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Forest Service Grazing Preference

Magdalena Pellatz

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Forest Service Grazing Preference

Magdalena Pellatz[*]

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ABSTRACT

The Thunder Basin National Grassland is facing an imminent, and perhaps unique, problem. With the advent of surface strip-mining in the late 1970s, the Forest Service withdrew public lands within the National Grassland from grazing use and transferred the lands to energy production use. Some of that land has been fully mined. These mines are about to complete their

[*] 3rd Year Law Student at the University of Wyoming College of Law. Note from the author - I was inspired to write on this topic by my father, who has been the rangeland manager for the Thunder Basin Grazing Association for the past 17 years. The Thunder Basin Grazing Association is one of three grazing associations in the Thunder Basin National Grassland. My family currently resides within the boundaries of the Thunder Basin National Grassland, and both sides of my family own ranches with permits to federal Forest Service-managed land in the Thunder Basin National Grassland. As such, this topic is truly relevant, not only to my community, but also to my immediate family.

reclamation process—where the land is restored to a condition suitable for its prior use—after which it will be released from the mines' special use permits and returned to grazing. Currently, there are no explicit guidelines in place for the distribution of grazing permits on the reclaimed land. To address current grazing permit administration issues within the National Grasslands, the Forest Service should return to the historic right of grazing preference by strengthening and enumerating the remnants of that right still present in the rules and regulations of the Forest Service and grazing associations. This historic right has survived despite significant difficulty applying it within the courts and varying terminology within Forest Service regulations. Forest Service grazing preference, unlike similarly named grazing preferences on Bureau of Land Management lands, creates a limited, nonpossessory property interest in grazing land which provides the holder with priority for renewal of the grazing permit if, and only if, the Forest Service decides to continue to use the land for grazing. It does not prioritize grazing over other potential land uses but rather provides a priority for the permit over other potential permittees. If applied, grazing preference would require reissuance of the grazing permits to the party that held the grazing preference rights prior to the withdrawal of the land. Not only would applying grazing preference address the imminent issues within the Thunder Basin National Grasslands, but it would bring a number of ancillary benefits, such as economic stability and effective stewardship.

I. INTRODUCTION

The Thunder Basin National Grassland is an area of around 626,270 acres in northeastern Wyoming.[1] The Grassland is an ecologically unique ecotone where four different ecosystems combine: the sagebrush steppe, the northern mixed grass prairie, the shortgrass prairie, and the Great Plains.[2] This combination means species that usually do not coexist, such as the greater sage-grouse and the black-tailed prairie dog, compete for resources.[3] Also noteworthy for its energy production, the Thunder Basin

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1 U.S. FOREST SERV., U.S. DEP'T OF AGRIC., LAND AREAS OF THE NATIONAL FOREST SYSTEM 52 tbl.4 (2022), https://www.fs.usda.gov/land/staff/lar/LAR2022/FY2022_LAR_book.pdf.

2 Ana. D. Davidson et al., *Boom and Bust Cycles of Black-tailed Prairie Dog Populations in the Thunder Basin Grassland Ecosystem*, 103 J. MAMMALOGY 1112, 1113 (2022); Telephone Interview with David W. Pellatz, Range Manager, Thunder Basin Grazing Ass'n and Exec. Dir./Conservation Coordinator, Thunder Basin Grasslands Prairie Ecosystem Ass'n (Nov. 21, 2023); *see* Lauren M. Porensky, Rachel McGee & David W. Pellatz, *Long-term Grazing Removal Increased Invasion and Reduced Native Plant Abundance and Diversity in a Sagebrush Grassland*, 34 GLOB. ECOLOGY & CONSERVATION 2, 11 (2020). David Pellatz has coordinated research in the area since 2007 and has co-authored numerous articles on the flora and fauna of the Thunder Basin National Grassland.

3 Telephone Interview with David W. Pellatz, *supra* note 2.

National Grassland is home to the largest coal mines in the world.[4] Outside of energy production, the economy of the Thunder Basin National Grassland is based in agriculture, centered around livestock ranching.[5] Ranches range in size from small, single-family operations, to larger, multi-family operations, to large corporate ranches.[6] A number of the ranches, including Steinle Ranch, Pellatz Ranch, and Riehle Ranch, have been owned and operated by the same families for more than 100 years.[7] The ranchers run cattle, sheep, and bison on a checkerboard of privately owned lands as well as Wyoming state public lands and federal lands managed by Forest Service, which allow use via leases or a permit system.[8]

The federal public lands within the Thunder Basin National Grassland are administered by three grazing associations, the Inyan Kara Grazing Association, the Spring Creek Grazing Association, and the Thunder Basin Grazing Association (the TBGA).[9] These grazing associations are a unique form of cooperative land management where the community is directly involved in grazing management of federal, state, and private lands within the association boundary.[10]

The grazing associations currently work with the Forest Service to administer the public land within the Thunder Basin National Grassland and hold overarching permits directly from the Forest Service.[11] In turn,

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4 *World's Ten Largest Coal Mines in 2020*, MINING TECH. (Sept. 6, 2021), https://www.mining-technology.com/marketdata/ten-largest-coals-mines-2020/?cf-view [https://perma.cc/H38T-52PS].

5 Telephone Interview with David W. Pellatz, *supra* note 2.

6 *Id.*

7 *Id.* These are the ranches owned by the author's maternal family (Steinle Ranch), maternal extended family (Riehle Ranch), and paternal family (Pellatz Ranch).

8 *Id.*

9 *Id.*

10 Edward G. Grest, *The Range Story of the Land Utilization Projects*, 6 J. RANGE MGMT. 44, 48 (1953), https://repository.arizona.edu/bitstream/handle/10150/648478/4523-4403-1-PB.pdf. These are formal grazing associations, as distinguished from any of the informal, historical groups of ranchers who gathered to decide grazing in their area. *See id.* at 47. One early mention of these associations is in documents from the Soil Conservation Service. Office Memorandum from Joy J. Deuser, Regional Land Mgmt. Div. Chief, Soil Conservation Serv., U.S. Dep't of Agric., to Edward G. Grest, Land Mgmt. Div. Chief, Soil Conservation Serv. (Nov. 2, 1953) (on file with author). Rexford Tugwell likely influenced the use of this specific form of administration during the time that the federal lands spent in the Resettlement Administration. *See* REXFORD G. TUGWELL, THE DIARY OF REXFORD G. TUGWELL: THE NEW DEAL 1932-1935 115 (Michael Vincent Namorato ed., 1992). Regardless of origin, the Soil Conservation Service considered them the most successful version of community management of federal land. *See* Grest, *supra*, at 44.

11 Elizabeth Howard, *Management of the National Grasslands*, 78 N.D. L. REV. 409, 424–25 (2002). For more information concerning the cooperation of the grazing associations and the Forest Service, *see* Agreement between U.S. Dep't of Agric. U.S. Forest Serv. and Thunder Basin Grazing Ass'n (Feb. 22, 2022) [hereinafter 2022

the grazing associations distribute individual permits to their members.[12] Grazing associations are also responsible for the enforcement of their own and the Forest Service's rules and regulations.[13] This creates two levels of grazing access: first, the lands are leased to the associations for grazing, and secondly, the associations issue permits to members for grazing on federal lands within the National Grasslands.[14] Though the lands are managed by the Forest Service, any use for grazing on them is administered by the grazing associations.[15]

Per its agreement with the Forest Service, the TBGA is authorized to "administer the permitted livestock grazing activities of [its] members."[16] Other uses of the National Grasslands, such as energy production, recreation, or use for cropland, are outside the purview of the TBGA and are not covered by their agreements with the Forest Service.[17] If the land is administered for any primary use other than grazing, the land must be withdrawn from the TBGA's administration and managed by the Forest Service directly.[18]

Starting in the late 1970s, the coal mines in southern Campbell County and in northern Converse County began acquiring land in advance of mine

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Association Permit] (on file with author); 36 C.F.R. § 222.3(c)(1) (2023); 36 C.F.R. § 222.4(b) (2023); H.H. WOOTEN, THE LAND UTILIZATION PROGRAM 1934 TO 1964 31–33 (1965); 36 C.F.R. § 222.7 (2023); U.S. FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE HANDBOOK 2209.13 ch. 10 (1992) [hereinafter 1992 FOREST SERVICE HANDBOOK] (available at https://www.fs.usda.gov/cgi-bin/Directives/get_dirs/fsh?2209.13). Other grazing associations may have different language in their agreements, but the general intent and purposes is the same. The TBGA Association Permit says, "This agreement is the Association's term grazing permit." 2022 Association Permit, *supra*, at 1.

12 2022 Association Permit, *supra* note 11, at 3, 6, 8. The Agreement describes the individual level permits as "Association-issued permits (which are not Forest Service permits) . . . for livestock grazing." *Id.* at 6.

13 *Id.* at 5, 7. "[T]he Association. . . is [responsible] for the… administration of those permits . . . . Administration shall be in accordance with applicable Federal law, regulation. Forest Service policies and procedures, and Forest or Grassland Plan direction." *Id.* at 5.

14 *See id.* at 2, 5, 7. "'Association Term Grazing Permit' is a grazing permit issued by the Association to a member authorizing livestock grazing on certain lands covered by this Agreement." *Id.* at 2. "The Forest Service will: . . . Make available to the Association the NFS lands . . . described . . . for livestock grazing purposes." *Id.* at 5. "The Association will: . . . Issue Association term grazing permits for the lands covered by this Agreement." *Id.* at 7.

15 *See id.* at 4 (noting the agreement "[a]uthorize[s] the Association to administer the permitted livestock grazing activities"); Telephone Interview with David W. Pellatz, *supra* note 2.

16 2022 Association Permit, *supra* note 11, at 5 § B(1).

17 *Id.* at 5 § C(4), (7), 10 § F(2).

18 *Id.* at 5 § D(16).

operations.[19] Some of those lands had been public lands managed by the Forest Service through the TBGA and used for grazing by local ranchers via a permit process.[20] Those lands were removed from grazing and administered under special use permits that allowed for coal mining.[21] The special use permits currently cover approximately 43,000 acres of Forest Service-managed public land within the Thunder Basin National Grassland.[22]

The method the coal mines use is called strip-mining.[23] When this method is employed, the surface of the ground is completely destroyed.[24] Once the coal is mined, the mines refill the hole created by the extraction and complete the process of reclamation, or the rebuilding and refurbishing, of the land.[25] The mining companies then restore the surface to make it appropriate for its prior use, typically grazing.[26] However, since the land was originally qualified as submarginal, most land reclaimed by the mines is restored to forage production that is greater than its original condition.[27]

Once the mines complete extraction of the coal and subsequent reclamation of the land, those lands will cease to be managed under the mines' special use permits.[28] Historically, lands removed from the TBGA's control and given to other uses have returned to the TBGA's control once the other uses were complete.[29] For example, in February of 1943, around 2,100 acres were withdrawn from the TBGA's control and dedicated to use by the War Department "as a bombing and gunnery range."[30] In July

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19 Telephone Interview with David W. Pellatz, *supra* note 2. Primary documents are not generally accessible but are available from the author upon request.

20 *Id.* Primary documents are not generally accessible but are available from the author upon request.

21 *Id.* Primary documents are not generally accessible but are available from the author upon request.

22 *Id.* Primary documents are not publicly accessible. For more information, contact the author.

23 C. Andrew Cole, *Surface Mining, Strip Mining, Quarries*, *in* ENVIRONMENTAL GEOLOGY: ENCYCLOPEDIA OF EARTH SCIENCE 586–87 (David E. Alexander & Rhodes W. Fairbridge eds., 1999).

24 *See Reclamation*, WYO. MINING ASS'N, https://www.wyomingmining.org/reclamation/ [https://perma.cc/NA5N-KM34] (last visited Nov. 21, 2023).

25 *Id.*

26 PEABODY ENERGY INC., ENVIRONMENTAL, SOCIAL, AND GOVERNANCE REPORT 18 (2023), https://peabodyenergy.com/Peabody/media/MediaLibrary/2023_Peabody_ESG_Report.pdf; Mickey Steward, *Postmining Land Use, in* HANDBOOK OF WESTERN RECLAMATION TECHNIQUES 6-2 (Frank K. Ferris et al. eds., 2d ed. 2006).

