CONSERVING THE BLM'S MANDATE: WILL CONSERVATION LEASES WORK?

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ABSTRACT

The Bureau of Land Management (BLM) has historically prioritized the management of productive 'uses' like oil, gas, mineral, and grazing leases on federal lands administered under the Federal Land Policy and Management Act (FLPMA). In an era where federal lands are positioned as a tool for climate change response, the BLM's priorities have shifted toward conservation. In fact, the Biden administration Conservation and Land Health (CLH) Rule established a conservation leasing structure whereby private users can pay to conserve BLM lands. This interpretive shift renews a long-standing question: whether FLPMA—which speaks in terms of the 'use' of land—grants authority to lease for conservation. It further begs a practical question: can conservation efforts and productive 'uses' coexist?

This Comment discusses the viability of interpreting conservation as a 'use' under the major questions doctrine and *Loper Bright*. In consideration of the history of BLM's 'use'-centric, commodity-focused approach and the practicality of leasing for conservation, this Comment posits that BLM's shift in its interpretation of its leasing authority would not pass judicial scrutiny. And without proper incentives and mechanisms for lease renewals, the practical sustainability of conservation leasing is questionable. The BLM must re-center itself on FLPMA's mandate for sustained yield and prohibition of unnecessary degradation of land. Under the statute, the BLM has always been a conservationist, and it cannot abdicate its duties by passing them to private lessees.

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INTRODUCTION

The "nation's largest landlord"[1] has dug itself an interpretive hole. The Bureau of Land Management's (BLM's) organic act, the Federal Land Policy and Management Act (FLPMA), requires the Bureau to manage its lands for "multiple uses" and "sustained yield" (MUSY). Historically, the Bureau has tipped the scales in favor of productive "uses" like oil, gas, mineral, and grazing leases. However, in a new era of federal land management, in which federal lands are posited as a tool for climate change response,[2] the BLM is attempting to reinvigorate conservation's fit in this framework. A Biden administration rule attempted to establish a conservation leasing structure whereby private users could pay to conserve BLM lands. The obvious question raised by the scheme was whether a statute that speaks in terms of "use" (and has been interpreted in favor of commodities[3] for decades) grants this kind of authority. But the leasing structure also renewed the pragmatic question that has plagued MUSY statutes for decades: can cows, commodities, and conservationists share the same acre of land over time?

This Comment questions:

1. Whether treating conservation as a "use" is a defensible interpretation of FLPMA under the major

1. *See* JAMES R. SKILLEN, THE NATION'S LARGEST LANDLORD: THE BUREAU OF LAND MANAGEMENT IN THE AMERICAN WEST 1 (2009).

2. *See* Sandra B. Zellmer & Robert L. Glicksman, *A Critical 21st Century Role for Public Land Management: Conserving 30% of the Nation's Lands and Waters Beyond 2030*, 54 ARIZ. ST. L.J. 1313, 1356–74 (2022).

3. Here, I include both mineral and oil leasing and grazing in the definition of 'commodities.' This is not meant to suggest that these groups are a monolith, simply that they shared similar concerns as to the rule at issue.

questions doctrine[4] and after *Loper Bright*'s holding striking down *Chevron* deference;[5] and

2. Whether forcing a public good into a leasing structure derived from this "use" framework makes pragmatic conservation sense.

Part I examines the history of federal land management and the passage of and major developments in FLPMA. In particular, I focus on the fact that BLM management has historically taken a "use"-centric, commodity-focused approach. This discussion also examines frameworks outside of the FLPMA context that attempt to join conservation and commodity uses on the same land—all of which account for the mismatch in the private costs of leasing and public benefits of conservation.[6]

In Part II, I survey the BLM's 2024 Conservation and Land Health (CLH) Rule, which set up a conservation leasing program. Although the Rule is now likely to be rescinded,[7] it notches into a historical debate on the scope of FLPMA authority that remains relevant today. I summarize

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4. *See* West Virginia v. Env't Prot. Agency, 597 U.S. 697, 721–23 (2022).

> [I]n extraordinary cases [where] the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority[,] both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there.

Id. (internal quotations and citations omitted).

5. *See* Loper Bright Enter. v. Raimondo, 603 U.S. 369, 412, 400 (2024) ("*Chevron* is overruled . . . . [Therefore, i]n the business of statutory interpretation, if it is not the *best*, it is not permissible." (emphasis added)); *cf*. Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984) ("[I]f [a] statute is silent or ambiguous with respect to the specific issue, [that the agency seeks to regulate] the question for the court is whether the agency's answer is based on a *permissible* construction of the statute." (emphasis added)).

6. This accrual of public benefit at private expense is effectively a reversal of the classic "tragedy of the commons." *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) ("Picture a pasture open to all . . . As a rational being, each herdsman seeks to maximize his gain . . .Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited.").

7. *See Rescission of Conservation and Landscape Health Rule*, OFF. OF INFO. & REGUL. AFF., EXEC. OFF. OF THE PRESIDENT, https://www.reginfo.gov/public/do/eoDetails?rrid=907019 [https://perma.cc/L4M7-XADG] (last visited June 28, 2025).

conservationists' and commodity users' reactions to the Rule as articulated in public comments and pending suits. These responses both recall historical problems articulated in Part I and cast new arguments that the CLH Rule will exhibit both pragmatic and interpretive weaknesses.

Part III of this Comment asks whether the CLH Rule makes pragmatic or interpretive sense in a post-*Loper* and major questions landscape. I first posit that, given the BLM's historical interpretation of "use" as commodity-focused, redefining "use" to include conservation will likely not pass judicial muster. FLPMA's structure further suggests that this new interpretation may be struck down. Even so, I argue that conservation leasing is not a pragmatic solution for climate resilience anyway, because lessees will neither be sufficiently incentivized to engage in conservation, nor assured that what they conserve will *stay* conserved in the face of continuous commodity leasing. As an alternative, I strongly suggest that BLM recenter itself on the mandate of sustained yield and prohibition on unnecessary and undue degradation over *all* its management decisions. A new era of public land management requires BLM to manage for conservation *itself,* by reeling back commodity leasing, not by privatizing its mandate.

Part III of this Comment concludes with hope. That hope is that BLM's dichotomous, historical view of conservation and commodities can be relinquished to the past in favor of true equal footing, through which the agency emphasizes its authority to "sustain yield" and abandons privatized half measures in favor of true adherence to its mandate.

I. THE LAY OF THE (PUBLIC) LANDS

A. Federal Land Management in General

Six hundred and fifty million acres of the United States is federal public land.[8] The paradigmatic federal land is the National Park: these lands are set

8. *See* U.S. GOV'T ACCOUNTABILITY OFF., MANAGING FED. LANDS AND WATERS, https://www.gao.gov/managing-federal-lands-and-waters [https://perma.cc/TAX5-HGJM] (last visited Oct. 25, 2023). The overwhelming majority of federally-managed lands are in the Western United States—47% of the West is owned by the federal government. Quoctrung Bui & Margot Sanger-Katz, *Why the Government Owns So Much Land in the West*, N.Y. TIMES (Jan. 5, 2016), https://www.nytimes.com/2016/01/06/upshot/why-the-government-owns-so-much-land-in-the-west.html [https://perma.cc/5K37-XGUS].

aside—often by an act of Congress—for robust preservation.[9] However, of the four agencies who administer our public lands, the National Park Service (NPS) controls the fewest[10] with the BLM controlling the vast majority.[11] Given the unparalleled entrustment of land to the BLM, its interpretation of its duties to the land and to the public is uniquely impactful on resource health and resilience in the climate change era.[12]

B. The BLM's "Use" Lock-In

However, the BLM's primary mandate is not as conservation focused as the NPS' mandate.[13] Instead, the BLM is required to manage lands for "multiple use and sustained yield."[14] The BLM's historical interpretation of this "deceptively simple"[15] mandate has limited its ability to respond to a changing climate. The MUSY mandate requires BLM to manage apparently conflicting uses—conservation and commodities—concurrently. However, the early years of BLM management resolved this conflict by drawing a

9. Designation of wilderness areas and national parks requires federal legislation. *See, e.g.*, 16 U.S.C. § 1131(a) (Westlaw through Pub. L. No. 118-158). The President may declare national monuments and reserve public lands as well, under the Antiquities Act. *See* 54 U.S.C. § 320301(a) (West 2023). Finally, the Department of the Interior can withdraw lands, but these withdrawals are temporary (limited to twenty years) and are not characterized by the same kinds of protections as are designated lands. *See* Justin R. Pidot & Ezekiel A. Peterson, *Conservation Rights-of-Way on Public Lands*, 55 U.C. DAVIS L. REV. 89, 102 (2021).

