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Jessica Owley

Jess Phelps

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By: Jessica Owley[†] *& Jess Phelps*[††]

INTRODUCTION

Land conservation is important for a variety of reasons.[1] Through land conservation efforts, we secure open space and recreation areas.[2] We also protect ecosystem services.[3] Land conservation can work to both mitigate the problems of climate change and preserve space for adaptation to climate change impacts.[4] Moreover, protection of the land serves spiritual purposes, saving natural areas for retreat and contemplation.[5]

Rural land has an important role to play in overall conservation strategies, as many, if not most, efforts occur in rural areas by virtue of their share of the nation's land mass.[6] Rural land, broadly defined, has important impacts on the natural environment and economy—impacts often considered in the abstract instead of in connection with the views of rural residents

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†† Associate General Counsel, The Lyme Timber Company, Hanover, New Hampshire.

1 *See, e.g.*, Andrew Bowman, *Land is the Answer*, LAND TR. ALL. (2016), https://www.landtrustalliance.org/news/land-answer [https://perma.cc/CX28-4H9D].

2 *See, e.g.*, *Protecting the Green Mountain State*, OPEN SPACE INST., https://www.openspaceinstitute.org/states/vermont [https://perma.cc/FQ4L-8YWJ].

3 *See, e.g.*, Matt Swain, *Ecosystem Services and Land Conservation*, PECONIC LAND TR. (June 15, 2017), https://peconiclandtrust.org/blog/ecosystem-services-and-land-conservation [https://perma.cc/8SVX-3GP5].

4 *See, e.g.*, *Climate Change and the Land Trust*, LAND TR. OF NAPA COUNTY, https://napalandtrust.org/climate-change-and-the-land-trust/ [https://perma.cc/G9HY-WLGU].

5 *See, e.g.*, Elisabeth Ptak, *The Source of All that Sustains Us*, SAVING LAND (Fall 2015), https://www.landtrustalliance.org/news/source-all-sustains-us [https://perma.cc/MET8-6SUD].

6 Olugbenga Ajilore & Zoe Willingham, *Redefining Rural America*, CTR. FOR AM. PROGRESS, (July 17, 2019, 7:00 AM), https://www.americanprogress.org/issues/economy/reports/2019/07/17/471877/redefining-rural-america/ [https://perma.cc/JKS2-38G8] (explaining that by some definitions up to 97 percent of the U.S. land mass is in rural areas).

or the land's rural characteristics.[7] Considering these resources in isolation from their rural settings ignores some of the issues and challenges associated with their ongoing protection.

All levels of government recognize the benefits of land conservation and have tried to mitigate the impacts of unplanned growth and conversion of rural landscapes to more intensive land-use forms.[8] The federal government has an important role to play in conserving such lands.[9] This article examines how the federal government furthers land conservation in rural areas—ranging from farmland to forests and wetlands; from working landscapes to national parks; and including both private and public landownership.

Part I defines and explains the importance of land conservation overall, outlining the reasons for focusing conservation efforts on rural lands and what environmental (and other) benefits can be gained in these areas. In addressing these issues, we spend some time explaining what we mean by "conservation," as this term has different meanings depending on the users' objectives, which can complicate discussions of the land conservation efficacy. Using examples, Part II outlines the role of land conservation of federal lands and Part III delves into the federal laws and policies that shape land conservation on private lands. Throughout both Parts we consider how the policies shape rural areas.

Beyond its actions as an ordinary landowner (albeit one with extraordinary power given the acreage it manages), the federal government uses its skills, resources, and authority by mandating, incentivizing, and facilitating conservation activity. The federal government *mandates* conservation through laws like the Endangered Species Act and the Clean Water Act. The federal government *incentivizes* conservation through Farm Bill programs and tax incentives. Finally, the federal government *facilitates* conservation through noncoercive funding, review,

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[7] *See generally, e.g.*, ROBERT BONNIE, EMILY PECHAR DIAMOND, & ELIZABETH ROWE, DUKE UNIV.: NICHOLAS INST. FOR ENV'T POL'Y SOLUTIONS, UNDERSTANDING RURAL ATTITUDES TOWARD THE ENVIRONMENT AND CONSERVATION IN AMERICA (2020), https://nicholasinstitute.duke.edu/sites/default/files/publications/understanding-rural-attitudes-toward-environment-conservation-america.pdf [https://perma.cc/S3J7-9582] (discussing rural perspectives in this arena).

[8] *See, e.g.*, Volker C. Radeloff, Roger B. Hammer, & Susan I. Stewart, *Rural and Suburban Sprawl in the U.S. Midwest from 1940 to 2000 and Its Relation to Forest Fragmentation*, 19 CONSERVATION BIOLOGY 793, 793–805 (2005) (profiling these land use issues across the rural landscape).

[9] Leslie Jones, *Land Conservation Strengthens Rural Communities: Examples of the Land and Water Conservation Fund at Work*, USDA (Feb. 21, 2017) https://www.usda.gov/media/blog/2014/07/24/land-conservation-strengthens-rural-communities-examples-land-and-water [https://perma.cc/G9R6-WLMF].

and technical assistance programs under the Farm Bill, the National Environmental Policy Act, and the Land and Water Conservation Fund.

This examination of federal land conservation programs gives insight into the tools and strategies available to protect rural lands and highlights the potential benefits of a strong federal role while demonstrating the gaps that current federal programs leave in meeting conservation needs in rural areas.[10] We close with some ideas of how federal conservation programs could work in conjunction with subnational and private programs to further land conservation goals.

I. CONSERVING LAND IN RURAL AREAS

Land conservation is important.[11] Conserving land in rural areas can protect environmental amenities and ecosystem services for the benefit of both local communities and society more broadly.[12] Conserved land also plays an important role in providing buffers and cushioning the blows from natural disasters such as floods.[13] It also sequesters carbon, thereby playing a role in combating climate change.[14]

Land conservation often, perhaps even most frequently, happens in rural areas. This section explores definitions of "rural" and "conservation" and discusses the difficulty in talking about these concepts with any degree of precision. Ultimately though, the definitions we choose matter because they inform which lands we protect and how we choose to protect them.

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[10] By highlighting these gaps, we hope to draw additional attention to local, state, and private action to advance rural conservation.

[11] This article examines strategies to promote land conservation in rural areas. An equally interesting inquiry would be promoting the protection of rural lands and preserving the rural landscape generally. To put this a different way, we may want to protect the rural landscape for its ruralness. In such cases, the chief culprit is suburban sprawl and housing development along with energy projects like fracking, pipelines, and siting of renewable energy facilities (like solar and wind). Rural land provides more environmental amenities than developed land. It also is integral to the culture of rural communities. *See* Ann M. Eisenberg, *Rural Blight*, 13 HARV. L. & POL'Y REV. 187 (2018).

[12] J. B. Ruhl, *In Defense of Ecosystem Services*, 32 PACE ENV'T L. REV. 306, 311 (2015) (exploring these benefits generally).

[13] *See* Mark Pires, *Watershed Protection for a World City: The Case of New York*, 21 LAND USE POL'Y 161, 170 (2004) (profiling these benefits).

[14] *See generally* Ginger Strand, *Carbon Cache*, NATURE CONSERVANCY MAG., (Oct. 1, 2016), https://www.nature.org/en-us/explore/magazine/magazine-articles/carbon-cache/ [https://perma.cc/WQT8-4GBT] (profiling the role of working lands in securing carbon and the potential for these lands to qualify for offset projects within California's carbon market).

A. Defining Rural/Ruralness

People often have a strong sense of what rural means—picturing idyllic farms, ranches, and open spaces—depending on their background, home state, and experience living and working in these areas.[15] In actual practice, however, ruralness often proves quite difficult to define.[16] As the USDA's Economic Research Service notes:

> [W]hen it comes to distinguishing rural from urban places, researchers and policymakers employ a dizzying array of definitions. The use of multiple definitions reflects the reality that rural and urban are multidimensional concepts, making clear-cut distinctions between the two difficult. Is population density the defining concern, or is it geographic location? Is it small population size that makes it necessary to distinguish rural from urban? If so, how small is rural?[17]

Depending upon the definition of rural, as few as 17 percent to as many as 49 percent of U.S. citizens live in rural areas.[18] These areas generally involve lower populations, lower population density, greater land areas, and not surprisingly, have economies that more heavily rely on farming/ranching and extractive industries than their urban counterparts do.[19] These population and geographic considerations are important to keep in mind when considering which tools are most appropriate for rural conservation (e.g., voluntary or incentive-based versus mandates or regulatory compliance). Despite definitional challenges, rural and urban contexts are inextricably connected as part of the society and landscape that shape one another. The unique characteristics of rural landscapes, however, must be considered in developing federal rural land conservation policy.

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[15] *See, e.g.*, W.E. Riebsame, H. Gosnell, & D.M. Theobald, *Land Use and Landscape Change in the Colorado Mountains I; Theory, Scale, and Pattern*, 16 MOUNTAIN RES. & DEV. 395, 396–405 (1996) (profiling rural amenity preferences).

[16] *See What Is Rural?*, U.S. DEP'T AGRIC. ECON. RSCH. SERV. (Oct 23, 2019), https://www.ers.usda.gov/topics/rural-economy-population/rural-classifications/what-is-rural/ [https://perma.cc/ZA87-4YLX]; *see also* Lisa R. Pruitt, *Gender, Geography &(and) Rural Justice*, 23 BERKELEY J. GENDER, L. & JUSTICE 338, 344 (2008).

[17] John Cromartie & Shawn Bulholtz, *Defining the "Rural" in Rural America*, U.S. DEP'T AGRIC. ECON. RSCH. SERV. (June 1, 2008), https://www.ers.usda.gov/amber-waves/2008/june/defining-the-rural-in-rural-america/.

[18] *Id.*; *see also* Patricia La Calle John & Jamie Flood, *What is Rural?*, U.S. DEP'T AGRIC. NAT'L AGRIC. LIBR. (2019), https://www.nal.usda.gov/ric/what-is-rural [https://perma.cc/F2DE-YR4X] (exploring the variety of definitions used within USDA and other federal departments and agencies in defining rural areas).

[19] *See* BONNIE ET AL. *supra* note 7, at 7.

B. Defining Rural Land Conservation

The meaning of the term "land conservation" has evolved. At the dawn of the twentieth century in the United States, the terms "preservation" and "conservation" formed two sides of a robust debate in grappling with how to best address protection of the landscape.[20] Preservationists, typified by John Muir, championed protecting the land in what they considered to be its natural state and minimizing human use and interference.[21] This attitude gave rise to the National Park System and is still reflected in policies like the Forest Service's Roadless Rule[22] and the 1964 Wilderness Act.[23] Conservationists, typified by Gifford Pinchot, advocated for environmental protection but also for a more active use of federal lands.[24] Conservation of this type is associated with ideas of sustainable use that allow extraction of resources, but only in ways that do not cause long-term damage to those resources.[25]

The current use of the term "conservation" has shifted from these beginnings to generally convey an idea of environmental protection.[26] Many people today would be surprised to hear that the term conservation previously implied active use of the natural resources at issue. One of the most useful references for understanding what people generally mean by conservation today is, oddly enough, the federal tax code. As explained in detail in Part IV, Congress amended the federal tax code in the 1980s to expressly allow tax deductions for donations of an emerging property right called a conservation easement.[27] In roughly the same period, states began altering their laws of servitudes to

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[20] *See generally* John M. Meyer, *Gifford Pinchot, John Muir, and the Boundaries of Politics in American Thought*, 30 POLITY 267, 267–84 (1997) (discussing the conflict and compatability between Muir's "preservationism" and Pinchot's "conservationism" approaches to nature).

[21] RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 161–81 (1973).

[22] Special Conservation Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (proposed Jan. 12, 2001) (codifying 36 C.F.R. 294).

[23] The Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136.

[24] *See* CHAR MILLER, GIFFORD PINCHOT AND THE MAKING OF MODERN ENVIRONMENTALISM 4 (2001).

[25] *See* Julianne L. Newton & Eric T. Freyfogle, *Sustainability: A Dissent*, 19 CONSERVATION BIOLOGY 23, 25–26 (2005); *see also* JAMES B. LEWIS, THE FOREST SERVICE AND THE GREATEST GOOD 32–45 (2005) (profiling the reflection of Pinchot's utilitarian ethos in the Forest Service's origin story).

[26] J. Baird Callicott, *A Brief History of American Conservation Philosophy, in* SUSTAINABLE ECOLOGICAL SYSTEMS: IMPLEMENTING AN ECOLOGICAL APPROACH TO LAND MANAGEMENT, USDA FOREST SERVICE, GENERAL TECHNICAL REPORT RM-246, 10-14 (1993) (noting that Aldo Leopold, the progenitor of the land ethic, "realized that the Muir-Pinchot schism had left North American conservation in an unfortunate 'zero sum' dilemma: either lock up and preserve pristine nature or efficiently and fairly develop it").

[27] Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations – A Responsible Approach*, 31 ECOLOGY L.Q. 1, 14 (2004).

enable this new legal structure,[28] which previously had been barred by common law principles, such as the Rule Against Perpetuities.[29] Collectively, the federal tax code and state property laws define acceptable conservation purposes for conservation easements. These statutorily defined purposes provide insight into how the term "conservation" is used today. Particularly useful for our purposes is that these laws seek to promote land conservation and outline the types of efforts that Congress and state legislatures generally believe fit into this rubric.

Many states have adopted the Uniform Conservation Easement Act (UCEA) or have statutes that have incorporated similar language.[30] Therefore, we look to the conservation purposes of the UCEA and supplement it with a discussion of the purposes outlined in the federal tax code and provide state specific examples where state property laws give additional context. Together, these state and federal laws illustrate how the term "conservation" is interpreted today.

The UCEA sets forth acceptable conservation purposes in its definitions section as "retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property."[31]

This definition brings together the different aspects of conservation mentioned above. In the protection of "natural, scenic, or open space values" (including an emphasis on air and water quality),[32] we see influences from the preservationist strain of the environmental movement. Some states go even further to identify goals like protecting "life-sustaining ecological diversity."[33] Conversely, references to agricultural and forest use invoke the Pinchot-style classical conservationist view and emphasize active use of the land. Some states get even more specific with Alabama's

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[28] *See, e.g.*, Jess R. Phelps, *Defining the Role of Agriculture in Agricultural Conservation Easements*, 45 ECOLOGY L.Q. 647, 656–57 (2018) (discussing the adoption of enabling legislation by various states) [hereinafter Phelps, *Defining the Role of Agriculture*].

[29] *See generally* Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning From the Uniform Conservation Easement Act Debates*, 46 NAT. RES. J. 65, 65 (2006).

[30] Twenty-one states have adopted the uniform act in some form, with some interesting but not generally material changes. Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 L. & CONTEMP. PROBS. 199, 204 (2011).

[31] NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIF. CONSERVATION EASEMENT ACT § 1(1) [hereinafter UCEA].

[32] *Id.*

[33] COLO. REV. STAT. § 38-30.5-102.

inclusion of "silvicultural" uses, indicating the state's desire to protect working forests.[34]

In addition to state laws that define the purposes conservation easements can advance, the federal tax code instructs when donations of conservation easements merit a tax deduction.[35] We discuss how this law works below, but in this section, we look to the statute to get an idea of what Congress means when it seeks to promote "conservation" in the context of land protection. The Internal Revenue Code sets forth the following acceptable purposes:

> (i) [T]he preservation of land areas for outdoor recreation by, or the education of, the general public, (ii) the protection of relatively natural habitat of fish, wildlife, or plants or similar ecosystems, (iii) the preservation of open space (including farmland and forestland) where such preservation is—(I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated Federal, State, or local government conservation policy, and will yield a significant public benefit, or (iv) the preservation of historically important land areas or a certified historic structure.[36]

Read together, the UCEA, state-enabling legislation, and the Internal Revenue Code provide several permissible conservation objectives. Some of these goals resonate with what many people think of as conservation, but some may be surprising. Let's begin with the unsurprising elements. All of the laws include traditional environmental protection objectives as falling under acceptable conservation purposes. For example, the UCEA and most state conservation easement statutes explain that one goal of conservation is to protect natural areas and natural resources.[37] In the Internal Revenue Code, Congress specifically identified habitats and ecosystems as valid conservation goals.[38] Additionally, the UCEA points out the importance of protecting air and water quality.[39] As we examine the federal policies that promote rural land conservation, we see

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[34] ALA. CODE § 35-18-1(1). Silvicultural is not defined in Alabama's conservation easement enabling statute, but it generally refers to active forest management. *See Silvicultural*, USDA FOREST SERV., https://www.fs.fed.us/forestmanagement/vegetation-management/silviculture/index.shtml [https://perma.cc/B5Y5-J9VP].

[35] *See* 26 U.S.C. § 170(h).

[36] *Id.*

[37] *See* UCEA, *supra* note 31, § 1(1).

[38] 26 U.S.C. § 170(h)(4).

[39] *See generally* UCEA, *supra* note 31. This is an oversimplification offered as an example of how conservation purposes function. Yet in practice, it is fairly common for a conservation easement to be designed to achieve multiple conservation purposes—both to better ensure the deductibility of the potential tax donation and to reflect the multiple values that these lands often support.

that environmental protection-related objectives can be furthered by several programs and laws.

A bit more surprising, perhaps, is the identification of securing recreational spaces as a conservation goal. Many local, state, and federal policies highlight the relationship between conserving land and bringing people outdoors. Where recreation is hiking or camping, conserving land for recreation can equate to protecting ecosystem services and amenities. Yet the approach is not necessarily to promote environmental protection and hope that it brings recreational opportunities, but instead to promote recreation and hope that it brings environmental benefits. Recreation is rarely defined in these laws, and the environmental impacts of a hiking trail can be quite different from an ATV track (or a manicured soccer field or golf course treated with pesticides and fertilizers).[40]

Also found in almost all conservation easement enabling statutes is a goal of protecting scenic values. One of the early goals of the conservation movement was the protection of scenic views or vistas, which lawmakers saw as environmentally beneficial.[41] Take, for a prominent example, some of the early efforts to use conservation easements.[42] During the Great Depression, the National Park Service used conservation easements to protect views along the Blue Ridge Parkway in Virginia and North Carolina.[43] The protection of scenic views imposed a sort of discipline against rural change and typically focused on the public enjoyment of the resource from those passing through the area, or perhaps more cynically, the urban travelers' experiences or perceptions of the rural area.[44] Notably, these projects often involved removal and displacement of

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[40] *See, e.g.*, Nancy A. McLaughlin, *Tax-Deductible Conservation Easements and the Essential Perpetuity Requirements*, 37 VA. TAX REV. 1, 4 n.9 (2017) (profiling examples of large tax deductions claimed for conservation easements involving golf courses, which were generally rejected by the IRS).

[41] *See* Norman Williams, Jr., *Scenic Protection as a Legitimate Goal of Public Regulation*, 38 WASH. U. J. URB. & CONTEMP. L. 3, 8–9 (1990) (profiling court rulings holding scenic viewshed protection to be a legitimate public purpose).

