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Tom Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Ave. S.W.
Washington, DC 20250
agsec@usda.gov
Tom.Vilsack@osec.usda.gov

Randy Moore
Chief
U.S. Forest Service
1400 Independence Ave. S.W.
Washington, DC 20250
randy.moore@usda.gov

Homer Wilkes
Under Secretary
Natural Resources and Environment
U.S. Department of Agriculture
1400 Independence Ave. S.W.
Washington, DC 20250
Meryl.Harrell@usda.gov

Myra Black
Program Manager
Forest Management, Range
Management and Vegetation
Ecology
U.S. Forest Service
1400 Independence Ave. S.W.
Washington, DC 20250
myra.black@usda.gov

Dear Secretary Vilsack, Chief Moore, and other Agriculture Department Officials,

The Property and Environment Research Center (PERC) petitions, pursuant to 5 U.S.C. § 553(e) and 7 C.F.R. § 1.28, for the Department of Agriculture and the Forest Service to take regulatory action that would facilitate markets for voluntary conservation on federal grazing lands. Specifically, PERC requests that the Forest Service revise its grazing rules to give permittees needed flexibility to manage their operations in response to changing climate, resource, and economic conditions and to work with conservation groups to establish incentives for stewardship efforts. Doing so would reduce conflict over the grazing program, expand opportunities for collaboration between permittees and environmentalists, and advance the Biden

Administration’s and Department of Agriculture’s conservation goals.¹ Without prompt action, differences between ranching and conservation interests will continue to be largely fought out through lose-lose legal and political conflict.

Current Forest Service grazing regulations significantly hamper permittee flexibility and restrict markets for voluntary conservation. The agency’s “substantial use” rules require permittees to graze 90% or more of the livestock authorized under a permit.² Other rules impose overly strict on/off dates and livestock-ownership requirements.³ These rules penalize livestock owners who modify their grazing practices for conservation, financial, or other reasons. They also effectively bar permittees from participating in programs that compensate them for adjusting grazing practices to produce conservation benefits, such as carbon sequestration markets. Instead, this “use it or lose it” policy encourages negative-sum litigation and political conflict.⁴

On private land, similar conflicts can be—and often are—resolved through collaboration and voluntary means. For instance, PERC and the Greater Yellowstone Coalition recently partnered with a rancher in Paradise Valley, MT, on an “elk occupancy agreement” under which the conservation groups compensated the landowner for managing 500 acres as elk winter range habitat.⁵ But “use it or lose it” rules forbid that same agreement being implemented on neighboring Forest Service land. Other conservation groups have set up grass banks, providing lower cost grazing opportunities to ranchers in exchange for adopting desired conservation practices.⁶ This option, too, is foreclosed on Forest Service land since a conservation group could not hold a grazing permit or make forage available for livestock owned by neighboring ranchers. The Department itself participates in this market, compensating private landowners for their conservation under the Conservation

¹ See Shawn Regan, Temple Stoellinger & Jonathan Wood, *Opening the Range: Reforms to Allow Markets for Voluntary Conservation on Federal Grazing Lands*, ____ Utah L. Rev. ____ (forthcoming 2023). A copy of this article is included as Attachment 2.

² Forest Service Handbook (FSH) 2231.7 (providing that permittees “must graze at least 90 percent of the number of livestock under term permit each year unless the Forest Service approves nonuse”); FSH 2209.13 (16.21) (providing that permits may be canceled if a permittee “fails to use range without obtaining approval for nonuse”); FSH 2209.13 (17.1), (17.2), (17.3) (limiting the length of time and circumstances in which nonuse can be authorized).

³ See 36 C.F.R. § 222.3 (c)(1)(i); FSH 2209.13, 11-5, 12.22.

⁴ See Bryan Leonard, et al., *Allow “nonuse rights” to conserve natural resources: “Use-it-or-lose-it” requirements should be reconsidered*, 373 Science 958 (2021). A copy of this article is included as Attachment 1.

⁵ See PERC, *Elk Occupancy Agreements*, <https://www.perc.org/elk-occupancy-agreements/>.

⁶ The Nature Conservancy, Matador Ranch, <https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/matador-ranch/>.

Reserve Program and other programs.⁷ These are only a few examples of the near infinite variety of innovative conservation solutions that have been developed and implemented on private land but are blocked on public land.

