

A Comparison of How the Bureau of Land Management Authorizes Land Use

by Bailey Brennan

Context:

Per the Federal Land Policy Management Act (FLPMA), the Bureau of Land Management (BLM) must manage public lands for multiple uses, including oil and gas, grazing, recreation, and fish and wildlife habitat. To meet this mandate, the agency has regularly permitted extractive and industrial activities by granting leases, permits, and rights-of-way to private entities. In its 2024 Conservation and Landscape Health Rule, known as the Public Lands Rule, the BLM proposes something similar for conservation, using restoration and mitigation leases to grant non-public entities the authority to do conservation work on public lands after decades of using similar mechanisms for many other, often extractive, purposes.

Conclusions:

The BLM has authorized multiple uses of its land for decades and under various authorities, for example issuing oil and gas leases, renewable energy rights-of-way, and grazing permits. Title III of FLPMA grants the BLM broad authority to issue leases, permits and easements for nearly any use, provided it is otherwise consistent with FLPMA or other federal statutes. These historical land use authorization mechanisms and the proposed restoration and mitigation leases are similar in that they must comply with FLPMA, the National Environmental Policy Act (NEPA), and applicable land use plans; they authorize the use of lands with limited interference; and they require applicants to demonstrate technical and financial capability. They differ in their statutory authorities, purposes, and incentives, as well as their cultural and economic legacies. BLM's broad and historical use of these mechanisms shows that the agency is accustomed to granting and managing interests in public lands and has sought to balance different and, at times, incompatible authorizations through regulation, guidance, and the terms and conditions of an authorization itself.

Implications:

There is nothing new about the BLM granting a non-public entity the authority to use public lands for a specific use. The BLM has the statutory authority to issue restoration and mitigation leases and, based on decades of issuing authorizations for other uses, the experience to manage and balance competing and overlapping uses.

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Introduction

Under FLPMA, the BLM must manage public lands for a variety of uses and resources, including ecological, environmental, and natural values; fish and wildlife habitat; watersheds; and recreation, in addition to the development of timber, range, and minerals. The agency tries to balance these uses through a variety of tools, including the land use planning process, reviewing individual projects and proposals, identifying areas for additional protections, and incorporating public comment and sentiment.

Despite this, the BLM has historically prioritized extractive and industrial uses of public lands, frequently granting permits to private entities for activities such as mining, oil and gas development, and grazing—often at the expense of other uses. With the issuance of its Public Lands Rule, the BLM introduced a mechanism that specifically enabled the agency to grant entities the right to use public lands for restoration and mitigation.

This paper provides an overview of the different mechanisms that the BLM may use to grant the right to use public lands and resources for specific and limited purposes, including restoration and mitigation leasing, and discusses some of their most meaningful similarities and differences. For a thorough comparison, see the table below. As this paper shows, the BLM has long been accustomed to reviewing, granting, managing, and balancing non-BLM interests in public lands under a variety of authorities and contexts.

How authorizations are similar

All authorizations must comply with FLPMA, applicable land use plans, NEPA, and NHPA

Uses authorized through any mechanism must be consistent with the BLM's broad statutory mandate under FLPMA to manage public lands for multiple use and sustained yield. Authorizations must also be consistent with existing land use plans, which the BLM periodically reviews and revises through a public process outlined in FLPMA. Moreover, both land use plans and any authorizations issued must comply with other federal laws, including NEPA and the National Historic Preservation Act (NHPA).

Theoretically, the BLM and the general public would consider all authorizations, implicitly or explicitly, through an open and transparent process required under FLPMA, NEPA or NHPA. For example, a land use plan that provides guidance or sets parameters for various authorizations—as well as the issuance of a specific authorization itself—is subject to the environmental analysis and public comment opportunities required under NEPA. If BLM issues an authorization without following the prescribed process—notifying the public of the planning process or project, accepting scoping comments, drafting and accepting comment on an environmental analysis, issuing a final decision for public review—a private citizen can legally challenge that authorization.

Most authorizations include the right to use public lands with limited interference

Most authorizations grant the right to use public lands for a specified and limited purpose with limited interference. Generally, when the BLM issues an authorization, it reserves the right to continue to use public lands or grant others the authority to use the public lands in question so long as that future use is not inconsistent with the original authorization. The agency's reservation of authority ensures its ability to balance multiple uses.

For example, per the terms of the BLM's form oil and gas lease, an operator may use "only so much of the leased lands as is necessary" for development and the agency reserves the right to "continue existing uses and authorize future uses" so long as they do not unnecessarily or unreasonably interfere with rights of lessee. These future uses could be identification of crucial winter range for mule deer, the issuance of a right-of-way for renewable energy, cheatgrass treatment, or nothing specific at all—it depends on the context.