10. *See* Bui & Sanger-Katz, *supra* note 8 (the NPS administers 79.6 million acres of land).

11. *Id*. (the BLM controls 247.3 million acres of land).

12. *See* Julia Nave et al., *Planning for Change? Assessing the Integration of Climate Change and Land-Based Livelihoods in Colorado BLM Planning Documents*, 20 REG'L ENV'T CHANGE 28, 28–29 (2020), https://doi.org/10.1007/s10113-020-01590-0 [https://perma.cc/AJ2W-KDM7] (describing how the Western U.S. is seeing increased climate impacts in the form of drought, forest fires, and flooding). "The agency will need to adapt their management strategies . . . to respond to the emerging effects of climate change." *Id.*; *see also Open for Business (and Not Much Else): Analysis Shows Oil and Gas Leasing Out of Whack on BLM Lands*, THE WILDERNESS SOC'Y, https://www.wilderness.org/articles/article/open-business-and-not-much-else-analysis-shows-oil-and-gas-leasing-out-whack-blm-lands [https://perma.cc/U7WF-2VR7] (last visited Oct. 25, 2023) (ninety percent of BLM lands are available for oil and gas leases); Carla Ruas, *Report: Oil and Gas Drilling on Public Lands is Fueling Climate Change*, THE WILDERNESS SOC'Y (Feb. 12, 2020), https://www.wilderness.org/news/blog/report-oil-and-gas-drilling-public-lands-fueling-climate-change [https://perma.cc/QC8S-KVT9] ("[F]ederal lands leased . . . [over three years] could produce as much as 5.9 billion metric [tons of greenhouse gases].").

13. The NPS' mandate requires them "to conserve the scenery, natural and historic objects and the wild life therein in such manner and by such means as will leave them unimpaired . . ." 54 U.S.C. § 100101 (Westlaw through Pub. L. No. 118-158).

14. 43 U.S.C.A. § 1732(a) (Westlaw through Pub. L. No. 118-158).

15. Norton v. S. Utah Wilderness All., 542 U.S. 55, 58 (2004).

false dichotomy between use and conservation, then skewing management choices toward commodity uses. Now, attempts have been made to restore balance to the MUSY framework, but BLM practice has locked in a commodity-focused interpretation of what "uses" lessees might have for public lands.

The BLM was born of a merger between the General Land Office and the Grazing Service.[16] Between this merger in 1946[17] and 1976, the BLM lacked an organic act.[18] This meant that for its first three decades, it had no specified mission, authority, or responsibility;[19] rather, it borrowed those things from its predecessors.[20] Carrying on those agencies' traditions,[21] the BLM's initial years were mostly characterized by unrestricted degradation. The BLM managed on a hierarchy of land uses, with mining claims being paramount, followed by grazing, and finally, recreation.[22] Notably,

16. Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L. Q. 140, 150 (1999). The General Land Office managed homestead laws, state land grants, Oregon timber lands, and mining. *Id*. at 151. The Grazing service managed lands under the Taylor Grazing Act of 1935. *Id*. Scott Hardt characterizes the Land Office and Grazing Service era as one of a "policy . . . of 'disposal'" and "no-management" in which federal lands were used to pay off war debts and "grazing, timber, and mineral interests each attempted to maximize their harvest." Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENV'T L. REV. 345, 351–52 (1994).

17. Hardt, *supra* note 16, at 368.

18. Kelly Nolen, *Residents at Risk: Wildlife and the Bureau of Land Management's Planning Process*, 26 ENV'T L. 771, 793 (1996).

19. *Id.*

20. *See supra* note 16 and accompanying text. In the case of grazing, this resulted in lease awards based on historic use, not on the land's health. *See* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENV'T L. REV. 405, 424 (1994). Because of historical management practices, the result of these continuing leases was, inevitability, overgrazing. *See* 43 U.S.C.A. § 1751(b)(1) (Westlaw through Pub. L. No. 118-158) (at the passage of FLPMA, Congress found that public lands were declining in health).

21. The period of 1850–1934 was characterized by battles between cattle baron monopolists and bureaucrats attempting to keep the lands "open and available to all." George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENV'T L. 1, 23 (1982). During this era, "federal law applicable to grazing . . . was notable mostly for its absence," resulting in a "classic example of . . . [the] 'Tragedy of the Commons.'" *Id*. at 27, 31. This was followed by the Taylor Grazing Act, characterized by the dominance of grazing interests. *Id*. at 65–66.

22. *Id*. at 95 ("[Wildlife and recreation interests] . . . were subservient to livestock grazing. Grazing, in turn, is legally subservient to mineral extraction."); *see also id.* at 98 n.634 ("In the nine years that I have worked on BLM districts, at no time have primitive or wilderness values been given adequate consideration."); George Cameron Coggins, *The Law of Public Rangeland Management III: A Survey of Creeping Regulation at the Periphery, 1934–1982*, 13 ENV'T L. 295, 307 (1983) ("Until very recently, the BLM parceled [sic] out mineral leases . . . without attempting either to curtail surface damage . . . or to fit mining into a more general management framework.").

conservation appears not to have featured in the hierarchy.[23] The overuse of BLM lands came to a head after thirty years of this commodity-focused management, when "most acres under BLM jurisdiction were still producing less than *half* the estimated historic levels of useful forage."[24] The BLM's initial management had decimated the land.

Thus, in 1976, Congress stepped in to redirect the BLM with its organic act, the Federal Land Policy and Management Act.[25] This act responded to the degradation on BLM lands and, for the first time, directed the BLM to manage its lands for "multiple use" *and* "sustained yield."[26] This dual mandate at first blush suggests that "sustained yield"—and by the same token, conservation—is not a use, but rather, an over-arching goal of BLM management.[27] BLM is further required by FLPMA to prevent "unnecessary and undue degradation"[28] and permanent impairment.[29] In reality, however, the BLM has continued its prior practice of managing primarily for

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23. *See supra* notes 21 & 22 and accompanying text.

24. George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENV'T L. 1, 2 (1983) (emphasis added).

25. Federal Land Policy and Management Act, Pub. L. No. 94–579, 90 Stat. 2745 (codified as amended at 43 U.S.C. §§ 1701 *et seq*.) (1976).

26. 43 U.S.C. § 1732(a).

> "[M]ultiple use" means the management of the public lands and their various resources values so that they are utilized in the combination that will best meet the present and future needs of the American people; . . . the use of some land for less than all of the resources; a combination of . . . uses that takes into account the long-term needs of future generations for . . . recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and . . . [avoidance of] permanent impairment of the productivity of the land and the quality of the environment . . . .

§ 1702(c). "'[S]ustained yield' means 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." § 1702(h).

27. 43 U.S.C. § 1732(a). This conclusion is confirmed by the definition of "principal or major uses." *See* § 1702(l) (defining "principal or major uses" as including but not limited to "grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production."). Because sustained yield is a separate and paramount mandate, however, conservation's inclusion or exclusion from the definition of "use" is not relevant to the BLM's mandate to conserve.

28. In management (and leasing) of public lands, the Secretary of the Interior is required to "take any action necessary to prevent unnecessary or undue degradation of the lands." § 1732(b).