Conservation markets also help livestock owners diversify their income, a critical need considering rising land values and challenging economic conditions. Throughout the west, many ranchers participate in conservation incentive programs that reward them for conserving open space, supporting wildlife, sequestering carbon, and stewarding other environmental values. For these reasons, the ranching industry identifies support for voluntary conservation as one of its top policy priorities.⁸ On Forest Service lands, however, the “use it or lose it” policy ensures that conservation comes at the cost of ranching, rather than being a source of opportunity.

Rescinding these rules and allowing markets to reward stewardship would produce precisely the sort of collaborative, voluntary, and locally-driven conservation that the Biden Administration has made the centerpiece of its America the Beautiful initiative and that the Department of Agriculture has championed in its work.⁹ As Robert Bonnie, Undersecretary of Agriculture for Farm Production and Conservation, recently observed, successful conservation is done “with” people, “not to them.”¹⁰

To advance the Administration’s conservation vision, the Department and the Forest Service should rescind “use it or lose it” policies and allow conservation on federal grazing lands to be done *with* permittees, rather than *to* them through litigation and regulation. Addressing these barriers to voluntary conservation and collaboration between permittees and conservation interests would promote innovation and defuse conflict over federal grazing lands. The Department and the Service should take prompt action to implement the requested reforms.

⁷ See, e.g., U.S. Dept. of Agriculture, *Conservation Programs*, <https://www.fsa.usda.gov/programs-and-services/conservation-programs/index>.

⁸ See Nat’l Cattlemen’s Beef Assoc., 2022 Policy Priorities, <https://www.ncha.org/Media/NCBAorg/Docs/22-policy-priorities.pdf>.

⁹ See *Conserving and Restoring America the Beautiful* (2021), <https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf>; Robert Bonnie, Undersecretary of Agriculture for Farm Production and Conservation, Keynote Address for the University of Wyoming’s 150th Anniversary of Yellowstone Symposium: The Importance of Private, Working Lands to Yellowstone in the Twenty-First Century (May 20, 2022), available at https://westernlandowners.org/wp-content/uploads/2022/07/BonnieKeynote_YNP150th-3.pdf.

¹⁰ See Bonnie, *supra* n.9.

I. Petitioner

The Property and Environment Research Center (PERC) is the national leader in market solutions for conservation, with over 40 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

In particular, PERC’s research has explored how policies constrain markets from reallocating natural resources to their highest valued use, including conservation.¹¹ PERC’s research has been informed by workshops bringing together economists, legal experts, and practitioners to understand obstacles to collaborative conservation and to explore practical solutions.¹² In 2021, PERC researchers and colleagues published groundbreaking research in *Science* showing how outdated federal and state “use it or lose it” policies stoke conflict, discourage voluntary conservation, and make what conservation occurs less stable.¹³ PERC researchers have also produced forthcoming research specifically on the effect of these policies in the federal grazing context.¹⁴

In addition, PERC develops innovative on-the-ground conservation partnerships that aim to solve problems for property owners and other resource users while encouraging and rewarding effective stewardship. These win-win solutions include the elk occupancy agreement referenced above. They also include a partnership with ranchers who graze federal lands to reduce livestock-wildlife conflict. But federal “use it or lose it” policies make this work substantially more difficult by introducing uncertainty, contingencies, and potential conflict that limit options to the detriment of both ranching and conservation.

¹¹ See Bryan Leonard & Shawn Regan, *Legal and Institutional Barriers to Establishing Non-Use Rights to Natural Resources*, 59 Nat. Res. J. 1 (2019).

¹² See *Allow “nonuse rights” to conserve natural resources*, *supra* n.4, at 961.

¹³ See *id.*, at 958.

¹⁴ See *Opening the Range*, *supra* n.1; Shawn Regan, *Managing Conflict Over Western Rangelands*, PERC Policy Series (2016), https://www.perc.org/wp-content/uploads/old/pdfs/PERC_PS54_FINAL.pdf; Robert H. Nelson, *Public Lands and Private Rights* (1995).

