

# **Solutions for Efficient Land Transactions**

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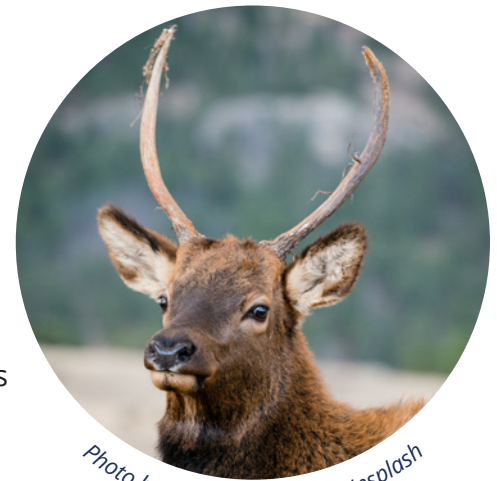


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# Introduction

Now is an important moment for land conservation in America. The federal government is poised to spend more on land conservation than it has in decades. In 2020, signing of the Great American Outdoors Act (GAOA) guaranteed a floor of \$900 million annually for the Land and Water Conservation Fund (LWCF), a significant source of funding for the land acquisition programs of the Department of the Interior (DOI) and the U.S. Department of Agriculture (USDA). The passage of the Infrastructure Bill and Inflation Reduction Act added billions to already historic levels of recent conservation investment. In 2021, President Biden signed an Executive Order establishing a goal of conserving at least 30% of U.S. land and water by 2030 and initiating the America the Beautiful Campaign for the next decade. The benefits of federal land acquisition and conservation for the public good are increasingly obvious—air and water quality, climate change mitigation, wildlife habitat, and human health and recreation to name a few—just as development pressures on America’s lands grow.

The urgency of the situation and rapid timeline necessitate federal land acquisition processes that are efficient and able to funnel increased funding at a more rapid pace to close land transactions. However, federal land acquisition processes (transactions) exhibit multiple inefficiencies that extend the timeline for getting deals done, frustrate landowners and lose potentially valuable deals in the process. Correcting these inefficiencies will be critical to meeting America’s conservation goals and serving the needs of conservation-minded landowners, while maintaining integrity and ensuring the government is not overpaying in land conservation transactions.



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This public brief identifies key efficiency challenges in federal land transactions for both direct fee purchase and easement acquisitions of DOI (Bureau of Land Management; National Park Service; Fish & Wildlife Service) and USDA (U.S. Forest Service, Natural Resources Conservation Service) agencies, and key solutions to remedy these inefficiencies. The transaction space starts from the point at which a project has been identified/prioritized for acquisition and ends at the point at which the deal is closed, and ownership of the land or easement transferred to the U.S. government (or in the case of some NRCS programs, a third party). Efficient transactions are defined as those that take less effort, cost and/or time to complete. Put another way, increasing the efficiency of transactions will involve reducing the effort, cost and time involved—for the government, landowners, and NGO partners. Efficiency also includes consideration of potential deals being lost entirely, especially following months or years of work by government staff or nonprofit partners and waiting by potential sellers. Time delays occasionally result in sellers walking away from deals.

Challenges and solutions included in this brief reflect information gleaned from extensive interviews and a series of roundtables with practitioners, landowner interests, and agency staff involved in federal land acquisition transactions. The final list of strategic recommendations—where priority and additional resources should be directed—have therefore been vetted through an iterative process with a broad range of stakeholders. There is currently a palpable positive mindset from both practitioners and agency staff on making improvements, all of whom had a willingness to talk about challenges and solutions and a commitment to making land acquisition transactions more efficient. The time is ripe for directing more resources towards solutions that can unlock greater efficiencies in America’s conservation efforts.

# Key Challenges and Solutions

This brief provides an overview of key challenges and solutions to address inefficiencies in America's federal land acquisition transactions. These key challenges and solutions were separated into first, second, and third tiers that reflect the current understanding of their relative priority. First and second tier challenges reflect those challenges for which there was strong support and solutions that seemed achievable (no one said the solution was impossible) and would have important efficiency impacts.

- **First tier challenges** include those related to appraisal and staff capacity and expertise; these challenges impact a significant number of land acquisition transactions across multiple DOI and USDA agencies and solutions have strong Congressional and other stakeholder support.
- **Second tier challenges** are important but not as pervasive in their impact on the efficiency of land acquisition transactions because they do not necessarily touch on all land transactions and their impact on the transactions they do affect may be small. These involve components of completing the due diligence process such as addressing mineral interests, conveying limited or special warranty deeds, removing buildings or structures, hazmat review, and surveys.
- **Third tier challenges** are those that will require more agency/practitioner support, are longer-term in nature, or require more research on potential efficiency impacts.