29. § 1702(c) ("[BLM] management . . . [should give] consideration . . . to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.").

commodity use, treating use and sustained yield dichotomously.[30]

Lately, this distinction is most clearly seen in the primary tool of BLM management: the resource management planning process.[31] One of the tools provided for BLM to authorize uses in this process—putting the "use" in MUSY—is leasing to private parties.[32] This tool allows private benefits (in the form of commodities extracted or acres grazed) to accrue from public lands, with the brunt of the costs being borne by the lands themselves (in the form of biodiversity and land health losses).[33] Unfortunately, the planning process gives priority to preexisting uses.[34] Thus, while the statute's text treats conservation as an overarching goal of BLM management,[35] a commodity-focused interpretation of "use" appears locked into BLM management.[36] The question now is how the historical BLM management practices can be adapted to an era of climate change.[37] This

30. *See* Hardt, *supra* note 16, at 348–49 (finding that multiple use statutes and other wilderness acts may force a dichotomy between conservation and multiple use). This dichotomy has bred disagreements between the two primary camps of public land users, even to the point of occupation of public lands. *See* Logan Glasenapp, *Collaborative Federalism: The Sage Grouse Solution to the Sagebrush Rebellion*, 8 ARIZ. J. ENV'T L. & POL'Y 1, 4–6, 8, 16 (2017) (describing Ammon Bundy's takeover of the Malheur National Wildlife Refuge and finding that commodity users and conservationists are in an "adversarial stature").

31. 43 U.S.C. § 1712. This planning process, in part, requires the Bureau to "weigh long-term benefits to the public against short-term benefits." §1712(c)(7).

32. The Secretary is directed to use leases and other private rights of way to regulate "use, occupancy, and development of the public lands, including, but not limited to, long-term leases . . . for habitation, cultivation, and the development of small trade or manufacturing concerns." § 1732(b).

33. *See* THE WILDLIFE SOC'Y TECH. REV. COMM., IMPACTS OF CRUDE OIL AND NATURAL GAS DEVELOPMENTS ON WILDLIFE AND WILDLIFE HABITAT IN THE ROCKY MOUNTAIN REGION 34–35 (2012), https://wildlife.org/wp-content/uploads/2014/05/Oil-and-Gas-Technical-Review_2012.pdf [https://perma.cc/L697-P5TP] (summarizing impacts to ungulates, waterfowl, songbirds and sage grouse).

34. *See* 43 U.S.C. § 1752(c) (existing permittees have priority for permit renewal).

35. *See* 43 U.S.C. § 1732(a) (requiring sustained yield on public lands).

36. *See* W. ENV'T L. CTR., COMMENTS ON BLM PROPOSED PUBLIC LANDS RULE 6 (2023) [hereinafter WELC Comments], https://www.regulations.gov/comment/BLM-2023-0001-154009 [https://perma.cc/4WEQ-N5XY] (90% of public lands are available for oil and gas leasing today); *see also* Blumm, *supra* note 20, at 427 ("FLPMA[] did little to change . . . preexisting commitments" to "sustained commodity production, segregated landscapes, and [precedence to] maintenance of local economies . . . ."); Sandra B. Zellmer, *Mitigating Malheur's Misfortunes: The Public Interest in the Public's Public Lands,* 31 GEO. ENV'T L. REV. 509, 560 (2019) ("Expectations for private use of the public's lands . . . are often based on past practices . . . rather than community public interests."); § 1712(e)(2) (requiring that when BLM managers exclude a principal or major use, it be reported to Congress). *But see* New Mexico v. Bureau of Land Mgmt., 565 F.3d 683, 710 (10th Cir. 2009) ("[I]t is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses.").

37. *See* Nave et al., *supra* note 12, at 28–29.

question has triggered a dialogue among land managers and academics as to whether and how conservation may be given a stronger stance in BLM management.[38]

C. Prior Attempts by the BLM

Prior attempts to incorporate conservation into this locked-in structure exemplify the issues that BLM now faces in shifting its interpretation of "use." The BLM made its first attempt to restore conservation to a stronger footing during the 1990s' Rangeland Reform era.[39] Among other reforms, the BLM authorized conservation-use permits under the Taylor Grazing Act.[40] The Act had previously required permittees to graze their allotment and to rest it *only* with permission of the BLM after a showing of need.[41] The new rule allowed for grazing permits to be used for conservation—which would otherwise be in danger of being defined as "non-use" and result in the loss of the permit.[42] The rule was struck down, however, in *Public Lands Council v. Babbitt*.[43] The clear text of the Grazing Act, the Tenth Circuit said, required that permits issued would have "the primary purpose of . . . grazing . . . ."[44] Thus, the statute spoke directly to the question

38. *See generally* Hardt, *supra* note 16 (arguing that multiple use is foundationally commodity-focused and that modern management must change the framework to incorporate more preservation); *see also infra* Part I.D.

39. Scott Nicoll, *The Death of Rangeland Reform*, 21 J. ENV'T L. & LITIG. 47, 62 (2006). The BLM also attempted a more conservation-positive approach in its Land Planning 2.0 rule, which provided for landscape-scale planning to identify "key conservation priorities in a region." Resource Management Planning, 81 Fed. Reg. 89580 (Dec. 12, 2016). However, this rule was struck down by the House of Representatives. Glasenapp, *supra* note 30, at 30.

40. Nicoll, *supra* note 39, at 85.

41. *Id.* The showing required was of drought, fire, natural causes, or overgrazing and the "rest" permission had to be renewed annually. *Id.* at 86. This requirement is an example of the "use it or lose it" principle of BLM management—if a leasehold isn't being used, it's no longer valid. *See* Shawn Regan, Temple Stoellinger & Jonathan Wood, *Opening the Range: Reforms to Allow Markets for Voluntary Conservation on Federal Grazing Lands*, 2023 UTAH L. REV. 197, 201 (2023) [hereinafter *Opening the Range*]; *see also* Bryan Leonard & Shawn Regan, *Legal and Institutional Barriers to Establishing Non-Use Rights to Natural Resources,* 59 NAT. RES. J. 135, 142 (2019) ("[M]aintaining [the validity of rights to natural resources] often depends on continued use . . . ." (citing the Taylor Grazing Act as a paradigmatic example of barriers to non-use rights)). Both grazing and mineral leases have so-called "use it or lose it" structures. *Id.* at 149, 162.

42. *Opening the Range*, *supra* note 41, at 201.

43. 167 F.3d 1287, 1308 (10th Cir. 1999). The Department of the Interior did not seek review of this holding by the Supreme Court. Pub. Lands Council v. Babbitt, 529 U.S. 728, 747 (2000).

44. 167 F.3d at 1308.

under a *Chevron* analysis, warranting the rule's overturn.[45] This was so over the objections of the BLM, which relied on asserted historical practices[46] and the overarching conservation mandates of the relevant statutes to justify its rule.[47] This pushed conservation users back out of leasing, unless they obtained livestock.[48] Fundamentally, Rangeland Reform failed because it attempted to fit conservation into a leasing framework that has historically been commodity-centric.

D. Other options

One of the reasons that commodity leases are locked into public land management is their incentive structure, as compared to conservation uses. While commodity leases accrue direct benefits to the lessee, conservation leases often create benefits to the public writ large.[49] Further, the public benefit of conservation is difficult to value.[50] Thus, when conservation is

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45. *Id.* at 1307.

46. *Id.* ("The Secretary asserts that the issuance of grazing permits for conservation use merely reflects 'a longstanding grazing management practice consistent with the resumption of grazing.'").

47. *Id.*

> The Secretary argues that the issuance of conservation use permits helps achieve the goal of multiple use…. [But the] question before use is not whether the Secretary possesses general authority to conservation measures- which clear he does-but rather, whether he has authority to take the specific measure in question, i.e., issuing a 'grazing permit' that excludes livestock grazing for the entire term of the permit.

Id. at 1308 ("If range conditions indicate that some land needs to be rested, the Secretary may place that land in non-use on a temporary basis, in accordance with Congress's [sic] grants of authority [under 43 U.S.C. § 1708(a)(8)].").

48. *See Opening the Range*, *supra* note 41, at 226. Some conservationists simply "convert the permits from one type of livestock (cattle) to another (bison)." *Id*.

49. *See* Scott K. Miller*, Missing the Forest and the Trees: Lost Opportunities for Federal Land Exchanges*, 38 COLUM. J. ENV'T L. 197 (2013) (canvassing the market value differential between commodity and conservation programs).

