Conservation Rights-of-Way on Public Lands

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The Biden–Harris Administration's ambitious America the Beautiful Campaign to protect thirty percent of the United States' lands and waters by 2030 will require a comprehensive inventory of conservation tools. This Article contributes to that inventory by identifying and evaluating a novel use of the authority of the Bureau of Land Management ("BLM") to issue rights-of-way under Title V of the Federal Land Management & Policy Act ("FLPMA") over the vast public lands managed by the agency, which account for roughly ten percent of the surface area of the United States. It contends that the BLM could issue a "conservation right-of-way" to a state, tribe, local government, or private party seeking to restore and protect ecological systems. Creating private rights to conservation in appropriate circumstances could address persistent asymmetries between active use of public lands — which tends to occur through private rights — and conservation use of public lands — which tends to occur through public policy. The BLM could plausibly deploy conservation rights-of-way in an array of circumstances, for example, to authorize the construction and maintenance of mitigation banks for wetlands or wildlife habitat or to monitor and maintain wildlife corridors. Conservation rights-of-way could be small in scale, nuanced and context dependent, and they could be issued in a distributed fashion at BLM field offices throughout the United States. These features suggest that conservation rights-of-way could serve as an important supplement to other conservation tools.

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INTRODUCTION

The Biden Administration has committed to a bold America the Beautiful Campaign to conserve thirty percent of the United States' lands and oceans by 2030 through locally led conservation efforts as part of an ambitious, government-wide program to address the climate crisis.[1] As America's network of national parks, national monuments, national wildlife refuges, wilderness areas, and other conservation lands indicates, land conservation has long been part of the bedrock of American public land law. Yet the United States has never embarked on conservation at this scale.

Rapidly increasing land conservation on federal, state, and private lands will require an inventory of available legal tools and incentives. The effort must include an evaluation of mechanisms to provide meaningful protections for the environment while accounting for ongoing economic land uses either to provide a just transition for communities dependent on public lands, or perhaps, in some cases, by allowing ongoing use in a manner compatible with conservation goals. The effort will also require developing context-specific tools to serve an interstitial function to network large areas dedicated to conservation in a manner that maximizes benefits to ecosystems and biodiversity.

This Article contributes to the effort of evaluating existing legal authority by identifying a potential conservation tool that could be both nuanced and context-specific, contending that the Bureau of Land Management ("BLM") could exercise authority under Title V of the Federal Land Policy & Management Act ("FLPMA") to issue permits ("Title V Permits") authorizing "conservation rights-of-way" for the public lands it manages.[2] This authority is an important one, because the BLM manages more than one-tenth of the surface area of the United

[1] *See* Exec. Order No. 14,008, 86 Fed. Reg. 7,619 § 216(a) (Jan. 27, 2021) ("The Secretary of the Interior . . . shall submit a report to the Task Force within 90 days of the date of this order recommending steps that the United States should take . . . to achieve the goal of conserving at least 30 percent of our lands and waters by 2030."); DEP'T OF THE INTERIOR, DEP'T OF AGRIC., DEP'T OF COM. & COUNCIL ON ENV'T QUALITY, CONSERVING AND RESTORING AMERICA THE BEAUTIFUL 18 (2021), https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf [https://perma.cc/TQ2H-HJ6H].

[2] Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701-1785). Title V Permits could also potentially be issued for conservation rights-of-way within national forests managed by the U.S. Forest Service. *See* 43 U.S.C. § 1761(a) (authorizing the "Secretary of Agriculture, with respect to lands within the National Forest System" to issue Title V Permits). This Article, however, focuses on the BLM's administration of public lands, although similar considerations might extend to national forests.

States.[3] Regardless of whether lands subject to conservation rights-of-way ultimately count as conserved for purposes of 30-by-30, conservation rights-of-way offer an important complement to other statutory and regulatory authorities.

Conservation rights-of-way are promising because they can be deployed in a decentralized fashion at BLM field offices, rather than requiring the attention of national decision-makers.[4] They also have the potential to be small scale and context sensitive, providing a means to fill gaps in the network of conservation lands across America one or two acres at a time. Conservation rights-of-way could be used in a more ambitious fashion to cover large areas of public lands, but their capacity for small-scale conservation is one of their distinctive and important features.

Conservation rights-of-way offer another advantage. The BLM has other land-use management tools to pursue conservation on public lands,[5] for example, through the land-use planning process, but those tools exist on an uneven playing field with private rights in public lands. Conservation rights-of-way could level the playing field by creating enforceable private rights in conservation.

Conceptually, conservation rights-of-way take advantage of the persistence of private rights in public lands. Private rights to public lands traditionally enable private parties to use public lands for mining, grazing, timbering, and other uses.[6] These rights are typically (although not always) in tension with conservation goals, and their nature as "private" rights can make them more durable than conservation commitments made through land-use planning. Some private rights to public lands already generate public conservation benefits, in addition to producing private benefits to the right-of-way holder — for example,

[3] Justin R. Pidot, *Compensatory Mitigation and Public Lands*, 61 B.C. L. REV. 1045, 1048 (2020) [hereinafter Pidot, *Compensatory Mitigation*]; *see also* 43 U.S.C. §§ 1761-72. Of the 245 million acres that the BLM manages, 11.9 million have been designated national monuments or national conservation areas. *See Monuments, Conservation Areas and Similar Designation*, BUREAU LAND MGMT., https://www.blm.gov/programs/national-conservation-lands/monuments-ncas (last visited July 14, 2021) [https://perma.cc/Q7NC-Y3MG]. Conservation rights-of-way may not offer additional conservation benefits across this modest portion of the public lands that the BLM manages.

[4] *See* Rights-of-Way, Principles and Procedures; Rights-of-Way Under the Federal Land Policy and Management Act and the Mineral Leasing Act, 70 Fed. Reg. 20,969, 20,970 (Apr. 22, 2005) (to be codified at 43 C.F.R. pt. 2800).

[5] While the term "public lands" has multiple meanings, this Article generally uses the term as it is defined in FLPMA to refer to lands managed by the BLM. *See* 43 U.S.C. § 1702(e).

[6] Sandra B. Zellmer, *Mitigating Malheur's Misfortunes: The Public Interest in the Public's Public Lands*, 31 GEO. ENV'T L. REV. 509, 541, 541 n.269 (2019).

constructing renewable energy generation facilities or engaging in conservation-oriented grazing. Conservation rights-of-way build on these successes by allowing durable private rights that are expressly conservation oriented.

Private rights have existed on public lands for as long as the Federal government has owned them.[7] At one time, they dominated Congress's approach to the millions of acres owned by the United States.[8] Transferring public lands into private hands served as a powerful incentive for westward expansion — meaning the movement of predominantly white "settlers" to occupy lands dispossessed from Native American tribes and considered open to settlement.[9] Over time, the paradigm shifted from one in which private exploitation of public lands was viewed as the highest use of them, indeed, it was valorized, into one in which the public was viewed as having compelling persistent, collective interests that were different from and more than the assemblage of individual interests. This change in the conception of public lands led to an evolution in the law. In the twentieth century, Congress began to disfavor privatization of public lands, gradually eliminating many of the mechanisms through which private parties can obtain fee title from the government.[10]

Nonetheless, private-use rights in public lands remain important, although they have metamorphosed.[11] Where once private parties

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[7] *See* John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 520 (2018).

[8] *See id.* at 518 ("During this era, Congress made divestiture the primary objective of public land policy. It encouraged the settlement of western lands with people loyal to the United States, and thus helped keep the nation bound together as it expanded across the landscape.").

[9] *See* Leigh Raymond & Sally K. Fairfax, *Fragmentation of Public Domain Law and Policy: An Alternative to the "Shift-to-Retention" Thesis*, 39 NAT. RES. J. 649, 712-13 (1999) (discussing the Homestead Act of 1862).

[10] Congress's pivot away from privatization culminated with the enactment of FLPMA, which established a new national policy favoring retention and management of public lands. *See* 43 U.S.C. § 1701(a)(1).

[11] This Article generally refers to private rights on public lands as "private-use rights." This term is meant to encompass private rights that authorize private use under statutes such as FLPMA, the General Mining Act of 1872, the Mineral Leasing Act, the Taylor Grazing Act, or the Materials Act. *See infra* Part III. While such rights are generally consumptive, extractive, or harmful to the land, they are not necessarily so. Indeed, a few environmental organizations hold grazing permits to allow conservation-oriented grazing. *See* Ed Grumbine, *A Good Kind of Trouble: Getting Ahead of the Climate Change Curve on the North Rim Ranches*, GRAND CANYON TR.: ADVOC. MAG. (Spring/Summer 2016), https://www.grandcanyontrust.org/advocatemag/spring-summer-2016/good-trouble [https://perma.cc/8GN5-RFFD] (describing conservation-

acquired fee title, today they hold a myriad of other interests generally, although not exclusively, linked to specified resources: hard rock minerals may be claimed under the General Mining Law of 1872,[12] fossil fuels and fertilizer minerals may be leased under the Mineral Leasing Act of 1920;[13] sand, stone, and other "common varieties" of materials may be purchased under the Materials Act of 1947;[14] grazing privileges may be obtained under the Taylor-Grazing Act of 1934;[15] permission to occupy public lands for transmission lines, pipelines, roads, and wind and solar farms may be acquired under Title V of FLPMA.[16] The contours of these rights vary considerably. For most, the BLM decides where to make the resources on public lands available for acquisition, although the General Mining Law permits "self-initiation" — meaning that a miner may claim minerals without prior authorization.[17] Some of these rights are more durable than others: a valid mining claim is "property" and the government must attend to the limits of the Fifth Amendment's takings clause before extinguishing it.[18] Leases are typically governed by contract principles.[19] Grazing "privileges" generally occur through permits that do "not create any right, title, interest, or estate in or to the lands."[20] As a corollary, the BLM exercises different degrees of control over private parties using public lands under these different instruments.

These differences, while significant, should not be overstated. All forms of private rights in public lands have proven durable in practice.

oriented grazing practiced undertaken by Grand Canyon Trust with grazing permits it holds).

[12] 30 U.S.C. § 22.

[13] *Id.* § 181.

[14] *Id.* § 601.

[15] 43 U.S.C. § 315.

[16] *Id.* § 1761.

[17] The BLM also exercises authority over mineral resources located beneath national forests. 36 C.F.R. § 228.1 (2021) ("It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior.").

[18] *See* Kunkes v. United States, 78 F.3d 1549, 1551 (Fed. Cir. 1996) ("Even though title to the fee estate remains in the United States, . . . unpatented mining claims are themselves property protected by the Fifth Amendment against uncompensated takings.").

[19] *See* Solenex LLC v. Bernhardt, 962 F.3d 520, 530 n.4 (D.C. Cir. 2020) ("We note that an agency decision to cancel a lease does not preclude the owner from raising breach of contract claims in the Court of Federal Claims.").

[20] 43 U.S.C. § 315b. Outside of designated grazing districts, grazing privileges occur through leases, rather than permits, although those leases are identically limited. *See* 43 C.F.R. § 4130.2 (2021).

Once issued, they generally persist even if the federal government concludes that managing public lands for other uses and values would better serve the public.[21] New conditions may be imposed on the exercise of those rights to reduce or mitigate negative consequences,[22] but they are rarely extinguished outright, even in circumstances where the federal government has authority to do so.

These private rights have something else in common. They all authorize active *use* of public lands — for mining, ranching, drilling, electricity generation and transmission, and other uses.[23] But federal law recognizes other uses of public lands that are more passive in nature, such as the "use" of an unspoiled watershed as the wellspring of a public water supply, or the use of public lands as wildlife habitat.[24] It also recognizes other public lands values that are more intangible still — such as the wilderness character of public lands.[25] Formally speaking, these various and often competing uses and values of public lands have similar status and stature. FLPMA establishes a multiple-use mandate as the polestar of BLM management of public lands that views all of these uses and values as valid.[26] How to balance and prioritize these uses is largely left for the BLM to decide.[27]

Conservation of public lands tends to occur through public policy, rather than active use which tends to manifest through private rights. Conceptually, these divergent approaches may make a degree of sense since conservation uses tend to generate public benefits — although not exclusively — and active uses tend to generate private benefits — although also not exclusively. The trouble, however, is that the durability of these mechanisms is often vastly different. Private rights to mine, graze, and drill abide. Public management decisions oriented to conservation do not. This creates a sustained structural preference for consumptive uses, because as political tides ebb and flow, only consumptive uses are sticky. So, for example, the Trump Administration's zeal for oil and gas leasing has subjected 108,000,000

[21] *See* Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 994 (2014) ("Once established, private claims to public lands . . . seem, in many instances, to take on a life of their own.").

[22] *E.g.*, 43 C.F.R. § 4130.3-3 (2021) (allowing modification of grazing permit or lease).

[23] *See* Zellmer, *supra* note 6, at 512.

[24] *See* 43 U.S.C. § 1702(c).

[25] *See* Or. Nat. Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1098 (9th Cir. 2010).

[26] *See* 43 U.S.C. § 1702(c).

[27] *See* New Mexico *ex rel.* Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 710 (10th Cir. 2009).

acres[28] to private rights that may be difficult to dislodge, while conservation initiatives like the Forest Service's Roadless Rule have experienced considerable fluctuation from administration to administration.[29] While a district court ruled that the Trump Administration inadequately explained its decision to reverse course on the withdrawal, this check on arbitrary agency decisions does not change the potentially precarious nature of conservation policies.[30]

To be sure, over time, private rights for use and public policy for conservation have converged to some extent. Conservation protections have become somewhat more durable, primarily through the land-use planning process. This has been done, for example, with retired grazing permits.[31] While amending a land use plan to close lands to grazing can always be undone, doing so takes time and requires public involvement.[32] Perhaps the more significant source of convergence has been decreasing the permanence of private rights and subjecting them to additional oversight. Private interests in public lands were once often perpetual. Miners could patent claims acquiring fee title, others could acquire title under homesteading and preemption laws.[33] The instruments through which public lands are transferred free and clear into private hands have dwindled. The Mining Law is the only law of that era that remains, and Congress has barred patenting of mining claims for many years.[34] Thus, private rights in public lands are, at least in theory, more limited today than they once were. But the durability of

[28] Emily Holden, Jimmy Tobias & Alvin Chang, *Revealed: The Full Extent of Trump's 'Meat Cleaver' Assault on US Wilderness*, GUARDIAN (Oct. 26, 2020, 1:00 AM EST), https://www.theguardian.com/environment/ng-interactive/2020/oct/26/revealed-trump-public-lands-oil-drilling [https://perma.cc/9VP8-B2RU].

[29] *E.g.*, Juliet Eilperin, *Trump to Strip Protections from Tongass National Forest, One of the Biggest Intact Temperate Rainforests*, WASH. POST (Oct. 28, 2020, 7:05 PM EDT), https://www.washingtonpost.com/climate-environment/2020/10/28/trump-tongass-national-forest-alaska/ [https://perma.cc/RZ6W-M9J4].

[30] W. Watersheds Project v. Bernhardt, 391 F. Supp. 3d 1002, 1017 (D. Idaho 2019). This victory for conservation groups reflects a general pattern in which the Trump Administration made careless blunders in pursuing its deregulatory agenda. *See* Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 10 (2019) (noting poor win rate in court of some deregulatory efforts by Trump Administration).

[31] John D. Leshy & Molly S. McUsic, *Where's the Beef? Facilitating Voluntary Retirements of Federal Lands from Livestock Grazing*, 17 N.Y.U. ENV'T L.J. 368, 383-85 (2008).

