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The Rise and Fall of Grazing Reform

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THE RISE AND FALL OF GRAZING REFORM

Karl N. Arruda & Christopher Watson***

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I. INTRODUCTION

Overgrazing of public lands has been and remains a serious threat to the ecological stability of the nation's federal lands. Grazing has led to desertification of large areas of land.¹ A half century ago, Aldo Leopold contrasted the impact of American settlement on Kentucky, in which the landscape evolved from canelands to blue grass but maintained its ecological stability, to the pioneers' impact on the Southwest in which intense use of the arid land led to soil erosion, loss of species, and slow but definite degradation of the ecosystem.² The American habit of treating all lands as equally suitable for settlement and economic exploitation, whether the moist East or the arid Southwest, produced, in Leopold's view, a "wrecked landscape."³

Human interaction with the land requires an ecological perspective, meaning that people are aware of their impact on ecosystems and the potential results of that impact. Without such a perspective, humans can threaten the long-term stability of ecosystems, and, therefore, human communities as well. Ecology relies both on a scientific understanding of the functioning of plants and animals and an historical understanding of how, over time, those species interact with each other, the climate, and humans. Without this historical and scientific perspective, human societies might not understand the dangers posed by ecologically ignorant land management. Of the Southwest's decline, Leopold explained, "[s]o subtle has been its progress that few residents of the region are aware of it. It is quite invisible to the tourist who finds the wrecked landscape colorful and charming"⁴

Since assuming office in 1993, Secretary of the Interior Bruce Babbitt has spearheaded Clinton Administration efforts to introduce an eco-

1. ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 205-06 (1949).

2. *Id.*

3. *Id.* at 206.

4. *Id.*

logical perspective into government policy in the form of a new western land ethic.⁵ Rather than manage the public lands for the benefit of a few private interests, Babbitt has said he aims to care for the land in order to serve multiple public interests such as watershed protection, recreation, wildlife conservation and ecosystem stability.⁶ In this way, Babbitt's goal seems similar to Leopold's vision of having people see the land as an interconnected whole—a "collective organism" having many values—rather than a "servant"⁷ having only economic value. One of the primary expressions of this new land ethic is an attempt to reform the way ranchers have used public lands as a commodity for the grazing of their cattle and sheep.

President Clinton and Secretary Babbitt took office with the express intention of reforming the allocation of federal grazing leases to private ranchers.⁸ They intended to make ranchers pay closer to the market value for grazing permits, to institute reforms to encourage ranchers to use good, ecologically-sound land stewardship principles and to end management inconsistencies between the Bureau of Land Management (BLM) and the Forest Service, the agencies that lease the most public land to ranchers.⁹ In short, the Clinton Administration sought to treat federal grazing land as the renewable but exhaustible natural resource that it is.¹⁰

On the way to this new land ethic, politics got in the way of Clinton and Babbitt. Ranching interests and environmentalists attacked the reforms,¹¹ and the administration dropped plans to raise grazing fees through the rulemaking process.¹² The BLM's final regulations went into effect August 21, 1995,¹³ while the Forest Service decided to put its regulations "on hold" due to uncer-

5. Michael C. Blumm, *Public Choice Theory and The Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 431 (1994).

6. *Id.*

7. LEOPOLD, *supra* note 1, at 223.

8. *Babbitt: High Fees and No Grazers Doesn't Help Range*, PUB. LANDS NEWS, February 4, 1993, at 2 [hereinafter *Babbitt: High Fees*].

9. BLM Grazing Administration Grazing Reform Announcement, 58 Fed. Reg. 43,208 (1993). A small amount of grazing occurs on National Wildlife Refuges and some National Park areas. GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 688 (3d ed. 1993).

10. A renewable resource is nevertheless exhaustible if it is damaged, polluted or used up faster than the resource can replenish itself. For example, timber is renewable, but if logging companies clear forests too quickly, the supply can run out.

11. *Babbitt's Rangeland Plan Pleases Nobody*, ROCKY MTN. NEWS, May 19, 1994, at 16-A.

12. *Interior Department Defers Decision on New Grazing Fee Structure to Congress*, B.N.A. NAT'L ENV'T DAILY, Dec. 30, 1994.