27 *See infra* notes 62–63 and accompanying text; Telephone Interview with David W. Pellatz, *supra* note 2.

28 Telephone Interview with David W. Pellatz, *supra* note 2.

29 *See infra* notes 30–39 and accompanying text.

30 Letter from A.E. McClymonds, Reg'l Conservator, Soil Conservation Serv., U.S. Dep't of Agric., to Thunder Basin Grazing Ass'n (Feb. 24, 1945) (on file with author).

of 1943, the bombing and gunnery range was relocated to other lands, which were then withdrawn from the grazing association's control; those lands totaled around 700 acres.[31] The land withdrawn in February of 1943 returned to grazing administration by the TBGA.[32] Then, in 1947, when the land was no longer needed for a bombing and gunnery range, it was also returned to the TBGA to administer for grazing use.[33] Significantly, those lands were subsequently re-permitted to the original member permittees or their successors.[34]

Similarly, in 1941, the government designated 280 acres for "the cultivation and growing of crops by the operators in the area."[35] Because the TBGA only administers grazing uses, the land was withdrawn from the TBGA and the direct permit to the farmer was administered by the government.[36] In 1945, the government transferred forty acres of that land back to the TBGA for grazing use.[37] The rest of the land was also returned to grazing use through the TBGA in 1953.[38] Just like the lands for the bombing range, these lands were re-permitted to the original member permittees or their successors.[39]

If the same pattern is followed here, the reclaimed public lands from the mines will return to grazing use under the TBGA's control within the next thirty years.[40] Neither the current contract governing the relationship

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31 Letter from H.E. Engstrom, Acting Reg'l Conservator, Soil Conservation Serv., U.S. Dep't of Agric., to Thunder Basin Grazing Ass'n (July 13, 1943) (on file with author).

32 *Id.*

33 Letter from Peter P. Goerz, Colonel, Corps of Eng'rs, to The Chief, Soil Conservation Serv. (Nov. 24, 1947) (on file with author); Telephone Interview with David W. Pellatz, *supra* note 2.

34 Telephone Interview with David W. Pellatz, *supra* note 2. Primary documents are not generally accessible but are available from the author upon request.

35 Letter from A.E. Jones, Acting Reg'l Conservator, Soil Conservation Serv., U.S. Dep't of Agric., to Thunder Basin Grazing Ass'n (Jan. 9, 1941) (on file with author).

36 *Id.*

37 Letter from A.E. McClymonds, *supra* note 30; Telephone Interview with David W. Pellatz, *supra* note 2.

38 Telephone Interview with David W. Pellatz, *supra* note 2; Grazing Permit from the Soil Conservation Serv. to Victor J. Nachtman (Feb. 25, 1952) (on file with author); Grazing Permit from the Thunder Basin Grazing Ass'n to Victor J. Nachtman (April 1, 1953) (on file with author).

39 Telephone Interview with David W. Pellatz, *supra* note 2. Primary documents are not generally accessible but are available from the author upon request.

40 *See supra* notes 30–39 and accompanying text; Telephone Interview with David W. Pellatz, *supra* note 2. While the current Forest Service Management plan does not explicitly say that the lands will be returned to grazing use, it does say that "the emphasis is toward traditional commodity uses, primarily grazing." U.S. DEP'T OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT AND LAND AND RESOURCE MANAGEMENT PLAN REVISION 33 (2002). More specifically, the plan says that "minerals exploration and development and livestock grazing will be significant management activities," that "reclamation activities will restore the area to a reasonable level of its pre-mining

between the TBGA and the Forest Service nor their rules provide guidance for administering grazing permits returned to the TBGA.[41] This lack of guidance raises concerns that some ranchers who lost the use of their permits many years ago may face a second loss in the future, if the reissuance of permits does not occur in the way they anticipated.[42] To address these current grazing permit administration issues within the National Grasslands, the Forest Service should return to the historic right of grazing preference by strengthening and enumerating the remnants of that right still present in the rules and regulations of the Forest Service and grazing associations.[43]

Part I of this Comment briefly covers the history of grazing within the Forest Service, with a specific focus on the development of the National Grasslands.[44] It discusses the two grazing programs within the Forest Service and how grazing preference affects them both.[45] Finally, this Part examines the confusion among grazing programs on Bureau of Land Management (BLM) lands, Forest Service lands in the National Forests, and Forest Service lands in the National Grasslands.[46] This complexity complicates how courts treat grazing preference across the three programs. Part II begins with an overview of the current Forest Service regulations affecting grazing preference.[47] It then explains the Forest Service doctrine of grazing preference in terms of what it is—a limited, nonpossessory property interest with right of renewal—and what it is not—a right to graze.[48] Part II ends by tracing grazing preference through its many name variations, both in the courts and the Forest Service documents.[49] Part III advocates for both Forest Service and the grazing associations to change the language of their implementing documents to clarify and solidify the doctrine of grazing preference.[50] This Part focuses on the TBGA *Rules of Management* as an example of the types of changes the Forest Service and

condition," and that "[w]hen mineral activities are concluded, the disturbed lands will be reclaimed to blend in with adjacent undisturbed areas." THUNDER BASIN NATIONAL GRASSLAND LAND AND RESOURCE PLAN 2-21 (2001). Finally, it characterizes the largest amount of the land in the area as "Rangeland with Broad Resource Emphasis," with the only other two uses being "Mineral Production and Development" and a very small amount of "Big Game Range." *Id.* at 2-22. Put together, this strongly implies that, if the use is no longer mineral development, it will be used for rangeland, and that goal is the intent of the reclamation process in the area. Further, the TBGA fully expects this result. Telephone Interview with David W. Pellatz, *supra* note 2.

41 *See* discussion *infra* Part III.A.

42 Telephone Interview with David W. Pellatz, *supra* note 2.

43 *See infra* Part IV.

44 *See infra* Part I.

45 *See infra* Part I.

46 *See infra* Part I.

47 *See infra* Part II.

48 *See infra* Part II.

49 *See infra* Part II.

50 *See infra* Part III.

the grazing associations should make and concludes by explaining the practical effects that such an application of grazing preference would have on the impending problem.[51] Finally, Part IV discusses the policy benefits that would result if the changes advocated for in Part III were made.[52]

II. LAND USE POLICY

A. The Beginning of the Forest Service

Currently, the majority of federal grazing land is managed by the BLM rather than the Forest Service.[53] However, the Forest Service has a longer history of federal land management and has been tasked with managing the National Grasslands.[54] In 1876, Congress established the Office of Special Agent within the Department of Agriculture to monitor the conditions of America's forests.[55] The Office of Special Agent expanded into the Division of Forestry in 1881.[56] Then, Congress passed the Forest Reserve Act of 1891, which allowed the President to set aside public land into "forest reserves" managed by the Department of the Interior.[57] In 1905, President Theodore Roosevelt transferred the forest reserves from the Department of Interior to the Department of Agriculture, which placed them in the Division of Forestry, renaming that agency the United States Forest Service.[58]

When the forest reserves were managed by the Department of the Interior, grazing was officially prohibited because the purpose of the reserves was to preserve a supply of timber for the nation.[59] However, the public demand to use the land for grazing and the lack of government supervision meant the land continued to be grazed illegally.[60] When Congress gave the Forest Service management of the National Forests, it

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51 *See infra* Part III.

52 *See infra* Part IV.

53 *See National History*, BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, https://www.blm.gov/about/history/timeline [https://perma.cc/2DWA-WU6D] (last visited Aug. 8, 2024).

54 BLM was not created until 1946, *id.*, while Forest Service was established in 1905. *Our History*, U.S. FOREST SERV., U.S. DEP'T OF AGRIC., https://www.fs.usda.gov/learn/our-history [https://perma.cc/SL2N-7PX2] (last visited June 20, 2023).

55 *Our History*, *supra* note 54.

56 *Id.*

57 *Id.*

58 *Id.*; GIFFORD PINCHOT, THE USE OF THE NATIONAL FOREST RESERVES: REGULATIONS AND INSTRUCTIONS 10 (1905).

59 B.H. Kosco, & J.W. Bartolome, *Forest Grazing: Past and Future*, 34 J. RANGE MGMT. 248, 249 (1981); PINCHOT, *supra* note 58, at 7.

60 Kosco & Bartolome, *supra* note 59, at 249; Bill Steven Stern, Permit Value: A Hidden Key to the Public Land Grazing Dispute 14–15 (Apr. 22, 1998) (M.A. thesis, University of Montana).

required the Forest Service to both protect and allow for legal use of the land.[61]

B. *The Beginning of the National Grasslands*

In the early 1930s, as part of his New Deal program, President Franklin Roosevelt supported legislation authorizing the government to buy back submarginal land from impoverished homesteaders.[62] This land was placed into the Land Utilization Projects (LUPs), the majority of which eventually became the National Grasslands.[63] Other public land was also added to the purchased lands.[64]

Initially established within the Agricultural Adjustment Administration in 1934, the LUPs were moved to the Resettlement Administration at its creation in 1935.[65] In 1937, the Resettlement Administration was moved under the auspices of the Department of Agriculture.[66] This move to the

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[61] Kosco & Bartolome, *supra* note 59, at 249.

[62] *See* WOOTEN, *supra* note 11, at v.

[63] *Id.* at v, 30–33, 38; *see* Howard, *supra* note 11, at 409–10.

[64] *See* Exec. Order No. 10,046, 14 Fed. Reg. 1375 (1949); WOOTEN, *supra* note 11, at 83. Under E, item one is the transfer of the land utilization program, and four is the transfer of lands acquired under emergency program. *Id.* The fact that these are listed separately suggests multiple sources of the land. *Id.*

[65] Agricultural Adjustment Act, Pub. L. No 73-10, § 10(a), 48 Stat. 31, 37 (1933) (declared unconstitutional in United States v. Butler, 297 U.S. 1, 77–78 (1936)); Exec. Order No. 6910-B (1934), http://www.fdrlibrary.marist.edu/_resources/images/eo/eo0024.pdf [https://perma.cc/8DAV-X48Q] (revoking Exec. Order No. 6793) (allocating funds from the appropriation to meet the emergency and necessity for relief in stricken agricultural areas and replacing said order with another directing the funds to the Department of Agriculture); Exec. Order No. 6983 (1935), http://www.fdrlibrary.marist.edu/_resources/images/eo/eo0027.pdf [https://perma.cc/J98D-ETTY] (authorizing and designating the Federal Emergency Relief Administrator to acquire property for certain purposes); R. Douglas Hurt, *The National Grasslands: Origin and Development in the Dust Bowl*, 59 AGRIC. HIST. 246, 249 (1985); Exec. Order No. 7027 (1935), https://www.presidency.ucsb.edu/documents/executive-order-7027-establishment-the-resettlement-administration [https://perma.cc/U5JX-8CUD]; Exec. Order No. 7200 (1935) (amending Exec. Order No. 7027 of April 30, 1935, by amending subparagraphs (a) and (b) of the second paragraph of the said order in include addition approved projects) (available at http://www.fdrlibrary.marist.edu/_resources/images/eo/eo0032.pdf [https://perma.cc/TVS9-PDLR] and located at page 58); C.F. Clayton, *Program of the Federal Government for the Purchase and Use of Submarginal Land*, 17 J. FARM ECON. 55, 61 (1935); WOOTEN, *supra* note 11, at 31, 83; TUGWELL, *supra* note 10, at 115, 238–40.

[66] Exec. Order No. 7530, 2 Fed. Reg. 7 (1936) (amending Exec. Order No. 7027 of April 30, 1935, establishing the Resettlement Administration as amended by Exec. Order No. 7200 of Sept. 26, 1935, by amending subparagraphs (a) and (b) of the second paragraph of the said order, by transferring all the powers, functions, and duties previously vested in the Resettlement Administration by those orders to the Secretary of Agriculture); Exec. Order No. 7557, 3 Fed. Reg. 343 (1937) (amending Exec. Order No.