[32] For discussion of the land-use planning process, see *infra* Part II.A.

[33] Sam Kalen, *An 1872 Mining Law for the New Millennium*, 71 U. COLO. L. REV. 343, 348-50 (2000).

[34] *Id.* at 346 (discussing the Congressional moratorium on processing new patents).

these temporary interests runs into decades and, indeed, in some sense remains never-ending. Consider the mining plan that would authorize the Rosemont Mine.[35] If it survives ongoing litigation, the company could deposit almost two billion tons of mine tailings on thousands of acres of national forest.[36] True, those lands remain in public ownership, but they will be forever transformed, replacing a rich ecological and cultural landscape with a dumping ground.

To the extent conservation and active use have converged, they have done so within their respective paradigms of private rights and public policy. Much good scholarship has been written on how private rights might become more contingent, less durable, and more closely tied to evolving conceptions of the public interest.[37] This Article suggests a different tact. If private rights remain durable even after significant efforts at reform, perhaps conservation could borrow from the private rights framework.

This Article suggests using private rights for conservation purposes by evaluating the potential for Title V Permits to authorize conservation rights-of-way because, in some circumstances, conservation uses can be understood as "systems or facilities that are in the public interest."[38] Although Title V has historically been used primarily for infrastructure and energy projects, its broad language gives it potential as a conservation tool. To explore the potential for conservation rights-of-way to augment other conservation tools, this Article proceeds in five parts. Part I examines two paradigms for conservation on public lands in the United States — the dedication paradigm and the multiple-use paradigm — explaining that conservation rights-of-way have the potential to augment conservation on multiple-use lands. Part II

[35] *See generally* ROSEMONT COPPER CO., MINE PLAN OF OPERATIONS – VOLUME 1 (2018), https://www.rosemonteis.us/files/mpo/vol1-201810-Rev3-Mine-Plan-of-Operations-Final_Redacted.pdf [https://perma.cc/TMH2-QR3L] (laying out the Mine Plan of Operations for the Rosemont Copper Project).

[36] *See* Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 409 F. Supp. 3d 738, 743 (D. Ariz. 2019).

[37] *See generally* Debra L. Donahue, *Federal Rangeland Policy: Perverting Law and Jeopardizing Ecosystem Services*, 22 J. LAND USE & ENV'T L. 299 (2007) (using BLM's management of invasive weeds as a case study to illustrate the duty of BLM to manage rangelands in the best interest of the public); Kalen, *supra* note 33, at 343 (proposing a new approach to Mining Law, specifically focused on a claimant's rights to public lands during the patenting process); Leshy & McUsic, *supra* note 31, at 368 (analyzing how policies should be reformed to address the devastation to livestock grazing and proposing suggestions for these changes); Pidot, *Compensatory Mitigation*, *supra* note 3 (advocating for compensatory mitigation to address use conflicts with respect to public lands).

[38] 43 U.S.C. § 1761(a)(1)-(7).

examines existing public policy mechanisms to promote conservation on multiple-use lands. Conversely, Part III examines private rights on multiple-use lands. Part IV identifies two asymmetries between public policy to promote conservation and private rights to allow active use. Finally, Part V explores the potential to for Title V Permits to authorize conservation rights-of-way.

This is not the first effort to redeploy private rights in public lands for conservation purposes, and past efforts have been met with limited success. For example, when renowned author and activist Terry Tempest Williams attempted to purchase oil and gas leases for public lands in Grand County, Utah,[39] the BLM concluded she was ineligible because she did not intend to use the leases,[40] never mind that many oil and gas companies acquire lease speculatively and never develop them.[41] Conservation organizations have had better, yet still limited, success acquiring grazing permits to benefit ecological systems; they may not hold them for nonuse, but so long as they actually graze livestock they are not disqualified.[42] Do Title V permits offer a better vehicle for conservation? They may, and at least, their potential is worthy of exploration. Unlike other private rights that conservationists

[39] *See* Brian Maffly, *BLM Pulls Back Oil and Gas Leases Bought by Utah Activist, Author Terry Tempest Williams*, SALT LAKE TRIB. (Oct. 20, 2016, 1:42 PM), https://archive.sltrib.com/article.php?id=4467584&itype=CMSID [https://perma.cc/H76P-EASE]; *see also* Bryan Leonard & Shawn Regan, *Legal and Institutional Barriers to Establishing Non-Use Rights to Natural Resources*, 59 NAT. RES. J. 135, 162-63 (2019).

[40] *See* Letter from BLM to Terry Tempest Williams (Oct. 18, 2016), https://www.documentcloud.org/documents/3146518-Terry-Tempest-Williams-Letter.html [https://perma.cc/VQJ2-3J92]; *see also* Leonard & Regan, *supra* note 39, at 163.

[41] Federal land with low potential for oil and gas development is routinely speculatively leased for minimum bids. *See* End Speculative Oil and Gas Leasing Act of 2020, S. 3202, 116th Cong. § 2(3)-(5) (2020) (proposed bill). In 2020 Nevada Senator Catherine Cortez Masto introduced a bill that would reprioritize management of lands with low potential for oil and gas development, noting that "[s]ince 2016, just over 9 percent of the land made available for oil and gas development in Nevada has actually been leased, and most of it for the minimum bid at $2 per acre. This speculative leasing on low-potential lands wastes BLM resources and 'locks up' precious areas that could be used for wildlife preservation, recreation, grazing or renewable energy development." Press Release, Catherine Cortez Masto, Cortez Masto Introduces Legislation To Prohibit Oil and Gas Speculation on Low Potential Lands (Jan. 17, 2020), https://www.cortezmasto.senate.gov/news/press-releases/cortez-masto-introduces-legislation-to-prohibit-oil-and-gas-speculation-on-low-potential-lands [https://perma.cc/X9LB-VPA4].

[42] *See* Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1305, 1308 (10th Cir. 1999) (upholding regulation permitting non-livestock businesses to hold permits but invalidating regulation authorizing permits to be acquired for non-use), *aff'd*, 529 U.S. 728 (2000).

acquire to use minimally, and therefore produce benefits for the environment by avoiding the intensive use in which an alternate rights holder might engage, conservation rights-of-way could be issued specifically for conservation. Put differently, Title V Permits have the potential to give private parties a right to public land conservation, thereby enabling them to restore or, perhaps, even preserve ecological systems.

I. PARADIGMS OF FEDERAL LAND CONSERVATION

Two paradigms define the federal government's conservation efforts on the land holds "in trust for the people of the whole country."[43] The first — the dedication paradigm — identifies lands with exceptional natural values, removes them from the public domain, and dedicates them to conservation. As professor Jedediah Britton-Purdy has aptly described, dedicated conservation lands "neither permit nor oblige so much pluralistic integration"; rather, the conservation purposes to which the lands are dedicated become paramount.[44] The second — the multiple-use paradigm — is a dicier proposition from the perspective of land conservation. This paradigm authorizes land management agencies to manage for conservation uses and values through a variety of land use tools, but as part of a mix of uses and values that include active uses like mining, oil and gas development, timbering, and grazing. This Part describes each of these paradigms. It begins by providing a broad overview of the dedication paradigm, the more familiar approach to land conservation. It then provides a detailed account of the mixed-use paradigm of conservation, which could be extended to include conservation rights-of-way.

A. The Dedication Paradigm

In 1872, Congress enacted legislation providing that "the headwaters of the Yellowstone River . . . [are] reserved and withdrawn from settlement, occupancy, or sale . . . and dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people."[45] The establishment of Yellowstone National Park marked the

[43] Light v. United States, 220 U.S. 523, 537 (1911) (quoting United States v. Trinidad Coal Co., 137 U.S. 160, 170 (1890)).

[44] Jedediah Britton-Purdy, *Whose Lands? Which Public?: The Shape of Public-Lands Law and Trump's National Monument Proclamations*, 45 ECOLOGY L.Q. 921, 942 (2018).

[45] 16 U.S.C. § 21.

beginning of what Professor Bob Keiter has described as a "remarkable commitment to nature" by the federal government.[46]

The dedication paradigm has expanded to encompass a dizzying number of designations managed by federal land management agencies:[47] the National Park Service alone manages 423 units encompassing almost 85 million acres falling within 19 different designations — for example, it manages 76 national historic sites, 3 national lakeshores, and 19 national preserves alongside the 63 flagship national parks.[48] The BLM manages 900 units of National Conservation Lands encompassing about 33 million acres, also with varying designations.[49] The U.S. Fish & Wildlife Service manages 567 national wildlife refuges encompassing 89.2 million acres. [50] The U.S. Forest Service manages 58.5 million acres of inventoried roadless areas.[51]

[46] Robert B. Keiter, *Toward a National Conservation Network Act: Transforming Landscape Conservation on Public Lands into Law*, 42 HARV. ENV'T L. REV. 61, 62 (2018). FLPMA reflects the fact that federal lands may be dedicated to specific purposes like conservation by exempting those lands from the multiple use mandate. *See* 43 U.S.C. § 1732(a). The federal government's "commitment to nature" has sometimes been effectuated with the intention or effect of dispossessing Native Americans. *See, e.g.*, Sarah Krakoff, *Not Yet America's Best Idea: Law, Inequality, and Grand Canyon National Park*, 91 U. COLO. L. REV. 559, 561-62 (2020) ("The Havasupai, Hualapai, Hopi, and eight other American Indian Tribes were violently displaced from their aboriginal lands in order to create 'public' land that became the basis for the National Park, even as their resources were recruited to build up the West's cities and suburbs.").

[47] The dedication paradigm also defines significant aspects of the United States's efforts to conserve marine resources, for example, through oceanic national monuments managed by the National Marine Fisheries Service. *See, e.g.*, Mass. Lobstermen's Ass'n v. Ross, 945 F.3d 535 (D.C. Cir. 2019) (affirming authority of President to designate marine national monuments).

[48] *See National Park System*, NAT'L PARK SERV., https://www.nps.gov/aboutus/national-park-system.htm (last visited Jan. 23, 2021) [https://perma.cc/RD4K-E3BZ]; *see also* CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 5 (2020), https://fas.org/sgp/crs/misc/R42346.pdf [https://perma.cc/KP9E-Y6FT].

[49] *See National Conservation Lands*, BUREAU OF LAND MGMT., https://www.blm.gov/programs/national-conservation-lands (last visited Jan. 23, 2021) [https://perma.cc/QN7D-K4S5].

[50] *See* CONG. RSCH. SERV., *supra* note 48, at 5; *Celebrating National Wildlife Refuges*, U.S. DEP'T OF THE INTERIOR: BLOG OF THE INTERIOR (Oct. 11, 2019), https://www.doi.gov/blog/celebrating-national-wildlife-refuges [https://perma.cc/N974-JTJQ].

[51] *Welcome to the Roadless Area Conservation*, U.S. DEP'T OF AGRIC.: FOREST SERV., https://www.fs.usda.gov/roadmain/roadless/home (last visited July 16, 2020) [https://perma.cc/7BJN-72GF]. Extensive controversy and litigation have surrounded roadless areas, particularly in the Tongass National Forest. *See* Press Release, Ctr. For Biological Diversity, Lawsuit Challenges Trump Administration Decision to Gut Tongass National Forest Protections (Dec. 23, 2020), https://biologicaldiversity.org/w/news/press-releases/lawsuit-challenges-trump-administration-decision-gut-tongass-

Overlapping with these conservation lands, Congress has designated 111 million acres of wilderness areas.[52]

The dedication paradigm is defined by extensive protections for the lands it affects. The durability and strength of these protections do not come easily; designating lands for conservation generally requires federal political leaders at the national level to make decisions. Indeed, some designations, like establishing wilderness areas and national parks, can only occur through legislation.[53]

Congress has delegated authority to establish other types of conservation lands to the Executive Branch. The Antiquities Act is among the most far-reaching of these conservation authorities, authorizing the president to issue proclamations that declare "objects of historic or scientific interest" as national monuments and reserve public lands for the care and management of objects so declared.[54] Exercising that authority, President Roosevelt established the Grand Canyon National Monument to protect "the greatest eroded canyon within the United States,"[55] and Mount Olympus National Monument to protect "numerous glaciers, and . . . summer range and breeding grounds of the Olympic Elk (*Cervus roosevelti*), a species peculiar to these mountains and rapidly decreasing in numbers."[56] Modern national monuments routinely also identify ecological resources as objects for protection.[57]

national-forest-protections-2020-12-23/ [https://perma.cc/DVD6-5PT7]. The Biden Administration has indicated that it will reverse course and restore protections for the Tongass National Forest. Ellen Montgomery, *Hope for the Tongass National Forest*, ENV'T AM. (Jan. 22, 2021), https://environmentamerica.org/blogs/environment-america-blog/ame/hope-tongass-national-forest [https://perma.cc/CAQ9-CUZG] ("As part of the 'Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis' . . . , President Biden directed the U.S. Department of Agriculture to immediately review a rule finalized in October, 'Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska . . . .' Essentially, this means that the Forest Service will be taking the first step toward restoring protections for our largest national forest, the Tongass National Forest in Southeast Alaska.").

[52] CONG. RSCH. SERV., RL31447, WILDERNESS: OVERVIEW, MANAGEMENT, AND STATISTICS 1 (2019), https://sgp.fas.org/crs/misc/RL31447.pdf [https://perma.cc/FA2U-GZZ3].

[53] *See, e.g.*, 16 U.S.C. § 1131(a) ("[N]o Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act."); John Copeland Nagle, *How National Park Law Really Works*, 86 U. COLO. L. REV. 861, 903 (2015) ("Only Congress can establish a national park.").

[54] 54 U.S.C. § 320301(a).

[55] Proclamation No. 794, 34 Stat. 3236 (1908).

[56] Proclamation No. 869, 35 Stat. 2247 (1909).

[57] *See, e.g.*, Proclamation No. 7318, 65 Fed. Reg. 37,249 (June 9, 2000) ("[T]he Cascade-Siskiyou National Monument is an ecological wonder, with biological diversity

For many years, presidents also exercised non-statutory authority to reserve public lands for conservation purposes under the Supreme Court's decision in *United States v. Midwest Oil*.[58] *Midwest Oil* held that the president enjoyed broad authority to reserve public lands and dedicate them to various public purposes because the president had exercised such authority hundreds of times without objection from Congress.[59] Before FLPMA expressly eliminated the president's authority to withdraw lands under *Midwest Oil*, many national wildlife refuges had been established through presidential proclamations.[60] Since then, a variety of authorities allow the creation of new wildlife refuges, often requiring centralized decision making by leadership of the Interior Department.[61]

Congress expressly delegated to the Secretary of the Interior the authority to withdraw lands from operation of the public land laws that authorize mining, mineral leasing, and other extractive uses.[62] The withdrawal authority is not, however, a true tool for dedicating lands to conservation; withdrawals are limited to twenty years in duration and the lands involved are not dedicated to any particular purpose, but rather simply exempted from certain private uses.[63]

unmatched in the Cascade Range."). The establishment of the Bears Ears National Monument by President Barack Obama demonstrates that the Antiquities Act can be used to support Native American tribes, rather than dispossess them. Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016). That monument was the first ever established at the request of tribes, recognized the importance of indigenous knowledge for land management, and directed that the management of monument lands occur in collaboration with tribal governments. *Id.*; Kurtis Lee, *'This Is Our Land': Native Americans See Trump's Move to Reduce Bears Ears Monument as an Assault on Their Culture*, L.A. TIMES (Dec. 25, 2018, 3:00 AM PT), https://www.latimes.com/nation/la-na-utah-bears-ears-20181225-htmlstory.html [https://perma.cc/9M6Q-DKKA].

