rubenstein, *Evidence Based Review: Positive Versus Negative Effects of Livestock Grazing on Wildlife. What Do We Really Know?*, 11 ENV’T RSCH. LETTERS 113003, at 1 (2016) (“In general, species adapted to open habitats are often positively affected by grazing, while species needing denser cover are negatively affected.”); Joseph T. Smith, Jason D. Tack, Lorelle I. Berkeley, Mark Szczypinski & David E. Naugle, *Effects of Rotational Grazing Management on Nesting Greater Sage-Grouse*, 82 J. WILDLIFE MGMT. 103, 103 (2018) (“[A] variety of locally appropriate grazing strategies focused on fundamental range health principles may provide adequate habitat quality for nesting sage-grouse.”); Adrian P. Monroe, Cameron L. Aldridge, Timothy J. Assal, Kari E. Veblen, David A. Pyke & Michael L. Casazza, *Patterns in Greater Sage-Grouse Population Dynamics Correspond with Public Grazing Records at Broad Scales*, 27 ECOLOGICAL APPLICATIONS 1096, 1096 (2017) (finding that the effects of livestock grazing on greater sage-grouse populations can be positive or negative, depending on the specific grazing practices used); Seth J. Dettenmaier, Terry A. Messmer, Torre J. Hovick & David K. Dahlgren, *Effects of Livestock Grazing on Rangeland Biodiversity: A Meta-Analysis of Grouse Populations*, 7 ECOLOGY & EVOLUTION 7620, 7623 (2017) (finding via a meta-analysis that livestock grazing has an overall negative effect on grouse populations).

<sup>10</sup> ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT 222 (1995) [hereinafter NELSON, PUBLIC LANDS AND PRIVATE RIGHTS] (“No other area of public land management has been the subject of as much controversy as the grazing lands.”); see also SHAWN REGAN, PROP. & ENV’T RSCH. CTR., PERC POL’Y SERIES NO. 54, MANAGING CONFLICTS OVER WESTERN RANGELANDS (2016), [https://www.perc.org/wp-content/uploads/old/pdfs/PERC\\_PS54\\_FINAL.pdf](https://www.perc.org/wp-content/uploads/old/pdfs/PERC_PS54_FINAL.pdf) [<https://perma.cc/9TYJ-8GT4>] (describing how competing interests over federal rangeland management can result in conflict).

protections.<sup>11</sup> Tensions have also risen over the management of federally protected endangered and threatened carnivores, like wolves and grizzly bears, that may prey on livestock on federal lands.<sup>12</sup> Recreation on grazed federal lands can also present challenges for ranchers, stoking conflicts over access.<sup>13</sup> In the worst cases, conflicts over grazing policy have boiled over into confrontations between ranchers and the federal government, including the armed standoff at the Bundy Ranch in Nevada in 2014 and the occupation of the Malheur National Wildlife Refuge in Oregon in 2016.<sup>14</sup>

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<sup>11</sup> See, e.g., Darrell Ehrlick, *To Protect Grizzlies, Groups Threaten to Sue Forest Service over Livestock Grazing Near Yellowstone*, IDAHO CAP. SUN (May 12, 2022, 2:51 PM), <https://idahocapitalsun.com/2022/05/12/seven-groups-threaten-to-sue-forest-service-over-grazing-north-of-yellowstone-national-park/> [https://perma.cc/WX8A-X2NW]; see Guy McCarthy, *Court Sides with Stanislaus National Forest, Cattle Ranchers in Grazing Lawsuit*, UNION DEMOCRAT (Apr. 19, 2022), [https://www.uniondemocrat.com/news/article\\_2c6f5eea-c01c-11ec-928f-23ec81517a27.html](https://www.uniondemocrat.com/news/article_2c6f5eea-c01c-11ec-928f-23ec81517a27.html) [https://perma.cc/NDG9-B38J]; Lindsey Botts, *Conservation Groups Poised to Sue Feds over Riparian Habitat Loss from Cattle Grazing*, ARIZ. CENT. (Apr. 15, 2022, 4:58 PM), <https://www.azcentral.com/story/news/local/arizona-environment/2022/04/13/groups-may-sue-forest-service-wildlife-service-over-cattle-grazing/9464703002/> [https://perma.cc/NDG9-B38J]; Mike Garrity, *Groups Halt Grazing in Elkhorn Mountains*, DAILY MONTANAN (Mar. 22, 2022, 4:55 AM), <https://dailymontan.com/2022/03/22/groups-halt-grazing-in-elkhorn-mountains/> [https://perma.cc/N6GJ-DPMC].

<sup>12</sup> See, e.g., Angus M. Thuermer Jr., *Ranchers: Grizzly Suit Imperils Rights, Wildlife Migrations*, WYOFILE (June 2, 2020), <https://wyofile.com/ranchers-grizzly-suit-imperils-rights-wildlife-migrations/> [https://perma.cc/NEB4-FLDZ]; Don Jenkins, *Ranchers Shut Out of ESA Lawsuits over Wolves*, CAP. PRESS (June 22, 2021), [https://www.capitalpress.com/ag\\_sectors/livestock/ranchers-shut-out-of-esa-lawsuits-over-wolves/article\\_101a6bb2-d2cf-11eb-92d3-f78f4b555fd2.html](https://www.capitalpress.com/ag_sectors/livestock/ranchers-shut-out-of-esa-lawsuits-over-wolves/article_101a6bb2-d2cf-11eb-92d3-f78f4b555fd2.html) [https://perma.cc/JR9Q-FAHL]; Julie Lorton Conley, Maria E. Fernandez-Gimenez, George B. Ruyle & Mark Brunson, *Forest Service Grazing Permittee Perceptions of the Endangered Species Act in Southeastern Arizona*, 60 RANGELAND ECOLOGY MGMT. 136, 142–44 (2007) (noting ranchers' negative attitudes toward threatened and endangered species on grazing allotments).

<sup>13</sup> See Kristina M. Wolf, Roger A. Baldwin & Sheila Barry, *Compatibility of Livestock Grazing and Recreational Use on Coastal California Public Lands: Importance, Interactions, and Management Solutions*, 70 RANGELAND ECOLOGY & MGMT. 192, 192–201 (2017); see also, e.g., April Reese, *The Big Buyout*, HIGH COUNTRY NEWS (Apr. 4, 2005), <https://www.hcn.org/issues/295/15398> [https://perma.cc/V4M6-BJ44]; Carol Ryan Dumas, *Conflicts Growing Between Ranchers, Recreationists*, CAP. PRESS (Nov. 18, 2021), [https://www.capitalpress.com/ag\\_sectors/livestock/conflicts-growing-between-ranchers-recreationists/article\\_f9050296-48a0-11ec-83e2-5b8ce69d38d6.html](https://www.capitalpress.com/ag_sectors/livestock/conflicts-growing-between-ranchers-recreationists/article_f9050296-48a0-11ec-83e2-5b8ce69d38d6.html) [https://perma.cc/HV V2-Z5G8].

<sup>14</sup> See, e.g., Adam Nagourney, *A Defiant Rancher Savors the Audience that Rallied to His Side*, N.Y. TIMES (Apr. 23, 2014), <https://www.nytimes.com/2014/04/24/us/politics/rancher-proudly-breaks-the-law-becoming-a-hero-in-the-west.html> [https://perma.cc/5Y2V-D52F]; see also Tay Wiles, *Malheur Occupation, Explained*, HIGH COUNTRY NEWS (Jan. 4, 2016), <https://www.hcn.org/articles/oregon-occupation-at-wildlife-refuge> [https://perma.cc/Q3R3-TNYD].

On private lands, similar conflicts can be—and often are—resolved through voluntary markets, including conservation easements and contracts that compensate landowners for adopting conservation practices.<sup>15</sup> But federal law and regulation prevent such voluntary and flexible solutions to conflicts on federal lands. For instance, federal law restricts who can hold grazing permits, limits permittees' ability to modify their grazing practices, and, most notably, prohibits permittees from voluntarily reducing their grazing levels.<sup>16</sup> Running afoul of these policies can result in a permit being canceled, forage being allocated to someone else, and, ultimately, frustration of voluntary conservation.<sup>17</sup>

Such “use it or lose it” requirements can exacerbate conflict by giving ranchers and conservation interests no alternative to political, legal, or administrative conflict. The result is a status quo that pits ranchers and environmentalists against each other in what amounts to a negative-sum fight over control of federal rangelands and land-use decisions.<sup>18</sup>

The time may be ripe to reconsider these obstacles to voluntary conservation on federal grazing lands. Many environmental organizations have grown frustrated with the no-win outcomes produced by litigation and political conflict over federal

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<sup>15</sup> Holly Doremus, *A Policy Portfolio Approach to Biodiversity Protection on Private Lands*, 6 ENV'T SCI. & POL'Y 217, 217–21 (2003); 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 LOWELL E. BAIER, SAVING SPECIES ON PRIVATE LANDS: UNLOCKING INCENTIVES TO CONSERVE WILDLIFE AND THEIR HABITATS 178–207 (2020).

<sup>16</sup> See Bryan Leonard & Shawn Regan, *Legal and Institutional Barriers to Establishing Non-Use Rights to Natural Resources*, 59 NAT. RES. J. 135, 144–51 (2019) [hereinafter Leonard & Regan, *Legal and Institutional Barriers*]; 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*, 373 SCI. 958, 959–60 (Aug. 27, 2021) [hereinafter Leonard et al., *Allow “Nonuse Rights”*].

<sup>17</sup> See Leonard & Regan, *Legal and Institutional Barriers*, *supra* note 16, at 144–59.

<sup>18</sup> The status quo defies easy description. Grazing privileges are treated as de facto rights by many, including generational ranch businesses that expect to continue operating indefinitely, base property purchasers who capitalize the grazing privilege into the purchase price, and lenders who use that capitalization when setting loan terms. See Robert H. Nelson, *How to Reform Grazing Policy: Creating Forage Rights on Federal Rangelands*, 8 FORDHAM ENV'T L. REV. 645, 649 (1997) [hereinafter Nelson, *Reform Grazing Policy*]. Moreover, grazing permittees often own the water rights associated with an allotment, without which the land cannot be effectively used or managed. However, grazing privileges are clearly not formal property rights. While the Taylor Grazing Act charges the BLM with “adequately safeguard[ing]” grazing privileges, it also makes explicit that these privileges create no “right, title, interest, or estate in or to the lands.” 43 U.S.C. § 315b. Citing this language, courts have repeatedly held that a grazing permit is subject to none of the protections ordinarily afforded to property rights. See, e.g., *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 741 (2000).

grazing.<sup>19</sup> Indeed, several groups have bought out grazing permits or otherwise contracted with federal-land ranchers to improve conservation outcomes despite the substantial risk that policy barriers could nullify these arrangements.<sup>20</sup> Facing rising land values and volatile commodity prices, ranchers have shown interest in diversified income streams, including conservation-related sources.<sup>21</sup> Further, in 2021, the Biden Administration launched an effort to conserve 30% of all U.S. lands and water by 2030 through the America the Beautiful campaign—which emphasizes collaborative, locally driven, and voluntary efforts—as the centerpiece of its conservation strategy.<sup>22</sup>

This Article offers legislative and administrative reforms that would allow voluntary conservation on federal grazing lands, thereby facilitating cooperation and negotiation between ranchers and conservation groups rather than counterproductive conflict. Importantly, these structural reforms would not give ranchers and conservation groups a single tool but would open a larger toolbox to address land-

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<sup>19</sup> See, e.g., Shawn Regan, *Why Don't Environmentalists Just Buy the Land They Want to Protect? Because It's Against the Rules*, REASON (Dec. 2019), <https://reason.com/2019/11/18/why-dont-environmentalists-just-buy-the-land-they-want-to-protect-because-its-against-the-rules/> [<https://perma.cc/EG6C-C4XQ>] (quoting one representative from the environmental group WildEarth Guardians expressing dissatisfaction with grazing litigation); see also Nelson, *Reform Grazing Policy*, *supra* note 18, at 650 (noting that environmental activists seeking to reduce livestock grazing on federal lands now favor “giving ranchers the right to sell their access to federal land forage” as opposed to “the tried-and-true method of the contemporary environmental movement: by persuading the federal government to wield a command-and-control stick to compel compliance with environmental objectives.”).

<sup>20</sup> Leonard & Regan, *Legal and Institutional Barriers*, *supra* note 16, at 144–59.

<sup>21</sup> See NAT'L CATTLEMEN'S BEEF ASS'N, 2022 POLICY PRIORITIES, <https://www.ncba.org/Media/NCBAorg/Docs/22-policy-priorities.pdf> [<https://perma.cc/93VH-ALPZ>] (last visited Aug. 12, 2022) (identifying support for voluntary conservation programs in the Farm Bill as policy priority); see also *Elk Occupancy Agreements*, PROP. & ENV'T RSCH. CTR., <https://www.perc.org/elk-occupancy-agreements/> [<https://perma.cc/DP96-VJU6>] (last visited Aug. 7, 2022) (describing a contract between conservation groups and a rancher to protect winter elk habitat in the Greater Yellowstone Ecosystem); *Grassbanking*, UNIV. OF WYO.: HAUB SCH. OF ENV'T & NAT. RES., <http://www.uwyo.edu/haub/ruckelshaus-institute/private-lands-stewardship/conservation-toolbox/grassbanking.html> [<https://perma.cc/RLD4-RCB7>] (last visited Aug. 8, 2022) (describing how the Nature Conservancy's Matador Ranch grass bank rewards neighboring landowners who adopt conservation practices); Jim Knight, *Turn Your Ranch's Wildlife into an Asset*, MSU EXTENSION: ANIMAL & RANGE SCIS., <https://animalrangeextension.montana.edu/range/wildlife-habitat/turn-ranch-asset.html> [<https://perma.cc/R445-U6NX>] (last visited Aug. 7, 2022) (describing outfitting opportunities for ranchers).

<sup>22</sup> See U.S. DEP'T OF THE INTERIOR, CONSERVING AND RESTORING AMERICA THE BEAUTIFUL (2021), <https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf> [<https://perma.cc/Y2K5-356P>] (“The President’s directive recognizes the opportunities that America’s lands and waters offer and outlines a historic and ambitious challenge to the nation. The U.S. should aim to conserve ‘at least 30 percent of our lands and waters by 2030.’” (citation omitted)).

use issues. With greater flexibility, parties could find the solutions that work best for them and the particular situation. In some cases, it may make sense for a conservation group to “buy out” a rancher looking to exit the ranching business by acquiring a permit with the intent not to graze. In others, a contract that compensates a rancher for modifying grazing practices or the extent of grazing to produce some conservation benefit may be the more desirable approach. In Part I, we provide an overview of federal grazing policy, and in Part II, we discuss the policy arguments for a market-based solution to conservation of federal grazing lands. In Part III, we discuss the legal and policy barriers to market-based solutions, and Part IV offers several policy pathways to allow voluntary conservation on federal grazing lands.

### I. THE FEDERAL-LAND GRAZING INSTITUTION

Livestock grazing occurs on about 220 million acres of federal land, meaning federal rangelands far exceed the National Wilderness Preservation System (111 million acres) and the National Park System (80 million acres).<sup>23</sup> These lands are managed through nearly 18,000 permits administered by the BLM covering 138.7 million acres and 6,000 permits administered by the Forest Service covering more than 93 million acres.<sup>24</sup> Altogether, federal grazing lands make up approximately 43% of all rangelands in the United States.<sup>25</sup>

This Part describes: (A) how so much federal land became primarily used for grazing; (B) how the basic institution for regulating grazing was established; and (C) the variety of environmental rules that have been layered on top of that institution. It concludes by (D) describing some of the conflicts that have arisen as environmental values have evolved, interest in outdoor recreation has boomed, and the economic challenges facing western ranchers have changed.

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<sup>23</sup> See VINCENT, *supra* note 7, at 2 (providing the acreage of grazing lands); CAROL HARDY VINCENT, LAURA A. HANSON & LUCAS F. BERMEJO, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 5 (2020), <https://crsreports.congress.gov/product/pdf/R/R42346> [<https://perma.cc/4S93-TLNA>] (providing the acreage of National Park System); *Wilderness*, U.S. FOREST SERV., <https://www.fs.usda.gov/managing-land/wilderness> [<https://perma.cc/33WT-7VJ2>] (last visited Aug. 11, 2022) (providing the acreage of National Wilderness Preservation System).

<sup>24</sup> CAROL HARDY VINCENT, CONG. RSCH. SERV., RS21232, GRAZING FEES: OVERVIEW AND ISSUES 1–2 (2019), <https://crsreports.congress.gov/product/pdf/RS/RS21232> [<https://perma.cc/YNC8-LYAQ>] (“On BLM rangelands, in FY2017, there were 16,357 operators authorized to graze livestock, and they held 17,886 grazing permits and leases. . . . On FS rangelands, in FY2017, there were 5,725 permit holders permitted (i.e., allowed) to graze commercial livestock, with a total of 6,146 active permits.”). Grazing is also authorized on some units of the National Wildlife Refuge System and National Park System. *Id.* at 1 n.1.

<sup>25</sup> See *About Rangeland Management*, U.S. FOREST SERV., <https://www.fs.fed.us/range-land-management/aboutus/index.shtml> [<https://perma.cc/NF68-VYPP>] (last visited Aug. 7, 2022) (“The federal government manages 43 percent of the rangelands. State and local governments manage the remainder.”).



*A. Grazing in the Wild West*

After the Louisiana Purchase, U.S. land policy in the nineteenth century encouraged western settlement and the use of the region's natural resources to spur economic development within the nation's newly expanded territory. Federal homestead acts, for example, allowed any U.S. citizen or prospective citizen to claim 160, 320, and, later, 640 acres by living on the land for five years, improving it, and paying a nominal fee.<sup>26</sup> While these acreages might have been sufficient to economically farm crops in the more fertile areas, a rancher raising livestock in more arid areas needed 2,000 to 50,000 acres of land to be able to economically graze cattle.<sup>27</sup> As a result, western livestock owners used the open range on the federal public domain and forest reserve lands to expand their available grazing acreage.<sup>28</sup>

Over time, unrestricted livestock grazing on the open public domain resulted in resource degradation, described by many as a classic example of the "tragedy of the commons."<sup>29</sup> Because each grazing operator's incentive was to graze as many

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<sup>26</sup> Valerie Weeks Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 MONT. L. REV. 155, 160 (1967) ("Under the Homestead Act he could take title in five years to 160 free acres surrounding his ranch house. Under the Preemption Act of 1841 he could get title to 160 more, as well as title to 160 free acres under the Timber Culture Act and 640 acres under the Desert Land Act in some states."). The Kinkaid Act of 1904 authorized 640-acre claims in western Nebraska. Kinkaid Act of 1904, Pub. L. No. 58-233, 33 Stat. 547, *repealed by* FLPMA, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2786 (1976). In 1909, 320-acre claims were allowed. *See* Enlarged Homestead Act of 1909, Pub. L. 60-245, 35 Stat. 639, *repealed by* FLPMA, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2786 (1976). In 1916, the Stock Raising Homestead Act allowed 640-acre claims to grazing lands but reserved the minerals underneath the surface in federal ownership. Stock Raising Homestead Act of 1916, Pub. L. No. 64-290, 39 Stat. 862, *repealed by* FLPMA, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2786 (1976).

<sup>27</sup> Scott, *supra* note 26, at 159.