13. BLM Grazing Administration Final Rules, 60 Fed. Reg. 9,894 (1995) [hereinafter BLM Final Rules]; *New Grazing Rules Called Slow-Paced*, ROCKY MTN. NEWS, Aug. 26, 1995, at 32A; *Weaning West's Ranchers Off 'Cowboy Socialism'*, L.A. TIMES, Aug. 27, 1995, at Part-M.

tainty over what the Republican Congress might do with grazing policy.¹⁴ The BLM's final product is different in many ways from earlier proposals, and members of Congress have expressed a strong desire to substitute their own rules for the Administration's.¹⁵ This analysis of the Administration's grazing reforms reveals what the regulations aspire to accomplish, what they could have done if ranching interests had not succeeded in weakening them, and whether the revised regulations are an improvement over the status quo. Examining the politics of the reform process can explain the causes of the Administration's tactical retreat from its goal of raising fees and can also assess the current state and future prospects of the Leopold/Babbitt land ethic.

Section II of this article provides an overview of the history of grazing on federal lands, both before and after the passage of the Taylor Grazing Act of 1934. Section III then discusses the content and impact of recent calls for reform of federal grazing policy, leading up to the Clinton Administration's early policy goals. Section IV supplies an in-depth explanation and analysis of the Administration's attempts to reform grazing rules. The Administration's plans have evolved into generally weaker versions, and Section V assesses the causes, results, and value of this evolution. The paper concludes that Leopold's vision offers a rational, humble, and essential blueprint for our society's relationship with the environment and calls for the adoption of Leopold's land ethic through reforms stronger than the revised regulations, based on a greater understanding of the different types of public lands and the realization that the historical pattern of overgrazing must end before federal lands can achieve ecological stability.

II. BACKGROUND

A. *The Growth of Grazing up to the Taylor Grazing Act*

When the first Spanish longhorn cattle reached New Mexico in the 16th century, ranching grew slowly.¹⁶ Only a few Spaniards, and later Mexicans, raised cattle in the arid Southwest. Animal husbandry began at Church missions, which raised mainly sheep, and on large land grants controlled by aristocrats.¹⁷ Spanish armies also herded cattle and sheep to

14. Telephone Interview with Berwin Brown, Range Expert, Forest Service (Nov. 13, 1995). As of the date of this writing, the Forest Service has yet to publish final rules.

15. *Congress Fails to Pass Range Policy; Senate Votes Regs Bar*, PUB. LANDS NEWS, Aug. 17, 1995, at 2-3.

16. DENZEL AND NANCY FERGUSON, SACRED COWS AT THE PUBLIC TROUGH 11 (1983).

17. WILLIAM VOIGT, JR., PUBLIC GRAZING LANDS: USE AND MISUSE BY INDUSTRY AND GOVERNMENT 17-18 (1976).

provide an easily-produced food source in the untamed Southwest.¹⁸ The western United States inherited Spanish ranching methods, which had produced a history of overgrazing in Spain.¹⁹ The cattle, descended from Spanish longhorns, were hardy and able to withstand harsh conditions.²⁰

Cattle did not reach the Northwest until British fur traders brought some to Astoria, Oregon in 1814.²¹ Western ranching on a large scale by U.S. citizens began with trading posts along trails, raising herds to sell to those settlers who had lost their own animals during the difficult journey west.²² Many went west with the belief that cattle and sheep meant easy money.²³ With no government regulation, no property taxes, and a need for only minimal supervision of hardy livestock, that belief often proved true.

The growth of railroads and mining, as well as the expansion of the Army to subdue Native Americans, caused the Western livestock industry to grow. Railroads allowed faster shipment of livestock, and the miners, soldiers, and settlers formed a growing local market for meat. By the mid-1800s, so many cattle roamed the Southwest that ranchers often slaughtered them just for their hides and tallow, and still made money.²⁴

When state laws did address grazing, the laws usually protected ranchers' interests by relying on ranching custom that had developed over decades.²⁵ The livestock industry was well-represented in early state legislatures, since it was one of the few organized interests in western states.²⁶ The general rule was that grass was free and belonged to the user.²⁷ Although ranchers shaped laws to fit their needs, they often went outside the law to protect their interests. Ranchers hired gunmen to control land, used illegal methods to control rustlers and to keep homesteaders from taking valuable land, and controlled huge ranches like medieval fiefdoms, consisting of both public and private land.²⁸

The Civil War was the immediate cause of several events which contributed to the swift growth of Western ranching. Congress, unimped-

18. *Id.* at 18.