II. “Use it or lose it” policies limit flexibility and discourage voluntary conservation

During the nineteenth century, the lands now administered by the Forest Service were in the public domain, available for settlers to homestead and for a variety of others to claim or use.¹⁵ The land that could be claimed by settlers was too small to support viable livestock operations.¹⁶ Therefore, western livestock owners grazed animals on unclaimed public domain lands, using the land as a commons with unrestricted grazing open to all.¹⁷

Over time, however, this arrangement led to tragedy.¹⁸ Competition for water and forage pitted local livestock owners against each other, pitted livestock owners against incoming settlers, and pitted all of them against Texas cattle barons.¹⁹ This stoked “range wars” involving violence and efforts to fence the open range without legal authorization.²⁰ It also caused resource depletion, as each person’s incentive was to graze as much as possible because, if they didn’t, someone else would.²¹

The solution to this tragedy of the commons was for the federal government to divide the open range into grazing allotments and allocate access.²² The Bureau of Forestry, the predecessor to the Forest Service, was the first agency to undertake this effort. Relying on the Organic Act’s authorization to regulate the “occupancy and use” of forest reserves, the agency instituted a permit system and, later, a grazing fee.²³ Prioritizing grazing rights for western settlers, the agency conditioned permits on ownership of “base property,” nearby private land that could serve as a base of operations.²⁴

While grazing permits are not formal property rights, Forest Service regulations have long granted existing permittees first priority for renewing their permits so

¹⁵ See *Opening the Range*, *supra* n.1, at 8-9.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *Public Lands Council v. Babbitt*, 529 U.S. 728, 732 (2000) (noting that “more cattle meant more competition for even-scarcer water and grass,” which along with “droughts, blizzards, and growth in homesteading, all aggravated natural forage scarcity.”). See also Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

¹⁹ See *Opening the Range*, *supra* n.1, at 8-9.

²⁰ See *id.*

²¹ See *id.*

²² See *id.* at 9-12.

²³ See *id.*

²⁴ See *id.*

long as they comply with permit conditions.²⁵ Consequently, permittees that have historically grazed an allotment have an expectation that they will continue to do so, subject to range conditions and agency requirements, an expectation that is reflected in the value of base property tied to the grazing permit.²⁶

This regime solved the challenges of the nineteenth century. But the federal range is closed and the homesteading era is over.²⁷ Today, the primary challenge is how ranching and growing conservation demands can coexist on federal land.²⁸ That new challenge calls for a new solution.

During the 1960s and 1970s, Congress responded to increased interest in conservation by enacting several laws that, while retaining the Forest Service's significant discretion to manage federal land and balance competing uses, also broadly authorized litigation against the agency over its use of that discretion.²⁹ Predictably, opponents of the agency's decisions have seized on these opportunities to litigate. Environmentalists have challenged grazing they perceive as harming riparian areas, endangered species, and other environmental values.³⁰ Ranching interests have challenged environmental rules they perceive as too burdensome or infringing their property rights.³¹

²⁵ See 36 C.F.R. § 222.3(c)(1)(i).

²⁶ L. Allen Torell and John P. Doll, *Public Land Policy and the Value of Grazing Permits*, 16 *Western J. of Ag. Econ.* 174 (1991).

²⁷ See *id.* at 23 (discussing the purposes underlying grazing permit restrictions). President Theodore Roosevelt described the Forest Service's grazing rules as "among the most potent influences in favor of the actual homemaker." See WILLIAM D. ROWLEY, U.S. FOREST SERVICE GRAZING AND RANGELANDS: A HISTORY, 3, 5 (1985) (quoting Roosevelt to Secretary Wilson, December 26, 1905, Reel 61, Series I, Theodore Roosevelt Manuscripts).

²⁸ See *Opening the Range*, *supra* n.1, at 12-16.

²⁹ See *id.*

³⁰ See, e.g., Caitlin Tan, *Cattle grazing privileges in Upper Green River region are upheld in court*, WY Public Radio (May 28, 2022), <https://www.wyomingpublicmedia.org/natural-resources-energy/2022-05-28/cattle-grazing-rights-in-upper-green-river-region-are-upheld-in-court>; Darrell Ehrlick, *To Protect Grizzlies, Groups Threaten to Sue Forest Service Over Livestock Grazing Near Yellowstone*, Idaho Capital Sun (May 12, 2022), <https://idahocapitalsun.com/2022/05/12/seven-groups-threaten-to-sue-forest-service-over-grazing-north-of-yellowstone-national-park/>; Guy McCarthy, *Court Sides with Stanislaus National Forest, Cattle Ranchers in Grazing Lawsuit*, Union Democrat (Apr. 19, 2022), https://www.uniondemocrat.com/news/article_2c6f5eea-c01c-11ec-928f-23ec81517a27.html; Lindsey Botts, *Conservation Groups Poised to Sue Feds Over Riparian Habitat Loss From Cattle Grazing*, AZ Central (Apr. 15, 2022), available at <https://www.azcentral.com/story/news/local/arizona-environment/2022/04/13/groups-may-sue-forest-service-wildlife-service-over-cattle-grazing/9464703002/>.