<sup>28</sup> *Id.*; *see also* John D. Leshy & Molly S. McUsic, *Where's the Beef? Facilitating Voluntary Retirement of Federal Lands from Livestock Grazing*, 17 N.Y.U. ENV'T. L. J. 368, 372 (2008) ("For a long time, the official U.S. policy toward livestock grazing on federal lands was silence. . . . [T]hese lands were treated as a commons, open to all comers. And come the livestock operators did, literally in droves, flooding the lands with millions of head of cattle and sheep beginning in the 1880s.").

<sup>29</sup> The tendency for open-access resources to be overused was famously described as "the tragedy of the commons" by Garrett Hardin in 1968, but the idea predates Hardin. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968); *see also, e.g.*, H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954). For discussions in the context of U.S. public domain grazing, *see* Pub. Lands Council v. Babbitt, 529 U.S. 728, 732 (2000) (noting that "more cattle meant more competition for ever-scarcer water and grass[,] which "along with droughts, blizzards, and growth in homesteading, . . . aggravated natural forage scarcity."); *see also* Libecap, *supra* note 2, at 274 (quoting a 1916 Department of Agricultural study, which noted that "[t]he only protection a stockman has is to keep his range eaten to the ground and the only assurance that he will be able to secure the forage crop any one year is to graze it off before someone else does").

livestock as possible on the open and free range before someone else's livestock consumed the available forage, federal lands were substantially overgrazed.<sup>30</sup>

This, in turn, led to “diminished profits, and hostility among forage competitors—to the point where violence and ‘wars’ broke out, between cattle and sheep ranchers, between ranchers and homesteaders, and between those who fenced and those who cut fences to protect an open range.”<sup>31</sup> This situation led to calls for a federal law to “regulate the land that was once free.”<sup>32</sup> In response, Congress passed the Unlawful Inclosures Act of 1887, which forbade anyone from fencing off the public domain lands or otherwise unlawfully denying others access to them.<sup>33</sup>

### B. *The Foundation of the U.S. Grazing Institution*

Congress also gradually responded to the tragedy of the commons playing out on western rangelands.<sup>34</sup> The first regulation of grazing on federal land occurred on designated forest reserves after Congress in the Organic Act of 1897 gave the executive branch authority to regulate “occupancy and use” of forest reserves.<sup>35</sup> At this time, grazing, not timber harvesting, was the primary commercial use of the forests.<sup>36</sup> In 1901, the Bureau of Forestry took initial steps to regulate grazing, including implementing a permit system, and in 1906, the newly created Forest Service added a fee requirement.<sup>37</sup> In 1911, the Supreme Court in *United States v. Grimaud* upheld the Forest Service's authority to charge a fee for grazing on federal

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<sup>30</sup> See Leshy & McUsic, *supra* note 28, at 372 (“In most arid parts of the West, entire ecosystems were, within a span of a few short years toward the end of the nineteenth century, degraded and permanently transformed.”).

<sup>31</sup> *Pub. Lands Council*, 529 U.S. at 732.

<sup>32</sup> *Id.*

<sup>33</sup> Pub. L. No. 48-149, 23 Stat. 321 (codified as amended at 43 U.S.C. §§ 1061–1066).

<sup>34</sup> *Pub. Lands Council*, 529 U.S. at 732–33 (noting that members of Congress regularly introduced legislation seeking to address grazing on the public domain, but political opposition to federal regulation was strong). The Supreme Court included the following quote from President Roosevelt who attributed the political opposition to “those who do not make their homes on the land, but who own wandering bands of sheep that are driven hither and thither to eat out the land and render it worthless for the real homemaker” as well as “the men who have already obtained control of great areas of the public land . . . who object . . . because it will break the control that these few big men now have over the lands which they do not actually own.” *Id.* (quoting 41 CONG. REC. S3618 (Feb. 22, 1907)).

<sup>35</sup> Leshy & McUsic, *supra* note 28, at 373 n.18 (noting that the 1897 law failed to mention the grazing in the context of regulating occupancy and use).

<sup>36</sup> WILLIAM D. ROWLEY, U.S. FOREST SERVICE GRAZING AND RANGELANDS: A HISTORY 3–5 (1985).

<sup>37</sup> *Id.* at 40–41, 60. The initial fee schedule called for cattle and horses to graze at 20 to 35 cents per head in the summer and 35 to 50 cents for the whole year. *Id.* at 60. Sheep were charged 5 to 8 cents for the summer and goats were charged 8 to 10 cents for the summer. *Id.* Because forest reserve regulation of grazing predated grazing regulation on the public domain by over thirty years, the early forestry officials became the “pioneers of government-range regulation and resource use.” *Id.* at 21.

lands.<sup>38</sup> However, the vast majority of public rangelands were not forest reserves and, thus, remained open and unrestricted for livestock grazing.<sup>39</sup>

After a period of tough times for western ranchers that included drought, agricultural depression, conflict among grazers, and deteriorating rangeland conditions, the situation reached a tipping point in the early 1930s.<sup>40</sup> Congress, spurred to action, passed the Taylor Grazing Act in 1934, which ended the tradition of free, uncontrolled grazing and in its place enacted a system of range allocation.<sup>41</sup> To “promote the highest use of the public lands,”<sup>42</sup> the TGA charges the Secretary of Interior to regulate grazing on non-Forest Service public domain lands to “stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.”<sup>43</sup> To accomplish these goals, the TGA provided the Secretary of the Interior with authority to divide the unreserved federal public domain into grazing districts consisting of lands chiefly valuable for grazing, issue grazing permits for these lands, charge fees, and create other necessary rules and regulations.<sup>44</sup> Within a few years, the Department of the Interior closed virtually the entire public domain by withdrawing available lands into grazing districts.<sup>45</sup>

In passing the TGA, Congress reaffirmed the Supreme Court’s holding in *Buford v. Houtz* that livestock grazers held only a revocable license to use the federal

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<sup>38</sup> 220 U.S. 506 (1911). The Court defended the fees as necessary to prevent excessive grazing thereby protecting the resources of the forest and to provide a slight income to the agency to cover the expenses of the program. *See* ROWLEY, *supra* note 36, at 68.

<sup>39</sup> Congress rejected the initial proposals to establish a leasing system for grazing on public domain for fear it would cut off opportunities for newcomers to the West. ROWLEY, *supra* note 36, at 18–19.

<sup>40</sup> Leshy & McUsic, *supra* note 28, at 374.

<sup>41</sup> Pub. L. No. 73-482, 48 Stat. 1269 (codified as amended at 43 U.S.C. §§ 315–315r).

<sup>42</sup> 43 U.S.C. § 315.

<sup>43</sup> Pub. L. No. 73-482, 48 Stat. 1269, 1269 (1934).

<sup>44</sup> 43 U.S.C. §§ 315, 315a, 315b. Under the TGA, the Secretary of the Interior was given authority to establish grazing districts over the remaining unreserved public domain land, but not on “national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands.” *Id.* § 315. The U.S. Supreme Court upheld the BLM’s authority to charge a fee for grazing in *Brooks v. Dewar*, 313 U.S. 354 (1941). William Rowley notes that despite Forest Service’s experience in grazing regulation it was not designated as the heir to the public domain for a number of reasons including: “(1) the stock industry’s resentment of the service and its policies; (2) the desire to have the new agency more under the control of stockmen; (3) the desire of the Interior Department for greater authority; and (4) the continued lack of any explicitly stated lawful authority for the Forest Service to administer range resources.” ROWLEY, *supra* note 36, at 152.

<sup>45</sup> ROBERT GLICKSMAN & GEORGE COGGINS, *MODERN PUBLIC LAND LAW IN A NUTSHELL* 257 (4th ed. 1995).

land.<sup>46</sup> The TGA specifically states that grazing permits “shall not create any right, title, interest, or estate in or to the lands.”<sup>47</sup> Reflecting the nature of a grazing lease as a privilege rather than a property right, the grazing regulations in effect since 1938 make the agency’s grant of grazing permits discretionary and revocable.<sup>48</sup> The regulations provided the Secretary with authority to cancel permits under some circumstances,<sup>49</sup> reclassify and withdraw land from grazing and devote it to another more valuable or suitable use,<sup>50</sup> or suspend grazing permits (in whole or in part) in the event of range depletion.<sup>51</sup>

The Department of the Interior developed basic rules for the allocation of grazing permits by 1937.<sup>52</sup> These rules gave first preference to livestock owners who also owned “base property” (land or water rights) sufficient to support their herds and who had grazed on the public range during the five years prior to the TGA’s enactment.<sup>53</sup> The inclusion of privileges for base property owners acknowledged that the established practice of ranchers was to keep livestock on home or base property for part of the year and then move them to federal land at other times. The regulations provided grazing permits for a certain number of livestock, measured in animal unit months (AUMs),<sup>54</sup> for up to ten years.<sup>55</sup> AUMs were based on the concept of carrying capacity, a measure of an allotment’s capacity to sustainably and productively support livestock.<sup>56</sup>

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<sup>46</sup> 133 U.S. 320, 326 (1890) (holding that “there is an implied license, growing out of the custom of nearly a hundred years” that the public domain shall be “free and open to the people who seek to use them”).

<sup>47</sup> 43 U.S.C. § 315b.

<sup>48</sup> *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 735 (2000) (“But the conditions placed on permits reflected the leasehold nature of grazing privileges, consistent with the fact that Congress had made the Secretary the landlord of the public range and basically made the grant of grazing privileges discretionary.”). The BLM’s authority to modify, suspend, or revoke grazing permits for noncompliance with the TGA or with permit terms is an inherent part of the power to issue such permits. *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397 (10th Cir. 1976) (establishing first instance in which a BLM decision to suspend grazing privileges for a violation of the regulations reached a court). The BLM TGA regulations were initially called the “Range Code,” however, that term was dropped after the enactment of FLPMA and PRIA. *See Delmer & Jo McLean v. Bureau of Land Mgmt.*, 133 Interior Dec. 225, 241 n.8 (IBLA 1995).

<sup>49</sup> 43 C.F.R. § 4170.1-2.

<sup>50</sup> *Id.* § 4110.4-2(a)(2).

<sup>51</sup> *Id.* § 4110.3-2(a).

<sup>52</sup> *Pub. Lands Council*, 529 U.S. at 734.

<sup>53</sup> *Id.*

<sup>54</sup> An animal unit month (AUM) refers to the amount of forage needed to sustain one animal unit (one cow/calf pair or 5 sheep) for one month. Karla H. Jenkins, *Understanding AUMs (Animal Unit Months)*, UNIV. NEB. (May 2013), <https://beef.unl.edu/cattleproduction/understandinganimalunitmonths> [<https://perma.cc/7Q4E-SEE4>].

<sup>55</sup> 43 U.S.C. § 315b.

<sup>56</sup> Swette & Lambin, *supra* note 8, at 2–3 (noting that the “goal” of the carrying capacity concept was to “maintain rangeland vegetation as close to climax species composition as possible, which was the standard measure of range condition”).

*C. Incorporating Modern Environmental Regulation into the Institution*

While ending open access and allocating rights to graze allotments to particular ranchers addressed the tragedy of the commons, it did not fully address other concerns about the health of rangelands and ecosystems that depend on them. Nor did it resolve growing conflicts over how the grazing of federal lands affects other potential public uses of those lands. Those issues led Congress to enact a series of laws during the 1960s and 1970s.

In 1960, in reflection of the shift toward greater multiple-use of national forests and to ensure the Forest Service discretion to permit forest uses other than the timber and watershed protection originally prescribed in its Organic Act, Congress passed the Multiple Use-Sustained-Yield Act (MUSYA).<sup>57</sup> The Act directed that national forests “shall be administered” for a diversity of uses, including “outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”<sup>58</sup> While promoting multiple-use of federal land resources, the MUSYA acknowledged that “some land will be used for less than all of the resources . . . .”<sup>59</sup> Despite range being listed alongside the other multiple uses, at the time of the MUSYA’s passage, the livestock industry purportedly feared the inclusion of outdoor recreation as a threat to grazing in national forests.<sup>60</sup>

Nine years after the passage of the MUSYA, Congress passed the National Environmental Policy Act (NEPA), which, although not specifically enacted to regulate federal-land grazing, has had a major impact on federal rangeland management.<sup>61</sup> NEPA requires federal agencies to prepare an environmental impact statement, a potentially costly and time-consuming process, for every major federal action significantly affecting the quality of the human environment.<sup>62</sup> In an initial attempt to comply with the new law, the BLM prepared a programmatic environmental impact statement covering its entire grazing program, intending the statement to serve as the foundation for all subsequent actions implementing the program.<sup>63</sup> The BLM’s NEPA approach, however, was rejected by environmental groups, most notably in the case of *Natural Resources Defense Council, Inc. v. Morton*. In this case, the District Court for the District of Columbia directed the BLM to prepare individual statements for grazing for each of its more than 200 planning units.<sup>64</sup>

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<sup>57</sup> 16 U.S.C. §§ 528–531.

<sup>58</sup> *Id.* § 528.

<sup>59</sup> *Id.* § 531.

<sup>60</sup> ROWLEY, *supra* note 36, at 231.

<sup>61</sup> 42 U.S.C. §§ 4321–4370.

<sup>62</sup> *Id.* § 4332(2)(c). Federal agencies prepare environmental assessments (EAs) for proposed federal actions that do not meet the EIS bar, but also have greater impacts than actions determined to be categorically excluded. *See* 40 C.F.R. §§ 1501.4, 1508.4.

<sup>63</sup> *See Nat. Res. Def. Council, Inc. v. Morton*, 388 F. Supp. 829, 832–33 (D.D.C. 1974).

<sup>64</sup> *See id.* at 838–39 (finding that the programmatic approach did “not provide the detailed analysis of local geographic conditions necessary for the decision-maker to determine what course of action is appropriate under the circumstances”).

The Natural Resource Defense Council later argued that the BLM should further refine its NEPA approach and prepare a NEPA analysis for each individual grazing allotment within a district.<sup>65</sup> This argument was rejected by the Federal District Court of Nevada in 1985, which found that NEPA did not require that level of specificity.<sup>66</sup> Ten years later, however, an administrative law judge in the Department of the Interior ruled that the BLM violated NEPA by failing to prepare an environmental impact statement that analyzed the specific impacts of livestock grazing in the Comb Wash Allotment in southeastern Utah and included site-specific information about the allotment.<sup>67</sup>

In response to the Comb Wash ruling, Congress passed an appropriations bill rider in 2003 that allowed grazing permits on both BLM and Forest Service lands to be renewed pending NEPA compliance through 2008.<sup>68</sup> In 2008, the BLM issued a new handbook on NEPA that included a categorical exclusion from NEPA for most decisions involving the issuance and renewal of grazing permits.<sup>69</sup> Today, most grazing permits are analyzed under this categorical exclusion or an environmental assessment.<sup>70</sup>

In 1976, Congress passed two major statutes requiring comprehensive land-use planning on federal lands. The National Forest Management Act (NFMA)<sup>71</sup> applies specifically to national forests while the Federal Land Policy and Management Act (FLPMA)<sup>72</sup> primarily addresses the former public domain lands managed by the BLM. Both NFMA and FLPMA have implications for federal grazing management.

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<sup>65</sup> See *Nat. Res. Def. Council v. Hodel*, 624 F. Supp. 1045, 1055 (D. Nevada 1985).

<sup>66</sup> See *id.* at 1051, 1059 (noting that a “document addressing the ecological and other impacts for each set of permutations of stocking levels would be a completely unmanageable undertaking”).

<sup>67</sup> See *Nat’l Wildlife Fed’n v. Bureau of Land Mgmt.*, 140 Interior Dec. 85 (IBLA 1997); see also Joseph M. Feller, *What Is Wrong with the BLM’s Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 591–600 (1994) (stating that the administrative law judge specifically found that the BLM failed to consider the impacts of grazing on riparian areas, vegetation, and wildlife habitat).

<sup>68</sup> Blue Ridge National Heritage Area Act of 2003, Pub. L. No. 108-108, § 140, 117 Stat. 1274 (2003) (codified as amended as a note at 54 U.S.C.A. § 320101).

<sup>69</sup> BUREAU OF LAND MGMT., NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK H-1790-1, at 150–51 (2008), [https://www.blm.gov/sites/blm.gov/files/uploads/Media\\_Library\\_BLM\\_Policy\\_Handbook\\_h1790-1.pdf](https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_Handbook_h1790-1.pdf) [<https://perma.cc/A8CV-NQ9J>]; see also Mark Squillace, *Grazing in Wilderness Areas*, 44 ENV’T L. 415, 430–31 (2014) (noting that if a grazing allotment has not been assessed and evaluated, or if the allotment is not meeting land health standards, then full NEPA compliance is required before permit may be issued or renewed).

<sup>70</sup> WYO. DEP’T OF AGRIC., A RANCHER’S GUIDE TO NEPA AND PERMIT RENEWALS: WYOMING 3 (2016), <https://rangemanagement.extension.colostate.edu/wp-content/uploads/sites/42/2018/05/WY-2016-nepa-for-ranchers.pdf> [<https://perma.cc/XQ5T-HJUP>].

<sup>71</sup> Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended at 16 U.S.C. §§ 1600–1687).

<sup>72</sup> Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. §§ 1701–1785).

NFMA requires the Secretary of Agriculture to assess forest lands and develop a Land and Resource Management Plan (Forest Plan) for each unit of the National Forest System based on multiple-use, sustained-yield principles.<sup>73</sup> Forest Plans specify which areas of the forest are open or closed to livestock grazing based on the landscape's suitability, which includes an analysis of environmental and economic factors.<sup>74</sup> The Forest Service then implements Forest Plans through site-specific actions. NFMA and Forest Service regulations require that proposed actions, including grazing allotment decisions, be consistent with the Forest Plans for each unit of the National Forest System.<sup>75</sup>

FLPMA mandates that the BLM manage its lands for multiple uses and sustained yield and that federal lands be inventoried systematically and subjected to land-use planning processes.<sup>76</sup> FLPMA did not repeal the TGA; instead, it "added a new management structure" that the Secretary is required to follow when implementing the TGA.<sup>77</sup> However, FLPMA does provide that, as long as an allotment remains open to grazing, the existing permittee has first priority for permit renewal, provided the land-use plan continues to make the land available for livestock grazing.<sup>78</sup> FLPMA also strengthens the BLM's discretion to decide whether lands should be available for grazing through the land-use planning process.<sup>79</sup> FLPMA further specifies that when a grazing permit is canceled for public purposes, the permittee is entitled to compensation for the adjusted value of permanent improvements that were constructed in the federal allotment, such as fences and water tanks, up to the value of the terminated portion of the permit.<sup>80</sup>

Two years after the passage of FLPMA, Congress passed the Public Rangelands Improvement Act of 1978 (PRIA),<sup>81</sup> which reaffirms the "national policy and commitment to: . . . manage, maintain, and improve the condition of the public rangelands so that they become as productive as feasible for all rangeland

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<sup>73</sup> See 16 U.S.C. §§ 1604(a), (e)(1).

<sup>74</sup> See *Wilderness Soc'y v. Thomas*, 188 F. 3d 1130, 1134–36 (9th Cir. 1999) (outlining historical process of determining suitability); 36 C.F.R. §§ 219.8, 219.19 (detailing requirements to incorporate sustainability maintenance in planning decisions).

<sup>75</sup> 16 U.S.C. § 1604(i); 36 C.F.R. § 222.1(b).

<sup>76</sup> 16 U.S.C. §§ 1603, 1604.