19. FERGUSON, *supra* note 16, at 11.

20. *Id.*

21. *Id.* at 12.

22. VOIGT, *supra* note 17, at 18.

23. FERGUSON, *supra* note 16, at 4.

24. *Id.* at 12.

25. Richard E. Shannon, *The Taylor Grazing Act: A 50 Year Perspective*, WESTERN WILDLANDS, Spring 1985, at 2.

26. *Id.*

27. *Id.* This custom was generally upheld by the United States Supreme Court in *Buford v. Houtz*, 133 U.S. 320 (1890).

28. *Id.* at 323-25, 329.

ed by regional strife since Southern members had left, approved the Homestead Act,²⁹ which allowed more settlement, and a route for a trans-continental railroad. As a result, ranches in the Far West could send cattle east at a reasonable expense.³⁰ In addition, when Union forces cut Texas off from the eastern part of the Confederacy, cattle could not be sent to market, and by the end of the war, Texan herds had increased dramatically.³¹ When the war ended, ranchers invented the large-scale cattle drive to take the Texan cattle to unstocked interior areas and to railroad lines that would take the cattle to markets North and South.³²

As railroads expanded after the Civil War, huge herds of livestock developed.³³ In 1870, four to five million cattle roamed the seventeen western states, but by 1884, the peak year, thirty-five to forty million cattle grazed on Western land, a 600% to 900% increase.³⁴ Sheep multiplied even more dramatically, from a half million in 1850 to twenty million by 1890, a 3900% increase.³⁵ These great herds of livestock had to compete with each other and with herds of wild horses for forage.³⁶ They also competed with homesteaders for good land. As farmers took the best lands, ranchers were forced to move more livestock to the arid intermountain region.³⁷ To help ranchers, Congress authorized larger homesteads of up to 640 acres in the arid West,³⁸ but that was not enough land for a successful ranch in such an arid region. As a result, ranchers continued to use public domain land as they always had.³⁹

Ranching also relied on subjugation of Native American tribes for expansion. The Army removed both the bison and the tribes that relied on them.⁴⁰ Congress often reduced the size of Indian reservations in response to calls from settlers and ranchers.⁴¹ Ranchers ran livestock illegally on reservations, and government officials did little about trespassing or corrupt leasing

29. 43 U.S.C. § 161 (repealed 1976). Southern members of Congress had opposed previous homesteading bills fearing that new anti-slavery states would result. COGGINS, *supra* note 9, at 83.

30. VOIGT, *supra* note 17, at 21.

31. *Id.*

32. *Id.*

33. FERGUSON, *supra* note 16, at 13.

34. LYNN JACOBS, WASTE OF THE WEST: PUBLIC LANDS RANCHING 11 (1991).

35. FERGUSON, *supra* note 16, at 15.

36. *Id.* at 14.

37. *Id.* at 13-14.

38. The Kinkaid Act of 1903, 43 U.S.C. § 224 (repealed 1976), the Enlarged Homestead Act of 1916, 43 U.S.C. § 218 (repealed 1976), and the Stock Raising Homestead Act of 1916, 43 U.S.C. §§ 219-301 (repealed 1976).

39. George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 20 (1982).

40. JACOBS, *supra* note 34, at 10.

41. *Id.* at 15.

agreements.⁴² The officials often were ranchers or cowboys themselves, and ranchers expected them to cater to the livestock industry.⁴³

The government created ecological problems by encouraging unlimited grazing and doing little, if anything, to protect the land. Even in the moist East, where farmers usually kept cattle confined, overgrazing occurred.⁴⁴ In the arid West, where ranchers had little oversight of livestock and the land usually was not well-suited for grazing due to poor soil and a short growing season, overgrazing was more likely and harder to avoid.⁴⁵ Also, droughts and harsh winters often led to catastrophic losses of animals and extensive damage to the land.⁴⁶ In 1886, Montana's weather was dry, but ranchers brought many cattle to the region anyway. By the time winter came, over a million cattle roamed the territory. That year, winter was early and harsh. The spring of 1887 revealed the results of laissez-faire grazing: "When the snow finally melted, thousands of dead cattle bobbed among the ice floes moving down the swollen streams—a procession of bodies testifying to the immensity of the tragedy."⁴⁷ In eastern Montana, up to 70% of cattle perished. Ranchers in the territory suffered an estimated loss of \$20 million.⁴⁸