[42] *See, e.g.*, Roger A. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DENV. L.J. 167, 181–83 (1968). Another noteworthy example is California's Scenic Easement Deed Act of 1959, CAL. GOV'T CODE §§ 6950-6953, which predates its Open Space Easement Act and its Conservation Easement Act. *See* Jessica Owley, *The Enforceability of Exacted Conservation Easements*, 36 VT. L. REV. 261, 264 (2011) (describing the different California statutes and the order in which they were created).

[43] John Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENV'T LAW. 319, 333 (1997) (profiling this effort and one to protect views from the Natchez Trace Parkway and in and around Washington, D.C.); *see also* RUSSELL L. BRENNEMAN, NAT'L PARK SERV., SHOULD "EASEMENTS" BE USED TO PROTECT NATIONAL HISTORIC LANDMARKS? 529, 531 (1985).

[44] *See, e.g.*, SARA C. GREGG, MANAGING THE MOUNTAINS: LAND USE PLANNING, THE NEW DEAL, AND THE CREATION OF A FEDERAL LANDSCAPE 38–39 (2010).

existing residents—many of whom lived on these landscapes for generations.[45]

Current examples contained in the Treasury Regulations of scenic-related projects that could qualify a conservation easement for the federal tax deduction include:

> 1. preservation of a unique natural land formation for the enjoyment of the general public;
>
> 2. preservation of a woodland along a public highway pursuant to a government program to preserve the appearance of the area so as to maintain the scenic view from the highway;
>
> 3. preservation of a stretch of undeveloped property located between a public highway and the ocean to maintain the scenic ocean view from the highway.[46]

The regulations also provide a number of factors to consider in determining whether a project should qualify—including "relief from urban closeness."[47] Overall, scenic resource protection can have a landscape-level environmental impact on rural areas, but as currently defined, these benefits are incidental or are indirectly secured in relation to the primary purposes of these projects as outlined above. There is no question, however, that conservationists seek to protect beautiful places and the greater the scenic value, often the higher the priority for protection.

The most amorphous conservation goal is the desire to protect "open space."[48] This term is rarely defined and sometimes seems to relate to working landscapes. The UCEA's description of conservation easements as protecting "natural, scenic, *or* open-space values"[49] suggests that "open space" is something other than natural or scenic. Indeed, there appears to be a premium on undeveloped land regardless of its environmental or scenic amenities. Before California passed its state conservation easement act, it passed the Scenic Easement Deed Act of 1959, which allowed for open space protection. This 1959 law defined open space as:

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[45] *See id.*

[46] Treas. Reg. § 1.170A-14(d)(4)(iv)(B) (2018).

[47] Treas. Reg. § 1.170A-14(d)(4)(ii)(A).

[48] *See, e.g.*, *What is Open Space/Green Space?*, EPA (Apr. 10, 2017), https://www3.epa.gov/region1/eco/uep/openspace.html#:~:text=Open%20space%20is%20any%20open,Open%20space%20can%20include%3A&text=Green%20space%20includes%20parks%2C%20community%20gardens%2C%20and%20cemeteries [https://perma.cc/5VBW-KUX9] (providing a working definition of open space and summarizing EPA-related projects to protect this resource type).

[49] *See* UCEA *supra* 31, § 1(1).

> an open space or open area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.[50]

Subsequent authorizing legislation, the Open Space Easement Act of 1974, requires land targeted for conservation to be "essentially unimproved and if retained in its natural state has either scenic value to the public, or is valuable as a watershed or wildlife preserve."[51] Read together, these laws suggest an evolving desire for open and undeveloped land that may or may not be scenic or directly aimed at the protection of environmental resources.

In Congress' tax-deduction based definition, open space relates to and subsumes the protection of scenic views or the picturesque. As noted above, under the code and then embodied in the IRS regulations, conservation easements securing two types of open space qualify for the federal tax incentives: (1) scenic[52] and (2) open space pursuant to a "clearly delineated government purpose."[53] This second category coincides with a general desire to protect working landscapes. As constituted, this category is the broadest and most commonly relied upon to qualify conservation easement donations for the applicable federal tax incentives.[54] Landowners generally invoke this purpose to protect farmland and working forests, which are not eligible for the federal tax incentives outside this prong.[55]

From an ecological standpoint, protection of working landscapes can be challenging. On the one hand, farmland and forestland can offer benefits in terms of wildlife habitat and other ecosystem services.[56] The environmental benefits of

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[50] CAL. GOV'T CODE § 6954.

[51] CAL. GOV'T CODE § 51084(b)(1).

[52] I.R.C. § 170(h)(4)(A)(iii)(I); Treas. Reg. § 1.170A-14(d)(4)(B).

[53] I.R.C. § 170(h)(4)(A)(iii)(II); *see also* Treas. Reg. § 1.170A-14(d)(4)(A); C. TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS 47–49 (2008) (explaining what is required to meet the clearly delineated governmental purpose standard).

[54] *See* Phelps, *Defining the Role of Agriculture*, *supra* note 28, at 647.

[55] This prong can be difficult to meet as it requires the conservation easement to fit a clearly delineated governmental purpose *and* provide a significant public benefit. *See* LINDSTROM, *supra* note 53, at 47–49.

[56] J.B. Ruhl, *Agriculture and Ecosystem Services: Strategies for State and Local Governments*, 17 N.Y.U. ENV'T L.J. 424, 434 (2008) (explaining the "new" understanding that farms may hold tremendous untapped value as providers of ecosystem services to local, regional, and national communities); *see also* OPEN SPACE INST., DELAWARE RIVER WATERSHED INITIATIVE CASE STUDY 1–16 (2017), http://osi.convio.net/site/DocServer/2017.4_Harris_Case_Study_sm.pdf?docID=16366 [https://perma.cc/F55T-MHPF] (profiling the Open Space Institute's effort to use buffer strips to safeguard drinking water in New Jersey).

agricultural land conservation include providing wildlife habitat, preventing unsustainable patterns of suburban sprawl, or preventing shifts to more damaging activities like fossil fuel development.[57] Agricultural land conservation, however, is often driven by nonecological motives that are more rooted in cultural values, farmland transfer planning, and a powerful farm lobby.[58] Working landscapes often involve chemical inputs and land clearing, which may create a tension between the conservation and working aspects that the conservation easement is intended to advance. There are also definitional challenges in defining agriculture for the purposes of these protective efforts, which often struggle to address intensification concerns.[59] Landowners may also limit recreational access in protected agricultural areas, as no public access is generally required.[60]

Overall, conservation is a broad-based definition that captures a range of activities from both the conservation and preservationist strains of the ecological protection movement. Some of the types of conservation objectives explored above can be obtained in rural areas through federal efforts; others are more challenging/less easily obtained through federal action, which will be explored in the following section.

We identify four principal ways that the federal government engages in rural land conservation. First, as discussed in Part II, the federal government has an impact in rural land conservation efforts owing to its status as a landowner. Second, as discussed in Part III, the federal government *mandates* conservation through laws that impose requirements or obligations on private landowners. Third, the federal government *incentivizes* conservation in rural areas by making payments to farmers and other landowners to achieve conservation outcomes. Last, the federal government *facilitates* conservation through noncoercive funding, review, and technical assistance programs that can achieve rural conservation objectives.

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[57] Michael Bunce, *Thirty Years of Farmland Preservation in North America: Discourses and Ideologies of a Movement*, 14 J. RURAL STUD. 233, 237–39 (1998).

[58] Matthew J. Mariola, *Losing Ground: Farmland Preservation, Economic Utilitarianism, and the Erosion of the Agrarian Ideal*, 22 AGRIC. & HUMAN VALUES 209, 210–12 (2005) (profiling the motivations for farmland preservation efforts generally).

[59] Jess R. Phelps, *Defining the Role of Conservation in Agricultural Conservation Easements*, 44 ECOLOGY L.Q. 627, 663–65 (2017) [hereinafter Phelps, *Defining the Role of Conservation*].

[60] *What You Can Do: Questions*, LAND TR. ALL., https://www.landtrustalliance.org/what-you-can-do/conserve-your-land/questions [https://perma.cc/VT7H-6VN2].

II. FEDERAL LAND CONSERVATION PROGRAMS ON PUBLIC LANDS

The main way the federal government promotes rural land conservation is through management of its own land. The federal government owns about one-third of the nation's land and holds the subsurface rights over thousands of additional acres.[61] Lands under public ownership can be targeted for conservation or other public uses.[62] We generally think of such land as being available to the government to use for any public purpose, giving decisionmakers a relatively free hand in determining what the conservation objectives should be or how such lands might be used to respond to climate change or other critical concerns. Assigning administration or control of land to a federal agency does not provide an agency with free rein, as Congress has mandated and defined the use of most federal lands.[63]

Federal lands in the United States are managed by federal land management agencies. The four primary federal land managers are the Bureau of Land Management (BLM), the U.S. Forest Service, the National Park Service, and the U.S. Fish and Wildlife Service.[64] Three of these agencies (the BLM, the National Park Service, and the U.S. Fish and Wildlife Service) fall under the jurisdiction of the Department of the

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[61] CAROL HARDY VINCENT & LAURA HANSON, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OWNERSHIP AND DATA 2 (2020). However, this public ownership is not static or without threat. The 2017 Republican-led House indicated its interest in either conveying land or increasing the extraction of natural resources on federal land. House Resolution 3650 State National Forest Management Act of 2015 for example would have conveyed two million acres of national forest land to states. Heather Hansman, *Congress Moves to Give Away National Lands, Discounting Billons in Revenue*, GUARDIAN (Jan. 19, 2017, 9:38 AM), https://www.theguardian.com/environment/2017/jan/19/bureau-land-management-federal-lease [https://perma.cc/7QBN-X2KZ]. There is also a movement to return lands to tribal entities. *See* Carey L. Biron, *Historic U.S. Island Return to Native Tribe 'Path Forward' for Other Land Transfers*, REUTERS (Oct. 21, 2019, 1:12 PM) https://www.reuters.com/article/us-usa-land-indigenous/historic-u-s-island-return-to-native-tribe-path-forward-for-other-land-transfers-idUSKBN1X01YL [https://perma.cc/7M2E-RFPT].

[62] John Ruple, *Western Public Land Law and the Evolving Management Landscape*, *in* THE ENVIRONMENTAL POLITICS AND POLICY OF WESTERN PUBLIC LANDS ch. 2 (2020). The monolithic sense of federal ownership of large blocks of land is "largely a myth. Even in the West, where federal lands were reserved from the public domain, ownership is mixed: rights of access, development, and use are diverse and complex." Sally K. Fairfax, Louise P. Fortmann, Ann Hawkins, Lynn Huntsinger, Nancy Lee Peluso, & Steven A. Wolf, *The Federal Forests Are Not What They Seem: Formal and Informal Claims to Federal Lands*, 25 ECOLOGY L.Q. 631, 640–41 (1999).

[63] Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENV'T L. REV. 345, 345–46 (1994).

[64] Additional land is managed by the Department of the Army (along with other military branches), the Bureau of Reclamation, the Tennessee Valley Authority, and other agencies that manage even smaller parcels. *See* VINCENT & HANSON, *supra* note 61, at 3.

Interior while the Department of Agriculture administers the Forest Service. Congress created most agencies by statute, generally termed the organic act of an agency.[65] The agencies are required to comply with their statutory mandates. The remainder of this Part examines these federal land management agencies and the constraints under which they operate in terms of rural land conservation.

A. The Bureau of Land Management (245 Million Acres)

The BLM is the government agency responsible for overseeing the most federal land.[66] Formed in 1946, it administers almost 245 million acres.[67] That is an area the size of Egypt, giving the BLM responsibility for one in every ten acres of land across the United States.[68] The Federal Land Policy and Management Act of 1976 (FLPMA) defines the BLM's responsibilities.[69] The BLM's charge is to provide for "sustained yields of the multiple uses, including recreation, grazing, timber, watershed, wildlife and fish habitat, and conservation."[70]

In 2000, under Interior Secretary Bruce Babbitt, the mission of the BLM changed with the creation of the National Landscape Conservation System, which covers about 12 percent of BLM holdings.[71] The BLM's mandate for these specific lands

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[65] While the National Park Service and U.S. Forest Service have clear organic acts, the other two agencies were formed far before Congress passed their organic acts, meaning that they operated for decades before having clear statements of their missions. *See* Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625, 628–30. (1997); *see also* Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L.Q. 457, 459 (2002) (explaining that the National Wildlife Refuge System did not get a congressional charter explaining the goals and policies for land management until 1997).

[66] BLM got the lands that were left over at the end of the public land disposal era. Prior to the BLM's taking over this mission of land management, the federal agencies tasked with this land were focused on getting this land in the hands of citizens to convert it to more productive use. Many of the BLM lands were, prior to its creation, under the control or administration of the General Land Office responsible for selling lands to farmers and ranchers. In 1934, the General Land Office was merged with the United States Grazing Service, which became BLM in 1946. Often, the BLM lands were the lands that could not be easily converted to agricultural use. *See* VINCENT & HANSON, *supra* note 61, at 4.

[67] *Id.*

[68] Frank Jacobs, *Just How Much Land Does the Federal Government Own—and Why?*, BIG THINK, (July 23, 2010), https://bigthink.com/strange-maps/291-federal-lands-in-the-us [https://perma.cc/TB62-KPZD]; *What We Manage*, BUREAU OF LAND MGMT., https://www.blm.gov/about/what-we-manage [https://perma.cc/32HR-PHBA].

[69] *See generally* 43 U.S.C. §§ 1701 et seq.

[70] *See* VINCENT &HANSON, *supra* note 61, at 4.

[71] *National History*, BUREAU LAND MGMT., https://www.blm.gov/about/history/timeline [https://perma.cc/7APJ-TF3V]; *National Conservation Lands*, BUREAU LAND MGMT., https://www.blm.gov/programs/national-conservation-lands [https://perma.cc/FGD2-QNCE]. *See generally* John D. Leshy, *The Babbitt Legacy at the Department of Interior: A Preliminary*

focuses more on conservation than other uses.[72] This is, however, in contrast with some of the challenges BLM faces in balancing conservation and other management objectives on its other lands outside of National Landscape Conservation System. Grazing, for example, can have significant environmental impacts.[73] Given this mixed mandate, not all lands under BLM administration can be considered conservation lands, which further complicates consideration of the agency's work as a land manager.

The BLM manages the lands where the largest array of activities occur, including some intensive, extractive industries.[74] The Trump administration encouraged increased nonrecreational use of such lands and worked to lessen the restrictions upon extractive activities like mining and oil exploration.[75] The Biden administration is actively reversing many of the policies of the prior administration.[76]

In rural areas, BLM lands often support local extractive industries, but any adverse impacts of these activities center on rural communities as well.[77] To the extent that there are movements to convey federal land to states, land targeted in these efforts is often administered by the BLM.[78] As the Cliven Bundy standoff highlighted, the grazing rights on BLM lands are often long-held, as are the disputes about federal ownership

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View, 31 ENV'T L. 199 (2001) (describing changes made while Bruce Babbitt was the Secretary of the Interior).

[72] David J. Hayes, *Land Conservation and Restoration: Moving to the Landscape Level*, 21 VA. ENV'T L. J. 115, 117–19 (2002).

[73] *About the BLM Grazing Data*, PUB. EMP. FOR ENV'T RESP. (Sept. 22, 2014), https://www.peer.org/blm-grazing-data/ [https://perma.cc/G99J-FR6L] (exploring some of these impacts).

[74] *See, e.g.*, *Mining and Minerals*, U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., https://www.blm.gov/programs/energy-and-minerals/mining-and-minerals [https://perma.cc/M3SY-2QBK].

[75] Jessica Owley, *Taking the Public Out of Public Lands: Shifts in Coal-Extraction Policies in the Trump Administration*, 13 FLA. INT'L U. L. REV. 35, 53–58 (2018).

[76] *See, e.g.*, Jim Robbins, *On U.S. Public Lands, Can Biden Undo What Trump Has Wrought*?, YALEENVIRONMENT360 (Jan. 20, 2021) https://e360.yale.edu/features/on-u-s-public-lands-can-biden-undo-what-trump-has-wrought [https://perma.cc/JUD5-CL9V]. Despite political promises and placing a moratorium on new leases, permit applications on leased lands continue to rise. *See* Dylan Brown, *Despite a Pledge to Ban It, Oil and Gas Permitting is Up Under Biden*, AUDUBON, Aug. 12, 2021, https://www.audubon.org/news/despite-pledge-ban-it-oil-and-gas-permitting-under-biden [https://perma.cc/LF8T-TEQL].

[77] *See, e.g.*, NAT'L WILDLIFE FOUND., HONORING THE RIVER: HOW HARDROCK MINING IMPACTS TRIBAL COMMUNITIES 24–25 (2013), https://www.nwf.org/~/media/PDFs/Wildlife/Tribal-Lands/Honoring%20the%20River%20Report.pdf [https://perma.cc/D5YP-SGPF].

[78] But not solely. The occupation of the Malheur Wildlife Refuge involved land managed by the U.S. Fish and Wildlife Service for example. *See generally* Michael C. Blumm, & Olivier Jamin, *The Property Clause and its Discontents: Lessons from the Malheur Occupation*, 43 ECOLOGY L.Q. 781 (2016) (describing the Malheur occupation and outcomes). Disputes over control of forest lands have also led to violence. *See* Elizabeth M. Osenbaugh & Nancy K. Stoner, *The County Supremacy Movement*, 28 URB. L. 497, 499 (1996) (describing local government officials trying to bulldoze open forest service roads in protest of federal governance of public lands).

and control.[79] In short, BLM lands are mixed use and perhaps more open to dispute regarding their intended purpose and use than other federal lands under a less broad management mandate. The land conservation amenities are also accruing to local communities that have access to recreation and open space.

B. The United States Forest Service (193 Million Acres)

Forestlands are almost by definition in rural areas. Congress passed the Forest Service Organic Act in 1897 and transferred the management authority of these lands to the U.S. Department of Agriculture in 1905.[80] Today, the Forest Service manages roughly 193 million acres.[81] Forest Service lands produce a significant amount of lumber but also provide other ecosystem services and amenities.[82] The federal government retained extensive forestland in the western United States, that is, land that the federal government did not disperse in the land distribution programs of the late 1800s and early 1900s.[83] These lands became the basis of the earliest national forests, authorized by Congress and reserved by administrations beginning in the late nineteenth century.[84]

To secure forestland in the east, Congress passed the Weeks Act of 1911, which focused on removing submarginal farmland from agricultural use and converting it back to forest cover.[85] The Weeks Act tied acquisition of private land for eastern national forests not to the trees or recreation and scenery, but to the protection of headwaters of navigable waterways to place these efforts on firmer constitutional ground (drawing on regulation of navigable waters under the commerce

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[79] *See, e.g.*, Ian Bartrum, *Searching for Cliven Bundy: The Constitution and Public Lands*, 2 NEV. L.J.F. 67, 69–70 (2018) (profiling this dispute).