<sup>77</sup> Lisa J. Hudson, *Judicial Review of Bureau of Land Management's Land Use Plans Under the Federal Rangeland Statutes*, 8 PUB. LAND L. REV. 185, 188 (1987).

<sup>78</sup> 43 U.S.C. § 1752(c).

<sup>79</sup> *Id.* § 1752. The 1978 grazing regulations issued after the passage of FLPMA further tied permit renewal and validity to the land use planning process, giving the Secretary the power to cancel, suspend, or modify grazing permits due to increases or decreases in grazing forage or acreage made available in the applicable land use plan. 43 C.F.R. § 4110.3-2(b); *id.* § 4110.4-2.

<sup>80</sup> 43 U.S.C. § 1752(g). A permittee's claim for compensation only arises if the government cancels a grazing permit; a mere lease suspension does not require compensation. *Sacramento Grazing Ass'n Inc. v. United States*, 66 Fed. Cl. 211, 214–15 (2005).

<sup>81</sup> Pub. L. No 95-514, 92 Stat. 1803 (codified as amended at 43 U.S.C §§ 1901–1908).

values . . . .”<sup>82</sup> PRIA also includes a Congressional finding that “vast segments of the public rangelands” were found to be “producing less than their potential” for the multiple uses for which they were being managed.<sup>83</sup> To address the situation, Congress directed \$2 billion to fund range improvements and directed the BLM to regularly assess range conditions to ensure that PRIA’s goals were met.<sup>84</sup>

Although these subsequent acts have imposed additional environmental provisions, land-use planning requirements, and multiple-use mandates, the TGA remains the foundation of grazing on BLM land today.<sup>85</sup> While the TGA does not apply to national forests, the Forest Service’s grazing program is similar to the BLM’s and has likewise remained relatively stable for decades.<sup>86</sup>

#### *D. Continuing Conflict over Federal Grazing*

The statutes discussed above and other environmental laws did not end conflict between ranchers, conservation interests, and regulators. Instead, new legislation often channeled conflicts into the courtroom to determine which federal lands should be grazed, how, and how much.<sup>87</sup> Land-use plans and individual grazing permits are often challenged for negatively affecting water quality, endangered species, public recreation, and other competing values.<sup>88</sup> Sometimes, these cases have resulted in the closure of allotments or the imposition of additional restrictions on grazing permittees.<sup>89</sup> But, as John D. Leshy and Molly S. McUsic have noted, litigation has not been successful in changing the U.S. grazing institution, in part because federal judges have little interest in being the “rangemaster” of hundreds of millions of acres of federal land.<sup>90</sup>

The continued conflict, however, provoked a backlash within rural communities and the livestock industry. In the 1970s and 80s, ranchers involved in the “Sagebrush Rebellion” sought to transfer federal rangelands to state or private

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<sup>82</sup> 43 U.S.C. § 1901(b)(2).

<sup>83</sup> *Id.* § 1901(a)(1).

<sup>84</sup> *Id.* §§ 1903–1904.

<sup>85</sup> See George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENV’T L. 1, 81 (1983) (“[T]he BLM’s only statutory management mandate until 1976 was the Taylor Grazing Act of 1934.”).

<sup>86</sup> Forest Service grazing policies are based on the 1897 Organic Act, the 1960 Multiple Use Sustained Yield Act, the 1976 National Forest Management Act, and the Wilderness Act. Despite the multiple-use mandates under the MUSYA, the courts have provided great deference to the Forest Service in managing grazing levels, even upholding a Forest Service decision to allocate 100% of forage to livestock use and none to wild ungulates. See *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1100 (9th Cir. 2003) (“[A]llocating available forage to livestock and monitoring the use of the land is consistent with the Forest Plan, and is neither arbitrary nor capricious.”).

<sup>87</sup> See NELSON, PUBLIC LANDS AND PRIVATE RIGHTS, *supra* note 10, at 153–57.

<sup>88</sup> *Id.* at 156–57.

<sup>89</sup> *Id.* at 160.

<sup>90</sup> Leshy & McUsic, *supra* note 28, at 376 n.28 (quoting *Nat. Res. Def. Council v. Hodel*, 624 F. Supp. 1045, 1048 (D. Nev. 1985), *aff’d*, 819 F.2d 927 (9th Cir. 1987)).



ownership in response to federal regulations and land-use decisions perceived as threatening western ranching.<sup>91</sup> More recently, ranchers have challenged grazing restrictions and limits on access to water rights as unlawful and unconstitutional.<sup>92</sup> Ranchers have further lobbied against environmental regulations and reductions in grazing they perceive as threatening their business and way of life.<sup>93</sup>

Parties on both sides have relatively little to show for all the time and resources devoted to these decades of conflict. The National Wildlife Federation, for instance, has criticized political and litigation tactics as “generat[ing] a great deal of controversy, but only a small amount of change” in grazing practices.<sup>94</sup> Judi Brower, an attorney with WildEarth Guardians, historically one of the most frequent litigants against grazing, has described lobbying and litigation as “a no-win for everyone.”<sup>95</sup> Moreover, either side’s victory in an individual dispute may prove only temporary if similar conflict reemerges when the permit comes up for renewal, a new species is listed under the Endangered Species Act, or the relevant agency simply decides to reconsider an earlier decision.<sup>96</sup> Without another tool to resolve conflicts between grazing and conservation, we are at what John D. Leshy and Molly S. McUsic have called “a kind of uneasy stalemate,” with little or no opportunity for groups to cooperatively resolve disputes over the use of public rangelands.<sup>97</sup>

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<sup>91</sup> See NELSON, PUBLIC LANDS AND PRIVATE RIGHTS, *supra* note 10, at 167.

<sup>92</sup> See, e.g., *Estate of Hage v. United States*, 687 F.3d 1281 (Fed. Cir. 2012) (arguing that limits on access to water rights constitutes a federal taking).

<sup>93</sup> See, e.g., *Ranchers Applaud Announcement of New NEPA Rules*, PUB. LANDS COUNCIL (Jan. 9, 2020), <https://publiclandscouncil.org/2020/01/09/ranchers-applaud-announcement-of-new-nepa-rules/> [<https://perma.cc/FWP5-99JT>] (supporting rolling back NEPA rules that created “onerous processes and bureaucratic red tape”); Jennifer Yachnin, *Could Conservation Plan Prompt Tougher Grazing Oversight?*, E&E NEWS (Nov. 1, 2021, 1:29 PM), <https://www.eenews.net/articles/could-conservation-plan-prompt-tougher-grazing-oversight/> [<https://perma.cc/EY5M-ZRUB>].

<sup>94</sup> *About the Program*, NAT’L WILDLIFE FED’N, <https://www.nwf.org/WCR/About> [<https://perma.cc/Z8ME-732C>] (last visited Aug. 7, 2022).

<sup>95</sup> See Regan, *supra* note 19.

<sup>96</sup> See *id.*; see also, e.g., Press Release, Center for Biological Diversity, *Lawsuit Targets Trump Administration Renewal of Oregon Ranchers’ Grazing Permit* (May 13, 2019), <https://biologicaldiversity.org/w/news/press-releases/lawsuit-targets-renewal-of-oregon-rancher-grazing-permit-2019-05-13/> [<https://perma.cc/Q7YX-KXNH>]; John Bowman, *Cattle Grazing Permit Renewal Halted on Marble Mountain Land*, PROVIDENCE J. (July 1, 2012, 1:07 PM), <https://www.providencejournal.com/story/news/2012/04/12/cattle-grazing-permit-renewal-halted/49496937007/> [<https://perma.cc/8M5H-5D4N>]; 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> [<https://perma.cc/5BKB-NMJ8>].

<sup>97</sup> Leshy & McUsic, *supra* note 28, at 376.

## II. MARKETS FOR VOLUNTARY CONSERVATION ON FEDERAL GRAZING LANDS

This conflict over federal grazing lands stands in sharp relief to similar conflicts on private lands. While there is some litigation against private landowners over environmental impacts,<sup>98</sup> the inefficiencies of litigation have often encouraged conservation interests to instead prioritize incentives and voluntary approaches. Nationwide, land trusts have conserved habitat, water quality, and other environmental values by acquiring private land and dedicating it to conservation.<sup>99</sup> They have also pursued these goals through conservation easements that permanently limit future development of private lands while, often, keeping them in agricultural or livestock production.<sup>100</sup> According to the Land Trust Alliance, 61 million acres were conserved by these methods as of 2020, with approximately 25% of the acreage conserved since 2010.<sup>101</sup>

In many other cases, conservation groups seek to influence ranching on private lands without asking landowners to permanently cede property rights, which many are reluctant to do. In Montana's Paradise Valley, for instance, conservation groups partnered with a Paradise Valley rancher on the state's first elk occupancy agreement.<sup>102</sup> Elk migrating from Yellowstone National Park impose costs on private landowners by consuming forage and risking the spread of brucellosis, a wildlife disease in the region that can be transmitted from elk to cattle.<sup>103</sup> This risk makes elk a source of conflict between ranchers, hunters, and conservation interests. The agreement seeks to solve conflict between elk and cattle and reduce disease

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<sup>98</sup> See, e.g., *Cascadia Wildlands v. Scott Timber Co.*, No. 6:16-CV-01710-AA, 2022 WL 3017684 (D. Or. July 29, 2022) (bringing an action against two private timber companies); *Cnty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, 80 F. Supp. 3d 1180 (E.D. Wash. 2015) (bringing an action against commercial dairy owners).

<sup>99</sup> See Parker, *supra* note 15; see also Alex Brown, *Private Lands Are the Next Battleground in State Conservation Policy*, PEW: STATELINE (Apr. 26, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/04/26/private-lands-are-the-next-battleground-in-state-conservation-policy> [https://perma.cc/TY2F-W4H8].

<sup>100</sup> See Brown, *supra* note 99.

<sup>101</sup> Press Release, Land Trust All., 61 Million Acres Voluntarily Conserved in America, 2020 National Land Trust Census Report Reveals (Dec. 8, 2021), <https://www.landtrustalliance.org/61-million-acres-voluntarily-conserved-america-2020-national-land-trust-census-report-reveals> [https://perma.cc/YLW7-RNVE].

<sup>102</sup> See *Elk Occupancy Agreements*, *supra* note 21.

<sup>103</sup> See Arthur D. Middleton, Temple Stoellinger, Drew E. Bennett, Travis Brammer, Laura Gigliotti, Hilary Byerly Flint, Sam Maher & Bryan Leonard, *The Role of Private Lands in Conserving Yellowstone's Wildlife in the Twenty-First Century*, 22 WYO. L. REV. 237, 241 (2022); see also Nathaniel D. Rayl, Jerod A. Merkle, Kelly M. Proffitt, Emily S. Almberg, Jennifer D. Jones, Justin A. Gude & Paul C. Cross, *Elk Migration Influences the Risk of Disease Spillover in the Greater Yellowstone Ecosystem*, 90 J. ANIMAL ECOL. 1264, 1265 (2021).

transmission risk by compensating the rancher for separating elk and cattle and conserving 500 acres of elk winter habitat.<sup>104</sup>

In North Central Montana, the Nature Conservancy operates its 60,000-acre Matador Ranch as a grassbank for local ranchers.<sup>105</sup> Those ranchers pay a discounted fee to graze their cattle on the bank in exchange for adopting conservation practices on their own land to control noxious weeds and avoid “sodbusting.”<sup>106</sup> Fees are discounted further for ranchers who install wildlife-friendly fences and take other steps to conserve prairie dogs, sage grouse, and other wildlife.<sup>107</sup>

States, too, often resolve similar trade-offs through market-like mechanisms. Upon statehood, Congress gave land to western states in trust to fund schools and other public services.<sup>108</sup> Many of these state trust lands are leased for grazing and other uses.<sup>109</sup> However, western states are typically required to use trust lands to maximize benefits to the beneficiary.<sup>110</sup> For parcels with high conservation values, conservation interests may be able to simply outbid other would-be users and obtain a conservation lease that precludes other uses and may even facilitate environmental improvement of the property.<sup>111</sup> In August 2021, for example, the environmental group Western Watersheds Project was the high bidder on a 624-acre state grazing lease in Idaho’s Sawtooth Valley, which the group says it will put to “conservation

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<sup>104</sup> See sources cited *supra* note 103.

<sup>105</sup> *The Matador Ranch*, NATURE CONSERVANCY, <https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/matador-ranch/> [https://perma.cc/GB7T-77LU] (last visited Sept. 13, 2022).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*; see also Laura Huggins, *Contracting for Conservation*, 36 PROP. & ENV’T RSCH. CTR. REPORTS 44, 44–45 (2017), <https://perc.org/wp-content/uploads/2017/06/PERCReports-Summer2017-hirez.pdf> [https://perma.cc/WZZ8-X89N] (describing American Prairie’s “Wild Sky” program, which funds incentive payments to Montana ranchers who adopt wildlife-friendly practices).

<sup>108</sup> See PETER W. CULP, DIANE B. CONRADI & CYNTHIA C. TUELL, TRUST LANDS IN THE AMERICAN WEST: A LEGAL OVERVIEW AND POLICY ASSESSMENT 2–3 (Jennifer A. Barefoot, ed. 2005), <http://opportunitylinkmt.org/wp-content/uploads/2015/07/Trust-Lands-in-the-American-West.pdf> [https://perma.cc/8QBY-NYNY].

<sup>109</sup> *Id.* at 55 (noting that state trust lands “are actively managed for a diverse range of uses, including timbering, grazing, mining, agriculture, oil and gas, residential and commercial developments, conservation, and recreational uses such as hiking, fishing and hunting.”).

<sup>110</sup> See generally CULP ET AL., *supra* note 108 (giving an overview of each western state’s approach to trust land management); see also Leonard & Regan, *Legal and Institutional Barriers*, *supra* note 16, at 156–59 (explaining that unlike federal grazing permits, leases to state trust lands are generally allocated through competitive bidding).

<sup>111</sup> Leonard & Regan, *Legal and Institutional Barriers*, *supra* note 16, at 156–59; see also *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).

use” for the next twenty years.<sup>112</sup> Such arrangements are growing increasingly common on state trust lands as conservation and recreation demand grows.<sup>113</sup>

This approach has also been applied, with success, outside the land-conservation context. In recent decades, many western states have recognized leaving water in streams to maintain flows and conserve fish habitat as a “beneficial use” sufficient to maintain water rights under the prior appropriation doctrine.<sup>114</sup> Prior to this change, western water law was based on historical “use it or lose it” rules.<sup>115</sup> If the owner of a water right failed to use all of the water covered by their right, another user was free to use the water and the owner could see their right reduced.<sup>116</sup> Recognizing in-stream flow rights has opened up the potential for water markets to resolve conflicting demands over water.<sup>117</sup> Today, under certain conditions and to varying degrees depending on the state, water rights can be traded and put to conservation uses, such as instream flows for fish and wildlife habitat.<sup>118</sup>

Due to dissatisfaction with the lobbying and litigation stalemate over federal grazing lands, there is growing interest in new tools and approaches for conservation interests to conserve wildlife and other natural resources on public lands.<sup>119</sup> Before

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<sup>112</sup> Press Release, W. Watersheds Project, Western Watersheds Project Wins Grazing Lease in Sawtooth Valley (Aug. 18, 2021), <https://www.westernwatersheds.org/2021/08/western-watersheds-project-wins-grazing-lease-in-sawtooth-valley/> [<https://perma.cc/36BH-2CLL>].

<sup>113</sup> See Sally K. Fairfax & Andrea Issod, *Trust Principles as a Tool for Grazing Reform: Learning from Four State Cases*, 33 ENV'T L. 341 (2003) (discussing detailed case studies in Arizona, New Mexico, Idaho, and Oregon in which environmental groups have attempted to bid against ranchers to acquire the rights to lands formerly used for grazing).

<sup>114</sup> Leonard & Regan, *Legal and Institutional Barriers*, *supra* note 16, at 172–78.

<sup>115</sup> See Laura Ziemer, Timothy Hawkes, Michelle Bryan & Kevin Rechkoff, *How the West Is Won: Advancing Water Law for Watershed Health*, 42 PUB. LAND & RES. L. REV. 81, 82–83 (2020) (describing how “the tide has begun to turn” such that “more places are harnessing the same human ingenuity that built the West to modernize water law and restore degraded habitats.”); see also Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 336 (2009) (noting that “[s]tate water laws have adjusted in varying degrees to acknowledge demand for protection of environmental flows”).

<sup>116</sup> See MacDonnell, *supra* note 115.

<sup>117</sup> See BRANDON SCARBOROUGH, PROP. & ENV'T RSCH. CTR., PERC POL'Y SERIES NO. 46, ENVIRONMENTAL WATER MARKETS: RESTORING STREAMS THROUGH TRADE 12–18 (Roger Meiners ed., 2010), <https://www.perc.org/wp-content/uploads/old/ps46.pdf> [<https://perma.cc/6ELA-32KK>].

<sup>118</sup> *Id.*

<sup>119</sup> See, e.g., Leonard et al., *Allow “Nonuse Rights,” supra* note 16; Justin R. Pidot & Ezekiel A. Peterson, *Conservation Rights-of-Way on Public Lands*, 55 U.C. DAVIS L. REV. 89 (2021) (suggesting how the Bureau of Land Management could issue conservation rights-of-way to maintain wildlife habitat); Temple Stoellinger, Heidi J. Albers, Arthur Middleton, Jason F. Shogren & Robert Bonnie, *Where the Deer and the Antelope Play: Conserving Big Game Migrations as an Endangered Phenomena*, 31 DUKE ENV'T L. & POL'Y F. 81 (2020) (discussing how economic decision frameworks and incentive-based tools can conserve big

examining policy barriers and potential pathways to allow markets for voluntary conservation on federal grazing lands, it is useful to outline (A) the benefits of allowing voluntary conservation on federal grazing lands, the myriad options voluntary conservation would give ranchers and conservation groups to resolve their differences, and the extent of interest in these tools among conservation organizations, and (B) common objections to this approach.

*A. The Case for Allowing Markets for Voluntary Conservation*

Opening markets for voluntary conservation on federal grazing lands has several advantages over the status quo. At a basic level, such exchanges are, by definition, mutually beneficial for the parties involved. A conservation organization that negotiates with a rancher is engaging in a voluntary market exchange that generates benefits for both the rancher and environmental group; otherwise, the deal would not occur.<sup>120</sup> This stands in stark contrast to grazing disputes involving litigation, regulation, or administrative processes in which both parties expend resources in such a way that one side's "win" is another side's "loss"—and when the costs of participating in those processes are considered, it's possible that both sides could ultimately lose. Thus, the decision to negotiate represents a fundamentally different approach that has the potential to generate more positive-sum outcomes for the parties involved.

Voluntary conservation through markets also has the potential to deliver more durable conservation outcomes than the status quo. Unlike lobbying or litigation "victories," voluntary agreements between ranchers and conservation groups are likely less vulnerable to changing political conditions that might otherwise influence how rangelands are managed. Such an approach also allows conservation priorities to adapt more easily to new environmental conditions such as climate change or to respond to emerging resource conflicts such as those stemming from increased recreation on public rangelands. And it is also a fairer, more pragmatic way to advance conservation that respects ranchers' long history of grazing these lands, including by compensating them for changes to grazing practices that advance conservation.