³¹ See, e.g., *Hage v. United States*, 687 F.3d 1281 (Fed. Cir. 2012).

While this litigation-centric approach has consumed significant resources, it has not served the Forest Service, livestock owners, or conservation interests well.³² Consequently, there is growing recognition of the need for an alternative. A “market-based approach” would, according to Judi Brawer of WildEarth Guardians, be “way more effective at the end of the day” than continued conflict.³³

Private land conservation reveals the promise of using markets to encourage voluntary conservation. Routinely, conflicts over the use and conservation of private lands are worked out through agreements that reward property owners for stewardship.³⁴ And these market solutions are infinitely adaptable to the needs of the particular landscape, landowner, and conservation goal. In some cases, such as where a rancher is looking to exit the industry, conservation interests have acquired land from willing sellers to conserve it.³⁵ In others, they’ve helped to keep working lands working by using conservation to lower livestock owners’ costs or diversify their incomes.³⁶

III. Rescind “use it or lose it” policies to facilitate voluntary conservation on federal grazing lands

Tools that have proven effective at resolving conflicts and conserving private land are foreclosed on federal rangelands because “use it or lose it” rules limit opportunities to negotiate over the extent, timing, and location of grazing.³⁷ Removing these requirements would make the full conservation toolbox available to resolve competing demands to federal lands and allow permittees to see conservation as an opportunity rather than a cost to their operations.

³² John D. Leshy & Molly S. McUsic, *Where’s the Beef? Facilitating Voluntary Retirement of Federal Lands from Livestock Grazing*, 17 N.Y.U. ENVTL. L. J. 369, 376 (2008) (quoting *NRDC v. Hodel*, 624 F. Supp. 1045, 1048 (D. Nev. 1985), *aff’d* 819 F.2d 927 (9th Cir. 1987)). *See also* Nat’l Wildlife Fed’n, *Wildlife Conflict Resolution: About*, <https://www.nwf.org/WCR/About> (criticizing grazing litigation as “generat[ing] a great deal of controversy, but only a small amount of change” in grazing practices); Shawn Regan, *Why Don’t Environmentalists Just Buy the Land They Want to Protect?*, Reason (Dec. 2019) (quoting a WildEarth Guardians attorney describing grazing litigation as “a no-win for everyone.”).

³³ *See Why Don’t Environmentalists Just Buy the Land They Want to Protect?*, *supra* n.32

³⁴ *See Opening the Range*, *supra* n.1, at 16-19.

³⁵ *See id.* at 16-17, 20-21.

³⁶ *See id.* at 17, 22.

³⁷ *See id.* at 27-34.

The substantial use requirement

Forest Service rules impose a substantial use requirement on all grazing permits. To satisfy this requirement, the Forest Service Handbook provides that permittees must graze “at least 90 percent of the number of livestock under term permit each year.”³⁸ The Forest Service Manual directs the relevant agency official to “cancel the permit in whole or in part for nonuse in excess of 10 percent, without approval.”³⁹

Under this rule, a conservation group cannot acquire a grazing permit from a willing seller and hold it for conservation purposes. Nor can they implement more modest arrangements with permittees, such as providing incentive payments for modifying grazing practices to avoid sensitive areas or reduce conflict with wildlife. If a rancher agreed to graze fewer cattle to reduce pressures on riparian areas, to vacate the allotment when predator conflicts are elevated, or to forego using part of an allotment critical to migratory elk, the Forest Service could deem them in violation of their permit, cancel it, and assign the forage to someone else.

The only relief permittees can obtain from this substantial use requirement is to ask the Forest Service to approve non-use of the permit. But the circumstances in which non-use can be approved are substantially constrained. A permittee can request nonuse for “personal convenience” or “resource protection or development.”⁴⁰ However, the Forest Service Handbook provides that whether to grant nonuse is discretionary, that requests will not be granted as a matter of course, and that granted periods of nonuse generally cannot exceed one year for personal convenience and five years for resource protection.⁴¹

These discretionary nonuse opportunities do not provide the flexibility needed to facilitate voluntary conservation on federal rangelands for several reasons. First, uncertainty whether the Forest Service would allow nonuse prevents permittees and conservation interests from directly negotiating over grazing practices and compensation for conservation activities. Second, the limited time for which nonuse is potentially available may not align with the needs to achieve the desired conservation outcome. Finally, the Forest Service’s nonuse guidelines incorporate “use it or lose it” principles by providing temporary permits for others to graze an

³⁸ FSH 2231.7.