58 United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915).

59 *Id.* at 469-71.

60 *See* Britton-Purdy, *supra* note 44, at 940-42.

61 *See Digest of Federal Resource Laws of Interest to the U.S. Fish & Wildlife Service*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/laws/lawsdigest/NWRSACT.HTML (last visited Aug. 31, 2021) [https://perma.cc/7KHW-FRJA]; *see also* 43 U.S.C. § 1714(a) (limiting delegation of withdrawal authority to "individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate").

62 *See* 43 U.S.C. § 1714(a).

63 *Id.* § 1714(c)(1). Withdrawals are, in this fashion, distinct from reservations because "[a] withdrawal makes land unavailable for certain kinds of private appropriation under the public land laws . . . . A reservation, on the other hand, goes a step further: it not only withdraws the land from the operation of the public land laws, but also dedicates the land to a particular public use." S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 784 (10th Cir. 2005).

Some conservation lands within these various designations remain subject to non-conservation uses. Recreation is generally permitted, although some national wildlife refuges are closed to the public.[64] However, the kind and intensity of allowable recreation can vary dramatically. Hunting is also allowed on many conservation lands.[65] Consumptive and extractive uses, such as logging, grazing, mining, and drilling, are also not always prohibited.[66] For example, grazing continues within many wilderness areas and national monuments, although it should be limited so that grazing does not compromise monument objects. Oil and gas development occurs within some national wildlife refuges,[67] and the Trump Administration set in motion a highly controversial plan to allow drilling in the Arctic National Wildlife Refuge.[68] It remains to be seen how the Biden Administration will respond. Conservation lands are also generally subject to valid existing rights, including mining claims, that predated their designation.[69] While critics rightly object to uses like drilling in the Arctic National Wildlife Refuge that threaten the conservation values to which lands are dedicated,[70] the careful calibration of conservation designations to allow some consistent uses to continue is a feature,

[64] *See* GOV'T ACCOUNTABILITY OFF., WILDLIFE REFUGES: CHANGES IN FUNDING, STAFFING, AND OTHER FACTORS CREATE CONCERNS ABOUT FUTURE SUSTAINABILITY 56 (2008) (noting a wildlife refuge that is closed to the public).

[65] *See Hunting and Fishing on National Parks and Fish and Wildlife Refuges*, DEP'T OF THE INTERIOR: BLOG (Mar. 1, 2017), https://www.doi.gov/blog/hunting-and-fishing-national-parks-and-fish-and-wildlife-refuges [https://perma.cc/Z9HM-ZQCK].

[66] *See* Zellmer, *supra* note 6, at 510-12.

[67] The Fish and Wildlife Service reports that approximately 5,000 oil and gas wells exist within more than 100 national wildlife refuges. *National Wildlife Refuge System Non-Federal Oil and Gas Final Rule Frequently Asked Questions*, U.S. FISH & WILDLIFE SERV. (Nov. 10, 2016), https://www.fws.gov/refuges/oil-and-gas/faqs.html [https://perma.cc/6URZ-VSYC].

[68] *See* Juliet Eilperin, *Trump Officials Rush to Auction Off Rights to Arctic National Wildlife Refuge Before Biden Can Block It*, WASH. POST (Nov. 16, 2020, 8:26 PM ET), https://www.washingtonpost.com/climate-environment/2020/11/16/arctic-refuge-drilling-trump [https://perma.cc/RJU9-C7QE].

[69] 16 U.S.C. § 1133(d)(3).

[70] *See, e.g.*, Jim Camden, *Washington Leads Suit Against Arctic Refuge Drilling*, SPOKESMAN-REV. (Sept. 9, 2020), https://www.spokesman.com/stories/2020/sep/09/washington-leads-suit-against-arctic-refuge-drilli/ [https://perma.cc/64UD-JC2T] ("[Drilling on the Coastal Plain] would harm Washington by exacerbating the effects of climate change and devastate birds that migrate through the state . . . ."); Elizabeth Shogren, *For 30 Years, a Political Battle Over Oil and ANWR*, NPR (Nov. 10, 2005, 12:00 AM ET), https://www.npr.org/templates/story/story.php?storyId=5007819 [https://perma.cc/LE44-SX68] (discussing stories of Stan Stenner who continues to fight for the conservation of the Arctic National Wildlife Refuge).

rather than a flaw, in America's conservation system. Allowing some use of conservation lands broadens support for them and highlights opportunities for compromise that can secure meaningful conservation benefits while allowing some uses to persist.[71]

Dedicating public lands to conservation has generally proven popular and bipartisan.[72] Indeed, in 2019 the Senate voted ninety-two to eight to enact what one reporter described as "the most sweeping conservation legislation in a decade" to protect millions of acres of public lands.[73]

The expansion of conservation designations has led Professor Keiter to describe federal public land management as having entered a "nature conservation period."[74] It is a mistake, however, to consider dedication as the only conservation strategy, because most federal lands remain subject to multiple-use management. As the next Section describes, conservation has, however, also occur on those lands.

B. Multiple-Use Paradigm

Public lands that have not been dedicated to a particular use — whether conservation lands or other components of the federal land base like the extensive lands managed by the Department of Defense —

[71] Professor John Leshy credits the willingness of conservation groups to accept ongoing grazing within wilderness areas as contributing to the ongoing willingness of Congress to designate new wilderness areas and, as he explains "[a]lthough grazing has continued, there have been no water projects and almost no mineral development authorized in wilderness areas." John D. Leshy, *Contemporary Politics of Wilderness Preservation*, 25 J. LAND RES. & ENV'T L. 1, 3 (2005).

[72] There have, however, been a few high visibility controversies over conservation lands. *See* Juliet Eilperin, *A Diminished Monument*, WASH. POST (Jan. 15, 2019), https://www.washingtonpost.com/graphics/2019/national/environment/will-anyone-mine-after-grand-staircase-escalante-reduction-by-trump/ [https://perma.cc/CJ22-DAHH]; Kirk Siegler & Claire Heddles, *When Everybody Wants a Piece of 'God's Country*,' NPR (July 8, 2019, 5:00 AM ET), https://www.npr.org/2019/07/08/735988755/when-everybody-wants-a-piece-of-god-s-country [https://perma.cc/AYT2-LGFM].

[73] Juliet Eilperin & Dino Grandoni, *The Senate Just Passed the Decade's Biggest Public Lands Package. Here's What's in It.*, WASH. POST (Feb. 12, 2019), https://www.washingtonpost.com/climate-environment/2019/02/12/senate-just-passed-decades-biggest-public-lands-package-heres-whats-it [https://perma.cc/MKE2-CEZ7].

[74] Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1129-31 (2005). Professor Keiter points to "new environmental protection standards and procedures; a significantly expanded federal commitment to preservation, including biodiversity conservation; more prescriptive organic statutes and new planning requirements along with extensive regulatory regimes; increased judicial involvement and oversight; newly acknowledged public legal rights; and unprecedented levels of citizen involvement in agency decision processes." *Id.* at 1129.

are generally managed under a multiple-use paradigm that recognizes conservation uses and values as among the uses for which public lands may be managed.[75]

The multiple-use paradigm has few antecedents in early American law, because the federal government engaged in little public land management in the early days of the republic.[76] Public lands were either reserved for various purposes — some conservation related, others not — or they were open to privatization under an array of preemption, homesteading, mining, and other disposal laws.[77] Lands owned by the federal government were open for public uses, including hunting, fishing, trapping, timbering, and the like, because any use was generally allowed.[78] Even during this unregulated era of public land law, early manifestations of what would become multiple use management existed. In 1885, for example, Congress enacted the Unlawful Inclosures Act to outlaw fencing of public lands in a manner to exclude others,[79] thereby promoting multiple overlapping uses of public lands by prohibiting monopolization of the land by ranchers.[80]

By the 1960s, Congress had grown wary of privatization of public lands and begun to favor a mixed-use approach to land management. The Multiple-Use Sustained-Yield Act of 1960 constituted the first legislation on this front, directing the U.S. Forest Service to manage national forests for a list of coequal uses, including "outdoor recreation,

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[75] 43 U.S.C. § 1701(a)(7) (declaring policy that land "management be on the basis of multiple use and sustained yield unless otherwise specified by law").

[76] Michael C. Blumm & Kara Tebeau, *Antimonopoly in American Public Land Law*, 28 GEO. ENV'T L. REV. 155, 175 (2016) ("For most of the Nineteenth century, federal natural resource management policies in the West were virtually non-existent.").

[77] Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 147-50 (1999).

[78] Hunting and fishing were important public rights in early America. *See* Darren K. Cottriel, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L.J. 1235, 1238 (1996) ("In fact, hunting was so fundamental in early American life that at least one of the original states, Pennsylvania, considered requiring a constitutional right to hunt prior to ratifying the United States Constitution.").

[79] Act of Feb. 25, 1885, ch. 149, 23 Stat. 321; *see* Camfield v. United States, 167 U.S. 518, 524-25 (1897).

[80] *See* Blumm & Tebeau, *supra* note 76, at 207. Professors Robert Fischman and Jeremiah Williamson identify the Unlawful Inclosures Act as a response to the range wars of the 1880s that arose from "[c]ompetition for scarce resources — forage and water" that were adjudicated "mostly by sword and pistol." Robert L. Fischman & Jeremiah I. Williamson, *The Story of* Kleppe v. New Mexico*: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123, 131 (2011) (quotation marks omitted).

range, timber, watershed, and wildlife and fish purposes."[81] In 1964, Congress temporarily extended multiple-use management to BLM's management of public lands through the Classification and Multiple Use Act of 1964.[82]

In 1976, FLPMA permanently established multiple-use management as the polestar of public lands management, directing the BLM to manage public lands that had not been dedicated to a particular dominant use for "multiple use and sustained yield."[83] FLPMA fully integrates conservation into multiple-use management, defining the phrase "multiple use" to include management that "takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values."[84] Congress recognized that these uses would sometimes, perhaps often, not be compatible, and directed that uses be "utilized in the combination that will best meet the present and future needs of the American people."[85]

Conservation uses of land are coequal with active uses; as the Tenth Circuit explained in *New Mexico ex rel. Richardson* v. *Bureau of Land Management,* "[i]t is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses."[86] At the

[81] Multiple-Use Sustained-Yield Act of 1960, Pub. L. No. 86-517, § 1, 74 Stat. 215 (codified as amended at 16 U.S.C. § 528) (listing the five major uses of national forests as "outdoor recreation, range, timber, watershed, and wildlife and fish purposes").

[82] Classification and Multiple Use Act of 1964, Pub. L. No. 88-607, 78 Stat. 986.

[83] 43 U.S.C. § 1701(a)(7). For a detailed discussion of the legislative history of FLPMA, see generally Eleanor R. Schwartz, *A Capsule Examination of the Legislative History of the Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 285 (1979).

[84] 43 U.S.C. § 1702(c). FLPMA defines the phrase "sustained yields" in a complementary fashion to mean "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." *Id.* § 1702(h).

[85] 43 U.S.C. § 1702(c); *see* Norton v. S. Utah Wilderness All., 542 U.S. 55, 58 (2004) ("'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'").

[86] New Mexico *ex rel.* Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 710 (10th Cir. 2009). There, the court explicitly states that "[d]evelopment is a *possible* use, which BLM must weigh against other possible uses — including conservation to protect environmental values . . . ." *Id.* (emphasis in original). Since FLPMA's passage, courts have recognized the tension that the multiple-use mandate presents and understood that to ensure that the BLM was meeting the mandate they must look at the equality of all uses in the aggregate. Utah v. Andrus, 486 F. Supp. 995, 1003 (D. Utah 1979) ("A parcel of land cannot both be preserved in its natural character and mined. . . . It is only

same time, because multiple-use management vests the BLM with considerable discretion,[87] the balance struck between conservation uses and values and active uses, including extractive and consumptive uses, can shift rapidly when successive presidents pursue different priorities. FLPMA is not, however, entirely ecumenical when it comes to conservation. It separately directs the BLM to "take any action necessary to prevent unnecessary or undue degradation of the lands."[88] Thus, FLPMA establishes a substantive limit — even if one that is indeterminate and subject to contestation — on the BLM's authority to ignore conservation in land management decisions.

II. CONSERVATION ON MULTIPLE-USE LANDS

Multiple-use management contemplates conservation uses and values as among the purposes for which public lands are managed. This Part discusses the public policy tools that the BLM has traditionally relied upon to manage for conservation.

A. Land-Use Planning

FLPMA sections 201 and 202 establish a land-use planning framework to guide management of public lands and implement multiple-use management.[89] The BLM can, and often has, integrated conservation into the development and revision of land use plans, generally called Resource Management Plans ("RMPs").[90] Once an RMP has been adopted, land-management decisions must be consistent with

by looking at the overall use of the public lands that one can accurately assess whether or not BLM is carrying out the broad purposes of the statute.").

[87] Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 518 (D.C. Cir. 2010) ("[T]he Bureau has wide discretion to determine how those principles [of multiple use management] should be applied."); Strickland v. Morton, 519 F.2d 467, 469 (9th Cir. 1975) (describing the multiple use management as "breath[ing] discretion at every pore").

[88] 43 U.S.C. § 1732(b).

[89] *Id.* §§ 1711-12.

[90] *How We Manage*, U.S. DEP'T OF THE INTERIOR: BUREAU OF LAND MGMT., https://www.blm.gov/about/how-we-manage (last visited Dec. 11, 2020) [https://perma.cc/R2NN-54XM]. Some scholars have criticized the complexity and time-intensive process of multiple-use land-use planning (outlined below) and suggested alternate planning models. *See* Mark Squillace, *Rethinking Public Land Use Planning*, 43 HARV. ENV'T L. REV. 415, 416 (2019).

it, although it is not uncommon for the BLM to amend the RMP to enable particular projects to proceed.[91]

Section 201 requires the BLM to "prepare and maintain on a continuing basis and inventory of all public lands and their resources and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern."[92] Section 202 directs the BLM to create and revise RMPs to "provide by tracts or areas for the use of the public lands."[93] FLPMA lists nine criteria for the development and revision of land-use plans, including "the principles of multiple use and sustained yield," the "consideration of physical, biological, economic, and other sciences," the "designation and protection of areas of critical environmental concern," and "long-term benefits to the public [weighed] against short-term benefits."[94] Thus, the land-use planning process does not commit the BLM to making any sort of specific conservation decisions, but FLPMA embeds conservation principles in the planning process.

The BLM begins its land-use planning process with a public scoping process to identify planning issues that it must consider when developing a plan.[95] Then, the BLM develops a range of planning alternatives in a draft RMP (the agency conducts environmental analysis under the National Environmental Policy Act concurrently).[96] The draft RMP is subject to a 90-day notice-and-comment period, after which the BLM releases the proposed RMP.[97] After the release of the proposed RMP, parties who previously participated in the planning process and may be adversely affected by the RMP have 30 days to file a protest.[98] The BLM also presents the proposed RMP to affected state governors for a sixty-day consistency review to allow states to identify inconsistencies with state or local land-use plans or policies.[99] After resolving any

[91] 43 U.S.C. § 1712(e); *see, e.g.*, U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., RECORD OF DECISION FOR THE GATEWAY WEST TRANSMISSION LINE PROJECT AND RESOURCE MANAGEMENT PLAN AMENDMENTS SEGMENTS 8 AND 9, at 14-15 (2017), https://eplanning.blm.gov/public_projects/nepa/39829/95807/115812/ROD_Gateway_West_Segments_8_and_9_2017_Full.pdf [https://perma.cc/BL66-Z644] (approving five land use plan amendments across multiple RMPs).