Another key benefit of this market approach is that it is not limited to one tool for resolving grazing conflicts but would open a larger toolbox of arrangements between ranchers and conservation groups. Despite the obstacles impeding this market discussed below,<sup>121</sup> ranchers and conservation groups are already experimenting with some of these tools. Perhaps the most common approach to date has been conservation groups "buying out" the permits of ranchers looking to exit

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game migrations); Leshy & McUsic, *supra* note 28; see also Nelson, *Reform Grazing Policy*, *supra* note 18, at 656–67.

<sup>120</sup> For a discussion of examples in the public-land grazing context, see Leonard & Regan, *Legal and Institutional Barriers*, *supra* note 16, at 151–56. For examples in the Greater Yellowstone Ecosystem, see Middleton et al., *supra* note 103, at 289–90.

<sup>121</sup> See *infra* Part IV.

the livestock industry or relocate their operations.<sup>122</sup> Interest in voluntary buyouts stems in part from frustrations among environmentalists with the standard approach of litigation or administrative actions to curtail grazing on federal lands.<sup>123</sup> Some buyout advocates, such as the environmentalist Andy Kerr, have referred to buyouts as “easier” and “more just” than political or legal wrangling.<sup>124</sup> Others view offering compensation to ranchers as a way to more effectively reduce conflicts on federal lands and as a more pragmatic approach to achieve conservation goals.<sup>125</sup>

For example, WildEarth Guardians has negotiated buyouts with ranchers on 28,000 acres of the Gila National Forest in New Mexico.<sup>126</sup> To facilitate these buyouts, the group negotiates a private agreement with a rancher and then, since it has no intention to graze under the permits, petitions the Forest Service to amend land-use plans to close the allotments to grazing.<sup>127</sup> Similarly, the National Wildlife Federation has bought out ranchers’ grazing permits in the Greater Yellowstone Ecosystem to reduce conflicts between livestock and large carnivores such as wolves and grizzly bears, as well as to avoid disease transmission between domestic sheep herds and wild bighorn sheep populations.<sup>128</sup>

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<sup>122</sup> See, e.g., Andy Kerr, *Removing Hoofed Locusts from the Public Trough*, WALLOWA CNTY. CHIEFTAIN (Aug. 15, 1996), <http://www.andykerr.net/chieftain-column-2/> [<https://perma.cc/T275-NA5C>] (arguing that “[a] permittee should be able to sell the grazing privilege to anyone: another rancher or to an environmental group who could elect to retire the permit in favor of salmon and elk or plenty and poetry”); see also Mark Salvo & Andy Kerr, *The National Public Lands Grazing Campaign*, WILD EARTH, Fall/Winter 2001–2002, at 83–84. Most recently, in 2020, Rep. Adam Smith (D-WA) introduced the Voluntary Permit Retirement Act with the support of major environmental groups including the Sierra Club, Natural Resource Defense Council, and Defenders of Wildlife. The proposed bill would not allow permits to be held for nonuse; rather, it would allow grazing permit holders to relinquish permits in exchange for compensation by private parties (e.g., environmental groups) and would then direct federal agencies to permanently retire the associated grazing allotment. Related proposals have been put forth by legal scholars and other federal land policy experts. See Leshy & McUsic, *supra* note 28, at 388 (advocating for legislation that “directs the responsible federal agency to retire federal land from grazing permanently if the holder of the federal permit requests it”); see also Nelson, *Reform Grazing Policy*, *supra* note 18, at 649–50 (calling for the creation of tradable “forage rights” on federal rangelands).

<sup>123</sup> See, e.g., Regan, *supra* note 19.

<sup>124</sup> See Kerr, *supra* note 122.

<sup>125</sup> See, e.g., Regan, *supra* note 19; see also *About the Program*, NAT’L WILDLIFE FED’N, <https://www.nwf.org/WCR/About> [<https://perma.cc/Z8ME-732C>] (last visited Aug. 7, 2022).

<sup>126</sup> *Grazing Permit Retirement*, WILDEARTH GUARDIANS, <https://wildearthguardians.org/public-lands/greater-gila/grazing-permit-retirement/> [<https://perma.cc/A8DR-GMKT>] (last visited Aug. 7, 2022).

<sup>127</sup> Under this approach, the allotment is not permanently retired and could be reopened by the agency in a future land management plan. See Leonard & Regan, *Legal and Institutional Barriers*, *supra* note 16, at 154–56.

<sup>128</sup> Since 2002, the National Wildlife Federation has retired more than 1.5 million acres of wildlife habitat through its Adopt-A-Wildlife Acre program throughout the Northern and

In other cases, conservation groups have sought not to end grazing on federal lands but to change the type of livestock to produce conservation benefits. The nonprofit American Prairie, for example, has acquired BLM grazing permits in eastern Montana, which it uses to sustain its herd of privately owned bison, as part of a broader strategy to restore a large prairie ecosystem to benefit wildlife.<sup>129</sup> Ultimately, the group wants to acquire private rangelands and federal grazing permits to support a 3.2 million-acre wildlife reserve, which would be the largest in the lower forty-eight states.<sup>130</sup> The National Wildlife Federation has also paid ranchers to convert their grazing permits from sheep to cattle to reduce the risk of disease transmission between domestic and wild sheep.<sup>131</sup> A similar approach has also been proposed to address the wild horse crisis.<sup>132</sup>

In still other cases, conservation groups have provided incentives to ranchers to adjust grazing practices to produce conservation benefits. In 2022, for instance, the National Wildlife Federation, Greater Yellowstone Coalition, and Property and Environment Research Center partnered with a rancher in the Greater Yellowstone Ecosystem to help the rancher acquire a grazing permit from an existing permittee in an area that is a hotspot for grizzly bears.<sup>133</sup> In exchange for this help, the rancher will implement grazing practices that reduce the risk of livestock-grizzly bear

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Southern Rockies, including nearly 700,000 acres in the Greater Yellowstone Ecosystem. *Adopt a Wildlife Acre Program*, NAT'L WILDLIFE FED'N, <https://www.nwf.org/Our-Work/Our-Lands/Adopt-a-Wildlife-Acre> [<https://perma.cc/WT7Z-RVFA>] (last visited Aug. 7, 2022); Robert B. Keiter, *The Greater Yellowstone Ecosystem Revisited: Law, Science, and the Pursuit of Ecosystem Management in an Iconic Landscape*, 91 U. COLO. L. REV. 1, 142–43 (2020).

<sup>129</sup> See Leonard & Regan, *Legal and Institutional Barriers*, *supra* note 16, at 151–54.

<sup>130</sup> See *Building American Prairie FAQs*, AM. PRAIRIE, <https://www.americanprairie.org/building-the-reserve-faqs> [<https://perma.cc/3473-2NQ4>] (last visited Aug. 7, 2022); James L. Huffman, *American Prairie Reserve: Protecting Wildlife Habitat on a Grand Scale*, 59 NAT. RES. J. 35, 35 (2019). American Prairie's attempts to use federal grazing permits for bison grazing has recently attracted opposition in Montana, including several legal challenges that question BLM's authority to issue grazing permits for the conservation group's non-production herd of bison. See Amanda Eggert, *Turf War*, MONTANA FREE PRESS (Aug. 31, 2022), <https://montanafreepress.org/2022/08/31/cattle-producers-gianforte-appeal-blm-bison-grazing-decision/> (quoting arguments from the State of Montana that “[a] non-production herd of bison is not considered ‘livestock’ under applicable federal law and BLM cannot issue the permit [American Prairie] seeks”).

<sup>131</sup> Kit Fischer, *NWF Protecting Bighorn Sheep in the High Divide*, NAT. WILDLIFE FED'N BLOG (Sept. 16, 2019), <https://blog.nwf.org/2019/09/nwf-protecting-bighorn-sheep-in-the-high-divide/> [<https://perma.cc/47U6-6S3S>].

<sup>132</sup> See Vanessa Elizondo, Timothy Fitzgerald & Randal R. Rucker, *You Can't Drag Them Away: An Economic Analysis of the Wild Horse and Burro Program*, 41 J. AGRIC. & RES. ECON. 1, 18 (2016) (explaining that wild horses and burros often compete with domestic livestock for limited forage resources on federal rangelands, but in many areas, the horse and burro population has grown far beyond the range's capacity to support them).

<sup>133</sup> Personal correspondence with Kit Fischer (National Wildlife Federation), Brooke Shifrin (Greater Yellowstone Coalition), and Brian Yablonski (PERC) (Aug. 11, 2022) (on file with the authors).

conflicts, including adjusting how many cattle graze the allotment, where the cattle graze, and when the cattle graze.<sup>134</sup> Ultimately, the goal of the partnership is to reduce the number of grizzlies lethally removed from the area due to livestock depredation.<sup>135</sup>

Others have recently suggested similar rights-based approaches to allow voluntary conservation of wildlife migration corridors. The U.S. Department of Agriculture and the State of Wyoming recently partnered to support voluntary conservation of private working lands and migratory big-game species using conservation leases through the Grassland Conservation Reserve Program.<sup>136</sup> Another proposal relies on federal agencies' authority to issue "rights-of-way" across federal lands and envisions that conservation groups would acquire such a right in the path of migrating ungulates and other species and, thereby, protect the corridor from development that conflicts with conservation of these corridors.<sup>137</sup>

These examples and proposals are notable because, as discussed below, federal policy is not set up to facilitate them but to discourage them (often unintentionally).<sup>138</sup> Therefore, ranchers and conservation groups that have pursued these approaches have either creatively worked around policy constraints or taken a significant risk that their agreement would ultimately be frustrated by the relevant agency.

### B. Anxieties About this Market

Despite the advantages of resolving grazing conflicts through markets, many of the examples described above, and policy proposals to make markets easier to replicate, have been controversial. In particular, the livestock industry and rural communities have generally opposed permit buyouts and other arrangements that would remove or reduce commercial livestock grazing from federal rangelands, citing concerns about the broader economic and social consequences of this shift in land use.<sup>139</sup> In some cases, past buyouts have attracted local political controversy and put pressure on federal managers to reopen and restock grazing allotments that were previously bought out by environmental organizations.<sup>140</sup> Federal land

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> See *USDA Commits to Big Game Conservation Partnership with the State of Wyoming: Initial Investments Forthcoming*, USDA: NAT. RES. CONSERVATION SERV. WYO. (May 20, 2022), <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/wy/newsroom/releases/?cid=NRCSEPRD1927621> [<https://perma.cc/HT6N-UQSM>].

<sup>137</sup> Pidot & Peterson, *supra* note 119, at 135.

<sup>138</sup> See *infra* Part IV.

<sup>139</sup> See, e.g., Leshy & McUsic, *supra* note 28, at 385–88.

<sup>140</sup> *Id.* at 385–86 (discussing the Grand Canyon Trust's purchase of grazing permits in the Grand Staircase-Escalante National Monument and the resulting political controversy); see also Mike Koshmrl, 'Bought Out' Grazing Lands Could Be Restocked, JACKSON HOLE NEWS & GUIDE (Jan. 29, 2020), [https://www.jhnewsandguide.com/news/environmental/bought-out-grazing-lands-could-be-restocked/article\\_34efa9f8-b4bb-5c02-bb35-d804c3c9243b](https://www.jhnewsandguide.com/news/environmental/bought-out-grazing-lands-could-be-restocked/article_34efa9f8-b4bb-5c02-bb35-d804c3c9243b)



managers and others have also objected to private arrangements that purport to decide how federal lands will be used—a decision that managers view as their prerogative.<sup>141</sup>

Rural communities and livestock-reliant industries have expressed concerns about at least some of the arrangements that might be facilitated by markets for voluntary conservation on federal rangelands, especially buyouts.<sup>142</sup> Throughout much of the American West, economic activity in rural communities is centered around agriculture or livestock production.<sup>143</sup> The prospect of taking livestock-supporting federal lands out of production for future livestock grazing causes concerns for many in those communities, given that those lands are often critical to sustaining economically viable ranches in the arid West, where deeded landholdings alone are typically too small to support a livestock operation.<sup>144</sup> Opposition to buyouts also stems from a concern that well-funded environmental organizations or high-net-worth individuals could purchase many leases and choose to remove them from development with little or no input from the affected local communities.<sup>145</sup>

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.html [<https://perma.cc/6ZRP-GKHZ>] (discussing the recent case of bought-out allotments in the Bridger-Teton National Forest that may be reopened to livestock grazing).

<sup>141</sup> See, e.g., FOREST SERV., U.S. DEP'T OF AGRIC., RANGELAND MANAGEMENT DIRECTIVES UPDATES [hereinafter DIRECTIVES UPDATES], <https://www.fs.fed.us/rangeland-management/documents/directives/RangelandMgmtDirectivesUpdates-508.pdf> [<https://perma.cc/XJ25-H5UH>] (last visited Aug. 7, 2022) (noting the U.S. Forest Service's desire to adopt a policy against third-party grazing permit buyouts to external groups in order "to maintain the agency's authority and responsibility into the future" and that the proposed policy would clarify that such arrangements "must NOT [sic] be assigned to only satisfy the request of an external third party or entity who has no legal authority to manage National Forest System lands").

<sup>142</sup> For a discussion of the controversies associated with large-scale acquisitions of rural lands and federal leases for conservation purposes, see Shawn Regan, *Where the Buffalo Roam: Rewilding the American Serengeti*, 10 BREAKTHROUGH J. 66, 66–82 (2019) [hereinafter Regan, *Where the Buffalo Roam*].

<sup>143</sup> See Swette & Lambin, *supra* note 8, at 2.

<sup>144</sup> See *Stewart v. Kempthorne*, 554 F.3d 1245, 1254 (10th Cir. 2009) ("The Counties argue that they will suffer financially from a decline in the range-fed cattle industry, and that the BLM's issuance of grazing permits to Canyonlands 'effectively eliminate[s] livestock grazing' in the area. In making this argument, the Counties suggest that a decrease in livestock grazing decreases the tax revenues generated through sales and property taxes, thus injuring the Counties. The Counties further argue that a decrease in livestock grazing injures the aesthetic appeal of the Counties and will hamper their ability to provide for the health, safety, and welfare of their citizens." (citations omitted)).

<sup>145</sup> In the 2000 U.S. Supreme Court decision *Public Lands Council v. Babbitt*, which addressed the 1994 revision to the BLM's grazing regulations, the ranchers challenging the revisions cited their concern that reducing the qualifications necessary to be a livestock permittee "is part of a scheme to end livestock grazing on the public lands." 529 U.S. 728, 747 (2000) (stating that "individuals or organizations owning small quantities of stock [will] acquire grazing permits, even though they intend not to graze at all or to graze only a nominal number of livestock—all the while excluding others from using the public range for grazing."

If successful, there is concern that large-scale acquisitions of this kind could have far-reaching effects on local communities that have long relied on ranching as the primary form of rural economic activity.<sup>146</sup> To the extent that buyouts or conservation leasing result in less ranching or agriculture in a region, large-scale acquisitions could have other economic effects on rural communities, such as a decline in other local industries or businesses that supply inputs that support ranching and agriculture.<sup>147</sup> Similarly, rural communities have expressed concern that a shift from commercial agriculture to conservation would reduce tax revenues for local governments, thereby making public services more difficult to afford.<sup>148</sup>

Some also view livestock grazing as an important form of rangeland management and contend that removing livestock from grazing allotments could have negative ecological consequences, especially if grazing was permanently excluded.<sup>149</sup> Targeted, properly managed livestock grazing may be used as a form of wildfire mitigation, to achieve certain vegetation management objectives, or to sustain natural ecological processes.<sup>150</sup> Moreover, to the extent that permit buyouts

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(alteration in original) (quoting Brief for Petitioners at 47–48)); *see also* Kathleen Epstein, Julia H. Haggerty & Hannah Gosnell, *With, Not for, Money: Ranch Management Trajectories of the Super-Rich in Greater Yellowstone*, 112 ANNALS AM. ASS'N GEOGRAPHERS 432 (2021) (discussing the social and ecological implications of the recent growth in ranch ownership by high-net-worth individuals).

<sup>146</sup> For a discussion of the controversies associated with large-scale acquisitions of rural lands and federal leases for conservation purposes in the context of the American Prairie, *see, e.g.*, Regan, *Where the Buffalo Roam*, *supra* note 142.

<sup>147</sup> *See* Swette & Lambin, *supra* note 8, at 2 (“The role of working landscapes in supporting rural prosperity, protecting against habitat fragmentation, and providing natural climate solutions could be undermined by a loss of ranching. Researchers speculate about the possibility of a tipping point, such that once a critical mass of ranches is lost, ranching is no longer viable because of the loss of key infrastructure and community benefits provided by a network of ranches.”).

<sup>148</sup> *See* Mark Steinbach & Jack Ward Thomas, *Potential Outcomes and Consequence of a Proposed Grazing Permit Buyout Program*, 60 RANGELAND ECOLOGY & MGMT. 36, 42 (2007).

<sup>149</sup> *See* Press Release, Pub. Lands Council, Ranchers Urge Congress to Oppose Voluntary Grazing Permit Retirement Act (Jan. 31, 2020), <https://publiclandscouncil.org/2020/01/31/ranchers-urge-congress-to-oppose-voluntary-grazing-permit-retirement-act/> [<https://perma.cc/K5P3-EGH5>] (“‘Grazing is an essential and irreplaceable tool for federal land managers,’ said fifth-generation Oregon rancher and PLC President Bob Skinner. ‘Depriving them of this tool—the oldest of the multiple-uses—in order to placate the unfounded demands of radical environmentalists would be detrimental to the overall health of these landscapes and is entirely inconsistent with the original intent of both the Taylor Grazing Act and the Federal Lands Policy and Management Act.’”).

<sup>150</sup> *See, e.g.*, Derek W. Bailey, Jeffrey C. Mosley, Richard E. Estell, Andres F. Cibils, Marc Horney, John R. Hendrickson, John W. Walker, Karen L. Launchbaugh & Elizabeth A. Burritt, *Synthesis Paper: Targeted Livestock Grazing: Prescription for Healthy Rangelands*, 72 RANGELAND ECOLOGY & MGMT. 865, 865–66 (2019).

contribute to the subdivision of large working ranches, they could have negative effects on wildlife habitat, open space, and other natural amenities.<sup>151</sup>

Some, including federal agency officials, have also suggested that arrangements between ranchers and conservation groups intrude on agencies' authority to manage federal lands, although this concern appears primarily limited to buyouts that purport to be permanent.<sup>152</sup> An example of this type of concern was expressed by a representative of the National Cattlemen's Beef Association in 2020 after legislation was introduced in Congress that would have facilitated voluntary, permanent grazing-permit retirements; at the time, he told a public radio station reporter, "I don't think that federal land management policy should be taken away from those line officers and range conservationists at the BLM and Forest Service in favor of third-party entities with their own agenda."<sup>153</sup>

Likewise, under the Trump Administration, the Forest Service proposed adopting an official policy regarding buyouts that stated that "[f]inancial arrangements made between third parties purporting to determine the status and management of [National Forest System] lands will not be acknowledged, sanctioned, or accepted by the Forest Service."<sup>154</sup> The agency indicated that buyouts undermine the Forest Service's management authority and emphasized that third-party groups have no legal authority to manage national forest system lands.<sup>155</sup>

Relatedly, ranchers have asserted it would be unfair to allow buyouts to permanently remove livestock from federal grazing allotments,<sup>156</sup> while ranchers'

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<sup>151</sup> See, e.g., Claire A. Runge, Andrew J. Plantinga, Ashley E. Larsen, David E. Naugle, Kate J. Helmstedt, Stephen Polasky, J. Patrick Donnelly, Joseph T. Smith, Tyler J. Lark & Joshua L. Lawler et al., *Unintended Habitat Loss on Private Land from Grazing Restrictions on Public Rangelands*, 56 J. APPLIED ECOLOGY 52, 58–60 (2019) (finding that restricting grazing on federal lands can have the unintended consequence of increasing the conversion of private rangeland to cropland, causing greater land fragmentation of sage-grouse habitat). See also DREW E. BENNETT & TESSA WITTMAN, U. WYO. RUCKELSHAUS INSTITUTE OF ENV'T & NAT. RES., COWS OR CONDOS: RANCHER AND LAND-USE OUTCOMES FOLLOWING COMPENSATED FEDERAL GRAZING PERMIT WAIVERS 15 (Aug. 2022), [http://www.uwyo.edu/haub/ruckelshaus-institute/publications/\\_files/cvc-report.pdf](http://www.uwyo.edu/haub/ruckelshaus-institute/publications/_files/cvc-report.pdf) (finding no evidence that federal grazing permit retirements are driving subdivision of private lands).