For many years, ranchers accepted these large losses as a normal part of business in the West.⁴⁹ Putting livestock on the range was a relatively easy investment, and ranchers preferred to gamble for profits.⁵⁰ Ranchers did not have a strong incentive to care about the damage being done because they had invested little, if any, money in land and, if livestock wore out part of the public domain, they could easily seek better forage elsewhere. In addition, the deterioration of the Western range was not always easy to notice. Unlike logging, which can leave clear, dramatic impacts on a forest, ranching can damage the range ecosystem through a "slow, insidious process."⁵¹ While John Wesley Powell, famous explorer of the Colorado River, wrote of the deterioration of grasses and increase in erosion in Utah,⁵² most people did not notice the problem or did not consider it to be urgent.⁵³

42. FERGUSON, *supra* note 16, at 27-28.

43. JACOBS, *supra* note 34, at 14.

44. FERGUSON, *supra* note 16, at 12.

45. COGGINS, *supra* note 9, at 693.

46. FERGUSON, *supra* note 16, at 19.

47. *Id.* at 17.

48. *See id.* at 16-17 for information on Montana.

49. *Id.* at 16.

50. *Id.*

51. VOIGT, *supra* note 17, at 32-33.

52. JOHN WESLEY POWELL, REPORT ON THE LANDS OF THE ARID REGIONS OF THE UNITED STATES 88 (Wallace Stegner ed., Harv. Univ. Press 1962) (1879).

53. VOIGT, *supra* note 17, at 34-35.

Heavy losses, however, helped convince many people that overgrazing was a problem.⁵⁴ The winter of 1886 to 1887 severely hurt the ranching industry from southern Colorado to Canada and from the 100th Meridian to the western slopes of the Rocky Mountains.⁵⁵ The hard winter of 1889 to 1890, which forced many ranchers into bankruptcy, ended the era of year-round grazing in the intermountain region, but periodic droughts continued to cause large losses.⁵⁶ The harsh weather, together with ranchers' shortsightedness, the advent of barbed wire—which enabled large operations to enclose huge ranches—and a decreasing market in the 1880s, all forced the industry to evolve from an adventure into a business.⁵⁷

When President Teddy Roosevelt organized the Forest Service in 1905, ranchers had free reign in the forest reserves which the government had established.⁵⁸ The new agency made the first attempts at regulating the livestock industry. In 1906 Roosevelt, through his Forest Service Chief, Gifford Pinchot, introduced a fee of five cents per animal unit month (AUM).⁵⁹ This first attempt at regulation met strong resistance from ranchers used to independence, but Roosevelt and Pinchot stuck to their policy in order to assert federal authority over the previously ignored public domain.⁶⁰ Pinchot reasoned that just as timber companies should not get trees for free, so too ranchers should not get grass for free.⁶¹ The new national forests existed to provide for the long-term benefits of the whole people, rather than the short-term benefits of companies or individuals.⁶² The Forest Service went on to develop a rational grazing program to heal the tired land,⁶³ but World War I's demand for resources led to a large increase in federal grazing, which decreased only slowly after the war.⁶⁴

This era of recklessness damaged the land. The results were altered vegetation and drastic changes in landscape.⁶⁵ Many areas had become

54. FERGUSON, *supra* note 16, at 16.

55. JOHN CLAY, *MY LIFE ON THE RANGE* 208 (1962).

56. FERGUSON, *supra* note 16, at 19. For example, a severe drought in the Southwest from 1891 to 1893 caused losses of 50% to 75% to livestock herds. *Id.* at 19.

57. THE WESTERN RANGE, S. DOC. NO. 199, 74th Cong., 2nd Sess. 124 (1936).

58. FERGUSON, *supra* note 16, at 33-34.

59. An AUM is the amount of forage consumed monthly by one bull, one cow and her calf, or five sheep.

60. FERGUSON, *supra* note 16, at 34.

61. VOIGT, *supra* note 17, at 47.

62. *Id.* at 44.

