



## DECISION NOTICE

### HABITAT CONSERVATION LEASE AGREEMENTS SUPPLEMENTAL ENVIRONMENTAL ASSESSMENT

May 12, 2023

#### **ACTION**

Decision Notice (DN). Montana Fish, Wildlife & Parks (FWP) shall prepare a DN for the proposed action. The DN must identify the agency decision, the reasons for the decision, and any special conditions surrounding the decision or its implementation.

With this action, FWP hereby adopts the Draft Supplemental Environmental Assessment or Draft SEA as final, without modification, and approves Alternative 2, the proposed action.

#### **AUTHORITY: MONTANA ENVIRONMENTAL POLICY ACT**

According to the applicable requirements of the Montana Environmental Policy Act or MEPA and its implementing rules and regulations, before a proposed action may be approved, environmental review must be conducted to identify, consider, and disclose any potential impacts of the proposed action on the affected human environment. The level of environmental review will vary with the complexity and seriousness of environmental issues associated with a proposed action. The level of public interest will also vary. The agency is responsible for adjusting public review to match these factors. *Title 75, Chapter 1, Parts 1 through 3, Montana Code Annotated (MCA)*.

Based on these factors, FWP determined a checklist supplemental EA (Draft SEA) constitutes the appropriate level of review for the proposed action. Therefore, to assess and disclose potential impacts of the proposed action, FWP prepared a Draft SEA for public review and comment. See *Public Participation Process* below.

Further, FWP must consider any substantive comments received in response to the Draft SEA and proceed in accordance with one of the following steps: determine the Draft SEA did not adequately reflect the issues raised by the proposed action and issue an Environmental Impact Statement or EIS; determine the Draft SEA did not adequately reflect the issues raised by the proposed action and issue a supplemental EA; or determine the Draft SEA adequately addressed the issues raised by the proposed action and make a final decision, with appropriate modification resulting from the analysis provided in the Draft SEA and the analysis of any substantive public comments received. See *Public Comment and FWP Response* below.

## **PUBLIC PARTICIPATION PROCESS**

The Draft SEA was made available for public review and comment from April 10 to May 1, 2023. A legal notice was published in the Helena Independent Record and the Draft SEA was posted on FWP's Public Notice webpage: <https://fwp.mt.gov/news/public-notices>. The Draft SEA was also made available for public review on the Environmental Quality Council or EQC website: <https://leg.mt.gov/mepa/search/>, by individual request, and through notice to identified interested parties. FWP received comments from 13 individuals or groups during the public comment period.

## **DESCRIPTION OF PROPOSED ACTION**

FWP established the Habitat Conservation Lease Program in 2022, consisting of 30- and 40-year lease options of priority habitats. The voluntary, incentive-based program was established to conserve priority prairie, associated riparian/floodplain, and wetland complex habitats with an initial enrollment objective of 500,000 acres over a 5-year period. The program conducted a 45-day application period during fall 2022 and only received 6 viable applications, totaling about 10,500 acres.

FWP re-evaluated details of the conservation lease program and, through the Draft SEA, proposed two modifications to the program to make habitat conservation leases more attractive and flexible for landowners and more effective as a conservation tool. These proposed changes involved 1) an increase to the payment level with discounts for hay land and cropland acres that are intermingled within a lease area and 2) a penalty-free buyout provision specifically for landowners who wish to substitute the lease with a conservation easement. The latter option would allow the landowner to buy out of the habitat conservation lease without a liquidated damages penalty, allowing them to receive full fair market value for the conservation easement. That is, a habitat conservation lease could substantially reduce fair market of a permanent conservation easement if the lease were to remain in place.

## **PURPOSE AND NEED**

FWP set out in 2022 to enroll up to 500,000 acres into the Habitat Conservation Lease Program over a five-year period. That objective remains unchanged.

The proposed action is intended to increase voluntary enrollments of high priority prairie, associated riparian/floodplain, and wetland complex habitats into the FWP conservation lease program through an increase in payment level and improved flexibility for landowners seeking future conservation options.

FWP earlier identified five habitats as being a high conservation priority. Achieving the goals of the Habitat Conservation Lease Program would help ensure long-term conservation of these habitats by protecting them from incompatible uses or developments while continuing to support traditional land uses that are compatible with wildlife.

## **ALTERNATIVES ANALYZED**

### **Alternative 1: No Action**

In addition to the proposed action, and as required by MEPA, FWP analyzes the "No-Action" alternative in the EA. Under the No-Action alternative, the proposed action would not occur. Therefore, no additional impacts to the human environment would occur. The No Action alternative forms the baseline from which the potential impacts of the proposed action may be measured.

Under the No Action alternative FWP would not make the proposed changes to the Habitat Conservation Lease Program. Under this alternative, it is unlikely that FWP would achieve the 500,000-acre enrollment objective of the program. Also, under the no action alternative, land enrollments would likely include habitats of lesser wildlife value because of a less-competitive process. That is, because of fewer landowners being interested in the program.

