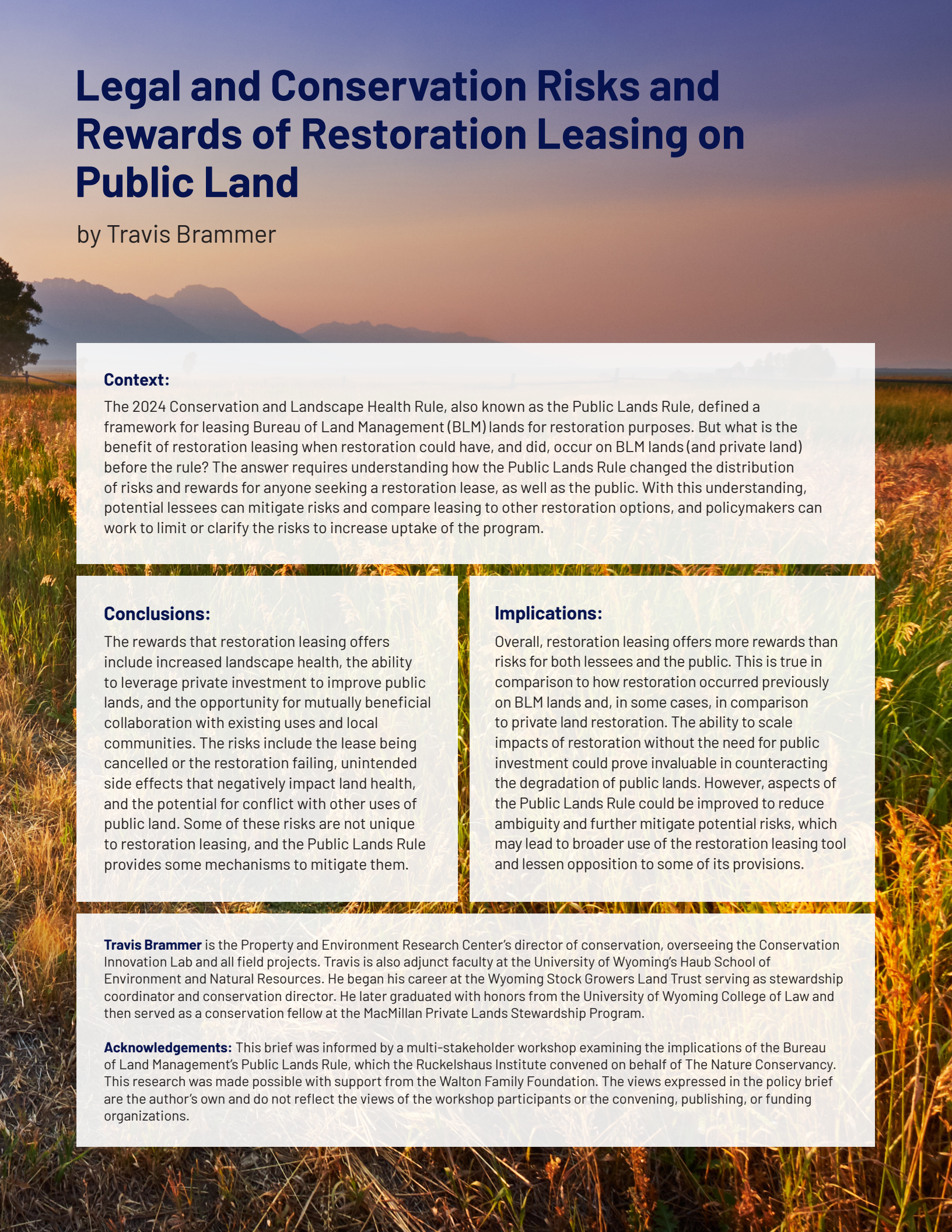
Legal and Conservation Risks and Rewards of Restoration Leasing on Public Land

by Travis Brammer



Context:

The 2024 Conservation and Landscape Health Rule, also known as the Public Lands Rule, defined a framework for leasing Bureau of Land Management (BLM) lands for restoration purposes. But what is the benefit of restoration leasing when restoration could have, and did, occur on BLM lands (and private land) before the rule? The answer requires understanding how the Public Lands Rule changed the distribution of risks and rewards for anyone seeking a restoration lease, as well as the public. With this understanding, potential lessees can mitigate risks and compare leasing to other restoration options, and policymakers can work to limit or clarify the risks to increase uptake of the program.