³⁹ Forest Service Manual (FSM) 2231.62a.

⁴⁰ FSH 2209.13 (17.1), (17.2).

⁴¹ *See id.*

allotment during some periods of nonuse, which could conflict with the conservation goal.⁴²

Additional restrictions that limit permittee flexibility and hamper collaborative conservation

While the substantial use requirement is the primary source of the “use it or lose it” policy, other grazing restrictions also restrict permittee flexibility in ways that discourage voluntary conservation. For instance, Forest Service rules limit grazing permits to those who “own livestock to be grazed”⁴³ and limit grazing on federal lands to livestock owned by the permittee.⁴⁴ While it makes sense to require permittees to have authority and control over the livestock they graze, formal ownership is unnecessary, increases costs, and limits permittees ability to adjust the size of the herd to variable range conditions.

This requirement limits permittee flexibility and opportunities for voluntary conservation in at least two ways. First, where a permittee wishes to exit the industry by selling her permit and the highest bidder would be a conservation group, the group cannot hold the permit unless it acquires livestock. For some groups, this may not be an obstacle because, for instance, they view grazing as part of their conservation plans.⁴⁵ But, for others, this may add cost and management challenges that make agreement unfeasible.

Second, this restriction limits permittees’ ability to graze livestock they have authority and control over but do not own. For livestock operators, the ability to manage cattle owned by a partner may help to lower the operator’s overhead, to adapt to variable resource conditions, and to increase profit. For conservation groups, the same ability would allow them to use a grazing permit to operate a grass bank, making forage available to neighboring livestock owners at low or no cost in exchange for implementing conservation practices on surrounding land.

⁴² See FSM 2233.1(1).

⁴³ 36 C.F.R. § 222.3 (c)(1)(i). The Forest Service Handbook further requires that “permit holders must own livestock grazed on the National Forest System under grazing permits with term status...” FSH 2209.13, 11-5, 12.22 (1992).

⁴⁴ See FSM 2230.5.

⁴⁵ See *Opening the Range*, *supra* n.1, at 21 (discussing American Prairie’s efforts to graze bison on BLM land as part of a larger conservation initiative). See also James L. Huffman, *American Prairie Reserve: Protecting Wildlife Habitat on a Grand Scale*, 59 Nat Resources J. 35 (2019).

Another restriction that limits permittee flexibility and collaboration between permittees and conservation interests are the strict on/off dates for permits. This restriction requires livestock owners to use the allotment during the authorized period, regardless of whether it is optimal for grazing or conservation purposes. It also limits the ability of livestock owners and conservation interests to negotiate over the timing of grazing to address predator conflicts, wildlife migrations, and other time-sensitive conservation issues.

The Bureau of Land Management is experimenting with the relaxation of strict on/off requirements, recognizing that permittees can produce better rangeland health outcomes if they can adapt grazing to conditions on the ground. In 2017, the BLM announced an outcome-based grazing pilot that sets rangeland health and other targeted outcomes that permittees would have flexibility to achieve.⁴⁶ This is a model that could inform how the Forest Service implements the reforms requested in this petition.

IV. The requested reforms would help the Forest Service better satisfy its statutory obligations

The Forest Service has the authority to implement the requested reforms under existing law. No statute requires this “use it or lose it” policy for the grazing program. Congress gave the agency wide latitude to adapt the program to current needs. Indeed, Congress directed the Forest Service to account for the “relative value” of different resources when managing federal land, a duty that will be substantially easier with a market for voluntary conservation on these lands.

The foundation for the Forest Service’s grazing program is the Organic Act’s authorization to regulate the “occupancy and use” of the national forest system.⁴⁷ Beyond this general authorization, the Organic Act does not impose particular requirements on how the agency authorizes and regulates grazing. In the Granger-Thye Act, Congress confirmed this flexibility, providing that the Secretary of Agriculture can regulate grazing on forest system land “upon such terms and conditions as he may deem proper.”⁴⁸ Thus, the Forest Service retains significant

⁴⁶ See Bureau of Land Management, *BLM Offers Livestock Operators Increased Flexibility Through Outcome-based Grazing Authorizations* (Sept. 22, 2017), <https://www.blm.gov/press-release/blm-offers-livestock-operators-increased-flexibility%C2%A0through-outcome-based-grazing>.