<sup>152</sup> See, e.g., DIRECTIVES UPDATES, *supra* note 141.

<sup>153</sup> Nate Hegyi, *Proposed Law Would Make It Easier to Remove Livestock from Public Lands*, KUNC (Jan. 31, 2020, 5:38 PM), <https://www.kunc.org/2020-01-31/proposed-law-would-make-it-easier-to-remove-livestock-from-public-lands> [<https://perma.cc/NRY9-TCFZ>].

<sup>154</sup> See FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE HANDBOOK 2209.13–GRAZING PERMIT ADMINISTRATION HANDBOOK § 13.7 (2020), <https://www.fs.fed.us/range-land-management/documents/directives/FSH2209-13-CH10-Proposed.pdf> [<https://perma.cc/2U46-FQBZ>] [hereinafter Proposed FSH 2209.13].

<sup>155</sup> *Id.*

<sup>156</sup> Cf. April Reese, *The Big Buyout*, High Country News (April 4, 2005), <https://www.hcn.org/issues/295/15398> [<https://perma.cc/T8G2-WYEE>] (noting opposition from cattlemen's associations to bills that would allow buyouts of federal grazing permits, and quoting one rancher as noting that "ranchers don't want this permanency . . . . Once it's gone, it's gone").

grazing permits do not similarly confer a permanent or secure right to graze livestock.<sup>157</sup> As discussed above, ranchers are granted temporary, ten-year grazing privileges, which can be reduced or revoked by federal agencies.<sup>158</sup> Thus, in this way, authorizing voluntary buyouts (if permanent) may unfairly tip the scales in favor of conservation interests, who would be able to remove livestock from allotments in perpetuity, while still only providing weak or insecure grazing rights to ranchers.<sup>159</sup>

Finally, others portray grazing permit buyouts as a tool that environmentalists use only after they have already weakened ranchers' federal grazing privileges through environmental litigation and regulations.<sup>160</sup> In this view, permit values are already significantly diminished from legal challenges and other administrative efforts to undermine grazing rights, and buyouts are often a last-ditch effort to remove livestock from federal rangelands, not a good-faith, market-based tool to resolve conflicting demands.

These concerns have likely hindered U.S. grazing policy from evolving in ways that can more directly accommodate environmental values through market exchange. In addition to the legal barriers to voluntary conservation on federal grazing lands described below, this has maintained a status quo in which conflicting demands over the use of public rangelands are pitted against each other in legal or political arenas rather than resolved cooperatively through market exchanges.

### III. BARRIERS TO MARKETS FOR VOLUNTARY CONSERVATION ON FEDERAL GRAZING LANDS

Currently, the U.S. grazing institution erects substantial legal barriers to markets for voluntary conservation on federal grazing lands, including (A) the requirement to own or control base property; (B) the requirement of stock ownership; (C) the requirement to actively use the permit for grazing; and (D) the lack of agency permanent retirement authority. Each barrier is discussed below.

#### *A. Ownership or Control of Base Property*

Both the BLM and the Forest Service require that grazing permittees own "base property," usually a farm or ranch near the federal allotment that serves as a base of operations. In the desert southwest, a water right is often the base property used to

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<sup>157</sup> 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).

<sup>158</sup> See *supra* Part II.

<sup>159</sup> *Id.*

<sup>160</sup> For one example of this view, see Myron Ebell, Opinion, *Ranchers Harassed Off Their Land*, WALL ST. J. (Apr. 28, 2014, 3:42 PM), <https://www.wsj.com/articles/SB10001424052702304518704579522022773686390> [<https://perma.cc/QYM4-VNCS>].

obtain a grazing permit.<sup>161</sup> These requirements are a barrier to at least some types of market agreements for voluntary conservation on federal grazing lands.

By regulation, the Forest Service has had a base property requirement since 1905, which was originally intended to prevent “the herds of nonresidents,” namely Texas cattle barons, from destroying the pasture.<sup>162</sup> At the time, President Theodore Roosevelt believed the policy adopted by the Forest Service was “among the most potent influences in favor of the actual home-maker.”<sup>163</sup> Today, Forest Service regulations limit grazing permits “to persons who own livestock to be grazed and such base property as may be required.”<sup>164</sup> These regulations further define base property as “land and improvements owned and used by the permittee for a farm or ranch operation and specifically designated by him to qualify for a term grazing permit.”<sup>165</sup> The Forest Service Handbook elaborates that base property should “produce a part of the annual forage crop needed to support the permitted livestock over a yearlong period as determined by the Regional Forester.”<sup>166</sup>

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<sup>161</sup> See FOREST SERV. & BUREAU OF LAND MGMT., GRAZING ADMINISTRATION REQUIREMENTS AND PROCESSES 2, <https://www.fs.fed.us/rangeland-management/documents/grazing/BLMGrazingAdministrationRequirementsProcesses201708.pdf> [<https://perma.cc/7ACW-9EWA>] (last visited Aug. 7, 2022).

<sup>162</sup> ROWLEY, *supra* note 36, at 62

<sup>163</sup> *Id.* (quoting Letter from Theodore Roosevelt, President, U.S., to James Wilson, Sec’y of Agric., Dep’t of Agric. (Dec. 21, 1905)).

<sup>164</sup> 36 C.F.R. § 222.3(c)(1)(i) (“Except as provided for by the Chief, Forest Service, paid term permits will be issued to persons who own livestock to be grazed and such base property as may be required, provided the land is determined to be available for grazing purposes by the Chief, Forest Service, and the capacity exists to graze specified numbers of animals.”).

<sup>165</sup> *Id.* § 222.1(b)(3). The Forest Service grazing regulations note that “if a permittee chooses to dispose of all or part of his base property or permitted livestock (not under approved nonuse) but does not choose to waive his term permit, the Forest Supervisor will give written notice that he no longer is qualified to hold a permit, provide he is given up to one year to reestablish his qualifications before cancellation action is final.” *Id.* § 222.3(c)(1)(v).

<sup>166</sup> FOREST SERV., U.S. DEP’T OF AGRIC., FOREST SERVICE HANDBOOK 2209.13—GRAZING PERMIT ADMINISTRATION HANDBOOK, 11-15 § 12.21 (1992), <https://www.fs.usda.gov/im/directives/dughtml/fsh.html> [<https://perma.cc/V5A8-PE4Y>] [hereinafter FSH 2209.13]. [Eds. note: Because the Forest Service website contains only links to word documents, the Permalink appended links to a PDF compiling the sections of the FSH cited in this article, as they existed in September 2022]. The Handbook further directs Forest Supervisors to develop base property requirements for each National Forest after:

- a. Consult[ing] with livestock operators concerning common or locally accepted practices.
- b. Consider[ing] the dependency of local livestock operators on National Forest System lands.
- c. Consider[ing] how the base property blends into the livestock operation.
- d. Consider[ing] the needs of permittees.

Modeled on Forest Service grazing regulations, the TGA incorporated the base property requirement and allowed the Secretary to issue grazing permits only to “bona fide settlers, residents, and other stock owners.”<sup>167</sup> The BLM’s grazing regulations implementing the TGA expand upon this requirement, adding that a grazing permit holder “must own or control land or water base property.”<sup>168</sup> The BLM regulations define base property as “(1) [l]and that has the capability to produce crops that can be used to support authorized livestock grazing for a specified period of the year, or (2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing.”<sup>169</sup>

Base property requirements artificially limit the market for grazing permits to those who own property near the allotment or can afford to also purchase the current permittee’s private land or water right. When a rancher wishes to sell their permit to a conservation group, they may also have to sell their private property, which can be a difficult choice depending on how long the property has been in their family and how it has been used. The base property requirement also increases the cost for conservation groups to participate in such agreements by requiring them to purchase and hold land that may not have much value to them.<sup>170</sup>

### B. Stock Ownership Requirement

The Forest Service and BLM also limit grazing permits to owners of livestock. This too can be a barrier for some voluntary agreements to conserve federal grazing land, such as when conservation groups wish to acquire a permit with the intent not to graze.

Forest Service regulations limit permits to those who “own livestock to be grazed.”<sup>171</sup> However, the Handbook notes that in some circumstances, “it may be desirable to modify livestock ownership requirements to encourage interest and continuity in range livestock operations and to provide grazing opportunity for sons or daughters of individuals grazing livestock on the National Forest System.”<sup>172</sup>

The TGA authorizes the BLM to issue grazing permits only to a settler, a resident, or “*other stock owners*.”<sup>173</sup> By implication, this limits permits to those who

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e. Where leasing of ranch lands is a common local practice, giv[ing] careful consideration to how large the ownership requirement is in relation to the total forage needed.

*Id.*

<sup>167</sup> 43 U.S.C. § 315b.

<sup>168</sup> 43 C.F.R. § 4110.1(a).

<sup>169</sup> *Id.* § 4100.0-5.

<sup>170</sup> See Leonard & Regan, *Legal and Institutional Barriers*, *supra* note 16, at 150.

<sup>171</sup> 36 C.F.R. § 222.3 (c)(1)(i). The Forest Service Handbook further requires that “permit holder[s] must own livestock grazed on the National Forest System under grazing permits with term status. . . .” FSH 2209.13, *supra* note 166, at § 12.22.

<sup>172</sup> FSH 2209.13, *supra* note 166, at § 12.22.

<sup>173</sup> 43 U.S.C. § 315b (emphasis added).

own livestock. In 1936, the Secretary of the Interior issued regulations confirming this reading of the statute.<sup>174</sup> In 1942, the Secretary of the Interior went further, issuing a regulation limiting eligibility to those “engaged in the livestock business.”<sup>175</sup> That regulation remained in place until 1995, when the BLM repealed the regulation requiring livestock ownership and that a permittee be “engaged in the livestock business.”<sup>176</sup> This repeal was challenged by the livestock industry and was ultimately upheld by the U.S. Supreme Court in *Public Lands Council v. Babbitt*.<sup>177</sup> In that case, the Supreme Court held that the TGA limits grazing permits to owners of livestock, but not necessarily those in the livestock business, and that BLM regulations do not need to restate all statutory requirements to be lawful.<sup>178</sup> Thus, any conservation group interested in purchasing a grazing permit from a willing seller must also acquire livestock to remain eligible to hold the permit.

Depending on the conservation goal being pursued, the impact of this barrier can vary. In eastern Montana, for instance, American Prairie purchases private ranchlands and associated grazing permits with the aim of restoring a large prairie ecosystem and the wildlife that depend on it.<sup>179</sup> Rather than forgoing livestock grazing under its permits, the organization seeks to convert the permits from one type of livestock (cattle) to another (bison) that it believes would better help to restore the ecosystem.<sup>180</sup> In other cases, owning and grazing livestock may be inconsistent with a conservation group’s objectives, making the livestock requirement a more meaningful barrier. This barrier, however, is not necessarily a high one, as the Tenth Circuit has previously held that ownership of just four stray cattle is sufficient evidence of livestock ownership to obtain a grazing permit from the BLM.<sup>181</sup>

### C. Substantial Use Requirements

Once a permit is granted, BLM regulations and Forest Service regulations require that the grazing unit actually be used for grazing, creating what, in effect, is a “use it or lose it” requirement.<sup>182</sup> This means that if a rancher and conservation group agree to reduce or forego grazing on an allotment to achieve a desired conservation outcome, they risk having the relevant agency cancel the permit in

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<sup>174</sup> *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 745 (2000).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 746; see also Leonard & Regan, *Legal and Institutional Barriers*, *supra* note 16, at 149 (noting the grazing requirement is a “use-it-or-lose-it” policy).

<sup>179</sup> See Huffman, *supra* note 130, at 36.

<sup>180</sup> *Id.*

<sup>181</sup> *Stewart v. Kempthorne*, 553 F.3d 1245, 1252 (10th Cir. 2009) (reaching its holding after finding that Grand Canyon Trust/Canyonlands acquired the cattle after agreeing to pay the BLM trespass fees of a rancher they bought a grazing permit from in exchange for the ownership of the stray cattle).

<sup>182</sup> *Id.* at 1253.

whole or in part, the agency reallocating forage to another permittee, and the purposes of their agreement frustrated.<sup>183</sup>

BLM regulations state that a permittee violates their grazing permit if they fail to make “substantial grazing use” for two or more years.<sup>184</sup> These grazing-use requirements also mean that grazing permits need to be used at or near the maximum level authorized in the terms and conditions of the permit or the remaining unused portion of the permit may be transferred to another qualifying rancher who will make use of the permit.<sup>185</sup> In 1995, the BLM revised its grazing regulations in an attempt to reduce this legal barrier to conservation use of grazing permits. The Clinton Administration reform added “conservation use” as a permissible use of a grazing permit.<sup>186</sup> The revised regulation defined the term “grazing permit” to include “all authorized use including livestock grazing, suspended use, and conservation use.”<sup>187</sup> Conservation use itself was defined as “an activity, excluding livestock grazing, on all or a portion of an allotment” for the purpose of “[p]rotecting the land and its resources . . . [, i]mproving rangeland conditions[,] or [e]nhancing resource values . . . .”<sup>188</sup> Ten-year conservation use permits were to be voluntary and initiated at the request of the permittee.<sup>189</sup>

The 1995 regulations were challenged by the livestock industry, which alleged BLM exceeded its authority under the TGA and FLPMA by authorizing conservation use grazing permits.<sup>190</sup> In *Public Lands Council v. Babbitt*, the Tenth Circuit agreed with the industry.<sup>191</sup> Citing the language in the TGA that authorizes the Secretary “to issue or cause to be issued permits to graze livestock” and similar language in FLPMA and PRIA, the court held that a permit expressly “excluding livestock grazing” is not a grazing permit authorized by the TGA, FLPMA, or PRIA.<sup>192</sup>

After the decision in *Public Lands Council v. Babbitt*, the BLM issued Instructional Memorandum No. 2009-057 (IM), clarifying when applications for nonuse of a grazing permit may be supported.<sup>193</sup> In the IM, the BLM notes that

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<sup>183</sup> Leonard & Regan, *Legal and Institutional Barriers*, *supra* note 16, at 149.

<sup>184</sup> 43 C.F.R. § 4140.1(a)(2).

<sup>185</sup> *Id.* § 4140.1.

<sup>186</sup> See Department Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration—Exclusive of Alaska, 60 Fed. Reg. 9894, 9961 (Feb. 22, 1995) (to be codified at 43 C.F.R. § 4100.0-5).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 9966 (to be codified at 43 C.F.R. § 4130.2(g)(1)).

<sup>190</sup> *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1292 (10th Cir. 1999).

<sup>191</sup> *Id.* at 1307–08.

<sup>192</sup> *Id.* at 1307. The federal government appealed the Tenth Circuit’s decision to the U.S. Supreme Court but did not seek review of this aspect of the decision. See *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 747 (2000). Thus, the Tenth Circuit’s decision on this issue stands, at least within the jurisdiction of that court.

<sup>193</sup> Memorandum from BLM Assistant Dir. of Renewable Res. & Planning to All State Dir., Nonuse of Grazing Permits or Leases (Jan. 12, 2009), <https://www.blm.gov/policy/im-2009-057> [<https://perma.cc/K232-R3PB>] [hereinafter BLM Memorandum].



permittees may apply to not use all or a portion of their permit or lease, but only under two bases, including “(1) Nonuse requested by the permittee or lessee because of personal or business reasons; and (2) Nonuse requested by the permittee or lessee for purposes of conservation and protection of the public land.”<sup>194</sup> The IM further notes that while the Tenth Circuit invalidated the regulatory provisions that allowed the BLM to issue a “conservation use” permit for a multi-year term of up to ten years, the court did note that the BLM may approve nonuse on an annual basis if justified based on the current year’s rangeland conditions “even when that temporary non-use happens to last the entire duration of the permit.”<sup>195</sup> Thus the BLM does have authority to process a nonuse application on an annual basis when the reason offered is for conservation and protection of the federal lands; this is called “Conservation and Protection Nonuse” or C&P Nonuse.<sup>196</sup> However, the IM further notes that C&P Nonuse applications should not be used as a surrogate method to implement a long-term grazing reduction or rest on allotments.<sup>197</sup> Instead, the BLM should adjust permitted grazing use or amend the land use plan to provide that the applicable area is no longer available for grazing.<sup>198</sup> Thus, under the BLM’s substantial use requirement, a permittee can only reduce grazing levels temporarily and with the BLM’s permission.

The Forest Service does not have the same storied litigation history regarding attempted conservation use of grazing permits as the BLM, nor is it bound by the TGA. Nevertheless, the Forest Service’s regulations require that permittees use substantially all of the grazing opportunity provided by a grazing permit. The Forest Service Manual specifically notes that a permittee “must graze at least 90 percent of the number of livestock under term permit each year unless the Forest Supervisor approves nonuse.”<sup>199</sup> And the Handbook notes that “[p]ermits may be canceled in whole or in part if the term permit holder fails to use range without obtaining approval for nonuse.”<sup>200</sup> A permittee can seek approval from the Forest Service for nonuse of a grazing permit in whole or in part for permittee convenience, resource protection or development, and range research.<sup>201</sup> But if the permittee “[f]ails to restock the allotted range after the full extent of approved personal convenience non-

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<sup>194</sup> *Id.*

<sup>195</sup> *Pub. Lands Council*, 167 F.3d at 1308.

<sup>196</sup> BLM Memorandum, *supra* note 193.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> FOREST SERV., U.S. DEP’T OF AGRIC., FOREST SERVICE MANUAL § 2231.7 (2005), [https://www.fs.usda.gov/cgi-bin/Directives/get\\_dirs/fsm?2200!..](https://www.fs.usda.gov/cgi-bin/Directives/get_dirs/fsm?2200!..) [<https://perma.cc/3BFV-EHXP>].

<sup>200</sup> FSH 2209.13, *supra* note 166, at § 16.21.

<sup>201</sup> *Id.* § 17. Nonuse approvals for personal convenience are typically granted for one year, and only if “circumstances are unusual.” *Id.* § 17.1. Nonuse approval for resource protection or development shall not exceed 5 years except when long-term development programs requiring longer periods have been agreed upon. *Id.* § 17.2. Nonuse approval for research is granted in the same manner as permits for nonuse for range protection or development. *Id.* § 17.3.

use has been exhausted[,]” the Forest Service’s substantial use requirement has been violated, and the permit can be canceled.<sup>202</sup>

These substantial use requirements significantly restrict markets for voluntary conservation of federal grazing lands by taking a key factor—the extent of grazing—off the table. Ranchers and conservation groups can ask the relevant agency to approve reduced grazing, but there is no guarantee that it will do so. And, even if the agency complies, the approved reduced use or nonuse will be only temporary.