The BLM takes a similar approach in the Public Lands Rule with restoration and mitigation leases, precluding the agency from issuing new authorizations that would be incompatible with the restoration or mitigation use. As the BLM provides, a lease "does not convey exclusive rights to use the public lands to the lease holder." 43 C.F.R. § 6104.4(f).

This approach is a recognition that there are certain public lands uses authorized under FLPMA that are simply incompatible but still permitted. The BLM "must weigh competing interests and, where necessary, make judgments about incompatible uses; a particular parcel need not be put to all feasible uses or to any particular use." *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 872 (9th Cir. 2017).

All applicants must demonstrate technical and financial capabilities

Any entity seeking an authorization under any of the mechanisms discussed in the table below must demonstrate the technical ability to carry out the proposed project. An applicant must also demonstrate the financial ability to complete a project consistent with the terms and conditions of the authorization, including reclamation standards.

For example, to obtain a Title V right-of-way, including a wind and solar lease or grant, an applicant must be "[t]echnically and financially able to construct, operate, maintain, and terminate the use of the public lands [they] are applying for[.]" 43 C.F.R. § 2803.10(b). These and similar requirements are meant to ensure that project proponents are committed, resourced, and able to safely and efficiently carry out the proposed activities.

How authorizations differ

Authorizations have different statutory authorities

The mechanisms that the BLM uses to issue rights to use public lands vary in the source and specificity of their statutory authorizations. For example, the Mineral Leasing Act of 1920 very specifically requires the BLM to hold oil and gas lease sales in “each state where eligible lands are available at least quarterly” and to issue permits to successful and qualified bidders. 30 U.S.C. § 226(b)(1)(A). By contrast, under Title III of FLPMA, Congress gave the BLM broad authority to issue leases, permits and easements necessary to regulate the “use, occupancy, and development of public lands[.]” 43 U.S.C. § 1732.

The significance of statutory authority depends on the context. Broad, general statutory authority, like under Title III of FLPMA, suggests an agency has ample discretion on what uses to authorize or not and on what conditions to authorize them. However, without definite direction from Congress, BLM authorizations may be more vulnerable to legal challenge and under greater scrutiny for authorizations that are controversial. On the other hand, specific statutory mandates leave the BLM little discretion but the ability to defend against lawsuits over authorizations.

The purposes and incentives of authorizations vary

Historically, the BLM has granted non-public entities the right to use public lands for extractive and economic purposes, including oil and gas development, timber harvesting, and livestock grazing. More recent authorizations, such as leases and grants for wind and solar development, share this trait. Most non-public entities pursue authorizations to use public lands for economic gain, looking to generate revenue through the extraction and sale of public resources such as timber, forage, wind, sun, oil and gas, and more.

The purpose of restoration and mitigation leases can be, but are not necessarily, economic. Mitigation projects intended to offset impacts elsewhere are likely to be financially motivated. There is also a burgeoning market for mitigation on public and private lands, recognizing that local, state, and federal permits are often conditioned upon offsetting a project’s impacts elsewhere. While there may not be as much of an economic incentive presently for restoration leases, there may be more of a market in the future.

The Public Lands Rule also recognizes that there are other purposes and incentives behind restoration and mitigation—conservation for the sake of conservation. Indeed, the Public Lands Rule identifies conservation as a use unto itself, on par with other uses that FLPMA identifies. Restoration leases, as they have been discussed and characterized, may provide an opportunity for the public to invest in restoration simply to improve the health of public lands.

Authorizations grant uses that carry different cultural and economic legacies

For decades, public lands have been used for extractive and economic purposes like oil and gas development, coal, gold, silver and copper mining, timber harvesting, livestock grazing, etc. These uses,

now and in the past, have deep economic and cultural roots in local communities. For example, a significant portion of Wyoming's budget comes from royalties from federal oil and gas development, and ranching, the success of which often depends on public land grazing, is a way of life in many small towns across the West. While conservation work has historically happened on public lands—in fact FLPMA was passed in part to address concerns about land degradation—it has not generally been part of Western cultural and economic identity as much as many other uses. Because of this, either conservation efforts have not been particularly visible to the public or, more likely, they haven't happened.

Conclusion

For decades, the BLM has granted other entities the right to use public lands for myriad purposes through various mechanisms, including grants, permits, leases, easements, and rights-of-way. While the purposes and statutory authorities for these mechanisms differ, their function and terms are relatively similar. The BLM's broad and historical use of these mechanisms shows that the agency is accustomed to granting and managing interests in public lands and has sought to balance competing and, at times, incompatible authorizations through regulation, guidance, and the terms and conditions of an authorization itself.