[80] JAMES P. LEWIS, THE FOREST SERVICE AND THE GREATEST GOOD 40–41 (2005).

[81] *By the Numbers*, U.S. FOREST SERV.: U.S. DEP'T AGRIC. (Nov. 2013), https://www.fs.fed.us/about-agency/newsroom/by-the-numbers [https://perma.cc/UR9A-S8D7].

[82] *See generally At a Glance—Benefits to People*, USDA FOREST SERV. (May 3, 2021), https://www.fs.fed.us/emc/economics/at-a-glance/benefits-to-people.shtml#:~:text=These%20benefits%20take%20many%20forms,a%20connection%20to%20the%20land [https://perma.cc/8N93-KSNA] (summarizing these benefits at the national and regional levels).

[83] William E. Shands, *The Lands Nobody Wanted: The Legacy of the Eastern National Forests*, *in* THE ORIGINS OF THE NATIONAL FORESTS 19, 19 (Harold K. Steen ed., 1992) (explaining that the western national forests were created out of retained lands in the west).

[84] *See generally* Sally K. Fairfax, Jon A. Souder, & Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENV'T L. 797 (1992).

[85] The Weeks Act, 36 Stat. 961 (1911). *See, e.g.*, Joseph J. Jones, *Transforming the Cutover: The Establishment of National Forests in Northern Michigan*, FOREST HIST. 48, 50–51 (2011); James G. Lewis, *Introduction*, *in* LANDS WORTH SAVING: THE WEEKS ACT OF 1911, THE NATIONAL FORESTS, AND THE ENDURING VALUE OF PUBLIC INVESTMENT 1, 1–4 (James G. Lewis ed., 2018) (discussing the origins and impacts of the Weeks Act).

clause).[86] Park-like acquisitions of scenic and ecological resources continued to be viewed generally as unauthorized.[87]

Statutes outline the general contours for how the Forest Service has managed its landholdings over time. The original 1897 Organic Act states that the purposes of the federal forest reservations are "to improve and protect the forest . . . or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."[88] The act also established an agency to make rules and regulations governing "the occupancy and use" of the forests as well as "to preserve the forests thereon from destruction."[89] Although the act sets forth forest purposes as protection of timber and water, the language did not prohibit other compatible uses. Following these guidelines, the Forest Service has allowed grazing, mineral development, hunting, water diversions, and other extractive uses.[90]

For over fifty years, the Forest Service operated with only the basic instructions of the Organic Act, and the agency had considerable flexibility in its regulations and permitting.[91] A result of this flexibility was that the agency prioritized logging and resource extraction.[92] Congress became involved in efforts to expand the operations of the Forest Service in 1960 with the Multiple-Use Sustained-Yield Act (MUSY).[93] While this statute had no enforceable obligations, it nominally expanded the Forest Service's goals to include providing for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes"[94] while still reinforcing the original purposes of the Organic Act.[95] While MUSY did not immediately mandate a change in agency behavior, it did

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[86] Gerald W. Williams, *The Beginnings of the National Forests in the South: Protection of Watersheds*, FOREST HIST. (2003), https://foresthistory.org/wp-content/uploads/2017/02/ProtectionofWatersheds_Williams.pdf; Mary Ann King & Sally K. Fairfax, *Beyond Bucks and Acres: Land Acquisition and Water*, 83 TEX. L. REV. 1941, 1951 (2004).

[87] F. Dale Robertson, Associate Chief, *75th Anniversary of the Weeks Act and the White Mountain National Forest*, FOREST HIST. (June 19, 1986) https://foresthistory.org/wp-content/uploads/2017/01/Robertson_75th.pdf [https://perma.cc/XR8N-UAFS] (discussing the constitutional debate over the Weeks Act and the ongoing resistance by House Speaker Joseph Cannon against spending "not one red cent for scenery").

[88] Organic Act of 1897, 30 Stat. 11, 35 (1897), repealed by The Federal Land Policy and Management Act of 1976, Pub. L. 94-579 § 704(a), 90 Stat. 2743, 2792 (1976); 16 U.S.C. § 475.

[89] *Id.*

[90] *See generally* Frederick W. Cubbage & David H. Newman, *Forest Policy Reformed: A United States' Perspective*, 9 FOREST POL'Y & ECON. 261 (2006).

[91] HAROLD K. STEEN, THE U.S. FOREST SERVICE 307–10 (1976).

[92] *Id.*

[93] 16 U.S.C. §§ 528–531.

[94] 16 U.S.C. § 528.

[95] *Id.* ("The purposes . . . of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established.").

begin an acknowledgment that forests have value beyond the timber they supply and showed that Congress was ready to delve into the inner workings of the Forest Service.[96]

After a 1975 decision in the Fourth Circuit[97] demonstrated that the Forest Service's Organic Act was not a workable statute in terms of providing on-the-ground rules for timber harvesting and management, Congress passed the National Forest Management Act of 1976 (NFMA).[98] NFMA required the Forest Service to acknowledge the multiple desirable uses of the forest as outlined in MUSY.[99] NFMA also required forest management plans for each forest unit to determine the best use of public resources, and it made several specific limitations on timber harvesting.[100]

Alongside these general forest laws, more restrictive laws may govern individual forest units (and sometimes areas within forests). The establishment act for a particular forest often has more restrictive rules. For example, the Norbeck Organic Act of 1920 created the Norbeck Wildlife Preserve, which is now a part of the Black Hills National Forest in South Dakota.[101] For land within the preserve area, the Forest Service must set wildlife protection as the dominant purpose of the land.[102]

Other land conservation mandates can add a layer of protection to public lands as well. For example, designated wilderness areas must comply with the strict prohibitions of the Wilderness Act of 1964, which prohibits permanent structures, roads, and commercial uses, among other things.[103] Agency rules covering multiple lands like the Forest Service's roadless area policies (protecting forestlands where roadbuilding has not yet occurred) can also conserve land in rural areas.[104]

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[96] *See* STEEN, *supra* note 91, at 307–10.

[97] W. Va. Div. of Izaak Walton League of Am., Inc. v. Butz (*The Monongahela Case*), 522 F.2d 945, 949 (4th Cir. 1975).

[98] 16 U.S.C. § 1604; T. Randall Fortenbery & Harley R. Harris, *Public Participation, the Forest Service, and NFMA: Hold the Line*, 4 PUB. LAND L. REV. 51, 59 (1983) (explaining that "NFMA was passed as a compromise between industry and the conservation community . . . . Besides repealing the Organic Act provision relied upon in the *Monongahel*a decision . . . [i]t reemphasize[d] the policy of multiple-use-sustained yield . . . . ").

[99] 16 U.S.C. §§ 1600(3),1604(e).

[100] 16 U.S.C. §§ 1604(a), (g).

[101] *See, e.g.*, Sierra Club v. U.S. Forest Serv., 259 F.3d 1281, 1284–85 (10th Cir. 2001).

[102] *See, e.g.*, *Norbeck Wildlife Preserve & Black Elk Wilderness*, USDA FOREST SERV., https://www.fs.usda.gov/recarea/blackhills/recarea/?recid=62818 [https://perma.cc/4HA6-PTP7].

[103] 16 U.S.C § 1133(c). *See generally* Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288 (1965) (providing a summary of the motivations behind this landmark legislation).

[104] *See generally* Special Areas: Roadless Area Conservation, 66 Fed. Reg. 3,244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294) (commonly referred to as the 2001 Roadless Rule).

The Forest Service interacts with its rural host communities in a materially different way than the National Park Service does and for that matter, than BLM[105] or the Fish and Wildlife Service does. The Forest Service is a more active land manager than the BLM, with more staff and more local interactions. Forest Service lands are also more likely to be checkerboarded ownership patterns, with many parcels of private land interwoven with the federal lands. National forest laws instruct that the lands should be managed for multiple uses with an explicit economic (i.e., forest products) function.[106] Although forest planning rules recognize the push for multiple and increasingly broad purposes, the relationship between the Forest Service and its host rural communities has long been under pressure.[107]

If the Forest Service approves a timber sale, environmentalists often complain about the negative environmental impacts.[108] Others argue that limitations on timber sales negatively impact the economy, harming the rural communities reliant on the logging industry.[109] In recent years, the timber industry has increasingly relied on plantation production on private lands and on foreign sources of lumber.[110] While this industry shift may have lessened some of the tension between the agency's multiple use mandate and conservation goals, rural communities remain on the front line of this ongoing

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[105] BLM and USFS management can be somewhat similar as they rely on the MUSY and work on "striking a balance in land use planning among the competing values of recreation, grazing, timber watershed protection, wildlife and fish, and wilderness." *Multiple Use Lands, The National Forests and the Public Lands*, U.S. DEP'T JUST., ENV'T & NAT. RES. DIV. (May 12, 2015), https://www.justice.gov/enrd/multiple-use-lands [https://perma.cc/P9JT-QBKY].

[106] *See, e.g.*, *Forest Products*, USDA FOREST SERV., https://www.fs.fed.us/forestmanagement/products/ [https://perma.cc/U5ZE-5DFQ].

[107] *See, e.g.*, *Timber Wars*, NAT'L PUB. RADIO, https://www.npr.org/podcasts/906829608/timber-wars [https://perma.cc/7G8W-S9K4] (examining the tension during the 1990s over Forest Service management in the Pacific Northwest).

[108] *See, e.g.*, *Lawsuit Challenges Massive Timber Sale in Alaska National Forest*, EARTHJUSTICE (May 7, 2019), https://earthjustice.org/news/press/2019/lawsuit-challenges-massive-timber-sale-in-alaska-national-forest [https://perma.cc/2VDY-GDUV]. *See generally* MARTIN NIE & PETER METCALF, BOLLE CTR. FOR PEOPLE & FORESTS, THE CONTESTED USE OF COLLABORATION & LITIGATION IN NATIONAL FOREST MANAGEMENT 4 (Oct. 2015), https://www.cfc.umt.edu/bolle/files/Nie_Metcalf_Bolle_Litigation_Perspective_Oct%202015.pdf [https://perma.cc/E4F6-LNRK] (providing context into litigation/other intervention in National Forest planning in Region 1 (Montana, Idaho, and small parts of Wyoming and eastern Washington state) which "receiv[es] a disproportionate amount of legal challenge compared to other administrative region").

[109] *See* WASH. DEP'T OF NAT. RES., WASHINGTON'S FORESTS, TIMBER SUPPLY, AND FOREST-RELATED INDUSTRIES 16, http://www.dnr.wa.gov/publications/em_fwfeconomiclow1.pdf [https://perma.cc/HR9M-2M43].

[110] DARIUS M. ADAMS, RALPH J. ALIG, BRETT J. BUTLER, DAVID J. BROOKS, IRENE DURBAK, RICHARD W. HAYNES, PETER J. INCE, DAVID B. MCKEEVER, JOHN R. MILLS, KENNETH E. SKOG, XIAOPING ZHOU, USDA FOREST SERV., AN ANALYSIS OF THE TIMBER SITUATION IN THE UNITED STATES: 1952 TO 2050 8 (2003), https://www.fs.fed.us/pnw/pubs/gtr560/gtr560_part1.pdf [https://perma.cc/9AGB-SNSP].

societal dialogue over the balance between these competing visions of the national forests.[111]

C. The National Park Service (85 million acres)

While the National Park Service does not administer the most land, it is perhaps the most visible or familiar because of its iconic landscapes.[112] Its management mandate is the most restrictive with its comparatively clear preservationist ethos/recreational use mandate.[113] The 1916 Organic Act of the National Park Service is short but by no means simple.[114] The National Park Service is required: "[T]o conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[115]

Additionally, many of the individual parcels were set aside by establishment acts that describe the purposes of each designated site.[116] Again, to take an example that is short but not simple, Yellowstone National Park's Establishment Act states that the park:

> shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be [to] provide for the preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition. . . . He shall provide against the wanton destruction of the fish and game found within said park, and against their capture or destruction for the purposes of merchandise or profit. He shall also cause all persons trespassing upon the same after the passage of this act to be removed therefrom, and generally shall be authorized to take

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[111] *See generally* JOHN FEDKIW, USDA FOREST SERV., MANAGING MULTIPLE USES ON NATIONAL FORESTS, 1905-1995: A NINETY-YEAR LEARNING EXPERIENCE AND IT ISN'T FINISHED YET, https://foresthistory.org/wp-content/uploads/2017/01/ManagingMultipleUsesOnNationalForests.pdf [https://perma.cc/KEE4-KYST] (profiling some of the challenges); Robert L. Deal, *Multiple-Use Forestry: Time for a Change in Federal Forest Management*, W. FORESTER, June/July/August, 2015, at 1, 1–3 (same).

[112] Joseph L. Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709, 711 (profiling the motivations and challenges for park acquisition/operation).

[113] NPT Staff, *Centennial Series: How Strong is A Conservation Mandate in National Park Service Legislation?*, NAT'L PARKS TRAVELER, (July 10, 2016, 3:30AM), https://www.nationalparkstraveler.org/2016/07/centennial-series-how-strong-conservation-mandate-national-park-service-legislation [https://perma.cc/WE3S-GGJ5].

[114] Robin W. Winks, *The National Park Service Act of 1916: "A Contradictory Mandate,"* 74 DENV. U. L. REV. 575, 575 (1997) (exploring the tensions between the agency's mandate to protect scenery and natural objects and public use/enjoyment of these resources).

[115] National Park Service Organic Act, ch. 408, 39 Stat. 535 (1916) (codified as 16 U.S.C. §§ 1 et seq.), *repealed by* Pub. L. No. 113-287, § 7, 128 Stat. 3272 (2014).

[116] Robert L. Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and Its Relationship to Pollution Control Law*, 74 DENV. U. L. REV. 779, 781–83 (1997) (discussing establishment acts).

> all such measures as shall be necessary or proper to fully carry out the objects and purposes of this act.[117]

Thus, in managing Yellowstone National Park, the National Park Service must comply both with its Organic Act and the Yellowstone Establishment Act (alongside other federal laws and policies). Based on these statutes, the National Park Service has passed regulations[118] governing the management of its 423 sites and over 85 million acres of land (or 4.4 percent of the nation's landmass).[119] The National Park Service interprets its mandate as highly restrictive.[120] It prohibits resource extraction, most hunting, and most permanent occupation.[121]

Statutory instructions constrain the actions of the federal agencies, including the National Park Service. As with other federal agencies, individuals can invoke the Administrative Procedure Act to sue the National Park Service for failing to comply with either the agency's Organic Act or a unit's Establishment Act.[122] Over the years, several court cases have challenged the balance that the National Park Service strikes between environmental protection and recreational enjoyment.[123] While often deferring to the Park Service, courts seek to ensure that the service is working to protect the environment but also taking into account park users.[124] Based on staffing and maintenance backlogs,

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[117] Act Establishing Yellowstone National Park, ch. 24, 17 Stat. 32–33 (1872).

[118] *See* 36 C.F.R. § 1.1.

[119] *Frequently Asked Questions*, NAT'L PARK SERV., https://www.nps.gov/aboutus/faqs.htm [https://perma.cc/3TZZ-L6QZ]; Stacey Vanek Smith & Cardiff Garcia, *The U.S. Has Nearly 1.9 Billion Acres of Land. Here's How It Is Used*, NPR (July 26, 2019, 4:28 PM), https://www.npr.org/2019/07/26/745731823/the-u-s-has-nearly-1-9-billion-acres-of-land-heres-how-it-is-used [https://perma.cc/B9AR-5EKR].

[120] *See, e.g.*, Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict and Centennial Values*, 33 WM. & MARY ENV'T L. & POL'Y REV. 850, 891–92 (2009).

[121] *See, e.g.*, *Energy and Minerals Development in the Parks*, NAT'L PARK SERV. (Jan. 9, 2017), https://www.nps.gov/subjects/energyminerals/development-in-parks.htm [https://perma.cc/7KSM-W27X] (discussing limits on these activities and work to mitigate impacts for outstanding third-rights); *Hunting, Sharing Traditions*, NAT'L PARK SERV., https://www.nps.gov/subjects/hunting/index.htm [https://perma.cc/YEX6-GLLZ] (explaining that several units of managed by the national park service allow limited hunting). Hunting is allowed on most national park land in Alaska and in Grand Teton National Park. *Hunting, Visit*, NAT'L PARK SERV., https://www.nps.gov/subjects/hunting/visit.htm [https://perma.cc/Z4PL-TKDB] (providing list of NPS units where some level of hunting is permitted).

[122] George C. Coggins, *Regulating Federal Natural Resources: A Summary Case against Devolved Collaboration*, 25 ECOLOGY L.Q. 602, 602–03, 606 (1999).

[123] *See* Antolini, *supra* note 120, at 856.

[124] *See, e.g.*, The Fund for Animals v. Norton, 294 F. Supp. 2d 92, 103 (D.D.C. 2003) (conservationists challenging what they saw as excessive snowmobile use); Int'l Snowmobile Mfrs. Ass'n. v. Norton, 340 F. Supp. 2d 1249. 1253 (D. Wyo. 2004) (recreationalists challenging what they saw as overly restrictive rules on snowmobiles).

demands from increasing visitation to the lands challenge the National Park Service's conservation efforts.[125]

Within rural areas, the national parks are unique. These are usually the most preserved units of land, are highly valued for their natural resources, scenic, and cultural benefits, and have amenity value that communities can leverage as a tourism benefit.[126] National Park Service lands are generally viewed more positively by rural communities than other federal landholdings,[127] but are still somewhat separated from the rural in the public perception because they are set aside and not wholly part of the rural communities in which they sit.[128] The relationship between rural host communities and the National Park Service is still complex,[129] and this form of federal land management will continue to evolve to meet changing societal pressures and demands on our most visited public lands.[130]

D. The United States Fish & Wildlife Service (146 million acres)

The United States Fish and Wildlife Service manages 89 million acres of land for the protection of birds and wildlife.[131] Congress established the first national wildlife refuge in 1903,[132]

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[125] LAURA B. COMAY, CONG. RES. SERV., R44924, THE NATIONAL PARK SERVICE'S MAINTENANCE BACKLOG: FREQUENTLY ASKED QUESTIONS 1, 13 (2017) (describing challenges of deferred maintenance in the National Park system); Matilyn Mortensen, Loving Our Lands: Park Budgets Stay the Same, While Visitors Increase, UTAH PUB. RADIO (June 19, 2018), https://www.upr.org/post/loving-our-lands-park-budgets-stay-same-while-visitors-increase [https://perma.cc/E5JP-SNLK].

[126] *See, e.g.*, Zach Montague, *Meet America's 63rd National Park*, N.Y. TIMES (Feb. 16, 2021), https://www.nytimes.com/2021/02/16/travel/national-park-new-river-gorge.html [https://perma.cc/366V-8RUF] (profiling the recent creation of New River Gorge in West Virginia with the hope of tourism benefits).