63. FERGUSON, *supra* note 16, at 35.

64. VOIGT, *supra* note 17, at 53-54. In 1908, the Forest Service authorized 14 million AUMs, but by 1918, the last year of the war, AUMs were up to 20.4 million. Authorized AUMs were 17.2 million in 1923, and 12.6 million in 1928. *Id.*

65. JACOBS, *supra* note 34, at 11.

virtual deserts; streams dried up, the once ubiquitous range grasses were less common and less healthy.⁶⁶ Changes in the way ranchers operated were essential.

As early as 1878, John Wesley Powell proposed reorganizing the way the government managed the arid Western lands, including establishing and leasing grazing districts.⁶⁷ Congress considered bills to establish such a leasing system for grazing districts as early as 1899.⁶⁸ In 1928, a group of Montana ranchers asked for, and the federal government agreed to, a withdrawal of 108,000 acres of public land in order to lease it to the ranchers for the exclusive right to graze livestock there.⁶⁹ This was the first experiment with grazing permits and foreshadowed grazing reforms which would greatly change the way ranchers used the public domain.

B. The Taylor Grazing Act and Its Aftermath

The Great Depression and a severe drought left the livestock industry on the brink of ruin in the early 1930s.⁷⁰ Congress responded with the passage of the Taylor Grazing Act⁷¹ (TGA) in 1934, finally asserting its control over the public domain. No longer was the public domain ignored and left to the local users to control by custom or state law. Through a new Division of Grazing and a system of grazing permits, federal law would now decide who could graze livestock on the land, how many livestock could graze, and how much the ranchers would need to pay for the right to graze. In the same breath, however, the law left most of those decisions to the ranchers by creating a system of self-government through local Grazing Advisory Boards.⁷²

Congress intended the TGA to end open range grazing and indiscriminate settlement on the public domain in order to stabilize the grazing industry and restore the land.⁷³ Grazing was still the dominant use of the

66. COGGINS, *supra* note 9, at 693.

67. POWELL, *supra* note 52, at 33-36. Powell and his team even included in their report a draft version of a bill "to authorize the organization of pasturage districts by homestead settlements on the public lands which are of value for pasturage purposes only." *Id.* at 45-49.

68. PHILLIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* 41-43 (1960).

69. Shannon, *supra* note 25, at 3.

70. Coggins & Lindberg-Johnson, *supra* note 39, at 40.

71. 43 U.S.C. § 315 (1994).

72. Shannon, *supra* note 25, at 3-4.

73. JACOBS, *supra* note 34, at 17. The TGA lists the goals of grazing districts as being "to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range"

public domain: the Grazing Advisory Boards, made up of ranchers, would carve up the public domain into grazing districts, decide who acquired grazing permits, and set general rules for grazing throughout the western public lands.⁷⁴ The TGA established a preference for issuing permits to adjacent landowners, effectively giving grazing rights to the historic users.⁷⁵ However, the Act did not give property rights to the ranchers, thus allowing grazing without payment of property taxes, but also leaving ranchers more vulnerable to government control.⁷⁶ Although the retention of lands by the federal government would come back to haunt the ranchers, in the first few decades after the TGA, ranchers successfully intimidated the Division of Grazing into asserting little authority, leaving control to the local advisory boards.⁷⁷ Still, the TGA stemmed further degradation of the land⁷⁸ and served as a foundation for later regulation.

C. Modern Legislation

With a growing Western population and greater concentration of people in urban and suburban areas, the federal government faces a growing demand for uses of public lands (including grazing, minerals, recreation, water, and preservation) that outpaces the supply.⁷⁹ This scarcity has led to attempts to balance competing interests and to prevent any one interest from hindering others. The Classification and Multiple Use Act (CMUA)⁸⁰ of 1964 ordered the Bureau of Land Management to study its lands and the authorized use of BLM lands for more than grazing.⁸¹ The Federal Land Policy and Management Act (FLPMA)⁸² of 1976 and the Public Rangelands Improvement Act (PRIA)⁸³ of 1978 went beyond the TGA and CMUA to give more management power and responsibilities to the BLM and the Forest Service over grazing and other uses of the public lands.⁸⁴

43 U.S.C. § 315a (1994).

74. Shannon, *supra* note 25, at 4.

75. COGGINS, *supra* note 9, at 694.

76. Shannon, *supra* note 25, at 4. *See also* Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 315 (D.C. Cir. 1938), where the court held that grazing rights under the TGA are not vested property rights: "We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property." *See also* U.S. v. Fuller, 409 U.S. 488 (1973) which held that the value of grazing permits is not part of the fair market value of a ranch taken by eminent domain.