Conclusions:

The rewards that restoration leasing offers include increased landscape health, the ability to leverage private investment to improve public lands, and the opportunity for mutually beneficial collaboration with existing uses and local communities. The risks include the lease being cancelled or the restoration failing, unintended side effects that negatively impact land health, and the potential for conflict with other uses of public land. Some of these risks are not unique to restoration leasing, and the Public Lands Rule provides some mechanisms to mitigate them.

Implications:

Overall, restoration leasing offers more rewards than risks for both lessees and the public. This is true in comparison to how restoration occurred previously on BLM lands and, in some cases, in comparison to private land restoration. The ability to scale impacts of restoration without the need for public investment could prove invaluable in counteracting the degradation of public lands. However, aspects of the Public Lands Rule could be improved to reduce ambiguity and further mitigate potential risks, which may lead to broader use of the restoration leasing tool and lessen opposition to some of its provisions.

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Background

Federal lands across the western US, including those managed by the BLM host many critical conservation values, like open space, wildlife habitat, and riparian corridors. However, years of federal budget deficits, increased use, and persistent drought have degraded some of these lands and their conservation value. For years, the BLM and interested groups have worked together to restore BLM landscapes through practices such as invasive species management, watershed heath improvements, fence modifications, and prescribed burning. Those restoration projects, however, were risky because there was not a designated process by which the parties could invest year-over-year or protect their efforts after the restoration was completed.

Without the ability to protect restored lands, conflicting uses could undo the restoration. Without a longer-term agreement, projects like reseeding or invasive plant management were not guaranteed the longevity required to come to fruition or become self-sustaining. The possibility of hard work being undone led potentially interested groups to avoid restoration on BLM lands more than they would have otherwise and instead focus their efforts on private lands, where there was more certainty. As a result, much of the expense of restoring federal land fell to already-stretched federal budgets and was easily overlooked for higher priorities.

The Public Lands Rule established a tool called restoration leasing that allows interested parties to follow a formal process to lease and restore BLM lands for a period of up to ten years and protect that land from uses that might undermine the restoration investment. The rule broadly defines restoration activities to include both passive and active actions that "assist in the recovery of an ecosystem that has been degraded, damaged, or destroyed to a more natural, resilient ecological state," For example, an interested party might lease BLM land to restore a migration corridor for big game like mule deer by removing outdated barbed wire fencing, or revegetate a stream bank to improve water quality and riparian habitat. This process makes it more possible for organizations to leverage private investment to pay for restoration on public land.

If restoration leasing is going to be successfully implemented, parties seeking leases need to understand whether the rewards of this new tool outweigh the risks in both the likelihood that landscape health will be improved and in the security of investment or potential for additional costs. With this understanding they might take action to mitigate these conservation and legal risks while leveraging rewards. Policymakers might also clarify or limit the risks to potential lessees and the public to ensure that the public reaps the rewards of restored BLM lands. Though individual restoration leases will vary, the following considerations will likely apply across third-party restoration projects on public lands.

Rewards of holding a restoration lease

Greater security and certainty mean more investment and improved landscape health

The biggest conservation and legal reward of restoration leasing is the likelihood that more restoration activities get completed on BLM lands than would happen without the Public Lands Rule or equivalent guidance. Restoration can and did take place on BLM lands without restoration leasing, but the work any group put into restoring public lands could be undone by incompatible uses of those same lands. For

example, a conservation group might have invested in restoring a degraded streambed, but recreational offroad users could have proposed an activity on that same streambed which would undo the benefits of the restoration activity. In such circumstances, BLM field office staff may have been able to redirect incompatible activities, but the general lack of certainty or security meant that groups interested in restoration were cautious when it came to restoring public lands or they turned their restoration efforts to private lands.