[127] *See generally* Jae Hoe Lee, David Matarrita-Cascante, Ying Xu, & Michael Schuett, *Examining the Conflicting Relationship between U.S. National Parks and Host Communities: Understanding a Community's Diverging Perspectives*, 10 SUSTAINABILITY 3667 (2018) (profiling the interaction between different groups and the national parks).

[128] Francis T. Achana & Joseph T. O'Leary, *The Transboundary Relationship Between National Parks and Adjacent Communities*, *in* NATIONAL PARKS AND RURAL DEVELOPMENT: PRACTICE AND POLICY IN THE UNITED STATES, at 67, 67–88 (2000).

[129] *See* Lee et al., *supra* note 127. *See, e.g.*, Audrey J. Horning, *The Displaced: When Past is Present: Archaeology of the Displaced in Shenandoah National Park*, NAT'L PARK SERV. (Feb. 26, 2015), https://www.nps.gov/shen/learn/historyculture/displaced.htm [https://perma.cc/7JH5-T7SE].

[130] *See, e.g.*, *National Parks Visitation*, DEP'T OF INTERIOR, OFF. CONG. & LEGIS. AFF. (Aug. 8, 2019), https://www.doi.gov/ocl/national-parks-visitation [https://perma.cc/P6ZC-QSSR] (discussing the challenges of increasing visitation and impacts on NPS lands).

[131] KATIE HOOVER, CONG. RSCH. SERV., IF10585, THE FEDERAL LAND MANAGEMENT AGENCIES (2019).

[132] Charles G. Curtin, *The Evolution of the U.S. National Wildlife Refuge System and the Doctrine of Compatibility*, 7 CONSERVATION BIOLOGY 29–38 (1993).

but the Refuge System itself wasn't created until 1966.[133] Moreover, the Fish and Wildlife Service did not get a true organic act outlining its operational mandate until 1997.[134] Individual wildlife refuges tend to have specific goals of protecting wildlife habitat, sometimes identifying specific species like the National Elk Refuge[135] or the Watercress Darter Refuge.[136]

These lands are generally acquired lands, rather than retained lands, which has an impact on rural areas. Acquisition of lands for refuges has created controversy in some rural areas. For example, some North Dakota residents view the agency as negatively impacting the farm economy through purchase of farmland in this important area of migratory bird habitat—the prairie pothole region. Removing land from the farm economy—either through fee simple purchase or through acquisition of conservation easements—changes the shape of rural communities.[137]

E. Summary of Federal Land Conservation in Rural Areas Via Public Landownership

As a landowner, the federal government can take significant action to protect ecosystem services and combat climate change.[138] Yet, the federal government's commitment to environmental goals vacillates between protective and extractive activities.[139]

Together, federal agencies work to conserve millions of acres of American land. The vast majority of these lands are in rural areas. The units differ concerning the level of development or use that can occur on the lands they manage. While lands protected as national parks or wilderness areas are dedicated to conserving environmental amenities, public lands are also sites

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[133] 16 U.S.C. §§ 668dd–ee.

[134] *See* Fischman, *supra* note 65.

[135] *National Elk Refuge*, U.S. FISH & WILDLIFE SERV. (Aug. 31, 2021), https://www.fws.gov/refuge/national_elk_refuge/ [https://perma.cc/NN29-97EQ].

[136] *Watercress Dater*, U.S. FISH & WILDLIFE SERV. (May 7, 2020), https://www.fws.gov/refuge/Watercress_Darter/ [https://perma.cc/89Y2-Q2YE].

[137] *See* Fischman, *supra* note 65, at 496. The federal government's use of conservation easements drove North Dakota to reject perpetual conservation easements. *See, e.g.*, Jon J. Jensen, *Limitations on Easements in North Dakota May Have Unintended Consequences for Qualified Conservation Easements Charitable Contributions*, 87 N.D. L. REV. 343, 345 (2011).

[138] Alison Kelly, *Public Lands Can Help Solve the Climate Crisis*, NRDC (July 14, 2020), https://www.nrdc.org/experts/alison-kelly/public-lands-can-help-solve-climate-crisis [https://perma.cc/CU2Z-D6MM].

[139] *See, e.g.*, *Fact Sheet: President Biden to Take Action to Uphold Commitment to Restore Balance on Public Lands and Waters, Invest in Clean Energy Future*, U.S. DEP'T INTERIOR, (Jan. 27, 2021), https://www.doi.gov/pressreleases/fact-sheet-president-biden-take-action-uphold-commitment-restore-balance-public-lands [https://perma.cc/UWS9-N9SC] [hereinafter *President Biden to Take Action*].

of energy development, mining, grazing, and forestry at levels or in ways often detrimental to environmental protection.

Public land conservation comes in different forms (with differing levels of stringency) because the land management agencies have different mandates and different relationships with the rural communities in which they work. If we define conservation in a preservationist mold, we see that there are many areas of federal lands that take on that approach and conserve land in park-like manner that often separates humans from nature. Such lands provide recreational and scenic amenities to rural communities while also protecting ecosystem services. But this approach to land conservation can also feel alienating, framing local use of the land as improper.

Some federal lands, however, are working lands and fit with the broader ideas of conservation that we see from the tax code and elsewhere. These can benefit local economies in the same ways as the more protected areas alongside providing jobs in extractive industries. Research on local economies near federal lands is conflicting when it comes to impacts, mostly because federal lands can differ greatly.[140]

One of the biggest impediments to using landownership to meet conservation goals, however, is the uneven distribution of the land with the bulk of area in the western United States and Alaska. Federal lands are not evenly distributed and will not protect ecosystem services or provide recreational activities in many, if not most, rural land areas.[141] This uneven distribution concentrates land conservation in the west, leaving ecosystems and communities out of luck. That could leave some areas overconserved (if we think that is possible) and others underconserved. Finally, the federal land management agencies sometimes have tense relationships with local communities, who feel that land management decisions are made without their involvement or consultation.[142]

One should not forget the role of rural tribal communities and the unique challenges they face because of federal control over their lands and the presence of so many cultural resources

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[140] *See generally* JENNIFER MORALES & MEGAN JENKINS, UTAH STATE UNIV. CTR. FOR GROWTH AND OPPORTUNITY, HOW DO FEDERAL LANDS IMPACT LOCAL ECONOMIES (July 2020), https://www.thecgo.org/wp-content/uploads/2020/09/How-Do-Federal-Lands-Impact-Local-Economies.pdf [https://perma.cc/ST6Y-KHZF] (explaining that there is no clear consensus on the impacts of federal landownership on local economies).

[141] *See, e.g.*, VINCENT & HANSON, *supra* note 61 (providing overview of federal landownership and distribution).

[142] Michelle Bryan, Graham Coppes, Katelyn Hepburn & Ross Keogh, *Cause for Rebellion? Examining How Federal Land Management Agencies & Local Governments Collaborate on Land Use Planning*, 6 J. ENERGY & ENV'T L. 1, 5 (2015).

on federal lands. We do not mean to imply that tribes are not a vital community, nor do we intend to present rural as white or working class. The federal government's trust obligations to protect tribal resources both on and off tribal reservation adds another layer to the complicated story we are already telling.[143]

III. FEDERAL LAND CONSERVATION ON PRIVATE LANDS

Rural land conservation will not be successful if efforts are all based in federal ownership and management of land. Not only would that omit vast areas without substantive federal landholdings, but it would fail to recognize the value of private lands. Many ecosystem types only exist on private lands.[144] Many working landscapes have high value for conservation if sustainable techniques can be used.[145] Preventing the conversion of rural land to development is an important part of the larger picture. While recognizing an important role for local governments and nongovernmental actors, this Part focuses on the types of federal programs that serve to further rural land conservation.

We offer not a laundry list of federal policies, but instead present the main categories or forms for federal land conservation. The federal government *mandates* conservation through laws that impose requirements or obligations on private landowners. Second, the federal government *incentivizes* conservation in rural areas by making payments to farmers and other landowners to achieve conservation outcomes. Last, the federal government *facilitates* conservation through noncoercive funding, review, and technical assistance programs that can achieve rural conservation objectives.

A. Mandating Land Conservation

Beyond actions the federal government undertakes on its own lands to further conservation goals, the federal government also mandates, incentivizes, and facilitates conservation on others' lands. This section explores the federal mandates for conservation

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[143] *See* Jessica A. Shoemaker, *Fee Simple Failures: Rural Landscapes and Race*, 119 MICH. L. REV. 1695, 1695 (2021) (pushing against ideas of homogenous rural communities).

[144] Richard L. Knight, *Private Lands: The Neglected Geography*, 13 CONSERVATION BIOLOGY 223, 223–24 (1999).

[145] Claire Kremen & Adina M. Merenlender, *Landscapes that Work for Biodiversity and People*, 362 SCIENCE 6412, 6412 (2018); Danny J. Eastburn, Anthony T. O'Geen, Kenneth W. Tate, & Leslie M. Roche, *Multiple Ecosystem Services in a Working Landscape*, 12 PLOS ONE e0166595, e0166595 (2017) (describing approach for calculating value of ecosystem services on agricultural lands).

activities on private land. Some federal laws require landowners to undertake land conservation activities if their behavior results in certain environmental harms. We use the examples of wetlands protection under the Clean Water Act and habitat protection under the Endangered Species Act to illustrate this point.

1. The Clean Water Act

The Clean Water Act works to conserve land in rural areas, with its biggest rural land conservation impact coming in the form of wetland protections.[146] The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[147] To achieve that objective, the Clean Water Act limits the ability to dredge or fill a wetland.[148] Section 404 of the Act details the regulatory program for protecting the integrity of wetlands.[149]

Although important, wetlands are not extensive. They cover less than 1 percent of the earth's surface.[150] Wetlands are also at risk. For example, Louisiana wetlands are disappearing at the rate of 90 square kilometers per year (one of the highest rates of loss in the world).[151] California boasts the highest overall loss with 91 percent of its wetlands lost by 2000.[152] Wetlands are threatened by pollution,[153] sea level rise,[154] extreme weather events, including floods and storms,[155] and conversion.[156] Wetlands can be the bane of developers, and they are often lost or degraded with the building of housing and commercial

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[146] *See* 33 U.S.C. § 2317.

[147] 33 U.S.C. § 1251(a).

[148] *See* 33 U.S.C. § 1362(b) (defining pollutant to include fill material).

[149] *See* MARGARET "PEGGY" STRAND & LOWELL M. ROTHSCHILD, WETLANDS DESKBOOK 7 (3d ed. 2009).

[150] Joy B. Zedler & Suzanne Kercher, *Wetland Resources: Status, Trends, Ecosystem Services, Degradation, and Restorability*, 30 ANN. REV. ENV'T & RES. 39 (2005).

[151] Joel Bourne, *Louisiana's Vanishing Wetlands: Going, Going . . . ,* 289 SCIENCE 1860, 1860–63 (2000) (Louisiana contains 40 percent of the wetlands in the contiguous forty-eight states, and accounts for 80 percent of the current wetland loss.).

[152] Richard F. Ambrose, *Wetland Mitigation in the United States: Assessing the Success of Mitigation Policies*, 19 WETLANDS (AUSTL.) 1, 2 (2000).

[153] Leon P.M. Lamers, G. Els Ten Dolle, Serge T.G. Van Den Berg, Sebastian P.J. Van Delft, & Jan G.M. Roelofs, *Differential Responses of Freshwater Wetland Soils to Sulphate Pollution*, 55 BIOGEOCHEMISTRY 87, 87–88 (2001).

[154] Robert J. Nicholls, Frank. M J. Hoozemans, & Marcel Marchand, *Increasing Flood Risk and Wetland Losses Due to Global Sea-level Rise: Regional and Global Analyses*, 9 GLOBAL ENV'T CHANGE S69, S69 (1999).

[155] Robert J. Nicholls, *Coastal Flooding and Wetland Loss in the 21st Century: Changes Under the SRES Climate and Socio-Economic Scenarios*, 14 GLOBAL ENV'T CHANGE 69, 69–70 (2004).

[156] *See, e.g.*, *CWA Section 404 and Swampbuster: Wetlands on Agricultural Lands*, EPA.GOV (Mar. 31, 2021) https://www.epa.gov/cwa-404/cwa-section-404-and-swampbuster-wetlands-agricultural-lands [https://perma.cc/U3F7-5GE2].

developments in low-lying areas.[157] In rural areas, converting wetlands to agricultural use is one of the major drivers of wetland loss.[158] Landowners often seek to dredge and fill their land to create or maintain areas for growing crops.[159]

Before converting wetlands to agricultural or other uses, one must first obtain a Clean Water Act section 404 permit.[160] These permits (issued by the Army Corps of Engineers with coordination and oversight from the Environmental Protection Agency) require project proponents to avoid, minimize, and mitigate the harms of any wetland destruction or modification.[161] Thus, a permit applicant must first demonstrate that her project avoids impacts to wetlands.[162] Next, the applicant must minimize any remaining impacts of the proposed project.[163] Finally, after the Corps is satisfied that the only remaining impacts are unavoidable (absent stopping the project), the Corps quantifies the damage that will be done to wetlands and requires project proponents compensate for that damage through "compensatory mitigation."[164] Wetlands created to replace the lost wetland functions, are often located in rural areas.[165]

A 2017 Congressional Research Service report stated that the Corps received more than 85,000 permits applications annually, the majority of which fall under general or nationwide permits.[166] The Corps rarely denies permits,[167] but most section 404 permits come with conditions. Many of those conditions involve

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[157] *See* Stephen Faulkner, *Urbanization Impacts on the Structure and Function of Forested Wetlands*, 7 URB. ECOSYSTEMS 89, 90–91 (2004).

[158] John M. Hefner & James D. Brown, *Wetland Trends in the Southeastern United States*, 4 WETLANDS 1, 1–11 (1984) (explaining that nearly all freshwater wetland losses in the southeast could be attributed to conversion to agriculture).

[159] *See, e.g.*, Roger K. Wiebusch & Christopher L. Lant, *Policy Drivers of U.S. Wetland Conversion Rates, 1955-2009*, 30 SOC'Y & NAT. RES. 16, 16–30 (2016).

[160] *See* 33 U.S.C. § 1344.

[161] *U.S. Permit Program under CWA Section 404*, EPA (Sept. 2, 2021) https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404 [https://perma.cc/TG4B-89K5].

[162] 40 C.F.R. § 230.91(c)(2).

[163] *Id.*

[164] *Id.*

[165] J.B. Ruhl & James Salzman, *The Effects of Wetland Mitigation Baking on People*, NAT'L WETLANDS NEWSL. (ENVTL. L. INST., D.C.), Mar.-Apr. 2006, at 1, 8–9 (profiling these distributional shifts).

[166] LAUREN GATZ & MEGAN STUBBS, WETLANDS: AN OVERVIEW OF ISSUES, CONG. RSCH. SERV. 33483 (2017); U.S. ENV'T PROT. AGENCY, CLEAN WATER ACT: SECTION 404(C): "VETO AUTHORITY" 2 (2016), https://www.epa.gov/sites/production/files/2016-03/documents/404c.pdf [https://perma.cc/MS5R-BSJU].

[167] The EPA has the authority to veto permits, but it does so exceedingly rarely. *See* Gatz & Stubbs, *supra* note 166, at 7 ("EPA is the only federal agency having veto power over a proposed Corps permit; EPA has used its veto authority 13 times in the 40-plus years since the program began.").

compensatory mitigation.[168] Corps regulations list four acceptable compensatory mitigation strategies: establishment, restoration, enhancement, and preservation.[169] These relatively straightforward-sounding approaches can be challenging to implement.

Establishment (or creation) of a wetlands requires building an ecosystem out of whole cloth where one did not exist before.[170] Wetland creation has been beset by a variety of problems with many failed projects.[171] Restoration takes a degraded wetland and increases its function through activities like removing debris and invasive species, planting wetlands species, and ensuring adequate water supplies.[172] Restoration efforts are linked to enhancement, which also starts with an existing wetland and increases its functions.[173] Restoration and enhancement projects have largely fared better than creation projects, and understandings of restoration ecology are improving the outcomes for all these endeavors.[174] Yet, restoration projects still provide fewer acres and fewer functions than ecologists predicted.[175] After creating, restoring, or enhancing wetlands, conservation easements typically encumber the land with the hopes of keeping the wetlands from being degraded or converted again in the future.

The final option for compensatory mitigation is preservation. Under this option, the Corps works with the applicant to determine an acceptable ratio of converted to protected wetlands. Preservation of wetlands can occur through fee simple ownership by private preservation organizations or government agencies, or by burdening property with conservation easements or

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168 *See, e.g.*, U.S. ARMY CORPS OF ENG'RS, COMPENSATORY MITIGATION RULE 1–2 (2008), https://www.nae.usace.army.mil/Portals/74/docs/regulatory/Mitigation/MitigationRuleBrochure.pdf [https://perma.cc/8AQD-LF93].

169 40 C.F.R. § 230.92.

170 *See* Carl Christian Hoffmann & Annette Baattrup-Pedersen, *Re-establishing Freshwater Wetlands in Denmark*, 30 ECOLOGICAL ENG'G 157, 165 (2007) (documenting efforts and struggles with creating new wetlands in Denmark).

171 *See* William J. Mitsch & Renee F. Wilson, *Improving the Success of Wetland Creation and Restoration with Know-How, Time, and Self-Design*, 6 ECOLOGICAL APPLICATIONS 77, 78 (1996); Dennis F. Whigham, *Ecological Issues Related to Wetland Preservation, Restoration, Creation and Assessment*, 240 SCI. TOTAL ENV'T 31, 35 (1999).

172 *See* sources cited *supra* note 171. *But see* David Malakoff, *Restored Wetlands Flunk Real-World Test* 280 SCIENCE 371, 371–72 (1998).

173 Roy R. Lewis III, *Wetlands Restoration/Creation/Enhancement Terminology: Suggestions for Standardization*, *in* WETLAND CREATION AND RESTORATION: THE STATUS OF THE SCIENCE 417, 418 (Jon A. Kusler & Mary E. Kentula eds., 1990) (explaining that it can be difficult to determine the difference between restoration and enhancement).

174 *See* Anya Hopple & Christopher Craft, *Managed Disturbance Enhances Biodiversity of Restored Wetlands in the Agricultural Midwest*, 61 ECOLOGICAL ENG'G 505, 509 (2013); Zedler & Kercher, *supra* note 150, at 60.

175 *But see* Malakoff, *supra* note 172, at 371 (noting struggles but suggesting that given enough time, the projects might end up more successful than currently demonstrated).

deed restrictions. With these mechanisms, the federal government mandates that landowners undertake land conservation measures.