⁴⁷ Leshy & McUsic, *supra* note 32, at 373, (citing 16 U.S.C. §§ 478, 551. The authors highlight the fact that the 1897 law failed to mention the grazing in the context of regulating occupancy and use).

⁴⁸ 16 U.S.C. § 580l.

latitude to adapt the grazing program to present circumstances, including by rescinding the rules identified above.

Congress has never imposed on the Forest Service's grazing program the detailed requirements that apply to the Bureau of Land Management's program under the Taylor Grazing Act.⁴⁹ Therefore, the Forest Service is not constrained by the Tenth Circuit's decision in *Public Lands Council v. Babbitt*, which held invalid a "conservation use" permit developed by the BLM.⁵⁰ However, this decision would not be an obstacle to rescinding the substantial use requirement even were the Forest Service to consider it persuasive.⁵¹ *Public Lands Council* held that the ordinary meaning of "grazing permit" is an authorization to graze federal land and does not cover permits that explicitly forbid grazing.⁵² However, the court expressly confirmed that "permittees may voluntarily reduce their grazing levels" without running afoul of its holding.⁵³ In other words, under *Public Lands Council's* rationale, a grazing permit must (at least for purposes of the Taylor Grazing Act) allow grazing, but need not require it.⁵⁴ Thus, even if the Forest Service were inclined to follow *Public Lands Council*, despite it not being binding, that would be no obstacle to the requested reforms.

Rescinding the requirement would also assist the Forest Service in carrying out its duties under other laws. The Multiple Use-Sustained Yield Act directs the agency to manage lands "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes" under multiple use and sustained yield principles.⁵⁵ In carrying out this responsibility, Congress directed the Service to give "due consideration . . . to the relative values of the various resources in particular areas."⁵⁶

The requested reforms would allow markets to reveal the relative value of areas for recreation, range, watershed, and wildlife conservation purposes.⁵⁷ This is one of the

⁴⁹ 43 U.S.C. § 315.

⁵⁰ *Public Lands Council v. Babbitt* 167 F.3d 1287, 1292 (10th Cir. 1999).

⁵¹ See *Opening the Range*, *supra* n.1, at 35-36. Unlike the statutes governing the Forest Service's grazing program, the Taylor Grazing Act limits BLM permits to "stock owners," which would limit that agency's ability to revise its livestock ownership requirement.

⁵² 167 F.3d at 1307-08.

⁵³ See *id.* at 1308.

⁵⁴ See *Opening the Range*, *supra* n.1, at 35-36.

⁵⁵ 16 U.S.C. §§ 528-29.

⁵⁶ See *id.* § 529.

⁵⁷ Although this petition focuses on opportunities for permittees to collaborate with conservation interests, the reforms could also potentially allow recreational and other interests to negotiate changing to grazing practices where there is conflict with other uses.

chief benefits of markets.⁵⁸ Moreover, markets would adapt over time to reflect changes in these relative values. For a permittee and conservation organization to agree on modified grazing practices to produce a desired conservation outcome, they both must be made better off. Otherwise, one or both would simply walk away. Because a win-win outcome is a necessary condition for voluntary agreement, the Forest Service can be confident that the requested reforms will ensure that the use of federal lands would better reflect the relative values of different resources.

Moreover, the substantial use requirement is an arbitrary “use it or lose it” policy. There may be cases where establishing a minimum level of grazing that must occur would help the Forest Service achieve land-management and other objectives. But the substantial use requirement is no substitute for such a standard. It is an arbitrary, one-size-fits-all requirement to make virtually maximal use of a grazing permit without regard to local conditions or competing concerns.⁵⁹ This arbitrariness, alone, is grounds to rescind the substantial use requirement.⁶⁰

Without a substantial use requirement, the Forest Service could still impose science-based minimum grazing requirements as appropriate. Such requirements would both be better tailored to resource needs and signal to permittees and conservation groups where are the best opportunities for voluntary conservation.⁶¹ Therefore, the potential need to set minimum grazing requirements in some permits should not discourage the Forest Service from rescinding the substantial use requirement.

Finally, the requested reforms would streamline the Forest Service’s administration of the grazing program and could reduce the amount of time and resources sapped by conflict. Because of the substantial use requirement, anytime a permittee wants to adjust his grazing practices even for a single year, she must seek and obtain permission from the Forest Service which takes away staff time from other priorities. The agency’s time and resources can also be consumed by the legal and political conflict that “use it or lose it” requirements encourage. These can be both direct costs of being a party to litigation and anticipatory costs as the agency seeks to preempt litigation by spending extra time analyzing (“bulletproofing”) decisions.