Department of Agriculture meant that the Bankhead-Jones Farm Tenant Act of 1937 (the BJFTA), which applied to the Department of Agriculture, affected the LUPs.[67]

The BJFTA authorized the Secretary of Agriculture to continue to purchase submarginal land "to develop a program of land conservation and land utilization."[68] The Secretary was authorized to "administer any property so acquired . . . as may be necessary to adapt it to its most beneficial use."[69] After the transfer of the Resettlement Administration to the Department of Agriculture, the application of the BJFTA caused the lands within the Resettlement Administration to be reorganized under the BJFTA's various titles.[70] Title III of the BJFTA controlled the land purchase program, including the majority of the LUPs.[71]

Administration of the lands under Title III of the BJFTA was then transferred to the Bureau of Agriculture Economics in late 1937, and finally moved to the Soil Conservation Service in 1938.[72] These moves were motivated by competition between the Department of the Interior and the Department of Agriculture,[73] concern that the Agricultural Adjustment Act—which created the Agricultural Adjustment Administration that originally housed the LUPs—would be held unconstitutional by the Supreme Court,[74] and other political realities of the

7530, Dec. 31, 1936, transferring functions, funds and property of the Resettlement Administration to the Secretary of Agriculture by the addition of certain Executive order numbers to the second paragraph of the said order). Originally, the Resettlement Administration was not under the control of any larger government agency. TUGWELL, *supra* note 10, at 238.

67 *See* WOOTEN, *supra* note 11, at 83; Hurt, *supra* note 65, at 249.

68 The Bankhead-Jones Farm Tenant Act, Pub. L. No. 75-75-210, § 31, 50 Stat. 522, 525–26 (1937) (codified at 7 U.S.C. § 1010).

69 *Id.* § 32(b) (codified at 7.U.S.C. § 1011(b)). While beneficial use is currently a term of art, at the time of the BJFTA's enactment, it was not defined either by Congress or in association contracts.

70 *Id.* § 32 (prior to the repeal of § 32(a) in 1961) (authorizing the Secretary of Agriculture to acquire and administer submarginal land); *Id.* § 41(f) (authorizing the Sectary of Agriculture to acquire other land, separate from the submarginal land mentioned before); WOOTEN, *supra* note 11, at 83; (noting that the resettlement and tenant purchase programs from the Resettlement Administration were assigned to Titles I, II and IV of the BJFTA, while the LUPs, and some additional land from the emergency program, were placed under Title III); Hurt, *supra* note 65, at 249.

71 *See* WOOTEN, *supra* note 11, at 83; Hurt, *supra* note 65, at 249.

72 WOOTEN, *supra* note 11, at 83–84; Hurt, *supra* note 65, at 249.

73 *See* TUGWELL, *supra* note 10, at 107, 124, 171, 175, 239, 309. This conflict is at least partially responsible for the decision to make the Resettlement Administration a standalone agency within the government. *See id.*

74 A lawsuit in federal court challenging the constitutionality of the Agricultural Adjustment Act, was progressing through the court system at this time. Franklin Process Co. v. Hoosac Mills Corp., 8 F. Supp. 552 (D. Mass. 1934), *rev'd sub. nom.* Butler v. United States, 78 F.2d 1 (1st Cir. 1935). In October of 1934, a federal district court held that the

time.[75] The LUPs stayed with the Soil Conservation Service until 1953, when they were transferred to the Forest Service.[76]

C. *Two Forest Service Grazing Programs*

The 1953 transfer of the LUPs—which became the National Grasslands—to the Forest Service complicated the grazing program within that agency.[77] Despite the similarities in Forest Service management between the grazing in the National Forests and the grazing in the National Grasslands, Congress is clear the two are distinct and separate legal entities.[78] Evidence of Congress's intent appears in the legislatively defined term "National Forest System," which Congress defined to:

Act was constitutional. *Franklin Process Co.*, 8 F. Supp. at 562. The intermediate appellate court reversed the district court's decision in July of 1935 and struck down the Act as unconstitutional. *Butler*, 78 F.2d at 12. However, the LUPs were not affected by this decision because they had been transferred to the Resettlement Administration by executive order barely two months prior. Exec. Order No. 7027 (1935); Exec. Order No. 7200 (1935). The Supreme Court of the United States issued its decision declaring the entire Agricultural Administration Act of 1933 unconstitutional in January of 1936. United States v. Butler, 297 U.S. 1, 77–78 (1936). The timing suggests that the LUPs were transferred to the Resettlement Administration in late April to early May of 1935 out of concern that the courts would strike down the Agricultural Adjustment Act of 1933 and dissolve the Agricultural Adjustment Administration. *See* WOOTEN, *supra* note 11, at 10; Hurt, *supra* note 65, at 249; Exec. Order. No. 7027; TUGWELL, *supra* note 10, at 231, 235. Then, in March of 1937, the Supreme Court of the United States issued the decision that marked what became known as "the switch in time that saved the nine," indicating that the Court would no longer obstruct President Franklin Roosevelt's New Deal efforts. W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine"*, 73 OKLA. L. REV. 229, 232–33 (2021).

[75] Congress, not the courts, caused the dissolution of the Resettlement Administration in September of 1937, because it did not approve of the Socialist ideology of the Resettlement Administration's head, Rexford Tugwell, who was making farming communes in the East. *See* TUGWELL, *supra* note 10, at 234, 309, 448, 478; James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMPAR. L. 747, 747 (1991). This forced the transfer of the LUPs to the Bureau of Agriculture Economics. *See* TUGWELL, *supra* note 10, at 309–10; WOOTEN, *supra* note 11, at 84.

[76] WOOTEN, *supra* note 11, at 29. Although the official transfer date was in January of 1954, documents from the time indicate that the transfer was actually effective as early as November of 1953, and that the transfer occurred with only two weeks warning, causing some members of the public to complain about its hurriedness. Office Memorandum from Joy J. Deuser, *supra* note 10.

[77] *See* WOOTEN, *supra* note 11, at 29. The lands were not officially designated as the National Grasslands until 1960. Dave Pieper, *The Origin of the National Grasslands*, NAT'L MUSEUM FOREST SERV. HIST. NEWSL., Nov. 2010, at 3, https://forestservicemuseum.org/wp-content/uploads/2020/10/NMFSH_newsletter_nov_2010.pdf [https://perma.cc/49XN-S6JG]; Howard, *supra* note 11, at 411; Hurt, *supra* note 65, at 246. The current acreage of the National Grasslands can be found here: U.S. FOREST SERV., U.S. DEP'T OF AGRIC., *supra* note 1, at 1 tbl.1.

[78] *See* 16 U.S.C. § 1609(a).

> include all national forest lands reserved or withdrawn from the public domain of the United States, all national forest lands acquired through purchase, exchange, donation, or other means, the national grasslands and land utilization projects administered under title III of the Bankhead-Jones Farm Tenant Act, and other lands, waters, or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system.[79]

Within that definition, the "national forest lands" are distinct and mentioned separately from the "national grasslands and land utilization projects administered under title III of the Bankhead-Jones Farm Tenant Act."[80] The Forest Service acknowledges this distinction in its regulations.[81] As a result, there are necessarily two different grazing programs within the Forest Service, one for the National Forests and one for the National Grasslands.[82]

Despite this, the Forest Service took its method for administering grazing within the National Forests and applied it to the later acquired National Grasslands.[83] Today, the Forest Service often treats grazing on the National Forests and grazing within the National Grasslands similarly, even taking legislation applying only to the National Forests and extending it via regulations to the National Grasslands.[84] This means that while the

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[79] *Id.*

[80] *Id.*

[81] *See* 36 C.F.R. § 261.2 (2023) (defining the "National Forest System" to include "all national forest lands" and "national grasslands and land utilization projects and waters administered under title III of the Bankhead-Jones Farm Tenant Act"); 36 C.F.R. § 222.1 (2023) (defining "[l]ands within the National Forest in the 16 contiguous western States" to specifically exclude the National Grasslands); 36 C.F.R. § 222.3(c)(1) (2023) (discussing the issuance of grazing permits on National Forest Systems lands and distinguishing the treatment of permits on the National Forest and on the National Grasslands on the issues of the minimal length of the term and the addition of the ability of grazing associations to hold a permit on the National Grasslands); 36 C.F.R. § 222.6(a) (2023) (identifying a specific exception where the Forest Service treats grazing on the National Forests differently than on the National Grasslands with relation to compensation for the cancellation of a permit).

[82] *See supra* notes 77–81.

[83] *About Rangeland Management*, U.S. FOREST SERV., U.S. DEP'T OF AGRIC., https://www.fs.usda.gov/rangeland-management/aboutus/index.shtml [https://perma.cc/V87G-LYTL] (last visited July 21, 2023) (discussing rangeland management within the National Forest System without distinguishing at all between rangelands within the National Forests and rangelands within the National Grasslands).

[84] 43 U.S.C. § 1702(e) (defining "public lands" to means lands "administered by the Secretary of the Interior through the Bureau of Land management" and defining the term "grazing permit and lease" to apply only to lands in National Forests, neither of which include the National Grasslands). *Compare* Federal Land Policy and Management

two grazing programs are distinct, they share many of the same features and are generally governed by many of the same principles and regulations, allowing grazing preference cases specific to one program to be useful in the interpretation of the other.[85]

The idea that courts should treat grazing preference on the National Forests and National Grasslands similarly is further supported by the Forest Service, which talks about grazing on both the National Forests and the National Grasslands without distinguishing between them.[86] Indeed, even on the official Forest Service documents like the document for waiver of a term permit,[87] escrow waiver of term grazing permit privileges,[88] and the term private land grazing permit,[89] the only difference between grazing on a National Forest or a National Grassland is a simple matter of which box is checked. These official documents all relate to grazing preference, strongly suggesting that while there are two grazing programs within the Forest Service, there is only one grazing preference.[90]

Act of 1976, 43 U.S.C. §§ 1751–1752 (discussing range management, but only applying to lands defined in § 1702 which exclude the National Grasslands), *with* 36 C.F.R. §§ 222.1–222.11 (taking many of the concepts from §§ 1751 and 1752 and applying them to the National Grasslands).

85 These are cases concerning the National Grasslands and yet citing to a National Forest case. Duncan Energy Co. v. U.S. Forest Serv., 50 F.3d 584, 590 (8th Cir. 1995) (citing Meadow Green-Wildcat Corp. v. Hathaway, 936 F.2d 601, 605 (1st Cir. 1991)). *Central South Dakota Cooperative Grazing District v. Secretary of the United States Department of Agriculture* is another case concerning the National Grasslands that cited multiple National Forest cases. 266 F.3d 889, 892 (8th Cir. 2001) (citing Sierra Club v. U.S. Forest Serv., 46 F.3d 835 (8th Cir. 1995)); *Id.* at 894 (citing Friends of the Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115 (8th Cir. 1999)); *Id.* at 900 (citing Perkins v. Bergland, 608 F.2d 803 (9th Cir. 1979)).

86 *See Why Does the Forest Service Permit Livestock Grazing on National Forest System lands?,* U.S. FOREST SERV., U.S. DEP'T OF AGRIC., https://www.fs.usda.gov/rangeland-management/grazing/allowgrazing.shtml [https://perma.cc/L7TM-33BS] (last visited July 21, 2023).

87 U.S. FOREST SERV., U.S. DEP'T OF AGRIC., WAIVER OF TERM GRAZING PERMIT (2014), https://www.fs.usda.gov/rangeland-management/documents/forms/WaiverofTermGrazingPermit2014.pdf.

88 U.S. FOREST SERV., U.S. DEP'T OF AGRIC., ESCROW WAIVER OF TERM GRAZING PERMIT PRIVILEGES (2014), https://www.fs.usda.gov/rangeland-management/documents/forms/EscrowWaiverofTermGrazingPermitPrivileges2014.pdf.

89 U.S. FOREST SERV., U.S. DEP'T OF AGRIC., TERM PRIVATE LAND GRAZING PERMIT PARTS 1 AND 2 (2013), https://www.fs.usda.gov/rangeland-management/documents/forms/PrivateLandGrazingPermitParts1&2Form2013.pdf.