[92] 43 U.S.C. § 1711(a).

[93] *Id.* § 1712(a).

[94] *Id.* § 1712(c)(1)-(9).

[95] Resource Management Planning, 43 C.F.R. § 1610.4-1 (2021). Detailed procedures for the land-use planning process are codified at *id.* §§ 1610.1-1610.8.

[96] *Id.* §§ 1610.4-5, 1610.4-7.

[97] *Id.* § 1610.2(e).

[98] *See id.* §§ 1610.5-1, 1610.5-2.

[99] *Id.* § 1610.3-2(e).

protests or inconsistencies, the BLM state director approves the final RMP and issues a record of decision.[100]

The BLM routinely uses the land-use planning process for conservation purposes. A land-use plan can close lands to mineral leasing or grazing, identify areas for ecological restoration, establish mitigation requirements or other terms and conditions for authorized uses.[101] For example, the federal government's ambitious greater sage grouse conservation effort — called by political leaders in the Obama Administration the "largest landscape-level conservation effort in U.S. history"[102] — was largely implemented through land-use plan amendments designed to conserve sage grouse habitat.[103] As experience with the sage grouse plans demonstrates, RMPs are not always durable, because they can be, and often are, amended. The BLM may implement minor plan amendments in less than six months with minimal environmental review.[104]

Designating Wilderness Study Areas ("WSAs") as a component of land-use planning has the potential for more durable protections. FLPMA section 603 required the BLM to review all lands with wilderness characteristics identified through the section 201 inventory process and report them to Congress by 1991.[105] The BLM must manage each WSA so as "not to impair the suitability of such areas for preservation as wilderness" until Congress acts to either designate the area as wilderness or releases the lands.[106] The Executive Branch thus lacks authority to unilaterally release WSAs and allow road construction and extractive and consumptive uses inconsistent with wilderness

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[100] *Id.* § 1610.5-1.

[101] *See, e.g.*, U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., RESOURCE MANAGEMENT PLAN, MISSOULA FIELD OFFICE II-36 to II-37 (2021), https://eplanning.blm.gov/public_projects/58107/200093747/20032222/250038421/Missoula_ROD_Jan2021_Final.pdf [https://perma.cc/C5MW-FLTV] (designating certain areas as open, closed, or limited for motorized travel).

[102] Christy Goldfuss, Secretary Sally Jewell & Secretary Tom Vilsack, *Unprecedented Collaboration to Save Sage-Grouse is the Largest Wildlife Conservation Effort in U.S.*, WHITE HOUSE (Sept. 22, 2015, 2:27 PM ET), https://obamawhitehouse.archives.gov/blog/2015/09/22/unprecedented-collaboration-save-sage-grouse-largest-wildlife-conservation-effort-us [https://perma.cc/9F4Y-QFPQ].

[103] *See* Justin R. Pidot, *Public-Private Conservation Agreements and the Greater Sage-Grouse*, 39 PUB. LAND & RES. L. REV. 165, 167-68 (2018).

[104] U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., LAND USE PLANNING HANDBOOK (H-1601-1) 45 (2005), https://www.ntc.blm.gov/krc/uploads/360/4_BLM%20Planning%20Handbook%20H-1601-1.pdf [https://perma.cc/63Q6-S24T] [hereinafter LAND USE PLANNING HANDBOOK].

[105] *See* 43 U.S.C. § 1782.

[106] *Id.*

values.[107] The durability of this designation no doubt contributed to the significant public controversy that surrounded the BLM's wilderness inventories.[108] Although the BLM designated new numerous WSAs pursuant to section 202, the federal government has taken the position since 2003 that its authority to designate WSAs expired when it transmitted its report to Congress.[109] While that legal position is not unassailable, WSA designation cannot occur unless it changes, although the BLM does continue to inventory lands with wilderness characteristics. The BLM can (but need not) manage to conserve those characteristics through the land use planning process.[110]

B. Areas of Critical Environmental Concern

The BLM designates areas of critical environmental concern ("ACECs") in RMPs to "highlight areas where special management attention is needed to protect and prevent irreparable damage to important historic, cultural, and scenic values, fish, or wildlife resources."[111] The BLM adopts site-specific management prescriptions to protect the unique resources that led to the designation of an

[107] *See* U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., WILDERNESS STUDY AREAS: OREGON/WASHINGTON BLM 1-2, https://www.blm.gov/sites/blm.gov/files/prog_ncls_orwa_WSA-FAQ.pdf [https://perma.cc/BU9L-W37K].

[108] The controversy over the wilderness inventory was particularly fierce in the State of Utah. *See* U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., UTAH WILDERNESS INVENTORY vii (1999), https://www.blm.gov/sites/blm.gov/files/Utah%20Wilderness%20Inventory%201999.pdf [https://perma.cc/ZM2G-FMJV].

[109] *See* Utah v. Norton, No. 2:96-CV-0870, 2006 WL 2711798, at *12-14 (D. Utah Sept. 20, 2006), *aff'd*, Utah v. U.S. Dep't of Interior, 535 F.3d 1184 (10th Cir. 2008); *see also* ROSS W. GORTE & PAMELA BALDWIN, CONG. RSCH. SERV., RS21917, BUREAU OF LAND MANAGEMENT (BLM) WILDERNESS REVIEW ISSUES 5-6 (2004) ("The Department, under Secretary Gale Norton, subsequently settled the case, and on September 29, 2003, issued new wilderness guidance (Instruction Memoranda No. 2003-274 and 2003-275). These directives apply to BLM lands nationwide, except for Alaska and certain categories of lands, and state that 1) the §603 authority terminated following presidential recommendations in 1993; 2) BLM cannot conduct further wilderness reviews; 3) BLM cannot administratively create more WSAs under §603 or other authority; and 4) the §603(c) nonimpairment standard cannot be applied to non-WSA lands.").

[110] Or. Nat. Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1111 (9th Cir. 2010) ("Wilderness values are among the resources which the BLM can manage under 43 U.S.C. §§ 1712 and 1732.").

[111] U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., EVALUATION OF RELEVANCE AND IMPORTANCE CRITERIA FOR AREAS OF CRITICAL ENVIRONMENTAL CONCERN 1 (1988), https://eplanning.blm.gov/public_projects/lup/35315/47944/52063/ACEC_Guidance_BLM.pdf [https://perma.cc/5PNZ-MR4J].

ACEC,[112] although the lack of standardized protections has led to inconsistent implementation of ACEC by different BLM field offices.[113]

Nonetheless, ACECs have successfully protected unique resources on public land. For example, the BLM has designated Nine Mile Canyon in Eastern Utah (featuring the highest concentration of rock art in the United States) and the Table Rocks, Oregon (the sole home of a unique wildflower) as ACECs and managed to protect those resources.[114] The BLM can, however, remove ACEC designations through the same land use planning process used to designate them, and the BLM has exercised that authority.[115] For example, the 2020 RMP for the Lewistown, Montana field office eliminated all ACECs in the planning area, amounting to 22,900 acres.[116]

Outside parties can nominate an area for designation as an ACEC, subject to the BLM's considerable discretion.[117] When the BLM evaluates potential ACECs it does so based on whether the areas meet

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[112] *See* John Ruple & Mark Capone, *NEPA, FLPMA, and the Impact Reduction: An Empirical Assessment of BLM Resource Management Planning and NEPA in the Mountain West*, 46 ENV'T L. 953, 965 (2016).

[113] *See* Kelly Nolen, *Residents at Risk: Wildlife and the Bureau of Land Management's Planning Process*, 26 ENV'T L. 771, 814-15 (1996).

[114] U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., PRICE FIELD OFFICE: RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN 136-37 (2008), https://eplanning.blm.gov/public_projects/lup/67041/83197/99802/Price_Final_Plan.pdf [https://perma.cc/QCS6-968K] (Nine Mile Canyon); U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., RECORD OF DECISION FOR THE MEDFORD DISTRICT RESOURCE MANAGEMENT PLAN 58 (1995), https://www.blm.gov/or/plans/files/medford_rmp.pdf [https://perma.cc/S79X-5SDR] (Table Rocks).

[115] *See, e.g.*, Ken Rait, *Millions of Acres of Public Lands Could Lose Protections*, PEW (July 23, 2019), https://www.pewtrusts.org/en/research-and-analysis/articles/2019/07/23/millions-of-acres-of-public-lands-could-lose-protections [https://perma.cc/F8NG-A8C6] (noting proposed removal of 23,000 acres of ACECs in Lewistown planning area).

[116] *See* U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., LEWISTOWN PROPOSED RESOURCE MANAGEMENT PLAN AND FINAL ENV'T IMPACT STATEMENT 3-6 (2020), https://eplanning.blm.gov/public_projects/lup/38214/20012601/250017167/Lewistown_PRMP_FEIS_Vol_1_Feb2020.pdf [https://perma.cc/Q8XY-5B46]. The proposed Lewistown RMP was promulgated under the authority of acting BLM Director William Pendley. In late 2020, the plaintiffs challenged Pendley's authority to serve as acting director for over a year and a court held that Pendley was unlawfully serving as acting director. Bullock v. U.S. Bureau of Land Mgmt., 489 F. Supp. 3d 1112, 1131 (D. Mont. 2020). The court enjoined Pendley from exercising authority of BLM Director and set aside actions that Pendley had taken while serving unlawfully — this included the Lewistown and Missoula RMP amendments which had eliminated ACEC designations. *Id.*

[117] *See* 43 C.F.R. §§ 1610.4-1, 1610.7-2 (2021).

certain relevance or importance criteria.[118] Internal BLM guidance indicates that, for an area to be designated as an ACEC, it must meet at least one of the criterion for both relevance and importance.[119] While the BLM need not designate an ACEC because it meets those criteria, it must consider doing so in at least one RMP alternative.[120]

C. Compensatory Mitigation

The BLM has relied upon compensatory mitigation for conservation purposes through both land use planning and implementation decisions.[121] Compensatory mitigation requires public land users to offset harms occurring at one location by improving environmental conditions elsewhere.[122] Unlike other project-specific mitigation measures designed to avoid or minimize impacts at a project site,[123] compensatory mitigation can be used to concentrate conservation and ecosystem restoration activities in areas managed for conservation values and uses. Compensatory mitigation requires parties engaging in land use activities to offset the environmental harms they cause.[124] The BLM has not historically implemented compensatory mitigation in a systematic fashion, but rather state offices of the BLM have imposed

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[118] U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., EVALUATION OF RELEVANCE AND IMPORTANCE CRITERIA FOR AREAS OF CRITICAL ENV'T CONCERN 1, https://eplanning.blm.gov/public_projects/lup/35315/47944/52063/ACEC_Guidance_BLM.pdf (last visited July 29, 2021) [https://perma.cc/8ADK-HGBX].

[119] *Id.* Relevance criteria include a significant cultural value (e.g., petroglyphs), a fish and wildlife resource (including habitat), a natural process or system (such as a rare plant species or a geologic system), and natural hazards (such as avalanches or dangerous cliffs). *Id.* Importance criteria mean that the value, resource, system, or hazard has significant qualities that gives it meaning, is particularly fragile or sensitive, has been recognized as warranting protection, or poses concerns to human safety or welfare. *Id.* at 1-2.

[120] *Id.* at 1.

[121] There is a distinction between land use planning and implementation decisions. LAND USE PLANNING HANDBOOK, *supra* note 104, at 29 ("Upon approval of the land use plan, subsequent implementation decisions are put into effect by developing implementation (activity-level or project-specific) plans. An activity-level plan typically describes multiple projects in detail that will lead to on-the-ground action. These plans traditionally focused on single resource programs (habitat management plans, allotment management plans, recreation management plans, etc.).").

[122] *See* Pidot, *Compensatory Mitigation*, *supra* note 3, at 1049-50.

[123] *See* 10 C.F.R. § 900.3 (2021) (identifying mitigation hierarchy including avoidance, minimization, and compensation).

[124] 40 C.F.R. § 1508.1(s) (2021). This is the Council of Environmental Quality's definition of mitigation. The regulation elaborates that mitigation includes actions that avoid, minimize, rectify, reduce, or compensate for the environmental impacts of an action. *Id.* § 1508.1(s)(1)-(5).

compensatory mitigation requirements in a somewhat *ad hoc* fashion with a particular focus on habitat for endangered species.[125] While the Obama Administration had begun to develop a landscape-scale approach to compensatory mitigation, this effort ended when the Trump Administration took the position that the BLM lacked authority to require mitigation.[126]

Again, the greater sage-grouse conservation plan is among the most ambitious examples of the BLM using this conservation tool.[127] The plan, implemented through more than 90 land-use plan amendments, required that parties seeking to engage in surface disturbing activities within sixty-seven million acres of public lands engage in compensatory mitigation to offset impacts to the sagebrush habitat essential to the grouse's survival.[128]

The BLM also embedded compensatory mitigation requirements in the Desert Renewable Energy Conservation Plan ("DRECP"), adopted, in part, to promote renewable-energy permitting in Southern California.[129] In order to encourage development of renewable energy sources, the DRECP designates "development focus areas" for streamlined development and other "variance process lands" for development contingent on specific compensatory mitigation requirements that compensate for environmental impacts.[130] The DRECP also sets caps on ground disturbance and requires compensatory mitigation for any ground disturbance in excess of the cap.[131]

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125 *See* Justin R. Pidot, *The Bureau of Land Management's Infirm Compensatory Mitigation Policy*, 30 FORDHAM ENV'T L. REV. 1, 3 (2018) [hereinafter Pidot, *Mitigation Policy*].

126 *See id.* at 3-4.

127 *See* Pidot, *Compensatory Mitigation*, *supra* note 3, at 1064.

128 *Id.* at 1064-65.

129 *See* U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., RECORD OF DECISION FOR THE LAND USE PLAN AMENDMENT TO THE CALIFORNIA DESERT CONSERVATION PLAN, BISHOP RESOURCE MANAGEMENT PLAN, AND BAKERSFIELD RESOURCE MANAGEMENT PLAN 6 (2016), https://eplanning.blm.gov/public_projects/lup/66459/133460/163124/DRECP_BLM_LUPA_ROD.pdf [https://perma.cc/L3FX-2PH8] [hereinafter BISHOP RESOURCE MANAGEMENT PLAN].

130 *Id.* at 39.

131 Pidot, *Compensatory Mitigation*, *supra* note 3, at 1065. The DRECP did not break entirely new ground in structuring solar development in this fashion. In 2012, the BLM finalized a Solar Programmatic Environmental Impact Statement to identify solar energy zones and adopt mitigation requirements for solar development. *See* Amy Wilson Morris & Jessica Owley, *Mitigating the Impacts of the Renewable Energy Gold Rush*, 15 MINN. J. L. SCI. & TECH. 293, 343-44 (2014).

III. PRIVATE RIGHTS ON MULTIPLE-USE LANDS

Conservation on multiple-use lands generally occurs through public policy, while active use often manifests through private rights. This Part examines the array of private-use rights that exist on public lands and the ways that these different use rights are created and managed.