50. *See generally* Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENV'T L. 1 (2012) (canvassing the difficulties and possibilities in measuring the value of conservation). "Conservation is often described in generalities… [It is] cultural, and a matter of policy, or assertion. One either shares the value or not. But sharing the value of conservation does not, as a general matter, answer the question of what conservation means and how it should be measured." *Id*. at 5 (internal quotation marks omitted). *See generally* Olivia Brumfield, *The Birth, Death, and Afterlife of the Wild Lands Policy: The Evolution of the Bureau of Land Management's Authority to Protect Wilderness Values*, 44 ENV'T L. 249 (2014). Philosophically speaking, ascribing a value to conservation may also be objectionable or counter-productive for environmental interests who assert that natural resources are, in fact, invaluable or intrinsically valuable. *See, e.g.*, Ronald Dworkin, *Politics, Death and Nature*, 6 HEALTH MATRIX 201, 206 (1996) ("[W]e need the concept of intrinsic

asked to compete with commodity leasing in the BLM's new market-like program, it will struggle with a management structure created for privatized commodities leasing.

Both private and public sector programs have recognized this failure in incentive matching and sought to redirect the benefits of conservation privately. A well-known conservation tool on private land is the conservation easement. Conservation easements take a "creature of the common law"[51] and allow a landowner to agree that they will restrict future development on the land in favor of conservation.[52] A close companion, land trusts, are functionally super-sized conservation easements.[53] In order to promote the use of these tools (and adjust incentives in favor of conservation), the federal government grants the landowners involved in the exchange a tax break.[54] Likewise, conservation-oriented federal programs outside of the BLM do the same. For example, the United States Department of Agriculture's Environmental Quality Incentives Program—a "flagship conservation program that helps farmers, ranchers and forest landowners integrate conservation into working lands"—offers cost-sharing of up to ninety percent to participants in the program.[55] Conservation programs generally recognize that the incentives for private parties to engage in conservation have to account for the public benefit of such activities.

II. A NEW RULE'S RENEWED ATTEMPT

A. The BLM's Conservation and Land Health Rule

The most recent development in the BLM's conservation-commodity saga is a Rule promulgated in 2024. In response to the Biden

value to justify long-term conservation.").

51. Andrew Flynn, *Restoring the Conservation Purpose in Conservation Easements: Ensuring Effective and Equitable Land Protection Through Internal Revenue Code Section 170(h),* 40 STAN. ENV'T L.J. 3, 9 (2021).

52. *Id.*

53. *Opening the Range*, *supra* note 41, at 213. In land trusts, non-profit entities purchase the land and reserve it from harmful uses (like grazing and extraction), often through conservation easements. *Id.*

54. Flynn*, supra* note 51, at 9.

55. *See* U.S. Dep't Ag., *Environmental Quality Incentives Program (EQIP)*, NAT. RES. CONS. SERV., https://www.nrcs.usda.gov/programs-initiatives/environmental-quality-incentives-program [https://perma.cc/V5N5-Q833] (last visited Oct. 24, 2025); Alison Peck, *Cows v. Capitalists: Visions of A Post-Carbon Economy*, 8 J. FOOD L. & POL'Y 145, 165 (2012).

administration's 30-by-30 mandate,[56] and no doubt seizing the political moment prior to the 2024 election, the BLM promulgated a new Conservation and Land Health Rule (The CLH Rule), defining conservation as "a *use* on par with other uses of the public lands" and making leases available for such a use.[57] This, the BLM said, would "support sustained yield" in the age of climate change.[58] The CLH Rule gives us the chance to once again consider what FLPMA requires in terms of conservation, and whether conservation leasing is it.

i. The CLH Rule's Provisions

Among other things, the CLH Rule explicitly defines "unnecessary and undue degradation"[59] and recognizes conservation as a land use under the multiple use framework for the first time.[60] This, the BLM asserts, is not new: "FLPMA has always encompassed conservation as a land use."[61] "Conservation" is defined in the CLH Rule as "management of natural resources to promote protection and restoration."[62] The CLH Rule integrates

56. President Biden, responding to increased climate disturbances, issued an executive order requiring 30% of American lands to be placed into conservation by the year 2030. *See* Exec. Order No. 14,008, § 216(a), 86 Fed. Reg. 7619 (Jan. 27, 2021); *see also* Zellmer & Glicksman, *supra* note 2 at 1356–74 (canvassing various options for the BLM to use FLPMA to comply with this mandate).

57. Conservation and Landscape Health, 89 Fed. Reg. 40308 (May 9, 2024, effective June 10, 2024) [hereinafter CLH Final Rule] (emphasis added).

58. *Id.* at 40310. The "overarching purpose of the rule is to help facilitate the use of conservation to support ecosystem resilience . . . ." *Id.* at 40317.

59. 43 C.F.R. § 6101.4(aa) (2024) ("*Unnecessary or undue degradation* means harm to resources or values that is not necessary to accomplish a use's stated goals or is excessive or disproportionate to the proposed action or an existing disturbance." (emphasis added)). This is the first time that a comprehensive definition of unnecessary and undue degradation has been promulgated. *See* Zellmer & Glicksman, *supra* note 2, at 1363–64. Note that this definition defines "undue degradation" with regard to the other use's goals, not objectively.

60. *See* CLH Final Rule at 40320; 43 C.F.R. § 6101.4(b) (2024).

61. CLH Final Rule at 40310.

> FLPMA authorizes and obligates the BLM to, within the multiple use framework, protect natural resources, preserves public lands, and provide habitat for fish and wildlife, among other conservation measures. The BLM has been practicing conservation of the public lands throughout the agency's history. The change this rule aims to achieve is providing clear, consistent, and informed direction . . . for conservation use to be implemented on the public lands in support of ecosystem resilience.

Id. But, as I argue *infra*, that BLM itself is mandated by FLPMA to conserve resource on public lands does not mean that conservation is properly characterized as a lease-able land use for private parties.

62. *Id.* at 40317. "Protection" is the "act or process of conservation by maintaining the existence

conservation as a use of public lands in a number of ways,[63] the newest of which is its creation of a conservation leasing program.[64]

Under the conservation leasing program, members of the public may purchase a lease for either restoration or mitigation, with the recognition that restoration can be a passive activity.[65] Leases for passive restoration purposes, however, have to be justified by the permittee in their application.[66] Restoration leases last for a term of ten years, while mitigation leases are issued for "a term commensurate with the impact" they are mitigating.[67] The conservation leases may be renewed "if necessary to serve the purpose" for which they are issued.[68] The CLH Rule leaves much to the discretion of local land managers, who can determine whether and when to award a conservation lease.[69]

The BLM has been careful to delineate how conservation and private leases will interact on public lands. When a conservation lease is awarded, the BLM has directed that inconsistent uses "shall not" be subsequently authorized on those lands.[70] However, the conservation leasing structure is not intended to preclude other uses or to demote prior rights-holders: the leases are "subject to valid existing rights."[71] Additionally, the BLM must typically charge "fair market value" for a lease, although rents on restoration leases can be waived or reduced if the lease will not be used to generate revenue and will "enhance ecological or cultural resources or provide a benefit to the general public."[72] This adjustment of the rental price no doubt reflects the incentive mismatch between conservation and commodity

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of resources while preventing degradation, damage, or destruction." 43 C.F.R. § 6101.4(t). "Restoration" is "the process or act of conservation by passively or actively assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed to a more natural, native ecological state." *Id.* § 6101.4(w).

63. The CLH Rule integrates conservation into its management planning process*, see* 43 C.F.R. § 6102.2, as well as its general principles of management for ecosystem resilience. *See id.* § 6101.5.

64. *See id.* § 6102.4.

65. *See id.* § 6102.4(a); *id*. § 6102.4(a)(1)(i)–(ii) (restoration can be achieved "passively or actively" and mitigation is done "to offset impacts" of other land uses).

66. *See id*. § 6102.4(c)(2)(iii).

67. *Id*. § 6102.4(a)(3)(i)–(ii).

68. *Id*.

69. *See id.* § 6102.4(a) ("The BLM *may* authorize restoration leases or mitigation leases under such terms and conditions *as the authorized officer determines are appropriate* for the purpose of restoring degraded landscapes or mitigating impacts of other uses." (emphasis added)).

70. *Id.* § 6102.4(a)(4).