⁵⁸ See *Allow “nonuse rights” to conserve natural resources*, *supra* n.4, at 959.

⁵⁹ See *Opening the Range*, *supra* n.1, at 37-28.

⁶⁰ See *Judulang v. Holder*, 565 U.S. 42 (2011).

⁶¹ See *Opening the Range*, *supra* n.1, at 3738.

V. Ending “use it or lose it” policies would benefit permittees and environmental interests and advance the Administration’s vision for conservation

While the long history of conflict over federal-land grazing likely means that any changes will have some detractors, PERC’s requested reforms can benefit both permittees and environmental interests, while also advancing the Administration’s vision for conservation.

Benefitting permittees

For permittees that are uninterested in participating in voluntary conservation initiatives, the requested reforms would provide needed flexibility to manage their operations in response to range conditions, economic realities, or family circumstances. Requiring livestock owners to graze more than they otherwise would to satisfy the substantial use requirement may increase costs, lower profitability, and reduce the viability of the business. The ability to graze livestock owned by partners may enable permittees to more easily adapt their operations year-to-year while bringing in additional income. And more flexible on/off dates would allow them to graze at the optimal time for the range, their cattle, and other considerations.

The requested reforms would also benefit permittees by honoring their reasonable expectations of continued grazing and the capitalization of that expectation in the value of their private property. The pursuit of conservation through legal and political conflict causes conservation to be a threat, rather than an opportunity. This is so even where the livestock owner prevails, because the conflict could reoccur when the permit comes up for renewal or the agency considers revising its rules. Instead of making conservation an unwanted cost and source of conflict, markets for voluntary conservation on federal land would reward permittees for conservation efforts, help to diversify their incomes and rural economies, and increase the value of their private land rather than depress it.

Permittees would also benefit by unlocking more tools for advancing voluntary conservation on federal lands. In several cases, conservation interests have “bought out” grazing permits from willing sellers then worked with the relevant federal agency to “retire” the permit by amending the land use plan to exclude grazing from

the allotment.⁶² While an important innovation that has helped to facilitate conservation in high-conflict areas while honoring livestock owners' property rights and expectations, the Forest Service and permittees have expressed several concerns about the buyout and retirement approach. The agency has suggested that its purported permanence intrudes on the agency's land-management responsibilities.⁶³ The livestock industry has questioned the voluntariness of buyouts negotiated in the wake of or under the threat of litigation and questioned why buyouts should be treated as permanent when grazing permits are not.⁶⁴

The requested reforms address these concerns by providing more options to permittees and conservation groups than the "full grazing" or "no grazing" options available to them now. If given the choice, permittees and environmentalists would likely select a compromise solution than either extreme because they can better target the desired conservation outcome at lower cost. And, where a permittee wishes to exit the industry and a conservation group wishes to purchase the permit, the group can hold the permit on the same terms as anyone else, leaving the land available for future grazing if it can be done on terms suitable to the permit holder.

Benefitting conservation

The requested reforms would also benefit environmentalists by providing more tools to pursue conservation on federal lands. The "use it or lose it" policy gives environmental groups few choices to influence federal land management other than through legal and regulatory conflict.⁶⁵ But this approach is costly, slow, and, ultimately, ineffective at producing lasting and meaningful change.⁶⁶ Even if a lawsuit or push for regulatory change is successful, the agency (perhaps under a future administration) could undo it by revising regulations or reanalyzing and reissuing a challenged decision.⁶⁷ That's why several conservation organizations have soured on this approach.⁶⁸

As mentioned above, several environmental groups have looked to directly advance their conservation goals by working with willing sellers to buy grazing permits and

⁶² *See id.* at 20-21.

⁶³ *See id.* at 25-26.

⁶⁴ *See id.* at 26-27.

⁶⁵ *See id.* at 15-16.

⁶⁶ *See id.*

⁶⁷ *See id.* at 32-34.

⁶⁸ *See id.* (collecting comments from environmental law scholars, the National Wildlife Federation, and WildEarth Guardians).

with the relevant agency to retire those permits. While this is a marked improvement from the conflict model, it shouldn't be the only market option available. It is costly to implement because the conservation group must buyout the entire permit rather than compensating the rancher for the more modest changes that may be needed to produce the desired conservation outcome. And it is risky because the agency may not honor the agreement.⁶⁹ Like acquiring private land outright, buyouts can be a useful conservation tool. But they shouldn't be the only tool in the toolbox.