Restoration leasing addresses this issue in a number of ways that make investment in restoration on BLM land more appealing and likely. First, the mechanism of a lease, rather than the previously used permit, is generally perceived as more secure. The leases also offer up to a ten-year term and limit the BLM's ability to restrict incompatible uses on the same land as active restoration leases. This greater security should be preserved or even strengthened in any mechanism meant to support restoration efforts on public land.

In addition to being an improvement on previous restoration efforts, restoration leasing offers advantages over private land restoration, namely the perceived security of federal ownership. On private lands, if parties interested in restoration don't gain a deeded right to the land, like an easement, there is no guarantee that the private landowner won't sell the land and the new owners won't undo, or fail to continue with, the restoration. The federal government, in contrast, is less likely to dispose of the land.

Evening out the desirability of restoration on public and private lands by increasing the certainty and security of restoration on BLM lands will also make it easier to plan for and conduct restoration across jurisdictions. This will improve landscape health because many restoration activities are more effective at scale, rather than as isolated actions. The equalization of private and public lands is specific to the Public Lands Rule and policymakers should ensure that this element of the rule stays strong.

Private investment relieves pressure on federal budgets

Another significant benefit of restoration leasing is the increased ability of lessees to invest private money to restore BLM lands, which offers several benefits compared to past reliance on overstretched federal budgets. Private investment is valuable because federal funding is competitive, difficult to access, can come with administrative burdens and decreased flexibility, and can be uncertain during times of political change. Moreover, federal funds are better suited to pay for certain budget priorities like federal staff salaries, to which private funders may not want to contribute. Policymakers should maintain this considerable strength of the Public Lands Rule and pursue additional ways to increase private investment in restoration.

Not only does restoration leasing open the door to private funding, it also lowers the barrier to entry for restoration investment. Historically, restoration on private lands has primarily involved leasing, purchasing, or closing a voluntary conservation easement. These practices can be cost-prohibitive, are often permanent, and rely on a connection to a willing private landowner. The short-term and flexible nature of a restoration lease on public land, as well as not needing to find a willing private landowner, may be more attractive and more financially feasible for groups looking to invest in restoration. Leasing is also less of a legal risk than purchasing land outright.

Collaboration and consultation create opportunities for partnership and community support

The Public Lands Rule encourages consultation and collaboration between restoration lessees, other existing users of BLM land, and local communities. This creates opportunities for restoration lessees to partner with existing users for mutual benefit. For example, a hunting organization may work with a grazing permittee to remove invasive species, improve forage, or enhance surface water conditions for both livestock and big game. This may make it less likely that restoration activities are undone after the term of the lease ends because the other users share in the benefit of the restoration and will work to keep it intact.

Consultation also can give groups interested in restoration a sense of community interest in the activity and an opportunity to highlight the value of the restoration. This could reduce community opposition and even lead to additional support and investment, which might in turn encourage the BLM to approve more leases. The consultation and collaboration requirements are specific to the Public Lands Rule, and one of the rule's strengths.

Rewards for other key stakeholders

Many of restoration leasing's benefits extend beyond the restoration lessees to other users and the general public. The increase in restoration, for example, will improve landscape health, wildlife habitat, and water quality and reduce risks of wildfire or invasive species outbreaks.

Additionally, by encouraging more private investment in public lands, restoration leasing means that the public bears less risk that federal agencies will have to pay for restoration using taxpayer dollars. This will allow federal agencies to spend their money on other priority areas, while still creating benefits to public land.

The public also benefits from reduced risk that certain areas will be closed for long term recovery efforts. For example, if a stream becomes too degraded, the BLM may reduce angler access to allow fishery recovery. Without active recovery efforts facilitated by restoration leasing, the fishery may be compromised and the stream may be inaccessible for many years. This reward is not specific to the Public Lands Rule because restoration could have happened before, but restoration leasing makes it more likely that the public will receive the benefit.