## Strategic Recommendations

### 1. **First tier: Take action to implement short- and long-term solutions to address appraisal delays at DOI.**

Appraisal is a critical piece of the land conservation transaction, and typically comes at the end of the due diligence process. Efficient appraisal at the federal government is hampered by historically strict adherence to Yellow Book appraisal standards; staff expertise and capacity issues (e.g., too few appraisers/review appraisers both within and outside of the federal government, where some states only have two qualified appraisers); new rules governing appraiser standards and conduct that make appraisers reluctant to discuss value outside of an official appraisal; and disagreements over valuation between the appraiser and potential sellers, a significant issue in rapidly changing and appreciating property markets in many areas of the country that leads to higher and higher landowner expectations of their property's value. The lengthy nature of the appraisal process also means that comparable property values can quickly become stale.

Appraisal delays are the single largest efficiency challenge to federal land acquisition at DOI. Appraisals for DOI land acquisitions are implemented by the Appraisal and Valuation Services Office (AVSO), an independent, centralized appraisal organization in the Office of Policy, Management and Budget in the Department of the Interior that services all the Department's agencies. Before 2003, when appraisals were moved from the agencies and centralized in AVSO, in-house appraisals were generally completed in 90 days. Today, many appraisals take AVSO over 200 days to complete.

Centralization of AVSO has led to increased delays and a breakdown in communication with potential sellers. Use of strict Yellow Book standards in an appraisal landscape with limited appraisers certified to conduct Yellow Book appraisals leads to further delays. In July 2022, the DOI Office of the Solicitor sent a memo to DOI Assistant Secretaries to clarify that DOI land acquisitions do not require Yellow Book appraisals and that USPAP appraisals are sufficient for most purposes. However, the memo has not been self-implementing: the agencies continue to consult with the Office of the Solicitor on whether Yellow Book is required or not, pushing the Office past its capacity and slowing the land acquisition timeline. In addition, the Solicitor's memo has no relevance to grant program-based land acquisition and easements which are equally slowed by adherence to Yellow Book appraisal rules, and which make up most of the department's acquisitions.

#### **Recommendations:**

- A short-term solution with powerful efficiency impacts would be to implement the Solicitor's Memo more fully by clarifying that agencies can move ahead with USPAP appraisals in most instances.
- Reverse the 2019 FAIR regulation language that states Yellow Book appraisals are required for grant-funded land acquisition.
- In the short term, staff capacity issues resulting from AVSO centralization can be addressed through hiring for in-house capacity at AVSO and encouraging AVSO to look for efficiencies in the appraisal process rather than defaulting to the Yellow Book standard narrative format.
- A longer-term solution is decentralizing AVSO by restoring appraisal functions back to the agencies and allowing for in-house appraisals. While this would also have powerful efficiency impacts and restore better communication with potential sellers, this is a politically charged issue and AVSO is resisting the change.

## **2. First tier: Focus on activities that can bolster the progress already underway at both DOI and USDA to address staffing capacity and expertise challenges. This is particularly important at USDA/USFS, where many inefficiencies are traceable to staff capacity and expertise needs.**

The Biden Administration inherited a vastly reduced federal workforce for federal land acquisition due to years of de-emphasis and de-prioritization of federal land acquisition concurrent with high levels of retirements and resignations. As a result, staff capacity and expertise are key efficiency challenges in federal land transactions. Capacity refers to the number of people filling key positions and able to dedicate enough time to land transactions to meet demand; expertise refers to the knowledge and experience of these staff to handle routine elements of land transactions as well as creatively solve the more nuanced or complicated issues that can arise. As it stands,