Congress sought to protect wetlands, including those in rural areas, through the Clean Water Act. The statute has firm language protecting wetlands that are connected to navigable waters. Yet, its impact on rural land conservation is unclear. The program still facilitates development and has many exemptions for agriculture. Even in this weak state, wetlands regulation under the Clean Water Act faces a lot of opposition from rural communities who view it as too invasive.[176] For many years there have been fights in the courts and the agencies (as presidential administrations change) over the proper reach of federal wetlands protection.[177]

There are clear flaws with section 404. The compensatory mitigation approach generally accepts a net decrease in protected wetlands.[178] While the program requires conservation efforts, it also facilitates development.[179] It is unclear whether we actually achieve conservation gains through section 404, and even selective conversion prohibitions would likely have greater benefits.[180]

Another major flaw is the extensive exemptions for agriculture.[181] Section 404(f) of the Act contains exemptions for common farming activity, including cultivation techniques and crop rotation.[182] Finally, the lands protected by the Clean Water Act are not evenly distributed, occurring only in areas where wetlands exist

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[176] Amena H. Saiyid, *Farmers, Ranchers Dispute Legal Limits of Revamped Water Rule*, BLOOMBERG L. (May 11, 2020, 6:00 AM), https://news.bloomberglaw.com/environment-and-energy/farmers-ranchers-dispute-legal-limits-of-revamped-water-rule [https://perma.cc/3ECD-2YJE].

[177] *See, e.g.*, Alyson C. Flournoy, *Section 404 at Thirty-Something: A Program in Search of a Policy*, 55 ALA. L. REV. 607 (2004); Jonathan H. Adler, *Reckoning with* Rapanos*: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 MO. ENV'T L. & POL'Y REV. 1 (2006); Hammons P. Hepner, *The Shifting Definition: The Clean Water Act, "Waters of the United States," and the Impact on Agriculture*, 73 OKLA. L. REV. 337, 338 (2021).

[178] R. Eugene Turner, Ann M. Redmond, & Joy B. Zedler, *Count it by Acre or Function—Mitigation Adds Up to Net Loss of Wetlands*, 23 Nat'l Wetlands Newsl. 5 (2001).

[179] *See* Harold Levrel, Pierre Scemama, Anne-Charlotte Vaissière, *Should We Be Wary of Mitigation Banking? Evidence Regarding the Risks Associated with this Wetland Offset Arrangement in Florida*, 135 ECOLOGICAL ECON. 136, 136 (2017).

[180] *See* Jessica Owley, *Preservation is a Flawed Mitigation Strategy*, 42 ECOLOGY L. CURRENTS 101, 113–14 (2015). For example, if there were outright prohibitions against converting certain types of high-value wetlands, this would have material impacts on wetland function loss.

[181] This fits within the general trend of exempting agriculture from generally applicable environmental laws. *See* J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 296–97 (2000) (profiling these exemptions). Surprisingly, wetland regulation has become a hot button political issue in farm country in recent years related to Army Corps of Engineers' rulemakings around how to define jurisdictional wetlands—despite the fact that this rulemaking was projected to have little impact on farmers. *See* Neil D. Hamilton, *Myth Making in the Heartland—Did Agriculture Elect the New President?* , 13 J. FOOD L. & POL'Y 5, 6–8 (2017).

[182] *See* STRAND & ROTHSCHILD, *supra* note 149, at 60.

and are at risk of development (generally rural areas with lower land values). Even if fully implemented, section 404 would not lead to conservation of vast acreage of the rural landscape and it generally maintains only the status quo in the acreage of total wetlands nationwide when the corresponding losses are also considered.

2. The Endangered Species Act

The Endangered Species Act (ESA) limits activities by government agencies and private individuals that will lead to harm to threatened and endangered species; such activities include adverse modification of habitat.[183] Through prohibitions on converting habitat, the ESA works to protect rural land.

In 1973, Congress passed the ESA,[184] establishing a program to protect threatened and endangered species and the ecosystems upon which they depend.[185] Federal protection for a species commences once the Department of the Interior[186] designates (or "lists") species as either threatened or endangered.[187] Alongside listing a species, the ESA requires designation of critical habitat—habitat that is "essential to the conservation of the species."[188]

Section 7 of the ESA requires federal agencies to consult with the Fish and Wildlife Service to ensure that their actions will not put any listed species in "jeopardy."[189] Jeopardy occurs "when an action is reasonably expected, directly or indirectly, to diminish a species' numbers, reproduction, or distribution so that the likelihood of survival and recovery in the wild is appreciably reduced."[190] If jeopardy or adverse modification appears likely, the Fish and Wildlife Service is obliged to suggest

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[183] *See, e.g.*, *Summary of the Endangered Species Act*, ENV'T PROT. AGENCY (Aug. 6, 2020), https://www.epa.gov/laws-regulations/summary-endangered-species-act [https://perma.cc/P7R6-SEBH].

[184] 16 U.S.C. § 1531 (1973).

[185] 16 U.S.C. § 1531(b).

[186] The ESA is most commonly implemented by the Department of Interior via the U.S. Fish and Wildlife Service. For species that spend at least part of their life in the ocean, the Department of Commerce via the National Marine Fisheries Service (NMFS or NOAA Fisheries) carries out the obligations of the ESA. *See About US*, NOAA FISHERIES, https://www.fisheries.noaa.gov/about-us [https://perma.cc/8WXM-8T5J].

[187] 16 U.S.C. § 1533.

[188] 16 U.S.C. § 1533(a)(3)(A)(i); J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 SW. L.J. 1393, 1396–97 (1991).

[189] 16 U.S.C. § 1536(a)(2).

[190] *Section 7 Consultation*, U.S. FISH & WILDLIFE SERV. (Dec. 4, 2019), http://www.fws.gov/Midwest/endangered/section7/section7.html [https://perma.cc/J7ZM-KGEY]; *see also* U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK, 4-25–4-39 (1998) (describing the Fish and Wildlife Service's jeopardy analysis process). Jeopardy considers a species as a whole, not impacts on individual members of the species.

"reasonable and prudent alternatives" that could be implemented to avoid such an outcome.[191] These measures often require minimization of habitat conversion and protection of rural landscapes for conservation purposes.

Section 9 of the ESA has an even broader reach, prohibiting any person from "taking" any listed wildlife or fish species.[192] Under the Act, "take" includes "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect."[193] Agency regulations explain that harm is "an act which actually kills or injures wildlife," potentially including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[194] This link to habitat modification means that many land-based activities in areas of endangered species habitat will trigger section 9.

The "take" prohibition applies to everyone and includes actions on private land, while section 7's limitations only apply to federal agencies.[195] However, section 7 reaches further than one might think because it encompasses federal actions, including decisions to issue permits, rights-of-way, and other government actions that affect private development projects.[196] Together, sections 7 and 9 of the ESA impact many actions that involve land conversion or development in rural areas.[197]

In 1982, Congress sought to provide partial relief from the section 9 ban on habitat modification by adding section 10, authorizing the Secretaries of Commerce and the Interior to issue incidental take permits.[198] These permits allow landowners to develop their land even when that land serves as endangered species habitat as long as the taking of individual listed species is "incidental to, and not the purpose of, the carrying out of an

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[191] *Id.*

[192] 16 U.S.C. § 1538(a)(1)(B).

[193] 16 U.S.C. § 1532(19); *see also* Babbitt v. Sweet Home Chapter, 515 U.S. 687, 691 (1995).

[194] 50 C.F.R. § 17.3.

[195] Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENV'T L.J. 279, 323 (1998).

[196] *See* Amy Wilson Morris & Jessica Owley, *Mitigating the Impacts of the Renewable Energy Gold Rush*, 15 MINN. J.L. SCI. & TECH. 293, 318–19 (2014).

[197] *See* Craig Anthony Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENV'T L.J. 1, 20 (1991); Oliver A. Houck, *The "Institutionalization of Caution" Under § 7 of the Endangered Species Act: What Do You Do When You Don't Know*, 12 ENV'T L. REP. 15001, 15001 (1982) ("[I]t is . . . difficult to identify a single, major development in the United States—no matter whether privately financed—which is not potentially subject to [section 7's] reach.").

[198] 16 U.S.C. § 1539(a)(1)(B).

otherwise lawful activity."[199] To obtain an incidental take permit, applicants must submit a "comprehensive plan," known as a Habitat Conservation Plan (HCP).[200] An HCP details what an applicant must do to protect listed species that might be impacted by the proposed activities.[201]

Incidental take permits (and the HCPs that accompany them) seek to protect species through their requirements to avoid, minimize, and mitigate the impact of incidental takes, including potential harm to species from habitat modification. The Fish and Wildlife Service may not issue incidental take permits unless the permit applicant can demonstrate that "to the maximum extent practicable," the applicant will "minimize and mitigate the impacts" of any incidental takes, and that adequate funding is available for minimization and mitigation.[202]

Because the regulations do not detail what HCP mitigation projects should look like and how the HCP process should work, the Fish and Wildlife Service provided guidance in the HCP Handbook in 1996.[203] The original 1996 Handbook used the definition of "mitigation" from the regulations in the National Environmental Policy Act (NEPA),[204] which resembles the mitigation approach described above for wetlands.[205] A 2015 presidential memo regarding mitigation[206] provided a new (yet similar) definition: "[A]voiding, minimizing, rectifying, reducing over time, and compensating for impacts on natural resources . . . . These three actions are generally applied sequentially, and therefore compensatory measures should normally not be considered until after all appropriate and practicable avoidance and minimization measures have been considered."[207]

This memo (followed by a new 2016 HCP Handbook) emphasizes the goal of net benefit conservation outcomes and full

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[199] *Id.* For example, the building of a hospital might destroy habitat for an endangered insect, but the goal of the project is not to harm the insect. The harm that the insect suffers is incidental to the project of building the hospital. *See generally* Patrick Duggan, *Incidental Extinction: How the Endangered Species Act's Incidental Take Permits Fail to Account for Population Loss*, 41 ENV'T L. REP. 10628 (2011).

[200] 16 U.S.C. § 1539(a)(2)(A) (1988) (The most recent version of the statute no longer includes the term "comprehensive plan.").

[201] Sandra B. Zellmer, Sam Panarella, & Oliver Finn Wood, *Species Conservation and Recovery Through Adequate Regulatory Mechanisms*, 44 HARV. ENV'T L. REV. 367, 380–81 (2020).

[202] 16 U.S.C. § 1539(a)(2)(A)(ii).

[203] U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., HABITAT CONSERVATION PLAN HANDBOOK ch. 3 (1996).

[204] 40 C.F.R. § 1508.20.

[205] *See supra* section II.B.

[206] Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, 80 Fed. Reg. 68,743 (Nov. 6, 2015).

[207] U.S. DEP'T OF THE INTERIOR FISH AND WILDLIFE SERV., HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK 9-3 (2016).

offset of any impacts on listed species.[208] To meet these goals, HCPs set aside thousands of acres for conservation. Mitigation banks, conservation easements, or similar restrictions may protect these areas.[209] There are over 1,000 HCPs.[210] HCPs are growing in coverage area as well as in number.[211] As they become more pervasive, their role in protecting rural landscapes increases.

Through HCPs, the Endangered Species Act works to protect lands in rural areas. A movement towards larger landscape-level HCPs could lead to strategic conservation that considers environmental needs beyond habitat protection.[212] Yet, many HCPs are piecemeal plans reacting to a single project and focusing on one environmental goal. Like the wetlands protected under the Clean Water Act, endangered species habitat is not evenly dispersed, and the success of the projects is arguable.[213]

3. Summary for Land Conservation in Rural Areas Via Federal Mandates

The Clean Water Act and the ESA are two examples of federal laws that mandate actions that could assist in the environmental protection of rural lands. These statutes illustrate ways that the federal government engages in land conservation. We think of land use as being the realm of state and local governments, but these federal laws place requirements on the land that shape our communities. This can

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[208] *Id.*

[209] Jessica Owley, *Keeping Track of Conservation*, 42 ECOLOGY L.Q. 79, 106–07 (2015).

[210] *See, e.g.*, *Choose a Habitat Conservation Plans Report*, U.S. FISH & WILDLIFE SERV., https://ecos.fws.gov/ecp0/conservationPlan/region?region=1&type=HCP [https://perma.cc/BAH5-PC8A].

[211] U.S. FISH & WILDLIFE SERV., HABITAT CONSERVATION PLANS: SECTION 10 OF THE ENDANGERED SPECIES ACT 1 (2005), http://www.fws.gov/endangered/esa-library/pdf/HCP_Incidental_Take.pdf [https://perma.cc/4YUB-4TKW] ("Most of the earlier HCPs approved were for planning areas of less than 1,000 acres; now 10 exceed 500,000 acres, with several larger than 1,000,000 acres."). The Fish and Wildlife Service has not updated this information in over ten years, so it is hard to track the changing acreage. *See* Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35,248 (June 1, 2000) (explaining that many HCPs are increasing in scope even though most are still smaller than 1,000 acres).

[212] *See, e.g.*, Lauren A Hierl, Janet Franklin, Douglas H. Deutschman, Helen M. Regan, & Brenda S. Johnson, *Assessing and Prioritizing Ecological Communities for Monitoring in a Regional Habitat Conservation Plan*, 42 ENV'T MGMT. 165, 166 (2008) (discussing the San Diego Multiple Species Conservation Plan); *see also* Marie Grimm, Johann Köppel, & Gesa Geiß., *A Shift Towards Landscape-Scale Approaches in Compensation-Suitable Mechanisms And Open Questions*, 37 IMPACT ASSESSMENT & PROJECT APPRAISAL 491, 491 (2019) (describing the 2016 ESA Compensatory Mitigation Policy as shifting away "from project-by-project compensation planning toward a landscape-scale approach").

[213] *See* Andrew Carter, Jacob Malcom, & Heather Harl, *A Database of Habitat Conservation Plans and Related Documents Developed under the U.S. Endangered Species Act*, presented at the 2021 National HCP Coalition Annual Meeting (on file with author) (summarizing critiques of HCPs).

be beneficial because they protect important ecosystem services and amenities, but they are also coarse tools.

Rural communities are informed about permitting programs and some of the processes have public participation elements, but rural communities are not necessarily part of the decision-making process. Pointedly, these laws are not tools for purposeful or strategic land conservation. There is no federal law that requires landowners or others to undertake environmentally beneficial activities, engage in landscape-level protection, or prohibit development. While some countries mandate environmental protection at the national level and even engage in nationwide land-use planning, the structure of our federal system combined with a strong property rights orientation make such a strategy unthinkable in the United States.

B. Incentivizing Land Conservation

Many rural landowners voluntarily engage in conservation practices to improve environmental outcomes. In working landscapes, landowners sometimes voluntarily engage in practices to reduce the environmental impact of their farming, forestry, and grazing activities. For example, farmers cite desires to protect soils, prevent erosion, and undertake activities that will improve working conditions on their land.[214] They also sometimes protect wildlife and scenic views for perhaps both personal (desires to hunt or admire nice views) and altruistic reasons (practicing an environmental ethic).[215]

Yet, personal motivations for conservation alone have been inadequate to meet public policy goals for land conservation. Market forces do not lead to optimum conservation efforts either. Therefore, beginning in the wake of the Dust Bowl in the 1930s, government agencies and private organizations have encouraged and facilitated voluntary land conservation efforts.[216] A near complete reliance on a voluntary conservation regime for working lands operates in marked difference to the typical practice of combining voluntary and involuntary mechanisms in other land use arenas.[217] The federal

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[214] Robert L. Ryan, Donna L. Erickson, & Raymond De Young, *Farmers' Motivations for Adopting Conservation Practices Along Riparian Zones in a Mid-Western Agricultural Watershed*, 46 J. ENV'T PLAN. & MGMT. 19, 19–20 (2007).

[215] *See* Phelps, *Defining the Role of Conservation*, *supra* note 59, at 631 (summarizing motivations for engaging in land conservation activities generally).

[216] Jess R. Phelps, *Conservation, Regionality, and the Farm Bill*, 71 ME. L. REV. 293, 302–03 (2019) [hereinafter Phelps, *Conservation, Regionality*].

[217] *See generally* Douglas R. Williams, *When Voluntary, Incentive-Based Controls Fail: Structuring a Regulatory Response to Agricultural Nonpoint Source Water Pollution*, 9 J.L. & POL'Y 21 (2002) (profiling the role of agricultural exceptionalism in the water quality arena and the contact from other pollution sources).

Farm Bill serves as a prime example and is discussed in detail below. Through largely voluntary payment schemes, the federal government seeks to incentivize farmers to engage in conservation practices on their lands.[218] In some cases, the funding offered by these programs helps farmers who would have voluntarily implemented conservation practices but could not afford to do so. In other cases, it leads to the implementation of conservation mechanisms by farmers who make their farm operation decisions on other bases (largely economic) and tend to adopt practices that also increase cash flow or the farm's productive output.[219]

Current programs to incentivize rural landowners to adopt conservation measures range from incentivizing the donation of conservation easements to a suite of options under the Conservation Title of the Farm Bill.

1. Conservation Easement Tax Incentives

One significant way that the federal government incentivizes rural land conservation is through tax incentives for the donation of conservation easements.[220] While state laws govern how conservation easements work, it is the Internal Revenue Code that drives both the contours and creation of many conservation easements.[221] Even where a conservation easement is not intended to be tax-deductible, we see the language of such agreements mirroring the Internal Revenue Code requirements given the importance of these tax incentives in developing current conservation easement practice.[222]

A conservation easement is a nonpossessory interest in land (meaning that the person who holds the conservation easement does not actually have the right to occupy or possess the land) that restricts the landowner's otherwise permissible

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[218] Adam P. Reimer & Linda S. Prokopy, *Farmer Participation in U.S. Farm Bill Conservation Programs*, 53 ENV'T MGMT. 318, 318–32 (2013).

[219] Virginia Gewin, *Why Aren't USDA Conservation Programs Paying Farmers More to Improve Their Soil*?, CIV. EATS, (Jan. 12, 2021), https://civileats.com/2021/01/12/why-arent-usda-conservation-programs-paying-farmers-more-to-improve-their-soil/ [https://perma.cc/VS28-5LU7] (discussing the amount of federal Farm Bill EQIP funding devoted to installation of practices on concentrated animal feeding operations).

[220] THOMAS L. DANIELS & JOHN C. KEENE, THE LAW OF AGRICULTURAL LAND PRESERVATION IN THE UNITED STATES 111–13 (Am. Bar Ass'n eds., 2018) (explaining the impact of these tax incentives within the protection of farmland in particular and the potential impact of recent tax reform, which reduces the number of farms with tax liability, and may reduce tax incentivized donations).

[221] *See* LINDSTROM, *supra* note 53, at xi–xii.