#### *D. The Impermanence of Grazing Permit Decisions*

Another obstacle to voluntary conservation arrangements on federal grazing lands is the impermanence of grazing rights. As discussed in more detail above, Congress has been clear that grazing permits confer no property rights or similar interests and, thus, are entitled to none of the protections that would ordinarily accompany such rights.<sup>203</sup> Instead, whether to graze a particular parcel and how much to graze are questions left to the discretion of the relevant agency.<sup>204</sup> Thus, a conservation group acquiring a federal grazing permit with the intent to end grazing has no assurance that the agency will honor that wish.

Under the TGA and FLPMA, the Secretary of the Interior has the authority to “reclassify and withdraw rangeland from grazing use” and (since the passage of FLPMA) to “use land use plans to determine the amount of permissible grazing” and where that grazing should occur.<sup>205</sup> Thus, if a BLM Field Office Manager wants to retire an allotment from grazing, they must amend the applicable land-use plan and provide sufficient justification for the decision, such as resource damage or chronic livestock-wildlife conflict.

Consistent with NFMA, Forest Service regulations similarly require that “[f]orage producing National Forest System lands will be managed for livestock grazing and the allotment plans will be prepared consistent with land management plans.”<sup>206</sup> Thus, decisions to retire a Forest Service allotment from grazing must also be made via an amendment to the applicable land-use plan. The Forest Service has also noted that “[i]f a permittee waives their grazing privileges back to the Forest Service, there can be no guarantee or agreement, whether written or verbal,

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<sup>202</sup> 36 C.F.R. § 222.4(a)(2)(iv).

<sup>203</sup> 43 U.S.C. § 315b. *See supra* notes 46–48 and accompanying text.

<sup>204</sup> *See Diamond Ring Ranch v. Morton*, 531 F.2d 1397, 1402 (10th Cir. 1976) (exemplifying the BLM’s authority to modify, suspend, or revoke grazing permits for noncompliance with the TGA or with permit terms is an inherent part of the power to issue such permits).

<sup>205</sup> *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 742–44 (2000). When contemplating the importance of land use planning to grazing decisions, Professor George Coggins has stated that FLPMA’s emphasis on the importance of land use planning suggests Congress “intended planning to be the centerpiece of future rangeland management” and “binding on all subsequent multiple use decisions.” George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA and the Multiple Use Mandate*, 14 ENV’T L. 1, 15 (1983).

<sup>206</sup> 36 C.F.R. § 222.2(c).

regarding waived grazing capacity allocation, based upon buyout agreements between permittees, conservation groups, or other outside parties.”<sup>207</sup> Instead, “[g]razing capacity allocations will be determined through the NEPA process, in consideration of rangeland soil, wildlife, watershed, fisheries, water quality, and other resource conditions.”<sup>208</sup>

Even when an agency amends a land-use plan to remove the area from grazing availability, there is no guarantee that a future amendment to the land-use plan won’t reverse that decision and once again make the area available for livestock grazing.<sup>209</sup> Only Congress has the power to more permanently retire grazing permits or to grant that authority to the BLM or Forest Service, an authority it has used occasionally to facilitate voluntary grazing retirements of existing permits in national parks, national monuments, and newly designated wilderness.<sup>210</sup>

Thus, voluntary buyouts are negotiated under substantial uncertainty and, ultimately, may be only temporary. The February 2020 decision by the BLM to re-issue grazing leases in the Grand Staircase-Escalante National Monument in Utah, after those leases had been bought out in the late 1990s by the Grand Canyon Trust, illustrates the tenuousness of this approach.<sup>211</sup> Likewise, the Bridger-Teton National Forest has recently proposed to restock grazing leases in the Upper Green River area in Wyoming that were previously bought out by the National Wildlife Federation.<sup>212</sup>

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<sup>207</sup> Email from Ralph Giffen, Forest Service Assistant Dir. of Rangeland Mgmt. to Terry Padilla, Thomas Hilken, Tom McClure, Barry Imler (Apr. 3, 2014, 1:53 PM) (on file with the authors). These policies were also included as “existing policy” in the Forest Service’s 2020 Proposed Amendment to the Grazing Management Section of its Handbook. *See* Proposed FSH 2209.13, *supra* note 154, at § 13.7.

<sup>208</sup> Proposed FSH 2209.13, *supra* note 154, at § 13.7 (citing 36 C.F.R. § 222.2(c)).

<sup>209</sup> *See, e.g.*, Aaron Paul, *The Unwisdom of Turning Canyon Country Back into Cattle Country*, GRAND CANYON TRUST (Mar. 3, 2020), <https://www.grandcanyontrust.org/blog/unwisdom-turning-canyon-country-back-cattle-country> [<https://perma.cc/MU6Z-T323>].

<sup>210</sup> *See, e.g.*, Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (providing for over permanent grazing retirement on 2 million acres in and near Oregon’s Cascade-Siskiyou National Monument and in six new wilderness areas in Idaho’s Owyhee Canyonlands); Sawtooth National Recreation Area and Jerry Peak Wilderness Additions Act of 2015, Pub. L. No. 114-46, 129 Stat. 476 (authorizing the USDA to accept the donation of any valid existing leases or permits authorizing grazing on federal lands within the Boulder White Cloud Grazing Area); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 319, 110 Stat. 1321 (codified as amended at 16 U.S.C. § 410mm-1(f)(2)) (amending the Great Basin National Park Organic Act and allowing for the donation of grazing leases); Arches National Park Expansion Act of 1998, Pub. L. No. 105-329, § 1, 112 Stat. 3060 (codified as amended at 16 U.S.C. § 272(a)(2)) (adding Lost Spring Canyon to Arches National Park and giving the NPS authority to permanently retire a grazing lease in the area).

<sup>211</sup> Leshy, *supra* note 96.

<sup>212</sup> The Forest Service proposes to allow neighboring permittees to graze livestock on the previously bought-out allotments without increasing the number of permitted livestock on the range, a change which the livestock industry has suggested could reduce livestock-grizzly conflicts in the area but that conservation organizations counter would frustrate the

This uncertainty likely harms both ranchers and conservation groups, as conservation groups may reduce the amount they offer for a permit based on the risk that their intentions for it may later be foiled.

These legal barriers to voluntary conservation, while deeply rooted in the foundations of the U.S. grazing policy, are ripe for reconsideration in light of new environmental demands, growing acrimony over federal land-use decisions, and increased interest among conservationists in market approaches. Reforming federal grazing policy to facilitate voluntary markets for conservation would require several statutory and regulatory changes. To be successful, these reforms could take a variety of forms, discussed below, while still retaining the basic longstanding structure and form of the existing U.S. grazing institution.

#### IV. POTENTIAL POLICY PATHWAYS

Markets for voluntary conservation on federal grazing lands hold substantial promise for reducing conflict over the federal range.<sup>213</sup> Fully realizing this promise, however, requires policy reforms to facilitate negotiation between ranchers and conservation groups and the flexibility to tailor solutions to their particular needs.

Below, we consider various policy pathways that could facilitate markets for voluntary conservation on federal grazing lands. Because the obstacles are a mix of statutory and regulatory restrictions, we analyze both (A) administrative reforms that could be implemented by the BLM and Forest Service without further legislation (although Congress could, of course, enact these reforms also) and (B) legislative reforms that would require congressional action. While the administrative reforms are perhaps easier to implement since they do not require new legislation, they are also more constrained because they must be consistent with existing statutes and they are more vulnerable to reversal by future administrations.

##### *A. Administrative Pathways*

###### *1. Rescind Substantial Grazing Use Regulations*

Perhaps the most straightforward administrative option is for the BLM and Forest Service to repeal regulations imposing substantial grazing use requirements on federal grazing permits. Rescinding both agencies' use requirements so that grazing permits established only an upper limit for grazing but not a lower limit would give ranchers and conservation groups considerably greater flexibility to

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earlier buyouts and create new conflicts. See Angus M. Thuermer, Jr., *Grizzly Conflicts Central to New Upper Green River Grazing Debate*, WyoFile (July 6, 2021), <https://wyofile.com/grizzly-conflicts-central-to-new-upper-green-river-grazing-debate/> [https://perma.cc/Q4D2-PAFT].

<sup>213</sup> See Leonard et al., *Allow "Nonuse Rights," supra* note 16 (making the case for reforms that would facilitate environmental markets to address a variety of natural resource conflicts).

negotiate whether grazing occurs on an allotment, when, and at what levels.<sup>214</sup> Under this approach, a permit would only be canceled if the permittee failed to pay required fees, harmed public resources, or otherwise violated the terms of the permit.<sup>215</sup>

This reform would empower conservation groups to create positive incentives for ranchers who reduce grazing or adopt desired conservation practices. Generally, ranchers and conservation groups would be free to negotiate limits on grazing to address a wide variety of conflicts, such as riparian areas during a critical wildlife nesting, migration corridors, livestock-grizzly conflicts, or disease transmission risks.

While such arrangements may lack the semi-permanence of a buyout, they would have lower upfront costs because the conservation group would not have to acquire a base property or livestock.<sup>216</sup> Such solutions could also be more adaptable, allowing the conservation group to reallocate its resources as its priorities for different areas and conservation practices change. Further, reductions in livestock use may be less likely to provoke opposition from the ranching industry and rural communities since the land is not permanently removed from grazing.

Where a conservation group desires greater long-term certainty, rescission of the substantial use requirement would allow the group to acquire and hold the grazing permit even if it chooses not to graze. Instead of risking cancellation of the permit and reallocation of forage to someone else, the group would be eligible to renew the permit and have “first priority” for doing so, just like any other permittee.<sup>217</sup> Thus, this reform could potentially sidestep controversies over permanent retirements of grazing permits by allowing conservation groups to hold permits without grazing.

No statute requires the BLM and Forest Service substantial use regulations. The TGA authorizes the Secretary of the Interior to issue “permits to graze livestock.”<sup>218</sup> The ordinary meaning of “permit” in 1934 was “[w]arrant ; license ; leave ; permission”—all of which concern only the permission to take some action, not a requirement to do so.<sup>219</sup> A law license, for example, authorizes a person to practice law; it does not compel them to. This reading of the TGA is reinforced by FLPMA

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<sup>214</sup> Without substantial use requirements, several other regulations would be inoperative and could also be repealed. For instance, because a permittee could reduce grazing without seeking a temporary nonuse status, the rules governing the BLM’s determination whether to grant such status, reallocation of unused forage to others, and limiting nonuse to three years would be inoperative. *See, e.g.*, 43 C.F.R. § 4130.4.

<sup>215</sup> *Cf.* 36 C.F.R. § 222.4(a); 43 C.F.R. § 4130.3-1.

<sup>216</sup> *Cf. supra* Part III.A–B.

<sup>217</sup> *See* 43 C.F.R. § 4130.2(e). Notably, this right of first priority is not conditioned on the full utilization of forage but on the land remaining “available for domestic livestock grazing.” *Id.*

<sup>218</sup> 43 U.S.C. § 315b.

<sup>219</sup> *Permit*, in WEBSTER’S NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE 1607 (W.T. Harris & F. Sturges Allen eds. 1910); *see also Permit*, BLACK’S LAW DICTIONARY 893–94 (2d ed. 1910) (“A written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority.”).

and PRIA, which define “grazing permit and lease” as “any document *authorizing* use of public lands . . . for the purpose of grazing domestic livestock.”<sup>220</sup> Likewise, the Forest Service’s authority to issue grazing permits, which is even less restricted than BLM’s, contains no requirement that permits compel substantial use.<sup>221</sup>

For this reason, rescinding substantial grazing use requirements avoids the problem raised in *Public Lands Council v. Babbitt*.<sup>222</sup> As discussed in more detail above, in that case, the Tenth Circuit declared unlawful the BLM’s “conservation use” regulation, which provided for a grazing permit that expressly excludes livestock grazing for the entire term of the permit.<sup>223</sup> This exceeded the agency’s authority, the court reasoned, because such conservation use permits do not authorize any grazing and, therefore, are not “permits to graze livestock” authorized by the TGA.<sup>224</sup> A grazing permit that authorized grazing but did not require it would be fully consistent with these authorities. Indeed, the Tenth Circuit observed that “permittees may voluntarily reduce their grazing levels[,]” distinguishing these voluntary decisions from a permit that expressly precluded grazing.<sup>225</sup> The key difference in making such voluntary reductions permissible is that it is the permittee, not the agency, who determines whether the full grazing allocation is used.<sup>226</sup> The agency’s role in such a situation is limited to authorizing grazing under the permit, precisely what *Public Lands Council* interprets the TGA to require.

Rescinding these requirements would also not frustrate any other aspect of the relevant statutes and regulations. In 2006, the BLM suggested the contrary, implying that the substantial use requirement is necessary because FLPMA “designates livestock grazing as a ‘principal or major use’ of public lands.”<sup>227</sup> But this view is mistaken. True, FLPMA defines “principal or major use” as “limited to[] domestic livestock grazing, fish and wildlife development and utilization, mineral exploration

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<sup>220</sup> *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999) (citing 43 U.S.C. §§ 1702(p), 1902(c)) (emphasis added).

<sup>221</sup> The genesis of the Forest Service’s grazing program is the agency’s general authorization to issue rules and regulations governing use of national forests. *See* Forest Service Organic Administration Act of 1897, Pub. L. No. 55-2, 30 Stat. 11, 34 (codified as amended at 16 U.S.C. §§ 473–482, 551). Congress has subsequently limited Forest Service grazing permits to ten-year terms. *See* Granger-Thye Act of 1950, Pub. L. No. 81-478, 64 Stat. 82 (codified as amended at 16 U.S.C. § 5801).

<sup>222</sup> 167 F.3d 1287 (10th Cir. 1999).

<sup>223</sup> *Id.* at 1307.

<sup>224</sup> *Id.* (quoting 43 U.S.C. § 315b).

<sup>225</sup> *Id.* at 1308.

<sup>226</sup> Our analysis in this section appears to differ from the BLM’s reading of *Public Lands Council*. In a 2009 Instruction Memorandum, the BLM informed state directors that the conservation use regulations were no longer operative after *Public Lands Council*. Where the agency desired to reduce use for conservation purposes, according to the memo, it could do so only one year at a time. *See* BLM Memorandum, *supra* note 193.

<sup>227</sup> *Grazing Administration—Exclusive of Alaska*, 71 Fed. Reg. 39402, 39485 (July 12, 2006) (to be codified at 43 C.F.R. pts. 4100) (quoting 43 U.S.C. § 1702(l)), *invalidated by* *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011).

and production, rights-of-way, outdoor recreation, and timber production.”<sup>228</sup> However, it uses this defined phrase in only one subsection, authorizing the exclusion, or “total elimination,” of a principal or major use provided that (1) the Secretary’s decision does not purport to be permanent and (2) the decision is reported to Congress if it affects 100,000 acres or more.<sup>229</sup> Thus, this phrase is relevant only to the government’s own decisions to close an area to grazing or any other principal or major use. It is irrelevant to private, voluntary decisions about how much forage to use.

The BLM has also suggested that a prior determination that land is “chiefly valuable for grazing,” which makes the land eligible for inclusion in a grazing district, dictates that it must be grazed to the full extent authorized.<sup>230</sup> However, the BLM has subsequently—and correctly—rejected this interpretation.<sup>231</sup> The TGA allows only lands deemed chiefly valuable for grazing to be included in grazing districts.<sup>232</sup> However, this is expressly a discretionary decision; there is no requirement that such lands be added to a grazing district or be retained within it.<sup>233</sup> Nor does the statute’s text lend any support to the notion that, once land is deemed chiefly valuable for grazing, the agency must compel its use to the maximum extent permissible.

Of course, there may be situations where it is desirable to maintain a certain amount of grazing to achieve rangeland health, wildfire management, or other goals.<sup>234</sup> But this does not justify the substantial use requirements. Instead, it suggests that the relevant agency should impose minimum grazing requirements on individual permits based on the particular condition and goals of that allotment.<sup>235</sup>

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<sup>228</sup> 43 U.S.C. § 1702(l).

<sup>229</sup> 43 U.S.C. § 1712(e)(1).

<sup>230</sup> See *Pub. Lands Council*, 167 F.3d at 1308.

<sup>231</sup> Memorandum from William G. Myers III, U.S. Dep’t Interior Solicitor on Clarification of M-37008 to Assistant Secretary of Pol’y, Mgmt. & Budget, Assistant Secretary of Land & Mins. Mgmt., & Dir. of Bureau of Land Mgmt. (May 13, 2003).

<sup>232</sup> 43 U.S.C. § 315.

<sup>233</sup> Cf. John C. Yoo, *The Executive Power of Reversal*, 42 HARV. J.L. & PUB. POL’Y 59, 66–67 (2019) (noting that the discretionary power to take executive action includes the power to reverse that decision according to the same terms and process).

<sup>234</sup> See, e.g., Devii Rao, *Benefits of Cattle Grazing for Reducing Fire Fuels and Hazard*, U.C. BERKELEY RAUSSER COLLEGE OF NAT. RES. (Sept. 11, 2020), <https://nature.berkeley.edu/news/2020/09/benefits-cattle-grazing-reducing-fire-fuels-and-fire-hazard> [<https://perma.cc/DKV5-D69D>].

<sup>235</sup> Repealing these regulations should not disqualify a permit for reissuance under the existing grazing categorical exclusion from National Environmental Policy Act review. See U.S. DEP’T INTERIOR, EXISTING CATEGORICAL EXCLUSIONS 22 (2020), <https://www.doi.gov/sites/doi.gov/files/doi-and-bureau-categorical-exclusions-dec2020.pdf> [<https://perma.cc/3N7B-LPSG>]. That exclusion provides that issuance of a grazing permit is categorically excluded from NEPA if (1) the new permit is consistent with the use specified in the prior permit and (2) the land is meeting land health standards (or failing them for reasons unrelated to the permittee’s actions). *Id.* at 21. Regarding the first criteria, the

Tailoring any minimum grazing requirements in this way would have at least two salutary benefits compared to the status quo. First, minimum grazing requirements are substantially less likely to be arbitrary because imposing minimums on individual permits would require justification based on specific conditions and scientific evidence, whereas the across-the-board approach bears no relationship to such information. Second, precise minimum grazing requirements would send a useful signal to permittees and conservation organizations about areas with more or less opportunity to advance conservation goals through negotiation.

Because repealing substantial grazing use requirements would transfer some decision-making from the federal agency to permittees, it arguably reduces the agency's control over the land, a concern the Forest Service has raised in the context of third-party buyouts.<sup>236</sup> However, this objection would be weakened if the substantial use requirement were to be rescinded because the agency would retain authority to set the maximum and, if appropriate, minimum grazing requirements to manage rangeland health. Moreover, a grazing permit without a substantial use requirement would operate like many other uses of federal land. For example, when the Forest Service authorizes use of a trail, individual recreators decide whether and how much to use that trail. And when the BLM issues an oil and gas lease, the operator decides when and if to drill. In this and other contexts, the federal-land user's discretion does not raise any concern that the agency has given up its control of federal land.<sup>237</sup>

The rescission of the substantial use requirement would also benefit grazing permittees by giving them more control over their businesses.<sup>238</sup> Currently, permittees can request to reduce or suspend grazing based on financial difficulties,

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Department of the Interior has explained that a new permit is consistent with the prior permit so long as “the active use previously authorized is not exceeded.” *Id.* The Forest Service has an identical exclusion for approving its grazing permits. *See* 43 U.S.C. § 1752(h).