71. *Id.*

72. *Id*. § 6102.4(j) (citing 43 C.F.R. §§ 2920.6, 2920.8 (2023)).

lessees.[73]

ii. Authority

In support of its decision to define conservation as a lease-able use on public lands, the BLM cites FLPMA's definition of multiple use and several court decisions affirming the agency's discretion over administration of its MUSY mandate.[74] The BLM derives its authority to grant conservation leases from the general leasing power under FLPMA § 302(b).[75] As previously mentioned, the BLM argues in its rulemaking that conservation as a "use" is not new, but rather part of a consistent historical practice.[76]

B. Public Reaction to the CLH Rule

The CLH Rule was almost immediately challenged in court,[77] and, at its proposed stage, it received numerous responses from conservation and commodity interests: more than 216,000 comments in total.[78] Approximately 92% of the comments supported the CLH Rule, while 4.5%

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73. *See supra* Part I.D.

74. *See* CLH Final Rule at 40313 (citing 43 U.S.C. § 1702(c)); Massachusetts *ex rel.* Richardson v. BLM., 565 F.3d 683, 710 (10th Cir. 2009); Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 518 (D.C. Cir. 2010); Or. Nat. Desert Ass'n v. BLM, 531 F.3d 1114, 1135 (9th Cir. 2008)).

75. *See* CLH Final Rule at 40314 (citing 43 U.S.C. § 1732(b)).

76. *Id.* at 40310 ("FLPMA authorizes and obligates the BLM to, within the multiple use framework, protect natural resources, preserve public lands, and provide habitat for fish and wildlife, among other conservation measures. The BLM has been practicing conservation of the public lands throughout the agency's history."). Note that this history pertains to the agency's, rather than private lessees', historical conservation of public lands.

77. A coalition of grazing, energy, petroleum, and mining interests have challenged the CLH Rule under the Administrative Procedures Act and on statutory grounds (among others), arguing that the conservation lease program allows for non-use in violation of FLPMA (which is argued to be a fundamentally *productive use* statute) and asking for vacatur. *See* Complaint at 23, 33, Am. Farm Bureau v. Dep't of Interior, No.1:24-cv-136-J (D. Wyo. July 12, 2024) [hereinafter Wyoming Complaint]. The state of Alaska has challenged the CLH Rule on similar grounds, arguing that "use" is active and productive—not passive as conservation often is. *See* Complaint at 10, 14–16, Alaska v. Haaland, No. 3:24-cv-00161 (D. Alaska July 24, 2024) [hereinafter Alaska Complaint]. The CLH Rule has also been challenged under the National Environmental Policy Act. *See* Complaint, Utah v. Haaland, No. 2:24-cv-00438-DAO (D. Utah June 18, 2024).

78. *See* CLH Final Rule at 40316; Mary Shinn, *Bureau of Land Management Proposal Sparks Questions from Both Sides of Issue*, THE GAZETTE (Aug. 28, 2023), https://gazette.com/news/government/bureau-of-land-management-proposal-sparks-questions-from-both-sides-of-issue/article_87de90f0-4060-11ee-8537-47de90d01e51.html [https://perma.cc/3PQY-XGFB].

opposed it.[79] Congress asked the BLM to retract the CLH Rule.[80] As described below, these responses affirm the dichotomous view of conservation and "use" of public lands, and they articulate many of the problems that have plagued the BLM's administration of conservation and "use" historically.[81]

i. Conservationists

While conservation groups appeared to generally support the CLH Rule,[82] they also articulated some objections to it. These objections tracked the contours of the pragmatic issues in leasing the same or proximate lands for conservation and commodities.

First, conservation groups worried that conservation leases may carry with them an implication that other land under BLM's management is not subject to conservation practices,[83] despite FLPMA's clear mandate to the contrary.[84] Specifically, some groups viewed the leasing framework as a way for the BLM to abdicate its mandate to prevent unnecessary and undue degradation, by outsourcing the work of conservation to private groups.[85]

79. Shinn, *supra* note 78.

80. Two bills were introduced in 2023 in response to (and denigration of) the proposed Rule. *See* A Bill to Require the Director of the Bureau of Land Management to Withdraw a Rule of the Bureau of Land Management Relating to Conservation and Landscape Health, S. 1435, 118th Cong. (2023); To Require the Director of the Bureau of Land Management to Withdraw a Rule of the Bureau of Land Management Relating to Conservation and Landscape Health, H.R. 3397, 118th Cong. (2023). Once the CLH Rule was finalized, a bill was introduced in the Senate to legislatively overrule it. *See* A Bill to Repeal a Rule of the Bureau of Land Management Relating to Conservation and Landscape Health, S. 530, 119th Cong. (2025).

81. *See supra* Parts I.C, I.D.

82. *See e.g.,* Jonathan Thompson, *A 'Seismic Shift' for Public Lands?,* HIGH COUNTRY NEWS (Apr. 13, 2023), https://www.hcn.org/articles/south-landline-a-seismic-shift-for-public-lands [https://perma.cc/WZH3-JUP3] (conservationists have called the CLH Rule a "seismic shift" and a "start to change"). Some others are more skeptical. *See* Andy Kerr, *The BLM's Proposed "Conservation" Rule: Open for Comments*, ANDY KERR'S PUB. LANDS BLOG (May 8, 2023) https://www.andykerr.net/kerr-public-lands-blog/2023/5/7/the-blms-proposed-conservation-rule-open-for-comments?rq=public%20lands%20rule [https://perma.cc/R8EP-NUPD] ("[The CLH Rule] might result in improved land management but more likely will serve as a shield for the agency to continue to degrade public lands . . . [and] would only direct—but not require—BLM field officers to consider doing better things for conservation.").

83. *See* WELC Comments, *supra* note 36, at 28.

84. Recall that the BLM has a mandate to avoid unnecessary and undue degradation whether or not lands are leased to conservation uses. *See* 43 U.S.C. § 1732(b) (requiring "any action necessary" to prevent such degradation).

85. *See* Center for Biological Diversity, Comment Letter on Conservation and Landscape Health

And, given the fact that the CLH Rule gives priority to pre-existing leases,[86] paired with the historical predominance of commodity uses,[87] its net conservation value may be found wanting. Compliance with the BLM's conservation mandate, the groups reminded us, should not be contingent on a private party's choosing whether to lease a tract for conservation.[88]

Closely related, conservationists worried that the impermanence of conservation as paired with the irreversibility of many commodity uses (amplified by the leases' mismatched lengths and renewal conditions) will disincentivize conservationists from leasing.[89] This is especially so if commodity uses are concurrent with or very close to conservation leases.[90] Some conservationists found the language within the CLH Rule itself ambiguous on the temporal relationship of conservation and commodity leases and whether one forecloses the other - and for how long.[91] Indeed, it

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Proposed Rule 43 (Jul. 5, 2023) [hereinafter CBD Comment], https://www.regulations.gov/comment/BLM-2023-0001-154268 [https://perma.cc/CL5G-VY93] (asking that the Agency not ascribe special "conservation" lease status to anything that it already has a non-discretionary duty to do); Kerr, *supra* note 82 ("[The leasing structure will] offload to private parties conservation measures that the BLM is required to take anyway.").

86. *See* CBD Comment, *supra* note 85, at 43.

87. *See supra* Parts I.B, I.C.

88. *See* 350 Eugene et al., Comment Letter on Conservation and Landscape Health Proposal 27 (Jul. 5, 2023), https://www.regulations.gov/comment/BLM-2023-0001-153534 [https://perma.cc/E8K8-TBFJ] [hereinafter 350 Eugene Comment].

89. *Id.* at 4 (positive mitigation results can require a "decades-long time frame"); *id.* at 35 (asking that post-restoration land use be addressed in the planning process to ensure that conservation lease's results are not countered as soon as the lease expires); Shinn, *supra* note 78 ("Who is going to do that? . . . Put in that kind of effort when they don't know in the long term it's going to remain?" (quoting Josh Osher, Public Policy Director for Western Watersheds Project)).