Administration's vision

Finally, the requested reforms align with the Administration's vision for conservation. Last year, the Department of Agriculture and other federal agencies released "Conserving and Restoring America the Beautiful," a report proposing a ten-year campaign to conserve thirty percent of the land and water in the United States.⁷⁰ The report identified 8 core principles that, in its words, are "essential ingredients to building and maintaining broad support, enthusiasm, and trust" and "indispensable to achieving durable outcomes."⁷¹

The requested reforms would directly advance several of these core principles. First, the report embraces collaborative conservation, explaining that "[t]he spirit of collaboration and shared purpose should animate all aspects of America's nature conservation and restoration efforts."⁷² "Use it or lose it" policies encourage conflict and division, while the requested reforms will allow permittees and conservation interests to find common ground.

Second, the report elevates locally-led and locally-designed solutions, rather top-down impositions. This principle, too, would be advanced by the requested reforms. They would empower permittees and conservation groups to find the right solution for their landscape, their business, and their conservation goals.

⁶⁹ See *id.* See also John Leshy, *A Trump Plan Breaks a Great Deal for Ranchers and Park Lovers*, N.Y. TIMES (March 3, 2020).

⁷⁰ See *America the Beautiful*, *supra* n.9. In addition to advancing the *America the Beautiful* principles, the conservation efforts unlocked by the requested reforms would help the Administration count federal working lands toward its goal of conserving thirty-percent of land in the United States.

⁷¹ See *id.* at 6.

⁷² See *id.* at 13.

Third, the report urges the government to “honor private property rights” and support “voluntary stewardship efforts.”⁷³ While grazing permits are not formal property rights, ranching families that have grazed the same land for generations have expectations of continued use and this expectation is capitalized in the value of their private land. The America the Beautiful Report implicitly recognizes this fact, noting in its discussion of property rights and voluntary stewardship that “maintaining ranching in the West—on both public lands and private lands—is essential to maintaining the health of wildlife, the prosperity of local economies, and an important and proud way of life.” The requested reforms would facilitate solutions that respect and reward the role of working ranches in delivering conservation outcomes on public lands. It would also unlock tools that can keep these ranches working by using conservation to lower costs or increase income.

The requested reforms would also advance the Department of Agriculture’s vision for the future of cross-boundary conservation. In May, Robert Bonnie, the Undersecretary of Agriculture for Farm Production and Conservation, spoke about a Department initiative to conserve ungulate migratory corridors at a University of Wyoming symposium celebrating Yellowstone National Park’s 150th anniversary.⁷⁴ In his speech, Undersecretary Bonnie distinguished a 21st century vision for conservation from the 20th century vision “which cast[] the federal government as dictator and solely as a regulator[.]”⁷⁵ A 21st century model must “work with, not against, states, tribes, and private landowners – with, not against, agriculture and forestry.”⁷⁶ This means advancing conservation “in a voluntary and incentive-based manner.”⁷⁷

This vision is already being realized on private land, thanks in part to some of the innovative and collaborative efforts discussed above and Department programs that reward private-land stewardship.⁷⁸ The requested reforms would extend these tools to federal grazing lands and build on their existing success in promoting effective and durable conservation. Importantly, it would allow conservation on federal grazing lands to be done “with” livestock owners, rather than “to” them.⁷⁹

⁷³ See *id.* at 15.

⁷⁴ See Bonnie, *supra* n.9.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *id.* (highlighting additional examples being developed and implemented by PERC, the Nature Conservancy, Western Landowners Alliance, and other conservation groups).

⁷⁹ See *id.*

Conclusion

In conclusion, PERC urges the Department of Agriculture and the Forest Service to revise its grazing program to give permittees more flexibility and to facilitate markets for voluntary conservation on federal lands. Doing so would enable the Forest Service to better satisfy its statutory duties, reduce legal and political conflict, make conservation an opportunity for livestock owners rather than a cost, and advance the Administration's vision of pursuing conservation through collaborative, locally-driven, and voluntary means.

PERC requests an opportunity to meet with responsible Department of Agriculture and Forest Service officials to discuss the reforms requested in this petition and any questions those officials may have.

Sincerely yours,

Jonathan Wood
VP of Law and Policy
Property and Environment Research Center
2048 Analysis Dr. Ste. A
Bozeman, MT 59718
jonathan@perc.org
(406) 587-9591