<sup>236</sup> *See* DIRECTIVES UPDATES, *supra* note 141 (proposing to incorporate this position in formal management directives).

<sup>237</sup> Indeed, the outcome-based grazing initiative discussed below similarly gives permittees flexibility to determine how to graze federal allotments, without any suggestion from the BLM that it sees that flexibility as depriving it of ultimate responsibility for managing federal land. *See* Press Release, U.S. Dep't Interior, BLM Offers Livestock Operators Increased Flexibility Through Outcome-based Grazing Authorizations (Sept. 22, 2017), <https://www.blm.gov/press-release/blm-offers-livestock-operators-increased-flexibility%C2%A0through-outcome-based-grazing> [<https://perma.cc/HXV9-UEDB>] [hereinafter BLM Offers Flexibility].

<sup>238</sup> *See, e.g.*, Letter from Ariz. Ass'n of Conservation Dists., Cal. Rangeland Conservation Coal., Malpai Borderlands Grp., Nat'l Ass'n of Conservation Dists., N. Am. Grouse Partnership, Nat'l Audubon Soc'y, Pheasants Forever, Pub. Lands Foundation, Quail Forever & Rocky Mountain Farmers Union et al. on Revisions to BLM Grazing Regulations to Bureau of Land Mgmt., at 2 (June 18, 2020), [https://westernlandowners.org/wp-content/uploads/2020/06/Collaborative-Letter-on-Revisions-to-BLM-Grazing-Regulations\\_vF\\_061820.pdf](https://westernlandowners.org/wp-content/uploads/2020/06/Collaborative-Letter-on-Revisions-to-BLM-Grazing-Regulations_vF_061820.pdf) [<https://perma.cc/7JW5-L23S>] (noting, generally, the benefits of providing clear regulatory permission for permittees to “consider how temporary nonuse may benefit their operations”).



temporary reductions in herd size, and other business reasons.<sup>239</sup> However, they are not entitled to make such decisions without approval from the BLM and Forest Service.<sup>240</sup> Moreover, permittees can lose their permit or part of their permit and their grazing privileges if their business circumstances require reduced use for more than a few seasons.<sup>241</sup> Without the substantial use requirement, grazing permittees would have more flexibility to adapt their use to changing circumstances.

## 2. Maximize Flexibility Under Outcome-Based Grazing Authorizations

Another administrative pathway is the Outcome-Based Grazing initiative that BLM announced in 2017.<sup>242</sup> Traditional grazing permits micromanage permittees' use of federal lands, dictating the number of animals to be grazed, type of livestock, dates of access, and where on the allotment grazing should occur. This focus on process and prescription can be suboptimal if, for instance, conditions on the allotment vary from those anticipated when the rules were set.<sup>243</sup> The Outcome-Based Grazing initiative seeks to shift the BLM's focus to ecological outcomes while giving permittees more flexibility to achieve them.<sup>244</sup> In this way, the initiative seeks to respond more quickly and effectively to changing conditions and to reward permittees for achieving predetermined goals.<sup>245</sup>

In 2018, the BLM selected eleven demonstration projects in six states to experiment with this new model.<sup>246</sup> The Deep Creek Ranch in Burley, Idaho, was chosen as one of the demonstration projects.<sup>247</sup> Previously, the ranch's permit had strict dates for when cattle had to be moved on and off different pastures.<sup>248</sup> But these rotations rarely matched conditions on the grounds, causing the permittee to move its livestock from pastures that still had excess forage to pastures that had not yet entered the growing season.<sup>249</sup> Instead of these fixed on/off dates, the permittee's

<sup>239</sup> 36 C.F.R. § 222.4(8); 43 C.F.R. § 4130.2(g).

<sup>240</sup> See sources cited *supra* note 239.

<sup>241</sup> See 43 C.F.R. § 4130.2(g).

<sup>242</sup> See BLM Offers Flexibility, *supra* note 237.

<sup>243</sup> See Gregg Simonds, *Sailing the Sagebrush Sea*, 34 PROP. & ENV'T RSCH. CTR. REPS. 30, 32 (2015), [https://www.perc.org/wp-content/uploads/2018/01/WEB-FINAL\\_PERCReports\\_Winter2015.pdf](https://www.perc.org/wp-content/uploads/2018/01/WEB-FINAL_PERCReports_Winter2015.pdf) [<https://perma.cc/G654-SMYG>] (noting that "policies that restrict the duration or season of grazing . . . can undermine the very management practices that are needed most" and that "[s]trict limits on the frequency or intensity of grazing can also hinder what we now understand to be proper rangeland management.").

<sup>244</sup> See BLM Offers Flexibility, *supra* note 237.

<sup>245</sup> See *id.*

<sup>246</sup> Press Release, U.S. Dep't Interior, BLM Announces Outcome-Based Grazing Projects for 2018 (Mar. 23, 2018), <https://www.blm.gov/press-release/blm-announces-outcome-based-grazing-projects-2018> [<https://perma.cc/R7X9-2LDY>].

<sup>247</sup> See *id.*

<sup>248</sup> *Id.*

<sup>249</sup> See *Outcome-Based Grazing Program*, PARTNERS IN THE SAGE, <https://www.partner-sinthesage.com/s/OGBA-profile-Deep-Creek-Ranch-myl3.pdf> [<https://perma.cc/9JES-MLGP>] (last visited Aug. 7, 2022).

new outcome-based grazing permit gave the ranch flexibility to adjust rotations to hit range-condition targets.<sup>250</sup>

The Outcome-Based Grazing initiative could facilitate markets for nonuse of federal grazing permits by expanding the flexibility afforded to permittees to include deciding how many livestock to graze. This would require further regulatory changes, such as excluding outcome-based grazing permits from the substantial use requirements.<sup>251</sup> This way, the agencies could experiment with these reforms in a subset of closely watched permits and, thereby, evaluate the potential effects of wholesale reform.

Conservation organizations could also benefit from the increased flexibility by influencing how permittees achieve or exceed rangeland health goals. A conservation group could, for instance, provide an incentive for permittees to adjust the timing, location, or number of animals grazed to accommodate wildlife migration or improve a watershed.

Such a model also offers a way to address potential concerns over the effect of nonuse on rangeland health and overall federal land management. By defining certain ecological outcomes that must be met regardless of whether the permit is used for livestock grazing or not, federal managers can ensure overall rangeland health is maintained. In this way, permittees can have greater flexibility over the amount and timing of grazing as long as prescribed land management outcomes are achieved.

While the lessons learned from the initial eleven demonstration projects are being incorporated into the BLM's ongoing regulatory revision process, outcome-based grazing remains an experiment.<sup>252</sup> Success depends on the ability of BLM managers to develop, monitor, and enforce outcome objectives. It will also require navigating other environmental laws and litigation.<sup>253</sup> However, the current

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<sup>250</sup> See Bureau of Land Mgmt. in Idaho, *Outcome Based Grazing*, YOUTUBE (Apr. 22, 2019), <https://youtu.be/wo35rmT9nCc> [<https://perma.cc/Z5FH-NH99>].

<sup>251</sup> The Forest Service's Forest Stewardship Contracting program could be an informative model to draw from. The stewardship contracting program addresses restoration on Forest System lands by allowing contracts (often signed with community partners) that exchange the removal of forest products for restoration services. See FOREST SERV., U.S. DEP'T OF AGRIC., STEWARDSHIP CONTRACTING: BASIC STEWARDSHIP CONTRACTING CONCEPTS (Aug. 2009), [https://www.fs.fed.us/restoration/documents/stewardship/stewardship\\_brochure.pdf](https://www.fs.fed.us/restoration/documents/stewardship/stewardship_brochure.pdf) [<https://perma.cc/5PTR-2AZ9>].

<sup>252</sup> See Press Release, U.S. Dep't Interior, BLM Takes Steps to Improve Administration of Grazing Regulations on Public Lands (Jan. 17, 2020), <https://www.blm.gov/press-release/blm-takes-steps-improve-administration-grazing-regulations-public-lands> [<https://perma.cc/5H22-4RDB>].

<sup>253</sup> See, e.g., *Lawsuit Filed Against BLM over New Grazing Program*, NORTHERN AG NETWORK (Oct. 1, 2019), <https://northernag.net/lawsuit-filed-against-blm-over-new-grazing-program/> [<https://perma.cc/EMG9-59YA>]. On March 19, 2021, Judge Sweitzer, an administrative law judge with the Interior Board of Land Appeals, found that the BLM failed to adequately examine in a NEPA document the potential harm of utilizing the Outcome Based Grazing program to expand grazing into sage grouse habitat in Nevada. Wildlands

administration has expressed its support for the program, suggesting that it will get a fair chance to succeed.<sup>254</sup>

### 3. *Use Exchange Authorities to Facilitate Voluntary Conservation Transactions*

Another option to facilitate markets for voluntary conservation would be for the BLM and Forest Service to use their authority to exchange federal land for private land. FLPMA authorizes both agencies to exchange lands if they are of equal value and the exchange would be in the public interest.<sup>255</sup> The agencies frequently exercise this authority to consolidate scattered landholdings and, thereby, improve the management and use of the resulting larger block of federal land.<sup>256</sup> They also use the authority to dispose of relatively low-value (to the agencies) land—often lacking legal public access—for land elsewhere that is more environmentally sensitive, useful for public recreation, or suitable for some other public purpose.<sup>257</sup> From 2006 to 2015, the BLM exchanged 159,130 acres of federal land for 193,663 acres of private land.<sup>258</sup>

Exchanges could facilitate voluntary conservation by allowing a conservation group to acquire the federal land they wish to remove from grazing in exchange for private grazing lands elsewhere that are potentially more valuable. This may seem a non-intuitive approach since it involves public-land supporters removing ecologically sensitive lands from the public domain. Moreover, the public may be concerned about these transfers, especially if they become common and the

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Def., NV-010-21-01 (IBLA Mar. 19, 2021). This decision is likely to be appealed to a federal district court. It is also not yet clear if the current administration will continue to authorize grazing permits under the Outcome-Based Grazing program. See Steve Davies, *Nevada Grazing Permit Decision Has Ranchers Concerned*, AGRIPULSE (Apr. 7, 2021, 5:33 AM), <https://www.agri-pulse.com/articles/15642-nevada-grazing-permit-decision-has-ranchers-concerned> [<https://perma.cc/C8FP-WSD8>].

<sup>254</sup> See David McCumber, *Montana's Tracy Stone-Manning: BLM Director Has Lots of Acres and a Big To-Do List*, MONT. STANDARD (Jan. 3, 2022), [https://mtstandard.com/news/state-and-regional/montanas-tracy-stone-manning-blm-director-has-lots-of-acres-and-a-big-to-do/article\\_310fbffb-dd41-5655-add9-1a4972af3c7f.html](https://mtstandard.com/news/state-and-regional/montanas-tracy-stone-manning-blm-director-has-lots-of-acres-and-a-big-to-do/article_310fbffb-dd41-5655-add9-1a4972af3c7f.html) [<https://perma.cc/HVH4-ATKY>] (reporting a comment from an incoming BLM Director that, “[t]he thought behind [outcome-based grazing] is exactly where we need to go: Determine the outcome we’re looking for on the landscape and graze accordingly”).

<sup>255</sup> See 43 U.S.C. § 1715(a).

<sup>256</sup> For a discussion of the process of consolidating fragmented public lands, and the benefits of doing so, see L. Claire Powers, Ashley E. Larsen, Bryan Leonard & Andrew J. Plantinga, *Reconnecting Stranded Public Lands Is a Win-Win for Conservation and People*, 270 BIOLOGICAL CONSERVATION 109557, at 2 (2022).

<sup>257</sup> Melanie Tang, *SNPLMA, FLTFA, and the Future of Public Land Exchanges*, 9 HASTINGS ENV'T L. J. 55, 59–76 (2002).

<sup>258</sup> CONG. RSCH. SERV., R41509, LAND EXCHANGES: BUREAU OF LAND MANAGEMENT (BLM) PROCESS AND ISSUES 2–3 (2016), [https://www.everycrsreport.com/files/20161107\\_R41509\\_11228ea8dd01d3e69dc731e81c7c726e38dd2cba.pdf](https://www.everycrsreport.com/files/20161107_R41509_11228ea8dd01d3e69dc731e81c7c726e38dd2cba.pdf) [<https://perma.cc/3UXY-GBAK>].

transferred lands are viewed as valuable for hunting, recreation, or other public uses. But the practice is already well-established at the state level, where there are fewer restrictions on conservation groups' ability to negotiate exchanges for state lands.<sup>259</sup> Concerns about transferring lands out of public ownership could be addressed in at least two ways. First, the conservation group could agree to a conservation easement to protect the land and retain certain public uses.<sup>260</sup> Second, the conservation group could donate the land back to the federal government with conditions restricting the future use of that land.<sup>261</sup>

Although this would be a reversal of the more common pattern—usually, the BLM or Forest Service ends up holding higher conservation value land after an exchange—that need not be an obstacle because nothing in FLPMA compels this result.<sup>262</sup> Indeed, exchanging sensitive land for land with high potential for economic use may be easier in some sense than the reverse. Federal appraisal requirements dictate that land must be assessed according to the market value of the “highest and best use,”<sup>263</sup> a standard that disadvantages lands with high conservation value but limited economic use. This standard can make difficult exchanges where the BLM or Forest Service seek to acquire lands for conservation purposes.<sup>264</sup> But when trading such lands to a conservation organization in exchange for more economically productive land, the standard's bias cuts in favor of the exchange.

This solution is not without its challenges, of course. Land exchanges are a time-consuming and costly process due to the extensive environmental, valuation, and other reviews they must undergo.<sup>265</sup> Without a substantial commitment from the BLM and Forest Service, both nationally and in local offices, the process may be

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<sup>259</sup> See SUSAN CULP & JOE MARLOW, LINCOLN INST. OF LAND POL'Y, *CONSERVING STATE TRUST LANDS: STRATEGIES FOR THE INTERMOUNTAIN WEST* 3, 18–20 (2015), <https://www.lincolnst.edu/sites/default/files/pubfiles/conserving-state-trust-lands-full.pdf> [<https://perma.cc/Z953-33PW>].

<sup>260</sup> See, e.g., Helena Dore, *Land Swap in the South Crazy Mountains Completed*, BOZEMAN DAILY CHRON. (Jan. 19, 2022), [https://www.bozemandailychronicle.com/news/environment/land-swap-in-the-south-crazy-mountains-completed/article\\_2b40349c-2096-58dd-b06d-07d304e4aec0.html](https://www.bozemandailychronicle.com/news/environment/land-swap-in-the-south-crazy-mountains-completed/article_2b40349c-2096-58dd-b06d-07d304e4aec0.html) [<https://perma.cc/X5EE-CJHV>] (describing a recent land exchange that included conservation easements and public access).

<sup>261</sup> See BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, MS-1105—DONATIONS, SOLICITATION, AND FUNDRAISING 1-15 (2019), <https://www.blm.gov/sites/blm.gov/files/MS-1105%20rel.%201-1801.pdf> [<https://perma.cc/CK6Y-VCUZ>] (observing that acceptance of restricted donations is appropriate, provided the restrictions would not conflict with the mission, programs, and laws governing the agency).

<sup>262</sup> 43 U.S.C. § 1716 (setting out standards for exchanges).

<sup>263</sup> 43 C.F.R. § 2201.3-2(a); 36 C.F.R. § 245.9(b).

<sup>264</sup> See *Proposed BLM Purchase of Lower Musselshell River Ranch Rejected*, MONT. LAND SOURCE (Aug. 3, 2021), <https://mtlandsource.com/news/proposed-blm-purchase-lower-musselshell-river-ranch-rejected> [<https://perma.cc/SH2R-7PM6>] (explaining that BLM's attempted purchase of 11,000-acre private ranch fell through because agency appraisals “cannot account for conservation values . . .”).

<sup>265</sup> See Dore, *supra* note 260 (noting that the South Crazy Mountain Land Exchange took more than a decade to complete).

too slow or expensive to attract proposed exchanges. It would also require substantial commitment from the conservation proponent. In addition to acquiring the base property to obtain the grazing permit, the proponent would also need to acquire similarly valuable private lands within the state to offer the agency in exchange. And such investments would not be without substantial risk. While federal policy encourages early, informal discussions regarding potential exchanges,<sup>266</sup> the BLM and Forest Service cannot commit to approving them until all procedural and substantive requirements have been met. However, once finalized, this method would give the conservation purchaser control over the conserved land and, therefore, a sense of permanence that is impossible if the land remains controlled by a political body.<sup>267</sup>

This approach could address several of the objections to nonuse of grazing permits. First, it would not necessarily reduce the total amount of federal land available for grazing. If the private land exchanged for federal land were suitable for grazing, grazing would simply shift among parcels rather than being generally reduced. Moreover, if the exchanged land were more suitable for grazing and less environmentally sensitive, it's possible that federal-land grazing could actually increase.<sup>268</sup> This could reduce the perception that nonuse rights necessarily come at the expense of grazing interests.

Second, it could avoid the impression that conservation interests or ranching interests are getting an unfair advantage over the other. Instead of giving one an avenue to achieve their goals permanently while the other is relegated to short-term commitments, the exchange authority would apply equally to both conservation groups and ranchers.<sup>269</sup> For instance, the BLM-Wyoming office has considered a proposal, facilitated by a conservation organization, to exchange various isolated public grazing lands in exchange for a more than 6,000-acre private ranch with

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<sup>266</sup> See BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, H-2200-1 LAND EXCHANGE HANDBOOK 1-15 (2007), <https://www.blm.gov/sites/blm.gov/files/H-2200-1.pdf> [<https://perma.cc/3WU2-VTWD>].

<sup>267</sup> We refer to some outcomes, such as the retirement of grazing permits, as “permanent” to distinguish it from explicitly temporary means of securing nonuse. But as long as the relevant land remains public, it is possible that Congress may change the rules governing it without creating any recourse for the organization responsible for the retirement. If a conservation group acquired the land by exchange, however, it would enjoy the same protections against expropriation as any other private land.

<sup>268</sup> Exchanges need not be acre for acre. Instead, the federal government must receive equal value for the land it conveys. See, e.g., *Southeast Wyoming Land Exchange*, BUREAU OF LAND MGMT., <https://www.blm.gov/southeast-wyoming-land-exchange> [<https://perma.cc/4QXM-WJT4>] (last visited Aug. 9, 2022).

<sup>269</sup> One significant obstacle to such exchanges is that the federal appraisal process does not capture conservation value well. See Smith Monson, Note, *Treating the Blue Rash: Win-Win Solutions and Improving the Land Exchange Process*, 2015 UTAH L. REV. 241, 268–69 (2015). This makes it unnecessarily difficult for federal agencies to accept lands with unique conservation values or to trade lands with higher economic potential.

higher recreation and conservation value.<sup>270</sup> If the exchange is ultimately approved, the former BLM lands could be sold as private property to the current grazing permittees.<sup>271</sup> Of course, the BLM and Forest Service's exchange authority is discretionary, meaning that conservation or ranching interests may receive better receptions in some administrations than others. But, in principle, this approach is equally open to either interest.