90. *See* The Nature Conservancy, *Comment Letter on Proposed Conservation and Landscape Health Rule* 8 (Jul. 5, 2023), https://www.regulations.gov/comment/BLM-2023-0001-153427 [https://perma.cc/4ELR-8WLT] [hereinafter TNC Comment] (citing "real or perceived concern of Conservation Leases being used solely to block subsequent [commodity] uses"). *But see* WELC Comments, *supra* note 36, at 28 (finding that "there may be [conservation] entities willing and able to assist . . . despite existing infrastructure and production"); 350 Eugene Comment, *supra* note 88, at 28 (finding that, on a system-wide rather than tract-based scope, logging and conservation leases are not inconsistent).

91. *See* TNC Comment, *supra* note 90, at 10.

> We can see how the language within [the CLH Rule] could be interpreted as a means by which conservation leasing could force other preexisting but incompatible uses to end. . . We believe the BLM intends this section to offer assurances that restoration completed under a conservation lease would not be undone by a subsequent incompatible use.

Id.

may take years for a conservation lessee to know whether their efforts have succeeded,[92] and conservation work may be viewed as futile given the ever-changing policy governing public lands.[93] This mismatch may deter potential conservation lessees.

Finally, conservation groups expressed concern over the lack of financial incentives for the leases. Because the return of a conservation investment will accrue to the public, charging a fee (or even waiving it) for the right to perform this work would provide a mismatch in lessees' gains and losses.[94] These complaints remind us of the pragmatic issues of fitting conservation into a structure historically beholden to commodity use.

ii. Commodity Groups

Commodity groups appeared to generally disapprove of the CLH Rule. Their comments' refrain was that conservation as a "use" is not mandated by and is, indeed, beyond the authority of FLPMA.[95] As compared to the conservationists' pragmatic concerns, these comments laid out an argument that the CLH Rule is indefensible as an interpretive matter.

Commodity users first compared FLPMA with other conservation statutes, such as the organic acts for the National Park Service and the Forest Service, finding this contrast indicates Congress' intent that FLPMA be less protective of the land, welcoming a variety of uses.[96] These groups also

92. *See* CBD Comment, *supra* note 85, at 50 (asking for a safety margin built into conservation leases to account for the fact that "not all efforts will be successful"); 350 Eugene Comment, *supra* note 88, at 4 (positive mitigation results can require a "decades-long time frame").

93. *See* Kerr, *supra* note 82 ("I would suspect that not much private money will be invested in public lands where a subsequent hostile administration can simply revoke or not renew one's conservation lease.").

94. *See* WELC Comments, *supra* note 36, at 29 (noting that many stewardship contracts in other federal programs *pay* the leaseholder to do restoration work).

95. Specifically, these commenters note that "conservation" is absent from FLPMA's definition of "principal or major uses." *See* American Petroleum Institute et al., Comment Letter on Conservation and Landscape Health Proposed Rule 7 (Jul. 5, 2023), https://www.regulations.gov/comment/BLM-2023-0001-152646 [https://perma.cc/6ARD-QJYY] [hereinafter API Comment]; *see also id.* at 15 (FLPMA defines "principal or major uses to be limited to" commodity uses, excluding conservation) (citing 43 U.S.C. § 1702(1)); Hardt, *supra* note 16, at 348 (describing how the multiple use doctrine itself has been criticized as prohibiting the exclusion of commodity users). *But see* CBD Comment, *supra* note 85, at 1 (arguing that the definition of multiple uses within the statutory scheme already gives conservation elevated footing as compared to commodity uses) (citing 43 U.S.C. § 1702(c)).

96. *See* API Comment, *supra* note 95, at 15 ("Congress intended an increased variety of considerations beyond environmental protection. . . ."); Public Lands Council et al., Comment Letter on Conservation and Landscape Health Proposed Rule 4, 5 (Jul. 5, 2023),

made a textual argument that the term "use" itself, as well as its context (listed with "occupancy" and "development" in § 302(b) of FLPMA), requires an active rather than a passive interpretation.[97] And, the statute provides for conservation outside of the leasing context, such as in its provisions for designated "areas of critical environmental concern" (ACECs) and withdrawals of land.[98] These commenters further reminded us of Rangeland Reform's attempt to use grazing permits for conservation, which was struck down on similar textual grounds.[99] Finally, these groups relied on the historical interpretation of "use" and the agency's most recent adoption of a new direction, pointing both to the *Loper* decision and to the major questions doctrine.[100]

The CLH Rule threw into sharp relief the debate that it has waged since FLPMA's inception. On the one hand, the conservationists' pragmatic argument: *Do conservation leases finally make good sense?* And, on the other hand, the commodity users' interpretive argument: *Even if conservation leasing makes pragmatic sense, are they the "best"*[101] *interpretation of FLPMA?* To both, I say, *probably not.* A new way through is needed, informed by the overarching responsibility of BLM managers for the commons—not a privatized dodge of its mandate.

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https://www.regulations.gov/comment/BLM-2023-0001-153870 [https://perma.cc/4SF9-RY2G] [hereinafter Grazing Coalition Comment] (arguing that the CLH Rule might be struck down under the Court's major questions doctrine as Congress retained authority for decisions that would "meaningfully alter public land designations").

97. *See* API Comment, *supra* note 95, at 17–19, 20 (marshaling dictionary definitions of "use" that suggest its active nature).

98. *Id.*

99. *Id.* at 21 (citing Pub. Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999)). In the CLH Rule, the BLM denies this case's applicability, as the CLH Rule neither relies on the Taylor Grazing Act authority, "nor does it modify the terms and conditions available for grazing permits or authorize the BLM to issue grazing permits approving non-grazing uses." Conservation and Landscape Health, 89 Fed. Reg. 40314 (Mar. 9, 2024). Instead, the CLH Rule "provides for a separate category of leases[.]" *Id.*

100. *Contra* Alaska Complaint, *supra* note 77, at 29 (arguing that the CLH Rule violates the major questions doctrine); *id.* at 16 (*Loper*); *id.* at 30 (citing decades of interpretation by BLM that did not include conservation as a use) *with* CLH Final Rule at 40314 (arguing that the major questions doctrine is inapplicable to the CLH Rule, as the statutory authority for conservation leasing is clear).

101. Loper Bright Enter. v. Raimondo, 603 U.S. 369, 400 (2024) ("In the business of statutory interpretation, if it is not the *best*, it is not permissible." (emphasis added)).

III. ANALYSIS

The CLH Rule attempts to fit conservation into a FLPMA structure that has historically bowed to commodity interests, by asserting that conservation "use" has really always been authorized by FLPMA. While this might have been an available interpretation 50 years ago, it may now be too late, placing the CLH Rule in the crosshairs of *Loper* and the major questions doctrine. Beyond the interpretive questions, however, the CLH Rule doesn't fully confront the pragmatic issues in treating conservation—a public good—largely as a private commodity. The leasing program's incentive mismatch and temporal conflicts between commodity and conservation uses may render it null. Instead of turning its duty to sustain yield and prevent unnecessary and undue degradation over to private parties, the BLM should reaffirm its commitment to doing so itself.

A. A Change in Interpretive Winds?

The first question that will determine conservation leasing's viability is whether it passes judicial muster in the already-pending suits filed by commodity interests. These suits allege that BLM's interpretation of "use" to include conservation reaches beyond FLPMA's mandate, is arbitrary, and implicates the major questions doctrine.[102] After the overturn of *Chevron* deference,[103] it is still an open question what level of deference will apply to the CLH Rule. In any event, BLM's historical interpretation of FLPMA, as well as certain facets of the CLH Rule itself, render it vulnerable to these interpretive attacks.

The pending suits' first interpretive argument is that the CLH Rule implicates the major questions doctrine.[104] As articulated in *West Virginia v. EPA*, this doctrine requires agencies to show a clear delegation of authority by Congress when it makes a dramatic change in an existing regulatory program.[105] Pending suits on the CLH Rule have argued that by

102. *See* Alaska Complaint, *supra* note 77, at 29 (major questions); Wyoming Complaint, *supra* note 77, at 45 (arguing the CLH Rule is arbitrary and capricious); *id.* at 34–40 (arguing that the CLH Rule exceeds FLPMA's authority).

103. *Loper*, 603 U.S. at 412.

104. *See* Alaska Complaint, *supra* note 77, at 29.