90 *See* U.S. FOREST SERV., U.S. DEP'T OF AGRIC., WAIVER OF TERM GRAZING PERMIT (2014), https://www.fs.usda.gov/rangeland-management/documents/forms/WaiverofTermGrazingPermit2014.pdf; U.S. FOREST SERV., U.S. DEP'T OF AGRIC., ESCROW WAIVER OF TERM GRAZING PERMIT PRIVILEGES (2014), https://www.fs.usda.gov/rangeland-management/documents/forms/EscrowWaiverofTermGrazingPermitPrivileges2014.pdf; U.S. FOREST SERV., U.S. DEP'T OF AGRIC., TERM PRIVATE LAND GRAZING PERMIT PARTS 1 AND 2 (2013),

D. One Historic Forest Service Grazing Preference

Despite the two grazing programs within the Forest Service, there is only one grazing preference that applies to both.[91] Applied to the National Forests, grazing preference allowed landowners to use resources in a "businesslike manner" that would address issues of conservation.[92] It also bolstered the stability of the livestock industry that depended on grazing within the National Forests.[93] In either program, grazing preference helped prioritize the pre-existing ranchers who had come to depend on the grazing land over transient grazers, by providing different classes of priority to receive grazing preference.[94] The highest priority went to small, nearby owners, then to other regular occupants of the land, and finally, if any grazing permits were left unclaimed, to owners of transient stock.[95] Only if ranchers had grazing preference, or no grazing preferences previously existed, would they be able to obtain a permit to graze on the forest land.[96] Grazing preferences were understood to be "of indefinite duration" which would continue "until canceled or revoked."[97] This distinguished them from permits, which only lasted for a ten-year period before requiring renewal.[98]

While grazing preference was often used in a way suggesting it was simply an ordering term, it clearly had greater significance.[99] For instance, violations of the terms of a permit might result in revoking a grazing permit or preference "in whole or in part."[100] The grazing preference functioned as a right attached to either "a permittee's livestock or ranch" and linked

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https://www.fs.usda.gov/rangeland-management/documents/forms/PrivateLand GrazingPermitParts1&2Form2013.pdf.

91 *See* Shufflebarger v. Comm'r, 24 T.C. 980, 981 n.1 (1955). The Granger-Thye Act strengthens grazing preference within Forest Service by requiring the Secretary of Agriculture to notify the local advisory board of any decision which would "substantially modify existing policy with respect to grazing," or "materially affect preferences of permittees." 16 U.S.C. § 580k(c)(1); *see* Howard, *supra* note 11, at 411. While regulations concerning the National Forest indicate grazing preference, 36 C.F.R. § 222.3(c)(1), Title 36 of the Code of Federal Regulations § 213.3(a) explicitly provides that, "[t]he rules and regulations applicable to the national forests . . . are hereby adopted [to] . . . regulate the . . . administration of . . . all. . . lands administered by the Forest Service under the provisions of title III of the Bankhead-Jones Farm Tenant Act insofar as is practical and consistent with said act." Grazing preference is consistent with the BJFTA.

92 PINCHOT, *supra* note 58, at 10; *accord* Kosco & Bartolome, *supra* note 59, at 249

93 *Shufflebarger*, 24 T.C. at 981 n.1.

94 PINCHOT, *supra* note 58, at 22.

95 *Id.*

96 *Id.*; *Shufflebarger*, 24 T.C. at 981 n.1.

97 *Shufflebarger*, 24 T.C. at 981 n.1.

98 *Id.*

99 *See id.* at 955, 981 n.1.

100 Modification of Regulations G-1 to G-19 Inclusive and Regulation G-21, 5 Fed. Reg. 1468, 1469 (April 20, 1940) (to be codified at 36 C.F.R. §§ 231.1–231.9).

to the permit.[101] As such, a grazing preference was transferable by private contract in a way a permit was not.[102] It could be transferred with the sale of said livestock or ranch.[103] A grazing preference was also considered a valuable asset that was part of the community property between husband and wife.[104]

E. *Conflation Between the BLM Grazing Preference and the Forest Service Grazing Preference*

1. *Confusion in Congress*

Forest Service grazing preference becomes confused in light of the treatment of grazing by Congress.[105] The Multiple Use Sustained Yield Act of 1960 (the MUSYA) expanded National Forest management to include not only water flows but also "outdoor recreation, *range*, timber" and other uses, but explicitly does not apply to "Federal lands not within national forests."[106] The Federal Land Policy and Management Act of 1976 (FLPMA), addresses grazing programs in the National Forest, the National Grasslands, and BLM managed public lands.[107] Some sections of FLPMA only apply to one of the three specified grazing programs, while some apply to two or all three.[108] Technically, only nine parts of FLPMA apply to the National Grasslands, and only one of those directly affects grazing.[109] However, section 402, which covers grazing permit systems,

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[101] Shufflebarger v. Comm'r, 24 T.C. 980, 981 n.1 (1955); *accord* Modification of Regulations G-1 to G-19 Inclusive and Regulation G-21, 5 Fed. Reg. at 1469.

[102] *See Shufflebarger*, 24 T.C. at 984–85, 988; Stern, *supra* note 60, at 18.

[103] *See Shufflebarger,* 24 T.C. at 995; Bassett v. Ryan, 236 P.2d 458, 460 (Ariz. 1951).

[104] Stevens v. Stevens, 219 P.2d 1045, 1048 (Ariz. 1950).

[105] *See* discussion *infra* notes 106–115.

[106] Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. § 528 (emphasis added).

[107] *See* 43 U.S.C. §§ 1702(e), (k), 1751 (enacted by Pub. L. 94-579, 90 Stat. 2745 (1976)).

[108] FLPMA defined the "Secretary" as the Secretary of the Interior unless otherwise designated, defined "public lands" as those administered by the BLM, and defined "grazing permit and lease" to be a document affecting lands in the National Forests. 43 U.S.C. § 1702(e), (g), (p).

[109] The nine parts of the FLPMA that apply to the National Grasslands are: 43 U.S.C. § 1712(b) (requiring "coordinate[d] land use plans for lands in the National Forest System" with the "Indian tribes"); *id.* § 1715(a) (authorizing the Secretary of Agriculture to acquire "access over non-Federal lands to units of the National Forest System" including by any previous ability to exercise eminent domain); *id.* § 1716 (allowing the Secretary of Agriculture to use land exchanges within the National Forest System); Federal Land Policy and Management Act of 1976, Pub. L. 94-579, § 213, 90 Stat. 2743, 2760 (amending the Bankhead-Jones Farm Tenant Act, 7 U.S.C. § 1012a to require public notice before allowing the Secretary of Agriculture to establish a townsite on National Forest System lands); 43 U.S.C. § 1732 (discussing hunting on National Forest System lands); *id.* § 1740 (giving the Secretary of Agriculture the authority to "promulgate rules and regulations to carry out the purposes" of the act); *id.* § 1751 (providing for a study of the "value of grazing" on the National Grasslands); *id.* § 1761 (authorizing the Secretary

applies equally to both National Forest lands and BLM lands but explicitly, and illogically, does not apply to the National Grasslands.[110]

Section 402's application to the National Forest lands strengthens grazing preferences by requiring that as long as the lands are being used for grazing, the permittee is following all the rules and terms of their permit, and the permittee agrees to be bound by the terms in the next permit, that permittee shall be "given first priority for the receipt" of the renewed permit.[111] This section also mentions the transfer of grazing preference.[112] It further acknowledges the interest a private party has in a permit by requiring that the government reasonably compensate any permittee for the value of any improvement made by the permittee on any part of a permit that was lost due to a change in land use.[113] That section also requires any non-emergency cancellation to provide "'two years' prior notification."[114] While this seems straightforward for the National Forests, the Forest Service regulations take many of the provisions of section 402 and apply them to the National Grasslands.[115] Perhaps the Forest Service regulations are an attempt to address the strange reality that FLMPA applies across two land management programs in two different agencies but not to land management programs within the same agency.

2. *Confusion in the Courts*

Because legislation like FLPMA fails to specifically identify the differences between grazing programs and grazing preference on BLM and

of Agriculture to grant rights-of-way through National Forest System lands); *id.* § 1771 (requiring applicants for right-of-way involving National Forest System lands to coordinate their applications within the various departments that might be involved).

[110] *See* 43 U.S.C. § 1752(a) (applying to permits and leases issued by the Secretary, earlier specific as the Secretary of the Interior and to those issued by the Secretary of Agriculture, but only "with respect to lands within National Forests," thereby excluding the National Grasslands).

[111] *Id.* § 1752(c)(1).

[112] *Id.* § 1752(c)(2).

[113] *Id.* § 1752(g).

[114] *Id.* For other legislation affecting Forest Service, but not affecting grazing preferences, *see generally Laws, Regulations, and Policies*, U.S. FOREST SERV., U.S. DEP'T OF AGRIC., https://www.fs.usda.gov/rangeland-management/aboutus/lawsregs.shtml [https://perma.cc/3EN3-HAEQ] (last visited July 23, 2023).

[115] *Compare* 43 U.S.C. § 1752(c)(1)(B), (C) (stating that if "the permittee . . . is in compliance with the rules," and "accepts the terms and conditions . . . in the new permit or lease, the holder of the expiring permit or lease shall be given first priority for the receipt of the new permit or lease."), *with* 36 C.F.R. § 222.3(c)(1)(ii) ("A term permit holder has first priority for receipt of a new permit at the end of the term period provided he has fully complied with the terms and conditions of the expiring permit."); *compare* 43 U.S.C. § 1752(g) ("Except in cases of emergency, no permit or lease shall be canceled under this subsection without two years' prior notification."), *with* 36 C.F.R. § 222.4(a)(1) ("Except in an emergency, no permit shall be cancelled without two years' prior notification.").

Forest Service managed lands, they may be responsible for the confusion and difficulties that courts have faced over the years.[116] The history of the Forest Service grazing preference, especially in the National Grasslands, has become so outdated and difficult to find that parties struggle to effectively distinguish between BLM grazing preference and the Forest Service grazing preference.[117]

One example of this conflation is a series of cases starting with *United States v. Fuller* in 1973,[118] continuing with *Alves vs. United States* in 1998,[119] and finishing with *Sacramento Grazing Association vs. United States* in 2005.[120] Both *Fuller* and *Alves* concern BLM grazing preference,[121] which is separate from the same-named but practically and legally distinguishable Forest Service grazing preference that covers the National Grasslands.[122] The BLM resides within the Department of Interior and gains most of its ability to manage public land from the Taylor Grazing Act.[123] The Taylor Grazing Act does not apply to the Forest Service as the Forest Service resides within the Department of Agriculture and gains much of its ability to

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116 See *supra* footnotes 105–15 and accompanying text.

117 The author notes that the majority of case law on this subject is from prior to 2000. *See e.g.* Bell v. Apache Maid Cattle Co., 94 F.2d 847 (1938), Bassett v. Ryan, 236 P.2d 458 (1951); Dooling v. Casey, 448 P.2d 749 (1968). Despite extensive searching, the only more modern cases on Forest Service grazing preference, or priority of renewal, are *Sacramento Grazing Association*, which barely discusses preference at all, and *Walker*. Sacramento Grazing Ass'n v. United States, 66 Fed. Cl. 211, 216–17 (2005); Walker v. United States, 66 Fed. Cl. 57, 67 (2005).

118 409 U.S. 488 (1973).

119 133 F.3d 1454 (Fed. Cir. 1998).

120 66 Fed. Cl. 211 (2005).

121 *Fuller*, 409 U.S. at 488–89 (discussing the loss of the use of grazing lands permitted under the Secretary of the Interior, meaning BLM); *Alves*, 133 F.3d at 1456.