For much of American history, private citizens could claim and establish ownership over public lands under laws intended to raise revenue, encourage settlement of the west, and promote desirable land uses.[132] These laws generally allowed private parties to select lands, so long as the lands had not been removed from the public domain, and stake claims, which would ripen into ownership once certain preconditions were met.[133] Today, private rights in public lands do not generally include a transfer of fee title,[134] and the BLM has considerably more authority over the creation of private rights and how right-holders can access and make use of such rights. This section describes features of the more common mechanisms by which private rights are created to provide context for the next section describing the asymmetries that exist between private rights and conservation.

The 1872 Mining Law creates among the strongest private rights in public lands, as it is the only remaining statute that allows private parties to establish property rights without prior authorization from federal agencies.[135] All public lands that have not been withdrawn or

[132] *See* Keiter, *supra* note 74, at 1152-53 ("The nineteenth-century disposal era, undergirded by the national commitment to laissez-faire capitalism, saw private ownership and property rights as the key to future progress. Confronted with a vast unsettled country, Congress used the federally owned lands and the prospect of private ownership to entice the growing citizenry westward to fill up the empty spaces and tame the frontier."); Leshy, *supra* note 71, at 518 ("During this era, Congress made divestiture the primary objective of public land policy. It encouraged the settlement of western lands with people loyal to the United States, and thus helped keep the nation bound together as it expanded across the landscape. Sale of public lands also could generate revenue that would help retire the national debt."); Pidot, *Compensatory Mitigation*, *supra* note 3, at 1072-74 (describing the different mechanisms through which Congress encouraged privatization including sale of public land, authorization to claim public lands for preferred uses, and passage of statutes that allowed private parties to stake claims for resource extraction).

[133] A variation on this theme were Preemption Laws that recognized ownership interests in parties who had improved public lands without express legal authority to do so. *See, e.g.*, Preemption Act of 1841, ch. 16, 5 Stat. 453 (1841) (allowing individuals living on public lands to purchase the land).

[134] *See* Pidot, *Compensatory Mitigation*, *supra* note 3, at 1075-76.

[135] 30 U.S.C. § 22. The 1872 Mining Law initially covered all minerals. *Id.* ("Except as otherwise provided, *all* valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and

reserved are open for location of mining claims under the 1872 Mining Law, and these rights are generally not subject to the BLM's land use planning authority.[136] A mining claim is staked by physically marking the boundaries of the claim and recording it with both the state and federal government.[137] The 1872 Mining Law limits the dimensions of claims, although a claimant can stake an unlimited number of adjacent claims (but must ultimately prove the validity of each).[138] While the act of staking a claim creates a priority right against other mining claimants,[139] it does not establish a valid property right. The claimant only acquires a property interest upon the discovery of a valuable mineral within the claim, which requires producing physical evidence of a mineral deposit of enough quantity and quality that a reasonable person would develop a reasonable prospect of developing a profitable mine.[140] Discovery validates a mining claim, meaning that if the land is subsequently withdrawn or reserved the claim will persist.[141] Valid

purchase." (emphasis added)). Today it covers those minerals that Congress did not subsequently designate as leasable under the Mineral Leasing Act ("MLA") or saleable under the Common Varieties Act. *See* Carl J. Mayer, *The 1872 Mining Law: Historical Origins of the Discovery Rule*, 53 U. CHI. L. REV. 624, 625 (1986). While distinguishing between minerals locatable under the 1872 Mining Law and leasable under the MLA is a simple proposition, questions can arise about whether minerals fall under the MLA's provisions or are subject to sale as common varieties under the Materials Act. *See, e.g.*, McClarty v. Sec'y of the Interior, 408 F.2d 907, 909 (9th Cir. 1969) (considering whether naturally fractured stone was a valuable mineral and subject to a claim under the General Mining Law rather than sale under the Materials Act).

136 *See* 43 U.S.C. § 1732(b).

137 *See id.* § 1744(a) (detailing the requirements for recording mining claims under FLPMA).

138 Ranchers Expl. & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 714 (D. Utah 1965) ("Discovery of mineral upon one claim in and of itself will not support rights to another claim or group of claims, even though contiguous."); *see* 30 U.S.C. § 23.

139 "Pedis possesio" rights flow from local custom, which is recognized by the 1872 Mining Law (30 U.S.C. § 23), and which generally requires a claimant to be diligently pursuing a mineral discovery. *See* Duguid v. Best, 291 F.2d 235, 238-39 (9th Cir. 1961) ("A prospector who has made no discovery which would entitle him to any possessory rights of his claim against the government nevertheless has some possessory rights against forcible, fraudulent or clandestine intrusions while he remains in possession of his claim diligently working towards discovery.").

140 *See, e.g.*, Earnest K. Lehman & Assocs. of Mont., Inc. v. Salazar, 602 F. Supp. 2d. 146, 161 (D.D.C. 2009), *aff'd*, 377 F. App'x 28 (D.C. Cir. 2010) (per curiam).

141 U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., MINING CLAIM PACKET 8 (July 30, 2014), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd488806.pdf [https://perma.cc/BT6R-DENK] ("The discovery of a valuable mineral deposit within the limits of a mining claim located on public lands in conformance with state and Federal statutes validates the claim; and the locator acquires an exclusive possessory interest in the mineral deposits within the claim.").

mining claims grant "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," rights that persist until mining activities are completed.[142]

The majority of other private rights in public lands are created through leasing and permitting and are subject to the BLM's land-use planning authority. The Mineral Leasing Act of 1920 ("MLA") grants the BLM authority to lease federally owned minerals including energy minerals and fertilizer minerals.[143] The MLA includes different mechanisms for different types of minerals and includes both competitive and non-competitive leasing.[144] Private parties can influence where leases are offered, [145] but the BLM ultimately decides where and whether to lease and on what terms. Moreover, leases do not themselves authorize surface disturbing activities such as mining for fertilizer minerals or drilling for oil and gas.[146] Rather, leaseholders must secure additional regulatory permission before they can begin extracting the minerals under lease and those permissions are often subject to conditions designed to reduce impacts of development.[147]

Leases issued under the MLA expire. For example, the BLM issues oil and gas leases for a primary term of ten years, but the leases continue past the primary terms so long as the land is still producing oil and gas in paying quantities.[148] If a lease is no longer producing oil and gas after the primary lease term then it is subject to termination because of cessation of production.[149] In practice, the ten-year lease term can be extended, because BLM often grants lease suspensions,[150] and a

[142] 30 U.S.C. § 26. The 1872 Mining Law contemplates that the holder of a valid mining claim may patent the claim and obtain fee title to the land. Congress has, however, included a rider in its annual appropriations bills for many years that prohibits patenting, meaning that the surface estate of a mining claim remains in federal ownership subject to the rights of the claimant. *See* Aaron Mintzes, *Congress Funds a Government Complete with Mining Policy Riders*, EARTHWORKS (Jan. 24, 2014), https://www.earthworks.org/blog/congress_funds_a_government_with_mining_policy_riders/ [https://perma.cc/EYD6-F643].

[143] *See* 30 U.S.C. § 181.

[144] *See, e.g.*, *id.* § 201 (coal); *id.* § 211 (phosphates); *id.* § 223 (oil and gas); *id.* § 241 (oil shale); *id.* § 261 (sodium); *id.* § 271 (sulfur); *id.* § 281 (potash).

[145] For regulations detailing the nomination process see 43 C.F.R. §§ 3120.3-1, 3120.3-7 (2021).

[146] 30 U.S.C. § 226(g).

[147] *Id.*

[148] *Id.* § 226(e).

[149] *Id.* § 226(i).

[150] *See, e.g.*, Solenex LLC v. Bernhardt, 962 F.3d 520, 522-23 (D.C. Cir. 2020) (holding that the district court improperly applied doctrine of laches to rule that Department of Interior lacked authority to cancel gas-drilling leases in Montana that

leaseholder can extend a lease by reworking drilling operations to produce more oil or gas.[151] The BLM can also approve ten-year lease renewals in some circumstances.[152]

The BLM regulates grazing on public lands under a permitting system established by the Taylor Grazing Act of 1934 ("TGA").[153] The BLM gives highest priority for grazing permits to applicants who own base property contiguous to a grazing area or who had grazed the public range prior to the enactment of the TGA.[154] Grazing permits contain specific terms and conditions to identify seasons of use and required rangeland conditions.[155] Grazing permits also generally have a ten year term.[156] They are, however, renewable so long as the lease-holder complies with the terms and conditions of the lease.[157] Grazing permits formally "convey no right, title, or interest held by the United States in any lands or resources"[158] and can be terminated or modified to address deteriorating rangeland conditions or because public lands have been closed to grazing through RMPs.[159]

The BLM authorizes occupancy of public lands and other rights-of-way for a variety of purposes through Title V Permits. These permits authorize the holder to "use a specific piece of public land for a certain project" and "authorize[] rights and privileges for a specific use of the land for a specific period of time."[160] Title V permits may authorize a

had been suspended for 30 years); Laura Lindley, *Unit and Federal Lease Suspensions and Extensions*, ROCKY MTN. MIN. L. FOUND., 2006, at 1, 10 (discussing reasons why a lease may be suspended).

151 *See Solenex*, 962 F.3d at 523. BLM might have inherent executive authority to terminate some leases because of climate-change impacts, but the argument is a novel one that has not been tested in courts. *See* Eric Biber & Jordan Diamond, *Keeping it* All *in the Ground?*, 63 ARIZ. L. REV. 279, 302 (2021).

152 *See* 43 C.F.R. § 3135.1-6(a)-(b) (2021).

153 43 U.S.C. § 315. The TGA provides for both grazing permits and grazing leases, depending on the classification of the land, although the two designations have little practical difference. *See* 43 C.F.R. § 4130.2 (2021).

154 CONG. RSCH. SERV., RS20453, FEDERAL GRAZING REGULATIONS: *PUBLIC LANDS COUNCIL V. BABBIT* 3 (2004), https://www.everycrsreport.com/files/20031120_RS20453_83d92d7f03343c60dff1f1bdb6454007b04c0970.pdf [https://perma.cc/CMF4-YMSR]. Base property is land owned by an applicant that "can serve as a base for a livestock operation that uses public lands." *Id.* at 3 n.9.

155 *See* 43 U.S.C. § 315.

156 43 C.F.R. § 4130.2(d) (2021).

157 *Id.* § 4130.2(e)(1)-(3).

158 *Id.* § 4130.2(a), (c).

159 *Id.* § 4110.4-2 (describing permit-cancellation procedures in the event that land available for grazing decreases).

160 U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., OBTAINING A RIGHT-OF-WAY ON PUBLIC LANDS 1 (2018), https://www.blm.gov/sites/blm.gov/files/Lands_ROW_

broad range of energy, infrastructure, and transportation uses and, potentially, could be used to establish conservation rights-of-way.[161]

The BLM also issues permits to harvest timber and special forest products.[162] Special forest product permits authorize relatively small operations and are issued without appraisal or competitive bidding.[163] In contrast, timber sales occur through an auction.[164] Both types of permits designate a certain volume of a specific product for removal and provide 48 months for harvest to occur.[165] These permits are not ordinarily subject to renewal or extension, although the BLM can grant extensions if harvest was delayed by causes outside of the permit holders control.[166]

The BLM regulates one class of resources — common varieties of minerals — by sale, rather than lease under the Materials Act of 1947.[167] The BLM sells common varieties of minerals through purchase agreements.[168] A purchase agreement only grants the right to extract the material until the contract terminates; it does not grant any other property rights on public lands.[169] Purchase agreements for common varieties are also subject to the continuing right of the United States to

ObtainingaROWPamphlet.pdf [https://perma.cc/7J42-YS9D]. The BLM has a distinct authority pursuant to the Alaska National Interest Lands Conservation Act of 1980 to grant rights-of-way across public lands in Alaska to provide private parties with access to private property. 16 U.S.C. § 3170.

161 *See infra* Part V for a more detailed discussion of Title V Permits and their potential to enable conservation rights-of-way.

162 *See* 30 U.S.C. § 601 ("The Secretary, under such rules and regulations as he may prescribe, may dispose of . . . vegetative materials . . . on public lands of the United States . . . ."); 43 C.F.R. § 5400.0-3 (2021). Special forest products include "firewood, Christmas trees, boughs, greenery, mushrooms, and other similar vegetative resources." *Id.* § 5402.0-6(e). Although most forest land in the United States is managed by the U.S. Forest Service, the BLM manages a significant swath of forest land in the West, particularly in Western Oregon and Alaska. *See Forests Defined*, U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., https://www.blm.gov/programs/natural-resources/forests-and-woodlands/forests-defined (last visited July 1, 2021) [https://perma.cc/ZBE3-TW8C].

163 *See* 43 C.F.R. § 5402.0-6(e) (2021).

164 *See id.* § 5442.1.

165 *Id.* §§ 5462.1, 5463.1.

166 *See id.* § 5473.4(a) (discussing the exceptions that would justify a permit extension).

167 Materials Act of 1947, Pub. L. No. 96-470, 61 Stat. 681 (codified at 30 U.S.C. §§ 601-604).

168 43 C.F.R. § 3601.21 (2021).

169 *Id.* § 3601.21(a).

issue other leases and permits on the underlying land under other authority.[170]

Finally, commercial recreational uses are also subject to permitting. The BLM issues special recreation permits to allow individuals, organizations, and businesses to commercially use public lands for recreation and athletic competitions.[171] Special recreation permits can encompass large areas of land,[172] and they are highly variable in nature — terms for special recreation permits can range from one day to ten years and are considered on a case-by-case basis.[173] They can be renewed if they are still consistent with BLM management plans and are generally renewed for the same term as the original permit.[174]

These various forms of private rights to public lands are not, however, without limitation. As described, the BLM must "prevent unnecessary or undue degradation" and this directive applies to all land uses including mining under the 1872 Mining Law.[175] By regulation, the BLM has sought to effectuate this obligation by requiring miners to submit a plan of operations before beginning large-scale mining activities and comply with a variety of performance standards to address things like waste disposal and reclamation.[176] Other private rights are subject to even greater supervision. For example, grazing permit holders must meet rangeland health standards.[177] And parties with oil and gas leases must comply with specific terms and conditions to minimize resource degradation that could include seasonal timing restrictions or surface use restrictions.[178]

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170 *Id.* § 3601.22.

171 *See id.* § 2931.2(a).

172 *See, e.g.*, U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., ENV'T ASSESSMENT FOR THE SILVERTON GUIDES HELICOPTER SKI TERRAIN EXCH. 7-8 (2017), https://eplanning.blm.gov/public_projects/nepa/67342/105809/129388/FinalEA_Silverton_Heli_Ski_Terrain_Environmental_Assessment_May2017.pdf [https://perma.cc/GUQ4-GF2A] (considering an expansion of an existing special recreation permit for heli-skiing by around 10,000 acres in southwestern Colorado).

173 43 C.F.R. § 2932.42 (2021). Special recreation permits are highly specific to the activity in question and could authorize activity for a day (e.g., for a kayaking competition), a season (e.g., for a river guide outfitter), or for multiple years (e.g., for a heli-ski operation in connection with an existing ski resort).

174 *Id.* §§ 2932.51, 2932.53.

175 43 U.S.C. § 1732(b).

176 43 C.F.R. § 3809.420 (2021).

177 *Id.* § 4180.2.

178 *See id.* § 3101.1-2 (requiring that leaseholders take "such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values").