Mechanism	Authority	Purpose	Application Process	Term? Renewable?	Rent? Fees?	Other uses allowed?
Restoration lease	FLPMA, Title III	"Restoration of land and resources by passively or actively assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed to a more natural, resilient ecological state." ¹	Non-competitive. An interested party submits an application to the BLM, complying with certain requirements, and is reviewed by BLM along with specific factors, including collaboration with existing permit holders, outreach to local communities, and environmental justice objectives. ²	Maximum of 10 years, with opportunity for renewal for a period no longer than the original term ³	Yes, though fees may be waived if not revenue-generating and lease will benefit general public. ⁴	"Subject to valid existing rights and applicable law... the BLM shall not issue new authorizations to use the leased lands if the use would be incompatible with the authorized restoration or mitigation use." ⁵ The regulations also state: "An approved lease does not convey exclusive rights to use the public lands to the lease holder. The authorized officer retains the discretion to determine compatibility of the renewal of existing authorizations and future land use proposals on lands subject to restoration or mitigation leases." ⁶
Mitigation lease	FLPMA, Title III	"Mitigation to offset impacts to resources resulting from other land use authorizations." ⁷		"...a term commensurate with the impact it is mitigating..." ⁸	Yes; varies. ⁹	
Oil and gas lease and permit	Mineral Leasing Act of 1920	To allow for the exploration and production of federal oil and gas resources.	Competitive. BLM offers parcels for lease through quarterly lease sales to the highest bidder, following NEPA and public comment processes. ¹⁰ A leaseholder must obtain a permit to drill before drilling. ¹¹	10 years for a lease, automatically renewed as long as "oil or gas is produced in paying quantities"; additional extensions possible ¹²	Rent and/or royalties of 16 2/3% required. ¹³	Yes, if they do not interfere with development. A lessee has the right to use "only so much of the leased lands as is necessary" for oil and gas development consistent with the terms of the lease and permit. ¹⁴ In current lease form, agency reserves the right to "continue existing uses and authorize future uses" so long as they do not unnecessarily or unreasonably interfere with rights of lessee. ¹⁵
Title III leases, easements and permits	FLPMA, Title III	For the "use, occupancy, and development of public lands" for any purpose not specifically authorized elsewhere in the law and not specifically prohibited. ¹⁶ Special Recreation Permits are also issued pursuant to Title III. ¹⁷	May be competitive. ¹⁸ An interested party submits a proposal to BLM, BLM publishes a notice of realty action, an interested party submits its application describing intended use, BLM reviews application. ¹⁹ Expedited process for applications with minimum impacts. ²⁰	For leases and easements, term is determined by the authorized officer. Permit term is 3 years. Option for renewal.	Yes, fair market value plus cost recovery. ²¹	BLM "reserves the right to use the public lands or to authorize the use of the public lands by the general public in any way compatible or consistent with the authorized land use." ²²
Title V rights-of-way	FLPMA, Title V	A variety of purposes, including ditches, roads, certain pipelines, communication facilities, "systems for generation, transmission, and distribution of electric energy," and "such other necessary transportation or other systems or facilities which are in the public interest." ²³ Includes wind and solar development.	Wind and solar may be competitive. ²⁴ Applications submitted must comply with certain requirements ²⁵ and are processed and prioritized by BLM consistent with specific factors ²⁶	A "reasonable term" given the use; renewable energy and transmission is up to 50 years. ²⁷	Yes, must pay rent. ²⁸ For wind and solar, either acreage rent and/or capacity fee. ²⁹	BLM reserves the right to grant third parties the right to use lands in question, so long as compatible. ³⁰ BLM may limit use on ROW lands by segregating (temporary withdrawal) or withdrawing them from use under general land laws, including mining and oil and gas. ³¹ Solar development generally precludes other uses, including grazing. ³²