122 For instance, BLM grazing preferences are closely attached to the required commensurate base property. State *ex rel.* Engle v. Dist. Ct., 174 P.2d 582, 584 (Mont. 1946). They have also been considered an adjudicated right. Pub. Lands Council v. U.S. Dep't of Interior Sec'y, 929 F. Supp. 1436, 1441 (D. Wyo. 1996), *aff'd in part, rev'd in part sub nom.* Pub. Lands Council v. Babbitt, 154 F.3d 1160 (10th Cir. 1998), *amended and superseded on reh'g by* 167 F.3d 1287 (10th Cir. 1999). Within BLM, the term "preference" originally referred to a "specified number of AUMs of forage." Grazing Administration – Exclusive of Alaska: Department Hearings and Appeals Procedures; Cooperative Relations, 58 Fed. Reg. 43208, 43211 (Aug. 13, 1993) (to be codified 43 C.F.R. pts. 4, 1780, 4100). However, Forest Service grazing preferences mostly signified a priority for renewal of permits while the permits themselves specified the AUMs of forage. *Id.* By inference, if a change to match Forest Service meant to stop using grazing preferences to describe AUMs, then Forest Service must not have been using grazing preference to describe AUMs. *See id.*; *see also* HENRY S. GRAVES, THE USE BOOK: A MANUAL FOR USERS OF THE NATIONAL FORESTS 95–97 (1915); HENRY S. GRAVES, THE USE BOOK: A MANUAL OF INFORMATION ABOUT THE NATIONAL FORESTS 103–05 (1918); WILLIAM B. GREELEY, THE USE BOOK: A MANUAL OF INFORMATION ABOUT THE NATIONAL FORESTS – GRAZING SECTION 22–24 (1926); F.A. SILCOX, THE USE BOOK: A MANUAL OF INFORMATION ABOUT THE NATIONAL FORESTS – GRAZING SECTION 25–27 (1936).

123 *See* 43 U.S.C. § 315b; *Pub. Lands Council*, 929 F. Supp. at 1439, 1441.

manage public lands from other acts, such as the BJFTA.[124] While courts might use BLM regulations as persuasive sources for its ruling concerning the Forest Service, those regulations are not binding.[125]

In *Fuller*, the Supreme Court considered condemnation proceedings for ranch lands used in conjunction with adjacent federal lands held under a revocable grazing permit issued to the landowner by the BLM via the Taylor Grazing Act.[126] The district court held the landowner may introduce, and the jury may consider, evidence as to the value accruing to the condemned lands resulting from their use in combination with the permit lands.[127] The Ninth Circuit affirmed, but the Supreme Court reversed, holding that "the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondents' fee lands in combination with the Government's permit lands."[128] Then, after stating the holding, and therefore arguably in dicta, the Supreme Court stated that the intent of Congress in passing the Taylor Grazing Act was not to create a compensable property right in the "permit lands themselves" through the permitting process.[129] However, the issue in *Fuller* was whether condemned private land could consider the value of the associated permit land when seeking compensation and did not involve any true discussion of grazing preference.[130]

In *Alves*, the Federal Circuit considered whether BLM's failure to prevent trespass on the plaintiff's permitted land constituted a compensable taking due to physical damage to the land and the violation of grazing preference.[131] While the court did discuss grazing preference, it

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124 *See generally* 7 U.S.C. §§ 1000–1029; *see also* discussion *supra* Part I.B–C. The Taylor Grazing Act was passed in 1934 and applied only to the Department of the Interior. Pub. L. No. 73-482, § 1, 48 Stat. 1269, 1269. Among other things, it authorized the Secretary of the Interior to set up a permit system for grazing on the public lands held by the Department of the Interior. *Id.* § 3, 48 Stat. at 1270. It also specifically provided for the permits to be "subject to the preference right of the permittees to renewal" and provided that "grazing privileges recognized and acknowledged shall be adequately safeguarded." *Id.* § 3, 48 Stat. at 1271. This language creates a different, perhaps stronger, grazing preference right within the Department of the Interior. *See* Pub. Lands Council v. Babbitt, 529 U.S. 728, 740 (2000).

125 *See* Kisor v. Wilkie, 588 U.S. 558, 573 ("[W]e presume that Congress intended for courts to defer to agencies when they interpret their *own* ambiguous rules." (emphasis added)). Further, BLM regulations cannot be binding on the courts in this instance because, for regulations to have the effect of law, they must have statutory authority, and there is no statute granting the BLM the authority to control grazing on National Forest System lands. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 301–03.

126 *Fuller*, 409 U.S. at 488–89.

127 *Id.* at 489.

128 *Id.* at 489, 493.

129 *Id.* at 493.

130 *See id.* at 488–89.

131 Alves vs. United States, 133 F.3d 1454, 1455–56 (Fed. Cir. 1998).

also decided trespass on the permitted lands did not constitute a physical taking because BLM had not authorized the trespass.[132] The decisions of these courts were clear because they only applied the Taylor Grazing Act to BLM and not to the Forest Service.[133]

Then, in 2005 the United States Court of Federal Claims decided *Sacramento Grazing Association v. United States*.[134] In that case, the Sacramento Grazing Association, Inc. (SGA), which was a corporate entity rather than a grazing association like those discussed earlier, purchased land including "grazing rights . . . on the appurtenant federally administered grazing allotment" which was located in the Lincoln National Forest.[135] In 1989 and 1999 the Forest Service issued the SGA 10-year term permits to the land appurtenant to the purchased land.[136] However, in May of 2000, the Forest Service exercised a contract provision to modify the terms of the permit due to the land condition and over-grazing.[137] Following the SGA's failure to comply with the new terms, the Forest Service continued to modify the permit due to the SGA's non-compliance, further decrease in the condition of the land, and continued over-grazing in violation of the terms of the permit.[138] The SGA sued the Forest Service for compensation under the Takings Clause for the de facto loss of the permit and grazing preference, among other claims.[139] In analyzing that claim, the court relied on *Fuller* and *Alves* to say that it need not address the difference between a permit and a grazing preference because neither created a compensable property interest, and dismissed the claim without further discussion.[140] That reliance was incorrect as *Alves* and *Fuller* interpreted the Taylor Grazing Act, which is not binding on the Forest Service.[141] In addition, *Sacramento Grazing Association* did not actually involve grazing preference, but rather the right to use the land to graze a certain number of livestock.[142] This is evidenced by the fact that the permit was never cancelled or given to a party other than the SGA, which could violate their grazing preference as modification or suspension of the permit would not.[143] This analysis by the court did not mention the differences between Forest Service and BLM grazing preferences or that the Taylor Grazing Act is not binding on the

132 *Id.* at 1457.

133 *Id.* at 1455–57; *Fuller*, 409 U.S. at 488–89.

134 Sacramento Grazing Ass'n v. United States, 66 Fed. Cl. 211, 211 (2005).

135 *Id.* at 211.

136 *Id.* at 212.

137 *Id.*

138 *Id.*

139 *Id.* at 212–13, 216.

140 *Id.* at 216–17.

141 Taylor Grazing Act, Pub. L. No. 73-482, § 1, 48 Stat. 1269, 1269; *see generally* United States v. Fuller, 409 U.S. 488 (1973).; Alves vs. United States, 133 F.3d 1454 (Fed. Cir. 1998).

142 *See Sacramento Grazing Ass'n*, 66 Fed. Cl. at 217.

143 *Id.* at 212.

Forest Service, causing the two grazing preferences to become inadvertently and improperly intermingled.[144]

III. CURRENT STATE OF FOREST SERVICE GRAZING PREFERENCE

A. Forest Service Regulations and Guidance Documents

Current Forest Service regulations state that some permits come "with priority for renewal at the end of the term," and again that "[a] term permit holder has first priority for receipt of a new permit at the end of the term period."[145] The *Forest Service Handbook* says that "preferences" and "permits with term status" are the same, and the *Forest Service Manual* says that permits with term status are permits that grant the permittee priority for renewal.[146] The *Forest Service Manual* provides for the transfer of permits to "preferred applicants," with the regulations specifying that "[n]ew term permits may be issued to the purchaser of a permittee's permitted livestock and/or base property, provided the permittee waives his term permit to the United States and provided the purchaser is otherwise eligible and qualified."[147] This is essentially the grazing preference that the Forest Service historically applied: the holder of the grazing preference had the first chance to obtain the permit.[148]

Within these documents, the terminology has mostly shifted to that of priority.[149] However, a historical analysis of the use of the terms "preference" and "priority" strongly suggest that they are referring to the same concept.[150] Further, the newly proposed amendments to the *Forest*

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144 *See generally Sacramento Grazing Ass'n*, 66 Fed. Cl. 211.

145 36 C.F.R. §§ 222.1(b), 222.3(c)(1)(ii). While Forest Service regulations explicitly superseded the rules and regulations previously "issued for the land utilization projects," they also explicitly provided for the continuation of the "rules and regulations applicable to the national forests" to apply to the National Grasslands "insofar as is practical and consistent" with the BJFTA, as well as stating that "[e]xisting valid rights . . . easements, leaves, permits, agreements, contracts and memoranda of understanding . . . shall continue in full force and effect." *Id.* §§ 213.3, 213.4. Those rules and regulations applicable to the National Forests would include any element of the grazing preference interest and right of renewal applicable to grazing on land within the National Forests. *Id.* §§ 222.1(b), 222.3(c)(1)(ii).

146 1992 FOREST SERVICE HANDBOOK, *supra* note 11, § 18.32; U.S. FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL CHAPTER 2230 § 2230.5 (2005).

147 U.S. FOREST SERVICE, U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL Chapter 2230, §§ 2230.5, 2231.82 (2005); 36 C.F.R. § 222.3(c)(1)(iv).

148 *See supra* Part II.D.

149 *See* cases cited *infra* in note 150.

150 *Compare* Olsen v. Bank of Ephriam, 68 P.2d 195, 199 (Utah 1937) (describing "a preferential right from year to year in the permittee to receive a renewal of his permit, and which runs on year after year until canceled or revoked."), *with* Walker v. United States, 66 Fed. Cl. 57, 58 n.5 (2005) (discussing permits "with priority for renewal" which the complainant referred to as grazing preference); *see also* Reid v. Reid, 269 F.2d 923, 928

Service Handbook explicitly say that "[p]riority for receipt of a new term grazing permit means the permittee has preference over other applicants," directly connecting grazing preference to the modern "priority" language.[151]

B. *Grazing Preference Defined*

Grazing preferences are best described as a limited, non-possessory property interest with a right of renewal.[152] A right is a "legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act," and an interest is either a collective term for a combination of rights, privileges, powers, and immunities or simply a term that means any of those things.[153] Since grazing preferences are based in the contract—the permit—between the possessor of the land, the Forest Service, and the holder of the grazing preference, they are a contract right—a right arising "out of a legally enforceable agreement."[154] Such rights can be either possessory or nonpossessory.[155] Possessory interests in

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(10th Cir. 1959) (using the phrase "preference right to a grazing permit"); Prude v. Lewis, 430 P.2d 753, 755 (N.M. 1967) (detailing the Forest Service's use of the term "Preference Right Permit"); Rudolph Inv. Corp. v. Comm'r, T.C.M. 1972-129, at *11–12 (1972) (characterizing it as a "preference right[] of renewal."); *In re* Estate of Cronin, 237 N.W.2d 171, 172–73 (S.D. 1975) (using the term "preference"). Then, in 1988, the Forest Service used the term "first priority" instead of "grazing preference." Grazing and Livestock Use on the National Forest System, 53 Fed. Reg. 30954 (Aug. 16, 1988) (to be codified at 36 C.F.R. pt. 222). *Compare id.*, *with* Dooling v. Casey, 448 P.2d 749, 754 (Mont. 1968). From then on, the term "priority" was mostly used. *See* Hubbard v. Brown, 785 P.2d 1183, 1184 (Cal. 1990) (using the term "priority consideration"); Crook v. Yeutter, No. 89-19429, 1991 U.S. App. LEXIS 10205, at *3 (9th Cir. Mar. 12, 1991) (using the term "priority for receiving [a] permit."). Part of this shift in terminology may have been due to confusion with BLM grazing preference, which originally referred to a different concept. Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1291 (10th Cir. 1999). In response to this confusion, Congress pressured the Forest Service and BLM to become better aligned. Karl N. Arruda & Christopher Watson, *See The Rise and Fall of Grazing Reform*, 32 LAND & WATER L. REV. 413, 415–16 (1997); Range Management; Grazing and Livestock Use and Grazing Fees, 58 Fed. Reg. 43202 (Aug. 13, 1993) (to be codified at 36 C.F.R. pt. 222).

151 U.S. Forest Serv., U.S. Dep't of Agric., Forest Service Handbook 2209.13, Ch. 10, § 11.4 (2020) (unpublished, proposed handbook) (on file with author) [hereinafter 2020 Forest Service Handbook].