77. JACOBS, *supra* note 34, at 18.

78. COGGINS, *supra* note 9, at 693.

79. *Id.* at 743.

80. 43 U.S.C. §§ 1411-1418 (expired 1970). The BLM's study lasted until 1970 when the CMUA expired.

81. Shannon, *supra* note 25, at 5.

82. 43 U.S.C. §§ 1701-1784 (1994)

83. 43 U.S.C. §§ 1901-1908 (1988).

84. COGGINS, *supra* note 9, at 711.

FLPMA gives the BLM permanent authority to manage lands for multiple uses⁸⁵ and calls for permanent retention of public lands by the federal government.⁸⁶ FLPMA requires the BLM to develop land use plans⁸⁷ using a multiple use and sustained yield perspective, considering environmental concerns and weighing long-term and short-term benefits of land uses.⁸⁸ PRIA establishes a policy to “manage, maintain and improve” rangeland conditions so that the lands will become as productive as possible for all rangeland uses,⁸⁹ including livestock forage, wildlife habitat, recreation, and water and soil conservation.⁹⁰ FLPMA gives the BLM and the Forest Service power to reduce livestock levels on grazing allotments.⁹¹ PRIA provides the BLM authority to discontinue grazing in selected areas.⁹²

The National Environmental Policy Act (NEPA)⁹³ of 1969, as interpreted in *NRDC v. Morton*,⁹⁴ requires both national and regional environmental impact analyses for grazing planning. In *Morton*, the court held that a national, programmatic environmental impact statement (EIS) considering general policy guidelines was not enough; NEPA required analysis of specific impacts of grazing permits, which vary region to region because of geography, climate and history.⁹⁵

While the success of NEPA, FLPMA and PRIA in balancing multiple uses is arguable,⁹⁶ they have helped improve the ecological integrity of the public range. Judicial review under FLPMA has ratified agency power to reduce grazing.⁹⁷ However, courts have also given great deference to agencies’ decisions with regard to planning and setting grazing levels.⁹⁸ The statutes require extensive planning by

85. 43 U.S.C. § 1732.

86. *Id.* § 1701(a).

87. *Id.* § 1712(a).

88. *Id.* § 1712(c).

89. *Id.* § 1901(b)(2).

90. *Id.* § 1901(a)(1).

91. *Id.* §§ 1752(a), (e).

92. *Id.* § 1903(b).

93. 42 U.S.C. §§ 4321-4370 (1988).

94. 388 F. Supp. 829 (D.D.C. 1974), *aff’d per curiam*, 527 F.2d 1386 (D.C. Cir. 1976).

95. *Id.* at 838-39, 841. Nevertheless, the court gave the BLM discretion in deciding the scope of the regional EISs. *Id.*

96. See generally Blumm, *supra* note 5.

97. In *Schwenke v. Secretary of Interior*, 720 F.2d 571 (9th Cir. 1983), the court ordered the transfer of a game refuge from BLM control to the control of the Fish and Wildlife Service (FWS) and directed the FWS to manage the refuge consistent with the refuge’s management act, which would lead to less grazing. Shannon, *supra* note 25, at 6-7.

98. *NRDC v. Hodel*, 624 F. Supp. 1045 (D. Nev. 1985), *aff’d* 819 F.2d 927 (9th Cir. 1987). The district court held that FLPMA and PRIA have the “broadest sorts of discretionary language.” *Id.* at 1062.

government officials with the goal of producing a rational public lands policy, but a lack of coherence remains in federal grazing policy, due to a lack in central coordination, changes in policy by different administrations, and opposition to regulation among western ranchers.⁹⁹ While planning for multiple uses has led to more forage for wild horses and wildlife, and to greater attention to watershed and recreation needs,¹⁰⁰ inertia and a lack of money have prevented many large permanent reductions in grazing levels.¹⁰¹ Lingering problems with damaged and overgrazed land have led to continuing calls from government agencies, scientists and environmental advocacy groups for changes in the management of public lands grazing.