### **Alternative 2: Proposed Action**

Under the Proposed Action, FWP proposed to increase the payment level for conservation leases. The lease payment formula is based on a percentage of average fee title values for rangelands and floodplain/riparian habitats, both in eastern and western Montana. For 30- and 40-year conservation leases, the program was originally structured to pay within a range of 5-10% of average fee title value with a 5% bonus for the longer-term lease. Average fee title values are based on appraisals contracted by Montana Department of Natural Resources and Conservation involving State Trust Lands scattered across the state. FWP proposed to increase the payment level as follows: 15% of average fee title value for a 30-year lease and 20% of fee title value plus a 5% bonus for a 40-year lease. For hay lands and croplands that are intermingled with native rangeland habitats, FWP would pay 70% and 50%, respectively, of the per acre conservation lease value, corresponding with surrounding native habitats (that is, rangeland or floodplain/riparian).

The second proposed change is to adjust the payment requirements for landowners if they wish to buy out of a conservation lease for the purpose of substituting the lease with a perpetual conservation easement that retains the conservation values reflected in the lease. In its original form, the lease agreement allows for buying out of a lease using a pro-rated formula as follows – multiply the percent of life left in the lease by the original lease payment and add 25% of the original lease payment as liquidated damages. Under this proposal, specifically for landowners wishing to transition to a perpetual conservation easement, the landowner would have the option to buy out of the lease agreement using the pro-rated formula, but the 25% liquidated damages would not be included in the buyout formula. If a landowner wishes to buy out of the habitat conservation lease for other reasons, the agreement would still require paying the pro-rated value plus 25% liquidated damages.

### **PUBLIC COMMENT AND FWP RESPONSE**

FWP received substantive public comment on the Draft SEA. A substantive public comment was defined as the identification of a specific issue or impact. In some cases, multiple individuals provided the same or similar comment; these comments were summarized, categorized, listed once, and a single FWP response is provided below. The following constitutes a synopsis of public input received and FWP's response to those comments.

Some comments were pertinent to the Habitat Conservation Lease Program but were outside the scope of actions evaluated in the Draft SEA. Those are summarized at the end of this section.

#### **Cost**

*Comment:* Several comments expressed concern about the proposed payment structure being too high for the anticipated conservation and access benefits. A comment expressed concern about doubling the rate from what was originally proposed and recommended 1.5X may be sufficient. A comment described the program as a “great giveaway with little tangible benefits to sportsmen and women.”

*FWP Response:* The Draft SEA detailed the overall enrollment acreage goal and the general lack of participation by landowners during the first application period (pages 4-5). FWP expects both the

quantity and quality of enrollments to increase as a result of increasing the lease payment level. The Habitat Conservation Lease Program, with an upfront payment and 30- or 40-year lease options, is unique from other state, federal, or private habitat conservation opportunities. There are no similar programs to draw a direct correlation from for determining an appropriate habitat conservation lease price. Therefore, setting an overall price is largely dependent on what landowners find reasonably appealing. Because of its uniqueness, the program itself, in essence, establishes the market, based on landowner interest.

The quality of enrolled habitats – the value from a wildlife perspective – is an important aspect for defining overall effectiveness of the Habitat Conservation Lease Program. By offering a higher payment, FWP anticipates a broader cross section of landowner interest, which in turn will afford the opportunity for FWP to select from among the most strategic properties for enrollment. FWP described some of the basic ranking criteria in the original Programmatic EA (pages 15-16) that would be used for identifying higher priority lease applications.

One of the comments suggested a more incremental approach for increasing the lease price. Out of fairness to landowners considering enrollment in the program, FWP determined it better to make a one-time increase in the lease valuation formula at the start of the Habitat Conservation Lease Program and apply that consistently here forward. This avoids the possibility of incremental increases that may be viewed as unfair to earlier program enrollees who would have received lesser payments under a lower lease valuation formula.

*Comment:* A comment recommended paying a reduced rate where conservation risks are lower.

*FWP Response:* When designing the program, FWP considered a sliding scale of payment levels based on threat or differences in land or habitat values. FWP determined that approach would add complexity and increase the potential for inconsistencies in valuation and program delivery. Offering two sets of values (upland and floodplain/riparian) across two broad geographic areas of Montana with standard discounts for cropland and hay land provides a consistent and transparent layout. Ranking and awarding leases to the best habitats will also help assure funding is directed toward the greatest conservation value.

*Comment:* A comment expressed concern that the higher payment level could outcompete permanent conservation easements for landowners who are weighing both options.

*FWP Response:* FWP acknowledges that with the higher payment offered for habitat conservation leases, some landowners may choose the term lease option over a permanent conservation easement. The Habitat Conservation Lease Program is intended to provide an additional tool for habitat conservation and remains structured to not undermine or outcompete permanent conservation easements. The intent of the Habitat Conservation Lease Program is to establish long term conservation assurances over large landscapes in a relatively short period of time. The program's focus is prairie habitats, including sagebrush grasslands where the size of the conservation footprint is particularly important. Permanent conservation easements completed by FWP involve negotiated terms, individual appraisals, more robust multi-step public review and approval processes, and higher cost. FWP's goal of 500,000 acres over 5 years for prairie conservation would not be possible if permanent conservation easements were the only tool. FWP is also aware that many landowners of prime wildlife habitat who are interested in the long-term lease option, have no interest in permanent conservation easements.