IV. ASYMMETRY BETWEEN CONSERVATION TOOLS AND PRIVATE RIGHTS

Parts II and III illustrate the dichotomous nature of public land management: active use tends to occur through private rights and conservation use tends to occur through public policy. These categories are not absolute: federal agencies themselves sometimes engage in active use of public lands — for example, constructing roads or visitor amenities. And a few private rights like grazing permits are held by conservation organizations. But these exceptions are relatively rare. This Part explains that differences between private rights and public policy lead to persistent asymmetries that favor use over conservation.

A. Durability

The greatest asymmetry between private rights for active use and public policy for conservation relates to durability. Private rights are longer lasting and more difficult to disturb than conservation commitments for at least three reasons that will be discussed. First, right-holders often have enforceable rights that cannot simply be terminated by the government due to a change in policy direction. Second, informal mechanisms for durability such as presumptive renewals and industry support favor private-use rights. Third, private-use rights are often (but not always) consumptive in practice, with the power to indelibly reshape the landscape. In other words, even a private right that is formally temporary in nature may have permanent degrade conservation values. On the other hand, public policy measures designed to promote conservation do not continue to protect conservation values if they end.

Private rights are more difficult to terminate than public policy commitments. Specifically, private rights draw durability from their specified duration, presumptive renewability, procedural protections from revocation, protection from subsequent withdrawals, and takings or breach of contract protection. Leases and permits are typically enforceable by the holder, and even grazing permits, which by their terms are subject to revision and revocation, are protected by an extensive administrative apparatus designed to ensure that permit holders enjoy broad procedural protections.[179] Public policy decisions to conservation made through land-use planning and management, on the other hand, are subject to revision and amendment.

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[179] *See* James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241, 272 (1994) ("Those whose use of the public lands is based upon a grant, permit, lease, or contract, even if for a short period of time, may have an enforceable property or contract right.").

The enumerated terms of private rights on public lands alone are enough to vest private rights with strong durability. The BLM grants leases for oil and gas resources for an initial term of ten years[180] and for coal for an initial term of twenty years.[181] Grazing permits generally have a primary term of ten years.[182] Valid mining claims staked under the General Mining Act of 1872 can last forever, so long as the claimant continues to pay a yearly fee.[183] These durations, while already long, understate the duration of many private rights. Oil and gas leases, for example, automatically extend beyond their primary term so long as they produce oil or gas in paying quantities.[184] Leases can also be renewed or suspended, to extend their life.[185] In contrast, conservation commitments made through land-use planning decisions are subject to revision at any time so long as the BLM complies with the appropriate procedures.[186]

Private rights often come with procedural protections to forestall revocation or modification, further strengthening durability. The Secretary of the Interior has the authority to forfeit and cancel mineral leases for violation of terms and conditions or regulatory requirements.[187] Cancellation of a productive lease typically requires the government to initiate judicial proceedings and cancellation of a nonproductive lease requires an administrative adjudication.[188] In both cases, the Due Process Clause entitles leaseholders to notice and an opportunity to be heard and challenge or appeal any cancellation.[189] Grazing permit-holders also enjoy significant procedural protections.[190] Moreover, the government could owe damages from abrogating some private rights and the specter of liability may influence government

180 30 U.S.C. § 226(e).

181 *Id.* § 207(a).

182 43 C.F.R. § 4130.2(d) (2021).

183 30 U.S.C. § 28f; 43 C.F.R. § 3834.11(a)(2) (2021).

184 30 U.S.C. § 226(e).

185 *See* Lindley, *supra* note 150, at 3 ("[T]he BLM is generally quite reasonable in granting extensions of drilling deadlines for unavoidable delay.").

186 *See* 43 U.S.C. § 1712.

187 30 U.S.C. § 188. The Secretary also has traditional administrative authority to cancel leases due to pre-lease events. Boesche v. Udall, 373 U.S. 472, 477-79 (1963).

188 Biber & Diamond, *supra* note 151, at 291; *see also* 30 U.S.C. § 188.

189 U.S. CONST. amend. V; *see, e.g.*, Ram Petroleums, Inc. v. Andrus, 658 F.2d 1349 (9th Cir. 1981) (considering an appeal from a district court's reversal of an I.B.L.A. decision that had upheld a lease cancellation for failure to pay).

190 *See* 43 C.F.R. §§ 4160.1-.4 (2021).

decision-making.[191] Valid claims under the 1872 Mining Law are property rights protected by the Takings Clause.[192] Government action deemed to have abrogated those rights may require payment of just compensation.[193] The holder of a mineral lease may enjoy similar, but distinct, protection for breach of contract if the government terminates a lease.[194]

The second factor that contributes to asymmetrical durability are informal mechanisms that favor private use. Private parties who profit on public lands wield considerable political power, creating incentives for land management agencies to tread carefully when limiting, conditioning, or excising private rights.[195] Professor Bruce Huber has identified the sometimes surprising "resilience and robustness" of private rights to public lands "in the face of strain or pressure or opposition."[196] Thus, he explains, even where public policy and legal considerations favor modification or termination of private rights, they often persist, due in part to "undue administrative lenience or the underenforcement of existing law."[197]

Finally, private rights often outlive conservation policies because they enable action that physically reshapes public lands. Even if the legal authorization to mine, timber, or graze is temporary, environmental consequences may persist for years, or forever. The proposed Rosemont Mine in Southern Arizona, for example, would have a lifetime of a

191 *Cf.* John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, 28 STAN. ENV'T L.J. 439, 462-63 (2009) (describing chilling effect associated with takings legislation).

192 *See* Beckett G. Cantley, *Environmental Protection or Mineral Theft: Potential Application of the Fifth Amendment Takings Clause to U.S. Termination of Unpatented Mining Claims*, 4. WASH. & LEE J. ENERGY CLIMATE & ENVIRONMENT 203, 207 (2013) ("The argument that is most likely to be successful, and the focus of this article, is that the invalidation and withdrawal of an otherwise valid unpatented mining claim may constitute a compensable Fifth Amendment taking by the U.S. government.").

193 U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

194 *Cf.* United States v. Hage, No. 07-CV-01154-GMN-VCF, 2017 WL 752832 (D. Nev. Feb. 27, 2017) (analyzing a grazing-permit dispute using contract principles and calculating damages rather than engaging in constitutional analysis).

195 *See* Huffman, *supra* note 179, at 276-77 ("The lords of the public lands are and always have been private interests. So long as half of the American West is owned by the United States Government, the pursuit of public land wealth by private interests will be a dominant factor in national politics."). While those pursuing public land wealth may not always dominate public land law and policy, they surely exercise considerable influence, as demonstrated by the mad rush during the Trump Administration to speed oil and gas leasing.

196 Huber, *supra* note 21, at 995.

197 *Id.* at 996.

couple of decades,[198] but the proposal includes a plan to dump toxic mine tailings and waste rock on thousands of acres of National Forest land.[199] Regardless of the temporary nature of the mine, such waste would have irreparable effects on the surrounding ecosystem.[200] Thus, regardless of the durability of private-use rights over conservation management, private-use rights impose much more drastic costs on the landscape than conservation. Put differently, some private rights — although of course not all — are permanent, even if the legal authorization lasts a short time. On the other hand, conservation uses and values must be perpetually protected because they can disappear in a virtual instant.

B. Initiation

A second asymmetry exists because of differences in the manner in which decisions about private rights and conservation policy are made. Many (although not all) components of the BLM's management of private-use rights are responsive in nature. People request permits, leases, grazing permits, and other use authorizations, and the BLM has mechanisms in place to process those requests.[201] While the BLM does not make conservation decisions in a vacuum, the opportunities for outside parties to set the bureaucratic apparatus in motion are more limited.[202]

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[198] U.S. DEP'T OF AGRIC., RECORD OF DECISION, ROSEMONT COPPER PROJECT AND AMENDMENT OF THE CORONADO LAND AND RESOURCE MANAGEMENT PLAN 37 (2017), https://www.rosemonteis.us/files/final-eis/rosemont-feis-final-rod.pdf [https://perma.cc/77ZB-9TYF].

[199] *Id.* at 33.

[200] *See id.* at 7 ("The geochemical composition of tailings and waste rock facilities may not support native vegetation. Soils are nonrenewable resources. Damage, disturbance, and removal of the soil resource may result in a loss of soil productivity, physical structure, and ecological function across the proposed mine site and across downgradient lands."). In 2019, a federal judge in Tucson held that the Forest Service did not conduct the required evaluations under environmental statutes when considering the environmental effects of these proposed tailings. Katrina Wilkinson, *Federal Judge in Tucson Rules on Rosemont Mine with Broad Impacts*, UNIV. OF ARIZ.: W. LANDS, W. WATERS BLOG (Oct. 15, 2019), https://westernlandsblog.arizona.edu/federal-judge-tucson-rules-rosemont-mine-broad-impacts [https://perma.cc/TY3D-LQMY].

[201] *See, e.g.*, 43 U.S.C. § 1744(a) (detailing the requirements for recording mining claims under FLPMA); 43 C.F.R. § 3120.3-1 to -7 (2021) (detailing the nomination process under the MLA); *id.* § 2932.22 (explaining how to apply for a special recreation permit).

[202] BLM's implementing regulations for land use planning indicate that parties may nominate lands for ACEC designation, subject to the agency's discretion. *See* UTAH WILDERNESS INVENTORY, *supra* note 117, at vii.

This difference in administration can limit the management options. For example, in the context of mining claims staked under the 1872 Mining Law, the private parties staking claims, rather than the BLM, get to make the basic decision about which lands should be subject to private rights.[203] So long as public lands have not been withdrawn and contain valuable mineral deposits, miners can acquire property rights for them. The BLM cannot make lands unavailable to mining through land-use planning,[204] meaning that even if a land-use plan provides direction to manage an area for conservation uses by, for example, designating an ACEC, a private party may stake a mining claim.

The BLM has greater authority over the creation of other private rights in minerals, forage, and timber, but the process by which these private claims are established and developed is still a mixture of government action and private-party decisions. For example, private parties can submit an expression of interest for oil and gas resources,[205] which will trigger the BLM to consider initiating a competitive leasing process.[206]

Moreover, the bureaucratic resources required to process permits, leases, and other use authorization can create a logic of its own. Mineral leaseholders can file an Application for Permit to Drill or a plan of operation, and the BLM requires staff to process and respond to those filings.[207] That means that even the most conservation-oriented administration must dedicate staff resources to administering private rights. In contrast, there are many fewer opportunities for private parties to trigger a response from the BLM about initiating a conservation process.[208] This disparity means that the BLM can reassign conservation-focused staff to work on processing private rights at a time when active use of public lands is favored but then has less flexibility to shift staff resources toward conservation.

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[203] 30 U.S.C. § 22 (noting that mineral deposits are "free and open to exploration and purchase").

[204] 43 U.S.C. § 1712(e)(3).

[205] 43 C.F.R. § 3120.1-1(e) (2021).

[206] *Id.* § 3120.1-1.

[207] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-329, OIL AND GAS PERMITTING: ACTIONS NEEDED TO IMPROVE BLM'S REVIEW PROCESS AND DATA SYSTEM (2020), https://www.gao.gov/assets/710/705590.pdf [https://perma.cc/Y54B-5LK6] (reviewing BLM's application and permitting process).

[208] *See supra* notes 86–91, 117 and accompanying text.

V. CONSERVATION RIGHTS-OF-WAY

As described in Part III, Title V of FLPMA establishes a mechanism through which nonfederal actors — private parties, and state, local, or tribal governments — may acquire rights-of-way over public lands. These rights-of-way are the most flexible private right in public lands and have been granted for a broad array of uses, including roads, transmission lines, cell-phone towers, and wind farms and solar generating facilities.[209] This Part begins by describing in greater detail the statutory authority and implementing regulations that govern Title V Permits and the rights-of-way they establish. It then describes current uses of Title V Permits to authorize land uses that have conservation benefits — specifically to enable construction of renewable energy generation and related transmission to facilitate an energy transition away from fossil fuels. While these uses have localized environmental impacts, they contribute to the national effort to address climate change. Finally, this Part explores the potential to use Title V Permits as conservation rights-of-way to establish private rights in conservation uses and values of public lands.

A. The Title V Framework

The BLM issues and administers rights-of-way "over, upon, under, or through" public lands under FLPMA Title V.[210] Section 501 identifies the purposes for which rights-of-way can be issued. These uses include a list of specific uses, including water projects, pipelines, energy generation and transmission, telecommunications, and roads and other transportation infrastructure.[211] The list also includes a broad authorization for rights-of-way for "other systems or facilities which are in the public interest and which require rights-of-way over, upon, under, or through" the public lands.[212] This final, general category of rights-of-way is the primary basis upon which conservation rights-of-way could be developed.

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[209] *See, e.g.*, U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., RECORD OF DECISION, TRANSWEST EXPRESS TRANSMISSION PROJECT AND RESOURCE MANAGEMENT PLAN AMENDMENTS 1 (2016), https://eplanning.blm.gov/public_projects/nepa/65198/92849/113809/BLM_ROD_FINAL_20161212.pdf [https://perma.cc/9N8K-TFQG] (approving a transmission line project crossing public and private lands in four states) [hereinafter TRANSWEST EXPRESS].

[210] 43 U.S.C. § 1761(a).

[211] *Id.*

[212] *Id.* § 1761(a)(7).

The enumerated categories of Title V rights-of-way identified in section 501 demonstrate that FLPMA uses the term right-of-way in a manner that is significantly broader than traditional common law rights-of-way, or affirmative easement, which generally provide a "right to pass through property owned by another."[213] A common law right-of-way would not ordinarily encompass a right to build and operate facilities like energy generation facilities on someone else land because such use is by its nature does not permit the type of concurrent use ordinarily envisioned when one party holds a non-possessory right over the land of another.

Section 504 provides general requirements for Title V Permits.[214] A permit-holder must pay fair market value to acquire and maintain a right-of-way.[215] The geographic scope of a right-of-way must be limited to those areas necessary for the permitted activity, taking into account considerations of public safety, and a permit must not authorize "unnecessary damage to the environment."[216] Permits are subject to terms and conditions to minimize environmental impacts, protect public safety and private property, and "otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto."[217] Terms and conditions typically direct permit-holders to provide compensatory mitigation to offset impacts.[218] Where a project may have significant environmental effects, an applicant must submit a plan for rehabilitation of the land when the project ends.[219]

The BLM has broad discretion when considering whether to grant a Title V Permit. If the agency determines that a proposed right-of-way would be inconsistent with the uses for which the lands are managed, not in the public interest, or otherwise inconsistent with the law then it may deny the application.[220] Where an applicant seeks a right-of-way

213 *Right-of-Way*, BLACK'S LAW DICTIONARY (11th ed. 2019).

214 43 U.S.C. § 1764.

215 *Id.* § 1764(g).

216 *Id.* § 1764(a). A permit may authorize temporary use of lands outside the bounds of the right-of-way. *Id.*

217 *Id.* § 1765. BLM's implementing regulations identify some general terms and conditions that will be required, including that permitees must take reasonable steps to prevent and suppress wildfires within the bounds of a right-of-way. 43 C.F.R. § 2805.12(a)(4) (2021).

218 Memorandum M-37039 from the U.S. Dep't of the Interior, Off. of the Solic. to the Sec'y, Assistant Sec'y of Land & Mins. Mgmt. & Dir. of Bureau of Land Mgmt. 21 (Dec. 21, 2016), https://www.eenews.net/assets/2017/02/21/document_ew_02.pdf [https://perma.cc/JSQ5-Z9ME].

219 43 U.S.C. § 1764(d).