Risks of holding a restoration lease

External and internal factors could lead to lease cancellation or failure of the restoration

The biggest risk of third-party restoration efforts on public land is that restoration is not completed. Some of this risk is not unique to restoration leasing; any entity conducting restoration may be unable to complete its activities because of natural disasters, funding and timing constraints, and other factors outside of its control. However, the Public Lands Rule does outline specific cases where the lease can be cancelled, including by mutual agreement, failure of the lessee to complete restoration activities, noncompliance with law, the impossibility of fulfilling the goals of the lease, and if the cause of degradation shifts or expands.

Failure to complete the activity as defined in the restoration plan may result in lease cancelation and loss of the bond, and all invested effort in the project. Further, if the cause of degradation shifts or expands, the BLM might cancel the lease because the lessee may no longer be able to meet the terms of the lease. For example, if a lessee is working to improve a migration corridor for mule deer by removing or modifying fences, but in the meantime a new road is built in the same area, it may be impossible to fully improve the health of the landscape for mule deer migration. This is a risk specific to restoration leasing because leases have specific targets and approved practices, and limited flexibility to address new or growing causes of degradation.

The BLM has discretion in canceling leases but must allow lessees the chance to correct the reason for cancellation. After that, the BLM may allow the lease to continue but does not have to, even in the case of events out of the lessee's control like fire, weather, and flooding. Lessees can mitigate these risks by clearly understanding why a lease may be canceled, carefully drafting the lease and restoration plan, and being prepared to correct the reason for a potential cancellation. However, they cannot account for every unknown, so policymakers might specify the expectations of restoration lessees if events out of their control affect their restoration work. They might also allow for flexibility in restoration practices so lessees can holistically address causes of degradation.

Certain restoration activities may also require more time than a restoration lease's maximum term of ten years. When compared to the ability of interested parties to lease or buy private land for longer term restoration efforts, the ten-year cap on restoration leases creates both a conservation and legal risk. The BLM does have the discretion to extend restoration leases, but potential lessees would benefit from increased certainty around this. Policymakers could clarify when and how the BLM can issue extensions, even providing for certain exceptions, while still avoiding tying up BLM lands indefinitely.

Unintended side effects could reduce overall benefits to landscape health

A second risk is that other land might be degraded to complete a restoration activity. For example, a lessee may need to build a new road to reach a riparian corridor to restore the streambank, and in the process, inadvertently introduces cheatgrass to the area. This is a conservation and legal risk not specific to restoration leasing, but one that the Public Lands Rule has attempted to mitigate by requiring lessees to issue bonds and prepare restoration plans. The bonds are a way to incentivize lessees to be cautious in their work and a resource the BLM can use to pay for any damage that occurs in the process of restoration. Restoration planning encourages the lessee to avoid damage and have a contingency plan to undo any potential damage. Bonding requirements and restoration planning should be maintained and strengthened to minimize the risk of additional degradation as a result of restoration practices on public land.

There is also the risk that restoration could lead to increased pressure or use. For example, if lands are restored to improve bird habitat, it may lead to an influx of bird watchers to the area, which may degrade the land. The risk of increased pressure is present regardless of the restoration mechanism and the Public Lands Rule does not propose a specific way to address this. Lessees may attempt to extend the term of their lease to reduce pressure until a restored area is stable, and the BLM has discretion to grant that. To improve uptake of restoration leasing, policymakers could consider providing guidance allowing for lease extensions when increased pressure is a risk. This would require further consultation with communities and other users to determine what additional pressures may be and how likely they are to occur.

Restoration could come into perceived and actual competition with other uses

The BLM attempts to avoid conflict between restoration and other uses by conducting compatibility analyses and requiring restoration lessees to consult with potentially impacted users. Additionally, the BLM cannot issue new leases that compete with restoration leases once the restoration lease is active. However, existing users do not get the power to veto a potential restoration lease, and there is a chance that a restoration lease is, in fact or in perception, in conflict with existing uses despite the compatibility analysis. Existing users––especially those who are issued permits––are also concerned that restoration leases may receive preferential treatment in the case of conflicts. Even the appearance of competition between restoration leases and other uses creates legal and conservation risks, which could result in the loss of the lease and strong community resistance.