105. 597 U.S. 697, 732 (2022). When agencies "assert highly consequential power . . . both separation of powers principles and a practical understanding of legislative intent [prohibit] read[ing] into ambiguous statutory text the delegation claimed to be lurking there." *Id.* at 723.

attempting to "recognize 'conservation' as a land use . . . on . . . par with" commodity uses,[106] it relies on "a statute enacted nearly 48 years ago []to discover[] authority for transforming the BLM's management focus . . . [impacting] more than 240 million acres of public lands . . . ."[107] This, the complaints allege, will have "far-reaching economic and social impacts."[108] As there was no clear expression of an intent to delegate this kind of authority in FLPMA, therefore, the CLH Rule ought to be vacated.[109] Such a major question of agency authority requires clear delegation, and the suits allege, FLPMA does no such thing.

There are, of course, counterpoints to this "major questions" attack. First, perhaps FLPMA *does* contain a clear delegation of authority to BLM to designate conservation as a use. The statute requires sustained yield, prevention of unnecessary and undue degradation,[110] and protection of interests like wildlife and recreation.[111] But the statute provides for conservation outside of the leasing structure, and nowhere in the leasing clause itself does it mention conservation.[112] The BLM might also point to its history of conservation, as it did in the CLH Rule itself, but this history has been inconsistent. It pertains only to the BLM's conservation practices, and does not specifically pertain to private leases for conservation, except during Rangeland Reform under the TGA—which was shortly thereafter overturned.[113] Of course, perhaps the CLH Rule is not really "major:" it affects only federal lands, regulated under the Property Clause, and does not

106. *See, e.g.*, Alaska Complaint, *supra* note 77, at 30.
107. *Id.* at 32.
108. *Id.* at 9.
109. *Id.* at 32.
110. *See* 43 U.S.C. §§ 1702(c), 1732(b).
111. *See id.*

> [P]ublic lands [must] be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

Id.

112. *Compare* 43 U.S.C. §§ 1711, 1712 (providing the authority for the BLM to designate areas of critical environmental concern for heightened protection), *with id.* § 1732(b) (the leasing authority under which the conservation leasing program will operate).
113. *See supra* Part I.B.

have national significance.[114] But, given the vast resources and land base managed by the BLM, this may not pass the red face test.

Even if interpreting conservation as a "use" does not constitute a major question, the CLH Rule still might exceed the BLM's statutory authority and be arbitrary and capricious under the Administrative Procedures Act. Prior to the Supreme Court's 2023 term, the *Chevron* doctrine instructed courts to defer to agency interpretations of ambiguous statutes, even if the agency interpretation was not the "best" reading.[115] On the other hand, if the statute was clear on the question asked, the court would give effect to that reading, whether the agency agreed or not.[116] But the Court overturned *Chevron* in *Loper Bright*, likely now requiring that courts *always* seek the "best" interpretation.[117] The agency's view will be given some weight, however, if it has been consistent over time and is persuasive under the *Skidmore* framework.[118] *Skidmore* requires the court to defer to the agency only so much as the "thoroughness evident in [its] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and other" persuasive factors that warrant such deference.[119] This search for the "best" interpretation demands much more of agencies than did *Chevron*, which required only that the statute was ambiguous and the agency's read was reasonable.[120]

The pending suits argue the CLH Rule is not the "best" reading of the FLPMA for several reasons.[121] First, they rely on the historical interpretation of "use" under FLPMA as limited to commodity use, and they

114. *See* CLH Final Rule, *supra* note 57, at 40314 (arguing that the CLH Rule is squarely within a statutory designation of authority from Congress and a continuance of a long history of conservation regulation by the BLM); Sandra B. Zellmer, *Conservation as Multiple Use*, 66 ARIZ. L. REV. 467, 495 (2024) (arguing that the CLH Rule's impact is insignificant); *id.* at 503 (arguing that as an exercise of the federal power under the Property Clause, as opposed to the Commerce Clause, property management by federal agencies–and therefore the CLH Rule–should be treated more deferentially).

115. *See* Thomas W. Merrill, *The Demise of Deference — and the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 228 (2024).

116. *See id.*

117. *See id.*

118. *See id.* at 228–29, 261.

119. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

120. *See* Merrill, *supra* note 115, at 228.

121. *See also* Stacey Bosshardt & Stephanie Regenold, *After Chevron: Conservation Rule Already Faces Challenges*, LAW360 (Sept. 12, 2024, 6:20 PM), https://www.law360.com/articles/1878831 [https://perma.cc/V6TZ-UW3E] (arguing that the CLH Rule is vulnerable to a *Loper* attack based on traditional rules of statutory construction).

point to the agency's failure to acknowledge its change in interpretation.[122] Beyond this, and echoing commenters on the proposed rule, the CLH Rule's challengers argue that the ordinary meaning of "use" is necessarily active, to the exclusion of passive conservation.[123] Instead, the suits argue, "FLPMA is fundamentally a land *use* statute[,]" and conservation is not identified in the plain text of the statute as a "use,"[124] even though several other activities are.[125] When Congress has designated land for such a passive use, it has done so clearly, as seen in the organic act for the national parks.[126] For BLM to find authority to lease for conservation (and, subsequently, to preclude uses that are inconsistent with conservation leases on the same parcel)[127] essentially constitutes a withdrawal of lands—a power that Congress has jealously guarded for itself.[128] It is also unclear from a structural standpoint how FLPMA's mandate to charge fair market value makes pragmatic sense for anything other than productive uses.[129] But to waive rents (a necessary choice to incentivize private conservation) violates the statute's mandate to generate revenue for the American public.[130] Thus, conservation as a "use" is not a permissible interpretation of FLPMA.

These arguments are not without flaws, though. It is possible that FLPMA explicitly calls for or allows discretion for the BLM to designate conservation as a use. The CLH Rule provides both for "active" conservation as well as more "passive" restoration[131]—thus, not all conservation leases are necessarily outside the typical active connotations of the word "use." Further, as described above, support for such an

122. *See* Wyoming Complaint, *supra* note 77, at 45; Alaska Complaint, *supra* note 77, at 7 ("[The CLH Rule] overrides policies that have governed public land planning, management, and uses for many decades . . . .").

123. *See* Alaska Complaint, *supra* note 77, at 14–16 ("As commonly understood, in the context employed in FLPMA, the noun 'use' means 'the legal enjoyment of property that consists in its employment, occupation, exercise of practice.'") In contrast, conservation as a use "is actually non-use." *Id*. at 16.

124. *See* Wyoming Complaint, *supra* note 77, at 34.

125. *See* 43 U.S.C. § 1702(1).

126. *See* Wyoming Complaint, *supra* note 77, at 35–36.

127. *Id*. at 38–39.

128. *Id*. at 38–39 ("Congress strictly circumscribed the Secretary's authority to set aside lands otherwise available for use.").

129. *Id*. at 35 ("[FLPMA's mandatory] charging [of] rents for resources makes sense only if the land is being used for productive ends. The CLH Rule flouts this purpose . . . .").

130. *Id*. (citing 43 U.S.C. § 1701(9)).

131. *See* 43 C.F.R. § 6102.4(a) (2024).

interpretation can be found in the general scheme of FLPMA[132] and in the context of its enactment as a response to land degradation.[133] However, the merit of these arguments depends on the frame of reference at which a court is called to review the CLH Rule. Even if, at the broader scale, FLPMA calls for conservation, it is not necessarily true that it calls for conservation as a *use* for which *leases* might be granted.[134] There are other places in the statute that more explicitly provide for conservation.[135] The agency might also rely on its historical treatment of FLPMA as providing for conservation. But for the same scaling reasons and the inconsistency of this history in any event, that argument is not convincing. The BLM can't ignore its history, even if it wants to.

It is not a foregone conclusion that the CLH Rule will pass judicial review. The statutory scheme does not directly mention conservation in the leasing section,[136] instead providing for conservation elsewhere.[137] The fact that multiple use contains a conservation-based limit[138] may militate against, rather than for, conservation as a "use." That is, conservation cannot be both a limit on use, *and* a use itself.[139] Given the BLM's historical neglect

132. *See supra* notes 27–29 and accompanying text.