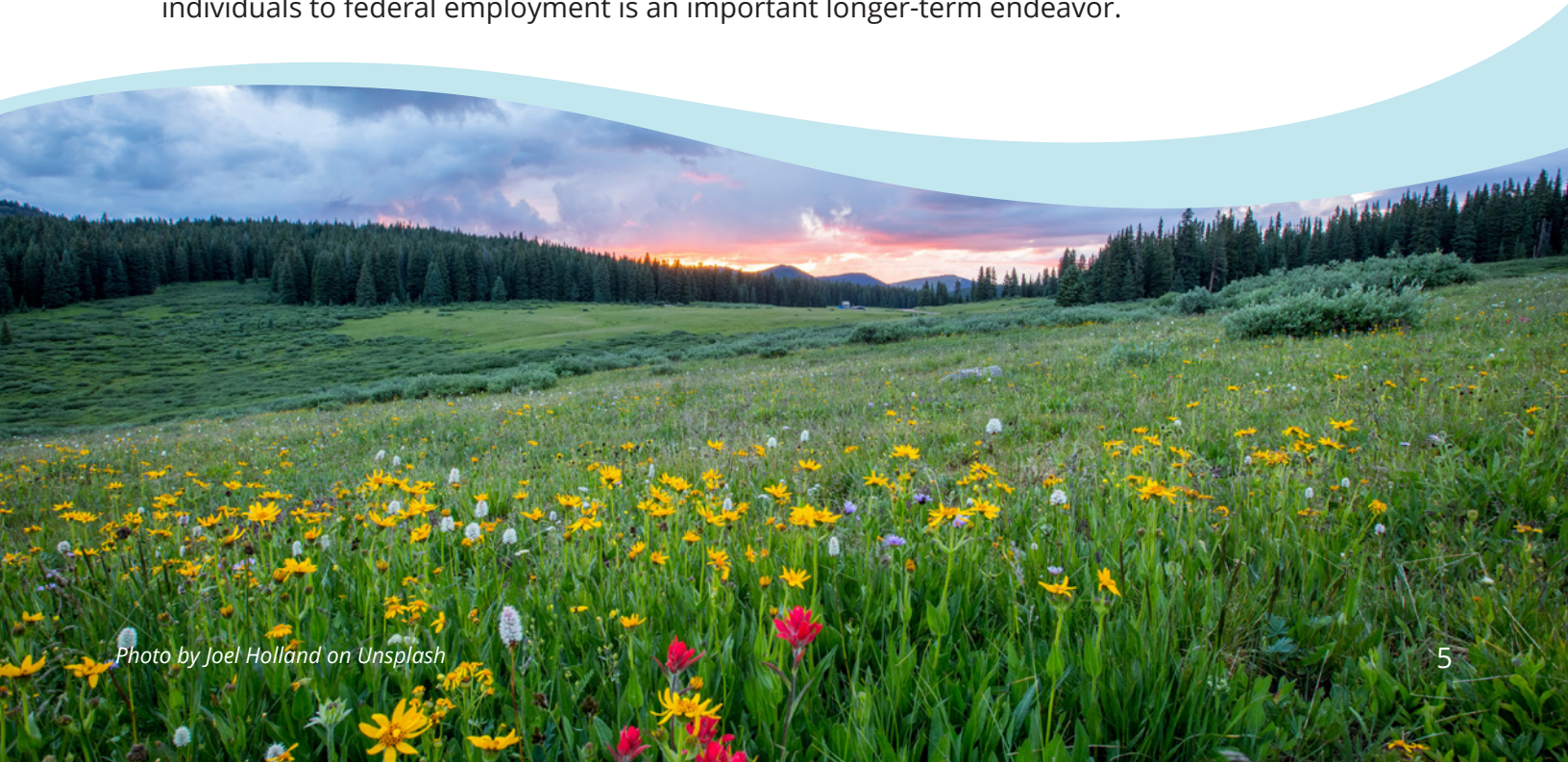
the workload associated with land transactions exceeds what the existing staff can complete effectively just as permanent funding of LWCF and other recent funding (e.g., the IRA) are going to push more money and projects through the government.

Overall staffing numbers in many land acquiring agencies have declined. Many experienced staff have left key land acquisition positions—including in realty and appraisal—due to retirements and staff turnover; these positions have until recently not been prioritized for filling. In addition to impacting in-house acquisition capacity in the federal government, staff turnover also leads to a loss of relationships between third parties (e.g., conservation partners) and the federal government that are instrumental in many land transactions. Current realty staff and other staff involved in land transactions work (e.g., Office of General Counsel (OGC) title review for USDA transactions) have multiple responsibilities of which land acquisition can be a small part: the portfolio of a realty specialist usually includes land use authorizations, rights-of-way, encroachments and trespass, title claims, and easements. USFS staff wear many hats and are often called to other duties such as wildfire response and special uses; land acquisition might be 5% of the specialist's program of work. There have also been reductions in in-person training opportunities due to cost and Covid restrictions and virtual training is still new for these agencies, leaving expertise gaps created by departing staff unaddressed.