152 *See* Pub. Lands Council v. U.S. Dep't of Interior Sec'y, 929 F. Supp. 1436, 1441 (D. Wyo. 1996), *rev'd on other grounds sub. nom.* Public Lands Council v. Babbitt, 529 U.S. 728 (2000); *Rudolph Inv. Corp.*, T.C.M. 1972-129, at *11 (1972); Uecker v. Comm'r, 81 T.C. 983, 994 (1983); *Non-Possessory Interest*, BOUVIER LAW DICTIONARY (2012), https://plus.lexis.com/api/permalink/9913e028-d9a3-46c7-9446-5d108bd3f784/?context=1530671; In *Dooling v. Casey*, the Montana Supreme Court uses the language "preference right to annual renewals." 448 P.2d at 754.

153 RESTATEMENT (FIRST) OF PROPERTY §§ 1, 5 (AM. L. INST. 1936).

154 *Right*, BLACK'S LAW DICTIONARY (11th ed. 2019). A contractual right is defined as "[a]n entitlement arising out of a legally enforceable agreement, whether express, implied, or imposed by law or equity." *Id.*

155 *See id.*

land are held by people who have a physical relation to the land that gives them control to exclude others from it.[156] Nonpossessory interests are then any interest in land other than a possessory interest.[157] Grazing preferences do not give the owner of the grazing preference the right to possess the land or to exclude others from it, making them non-possessory.[158] The only right grazing preference affords is the legally enforceable claim of the holder that Forest Service will give them the first chance to renew the grazing permit. In the traditional legal imagery of property as a "bundle of rights," involving "multiple parties tied together in relationships that are social as well as legal," a grazing preference is only a single, small stick in the large bundle that makes up the public property of the federal land within the National Grasslands.[159] That single stick of grazing preference is transferred from the Forest Service to the permittee with the issuance of the permit with priority for renewal.[160]

C. Grazing Preference is Not a Right to Graze

Unfortunately, this limited right of renewal is often incorrectly elevated to a right to graze, which courts have consistently held does not exist.[161] For instance, in *Bassett v. Ryan,* the court references a section of the Forest Service manual saying "[a] preference conveys no legal right to the use of national-forest range," and that "[a] preference does not entitle the holder to continue use of any certain part of the forest."[162] This language is consistent with treating grazing preference as a limited, nonpossessory property interest with an attached right of renewal, because such a right does not constitute a right to use the land.[163] Grazing preference does not grant a right to use the land, or a right to use a certain part of the land,

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156 RESTATEMENT (FIRST) OF PROPERTY § 7 (AM. L. INST. 1936).

157 *Id.* § 7, cmt. a.

158 While no cases discuss this point directly concerning grazing preference, a number of cases suggest that permits cannot grant possessory interests because there is no right to exclude. *See, e.g.*, Robinson v. Legro, 2014 CO 40, ¶ 27 (Hobbs, J., concurring); Legro v. Robinson, 2015 COA 183, ¶ 27. Since a grazing preference is tied to a permit, it may be implied that grazing preferences also do not include a right to exclude. *See Robinson*, 2014 CO 40, ¶ 27 (Hobbs, J., concurring); *Legro*, 2015 COA 183, ¶ 27. Further evidence of the inability to exclude others from land comes from the public access to those permitted lands for hunting. *See Access Summary*, WYO. GAME & FISH DEP'T, https://wgfd.wyo.gov/Public-Access/Access-Summary/ [https://perma.cc/D6TT-U3UL] (last visited Aug. 8, 2024).

159 Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 58 (2013).

160 *See* 36 C.F.R. §§ 222.1, 222.3(c)(1)(ii); 2022 Association Permit, *supra* note 11.

161 *See* Sacramento Grazing Ass'n vs. United States, 66 Fed. Cl. 211, 217 (2005) (dismissing the alleged taking of the plaintiff's permit or "preference grazing right" with prejudice for having no legal basis); Shufflebarger v. Comm'r, 24 T.C. 980, 980(1955) ("a preference conveys no legal right to the use of national-forest range").

162 Bassett v. Ryan, 236 P.2d 458, 459 (Ariz. 1951).

163 *See supra* Part II.

rather grazing preference is merely a right of renewal.[164] In *Hubbard v. Brown,* the Supreme Court of California said Forest Service regulations "ensure[] that the holder of a grazing permit does not acquire rights in federal land which are compensable."[165] Therefore, *Hubbard* refers to permits, and says that they do not grant rights.[166] *Bassett* and *Hubbard* show there is no right to use the land for grazing, since in the language of the grazing associations and Forest Service regulations, a grazing right could mean either an independent right to use land for grazing or the right to a permit, as the permit is what allows the grazing to occur.[167]

Additionally, in *Bell v. Apache Maid Cattle Co.*, a plaintiff bought base property for a grazing permit on National Forest land from the defendants, and defendants did not tell plaintiffs that the grazing permit was about to be reduced due to a violation of the terms of the permit.[168] In denying the request for the Forest Service's specific performance to restore the permit to its condition before the defendant's conduct, the court quoted a Forest Service regulation: "A grazing preference is not a property right. A preference does not give the owner the right to continue grazing. Permits are granted only for the exclusive use and benefit of the persons to whom they are issued . . . ."[169] If the Forest Service chooses to withdraw the land from grazing and give it over to another use, the Forest Service may do so, subject to its own rules and regulations.[170] If the rancher decides not to renew the permit or voids the contract with the Forest Service by violating the terms of the contract, then the Forest Service is not bound to give the permit to the rancher.[171] It may instead give the permit to a different person entirely.[172] All that grazing preference does is force the Forest Service to give the rancher the first chance to renew a grazing permit.[173]

O*sborne v. United States*, which the Ninth Circuit Court of Appeals decided after *Apache Maid Cattle Co.*, considered the same regulation but held "[w]hen the permittee sells cattle presently grazing on national forest lands[,] a grazing preference will be given the purchaser over others seeking permits. It is this preference that the regulation refers to as not being a property right."[174] In this case, the court was very concerned about the

164 Olsen v. Bank of Ephriam, 68 P.2d 195, 199 (Utah 1937).

165 Hubbard v. Brown, 785 P.2d 1183, 1186 (Cal. 1990).

166 *Id.*

167 *See Hubbard*, 785 P.2d at 116; *Bassett*, 236 P.2d at 459; *accord* Diamond Bar Cattle Co. v. United States, 168 F.3d 1209, 1217 (10th Cir. 1999) (plaintiffs had "no right . . . to graze a specific allotment of land.").

168 Bell v. Apache Maid Cattle Co., 94 F.2d 847, 849–50 (10th Cir. 1938).

169 *Id.* at 849 n.1.

170 *Diamond Bar Cattle Co.*, 168 F.3d at 1217

171 *See supra* note 111 and accompanying text.

172 *See* 2020 Forest Service Handbook, *supra* note 151, § 13.2.

173 *See supra* notes 111, 145–46 and accompanying text.

174 145 F.2d 892, 895 (9th Cir. 1944).

ability of the individual to claim property rights against the government.[175] Despite this concern, the court held a "limited right to grazing granted by the service would not act to perfect any property right as against the sovereign," referring to the nuance that while there is no right to graze, the more limited right of renewal exists.[176]

Shufflebarger v. Commissioner further supports this nuance by saying that "while 'a preference conveys no legal right to the use of national-forest range,' it does entitle 'the holder to special consideration over other applicants who have not established preferences.'"[177] Finally, in *Walker v. United States*, the United States Court of Federal Claims relied on *Alves* and *Fuller* to find the cancellation of a grazing permit for violation of its terms was not compensable.[178] Specifically, the court mentioned "the Walkers had no property rights on the allotments superior to those of the Government."[179] This is consistent with grazing preference, as grazing preference does not provide rights superior to the Government (a right to graze on the land) but rather rights superior to others (a first right of renewal).[180]

Thus, a grazing preference, or priority for renewal, is simply a designation of the order ranchers receive permits to graze public land.[181] It is not a permit, which is the actual contract between the grazing association or Forest Service and the rancher.[182] However, the grazing preference is tied to the permit, in that a rancher must have or acquire a grazing preference to obtain a permit, and violations of the permit may result in the loss of the grazing preference.[183] If the land goes out of grazing use,

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175 *See id.* at 894.

176 *Id.* at 895–96; *accord* Placer Cnty. Water Agency v. Jonas, 80 Cal. Rptr. 252 (Cal. Ct. App. 1969) (rejecting a claim that permits are compensable in eminent domain, as another example of permits granting no rights against the sovereign).

177 Shufflebarger v. Comm'r, 24 T.C. 980, 981 (1955); *accord* Rudolph Inv. Corp. v. Comm'r, T.C.M. 1972-129, at *11 (1972) ("holders of Federal BLM grazing leases and the Forest Service grazing permits . . . are granted preference rights of renewal."). Another tax court case, *Uecker v. Commissioner*, describes the *Shufflebarger* case as "review[ing] similar U.S. Department of Agriculture grazing privileges which also possessed preferential rights of renewal." 81 T.C. 983, 999 (1983).

178 Walker v. United States, 66 Fed. Cl. 57, 67 (2005).

179 *Id.*

180 *See supra* notes 111, 115, 164, 176 and accompanying text.

181 Or. Nat. Desert Ass'n v. U.S. Forest Serv., 312 F. Supp. 2d 1337, 1340 (D. Or. 2004); *see* 36 C.F.R. § 222.1; Crook v. Yeutter, No. 89-16429, 1991 U.S. App. LEXIS 10205, at *2–3 (9th Cir. May 10, 1991).

182 Osborne v. United States, 145 F.2d 892, 895 (9th Cir. 1944); *see* Term Grazing Permit from Thunder Basin Grazing Association (2022) (on file with the author).

183 Shufflebarger v. Comm'r, 24 T.C. 980, 980 n.1, 995 (1955); Modification of Regulations G-1 to G-19 Inclusive and Regulation G-21, 5 Fed. Reg. at 1469; PINCHOT, *supra* note 58, at 22. In *Crook v. Yeutter*, the Forest Service acknowledged that "the Crooks' had the highest priority for receiving the permit," but still "denied the Crooks' application

the Forest Service will cancel the permit, but the grazing preference will remain in temporary suspension until the land is returned to use for grazing.[184] In other words, the loss of the permit for reasons other than noncompliance with the terms, or the modification of the permit, does not necessarily result in the loss or modification of the grazing preference.[185]

IV. APPLICATION

Once the Forest Service fully acknowledges the existing right of grazing preference, it should change its implementation policies to reflect realities of grazing preference that have gone unrecognized for many years, especially in the terminology of permit vs. grazing preference, and the lack of a definition of grazing preference.[186] The TBGA implementation documents showcase this need for policy and rule changes.[187] This Part provides an example of how such changes should occur.[188]

A. The TGBA's Rules of Management

The actions of the TBGA are governed by its *Rules of Management*.[189] These rules are incorporated by reference into the contract between the Forest Service and the TBGA—the overarching term grazing permit.[190] As such, they are part of the cooperative, contractual relationship between the Forest Service and the TBGA, and while they are written by the TBGA,

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and issued the permit to another party . . . with a lower priority." 1991 U.S. App. LEXIS 10205, at *2–3. However, the Forest Service denied the application because the Crooks had submitted "false and fraudulent information" to the Forest Service in an earlier application for the permit. *Id.*

184 *See* 1992 FOREST SERVICE HANDBOOK, *supra* note 11, § 13.2 (stating that grazing permits cannot be granted until "all resource improvement reductions made during the preceding 10 years . . . have been restored to permits involved," suggesting a temporary suspension); *id.* § 16.2 ("Grazing permits may be suspended. . . for various reasons," including to devote the lands to another public purpose.); 2020 Forest Service Handbook, *supra* note 151, § 13.2 (giving existing permittees priority to receive grants if they suffered a reduction, suggesting that they have priority for permits they previously lost. Also, the term "unobligated capacity" suggests that a permittee may have some capacity obligated to them.); Agreement between U.S. Dep't of Agric. Resettlement Admin. and Thunder Basin Grazing Association (Sept. 1, 1937) [hereinafter 1937 Agreement] (on file with author).