These administrative reforms could be implemented by the BLM and Forest Service without congressional action, making them easier to implement. However, they are also more limited, modest, and vulnerable to reversal than the legislative pathways discussed below.

### *B. Legislative Pathways*

While administrative pathways are substantially constrained by existing law, Congress faces no such limits.<sup>272</sup> Therefore, legislative pathways are almost infinitely variable. Here we will focus on a few broad ideas.

#### *1. Authorize Conservation Use*

Although the Tenth Circuit has held that a "conservation use" permit exceeds the BLM's authority under the TGA,<sup>273</sup> Congress is free to overrule that decision. Under this approach, Congress could authorize conservation use as a permissible use of a grazing permit. In doing so, Congress could also choose to fill in the details of a conservation use program. For example, it could require agency approval of a switch from grazing to conservation use or leave the decision to permittees. The former option, which is what the BLM adopted in 1994 in its ultimately struck-down regulations, preserves agency discretion but may increase the transaction costs of voluntary conservation.

An advantage of recognizing conservation-use leasing is that it would largely preserve the existing structure and allocation of federal grazing permits, thereby avoiding the uncertainty and complexity of a more comprehensive change. The other requirements of federal grazing policy (e.g., the livestock-ownership and base-property requirements) would remain in place, but "conservation use" would be an acceptable method to maintain existing grazing permits.

As discussed more fully above, there is some precedent for such a focused legislative fix in natural resource law: western states' water law reforms recognized that instream-flow conservation as a form of "beneficial use" is sufficient to

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<sup>270</sup> See Angus M. Thuermer, Jr., *Land Swap Would Create 38,000-Acre Public Block in SE Wyo*, WYOFILE (Oct. 19, 2021), <https://wyofile.com/land-swap-would-create-38000-acre-public-block-in-se-wyo/> [<https://perma.cc/4979-3PWP>].

<sup>271</sup> See *id.*

<sup>272</sup> Under the Constitution's Property Clause, Congress' authority over federal lands is plenary. See *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987).

<sup>273</sup> *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1307 (10th Cir. 1999).

maintain a valid water right under the prior appropriation doctrine.<sup>274</sup> If applied to federal grazing policy, this approach would also maintain the option of future livestock grazing on permitted allotments, which may be an important factor in gaining broader acceptance for such a policy change. Just as instream-flow water rights are typically not permanent acquisitions or retirements of water rights, the authorized use of a grazing permit—whether for sheep, cattle, bison, or, in this case, “conservation use”—is likewise not permanent and can be modified in the future under applicable law.<sup>275</sup> While this may seem suboptimal from the perspective of some conservation organizations that prefer permanent retirement of grazing privileges,<sup>276</sup> that preference may not discourage transactions. Such groups frequently engage in similar temporary rights-based transactions to conserve water and other natural resources.<sup>277</sup> Moreover, since this approach maintains the existing structure of grazing permits and does not permanently remove allotments from future grazing, it may avoid some of the opposition that previous permit-retirement proposals have received from ranchers and rural communities.

From a conservation perspective, there may be important advantages of such a rights-based approach. In particular, this approach could enable better adaptations to evolving market conditions and environmental realities.<sup>278</sup> For example, climate change is likely to reshape conservation priorities by altering the condition of federal grazing allotments or altering the market conditions related to livestock grazing in parts of the arid West.<sup>279</sup> As a result, rather than seeking permanent retirements, environmental priorities may be better served by allowing groups to negotiate freely with existing permittees to modify the use of their permits in ways that could facilitate conservation use on a timely, adaptive, and evolving basis. By enabling contracting with existing permittees, such a strategy would also allow environmental groups to conserve rangelands at less than the full cost of outright acquisition or

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<sup>274</sup> See *supra* Part III.

<sup>275</sup> See SCARBOROUGH, *supra* note 117, at 22.

<sup>276</sup> See, e.g., George Wuerthner, *Voluntary Grazing Permit Retirement Legislation Introduced*, WILDLIFE NEWS (Mar. 3, 2022), <https://www.thewildlifeneeds.com/2022/03/03/voluntary-grazing-permit-retirement-legislation-introduced/> [https://perma.cc/EH5K-RU7H] (arguing for permanent retirement of federal grazing lands).

<sup>277</sup> State-level policy offers another parallel. In 2019, the nonprofit group Save Our Gallatin Front outbid a logging company at a timber auction on state trust lands in Montana to prevent timber harvesting in the foothills outside of Bozeman, Montana. The group was awarded a 20-year conservation license to keep the trees standing, after which point the state could put the timber sale back up for auction. The group may have preferred a permanent withdrawal of the area from future harvesting, but it nonetheless acquired the rights to protect the forest for the next two decades. Environmental organizations have also purchased state trust grazing leases, which are not retired but are held by environmental groups for conservation use. See Regan, *supra* note 19.

<sup>278</sup> See Leonard et al., *Allow “Nonuse Rights,”* *supra* note 16, at 960.

<sup>279</sup> Cf. TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* 4–5 (1991) (describing an example where the Nature Conservancy sold its beachfront property in the Virgin Islands to fund the purchase of Wisconsin land containing endangered plants).

retirement of grazing permits. Allowing conservation use of grazing permits could also facilitate various leasing or subleasing options or other innovative arrangements between ranchers and environmental organizations.<sup>280</sup>

Under this legislative approach, conservation groups would have several market-based options to pursue voluntary grazing reductions on federal lands: (1) they could negotiate with existing permittees to facilitate “conservation use” of existing grazing permits, either in part or in full, subject to the approval of the BLM or Forest Service; or (2) they could negotiate to acquire the permits directly and hold them for conservation purposes with the approval of the relevant agency, so long as they also satisfy the livestock-ownership and base-property requirements. This latter approach is similar to what the Grand Canyon Trust pursued with its buyouts in Utah, which included acquiring base properties and obtaining a minimum number of livestock.<sup>281</sup> However, because the group could not legally hold a federal grazing permit for “conservation use,” its attempt to pursue a market-based strategy to reduce grazing on federal lands has encountered significant challenges.<sup>282</sup> This proposed solution would resolve those challenges.

## 2. *Remove Requirements to Own Livestock and Base Property*

Congress could further facilitate voluntary conservation by removing livestock-ownership and base-property requirements. This would enable conservation groups to more easily acquire federal grazing permits for conservation purposes without having to own nearby private property or livestock.<sup>283</sup> Coupled with other reforms discussed above, such a change would significantly reduce the transaction costs associated with a grazing lease buyout.<sup>284</sup>

For this to occur on lands managed by the BLM, Congress would have to amend the TGA, which limits permits to “bona fide settlers, residents, and other stock owners.”<sup>285</sup> For the Forest Service, however, such a change could be made through administrative reforms. The TGA does not apply to the Forest Service, and although the agency has adopted regulations that are similar to what the TGA requires,<sup>286</sup> it could revise those regulations to remove livestock-ownership and base-property requirements.

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<sup>280</sup> See Nelson, *Reform Grazing Policy*, *supra* note 18, at 677–79 (“Historically, the Forest Service has prohibited subleasing of grazing rights to an allotment. The BLM has allowed subleasing, but with significant limitations, including a recent requirement that the rancher turn over to the BLM a share of any subleasing revenues that exceed the federal grazing fee.”).

<sup>281</sup> For a discussion of Grand Canyon Trust’s grazing buyouts, see Leonard & Regan, *Legal and Institutional Barriers*, *supra* note 16, at 151–52.

<sup>282</sup> See *id.*; see also Leshy, *supra* note 96.

<sup>283</sup> For a related policy proposal to establish “forage rights” on federal rangelands that could be allocated for livestock grazing or conservation purposes, see Nelson, *Reform Grazing Policy*, *supra* note 18.

<sup>284</sup> See *id.*

<sup>285</sup> 43 U.S.C. § 315b.

<sup>286</sup> See *supra* Part III.A–B.



There are good reasons for Congress and the Forest Service to make such a change to remove the base property and livestock ownership requirements. The original speculation concern that “the herds of nonresidents,” namely Texas cattle barons, would destroy the local pasture<sup>287</sup> faded once the open range was closed, and, along with it, the rationale for requiring ownership of local base-property. Further, because the livestock-ownership requirement has been interpreted to require ownership of just a few stray cattle,<sup>288</sup> the livestock-ownership provisions are ripe for rescission as well.

### 3. *Grant Agencies Administrative Retirement Authority*

Another legislative option would be for Congress to grant the BLM and Forest Service general authority to administratively retire grazing allotments at the request of the permit holder. This buyout and retirement solution was previously proposed by John Leshy and Molly McUsic in a 2008 article suggesting that it would “bring more private philanthropic capital to bear, because conservation buyers would have assurance they would get what they are paying for . . . .”<sup>289</sup>

While conservation groups may prefer a legislative solution that allows agencies to permanently retire a grazing allotment after a voluntary retirement, ranchers are likely to strongly oppose any such limitation. To the ranching community, a permanent retirement may be perceived as unfair since ranchers enjoy no such permanency when it comes to grazing federal allotments. This objection might be resolved in several ways. Congress could make federal grazing privileges operate more like secure property rights. Alternatively, Congress could provide that a retirement can be reversed, but only with the consent of the conservation group that originally obtained the retirement. This way, retired lands could be put back into grazing use if market conditions, the land’s conservation value, or a conservation group’s priorities change.<sup>290</sup>

If pairing a retirement authority with more formal property rights for ranchers were not politically feasible, rancher concerns might also be addressed by limiting the number of retirements that can be made by year, by agency, or by state. A version of this type of limited permanent retirement authority policy was included in Rep. Adam Smith’s proposed 2020 legislation, H.R. 5737, which would have limited the number of retirements the BLM and Forest Service were permitted to make to an aggregate total of 100 permits per year, with no more than 25 permits coming from any individual state.<sup>291</sup> Limiting the number of retirements in this way would likely

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<sup>287</sup> ROWLEY, *supra* note 36, at 62

<sup>288</sup> *Stewart v. Kempthorne*, 554 F.3d 1245, 1252 (10th Cir. 2009).

<sup>289</sup> Leshy & McUsic, *supra* note 28, at 389.

<sup>290</sup> Currently, administrative retirements can be reversed by the agency revising the relevant forest plan or management plan and performing a NEPA analysis. Aside from the public comment process, the conservation group that negotiated the buyout has no influence over that process.

<sup>291</sup> H.R. 5737, 116th Cong. (2020).

encourage conservationists to prioritize allotment retirements in high-value conservation areas.

While limitations placed on the agency's administrative retirement authority, like those contained in H.R. 5737, may help reduce concerns that this type of policy will result in any widespread reduction of livestock grazing on public lands, many in the grazing industry continued to oppose this bill citing opposition to any policy that results in a net reduction in grazing AUMs on federal land.<sup>292</sup> To address this concern, lawmakers could consider including language in the proposal that requires federal agencies to assist in finding alternative grazing allotments (on the same unit of federal land or on other nearby units) to replace those lost by the permanent retirement. This alternative would allow federal agencies to maintain the total number of federal grazing AUMs, while also providing the agencies with a tool to eliminate livestock grazing in conflict areas.

On the other side, there are likely those who would feel that setting a cap on the number of agency retirements is an unnecessary market restriction, dampening the effect of a much-needed tool to address ecological degradation and conflict caused by federal livestock grazing. Sticking to this point, however, may preclude the passage of any policy granting the agencies permanent retirement authority, perpetuating the current "uneasy stalemate."<sup>293</sup>

#### 4. Recognize Grazing Privileges as Formal Property Rights

In the private land context, conservationists are free to negotiate with landowners to advance their conservation goals.<sup>294</sup> Indeed, the National Conservation Easement Database, a project sponsored by Ducks Unlimited and the Trust for Public Land, reports that approximately 200,000 conservation easements exist in the United States, conserving nearly 33 million acres of private land.<sup>295</sup> Private land can also be conserved by conservation interests purchasing the land from willing sellers, as groups like The Nature Conservancy do routinely.<sup>296</sup> Because private rights to land are generally secure, divisible, and tradeable in the property rights system, private landowners can more easily adapt to competing demands for land or resources.

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<sup>292</sup> See Press Release, Pub. Lands Council, Ranchers Urge Congress to Oppose Voluntary Grazing Permit Retirement Act (Jan. 31, 2020), <https://publiclandscouncil.org/2020/01/31/ranchers-urge-congress-to-oppose-voluntary-grazing-permit-retirement-act/> [<https://perma.cc/QFG4-3VZ8>].

<sup>293</sup> Leshy & McUsic, *supra* note 28, at 376.

<sup>294</sup> Parker, *supra* note 15.

<sup>295</sup> See *Homepage*, NAT'L CONSERVATION EASEMENT DATABASE, <https://www.conservationeasement.us/> [<https://perma.cc/DR38-6FTS>] (last visited Feb. 2, 2022).

<sup>296</sup> See *How We Work: Private Lands Conservation*, NATURE CONSERVANCY, <https://www.nature.org/en-us/about-us/who-we-are/how-we-work/private-lands-conservation/> [<https://perma.cc/3N79-DYZR>] (last visited Aug. 7, 2022).

The obstacles blocking markets in the nonuse of grazing lands are uniquely a public-land problem. For that reason, an obvious solution could be to make them private, either by disposing of the land itself or by converting grazing privileges into secure property rights. While perhaps a radical departure from the status quo, such change would facilitate the resolution of grazing conflicts through negotiation, as such conflicts are often resolved in the private land context. Although proposals like this have been around for decades,<sup>297</sup> they raise considerable political controversy.

##### 5. *Expand Targeted or Regional Approaches to Resolve Specific Conflicts*

An alternative to these broad legislative reforms is to apply them at a regional or site-specific level. Congress could, for instance, allow agencies to retire grazing permits voluntarily surrendered by ranchers or conservation groups in areas with a specific grazing conflict. For example, Congress could enact legislation targeted at reducing carnivore-livestock conflict in the Greater Yellowstone Ecosystem and could provide the agencies within the area with authority to permanently retire grazing leases. To address concerns from the ranching community, Congress could also limit the total number of retirements allowed. This same approach could be applied within the sagebrush ecosystem to address sage grouse conservation or in targeted delicate desert environments to protect riparian areas. This type of targeted or regional approach could help reduce concerns over widespread grazing permit retirements by focusing on specific issues and specific areas.

Congress has utilized this approach in the past to allow buyout and permanent retirement of oil and gas leases in sensitive locations. The Wyoming Range Legacy Act is an example of a Congressional act that provided authority to the Forest Service to accept for permanent retirement oil and gas leases on more than 80,000 acres voluntarily purchased by environmental groups within the Bridger-Teton National Forest in Wyoming.<sup>298</sup> The Act was passed at the bequest of local sportsmen and conservationists who successfully argued the area's preservation value outweighed its oil and gas potential.<sup>299</sup> Conservationists raised \$8.75 million to buy out some of the most controversial leases in the area.<sup>300</sup>

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<sup>297</sup> See, e.g., NELSON, PUBLIC LANDS AND PRIVATE RIGHTS, *supra* note 10, at 222–23; Nelson, *Reform Grazing Policy*, *supra* note 18.

<sup>298</sup> Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991. See also Scott Streater, *Billionaire Funds Deal to Retire Wyo. Drilling Leases*, E&E NEWS (July 5, 2018), <https://www.eenews.net/articles/billionaire-funds-deal-to-retire-wyo-drilling-leases/> [https://perma.cc/4BST-FZC6].

<sup>299</sup> See, e.g., Press Release, Trout Unlimited, Wyoming Range Legacy Act Gets House Vote (Mar. 25, 2009), <https://www.tu.org/press-releases/wyoming-range-legacy-act-gets-house-vote/> [https://perma.cc/DQ6D-DYVA].

<sup>300</sup> See Kelsey Dayton, *Last Minute Donation Lands Wyoming Range Deal*, WYOFILE (Jan. 2, 2013), <https://wyofile.com/last-minute-donation-lands-wyoming-range-deal/> [https://perma.cc/GZP4-GACT].

Another example is President Biden’s recent proclamation on the boundaries of Grand Staircase-Escalante National Monument.<sup>301</sup> It directs the Secretary of the Interior to “retire from livestock grazing” lands within the monument when the permittee voluntarily relinquishes grazing rights.<sup>302</sup> The proclamation also states that forage covered by such retirement “shall not be reallocated for livestock grazing purposes” except to advance the purposes of the monument.<sup>303</sup> This was the first time a President purported to establish a retirement authority in a monument proclamation, so it remains to be seen whether it will be challenged and upheld.<sup>304</sup> However, it is a noteworthy example of a narrow retirement authority being put forward as the solution to a localized conflict between grazing and conservation values.

### CONCLUSION

Conflicts over the use of federal rangelands are not new; however, efforts to resolve those conflicting demands through voluntary market exchanges rather than political actions or litigation are becoming increasingly common, despite legal obstacles to conservation leasing. Recent attempts by environmental groups to negotiate with ranchers to pursue conservation outcomes have been met with mixed results due to legal and institutional barriers that preclude markets for voluntary conservation on federal grazing lands. A form of “use it or lose it,” these requirements effectively prohibit conservation leasing and other flexible tools on federal rangelands, leaving environmental groups with few options other than to lobby or litigate to reduce grazing on federal lands.

It doesn’t have to be this way. There are several statutory and regulatory reforms that Congress and federal agencies could pursue to overcome these barriers and facilitate markets for conservation on federal grazing lands, some more easy to implement than others. If adopted, these reforms would have several advantages over the status quo: (1) they would promote voluntary, mutually beneficial exchanges between ranchers and environmentalists—two groups that are often in conflict with one another; (2) they would reduce these conflicts by providing environmental groups with a pragmatic alternative to litigation that honors ranchers’ long-standing grazing privileges and encourages honest bargains that reflect the value of foregone land uses; and (3) they would also result in more durable conservation outcomes that cannot be easily reversed as political realities change.

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<sup>301</sup> Proclamation No. 10286, 86 Fed. Reg. 57335 (Oct. 15, 2021).

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> Historically, proclamations establishing monuments under the Antiquities Act of 1906 simply identified the designated lands and declared that they were withdrawn from potential disposition under various federal land laws. Since 2006, however, presidents have included more regulatory provisions in monument proclamation, directing uses that would be allowed or forbidden on designated land. See CAROL HARDY VINCENT, CONG. RSCH. SERV., RL41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT (July 11, 2022), <https://sgp.fas.org/crs/misc/R41330.pdf> [<https://perma.cc/8YX5-KGMT>].

Such reforms are important in light of new environmental realities and evolving demands over the use of federal rangelands. Climate change is likely to alter the condition of federal rangelands, and, as a result, conservation priorities will need to continually evolve and adapt. Nonuse leasing would enable conservation on federal rangelands to be pursued on an adaptive, evolving basis that can respond to environmental changes. Growing conflicts between livestock and wildlife, such as grizzly bears and wolves, whose populations have increased in recent decades, also demonstrate the need for such solutions. Allowing conservation leasing of federal grazing permits could also advance the Biden Administration's goal to conserve 30% of U.S. lands and waters by 2030.<sup>305</sup> To the extent that achieving that goal implicates areas of public land with existing resource rights and privileges—such as the 220 million acres of federal lands that are used for livestock grazing today<sup>306</sup>—new tools and approaches are likely to be needed, including opening markets for voluntary conservation on federal grazing lands.

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<sup>305</sup> See *supra* note 22 and accompanying text.

<sup>306</sup> See *supra* note 23 and accompanying text.