Mechanism	Authority	Purpose	Application Process	Term? Renewable?	Rent? Fees?	Other uses allowed?
Grazing permits	Taylor Grazing Act, FLPMA	To “prevent[] overgrazing and soil deterioration,” to provide for the “orderly use, improvement, and development” of public lands and “stabilize the livestock industry dependent upon the public range.”	Applicant who meets all necessary qualifications, including holding base property, submits application to BLM. Application for renewals follows a similar process. Where there are competing applications, BLM weighs them based on certain factors. ³³ Permits are often transferred with BLM consent when base property ownership changes hands.	10 years with opportunity for renewal; preference given to existing permit holders. ³⁴	Yes, based on the number of animal units per month – \$1.35 in 2024. ³⁵	Yes.
Hardrock mining	General Mining Law of 1872	To allow for hardrock mining on public lands, subject to certain terms and conditions, including reclamation requirements. ³⁶	On lands open to mineral entry and not previously claimed, an interested party may stake a claim, which is valid upon discovery of a reasonable quantity of mineral. ³⁷ BLM must approve a plan of operations. ³⁸	Until mining operations cease and reclamation obligations are met.	Claim fee, annual maintenance fee. ³⁹	Potentially, depending on the nature of mining activities.
Timber contracts	FLPMA	Manage timber harvest on lands suitable for such production on a sustained-yield basis. ⁴⁰	Competitive. Consistent with the applicable land use plan and forest product sale plans, BLM identifies and appraises value of certain timber and accepts bids for the sale of such timber. A sale contract is awarded to the highest bidder. ⁴¹	4 years with opportunity for extension. ⁴²	A contract is sold for at least the appraised value of the timber. ⁴³	Not explicitly. In effect, unlikely, given the nature of timber harvesting.

Endnotes

- 1 43 C.F.R. § 6102.4(a)(1)(i).
- 2 43 C.F.R. § 6104.4(b), (c) and (d).
- 3 43 C.F.R. § 6102.4(a)(3).
- 4 43 C.F.R. § 6102.4(j) and as governed by 43 C.F.R. § 2920.6 and 2920.8.
- 5 43 C.F.R. § 6104.4(a)(4).
- 6 43 C.F.R. § 6104.4(f).
- 7 43 C.F.R. § 6102.4(a)(1)(ii).
- 8 43 C.F.R. § 6102.4(a)(3)(ii).
- 9 43 C.F.R. § 6102.4(j) and as governed by 43 C.F.R. § 2920.6 and 2920.8.
- 10 30 U.S.C. § 226(b)(1)(a).
- 11 43 C.F.R. § 3162.3-1.
- 12 30 U.S.C. § 226(e).
- 13 30 U.S.C. 226(b)(1)(A), (d).
- 14 43 C.F.R. § 3101.12.
- 15 BLM, Lease for Oil and Gas, Form 3100-11, Section 6 (Mar. 2023), available at https://www.blm.gov/sites/blm.gov/files/uploads/Services_National-Operations-Center_Eforms_Fluid-and-Solid-Minerals_3100-011.pdf.
- 16 43 U.S.C. § 1732(b), 43 C.F.R. § 2920.0–1, 2920.1–1.
- 17 43 C.F.R. Subpart 2930.
- 18 43 C.F.R. § 2920.5-4.
- 19 43 C.F.R. §§ 2920.2-2920.5.
- 20 43 C.F.R. § 2920.2–2.
- 21 43 C.F.R. §§ 2920.6, 2920.8.
- 22 43 C.F.R. § 2920.7(a).
- 23 43 U.S.C. § 1761(a).
- 24 43 C.F.R. § 2809.10.
- 25 43 C.F.R. § 2804.12.
- 26 43 C.F.R. §§ 2804.25, see (e)(2) specifically, and 2804.35.
- 27 43 C.F.R. § 2805.11(c).
- 28 43 C.F.R. § 2806.10(a).
- 29 43 C.F.R. Subpart 2806.
- 30 BLM, Manual MS-2805.15(B), Timber Production Capability Classification (Oct. 23, 1984).
- 31 43 U.S.C. § 1714, 43 C.F.R. § 2804.25(f).
- 32 See Bureau of Land Management, Notification to Livestock Grazing Operators, available at <https://blmsolar.anl.gov/law/authorization-policies/livestock/>; 43 CFR 4110.4-2(b).
- 33 Pub. L. No. 73-482, 48 Stat. 1269 (1934). This paper focuses on TGA Section 3 permits, not Section 15 leases.
- 34 43 C.F.R. § 4130.1-2.
- 35 43 U.S.C. § 315b.
- 36 Bureau of Land Management, IM2024-017: 2024 Grazing Fee, Surcharge Rates, and Penalty for Unauthorized Grazing Use Rates (Feb. 28, 2024).
- 37 Congressional Research Service, Policy Topics and Background Related to Mining on Federal Lands (Mar. 19, 2020).
- 38 30 U.S.C. §§21-54.
- 39 43 C.F.R. §§3809.300-3809.424
- 40 Congressional Research Service, Policy Topics and Background Related to Mining on Federal Lands, 7-8 (Mar. 19, 2020).
- 41 BLM, Manual MS-5251.06, Timber Production Capability Classification (Oct. 23, 1984).
- 42 43 C.F.R. Group 5400.
- 43 C.F.R. § 5463.1, Subpart 5473.
- 44 43 C.F.R. § 5430.1.