III. CALLS FOR REFORM AND THE CLINTON ADMINISTRATION'S RESPONSE

A. *Calls for Reform*

Despite the increased regulatory power of the BLM and the Forest Service, grazing is still damaging to federal lands, according to many observers. Since 1988, the General Accounting Office of the federal government has issued several reports arguing that public lands grazing is damaging riparian areas, deserts, and wildlife due to management that neglects wildlife values and emphasizes commodity production.¹⁰² In 1989, The National Wildlife Federation (NWF) and the National Resources Defense Council (NRDC) reported that public lands grazing is hurting wildlife and soil and water quality.¹⁰³ The NWF later reported that the

99. COGGINS, *supra* note 9, at 694, 743.

100. Shannon, *supra* note 25, at 7.

101. Joseph M. Feller, *What Is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 576 (1994). According to Professor Feller, the BLM's recent policy has been that not to reduce grazing levels unless it has several years of solid data establishing a need for a reduction. Therefore, if the agency lacks money to do adequate research, reductions will not occur. Professor Feller also wrote that the BLM generally designs plans to protect or enhance environmental resources so as to accommodate current levels of livestock. *Id.* at 577.

Tim Salt, Senior Rangeland Management Specialist for the BLM, said that with the new regulations, BLM personnel have more flexibility as far as what type of information will be sufficient to allow reductions in grazing levels. Telephone Interview with Tim Salt, Senior Rangeland Management Specialist, Bureau of Land Management (Jan. 24, 1997).

102. See generally GENERAL ACCOUNTING OFFICE, CURRENT FORMULA KEEPS GRAZING FEES LOW (1991); GENERAL ACCOUNTING OFFICE, PUBLIC RANGELANDS: SOME RIPARIAN AREAS RESTORED BUT WIDESPREAD IMPROVEMENT WILL BE SLOW (1988) [hereinafter SOME RIPARIAN AREAS RESTORED]; GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: BLM'S HOT DESERT GRAZING PROGRAM MERITS RECONSIDERATION (1991); GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: INTERIOR'S MONITORING HAS FALLEN SHORT OF AGENCY REQUIREMENTS (1992); and GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: MORE EMPHASIS NEEDED ON DECLINING AND OVERSTOCKED GRAZING ALLOTMENTS (1988) [hereinafter MORE EMPHASIS NEEDED].

103. See generally J. WALD AND D. ALBERSWERTH, OUR AILING PUBLIC RANGELANDS: STILL

number of endangered, threatened, and candidate species on BLM land has increased greatly in recent years: seventy-five species were on the threatened or endangered list for BLM land in 1982, but in 1993 the number was 216, with 1100 other candidate species.¹⁰⁴

The NWF/NRDC report also claimed that, in 1989, 97 million acres of BLM land, or 68.4 percent of BLM land for which data was available, were in unsatisfactory condition.¹⁰⁵ Four years earlier, *High Country News* reported that, in 1985, 83 percent of the BLM's land was in fair to poor condition.¹⁰⁶ In 1988, the GAO acknowledged that overgrazing threatened one-fifth of federal grazing allotments with ecological damage¹⁰⁷ and that overgrazing was damaging 8 percent of grazing allotments, but that officials were not responding to the problem in 75 percent of these cases.¹⁰⁸

Even though many federal lands are worn-out and ecologically-threatened from excessive grazing, they produce only a small portion of the nation's livestock. By most measures, western livestock grazing is not nearly as efficient or productive as eastern livestock operations. In 1980, U.S. farmers and ranchers were raising an estimated 120 million cattle, but only 1.5 million of them grazed on public land in the eleven western states.¹⁰⁹ The eleven western states provided an estimated 18 percent of the nation's beef in 1980, mostly due to private irrigation, but Forest Service and BLM grazing land provided only 2.3 percent of total beef.¹¹⁰ These western states have 11 percent of all livestock producers, 9 percent on private land alone, and only 1.5 percent using private and federal lands.¹¹¹ In those eleven states a

AILING, CONDITION REPORT—1989 (1989).

104. JOHN HORNING, *GRAZING TO EXTINCTION: ENDANGERED, THREATENED AND CANDIDATE SPECIES IMPERILED BY LIVESTOCK GRAZING ON WESTERN PUBLIC LANDS 2* (1994).

105. *Id.* at 3.