[222] Even, for example, in conservation easements acquired by the Natural Resources Conservation Service (NRCS), which purchases conservation easements, the IRS requirements play a large role in shaping the terms of these restrictions. *See* Phelps, *Defining the Role of Conservation, supra* note 59*,* at 645–46.

behavior with the goal of yielding a conservation benefit.[223] The holder of the right is the entity that has the ability to enforce the agreement and by state law they must be either a qualifying governmental entity or a nonprofit organization.[224] The nonprofit organizations that work with this tool are called land trusts, and there are now over 1,700 of them across the United States.[225] Conservation easements encumber over 40 million acres in the United States, and their use continues to grow.[226] The typical conservation easement is a perpetual restriction on land use.[227] Indeed, three states (California, Hawaii, and Florida) require them to be perpetual, one state (North Dakota) prohibits perpetual restrictions, and most other states assume perpetuity when not explicitly stated otherwise in the agreement.[228]

While state property law sets forth the rules for establishing enforceable conservation easements, federal tax law determines deductibility of conservation easement The Internal Revenue Code generally does not allow tax deductions for donations of partial property interests, but conservation easements are one of the few exceptions.[229] As discussed above,[230] the statute defines acceptable purposes for conservation easements as including a variety of goals and uses including "the protection of a relatively natural habitat" to preservation of open space and recreation lands, as well historical lands and structures.[231] In addition to meeting one of the acceptable purposes, the donation

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[223] Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC'Y 107, 110 (2015).

[224] A. M. Merenlender, L. Huntsinger, G. Guthey, & S.K. Fairfax, *Land Trusts and Conservation Easements: Who is Conserving What for Whom?* 18 CONSERVATION BIOLOGY 65, 67 (2004).

[225] Every approximately five years, the Land Trust Alliance performs a census—collecting information about land trusts and their activities. The 2010 census stated that there are over 1700 land trusts in the United States. *See* KATIE CHANG, 2010 NATIONAL LAND TRUST CENSUS REPORT 8 (2011); Protected Forever, LAND TR. ALL., https://www.landtrustalliance.org/why-conserve-land/how-it-works/protected-forever [https://perma.cc/HJJ4-85V7].

[226] There is no comprehensive database of conservation easements in the United States, although the National Conservation Easement Database is trying to serve that function. As of August 2020, it contained data about nearly 28,000 acres of conservation easements, but also admits that its database is not complete. *See Database*, NAT'L CONSERVATION EASEMENT DATABASE, https://www.conservationeasement.us/ [https://perma.cc/6RTV-QYSC].

[227] Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENV'T L.J. 121, 122 (2011).

[228] Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1041 (2007).

[229] *See* Treas. Reg. § 1.170A-14(a).

[230] *See supra* Part II.B.

[231] I.R.C. § 170(h)(4)(A).

has to be made to a qualified holder and has to be of a qualified property interest (protecting the resource in perpetuity).[232]

This tax deduction matters because it can represent a substantial financial incentive leading a rural landowner to decide to protect her lands.[233] The value of the donation is tied to an appraisal of the fair market value of the conservation easement at the time of its donation.[234] Appraisers use a before-and-after methodology to assess the economic impact or value that the landowner has conveyed to the qualified conservation easement-holder.[235] Consider a property worth $1,000,000 before the conservation easement. If the conservation easement has the effect of reducing the property value to $100,000, the landowner could claim, provided all procedural requirements are met, a noncash charitable gift of $900,000. The actual economic value of this gift would hinge on the landowner's income tax bracket, but the tax incentives have lengthy carry-over provisions (in some instances, allowing the gift to be claimed over a fifteen-year window) to assist rural landowners who are often too "land-rich/cash-poor" to access this donation.[236] In addition to outright incentivizing donations, this tax incentive also serves as a funding match in federal purchase programs, discussed in more detail below.

One of the challenges of tax-incentivized conservation easements, however, is that this tool does not target specific habitats or lands, but instead relies on landowners making the decision to protect their own properties.[237] Although the IRS has increased scrutiny over these transactions,[238] and has regulatory requirements that shape the form of conservation easements, there is still considerable variation in what these conservation

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[232] Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements*, 46 REAL PROP. TR. & EST. L.J. 1, 3 (2011).

[233] *See Income Tax Incentives for Land Conservation*, LAND TR. ALL., https://www.landtrustalliance.org/topics/taxes/income-tax-incentives-land-conservation [https://perma.cc/VUX2-RLKE] [hereinafter *Incentives for Land Conservation*].

[234] *See* Treas. Reg. § 1.170A-13(c)(3)(i)(A).

[235] *See* LAND TR. ALL., APPRAISING CONSERVATION EASEMENTS: GUIDELINES FOR VALUATION OF LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENTS 30–33 (3d ed. 1999).

[236] *See Incentives for Land Conservation*, *supra* note 233.

[237] *See* Jeff Pidot, *Reinventing Conservation Easements*, LINCOLN INST. LAND POL'Y (Apr. 2005), https://www.lincolninst.edu/publications/articles/reinventing-conservation-easements [https://perma.cc/LS78-UZ9Q].

[238] *See, e.g.*, Timothy Lindstrom, *The Syndication of Conservation Easement Tax Deductions*, LAND TR. ALL. (Summer 2015), https://www.landtrustalliance.org/news/syndication-conservation-easement-tax-deductions [https://perma.cc/7WQJ-TX9B] (profiling increasing IRS attention to this donative form).

easements actually protect.[239] The complexity of these agreements and the number of reserved rights (options for future land use that the landowner retains) have increased with time as experience with this conservation tool has increased.[240]

2. The Farm Bill

The Farm Bill plays a critically important role in working lands protection.[241] In the area of rural conservation, Farm Bill conservation programs often focus on protecting farmland to keep it farmed or ranched[242] while reducing the environmental impacts of the farming activity, and often the conservation benefits associated with this protection are related to production-centric objectives.[243] For example, a conservation project may involve installing a terrace to prevent soil erosion, which has a conservation impact but also helps the farmer in being able to continue to plant/harvest the protected acreage.[244] Through these programs, the Farm Bill is the largest source of funding for private land conservation and has a widespread impact on the environmental health of the rural countryside.[245] This subsection introduces some of the Farm Bill's conservation programs and provides context for how federal conservation programs fit within the larger framework designed around rural resource and land protection.

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[239] *See* Jessica Owley & Adena R. Rissman, *Trends in Private Land Conservation: Increasing Complexity, Shifting Conservation Purposes and Allowable Public Land Uses*, 51 LAND USE POL'Y, 76, 77 (2016).

[240] *Id.*

[241] *See* Phelps, *Conservation, Regionality*, *supra* note 216, at 313–15 (discussing the Farm Bill's role in this area).

[242] This is an interesting contrast to Congress' approach to protection of agricultural lands under the Internal Revenue Code. Conservation easements protect both open space and agricultural land for its open space values. Through the Internal Revenue Code, Congress does not protect agricultural land because of a moral obligation or desire to protect rural communities or culture. Additionally, it does not protect agricultural land because of the environmental benefits that might accrue but focuses instead on agricultural land as an open space value.

[243] Laurie Ristino & Gabriela Steier, *Losing Ground: A Clarion Call for Farm Bill Reform to Ensure a Food Secure Future*, 42 COLUM. J. ENV'T L. 59, 80–84 (2016) (profiling the agency's shifting focus and multiple missions).

[244] *See, e.g.*, Rolland Z. Wheaton & Edwin J. Monke, *Terracing as a 'Best Management Practice' For Controlling Erosion and Protecting Water Quality, Agricultural Engineering*, PURDUE U. EXTENSION (2001), https://www.extension.purdue.edu/extmedia/ae/ae-114.html#:~:text=What%20are%20the%20benefits%20of,than%20would%20otherwise%20be%20possible [https://perma.cc/ST95-MFDT] (explaining the production and conservation benefits associated with terracing).

[245] *See Farm Bill Conservation Programs: 2018 Farm Bill*, LAND TR. ALL., https://www.landtrustalliance.org/topics/federal-programs/farm-bill-conservation-programs [https://perma.cc/ACH9-HJ7M].

Congress first passed a Farm Bill in 1933 in the wake of the Dust Bowl and the Great Depression.[246] At that time, people could not afford to purchase the crops that were being produced, which deflated market prices leading to severe economic impacts on the rural economy.[247] To alleviate these hardships, the government paid farmers to reduce production in an attempt to bring prices back up.[248] At the same time, the Farm Bill created the Soil Conservation Service, the predecessor to today's Natural Resources Conservation Service (NRCS).[249] The Soil Conservation Service focused on blunting the worst of the environmental ills of the Dust Bowl era by encouraging conservation tillage and terracing of highly erodible lands.[250] Conservation programs have been a part of United States Department of Agriculture's work since then, although the focus and motivations change to address evolving challenges facing the rural economy and landscape.[251]

Roughly every five years, Congress passes a new Farm Bill.[252] Around 80 percent of the funding allocated under every Farm Bill goes towards nutrition programs, the biggest portion of which is the Supplemental Nutrition Association Program (SNAP).[253] About 8 percent goes toward crop insurance subsidies, 6 percent to conservation efforts, 5 percent to commodity programs, and only 1 percent to the remaining titles. These "other" titles can be quite diverse and includes some funding for forestry, local food movements, racial equity research, international trade,

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[246] Mary Beth Blauser, *The 2008 Farm Bill: Friend or Foe to Conservationists and What Improvements are Needed?*, 12 VT. J. ENV'T L. 547, 548–49 (2011).

[247] Tom Morain, *The Great Depression Hits Farms and Cities in the 1930s*, IOWA PATHWAYS, https://www.iowapbs.org/iowapathways/mypath/great-depression-hits-farms-and-cities-1930s#:~:text=When%20prices%20fell%20they%20tried,bankrupt%20and%20lost%20their%20farms.&text=Some%20farmers%20became%20angry%20and,farm%20families%20in%20their%20homes [https://perma.cc/LKS8-YXUP].

[248] R. DOUGLAS HURT, THE PROBLEMS OF PLENTY: THE AMERICAN FARMER IN THE TWENTIETH CENTURY 95–166 (2002).

[249] *Honoring 85 Years of NRCS – A Brief History*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143_021392 [https://perma.cc/6UXB-Z5FS].

[250] *Id.*

[251] TIM LEHMAN, PUBLIC VALUES, PRIVATE LANDS: FARMLAND PRESERVATION POLICY 1933–1985 26 (1995) (profiling the USDA's shifting conservation focus over time).

[252] William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 221 (2009) (providing an overview of the history of the Farm Bill).

[253] Brad Plumer, *The $956 Billion Farm Fill, in One Graph*, WASH. POST (Jan. 28, 2014), https://www.washingtonpost.com/news/wonk/the-950-billion-farm-bill-in-one-chart [https://perma.cc/Y2PF-Q3QA]. This program was previously and is still commonly referred to as food stamps. The classic tradeoff in the Farm Bill is the agreement to link the nutrition program (which has a more urban constituency) with the rest of the Farm Bill to garner support to pass this omnibus legislation. *See* Neil D. Hamilton, *The 2014 Farm Bill: Lessons in Patience, Politics and Persuasion*, 19 DRAKE J. AGRIC. L. 1, 11–14 (2014).

and rural development.[254] The conservation title of the 2018 Farm Bill had a budget of $60 billion across all conservation programs over its five-year authorized life.[255]

The NRCS administers most of the Farm Bill's conservation programs.[256] It offers financial and technical assistance for the conservation of agricultural lands and wetlands and the installation of conservation practices on working lands.[257] In the fiscal year 2021, NRCS plans to invest $450 million in conservation easements, amongst other programming.[258] Over the past twenty-five years, the Farm Bill has protected 4.4 million acres at a cost of over $1 billion.[259]

The first conservation title appeared in the 1985 Farm Bill (which is largely viewed as the most impactful iteration of the Farm Bill as far as reorienting the relationship between farmers and the environment),[260] but there were conservation programs before that (just not within a separate title).[261] Current NRCS programs fall into a few primary categories: (1) conservation easement programs; (2) working land programs; and (3) land retirement programs.[262] These programs are explored in turn below.

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[254] JIM MONKE, CONG. RSCH. SERV., IF10783, FARM BILL PRIMER: BUDGET ISSUES (2017).

[255] *See A Closer Look at the 2018 Farm Bill: Working Lands Conservation Programming*, NAT'L SUSTAINABLE AGRIC. COALITION (Jan. 14, 2019), https://sustainableagriculture.net/blog/a-closer-look-at-the-2018-farm-bill-working-lands-conservation-programs/ [https://perma.cc/65XK-27SE] [hereinafter *A Closer Look at the 2018 Farm Bill*] (exploring the impacts of this legislation).

[256] Other USDA agencies, particularly the Farm Services Agency play a large role in program delivery and have a leadership role in administering the Conservation Reserve Program. *Farm Bill*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/farmbill/ [https://perma.cc/Q3FZ-DSMM].

[257] *See, e.g.*, *How the Conservation Technical Assistance Program Works*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/technical/cta/?cid=nrcs143_008371 [https://perma.cc/RHM8-MYQL].

[258] *See, e.g.*, Press Release, USDA, USDA Offers Conservation Assistance to Landowners to Protect Wetlands, Agricultural Lands and Grasslands, (Mar. 27, 2019); *see also Agriculture Conservation Easement Program*, NAT'L SUSTAINABLE AGRIC. COALITION (July 2019), https://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/agricultural-conservation-easement-program/ [https://perma.cc/7M7G-CM2S] (summarizing funding over this program's five year authorized life).

[259] *See, e.g.*, *Agricultural Conservation Easement Program*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/ [https://perma.cc/R6AR-9YEE].

[260] *See* Linda Malone, *Conservation at the Crossroads: Reauthorization of the 1985 Farm Bill Conservation Provisions*, 8 VA. J. NAT. RES. L. 215, 217–19 (1989).

[261] *See* Linda Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting, and the Conservation Reserve*, 34 U. KAN. L. REV. 577, 578 (1986).

[262] MEGAN STUBBS, CONG. RES. SERV., R40763, AGRICULTURAL CONSERVATION: A GUIDE TO PROGRAMS 2 (2019).

a. Farm Bill Conservation Easement Programs

Since the 1990s, Congress has authorized multiple conservation easement programs for NRCS to pursue different land management objectives.[263] To streamline authority and improve program delivery, the 2014 Farm Bill consolidated them into a single program: the Agricultural Conservation Easement Program (ACEP).[264]

Before 2014, four conservation easement programs had been in the NRCS's overall easement portfolio.[265] The Wetlands Reserve Program sought to deter draining of lands for agricultural use and to restore wetland habitat where this habitat had been lost.[266] The Grasslands Reserve Program protected thousands of acres mostly in the Midwest and Plains states, seeking to curb environmental degradation from overgrazing.[267] The Healthy Forests Reserve Program focused on private forestlands in the Northeast and Southeast.[268] Last, the Farm and Ranchland Protection Program focused on protecting farmland.[269] All four programs relied on conservation easements held by the USDA, local governments, or land trusts.[270] Even with the official expiration of these programs, conservation easements previously created are still in existence, protecting thousands of acres of land under their successor programs.[271]

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[263] Neil D. Hamilton, *Legal Issues in Enforcing Federal Soil Conservation Programs: An Introduction and Preliminary Review*, 23 U.C. DAVIS L. REV. 637, 640–45 (1990).

[264] Margaret Claire Osswald, *Custom-Made Conservation: Resource-Specific Conservation Easement Implementation Unpaves the Path of Tax Abuse*, 32 J. ENV'T L. & LITIG. 1, 18–20 (2016).

[265] *NRCS Conservation Programs: Agricultural Conservation Easement Program (ACEP)*, NRCS CONSERVATION PROGRAMS (Feb. 24, 2021), https://www.nrcs.usda.gov/Internet/NRCS_RCA/reports/srpt_cp_acep.html [https://perma.cc/UV6W-UKLB].

[266] *See, e.g.*, MICHAEL T. SUCIK & ELIZABETH MARKS, THE STATUS AND RECENT TRENDS OF WETLANDS IN THE UNITED STATES 5 (2010), https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1262239.pdf [https://perma.cc/BD5S-3JBK].

[267] *See* STUBBS, *supra* note 262, at 12.

[268] *See* KATIE HOOVER, CONG. RSCH. SERV., R43431, FORESTRY PROVISIONS IN THE 2014 FARM BILL (P.L. 113-79) 6 (2014). The FRPP has been authorized for a number of years but was refunded through the Regional Conservation Partnership Program (RCPP) in the 2014 Farm Bill, which has revitalized this program and made it an option for those looking to protect working forests.

[269] *Farm and Ranch Lands Protection Program*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/detail/null/?cid=nrcs141p2_018768 [https://perma.cc/STA9-WY58].

[270] *See Phelps, Defining the Role of Conservation*, *supra* note 59, at 649–50.

[271] *See Wetland Reserve Program*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/detail/null/?cid=nrcs143_008419 [https://perma.cc/LG9F-KYZY] (explaining the impact of this program's repeal in the 2014 Farm Bill).

The 2014 Farm Bill consolidated these four programs into the ACEP.[272] ACEP offers financial and technical assistance regarding the conservation of agricultural lands and wetlands, and it facilitates voluntary donations or protection of these lands.[273] It now consists of two primary subprograms: Wetlands Reserve Easements (ACEP-WRE) and Agricultural Land Easements (ACEP-ALE).[274] ACEP-WRE is the Wetlands Reserve Program's replacement.[275] Farmers enter into ACEP-WRE conservation easements directly with NRCS, which holds these conservation easements.[276] The WRE conservation easements are negative property encumbrances that prohibit landowners from engaging in actions that degrade the wetlands (essentially giving the federal government most of the rights to the property other than quiet enjoyment).[277] NRCS pays for the restoration, in whole or part, in relation to these projects.[278]

ACEP-ALE replaces the Farm and Ranchland Protection Program and consolidates grassland protection within this program.[279] For ACEP-ALE conservation easements, the farmer must find a holder committed to stewarding the land.[280] This holder can be a land trust focused on farmland protection but more often will be a local government (because of the funding match requirements).[281] The holder then submits an application to the USDA and has to come up with 50 percent of the conservation easement value and demonstrate its ability to fund the project and complete the transaction.[282] The landowner can,

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[272] *See, e.g.*, *Agricultural Act of 2014: Highlights and Implications*, U.S. DEP'T AGRIC. ECON. RSCH. SERV. (Aug. 20, 2019), https://www.ers.usda.gov/agricultural-act-of-2014-highlights-and-implications/ [https://perma.cc/7KFN-PU3M].

[273] *Agricultural Conservation Easement Program*, U.S. DEP'T OF AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/ [https://perma.cc/6ZS6-YYAJ].

[274] *Id.*

[275] *Id.*

[276] *Wetland Reserve Easement*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/detail/null/?cid=nrcseprd416653 [https://perma.cc/L35L-BH54].

[277] *See* Pidot, *supra* note 237, at 4 (summarizing reserved interest easements and how restrictive this easement form is in practice).

[278] *See* U.S. DEP'T OF AGRIC.: NAT. RES. CONSERVATION SERV. MASS., HOW NRCS WETLAND RESERVE EASEMENTS WORK 1 (2016), https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcseprd888660.pdf [https://perma.cc/NP85-FR4C] (discussing this program in operation).

[279] *2014 Farm Bill Drill Down: Conservation–Easements, CRP, and Energy*, NAT'L SUSTAINABLE AGRIC. COALITION, http://sustainableagriculture.net/blog/2014-farm-bill-acep-crp-energy/ [https://perma.cc/36R6-2Z3G].