185 1937 Agreement, supra note 184; 2020 Forest Service Handbook, *supra* note 151, § 13.2.

186 *See infra* Part IV.A–C.

187 *See* Rules of Management for the Thunder Basin Grazing Association 1 (2022) [hereinafter 2022 Rules of Management] (on file with author).

188 *See infra* Part IV.A–C.

189 *See generally* 2022 Rules of Management, *supra* note 187.

190 2022 Association Permit, *supra* note 11, at 7; *see supra* notes 12–15 and accompanying text.

they must be approved by the Forest Service and are heavily based on the *Forest Service Handbook* and the *Forest Service Manual*.[191]

The current process for acquiring term grazing permits within the TBGA is found within its *Rules of Management*.[192] These rules provide four different methods through which permittees may acquire association term grazing permits, but only the first three are relevant to this Comment.[193] This sub-part will discuss these three methods, which mostly ignore the importance of grazing preference by focusing on the transfer of permits, leaving purchasers woefully unprepared to engage in the process.[194]

In method one, an association member may acquire a permit through "changes in ownership of base property and completion of a waiver with preference," provided the new permittee received a transfer of land associated with a permit, and the previous holder of the permit waived their grazing preference to the buyer.[195] That transfer can occur in many ways, including through sale or inheritance, but regardless, the grazing preference must have been waived in favor of the new base property owner.[196] Waiver is the process by which the old permittee identifies the new permittee intended to receive the permit with attached grazing preference, assuming the new permittee is qualified under the *Rules of Management*.[197]

The rules covering method one are detailed in the section titled "waiver and reissuance of grazing permits because of changes in land ownership."[198] Despite the fact that grazing preference is mentioned in the sentence describing the first method, and is mentioned in connection with waiver in other sections, these rules do not mention grazing preference anywhere else.[199] This is confusing because these rules deal with the waiver of grazing preference, even though they do not explicitly acknowledge that

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[191] *See* 2022 Association Permit, *supra* note 11, at 7; *see supra* notes 11–13 and accompanying text.

[192] 2022 Rules of Management, *supra* note 187, at 9–14, 25–29.

[193] *Id.* at 9–10. The final method for acquiring permits is less of an acquisition than an exchange of equivalent. *See id.* at 10. This method is used to make management more efficient for the Forest Service and other public land management agencies. *Id.* As such, it is irrelevant to this topic.

[194] *See infra* notes 195–97, 205–10 and accompanying text.

[195] 2022 Rules of Management, *supra* note 187, at 9.

[196] *Id.*

[197] *Id.* at 25–29.

[198] *Id.* While method one is first discussed on page 9 of the Rules of Management, the rules that dictate the implementation of method one are not discussed until page 25, under an entirely different heading. *See id.* at 9, 25. Further, there is no text within the document to tie the two separate sections together. *See id.* This only adds to the confusion of grazing preference within the Rules of Management. *See id.*

[199] *See id.* at 9, 12.

fact.[200] For example, the rules for waiver provide that "[a] buyer who purchases ranch property from a member who does not execute a waiver shall receive no special consideration over other applicants."[201] The "special consideration" language is the essence of grazing preference.[202] Even though the rules are discussing waivers of grazing preference, they consistently and inaccurately refer to the waivers as waivers of the permits.[203] While grazing preference is very obscure and difficult to implement as currently worded in this method, it should become clearer if the procedure for waiver is clarified.[204]

The second method for the acquisition of a permit is the grant process, which does not mention grazing preference at all.[205] Despite the lack of grazing preference discussion, the rules still designate which members receive first priority and specify that "first consideration" should be given to existing members, so long as they are capable of receiving the permit.[206] This language, while lacking clarity, expresses concepts of grazing preference.[207]

The third method for acquiring permits also does not mention grazing preference.[208] However, its own title of "prior use" suggests concepts of grazing preference, and it requires that "priority for permit issuance" goes to those "who were using the lands immediately before acquisition if that use was authorized under a grazing permit."[209] This language strongly implies the prior users of the land have grazing preference to the permit for grazing on the land.[210]

All three of these methods could benefit from language clarifying the role of grazing preference.[211] However, method one also requires language solidifying its oblique reference to grazing preference.[212] For instance, despite references to permit waivers with grazing preference, the rules

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200 *See id.* at 25

201 *Id.* at 29.

202 *See supra* notes 94–96, 115, 145–51 and accompanying text.

203 2022 Rules of Management, *supra* note 187, at 25–28.

204 The main issue with the current procedure is the inaccuracy of the rules referring to the waiver as a waiver of a permit, not a waiver of a grazing preference. Telephone Interview with David W. Pellatz, *supra* note 2. This inaccuracy takes attention away from the lasting nature of the grazing preference and causes the TBGA to think the permits can be moved around without concern for the grazing preference, inadvertently violating and discarding that valuable right. *Id.*

205 *See* 2022 Rules of Management, *supra* note 187, at 9–10.

206 *Id.* at 9.

207 *See id.*

208 *Id.* at 10

209 *Id.*

210 *See id.*

211 *See id.* at 9–10.

212 *See id.* at 9.

make it clear that a waiver does not guarantee the person who received it will also receive the permit.[213] Sales with waiver require the confirmation of the waiver by the TGBA and explicitly state that "the permit, *if issued*, would be subject to" various restrictions.[214] Further, an entire subsection of the rules discusses "Preferred Applicant Status" which occurs when "the holder of a Waiver of Term permit submits an application and . . . they are not fully qualified to hold a permit."[215] If that happens, the holder has a specific amount of time to become qualified, and "if they do not qualify within the stated period their preferred applicant status will be cancelled and they will no longer be accorded priority for the issuance of a grazing permit."[216] This language also suggests that what is actually waived is not the permit, which is subject to other requirements, but the grazing preference—the limited right to renew which gives the holder a priority consideration for the issuance of the permit.[217]

B. Suggested Implementation Example

These rules reveal the confusion and inconsistency concerning what permittees are waiving—the permit or the grazing preference.[218] However, grazing preference more clearly represents the apparent intent of the rules.[219] It also more accurately describes the consequences of a waiver — a waiver does not mean the holder will receive the permit, but rather they receive grazing preference for the permit, provided they meet the qualifications that allow them to exercise that grazing preference.[220] Furthermore, it makes more sense for waiver to refer to grazing preference, because permit holders do not have authority to transfer permits.[221] The permit must be issued by the TBGA to ensure the receiving party complies with the permit terms.[222] As such, the meaning and intent of the rules would be better served by clarifying the grazing preference, rather than the permit, is being waived.[223]

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213 *See id.*

214 *Id.* at 26 (emphasis added).

215 *Id.* at 12.

216 *Id.*

217 This implication comes from the fact that failure to follow the requirements does not mean that the person will not receive a permit, but rather means that their "preferred applicant status will be cancelled" and they will not "be accorded priority." *Id.*

218 *See supra* Part IV.A.

219 *See infra* Parts III, IV.A.

220 *See supra* notes 215–16 and accompanying text.

221 2022 Rules of Management, *supra* note 187, at 25; *see* Reid v. Reid, 269 F.2d 923, 927–28 (10th Cir. 1959); Shufflebarger v. Comm'r, 24 T.C. 980, 981 n.1 (1955); Dooling v. Casey, 448 P.2d 749, 755 (Mont. 1968); Fence Creek Cattle Co. v. U.S. Forest Serv., 602 F.3d 1125, 1128 n.1 (9th Cir. 2010).

222 *See* 2022 Rules of Management, *supra* note 187, at 12–15.

223 *See id.* at 25–29.

To clarify, the Forest Service and the grazing associations would need to change the terminology from a permit waiver to a grazing preference waiver, and also include a definition of grazing preference, which is currently absent from their rules.[224] Such a definition would logically fit within the section discussing waiver, as grazing preference is largely relevant within the context of the transfer of base property.[225] Doing so would clarify most of the procedures for the reissuance of grazing permits, as most of them include a waiver.[226] It would also provide clarity for the acquisition of permits, another situation in which the waiver of grazing preference is relevant.[227]

Additionally, the rules would need to include provisions for tracking grazing preference as permittees transfer it via waiver.[228] Since the rules do not require tracking grazing preferences, the rules should address how to evaluate past transactions, especially transactions that do not explicitly discuss transferring grazing preference.[229] Further, additional rules could provide courses of action in specific situations.[230] For instance, while the first method of acquisition mentions changes in the ownership of base property accompanied by a completion of a waiver, it does not provide guidance in the event only part of the base property changes ownership, or the base property is split and given to multiple different owners.[231] While the creation and implementation of rules governing a tracking scheme would create increased workload in the short term, it would also provide for clearer tracking of the public lands amongst members and explain to the public why certain ranchers would receive permits while others would not.[232] Implicit in this benefit is the concept the public deserves to understand the management decisions of the Forest Service and grazing associations concerning public land use.[233]

Even though the second and third methods do not directly mention grazing preference at all, they seem to implicate similar grazing preference policy goals.[234]The intent of these current procedures becomes clear only when viewed in the broader context of grazing preference as a limited,

224 *See generally id.*; Rules of Management for Land Under Grazing Agreement with the Thunder Basin Grazing Association (1964) (on file with author) (demonstrating a previous way that grazing preference was included in the rules).

225 *See supra* notes 147, 174 and accompanying text.

226 *See* 2022 Rules of Management, *supra* note 185, at 25–29.

227 *Id.* at 9.

228 *See id.* at 25–29.

229 *See id.* at 31–35.

230 *See id.*

231 *See id.* at 9.

232 *See id.* at 9–10.

233 *See* 2022 Association Permit, *supra* note 11, at 4.

234 *See id.* at 9–10.

nonpossessory property interest with an attached right of renewal.[235] The TBGA rules would benefit from the explicit use of grazing preference, as defined elsewhere in the rules, to avoid misunderstandings.[236] The rules should clarify in which circumstances grazing preferences do not yet exist (such as when the land is new to grazing use or the permittees have waived or voided their grazing preferences) and circumstances when the Forest Service and the associations should follow grazing preference.[237]

Additionally, missing entirely from the rules is any mention of the value of grazing preference.[238] Although the rules mention waiver as part of a sale or other legally binding procedure involving value, such as "Contracts to Purchase With Waiver," or "Foreclosure with Waiver of Term Permit," the rules neglect to mention the value of such a waiver.[239] However, the rule implies transfers associated with a waiver include value that transactions without a waiver do not, as evidenced by the provision: "[a]n entity which acquired base property . . . without . . . [a] waiver shall receive no special consideration over an ordinary purchase."[240] This provision implies those with waiver do receive special consideration, an item of value. Beyond the rules themselves, many court cases suggest a grazing preference's right of renewal has value.[241]

A simple statement acknowledging the value of a grazing preference would explain why the rules differentiate between land transfers with and without waiver.[242] Along with that acknowledgement, a few additional rules in the TBGA *Rules of Management* denoting the proper valuation of the grazing preference, and the ability to explicitly contract for the grazing preference, would allow the parties conducting the transfer of the base property to fully understand the importance of the procedures that they follow.[243] If the buyer understands they are purchasing a waiver of grazing preference, or a limited, nonpossessory right to renew, they will be better equipped to evaluate the price for such a waiver, as opposed to current practice which makes it unclear whether a waiver is desirable, or what the waiver is actually providing.[244] Additionally, clarifying grazing preference would help ensure that buyers do not overpay for land expecting to get a

235 *See supra* notes 152–60 and accompanying text.

236 *See generally* 2022 Rules of Management, *supra* note 187.

237 *See id.* at 9–10, 17–23, 25–19.

238 *See generally* 2022 Rules of Management, *supra* note 187.

239 *Id.* at 26, 28.

240 *Id.* at 29; *see* Hubbard v. Brown, 785 P.2d 1183, 1186 (Cal. 1990); Stern, *supra* note 60, at 18 (the value of grazing preferences being part of the value of the permit); Robert H. Nelson, *How to Reform Grazing Policy: Creating Forage Rights on Federal Rangelands*, 8 FORDHAM ENV'T L. J. 645, 663 (1997).

241 *See supra* notes 99, 101–04, 115 and accompanying text.

242 *See* 2022 Rules of Management, *supra* note 187, at 25–29.