220 Bear River Dev. Corp., 157 I.B.L.A. 37, 37 (2002).

under the general category for projects in the public interest, the BLM weighs the totality of facts and circumstances to determine whether the right-of-way will serve the public interest.[221]

With the exception of certain water projects that may be permanent,[222] a right-of-way is "limited to a reasonable term in light of all circumstances concerning the project,"[223] and the BLM typically issues rights-of-way for a maximum of 30 years.[224] A right-of-way may, however, be renewable and conditions for renewal may be provided in the Title V Permit.[225] In such circumstances permits will often be renewed as a matter of course, although the BLM has authority to change the conditions for renewal of a right-of-way, or the terms and conditions to which it is subject. The BLM may suspend or terminate a right-of-way for various reasons including abandonment — which is presumed if the right-of-way has not been used for five years — violation of terms and conditions, or for other reasons, although generally the permit holder is entitled to process for that to occur.[226] If a right-of-way ends, either because its term has passed or because of a termination proceeding, the permit-holder must remove any facilities within the right-of-way and remediate and restore the land to a satisfactory condition.[227]

A Title V Permit may authorize uses that conflict with other land uses, including other private rights to public land resources. For example, a right-of-way may overlie a hard rock mining claim or lands subject to a grazing permit or oil and gas lease. The BLM addresses such conflicts using a conventional first in time, first in right framework, such that the earliest valid right takes precedence.[228] Thus, if the BLM issued a right-of-way across lands subject to a valid mining claim, the miner's interest would have priority should it conflict with use of the right-of-way. Conversely, if the BLM issued right-of-way for lands free of mining claims, or for which a mining claim has been staked but the claimant

[221] *Id.* at 38.

[222] 43 U.S.C. § 1761(c).

[223] *Id.* § 1764(b).

[224] Rights-of-Way, Principles and Procedures; Rights-of-Way Under the Federal Land Policy and Management Act and the Mineral Leasing Act, 70 Fed. Reg. 20,969, 20,970 (Apr. 22, 2005) (to be codified at 43 C.F.R. pt. 2800).

[225] *Id.* at 20,970, 20,972.

[226] 43 U.S.C. § 1766; 43 C.F.R. § 2807.17(c) (2021). A permit may be temporarily suspended prior to an administrative proceeding if "necessary to protect public health or safety or the environment." 43 U.S.C. § 1766; *see also* 43 C.F.R. § 2807.16-.17 (2021).

[227] 43 C.F.R. § 2807.19(a)-(b) (2021). This includes removal and cleanup of hazardous materials. *Id.*

[228] *See* 43 U.S.C. §§ 1763, 2805.14 (2021).

has not validated it through the discovery of a valuable mineral, the right-of-way would take precedence and mining could occur only to the extent consistent with the rights encompassed in the Title V Permit.[229]

B. The Existence of Title V Permits with Conservation Benefits

Title V Permits have played an increasingly important conservation function as part of America's clean energy transition.[230] Permits authorize renewable energy generation, primarily wind and solar facilities, and also major transmission lines designed to carry clean energy from resource centers, like Wyoming and Nevada, to population centers like California. These permits cause localized environmental impacts — from construction and operation of physical infrastructure — but are an integral component of efforts to address climate change. This Section describes these proto-conservation rights-of-way — by which we mean rights-of-way that authorize intensive use of public lands but in a manner that serves important conservation goals.

The BLM issues Title V Permits for transmission lines in coordination with federal and state agencies that oversee the federal power grids.[231] The BLM also designates specific transmission corridors as the preferred sites for transmission rights-of-way.[232] Under the Obama

[229] Neither FLPMA nor BLM's implementing regulations specifically address prioritization. It has, however, been the longstanding view and practice of the Interior Department to recognize the priority of rights-of-way over rights established under homesteading and other disposal laws. *See* U.S. Dep't of the Interior, *Instructions: Roads, Trails, Bridges, Etc. in National Forests — Exception in Patents*, *in* 44 DECISIONS PUB. LANDS 513 (1916), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/doi_decisions_044.pdf [https://perma.cc/8FFE-6RVW]; *see also* BUREAU RECLAMATION, RECLAMATION LANDS HANDBOOK 21 (2013), https://www.usbr.gov/lands/LandsHandbook/Chapter06.pdf [https://perma.cc/9BLH-DVDC].

[230] Part of this transition is the move to quickly deploy renewable energy on public lands. *See, e.g.*, Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 ENV'T L. REP. 10,591, 10,595 (2017) (discussing how permits to lease BLM land for wind and solar are treated under Title V); Alexandra B. Klass, *Renewable Energy and the Public Trust Doctrine*, 45 UC DAVIS L. REV. 1021, 1038-40 (2012) (describing the increased demand for renewable energy and the large land requirement); J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693, 700 (2020) ("To put the challenge bluntly, the Green New Deal must undertake multiple national-scale infrastructure initiatives of magnitudes never before processed through existing siting and environmental law standards and procedures.").

[231] 43 U.S.C. § 1761(a)(5).

[232] *See id.* § 1763. The Energy Policy Act of 2005 required the BLM to designate transmission corridors in 11 Western states. 42 U.S.C. § 15926 ("[The Secretaries of Agriculture, Commerce, Defense, Energy, and Interior shall] designate, under their respective authorities, corridors for oil, gas, and hydrogen pipelines and electricity

Administration, the BLM developed a Rapid Response Team to facilitate the development of priority transmission lines.[233] For example, the TransWest Express Transmission Project involved a 728-mile energy-transmission system designed to deliver wind energy produced in Wyoming to Las Vegas and the Southwest.[234] Approval of such large-scale rights-of-way often involves amending the BLM's existing land-use plans. The TransWest right-of-way necessitated dozens of land-use plan amendments that allowed approval of the right-of-way outside of specific power transmission corridors that had been designated in land-use plans.[235]

The use of Title V Permits to authorize development of renewable energy on public lands is of more recent vintage. Such facilities plainly fall within the scope of Title V, which identifies energy generation infrastructure as permissible uses for rights-of-way. In 2005, Congress sought to jump-start deployment of renewable energy on public lands by including a provision in the Energy Policy Act encouraging the approval of 10,000 megawatts of renewable energy generation capacity on public lands within ten years.[236] The Obama Administration's climate action plan established a new goal of deploying 20,000 megawatts of renewable energy generation on public lands by 2020,[237] and the BLM promulgated specific regulations for the issuance of Title V Permits for this purpose,[238] which encourage rights-of-way for wind and solar energy projects.[239]

The solar and wind regulations contemplate that the BLM establish specific "designated leasing areas" ("DLAs") that are "preferred location[s] for solar or wind energy development that may be offered

transmission and distribution facilities on Federal land in the eleven contiguous Western States.").

[233] *See* U.S. DEP'T OF THE INTERIOR, *Interior Approves New High-Voltage Interstate Transmission Line Project in Wyoming and Idaho* (Nov. 12, 2013), https://www.doi.gov/news/pressreleases/interior-approves-new-high-voltage-interstate-transmission-line-project-in-wyoming-and-idaho [https://perma.cc/Y79Y-FUT3].

[234] *See* TRANSWEST EXPRESS, *supra* note 209, at ES-1; *Critical Grid Infrastructure to Connect the West*, TRANSWEST EXPRESS LLC, http://www.transwestexpress.net/ (last visited Feb. 11, 2021) [https://perma.cc/4NC8-MP39].

[235] TRANSWEST EXPRESS, *supra* note 209, at 26-27.

[236] Energy Policy Act of 2005, Pub. L. No. 109-58, § 211, 119 Stat. 660.

[237] Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections, 79 Fed. Reg. 59,021, 59,025 (Sept. 30, 2014) (to be codified at 43 C.F.R. pt. 2800).

[238] *Id.* at 59,024.

[239] *See* 43 C.F.R. § 2809.10 (2021).

competitively."[240] Unlike traditional Title V Permits, the regulations allow the BLM to offer wind and solar permits through a competitive leasing process,[241] and prioritize the issuance of solar and wind projects in DLAs.[242]

Solar and wind rights-of-way are subject to similar terms and conditions as other Title V Permits. They are issued for a term of 30 years with the right to apply for renewal under the same conditions as any other Title V Permit.[243] Permit holders must commence construction within five years of permit issuance and begin producing electricity within seven years.[244] Solar and wind rights-of-way are subject to different rental rate calculations than other rights-of-way, although the rental rate is also designed to establish fair market value.[245]

The solar and wind regulations include an important mechanism to address potential use conflicts, allowing the BLM to segregate lands — meaning that the lands are temporarily closed to new hard rock mining claims for up to two years — while considering a proposed renewable-energy development.[246] The segregation enables the BLM to avoid delays "that could result from encumbrances placed on lands after a wind or solar energy generation ROW application has been filed or after the BLM has identified an area for such applications, but before the BLM is able to make a decision on any such ROW."[247]

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[240] *Id.* § 2801.5(b)(9). For further discussion of wind and solar development on public lands, see generally Gregory M. Adams, *Bringing Green Power to the Public Lands: The Bureau of Land Management's Authority and Discretion to Regulate Wind-Energy Developments*, 21 J. ENV'T L. & LITIG. 445 (2006); Robert L. Glicksman, *Solar Energy Development on the Federal Public Lands: Environmental Trade-Offs on the Road to a Lower-Carbon Future*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 107 (2011); David J. Lazerwitz, *Renewable Energy Development on the Federal Public Lands: Catching Up with the New Land Rush*, 55 ROCKY MTN. MIN. L. INST. 13-1 (2009).

[241] Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections, 81 Fed. Reg. 92,122, 92,124 (Dec. 19, 2016) ("In this rule, the BLM amends its regulations implementing FLPMA to provide for two competitive processes for solar and wind energy rights-of-way on public lands. One of the processes is for lands inside DLAs. The other process is for lands outside of DLAs.").

[242] 43 C.F.R. § 2809.10(d) (2021) ("The BLM will generally prioritize the processing of 'leases' awarded under this subpart over the processing of non-competitive 'grant' applications under subpart 2804, including those that are 'high priority' under § 2804.35.").

[243] *Id.* §§ 2805.14(g), 2807.22, 2809.18(a).

[244] *Id.* § 2809.18(g).

[245] *See id.* § 2809.18(b).

[246] Segregation of Lands — Renewable Energy, 78 Fed. Reg. 25,204, 25,204 (Apr. 30, 2013) (to be codified at 43 C.F.R. pts. 2090, 2800).

[247] *Id.*

C. The Possibility of Title V Permits for Conservation Purposes

Could Title V Permits be granted explicitly for conservation purposes, rather than to authorize uses that have ancillary (even if vital) conservation benefits, like renewable energy production and transmission? This Section begins by providing a theoretical account of why creating conservation rights-of-way *should* be permissible, before exploring a range of potential uses for them, some more certain than others, and identifying limitations.

1. Legal Bases

Before describing three legal bases for distinct, but overlapping, categories of conservation rights-of-way, let's begin with an intuitive justification. That ecosystems produce value is an observation so broadly understood that it is almost banal. Professor Gretchen Daily coined the term ecosystem services to describe the economic value ecosystems produce,[248] and scientists and economists have invested significant effort to estimate the monetized value of ecosystems producing clean air and water, flood protection, pollination, and a range of others benefits.[249] To take a concrete example, some experts estimate that a one-acre wetland can hold 1.5 million gallons of water, roughly the equivalent of half-acre, ten-foot-deep reservoir.[250] Since Title V would plainly authorize a right-of-way to construct a reservoir to provide flood-protection to a downstream community,[251] it should also

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[248] *See generally* GRETCHEN C. DAILY, NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS (1997) (describing the term "ecosystem services").

[249] *See, e.g.*, DAVID EVANS & ASSOCS., INC. & ECONORTHWEST, COMPARATIVE VALUATION OF ECOSYSTEM SERVICES: LENTS PROJECT CASE STUDY 8-29 (2004), https://www.portlandoregon.gov/bes/article/386288 [https://perma.cc/TBS4-TFFV] (quantifying the value of ecosystem services such as flood control, air purification, and water purification); FOOD & AGRIC. ORG. OF THE U.N., ECONOMIC VALUATION OF POLLINATION SERVICES: REVIEW OF METHODS 21-33 (2006), http://www.fao.org/fileadmin/templates/agphome/documents/Biodiversity-pollination/econvaluepoll1.pdf [http://perma.cc/48Z8-BQU4] (discussing the monetary value of pollination services).

[250] *See* J.B. Ruhl, *Making Nuisance Ecological*, 58 CASE W. RES. L. REV. 753, 768-69 n.53 (2008) ("Experts estimate that a 1-acre wetland can hold up to 1.5 million gallons of water." (quoting Jon Kusler, *Wetlands, Hurricanes, and Flood Hazards*, *in* AFTER THE STORM: RESTORING AMERICA'S GULF COAST WETLANDS 34, 35 (Gwen Arnold ed., 2006))); *A Million Gallons of Water — How Much Is It?*, USGS, https://www.usgs.gov/special-topic/water-science-school/science/a-million-gallons-water-how-much-it? (last visited Feb. 7, 2021) [https://perma.cc/RBU3-XHMR] (explaining that one million gallons would fill a 13,350 square foot, ten-foot-deep swimming pool).

[251] 43 U.S.C. § 1761(a)(1) ("[The Secretary is] authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for — (1) reservoirs, canals,

allow the community to construct (or restore) wetlands for the same purpose, particularly since the wetlands will produce many other benefits. And, if constructing wetlands is allowed, so too should protecting wetlands already in existence.

The text of FLPMA is consistent with that intuitive account, supporting at least three justifications for conservation rights-of-way. First and most narrowly, a Title V Permit issued for traditional uses could encompass public lands upon which the permit-holder will engage in compensatory mitigation.[252] Compensatory mitigation has been required as a term and condition of a permit and, therefore, the lands to be restored or conserved to offset project impacts can fairly be viewed as a necessary component of the project.[253] For example, if a Title V Permit were issued to a state agency to construct a road subject to the condition that the agency restore an acre of wetlands for each acre of wetlands degraded by the project, the permit could encompass the area where restoration activities will occur as well as the road site.

Second, permits to restore or conserve natural systems may sometimes fit within specific categories described in section 501(a). A wetland is literally a "system[] for the impoundment . . . of water,"[254] and section 501(a)(1) would, therefore, appear to authorize a conservation right-of-way to restore, construct, or preserve a wetland. An overpass constructed over a highway to allow wildlife to migrate between seasonal habitats could constitute a trail within the meaning of section 501(a)(6) and would seem comfortably to constitute "other means of transportation,"[255] particularly because the inclusion of "livestock driveways" demonstrates that Congress contemplated non-human movement along infrastructure authorized under Title V.

Third, the broadest legal justification for conservation rights-of-way relies on a straightforward reading of section 501(a)(7), which authorizes rights-of-way for "other systems . . . in the public interest . . . which require rights-of-way over, upon, under, or through" public

ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water.").

[252] *See* 43 C.F.R. § 2805.12(a)(8)(iv) (2021).

[253] TRANSWEST EXPRESS, *supra* note 209, at 34. The Trump Administration disclaimed authority to require compensatory mitigation based on a dubious and novel interpretation of the BLM's legal authority. *See* Pidot, *Mitigation Policy*, *supra* note 125, at 4.

[254] 43 U.S.C. § 1761(a)(1).

[255] *Id.* § 1761(a)(6) (This includes "roads, trails, highways, railroads, canals, tunnels, tramways, airways, livestock driveways, or other means of transportation.").

lands.[256] That language is capacious enough to include natural systems, since it includes no limitation that only artificial systems may be authorized. [257] Because the creation, restoration, and protection of wetlands or other ecosystems involve natural systems requiring a right-of-way, the text of Title V is satisfied.