133. *See infra* Part I.B; *see also* Jamie Pleune, *BLM's Conservation Rule and Conservation as a "Use",* 53 ENV'T. L. REP. 10824, 10828 (2023) (arguing that conservation is inherently within the BLM's mandate, that the multiple use definition is broad, and that it contains a "conservation-oriented limit" in the permanent impairment and sustained yield clauses, therefore making conservation appropriate as a "use").

134. *See* Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1307 (10th Cir. 1999).

> The Secretary argues that the issuance of conservation use permits helps achieve the goal of multiple use…. [But the] question before use is not whether the Secretary possesses general authority to conservation measures- which clear he does-but rather, whether he has authority to take the specific measure in question, i.e., issuing a 'grazing permit' that excludes livestock grazing for the entire term of the permit.

Id.

135. *See, e.g*., 43 U.S.C. § 1702(a) (designation of ACECs); *id.* § 1702(j) (withdrawal authority).

136. 43 U.S.C. § 1732(b).

137. *See supra* note 134 and accompanying text.

138. *See* Pleune, *supra* note 133, at 10828.

139. *See* 43 U.S.C. § 1702(c).

> The term 'multiple use' means the management of the public lands and their various resource values so that they are utilized in the combination that will *best meet the present and future needs* of the American people; making the *most judicious use* of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the *use of some land for less than*

of a conservation-based interpretation of "use," especially in leasing, it's not clear that its interpretation will be deferred to, and it is possible that, such a wide-ranging decision, implicating millions of acres, will constitute a major question. The bottom line is that while FLPMA contains conservationist limits on leasing to commodities, BLM's new interpretation of conservation as a lease-able use does not directly follow from the text or history of FLPMA's interpretation.

B. Pragmatic Questions

Even if the CLH Rule passes interpretive muster, it also repeats the pragmatic difficulties of the privatization of conservation on the same land on which commodity leasing occurs. This includes the age-old mismatch in incentives between the two camps, real or perceived conflicts in uses in space or over time, and the relative impermanence of conservation as compared to commodity uses. The CLH Rule touches on, but does not adequately resolve, these pragmatic issues as to the functionality and desirability of conservation leases.

i. Incentives to Lease for Conservation

As described in Part II.A, the primary problem of conservation leasing is the pricing incentive mismatch. Even by waiving rents, BLM is still asking private parties to fund what is a mandatory BLM duty: to ensure sustained yield and prevent unnecessary and undue degradation.[140] This is not a competitive position in a market that also grants commodity leases for valuable resources.[141] Other federal programs and private sector analogues,

> *all of the resources*; a *combination of balanced and diverse resource uses that takes into account the long*-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources *without permanent impairment of the productivity of the land and the quality of the environment* with *consideration being given* to the relative values of the resources and *not necessarily to* the combination of uses that will give the *greatest economic return or the greatest unit output*.

Id. (emphases added).

140. 43 U.S.C. § 1732(a)–(b).

141. In fact, grazing leases are granted on a deeply subsidized animal unit head per month basis. *See generally* Michelle M. Campana, *Public Lands Grazing Fee Reform: Welfare Cowboys and Rolex*

pay for conservation, even on *private lands*.[142] There, the incentives place conservation on a competitive footing, given that the cost is minimized and the private party retains the benefits of the program. To ensure the attractiveness of conservation leases, BLM must directly subsidize them.

ii. Real or Perceived Conflicts in Uses

Any BLM conservation leasing structure likewise must squarely confront the real or perceived conflicts between commodity and conservation lessees. As suggested by the conservation groups, there is ambiguity in the CLH Rule as to whether conservation and commodity leasing can co-exist, both in space and over time.[143] Just because the CLH Rule says that uses can be compatible,[144] does not make it so in reality.

iii. Temporality

Another problem with the CLH Rule is that of time. Conservation is easily reversible but slow on the up-take,[145] and the CLH conservation leases are only for ten years. On the other hand, commodity leases are easily renewable after their ten-year term and have potentially irreversible effects

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Ranchers Wrangling with The New West, 10 N.Y.U. ENV'T L.J. 403 (2002).

142. *See infra* Part I.D.

143. *See* API Comment, *supra* note 95, at 31–32 (questioning how a surface conservation lease would operate when paired with separate, subsurface mineral leases; whether they will "result in interference with existing leases" or be used to "block" development; and whether they will preclude future uses of a leasehold); Grazing Coalition Comment, *supra* note 96, at 12–14 (conservation leases will create conflict among users); Shinn, *supra* note 78 ("This is a way to put livestock grazing basically out of business" (quoting Mark Roeber, President of Public Lands Council)).

144. *See* CLH Final Rule at 40310.

> The rule does not prioritize conservation above other multiple uses. It also does not preclude other uses where conservation use is occurring. Many uses are compatible with different types of conservation use, such as sustainable recreation, grazing, and habitat management. The rule also does not enable conservation use to occur in places where an existing, authorized, and incompatible use is occurring.

Id.

145. *See, e.g*., Rachel Nuwer, *Cut Down a Forest, Let It Grow Back, and Even 30 Years Later It's Not the Same*, SMITHSONIAN MAG. (Dec. 13, 2013), https://www.smithsonianmag.com/smart-news/cut-down-a-forest-let-it-grow-back-and-even-30-years-later-its-not-the-same-180948152/ [https://perma.cc/S5CX-AM2Y] (research by Smithsonian shows that even after 32 years of regrowth, a disturbed jungle did not return to original levels of biodiversity, with some plots even being deemed relatively useless for regrowth).

on the land. This is both a problem of incentives for private party conservation lessees and brings into question whether, through a leasing structure, BLM is sufficiently ensuring "sustained yield" on its lands.

C. Less Leasing

The real solution to climate impacts on public lands is for BLM to alter its commodity leasing and management strategy in reflection of the sustained yield mandate[146] and the prohibition on unnecessary and undue degradation (UUD) of public lands.[147] Historically, the UUD duty has not been well-developed and is often defined in relation to the commodity activity with which it is associated.[148] This prohibition on unnecessary and undue degradation has been interpreted to grant significant deference to the BLM[149] and is superimposed onto the leasing clause, making it an express limitation on BLM's commodity leasing authority.[150] While the CLH Rule promulgates a wide-ranging definition of UUD for the first time, it still defines the term in relation to the "use" itself.[151] This has two implications: first, that the UUD standard is diluted by a subjective application, where what is "unnecessary" degradation by an oil pad is entirely different from what would be considered "unnecessary" degradation arising from, say, a recreation program. Second, it logically contradicts the rest of the Rule's designation of conservation as a "use" (what kind of degradation would we expect to arise from a conservation "use"?). Again, the CLH Rule suffers as an attempt to privatize the BLM's mandatory duty to engage in conservation. Limiting and imposing regulations directly on commodity leases properly reflects conservation's paramount position as a *limit* on the leasing authority rather than as a use for which leases may be granted.

146. *See* 43 U.S.C. § 1732(a); CBD Comment at 1–2 (arguing that the definition of multiple uses within the statutory scheme already gives conservation elevated footing as compared to commodity uses) (citing 43 U.S.C. § 1702(c)).

147. 43 U.S.C. § 1732(b); *cf.* THE WILDERNESS SOC'Y, *supra* note 12 (ninety percent of BLM lands are available for oil and gas leases).

148. *See* Zellmer & Glickman, *supra* note 2, at 1363–64 (citing the "undeveloped nature of the UUD standard" and the fact that it has historically been applied in a context-specific nature, such as by reference to mining).

149. *Id.* at 1364–65.

150. *See* 43 U.S.C. § 1732(b).

151. 43 C.F.R. § 6101.4(aa) (2024).

CONCLUSION

Conservation is at a historical disadvantage on BLM lands. To fulfill its multiple use and sustained yield mandate, while responding to climate change, the BLM must truly restore conservation to an equal footing under FLPMA. This cannot be done through a private leasing scheme that pits conservation (a public good) against commodity uses (private goods) and ignores the BLM's unfortunate historical interpretation of "use" as commodity focused. Such an attempt creates both interpretive and pragmatic issues. Rather, the public benefit can only be supplied by the public agency tasked with "sustaining yield"—not *ad hoc* private lessees. The BLM must decline to abdicate its own duty to conserve the resources under its care.