[280] *Agricultural Conservation Easement Program–Agricultural Land Easements*, AM. FARMLAND TR.: FARMLAND INFO. CTR. (Jan. 30, 2020), https://farmlandinfo.org/publications/agricultural-conservation-easement-program-agricultural-land-easements/ [https://perma.cc/V2TQ-49T6].

[281] *See* Phelps, *Defining the Role of Conservation*, *supra* note 59, at 650–51.

[282] *See* DANIELS & KEENE, *supra* note 220, at 197.

however, donate up to 25 percent of the appraised value to lessen the easement holder's match obligation.[283]

ACEP sounds like a pure land conservation program, but it plays other important roles within the farmland preservation movement. These other roles include funding farm transition, paying off debts, or financing other agricultural activities, which may be more critical to the farmer than the conservation motivation.[284] These agreements, at least the ACEP-ALE component, are primarily focused at keeping these lands in active farming use.[285] While the programs may provide environmental benefits, farmers and the NRCS may enter into the agreements to advance other objectives.[286] To the extent that this is a critique of ACEP-ALE, it is likely a critique of many farmland preservation projects globally as these projects have to balance the multiple objectives their advocates are seeking to secure and advance.[287] Overall, ACEP is one of the largest funding sources available for working lands protection based on the enactment of the 2018 Farm Bill, which raised appropriations under this program from $250 million annually to $450 million.[288] The conservation objectives of these programs is primarily two-fold: (1) to restore converted farmland back to its original wetland use and function; and (2) to prevent farmland from being converted to a more intensive use.[289]

b. Working Land Programs

Beyond land protection, NRCS, has a suite of tools designed to help farmers implement conservation practices,

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[283] *See* Phelps, *Defining the Role of Conservation*, *supra* note 59, at 690.

[284] *Id.* at 652; *see also* Cris Coffin & Lisa Luciani, *Advocating for Land Access and Farm Transfer Support in the 2018 Farm Bill*, LAND FOR GOOD (Feb. 16, 2018), https://landforgood.org/2018-farm-bill/ [https://perma.cc/V4RC-2QSW] (explaining the impact of this program in the farm transfer arena).

[285] *See* Phelps, *Defining the Role of Conservation*, *supra* note 59, at 663–65.

[286] *Livestock in Harmony with Bi-State Sage Grouse*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/detail/ca/programs/farmbill/rcpp/?cid=nrcseprd1382853 [https://perma.cc/BD9R-EP9W] (profiling the impact of ACEP-ALE lands on sage grouse habitat in the Eastern Sierra).

[287] *See* Phelps, *Defining the Role of Conservation*, *supra* note 59, at 663–65.

[288] *Farm Policy Update: The 2018 Farm Bill*, AM. FARMLAND TR., (Dec. 28, 2018), https://www.farmland.org/blog/farm-policy-update-the-2018-farm-bill [https://perma.cc/28RT-A39B].

[289] Beyond ACEP, other NRCS programs also work through the acquisition of conservation easements, including the RCPP. RCPP was originally a funding mechanism for delivery of other NRCS programs to address targeted conservation concerns, but in the 2018 Farm Bill, RCPP became a standalone program, which has more flexibility than ACEP to achieve targeted conservation priorities, including through conservation easements. *See Regional Conservation Partnership Program*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/rcpp/ [https://perma.cc/YRQ8-ERLF].

referred to generally as working lands programming.[290] These programs typically operate through cost-share assistance to farmers to allow them to construct conservation features or implement projects, but are surprisingly broad in reach.[291]

The largest and most prominent USDA working lands program is the Environmental Quality Incentives Program (EQIP).[292] Under EQIP, farmers and the USDA split the cost of projects that help the environment (e.g., installation of infrastructure, implementation of improved production practices).[293] This program covers a wide range of on-farm projects, like installing terraces and buffer strips.[294] The projects rely on NRCS for technical and financial resources both to help farmers protect the environment and to help farmers operationally.[295]

Sometimes called a green payment,[296] the other principal working lands program, the Conservation Stewardship Program (CSP) expressly rewards farmers for employing farm practices that protect the environment.[297] Working with the USDA

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[290] *See* STUBBS, *supra* note 262, at 2.

[291] *Id.* at 7–9.

[292] 16 U.S.C. §§ 3801 et seq.; 7 C.F.R. § 1466.

[293] *See Environmental Quality Incentives Programs*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/eqip/ [https://perma.cc/HCG4-BAWL].

[294] *See Conservation Practices*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/technical/cp/ncps/?cid=NRCS143_026849 [https://perma.cc/F5TF-CDU5] (providing overview of practices currently funded).

[295] *See, e.g.*, Analena B. Bruce, James R. Farmer, Elizabeth T. Maynard, Julia C.D. Valliant, *Assessing the Impact of the EQIP High Tunnel Initiative*, 7 J. AGRIC., FOOD SYS., & CMTY. DEV. 159 (2017) (profiling the use of EQIP and NRCS resources to promote the adoption and use of high tunnel systems for food production). Some argue that this is a subsidy to factory farms and just has the taxpayers helping to foot the bill for farm pollution costs. For example, the program helps fund installation of manure lagoons for concentrated animal feeding operations and infrastructure associated with large-scale agriculture. EQIP does not directly provide for the long-term preservation or conservation of farmlands, but it helps defray costs to encourage the deployment of environmentally advantageous practices. *See, e.g.*, Andrew Martin, *In the Farm Bill, A Creature from the Black Lagoon*?, N.Y. TIMES (Jan. 13, 2008), https://www.nytimes.com/2008/01/13/business/13feed.html [https://perma.cc/646E-E844] (profiling the use of EQIP to fund animal waste management systems).

[296] *See generally* 16 U.S.C. §§ 3838d–g; 7 C.F.R. § 1470 (2019); U.S. DEPT. AGRIC., PART 507 – CONSERVATION PROGRAMS MANUAL (Nov. 2016) https://directives.sc.egov.usda.gov/OpenNonWebContent.aspx?content=40156 wba [https://perma.cc/G2ST-RECK]. The CSP replaced the earlier Conservation Security Program, created under the 2002 Farm Bill but largely replicates its structure. *See* Earman v. United States, 114 Fed Cl. 81, 88–90 (Fed. Cl. 2013) (profiling this program).

[297] Ferd Hoefner, *Opinion: Conservation Stewardship Program 'Reinvention': What to look for in the Upcoming Overhaul*, AGRI-PULSE (Aug. 29, 2016, 12:31 PM), https://www.agri-pulse.com/articles/7408-opinion-conservation-stewardship-program-reinvention-what-to-look-for-in-the-upcoming-overhaul [https://perma.cc/NL8X-KA8S] This program was on the chopping block in the 2018 farm bill. It ended up surviving but is not well funded. This program is likely to face continued calls for elimination given its complexity. *See 2018 Farm Bill Breakdown: Conservation Reserve Program*, NAT'L ASS'N OF CONSERVATION DISTS. (Jan. 22, 2019), https://www.nacdnet.org/2019/01/22/2018-farm-bill-breakdown-conservation-reserve-program/ [https://perma.cc/SP7N-FZ6J] [hereinafter *2018 Farm Bill Breakdown*].

(through the NRCS office), farmers enter into contracts and agree with the agency on which conservation practices they will adopt.[298] These plans include practices such as implementing no-till (to limit erosion) and fostering wildlife habitat.[299] The contracts currently cover over 7 million acres of agricultural land and forest.[300] To enroll in the program, an NRCS conservation planner meets with an interested farmer to create a CSP plan.[301] Farmers enrolled in the program receive annual incentive payments for initiating conservation practices on their land and receive higher payments for further enhancements.[302]

Currently, CSP contracts last for five years with an option to renew if farmers successfully fulfill the terms of their initial contract and agree to additional objectives—as a way to incentivize conservation-minded farmers to do more for their lands.[303] Payments are broken down into three components: (1) payments to maintain the existing conservation based on the operation type and resource concerns (the stewardship payment); (2) additional activity payments (to implement additional conservation measures); and (3) supplemental payments for adopting additional resource-conserving crop rotation.[304]

To enroll in the program, farmers must demonstrate they meet a stewardship threshold for one of the priority resource concerns for their state, and they must agree to address one additional priority during the contract period.[305] States set additional property areas and focus areas to meet regional

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[298] *CSP – Learn More*, U.S. DEPT. AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/csp/?cid=nrcseprd1288524 [https://perma.cc/M6UH-EAVV].

[299] Margot J. Pollans, *Regulating Farming: Balancing Food Safety and Environmental Protection in a Cooperative Governance Regime*, 50 WAKE FOREST L. REV. 399, 410–11 (2015).

[300] *CSP Success Stories*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/csp/?cid=nrcseprd1290718 [https://perma.cc/5T9E-YDNG] (profiling the program's impacts).

[301] *Conservation Stewardship Program*, NAT'L SUSTAINABLE AGRIC. COALITION (Apr. 2019), http://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/conservation-stewardship-program [https://perma.cc/9Q2V-BVRW] (providing overview of how this complex program works).

[302] *Id.*

[303] *Id.*

[304] *See Conservation Stewardship Program*, *supra* note 301.

[305] CORA FOX & ANNA JOHNSON, CTR. FOR RURAL AFFAIRS, A FARMER'S VIEW: A LOOK AT THE CONSERVATION STEWARDSHIP PROGRAM 2 (July 2018), https://www.cfra.org/sites/www.cfra.org/files/publications/A%20Farmers%20View%20A%20look%20at%20the%20Conservation%20Stewardship%20Program.pdf [https://perma.cc/ZY4P-NP6Y] (summarizing program eligibility). For an example of priority resource concerns, *see Conservation Stewardship Program*, U.S. DEP'T AGRIC.: NRCS IOWA, https://www.nrcs.usda.gov/wps/portal/nrcs/ia/programs/financial/csp/ (laying out Iowa's FY21 priority resource concerns for crop land, which include preventing wind and water erosion, reducing field sediment, nutrient and pathogen loss, limiting livestock production, and creating terrestrial habitat).

considerations; Texas, for example, has a special program for protecting the Ogallala Aquifer and for the lesser prairie chicken.[306] The challenge for CSP is demonstrating that it is having a conservation effect.[307] This program, again, relies on farmers to voluntarily adopt practices, as incentivized via the program requirements and state resource concerns, which necessarily impacts the results achieved on the ground.

c. Land Retirement Programs

One of the more traditional USDA approaches to conservation involves taking land out of active production to reduce overproduction of commodity crops and hopefully secure passive environmental gains.[308] This type of effort has its origins in the 1950s and 1960s as American's Soil Bank program.[309] The current land retirement program, the Conservation Reserve Program (CRP) was authorized in the 1985 Farm Bill.[310] For CRP, the USDA, via the Farm Service Agency, enters into contracts with landowners who have highly vulnerable lands, paying them to take the land out of production for ten years.[311] The acreage cap for CRP currently authorized at 22.7 million acres with the payment being equal to 85–90 percent of the average county rental rate.[312] The goal of this program is similar to other USDA programs in that it balances income support to farmers (allowing farmers to take out of production their least productive lands, which are often some of the most environmentally sensitive lands) but also has an environmental or conservation gain (here, for the duration of the ten-year contract).[313]

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[306] *See, e.g.*, *Conservation Stewardship Program*, U.S. DEP'T AGRIC.: NRCS TEX., https://www.nrcs.usda.gov/wps/portal/nrcs/main/tx/programs/financial/csp/ [https://perma.cc/T995-BEFM]; *NRCS Announces Deadlines for Conservation Stewardship Program Contracts*, U.S. DEP'T AGRIC.: NRCS TEX., https://www.nrcs.usda.gov/wps/portal/nrcs/detail/tx/newsroom/stories/?cid=nrcseprd323636 [https://perma.cc/SUX6-BBMS] (referring to Texas' initiatives related to the Prairie Chicken, Ogallala Aquifer, and Long Leaf Pine).

[307] *See generally* Roger Claassen, Eric Duquette, & John Horowitz, *Additionality in Agricultural Conservation Payment Programs*, 68 J. SOIL & WATER CONSERVATION 74A (2013) (profiling these challenges).

[308] *See* STUBBS, *supra* note 262, at 6.

[309] J. DOUGLAS HELMS, U.S. DEP'T AGRIC.: NRCS, BRIEF HISTORY OF THE USDA SOIL BANK PROGRAM 1 (1985) https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1045666.pdf [https://perma.cc/8KZY-6QXZ] (exploring this program's history).

[310] *See* STUBBS, *supra* note 262, at 1.

[311] *Conservation Reserve Program*, U.S. DEP'T AGRIC., https://www.fsa.usda.gov/programs-and-services/conservation-programs/conservation-reserve-program/index [https://perma.cc/S7LX-HHM8] (explaining the program and enrolment).

[312] *See 2018 Farm Bill Breakdown*, *supra* note 297 (discussing the acreage cap for funding levels and how this has been ratcheted down over time and providing the actual estimated annual funding amounts (or the appropriations tied to the acreage cap)).

[313] This mid-term land retirement program has habitat benefits in creating successional habitat—which has led to its popularity amongst sportsperson groups. *See* Jack

d. Conservation Compliance

Beyond the programs outlined above, the other primary factor or tool that NRCS has at its disposal to promote better land stewardship is conservation compliance.[314] We categorize these programs as federal-incentivizing, but a better label here might be coercion. Conservation compliance conditions a producer's ability to participate in USDA programs upon meeting a baseline of environmental stewardship regarding their lands.[315] The two main conservation compliance operations are called "swampbuster" and "sodbuster"—both created in the 1985 Farm Bill.[316] "Swampbuster" seeks to prevent drainage of wetlands.[317] If a farmer drains a wetland, he or she is no longer eligible to obtain federal commodity payments or subsidized crop insurance (or participate in other USDA programs, such as the conservation programs described above).[318] The same consequences result if a farmer plants highly erodible lands without having an approved conservation plan under "sodbuster."[319] These programs, although difficult to administer, have a rural environmental or conservation impact as the consequences of losing eligibility to participate in these programs can be drastic.[320]

Hennessy, *CRP: Achieving Conservation Goals on Private Lands for 30 Years*, PHEASANTS FOREVER (Dec. 22, 2015), https://www.pheasantsforever.org/BlogLanding/Blogs/Field-Notes/CRP-Achieving-Farming-and-Conservation-Goals-on-Pr.aspx?feed=articles [https://perma.cc/2DMK-EHZU].

[314] *See Conservation Compliance*, U.S. DEP'T AGRIC., https://www.fsa.usda.gov/programs-and-services/payment-eligibility/conservation_compliance/index [https://perma.cc/44PW-73NG] (providing overview of this mechanism).

[315] *See* Ristino & Steier, *supra* note 243, at 88, 110 (discussing this requirement and the challenges in enforcing these terms).

[316] Jamie Konopacky & Laurie Ristino, *The Healthy Watershed Framework: A Blueprint for Restoring Nutrient-Impaired Waterbodies Through Integrated Clean Water Act and Farm Bill Conservation Planning and Implementation at the Subwatershed Level*, 47 ENV'T L. 647, 678 (2017).

[317] *See Wetland Conservation Provisions (Swampbuster)*, U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/water/wetlands/?cid=stelprdb1043554 [https://perma.cc/32MG-FQSG].

[318] *Id.*; *see also* STUBBS, *supra* note 262, at 15 (providing list of programs that a farmer will be ineligible for if the violate conservation compliance requirements).

[319] *Conservation Compliance on Highly Erodible Land and Wetlands*, U.S. DEP'T AGRIC.: NRCS N.Y., https://www.nrcs.usda.gov/wps/portal/nrcs/detail/ny/programs/?cid=nrcs144p2_027057 [https://perma.cc/7AVA-9ZRP].

[320] *See* Roger Claassen & Maria Bowman, *Conservation Compliance in the Crop Insurance Era*, U.S. DEP'T AGRIC., (July 27, 2017) https://www.ers.usda.gov/amber-waves/2017/july/conservation-compliance-in-the-crop-insurance-era/ [https://perma.cc/P5NB-HMSL]. As a result, there has been a debate over the last few Farm Bills about whether to continue to condition participation in USDA programs, or decouple, conservation compliance from program eligibility, particularly with the increases in crop insurance subsidies in the 2014 Farm Bill. To date, these objectives have been linked, but this remains a potential policy point of inflection and discussion in the Farm Bill policy arena.

Overall, the USDA offers a wide range of benefits and programs to farmers to encourage and facilitate better environmental stewardship. At the floor, farmers must follow conservation compliance provisions to remain eligible for USDA programs generally.[321] This is often not a difficult burden to meet.[322] Beyond conservation compliance, USDA programs rely on farmers to seek out these partnerships with the agency to participate in programs through cost-sharing, land retirement, or conveying a conservation easement.[323] While farmers can be conservation-inclined out of their close association or affinity for their lands, financial considerations are generally involved.[324] Not surprisingly, the conservation measures they take under EQIP generally have a positive benefit on a farm's operation.[325] The lands retired through the CRP or converted back to wetlands under ACEP-WRE also are often the farmer's less productive lands (minimizing the productive impact).[326] Relying on a low bar for conservation compliance supplemented almost entirely by voluntary conservation programs leaves a large gap in our programming for the rural countryside,[327] which may account for many of the issues faced by farmland preservationists and conservation advocates working in this area.[328]

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[321] *See Conservation Compliance*, *supra* note 314.

[322] *See generally* NAT'L SUSTAINABLE AGRIC. COAL., ENFORCEMENT OF CONSERVATION COMPLIANCE FOR HIGHLY ERODIBLE LANDS (June 5, 2018), https://sustainableagriculture.net/wp-content/uploads/2018/06/CFRA-NSAC-Conservation-compliance-special-report.pdf [https://perma.cc/5SBE-GAVE].

[323] *Conservation*, U.S. DEP'T AGRIC., https://www.usda.gov/topics/conservation [https://perma.cc/KG5H-UF5K].

[324] Dayton M. Lambert, Patrick Sullivan, Roger Claassen, & Linda Foreman, *Profiles of US Farm Households Adopting Conservation-Compatible Practices*, 24 LAND USE POL'Y 72, 75 (2007).

[325] *Environmental Quality Incentives Program*, U.S. DEP'T AGRIC., https://www.farmers.gov/conserve/eqip [https://perma.cc/8ELW-69XF] ("Are you interested in conserving natural resources while strengthening your agricultural operation?").

[326] Thomas L. Daniels, *America's Conservation Reserve Program: Rural Planning or a Just Another Subsidy?*, 4 J. RURAL STUD. 405, 405–08 (1988). Land retirement programs were originally proposed as a production supply mechanism (taking land out of farming production with an eye to decreasing supply and increasing commodity prices). These efforts largely were not successful for this purpose as farmers generally took the poorest production lands out of operation, which only had marginal impacts on their overall production. *See* Zachary Cain & Stephen Lovejoy, *History and Outlook for Farm Bill Conservation Programs*, CHOICES, 4th Quarter 2004, at 37.