243 *Id.*

244 *See supra* notes 147, 195–204, 220–21 and accompanying text.

guaranteed permit when they only get a right of renewal, and may have to expend additional time and energy to become qualified to hold the permit.[245]

C. Practical Effect

If grazing preference was explicitly defined, it would provide needed guidance for the return of reclaimed land from the mines for grazing use.[246] Once the land is returned to grazing use, grazing preference would entitle any party that retained a grazing preference right to priority for the permit.[247] If a party no longer exists and their successor received the land via a transfer with a waiver, then that successor would hold the grazing preference and be entitled to priority.[248] If the party no longer exists and did not waive their grazing preference, that grazing preference is void, and the land can be permitted to any qualified applicant under the current grant guidelines.[249] Most importantly, grazing preference acknowledges the value that members who refused to waive their "pre-mining" era grazing preference and retained their limited, non-possessory property interest with attached right to renewal.[250] This ensures that their expected value is not lost.[251]

V. BENEFITS

Using grazing preference to illuminate the current permit acquisition processes would bring a number of benefits.[252] Grazing preference would provide guidance for both the grazing associations and the Forest Service.[253] Grazing preference would also provide protection for the older, smaller, family ranches by reaffirming and strengthening the language in the current rules, giving them priority over larger and newer ranches

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245 *See generally* Bell v. Apache Maid Cattle Co., 94 F.2d 847 (1938); Bassett v. Ryan, 236 P.2d 458, 460 (Ariz. 1951).

246 Telephone Interview with David W. Pellatz, *supra* note 2.

247 *See* discussion *supra* Part II.B.

248 2022 Rules of Management, *supra* note 187, at 9, 25–27; *see supra* notes 34, 39, 102, 147 and accompanying text.

249 The idea of "vacated range" within the grant process and the 1-year time limit to keep the preferred applicant statutes suggests that grazing preferences with are not timely dealt with are lost. 2022 Rules of Management, *supra* note 187, at 9–12.

250 *See supra* notes 27–29, 34, 39, 42 and accompanying text.

251 *See supra* notes 27–29, 34, 39, 42 and accompanying text.

252 *See infra* notes 253–54, 259, 271–72 and accompanying text.

253 *See* Dixon v. McKenzie Cty. Grazing Ass'n, 2004 ND 40, ¶ 3, 675 N.W.2d 414, 418 (illustrating the cooperative nature of the relationship between the government and grazing association in historical use of grazing preference); *see* Rules of Management for Land Under Grazing Agreement with the Thunder Basin Grazing Association, *supra* note 224, at 1–5.

moving into the area.[254] Following grazing preference would mean that powerful ranches would not be able to take permits from smaller, less powerful ranches, as the smaller ranches would be afforded the right to renew their permits.[255] However, if the larger ranches properly buy land and bargain appropriately for the value of the grazing preference, the larger ranches would be able to get the permits, and the smaller ranches would be paid a closer approximation of the actual value of their land.[256]

Grazing preference would affect the distribution of newly added lands to the National Grasslands.[257] New grazing preferences would be established, placing more emphasis on the decisions of the grazing association to issue term permits with grazing preference, or issue temporary permits without grazing preference.[258] Grazing preference would also further encourage the grazing associations to seriously consider all relevant factors when granting a permit, as that permittee has the right to renew the permit.[259] Some may see this as a negative, strengthening control that grazing associations hold over public lands. However, grazing association control is better than the alternative of direct Forest Service control, because the grazing associations are the democratic voice of the community administering federal land.[260]

If grazing preference were followed, it would restrict options for lands returning to grazing use after having been used for non-grazing purposes, such as mining.[261] Grazing preference would entitle those who retained their grazing preference when their land went out of grazing use to renewal

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[254] *See* Grest, *supra* note 10, at 47; Sacramento Grazing Ass'n v. United States, 135 Fed. Cl. 168, 172 (2017).

[255] *See* discussion *supra* Part II.B.

[256] *See supra* notes 101–04, 115 and accompanying text. This valuation is important for the community because the small family ranches are struggling to survive generational succession, and as a result often end up being sold to large corporations. Due to economies of scale, this means that ranching supports fewer families within the local communities, making the value they get for their land more important to the survival of the community.

[257] Bogner v. U.S. Forest Serv., 851 F. Supp. 1437, 1439–40 (D.S.D. 1994).

[258] 2022 Association Permit, *supra* note 11, at 2. Term permits last for no more than 10 years and entitle the holder to grazing preference or priority for renewal. 36 C.F.R. § 222.1. Temporary permits typically last for one year and do not entitle the holder to any grazing preference or priority. *Id.*

[259] 2022 Rules of Management, *supra* note 187, at 9, 12. Current procedures allow the grazing associations to issue new permits in a cavalier fashion because the serious implications of granting a grazing preference are not well articulated. Telephone Interview with David W. Pellatz, *supra* note 2.

[260] Grest, *supra* note 10, at 44, 47.

[261] 2020 Forest Service Handbook, *supra* note 151, §13.2; Agreement between U.S. Dep't of Agric. Resettlement Admin. and Thunder Basin Grazing Ass'n (Sept.1, 1937) (on file with author); 2022 Association Permit, *supra* note 11, at 7.

of their permits, assuming they remain a member of the association.[262] However, if the rancher did not want to wait for the grazing preference to be reestablished, they could contract for the value of that grazing preference by waiving the grazing preference to another party who was willing to wait, or they could waive the grazing preference to the association so that it would be available to be given to a new permittee.[263]

Following grazing preference would also affect the transfer of land. Many current land transfers do not address the transfer of grazing preference.[264] This causes loss of many types of value connected to the grazing preference.[265] For instance, grazing preference has a legal value.[266] Further, tax courts have assigned tax value to grazing preference.[267] Courts have also acknowledged that grazing preference has some value under reasonable expectations.[268] Finally, grazing preference has contract value.[269] Further, the stability of the lands provided by grazing preference benefits the public through the steady improvement of the quality of the submarginal lands.[270] An acknowledgment of the value of grazing

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262 2022 Rules of Management, *supra* note 187, at 1.

263 *Id.* at 9.

264 *See generally* Stern, *supra* note 60 (giving examples of improper procedures in the transfer of grazing preference.)

265 *See infra* notes 266–71.

266 *See* Hubbard v. Brown, 785 P.2d 1183, 1183–84 (Cal. 1990); *see also In re* Estate of Cronin, 237 N.W.2d 171, 173–74 (S.D. 1975) (real estate broker, when valuing the real estate, "took into consideration the availability of the leased grazing land that decedent had utilized under the terms of his grazing preference permit"). This value was acknowledged even despite regulations saying that the grazing preference could not be transferred.

267 Shufflebarger v. Comm'r, 24 T.C. 980, 999–1000 (1955) (grazing preference rights do not qualify for section 23(1) of the tax code.); Placer Cnty. Water Agency v. Jonas, 80 Cal. Rptr. 252, 254, 257 (Cal. Ct. App. 1969) (state tax assessment categorized a grazing preference permit as a taxable possessory interest.); Uecker v. Comm'r, 81 T.C. 983, 993 (1983) (restating the holding from *Shufflebarger* as "Federal grazing privileges with respect to public lands are an intangible asset").

268 Sacramento Grazing Ass'n v. United States, 135 Fed. Cl. 168, 217 (2017). Rudolph Inv. Corp. v. Comm'r, T.C.M. 1972-129, at *11–12 (1972) (referring to a "reasonable certainty of continued renewal"). Forest Service regulations also provide for reasonable expectations by making modifications to the permits appealable, since modifications are essentially the part of permits covered by grazing preference. 36 C.F.R. §§ 214.4, 222.4, 222.20.

269 36 C.F.R. §§ 222.51, 222.52; Dooling v. Casey, 448 P.2d 749, 756 (Mont. 1968).

270 *See* Grest, *supra* note 10, at 44 (recognizing the original poor land quality, but saying that the stabilization of grass production on the LUP lands "furnished the basis for a healthy economy"); Nelson, *supra* note 240, at 660–62 (showing that the lands were originally of poor quality, and were suffering from the instability in land management, an instability which was partly addressed by giving rights to livestock producers who had been previously using the land). Land quality improvements within the Thunder Basin National Grassland occur very slowly and may take decades to manifest. Telephone Interview with David W. Pellatz, *supra* note 2. The expectation of long-term permit retention encourages permittees to work towards those changes. *Id.*

preference to the permittees encourages them to protect the public land, rather than attempt to exploit it.[271]

Following grazing preference also brings the benefit of consistency.[272] Grazing preference is consistent with historic grazing, both on lands within the National Forests and on lands within the National Grasslands.[273] The proposed Forest Service grazing preference as detailed above also aligns more closely with the practices of BLM, which would beneficially limit discrimination between similarly situated people and reduce confusion for landowners with permits from both BLM and Forest Service.[274] It would also be consistent with the public policies of both the Forest Service and the federal government in general, including the policies regarding sound land management and stewardship.[275] Utilizing grazing preference also aligns with the goals and mission of the current Forest Service planning regulation.[276]

Using grazing preference to update and interpret current regulations would codify custom to provide economic stability in land and resource management.[277] Finally, such clarification of the regulations would make for more efficient governmental management.[278] Grazing preference

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271 *See* Grest, *supra* note 10, at 46–47.

272 *See infra* notes 274–77 and accompanying text.

273 *See supra* Part I.

274 *See* Pub. Lands Council v. Babbitt, 529 U.S. 728, 740 (2000) (describing the current definition of BLM grazing preference); 43 C.F.R. § 4100.0-5 (describing current BLM practices concerning grazing preference); U.S. CONST. amend. XIV, § 1 (preventing the "den[ial] to any person . . . the equal protection of the laws"); Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause . . . keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."); Nelson, *supra* note 240, at 663–67 (discussing the current practices of BLM and the Forest Service concerning the "assurance of future access to federal lands," which is essentially grazing preference).

275 43 U.S.C. § 1901(b)(2); Arruda & Watson, *supra* note 150, at 414–16, 422–24, 434–37; *Why Does the Forest Service Permit Livestock Grazing on National Forest System Lands?*, *supra* note 86; U.S. FOREST SERV., U.S. DEP'T OF AGRIC., THIS IS WHO WE ARE 9 (2019), https://www.fs.usda.gov/sites/default/files/This-is-Who-We-Are.pdf.

276 The current planning rule's mission is, in part, to "guide the management of the National Forest System lands so that they are ecologically sustainable and contribute to social and economic sustainability . . . and have the capacity to provide people and communities with . . . multiple uses that provide a range of social, economic, and ecological benefits for the present and into the future." 36 C.F.R. § 219.1(c).

277 WOOTEN, *supra* note 11, at 39; Mark S. Steinback & Jack Ward Thomas, *Potential Outcomes and Consequences of a Proposed Grazing Permit Buyout Program* 60 RANGELAND ECOLOGY & MGMT. 36, 37 (2007); Howard, *supra* note 11, at 421; *see* Nelson, *supra* note 240, at 663–67.

278 *See* Nelson, *supra* note 240, at 663–67 (discussing how the current confusing and ineffective practices of the agencies concerning "the assurance of future access to federal lands," which is basically grazing preference, create a strong economic incentive to find an alternative).

should be applied to guide the issuance and renewal of all grazing permits.[279]

VI. CONCLUSION

Soon, the Forest Service and the grazing associations will make decisions impacting the lives of the many livestock producers who inhabit the Thunder Basin National Grasslands.[280] To address those decisions, which concern the re-permitting of federal land from energy production to private grazers, the Forest Service should return to the historic right of grazing preference by strengthening the remnants of that right still present in modern Forest Service rules and regulations and those of the grazing associations.[281] Grazing preference would obligate the Forest Service and grazing associations to first offer the new permits to previous permit holders with an un-waived interest.[282] Following grazing preference would also bring many other benefits, including acknowledging a value of the land that has not been appropriately recognized, as well as incentivizing stewardship and improvement of the lands themselves.[283]

279 *See supra* Part IV(A).
280 *See supra* notes 28–39 and accompanying text.
281 *See supra* notes 28–39 and accompanying text.
282 *See supra* Part III.
283 *See supra* Part V.