These risks are specific to restoration leasing and difficult for lessees to mitigate, so the rule requires updates to reduce uncertainty around competing uses. First, existing uses should get more weight in the decision-making process, instead of simple consultation. Second, existing uses should be allowed to directly benefit from the restoration practices. For example, if restoration improves range conditions such that the land's carrying capacity increases, grazing permittees should be allowed to increase the stocking rate of livestock accordingly. Third, policymakers must clarify the impacts of restoration leases on existing permits, especially where permits contain a "use it or lose it" requirement. Currently it is unclear whether a grazer who reduces their livestock stocking rate for restoration practices would lose a portion of their grazing permit. Finally, clarifying the difference between a lease and a permit, and specifying conflict resolution between the two, would reduce the risks of restoration leasing to both potential lessees and existing users.

It may be challenging for restoration lessees to comply with federal and state regulations

Another significant legal risk that potential lessees must consider is compliance with all federal and state regulations governing their restoration activity. For example, potential lessees will have to comply with the Endangered Species Act if they want to restore an endangered species' habitat. The risk is especially prevalent when the restoration activity includes something like restoring an abandoned mine. These risks are not specific to the restoration and mitigation leasing, and they will not be relevant for all restoration activities, but the rule does not provide any incentive or improved flexibility to lessees to avoid conflict with relevant statutes. To increase adoption of restoration leasing, policymakers should consider, for example, clarifying exemptions from the National Environmental Policy Act or take exemptions under the Endangered Species Act for activities conducted under a restoration lease.

For potential lessees, these risks are important to understand and mitigate to conduct restoration on public lands. Those risks borne by the public are important for policymakers to understand so they can update policies to clarify or limit risks. Overall, the risk that parties interested in restoration and the public bear are greatly reduced as a result of the Public Lands Rule.

Risks for other key stakeholders

The biggest risk for other stakeholders is actual or perceived conflict between restoration leases and existing or future uses. There might be a conflict between a proposed restoration lease and an existing lease, or an active restoration lease may preempt another proposed use. While the Public Lands Rule attempts to address these conflicts by requiring consultation and compatibility analyses, there is some uncertainty around how conflicts are managed that should be clarified. Additionally, as noted above, allowing existing users to benefit from restoration rates, for example by increasing stocking rates on restored rangeland, could help reduce conflict and improve adoption of restoration leasing. Another risk that other stakeholders face is that restoration is done poorly or is not in line with community expectations, as execution of restoration activities shifts from primarily the BLM to private entities. The Public Lands Rule attempts to mitigate these risks by requiring lessees to prepare restoration plans, issue bonds, and consult with communities, but policymakers could strengthen bonding and community consultation requirements to reduce the risks to the public.

Implications

In all, the rewards of restoration leasing outweigh the risks for potential lessees, the public, and the land itself. In comparison to previous restoration mechanisms, and even some aspects of private land restoration, BLM restoration leasing greatly reduces the risks and amplifies the rewards, making it increasingly possible to conduct landscape-scale restoration while relieving pressure on federal coffers. As such, the Public Lands Rule offers exceptional benefits for landscape health and warrants continuation.

Aspects of restoration leasing could be improved to reduce ambiguity, lessen opposition, and encourage broader use. In some cases, the Public Lands Rule creates adequate means for potential lessees to mitigate risks. In others, policymakers should consider changes that allow for lessees to better mitigate their risks and clarify or eliminate risks to the public. In particular, the possibility of conflict between restoration leases and existing or future uses requires considerable thought.

Conclusion

The Public Lands Rule created a new paradigm of risks and rewards for completing restoration activities on BLM lands. In this new paradigm, the rewards of third-party restoration on public lands now outweigh the risks. This should lead to an increase in third party restoration efforts, which will improve wildlife habitat, fuels management, water quality, and many other components of landscape health.