With new funding and attention to staff capacity and expertise challenges, all agencies are working at staffing up and developing new training modules and programs. These efforts need to be bolstered and supported moving forward as agencies make budget requests for additional staff and training and take other actions to remedy these challenges. A continued emphasis on right sizing staffing and sufficient training will be necessary, especially now that land conservation funding is at historic levels. Specific staff capacity and expertise gaps vary by agency and geographic area and are an important area of future inquiry.

Staff capacity and expertise is a particular efficiency challenge at USFS, where staff limitations extend beyond realty-focused staff to title review at OGC. Addressing staffing at USFS is likely to have a larger impact than fixing internal appraisal processes or other challenges.

Another capacity issue is the pipeline of certified appraisers. Strengthening the pipeline of certified appraisers and other talent specific to federal land acquisition transactions and attracting these individuals to federal employment is an important longer-term endeavor.



## Recommendations:

- Agencies should implement a roundtable or workshop series on right-sizing staffing, facilitated by a third party who can also engage NGOs and firms with expertise and experience in this field. Such a workshop should explore how to better utilize new federal funding to fund more individuals and teams dedicated to the land acquisition function of their department. The workshop should also explore how to increase efficiencies in hiring; the process used today is far too slow.
- Agencies should build existing staff expertise through a strategic combination of in-person and virtual training. Technology should be utilized to increase communication, networking, and knowledge sharing across staff groups and among individuals. LWCF funds can be leveraged to support additional training opportunities.
- A joint working group could be created to explore how external capacity in professions such as appraisal can be increased. Members of such a group could include agency leads, appraisal industry experts, and workforce development experts.

### 3. Second tier: Increase consistency, clarity, and communication around land transaction processes.

Second-tier efficiency challenges include lack of consistency, clarity, and communication around existing rules and processes governing land transactions both internally within agencies and externally with NGO partners and landowners. Many of the challenges relate to the appraisal process. Consistency, clarity, and communication challenges sometimes result from lack of familiarity with existing guidance, and sometimes from processes that are established practice rather than being rooted in guidance or policy and could be more formally standardized. Second tier challenges include appraisal challenges, and challenges related to structures and surveys in the land acquisition process.

#### ***Acquisition from NGOs***

Land acquisition agencies work closely with NGO partners on some land acquisition projects. Because appraisal is required when an NGO pre-acquires a piece of land and when the federal government purchases the land from the NGO, an efficiency opportunity arises if implementing two appraisals can be avoided or if surprises in the second appraisal can be avoided by selecting a qualified appraiser for the first NGO appraisal. Early and close communication between the federal agency and the NGO partner around appraisal and appraiser selection are critical.

#### ***Restricted Use Appraisals***

Chapter 31.2 of the 2021 update to the Forest Service Appraisal Handbook provides guidance on Restricted Use Appraisals. Restricted Use Appraisals are helpful to provide information on value to landowners/sellers and project partners ahead of the official appraisal, so that sellers aren't surprised by lower-than-expected valuation. According to the Handbook, Restricted Use Appraisals are allowed under USPAP but not under Yellow Book standards; however, there are some exceptions and some discretion left to the Regional Appraiser. NGO partners can implement Restricted Use Appraisals for transactions they are party to. In this case, it is critical that early, clear, and consistent communication exist between the NGO partner and the USFS to prevent harmful discrepancies between the Restricted Use Appraisal and the Yellow Book appraisal—if the Restricted Use Appraisal is meaningfully higher to the seller than the Yellow Book appraisal, the deal could be lost or further delayed.

## Appraisal Shelf Life

The former appraisal shelf life for ACEP—ALE appraisals (6 months) has been changed to an appraisal needing to be completed within 6 months of obligation to be valid no matter how long the deal takes to close, but this information might not be apparent to all project partners. Better communication of the new ACEP-ALE appraisal standard to NRCS state staff and project partners would help address this challenge.

## Structures

Acquiring land with structures (i.e., buildings) can pose problems for the acquiring agency. Unless needed for public purposes, structures pose liabilities including safety and environmental contamination, but in some cases, structures might be utilized. General practice is to avoid acquiring structures either by carving out improvements from the purchase or ensuring the seller demolishes structures before closing.

Some on-the-ground agency personnel for the USFS believe that the agency should provide more direction on options for dealing with structures; however, Forest Service Handbook 5409.13, section 12.4—Acquisition of Improvements, provides guidance on acquiring land with structures and provides sufficient direction. It identifies a preference for acquiring properties without improvements. The Handbook also outlines considerations for acquiring properties with improvements in place if removal is not possible and in the public interest.