[327] Diana Stuart & Sean Gillon, *Scaling Up to Address New Challenges to Conservation on US Farmland*, 31 LAND USE POL'Y 223, 224 (2013) (explaining that "[o]verall, environmental regulation for agriculture remains very weak and difficult to implement and enforce in the US").

[328] J.B. Ruhl, *Agriculture and the Environment: Three Myths, Three Themes, Three Directions*, 25 ENVIRONS: ENV'T L. & POL'Y J. 101, 101 (2002).

3. Summary of Federal Incentive Programs

A lot of the incentive tools involve property rights or contract tools. The federal government either enters directly into agreements with landowners or facilitates private enforceable agreements with land trusts and local governments. Based either on property tools like easements or contracts and user agreements. Incentive tools are the only ones really working towards protecting working lands. Here we see ideas of conversation writ large with different ideas of conservation being accepted (except not much on the recreation front). These tools may be particularly useful in rural landscapes where people may be land rich and cash poor. Indeed, a critique of conservation easements is often that they are focused on rural lands giving urban residents few opportunities to access the amenities such land conservation provides.

C. Facilitating Land Conservation

The federal government also engages in land conservation in more passive ways. Our two examples show where the government promotes land conservation (at least in theory) through providing information and financial support. These programs are less aggressive than the mandates and incentives described above.

Although we do not treat it as a separate example, numerous programs under the Farm Bill seek to improve conservation outcomes through providing information and technical assistance. Under the Farm Bill conservation title, NRCS often works to achieve its conservation priorities outside of the programs profiled above. One of the primary mechanisms for doing this is through the agency's technical assistance efforts. NRCS looks at its efforts as being either technical or financial assistance. Although financial assistance often gets the attention, the agency's technical expertise is often significant in assisting farmers evaluate improving environmental function of their lands. A host of other efforts potentially fall into this camp, but the Farm Bill is not the only game in town.

1. The National Environmental Policy Act

Various laws and programs inform and support conservation efforts. Often this information comes through policies that are not necessarily focused on rural land conservation but laws that promote transparency and disclosure.

NEPA requires federal agencies undertaking a major federal action to consider and evaluate the action's impacts on the environment.[329] The environmental review process involves public participation and the production of environmental review documents.[330] The production of these documents and the provision of public information can influence landowners, public entities, and environmentalists to take actions to protect lands.[331] Sometimes, this production of information even inspires land trusts and private organizations to purchase lands or property rights.[332]

2. The Land and Water Conservation Fund

The Land and Water Conservation Fund (LWCF) Act of 1965 established a fund for acquiring land for outdoor recreation purposes.[333] Most the fund is for federal land acquisition. Where LWCF money is used, the resulting federal land must be open to the public for recreation.[334] Therefore, LWCF areas are park and open space lands.[335] Such funding can increase federal landholdings in areas of traditionally few public lands.[336]

A significant portion of the fund supplies matching money for state land acquisition for the creation of state and local parks.[337] States apply for the money, which Congress generally disperses in

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[329] *See* 42 U.S.C. § 4331(a) (1970) (recognizing the policy of the Federal Government to "use all practicable means and measures" to ensure the policies of § 4331 are achieved); *see also* Daniel R. Mandelker, *Thoughts on NEPA at 40*, 39 ENV'T L. REP. 10640, 10641 (2009).

[330] COUNCIL ON ENVTL. QUALITY, A CITIZEN'S GUIDE TO THE NEPA 26 (2007), https://ceq.doe.gov/get-involved/citizens_guide_to_nepa.html [https://perma.cc/Y5S8-4XE6].

[331] *How the National Environmental Policy Act Gives the Public a Voice*, WILDERNESS SOC'Y (Sept. 15, 2020), https://www.wilderness.org/news/blog/how-national-environmental-policy-act-gives-public-voice [https://perma.cc/4USJ-KUNN]; *see also* Chelsea Pennick McIver & Dennis R. Becker, *An Empirical Evaluation of the Impact of Collaboration on the Pace and Scale of National Forest Management in Idaho*, FOREST SCI. 49, 49 (2021) (profiling how the Forest Service is engaging in more collaborative planning efforts to attempt to develop better projects).

[332] For example, the Nature Conservancy's first U.S. landholding Mianus Gorge, was protected by community members when public notices informed them of a proposed dam (and later a housing development). *See The Early Years*, MIANUS RIVER GORGE, https://mianus.org/the-early-years/ [https://perma.cc/7KM7-492H] (although this 1953 action predates NEPA, it demonstrates how provision of public information can lead to private protective action); *see also* Elly Pepper, *Never Eliminate Public Advice: NEPA Success Stories*, NRDC (Feb. 1, 2015), https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories [https://perma.cc/PW9Z-EGTM].

[333] Land and Water Conservation Fund Act of 1965, 54 U.S.C. § 100101 (2014).

[334] CAROL HARDY VINCENT, CONG. RSCH. SERV., RL33531, LAND AND WATER CONSERVATION FUND: OVERVIEW, FUNDING HISTORY, AND ISSUES 19 (2019).

[335] *Id.*

[336] CAROL HARDY VINCENT, ANNE A. RIDDLE, R. ELIOT CRAFTON, & LAURA A. HANSON, CONG. RSCH. SERV., R46563, LAND AND WATER CONSERVATION FUND: PROCESSES AND CRITERIA FOR ALLOCATING FUNDS 20 (2020).

[337] NAT'L PARK SERV., LWCF, STATE ASSISTANCE PROGRAM MANUAL 1-1 (VOL. 69 2008).

proportion to population levels.[338] Such a pattern might suggest a preference for urban areas. However, while the distribution to states is based on state population levels, the federal government does not determine which lands within a state will be protected under the state grants program.[339] States decide which lands will receive protection through an application process from local governments. If states favor rural areas or if more rural local governments apply, as often occurs, the LWCF can be a significant supporter of rural land conservation.[340]

The LWCF has the potential to fund significant levels of conservation projects.[341] The revenue from drilling for oil and gas in Outer Continental Shelf funds the LWCF, and it accrues around $900 million a year.[342] However, the money is not available for use until Congress appropriates these funds. It was not until August 2020 that Congress finally made the full funds available.[343] For years, the LWCF was at risk of being defunded with conservationists aggressively lobbying Congress annually for appropriations (funding the LWCF in whole or in part).[344] In 2019, after years of advocacy, the LWCF was made permanent law,[345] and a year later President Trump signed the Great American Outdoors Act, ensuring permanent full funding for the LWCF.[346]

We place this funding program under the category of federal efforts that facilitate conservation because it is a periodically available source of funds for local communities to

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[338] *See* VINCENT, *supra* note 334, at 1.

[339] *Land and Water Conservation Fund*, U.S. DEP'T INTERIOR, https://www.doi.gov/lwcf [https://perma.cc/GDA5-DFAG].

[340] *State and Local Grant Funding*, NAT'L PARK SERV.: LAND AND WATER CONSERVATION FUND (Oct. 27, 2016), https://www.nps.gov/subjects/lwcf/stateside.htm [https://perma.cc/25QR-V4ZY].

[341] Margaret A. Walls, *The Land and Conservation Fund 101*, RES. FOR FUTURE (July 22, 2020), https://www.rff.org/publications/explainers/land-and-water-conservation-fund-101/ [https://perma.cc/NW9E-RX55] (explaining that reliance on this funding stream may present longer-term challenges).

[342] *Id.*

[343] *Congressional Acts*, NAT'L PARK SERV.: LAND AND WATER CONSERVATION FUND (Oct. 2, 2020), https://www.nps.gov/subjects/lwcf/congressionalacts.htm [https://perma.cc/V69M-MPFL] (summarizing these actions).

[344] Press Release, Land and Water Conservation Fund Coal, New Legislation Makes Historic Investment in Land and Water Conservation (Mar. 4, 2020), https://static1.squarespace.com/static/58a60299ff7c508c3c05f2e1/t/5e6012f908f9a557c68f2d9d/1583354617404/LWCF+Coalition+News+Release_New+Gardner+Manchin+Bill+3.4.20_+Final.pdf [https://perma.cc/BDD5-W9TG].

[345] *Legislation*, LAND & WATER CONSERVATION FUND COAL., https://www.lwcfcoalition.com/legislation [https://perma.cc/UQ6L-4LG4].

[346] President Trump, Remarks at the Signing of H.R. 1957, The Great American Outdoors Act (Aug. 4, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-1957-great-american-outdoors-act/ [https://perma.cc/DD3J-V4CX] (explaining that "[f]or more than 50 years, Congress has struggled to adequately fund land and water conservation").

increase open space and recreation lands. The role of the federal government here is funding, with state and local governments acquiring and managing the land.[347] A drawback of the LWCF State Grants Program is that the money can only be used for land acquisition. While protecting the land by prohibiting development can deliver conservation value, many lands would also benefit from active management or stewardship activities. The LWCF currently provides no help on that score.

3. Summary of Federal Facilitation of Rural Land Conservation

Incentive programs fall into two broad categories: providing information and providing money. Through NEPA's disclosure of environmental impacts of federal actions, rural communities can learn about potential land conservation implications and either lobby against them or work to counteract them.[348] Other programs that provide information on land conservation techniques through the Farm Bill are soft law strategies that can lead to tangible outcomes. It is when the federal government puts money and support directly to local governments (as opposed to directed towards individual landowners) that we see the greatest potential for thoughtful planned land conservation meeting needs for open space, ecosystem services, and recreational value. Such money allows the local governments to determine how to best fit conservation goals into rural communities.

CONCLUSION

Ultimately, the federal government plays a large role in conserving lands in rural areas for a sweeping range of public purposes and rationales and through a wide mix of potential tools and policies. As we explored in reviewing conservation purposes, conservation, however, does not have the same meaning to all stakeholders. These differing views create challenges in determining prioritization and in designing programs.

If we view land conservation as focusing on ecosystem services and natural areas, several approaches play a role: public land conservation, mandates for wetlands and habitat protection

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[347] *See, e.g.*, *Land and Water Conservation Fund Grants Awarded to 6 New Hampshire Communities*, N.H. ST. PARKS, https://www.nhstateparks.org/news-events/press-releases/lwcf-grants-awarded-2018 [https://perma.cc/9FXS-8GW9].

[348] Emergency Planning and Community Right-to-Know Act, 42 U.S.C.§ 11001 et seq., provides local communities about potential exposure to chemical hazards. Such laws illustrate the importance of community information and participation in spurring action for environmental protection.

under the CWA and ESA, incentives like the LWCF funding. Even conservation easements have a part to play here. However, if we expand our idea of conservation to include working lands, the most successful tools are from the Farm Bill and conservation easements generally. Congress doesn't interrogate what conservation means very often. We have taken a capacious view of conservation in this article to help illustrate the different types of conservation work being done by different programs.

Despite large acres of land in federal ownership and substantial public investment in working lands, conservation challenges remain. If rural land conservation is the goal, the federal government's role is not as strong or effective as it could be in advancing this objective regardless of our definition of conservation.

As a landowner, the federal government can take significant action to protect ecosystem services and combat climate change.[349] Yet, the federal government's commitment to environmental goals vacillates between protective and extractive activities.[350] Additionally, federal lands are not evenly distributed and will not protect ecosystem services or provide recreational activities in many, if not most, rural land areas.[351] Finally, the federal land management agencies sometimes have tense relationships with local communities, who feel that land management decisions are made without their involvement or consultation.[352]

As we outline in this article, the federal government also mandates, incentivizes, and facilitates land conservation in rural areas. These approaches can improve outcomes but they also all suffer from obstacles as well. Programs mandating conservation can be effective because they require restrictions on the land, but they operate outside a comprehensive landscape-scale approach. Where the federal government mandates environmental protection, it often does so in a piecemeal fashion, protecting individual wetlands or habitat for a particular species. The laws mandating protection have a more complicated task in rural areas given the substantial exemptions agricultural activities are afforded from most generally applicable environmental laws.[353] The requirements to protect wetlands and critical endangered species habitats highlight the sporadic nature of the conservation efforts. These

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[349] *See* Kelly, *supra* note 138.

[350] *See President Biden to Take Action*, *supra* note 139.

[351] *See, e.g.*, VINCENT & HANSON, *supra* note 61 (providing overview of federal landownership and distribution).

[352] *See* Bryan et al., *supra* note 142, at 3–6.

[353] *See generally* MEGAN STUBBS, CONG. RSCH. SERV., R41622, ENVIRONMENTAL REGULATION AND AGRICULTURE (June 16, 2014), (summarizing the broad exemptions for agriculture within environmental law).

are non-aggressive land conservation efforts that seek to prevent increased loss of environmental amenities, not create more, and they may not even succeed on that score.[354]

Programs facilitating conservation can be effective, but they contain few guarantees. NEPA provides information that can help conservationists, and sunshine can drive better action. But there are no requirements for conservation within NEPA itself. The effect of efforts like NEPA that encourage conservation by making information public is unknown and even though anecdotal evidence suggests some land conservation successes, they are likely few and far between.[355] The LWCF also has the potential for a significant effect because it assists local government with the acquisition of parklands.[356] However, the money cannot go to land management.[357] Additionally, the LWCF focuses on recreational lands, not ecosystem services, and it is dependent on local communities finding matching funding.[358] The need to match funds and cover all maintenance costs may make the program too expensive for some rural communities and may hinder the long-term performance of the lands post-acquisition.

Thus, incentive programs may offer the most opportunities. When Congress created a tax incentive for conservation easements in the 1980s, it had no idea how many acres would become encumbered and how many tax dollars would be forgone in the process.[359] Yet, it has become such a popular tax benefit that a strong constituency to protect it has formed, and has guarded the tool against periodic challenge and through several significant controversies.[360] It is not clear how many rural acres conservation easements protect because there is no systematic recording, cataloguing, or mapping of the conservation easements, despite private efforts to improve

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354 *See* Michael Blumm, Erica J. Thorson, & Joshua D. Smith, *Practiced at the Art of Deception: The Failure of Columbia Basin Salmon Recovery Under the Endangered Species Act*, 36 ENV'T L. 709, 711–12 (2006).

355 The real impact of NEPA may be more in forcing agency decisionmakers to consider a project's impacts on the environment before commencing project development before investing too much in a project design or outcome. *See* JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 354 (5th ed. 2019).

356 *See, e.g.*, *Land and Water Conservation Fund*, VT. AGENCY NAT'L RES.: DEP'T FORREST, PARKS & RECREATION https://fpr.vermont.gov/land-and-water-conservation-fund [https://perma.cc/W35F-8FLT].

357 *See* VINCENT, *supra* note 334, at 21–22.

358 *See* U.S. DEPT' INTERIOR: NAT'L PARK SERV., A BRIEF GUIDE TO LWCF MATCH 1 (Oct. 2008), https://www.nps.gov/subjects/lwcf/upload/LWCF-Training-Session-6-A-Brief-Guide-To-LWCF-Match.pdf [https://perma.cc/7ZGB-BCYC].

359 Isla S. Fishburn, Peter Kareiva, Kevin J. Gaston, & Paul R. Armsworth, *The Growth of Easements as a Conservation Tool*, PLOS ONE (Mar. 26, 2009), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0004996 [https://perma.cc/24SB-PK3Y] (profiling the dramatic growth in the use of this tool upon creation of the tax incentives).

360 *See* Lindstrom, *supra* note 238,

access to such information.[361] As a voluntary program focused on only some conservation goals, conservation easements may leave key ecosystem services unprotected and leave the same problems of uneven distribution of protected areas. Local governments and community groups sometimes work to make conservation easement acquisition efforts more strategic.

Federal incentives through the Farm Bill have also protected open space and ecosystem services throughout the United States.[362] Programs incentivizing conservation may hold the most promise if they are backed with substantial funding, resources, and also have public support. For example, NRCS's ACEP-WRE program has a clear conservation mandate and has sufficient resources to carry out their desired ends (restoring agricultural lands back to their wetland function), which has helped the program identify an issue and continue to receive funding to carry out wetland restorations.[363]

As farmland is located largely in rural areas, these programs benefit primarily rural areas, but they have their own challenges.[364] A chief impact of the Farm Bill's conservation programs is supporting farming, an activity that raises environmental concerns through its uses of industrial inputs and impacts on land and water resources, even as Farm Bill programs seek to limit these adverse effects.[365]

The limits of federal land conservation programs indicate there remains a large opportunity space for subnational governments or private action through regulation or acquisition-related activities to fill gaps or augment what the federal government is able to achieve through the policy mechanisms it has at its disposal. If we believe that the federal government has an important role to play in conserving land in rural areas, and we do,

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[361] Amy Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237, 1239 (2009).

[362] *See, e.g.*, *Farm Bill Conservation Programs*, LAND TR. ALL., https://www.landtrustalliance.org/topics/federal-programs/farm-bill-conservation-programs [https://perma.cc/NKM7-75NQ] (profiling the impact of the conservation title generally).

[363] *See, e.g.*, *Wetland Success Story – A Wetland Once More – South Branch Prairie*, U.S. DEP'T AGRIC.: NRCS ILL. (May 2014), https://www.nrcs.usda.gov/wps/portal/nrcs/il/newsroom/stories/STELPRDB1254075/.

[364] *See, e.g.*, U.S. DEP'T OF AGRIC, BALANCING THE MULTIPLE OBJECTIVES OF CONSERVATION PROGRAMS 52 (May 2006), https://www.ers.usda.gov/webdocs/publications/45394/29439_err19_002.pdf?v=8396 [https://perma.cc/M4CT-WBWP]. The concerns of balance also impact the structure and design of conservation funding. *See* Cain & Lovejoy, *supra* note 326, at 42 (profiling the concerns of some within the farm policy community to disfavor land retirement in favor of keeping land available for production).

[365] *See, e.g.*, *Agriculture*, CHESAPEAKE BAY PROGRAM (2021), https://www.chesapeakebay.net/issues/agriculture [https://perma.cc/H2LT-UAB8] (profiling the environmental impacts of agricultural activities on this important resource and efforts to reduce these effects).

[365] *See A Closer Look at the 2018 Farm Bill*, *supra* note 255.

this article helps demonstrate why and where the federal government is working in this area and considers some of the gaps in its efforts. However, it may be that the federal government is simply not the actor that can take on many aspects of this overarching task. State and local governments may be more effective, nimble, and responsive to their community needs and environmental conditions.[366] States and local governments may also be able to use regulation, zoning, and other tools more directly to address land-use considerations by virtue of their authority over this area. Additionally, private actors, such as land trusts and other non-governmental organizations and potentially the business sector could step in and take on additional land conservation challenges.

[366] We leave analysis of subnational and private actors to another day, but our experiences in rural areas suggest that the greatest obstacle to successful environmental protection in rural areas is a lack of active environmental management and the conversion of land to other uses, chiefly residential and energy development. Current land conservation programs do not appear to be addressing these issues directly, and action on some level is necessary to achieve more optimal environmental outcomes in the rural countryside.