*Comment:* One comment expressed concern that payment for conservation leases at the higher rate would consume all of the Habitat MT funding, representing a policy shift away from permanent forms of conservation.

*FWP Response:* Funding for the Habitat Conservation Lease Program is predominantly derived from Pittman Robertson Wildlife Restoration (PR) matched with Habitat Montana funds. Each dollar of Habitat Montana will leverage up to 3 dollars of PR. FWP anticipates funding will remain available for more permanent forms of conservation. There is also a likelihood that other non-federal funding sources may be used to leverage PR, such as state Migratory Bird Wetland Program funding for wetland complex habitats.

*Comment:* A comment expressed concern for the lack of detail on how lease values are derived in the absence of formal appraisals, stating “If appraisals are not required, questions of abusive dealing and favoritism between the agency, others in government and landowner increase markedly.”

*FWP Response:* Both the Programmatic EA (page 14-15) and Draft SEA (Page 5) provide a summary of how values will be consistently applied for the Habitat Conservation Lease Program. Through contracted appraisal, Montana Department of Natural Resources and Conservation (DNRC) periodically determines fee title values of State Trust Lands under their management responsibility. Lease values for the Habitat Conservation Lease Program are based on a set percentage of the fee title value averaged across specific portions of Montana. The Draft SEA included a map (Figure 1, page 6) for how those portions of Montana are defined. By using the DNRC appraisal data and the consistent application of a specified percent of fee title value, FWP is avoiding any possibilities of inconsistent payment levels.

*Comment:* A comment spoke in general support of the proposed increase in payment.

#### Buyout Option

*Comment:* A comment suggested the higher payment amount would make it more challenging for a landowner to buy out of the lease, particularly with the 25% liquidated damages component. A comment expressed concern that it wasn't clear who is subject to the 25% penalty if a landowner chooses to buy out of a habitat conservation lease.

*FWP Response:* The Programmatic EA and subsequent decision notice included a description of the 25% liquidated damages clause, along with a draft copy of the lease agreement. Under that original proposal, all landowners wishing to terminate a habitat conservation lease would pay the remaining pro-rated value of the lease and in addition they would have to pay 25% of the cost of the lease (liquidated damages). The purpose, in part, for the additional cost to buy out of the lease is to discourage premature ending of the lease agreements. However, for landowners intent on transitioning to a permanent conservation easement that provides habitat protections similar to the conservation lease, FWP felt it was better to not assign the same liquidated damages penalty to landowners seeking permanent conservation protection. Landowners in this circumstance who wish to buy out of the lease agreement would only be subject to paying the pro-rated value for the remainder of the lease. It may be, as one of the comments implied, that a higher lease payment by FWP could further discourage buying out of a lease, particularly for those landowners who would still be subject to the 25% liquidated damages.

*Comment:* A comment expressed support for removing the 25% add-on fee for enrolled lands. They felt this would encourage permanent protection, while the conservation lease could provide an “on-ramp for landowners to test out the requirements of contractual habitat protections while building relationships with FWP staff and members of the public.”

*FWP Response:* FWP agrees that the Habitat Conservation Lease Program will open the opportunity for the department to work with many landowners who may be new to habitat conservation programs. The department hopes that the lease experience for landowners will be positive and lead to other habitat and access opportunities, as motivated by landowner interest.

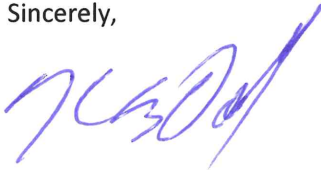
#### Comments Outside Scope of SEA

Comments received by FWP included concerns that are outside the scope of the proposed action but are generally related to the Habitat Conservation Lease Program. One or more comments reflected on each of the following: concern that the leases do not include any grazing management requirements; general support for the focal habitats of the Habitat Conservation Lease program; concern for the lack of prairie dog protection as part of the lease agreements; disagreement with the allowance for outfitting in association with conservation leases; and concern that public recreation outside of hunting and fishing should be better defined. FWP values these comments, many of which were similar to earlier comments received by the department in response to the original Programmatic EA.

#### DECISION

Based on the environmental review provided in the Draft SEA, and in accordance with all applicable laws, rules, regulations, and policies, FWP determined the proposed action (Alternative 2), will not have significant adverse impacts on the human environment associated with the proposed action and constitutes a reasonable and appropriate strategy to achieve identified objectives. Therefore, preparation of an EIS is unnecessary. FWP hereby adopts the Draft SEA as final and approves Alternative 2, the proposed action.

Sincerely,



Ken McDonald  
Wildlife Division Administrator  
Montana Fish, Wildlife & Parks