2. Examples

A broad variety of conservation rights-of-way could flow from those distinct legal bases. This Section explores possibilities, without suggesting that the BLM is likely to issue conservation rights-of-way for all of them. The BLM could face strong headwinds if it chose to use conservation rights-of-way in the broadest conceivable manner. The point, however, is that both conservationists and the BLM should carefully consider how conservation rights-of-way might augment other conservation tools, and the examples provided here are designed to promote such thinking.

Prior to the Trump Administration, the BLM frequently required compensatory mitigation as a term and condition of permits that authorize physical occupancy of public lands, and permits could be expanded to encompass lands where compensatory mitigation activities will occur.[258] The BLM could establish this practice on a case-by-case basis when it issues permits. For example, when the BLM authorized the TransWest Express Transmission Project, it required the project proponent to "perform, or provide funding to perform, preservation and/or restoration actions" to offset harms to lands with wilderness characteristics.[259] The BLM could have included the lands subject to restoration or preservation in the company's Title V Permit, thereby

[256] *Id.* § 1761(a)(7). Arguably, wetlands in this example could also qualify as an "impoundment . . . of water." *Id.* § 1761(a)(1).

[257] Such an interpretation of FLPMA would be afforded *Chevron* deference by the courts, and the Courts defer to such an interpretation if (1) congress had not directly spoken to the precise question; and (2) the agency's interpretation was reasonable. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). In this hypothetical case, both prongs of *Chevron* would likely be satisfied.

[258] The Trump Administration adopted the legally dubious position that it lacked authority to require compensatory mitigation, notwithstanding its broad authority under FLPMA and Title V's specific requirement for terms and conditions to "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. § 1765(a)(ii); *see* Pidot, *Mitigation Policy*, *supra* note 125, at 4.

[259] U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., TRANSWEST EXPRESS TRANSMISSION PROJECT RECORD OF DECISION app. at F20-21 (2016), https://eplanning.blm.gov/public_projects/nepa/65198/92793/111802/AppF_TWE_ReqdMitigation.pdf [https://perma.cc/7ZHC-WX84].

increasing the durability of those efforts and preventing inconsistent land uses after restoration or preservation had occurred.

Land use planning decisions could also embrace this practice. For example, the BLM's DRECP requires compensatory mitigation for solar projects in certain parts of the planning area.[260] The DRECP could have provided that Title V Permits issued for projects on those lands would extend to lands where mitigation would occur. In such a circumstance, Title V Permits would not be issued solely for conservation purposes, but rather, the conservation components of traditional uses would be incorporated.

Conservation rights-of-way to facilitate wildlife migration could constitute transportation systems authorized under section 501(a)(6). The simplest instance of such use is foreshadowed above — issuing permits for wildlife overpasses.[261] A state fish and game department or transportation department might believe that it would be advantageous, both from a wildlife-management perspective and a road-safety perspective, to construct a wildlife overpass that allowed for uninterrupted migration. While a wildlife overpass is not expressly named, it fits comfortably within the text authorizing "road, trail, . . . tunnel"[262] or "such other necessary transportation or system or facility which [is] in the public interest."[263]

Trails for human passage often are considerably longer than a span across a highway; the Appalachian Trail, for example, is more than two thousand miles long.[264] Could the BLM issue a right-of-way to a state

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[260] *See* BISHOP RESOURCE MANAGEMENT PLAN, *supra* note 129, at 92-93.

[261] This is common in the Western United States, and multiple states have undertaken significant projects to improve migration corridors near highways. *See, e.g.*, AMANDA R. HARDY, JULIE FULLER, MARCEL P. HUIJSER, ANGELA KOCIOLEK & MEREDITH EVANS, EVALUATION OF WILDLIFE CROSSING STRUCTURES AND FENCING ON U.S. HIGHWAY 93 EVARO TO POLSON, at xvi (2007), https://mdt.mt.gov/other/webdata/external/research/docs/research_proj/wildlife_crossing/final_report.pdf [https://perma.cc/VJ93-H6NS] (evaluating the potential to improve migration corridors and reduce bear and deer collisions on U.S. Route 93 in Western Montana). The aforementioned project resulted in the construction of 81 fish and wildlife crossing structures. *US 93 — Wildlife Crossing Structures in Use*, MONT. DEP'T OF TRANSP., https://www.mdt.mt.gov/pubinvolve/us93info/wildlife_crossings.shtml (last visited Jan. 9, 2020) [https://perma.cc/5GU6-3NGH]. For photos of mountain lions, black bears, and coyotes using a wildlife underpass, see Lora Shinn, *Montana's Wildlife Needs Safer Crosswalks*, NAT. RES. DEF. COUNCIL (Mar. 13, 2019), https://www.nrdc.org/stories/montanas-wildlife-needs-safer-crosswalks [https://[perma.cc/K7UB-EQZA].

[262] 43 U.S.C. § 1761(a)(6).

[263] *Id.* § 1761(a)(7).

[264] *See Appalachian Trail*, NAT'L PARK SERV., https://www.nps.gov/appa/index.htm (last visited Feb. 15, 2021) [https://perma.cc/726C-RKYP].

agency or conservation organization for a migratory corridor of similar length? To be more specific, the Wyoming Game and Fish Department manages a 200-mile migration corridor for pronghorn antelope — the longest such migration corridor in the contiguous United States.[265] A Title V Permit could prove a powerful tool to enhance the state's efforts where the migration corridor crosses public lands. The state agency would presumably engage in more active management along parts of the right-of-way, while other stretches would not require intervention. Of course, the same could be said for many trail systems: foot traffic alone will maintain stretches of trail in many settings, but others require tending.

Examples that could fit within section 501(a)(7)'s broad authorization for rights-of-way for "other systems . . . in the public interest" are manifold. The text is open textured, inviting experimentation. On the simple side, using Title V Permits to authorize mitigation banks — enterprises that engage in restoration activities to generate credits that others can use to offset the impacts of their activities[266] — on public lands would seem relatively simple. Like other permit holders, a mitigation bank would acquire a right to establish a "system" on public lands, in this case a natural system like a wetland or wildlife habitat that the permit holder restores and maintains. While Title V permits are not limited to for profit enterprises, many mitigation banks function in this fashion; mitigation banks are among the newer potential economic uses of public lands by private entities.[267] There appears no reason to preclude them from acquiring Title V permits for this use.

A more ambitious conservation right-of-way might seek to conserve a landscape or ecosystem to secure the services produced. A municipality might, for instance, seek a permit to protect a watershed from which it draws its drinking water supply;[268] or perhaps a wildlife

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[265] *The "Path of the Pronghorn" in Wyoming*, CONSERVATION FUND, https://www.conservationfund.org/projects/the-path-of-the-pronghorn-in-wyoming#:~:text=The%20pronghorn%20has%20the%20longest,migration%20corridor%20in%20the%20nation (last visited Jan. 13, 2020) [https://perma.cc/3Z7M-JA93].

[266] *See* Pidot, *Compensatory Mitigation*, *supra* note 3, at 1098.

[267] *See* Jessica Owley, *The Increasing Privatization of Environmental Permitting*, 46 AKRON L. REV. 1091, 1118-25 (2013); Elan L. Spanjer, Note, *Swamp Money: The Opportunity and Uncertainty of Investing in Wetland Mitigation Banking*, 113 NW. U. L. REV. 371, 374 (2018).

[268] New York City, which relies on the Catskill, Delaware, and Croton watersheds for its water supply, has engaged in a 100,0000-acre land acquisition program to establish conservation easements that ensure high water quality for its citizens. *See* N.Y.C. DEP'T OF ENV'T PROT., NEW YORK CITY'S LAND ACQUISITION PROGRAM 2 (2010),

conservation organization could seek a right-of-way to conserve wildlife habitat for game species.

3. Limitations

Conservation rights-of-way face a number of limitations and challenges, particularly in their more ambitious manifestations.

First, the viability of conservation rights-of-way will depend on the willingness of the BLM to innovate. Secretary Bruce Babbitt once issued a "call for innovation" for "imaginative and creative" ways to implement the Endangered Species Act.[269] Today, the BLM (and other land management agencies) must innovate to develop new approaches to land conservation. While the text of Title V would support such an effort, it would be difficult to develop conservation rights-of-way over the agency's objections, because the BLM has broad authority to consider the public interest in issuing permits.[270] Moreover, other components of the Department of the Interior would also need to be brought along. In the past, the Interior Board of Land Appeals, which adjudicates administrative appeals of BLM decisions, [271] has precluded the use of Title V rights-of-way for purposes it believed were "not among the purposes authorized under FLPMA."[272] Moreover, the Board may find that conservation rights-of-way are impermissible where it views them as an end-run around other statutes.[273] In *Department of the Army*, the Army Corps of Engineers sought a 8,300-acre right-of-way for large-scale maneuver and tactics training.[274] The Board viewed the request as an attempt to circumvent the Engel Act, which requires

https://www1.nyc.gov/assets/dep/downloads/pdf/watershed-protection/assistance-for-homeowners-landowners/2010_lap_brochure.pdf [https://perma.cc/H37B-99W6].

[269] Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation Within the Terms of the Act*, 24 ENV'T L. 355, 366 (1994).

[270] *See* Bear River Dev. Corp., 157 I.B.L.A. 37, 37 (2002). The BLM would also have to develop a method of assessing the fair market value for conservation rights of way in circumstances in which a for-profit corporation — like a mitigation bank — sought to acquire one. *See* 43 U.S.C. § 1764(g). The BLM may, however, waive rental fees for governments and nonprofit organizations. *See id.*

[271] 43 C.F.R. § 4.1 (2021) (explaining that the Interior Board of Land Appeals has the "purpose of hearing, considering, and deciding matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary").

[272] Nev. Div. of State Lands, 127 I.B.L.A. 375, 376-78 (1993). In this decision, the Interior Board of Land Appeals concluded that a Title V permit could not be issued to authorized military maneuvers by the Nevada National Guard.

[273] Dep't of the Army, 95 I.B.L.A. 52, 53 (1986).

[274] *Id.* at 52.

congressional approval for any withdrawal of public lands for a defense project or facility of more than 5,000 acres.[275] Similar concerns could arise if conservation-rights-of-way were used primarily to block hard rock mining, since Title II of FLPMA establishes a process for withdrawing lands from operation of the mining law.[276]

Second, conservation rights-of-way designed to preserve the status quo, rather than authorize active management, could face the same skepticism that met the efforts of conservationists to acquire oil and gas leases and grazing permits for non-use. Courts have already invalidated grazing permits where permittees did not intend to graze, but rather obtained permits to exclude the land from use by other ranchers.[277] In contrast, conservation groups have been successful in obtaining grazing permits where they intend to graze in a conservation-oriented and sustainable fashion.[278] A court could extend that same logic to conservation rights-of-way, viewing Title V Permits to protect existing natural systems from disturbance as impermissible. Having said that, the distinction between use and non-use use should be easily overcome in most circumstances, since many conservation purposes will be advanced by a degree of active management to, for example, restore degraded habitat or address invasive species.[279]

Third, conservation rights-of-way may not provide the degree of durability that some conservationists would like. Indeed, some of the examples discussed above would appear to require permanence — mitigation banks, for example, typically create credits only if conservation benefits are permanent.[280] FLPMA section 501(c) references "permanent easements" for water systems, but not for other

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[275] *Id.* at 53.

[276] 43 U.S.C. § 1712(e)(3).

[277] *See* Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1308 (10th Cir. 1999), *aff'd*, 529 U.S. 728 (2000).

[278] *See, e.g.*, Stewart v. Kempthorne, 554 F.3d 1245, 1253 (10th Cir. 2009) (rejecting Utah counties' challenge to a nonprofit's grazing permits).

[279] *See* U.S. FISH & WILDLIFE SERV., LAND MANAGER'S GUIDE TO DEVELOPING AN INVASIVE PLANT MANAGEMENT PLAN 31-36 (2018), https://ecos.fws.gov/ServCat/DownloadFile/162024?Reference=109270 [https://perma.cc/ES2C-7LDJ] (explaining active-management practices for controlling the spread of invasive plant species).

[280] U.S. ARMY CORPS OF ENG'RS, REGULATORY GUIDANCE LETTER 10 (2002), https://www.epa.gov/sites/production/files/2015-08/documents/mitigation_rgl_02-2_0.pdf [https://perma.cc/S9WY-5UF9] ("Corps permits [for compensatory mitigation] will require permanent compensatory mitigation unless otherwise noted in the special conditions of the permit.").

uses.[281] Rather, section 504(b) requires that permits have "a reasonable term in light of all circumstances concerning the project."[282]

Perhaps the BLM could determine permanence is the "reasonable term" for a mitigation bank's Title V Permit, although that result might be difficult to square with the text of the act. An alternate and more solid solution might be to establish clear conditions for permit renewal. BLM's implementing regulations provide if a "grant or lease specifies the terms and conditions for its renewal . . . [BLM] will renew the grant or lease if you are in compliance with the renewal terms and conditions; the other terms, conditions, and stipulations of the grant or lease; and other applicable laws and regulations."[283] That language comes close to allowing for permit renewal as of right, so long as terms and conditions are met. While not permanent from the outset, rights-of-way that incorporate renewal terms and conditions might be sufficiently durable to meet the certainty that is generally required to produce mitigation credits.

Fourth, conservation rights-of-way could be criticized for relying on the problematic logic of private rights in public lands that many conservationists resist. These instruments, like other private rights, constrain land management options as conditions change, calcifying public land management, rather than making it more flexible. That this danger exists demands vigilance and the need for calibration and experimentation. It does not, however, suggest that conservations abandon a promising tool to address existing asymmetries between private use rights and conservation.

Fifth, conservation rights-of-way would be subject to preexisting rights. A valid, existing right would always take precedent over a newly issued right-of-way.[284] A Title V conservation right-of-way is not a guarantee of conservation, it would be subject to any existing valid rights. With this hierarchy of rights comes a certain degree of bureaucratic burden: the BLM would be responsible for resolving conflict between rights. This structure would not be unique to conservation rights-of-way, as it already exists for every Title V right-of-way.

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[281] 43 U.S.C. § 1761(c).

[282] *Id.* § 1764(b).

[283] 43 C.F.R. § 2807.22(a) (2021).

[284] *See id.* § 2805.14 ("The grant conveys to you only those rights which it expressly contains. BLM issues it subject to the valid existing rights of others, including the United States.").

CONCLUSION

Conservation rights-of-way offer important opportunities to restore, maintain, and protect conservation uses and values on America's public lands by establishing private rights to conservation. In appropriate circumstances, the BLM could rely on this tool to complement other approaches to land conservation, such as the establishment of national monuments by the President under the Antiquities Act, or the designation of wilderness areas by Congress. Conservation rights-of-way are unlikely to protect millions of acres, as can be accomplished using those other tools, but they can serve a vital connective function to ensure that conservation commitments produce the most environmental benefits.

Realizing the potential benefits of conservation rights-of-way will require creativity and commitment by the BLM and willing partners among state, tribal, and local governments and conservation-oriented individuals or organizations. While sometimes elusive, these ingredients — creative thinking, durable commitment, and meaningful partnership — are essential to any effort to address climate change with the potential to succeed. The climate crisis demands a society-wide response and the development and refinement of an array of tools, both powerful and sweeping ones, and nuanced and context-specific ones, like conservation rights-of-way.