## Surveys

Yellow Book standards do not address if or when land should be surveyed to appraise it. The Yellow Book does recognize that the appraiser may need to consult with other experts such as engineers, lawyers, title examiners, and surveyors. Waiting for survey completion before initiating appraisal was identified as a challenge that extends the land transaction timeline—surveys can take longer than 90 days and are subject to issues of limited staff capacity as well. Initiating the appraisal early and concurrent with the survey would shorten the timeline. Whether recorded acres instead of survey acres are useable at time of appraisal is at the discretion of the region; national USFS guidance on this does not exist.<sup>1</sup> If recorded acres are used, supplemental appraisal analysis can be conducted to incorporate any differences in surveyed acres once the survey is complete.



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## 4. Third tier: Continue to fill knowledge gaps to understand the third-tier challenges and solutions to elevate.

Further exploring the third-tier challenges and solutions for their potential impact on efficiency would be beneficial. These include things such as listing project partners as intended users of appraisals, encouraging donations of mineral interests to address severed estate concerns, and waiving match requirements for equity purposes.

<sup>1</sup> Recorded acres refer to what the agency has in their system of records; they can usually refer to the property deed from the local county courthouse for the property.

### ***Intended Users of Appraisals***

Intended users of appraisals are parties to the transaction or entities who have done considerable work to bring the transaction to the table; however, not all project partners may be listed as intended users. The Chief Appraiser's office of the USFS has been providing technical assistance to the regions to assist them in writing Requests for Appraisal Services, with a focus on identifying the client (always USFS), the intended users of the appraisal, and the purpose/use of the appraisal. Further clarification on the intended user issue was provided in an update to the Forest Service Appraisal Handbook in 2021 at 5409.12 where the USFS appraisal staff are encouraged to work directly with people in the field to define the intended users and use of the appraisal and engagement with intended users is supported. Identifying these pieces of the appraisal assists in properly defining the scope of work for the appraiser and improves engagement with project partners.

### ***Mineral Interests***

Mineral rights can be severed from land and conveyed as a separate estate. In the public domain states of the west, these mineral rights can be in the form of mining claims under the 1872 Mining Law. Where land is privately owned, the owner can sell and convey the mineral rights while retaining surface rights, such as with oil and gas leases. It has been customary for sellers of land to retain mineral rights when otherwise conveying the fee title. The exercise of a mineral right can impact the surface estate in cases such as strip mining or roads associated with drilling rigs, and it is often not possible to acquire the outstanding mineral rights either because it is difficult to value them or because the rights are held by corporate entities that may no longer exist. For this reason, mineral interests can be a barrier to federal land transactions, and this topic warrants further exploration to find solutions.

### ***Match***

For program match requirements, larger organizations and some states are at an advantage to meet match requirements; poorer cities and states are often unable to produce enough match. For this reason, there is an equity issue in some grant programs for land acquisition. An example of legislation that could serve as a model for bringing more equity into grant programs is the "Outdoors for all Act" (introduced during the 117<sup>th</sup> Congress) which would codify the Outdoor Recreation Legacy Partnership (ORLP) program in federal law and guarantee funding for the program. The ORLP program supports urban parks in underserved communities across the country. While this legislation requires 100% matching dollars for any grant, it also provides for a waiver: the Secretary of the Interior may waive all or part of the matching requirements if the Secretary determines that "no reasonable means are available through which the eligible entity can meet the matching requirements, and the probable benefit of the project outweighs the public interest in the matching requirement."





**5. All tiers: New America the Beautiful and Justice40 initiatives have increased the focus on achieving equitable outcomes from federal conservation spending; a better understanding of the trade-offs between efficiency solutions and equity is necessary to identify win-win opportunities.**

Specifically, match requirements and income waiver requirements have direct equity implications; however, the impact on equity of many of the challenges and solutions identified through this activity are unclear. An ongoing commitment to prioritize equitable impacts will be critical to appropriately guide changes to federal land acquisition programs. With regard to indigenous lands, tribal sovereignty and land protection, efforts to increase efficiency in federal land transactions must be put into context; the federal government appointed itself owner of land that did not originally belong to it. Many tribes are interested in restoring access to and ownership of ancestral lands, and finding policy and programmatic ways to do so would be beneficial. In this vein, one new effort is tribal co-stewardship agreements with National Parks.