106. Steve Johnson, *BLM's Grazing Program is a National Scandal*, *HIGH COUNTRY NEWS*, Dec. 23, 1985, at 15. The distinction between "unsatisfactory" and "fair" or "poor" is not clear. The Draft EIS explained that "[i]nterpreting rangeland conditions has always been controversial." BUREAU OF LAND MANAGEMENT AND UNITED STATES FOREST SERVICE, *RANGELAND REFORM '94: DRAFT ENVIRONMENTAL IMPACT STATEMENT 25* (1994). [hereinafter DRAFT EIS]

107. See MORE EMPHASIS NEEDED, *supra* note 102, at 30. The GAO measured range condition by comparing present plant communities on allotments with what natural undisturbed communities would look like. The more similar the present condition is to the natural condition, the better the rating for the allotment. *Id.* at 20, 22.

108. *Id.* at 3. The main reason for inaction was lack of information. *Id.* at 28; see also *supra* note 101.

109. Johnson, *supra* note 106, at 15. The 11 western states are Washington, Oregon, California, Arizona, Nevada, Idaho, Utah, New Mexico, Montana, Wyoming, and Colorado.

110. *Id.* While the BLM's land covers 11 states, the Forest Service's land covers 46 states.

111. JACOBS, *supra* note 34, at 25. Estimates for the number of federal permittees ranges from 23,000 (*Id.*) to 28,000; Joy Belsky, *Natural Resource Colloquium*, Northwestern School of Law,

rancher needs an estimated 168 acres of land to raise one cow, which is nine times the national average.¹¹²

Notwithstanding the numerous reports of continuing degradation on public grazing land, in 1988, the GAO argued that improvement has occurred since the passage of the TGA, and that more improvement is possible if the BLM and Forest Service can overcome budget cuts and institutional gridlock.¹¹³ The government achieved dramatic improvements in some riparian areas, but such programs need monetary and agency support.¹¹⁴ The Clinton Administration intended to provide that additional support when it came to power in 1993.

B. Clinton Administration Plans

While governor of Arizona, Bruce Babbitt, now Secretary of the Interior, called for a "new western land ethic" which would replace the concept of multiple use with public use.¹¹⁵ Babbitt explained that, with an increasingly urban population, "we must recognize the new reality that the highest and best, most productive use of western public land will usually be for public purposes—watershed, wildlife and recreation."¹¹⁶ He said that the government would need to subordinate its subsidy to traditional uses such as grazing to the need for regeneration and restoration of public grasslands: "The great urban centers of the west are filled with citizens who yearn for solitude, for camping facilities, for a blank spot on the map, a place to teach a son or daughter to hunt, fish or simply survive and enjoy."¹¹⁷

As Secretary of Interior, Babbitt renewed his call for improved stewardship of public lands, but said he was not as concerned with raising grazing fees to make money for the government.¹¹⁸ Babbitt explained that his goals in studying grazing and proposing reforms were as follows:

January 31, 1995. The remaining one-half percent of permittees use state-owned lands in combination with private and/or federal land.

112. Johnson, *supra* note 106, at 15. In addition, U.S. consumption of beef, lamb and mutton has declined steadily since 1970. In 1970 the per capita consumption was 83.7 pounds. By 1993 it was 63.3 pounds. U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 147 (1995). Nevertheless, production of beef, lamb and mutton showed a slight increase during the same period (going from 22,361 animals in 1970 to 23,671 in 1993), with producers exporting much more meat to compensate for the decreased U.S. demand: exports went from 176 million pounds in 1980 to 1.28 billion pounds in 1993. *Id.* at 690.

113. SOME RIPARIAN AREAS RESTORED, *supra* note 102, at 3-4.

114. *Id.* at 2-3.

115. COGGINS ET AL., *supra* note 9, at 1080.

116. *Id.*

117. *Id.* at 1081.

118. Babbitt: *High Fees*, *supra* note 8, at 1.

- 1) to raise public awareness of public lands grazing;
- 2) to focus on recovery of riparian areas, since they are the key to water supplies and wildlife survival and because a 1990 Environmental Protection Agency study said riparian areas were at their worst point in history;
- 3) to set specific guidelines to give certainty to all involved;
- 4) to clarify ownership of water rights on BLM lands;
- 5) to achieve fairer and more effective enforcement of regulations through streamlining;
- 6) to raise grazing permit fees to get fair value for use of the land;
- 7) to reform grazing without significant harm to ranchers, their communities, and open space; and
- 8) to obtain more local participation in land use decisions.¹¹⁹

With these ideas and goals, Babbitt headed the Clinton Administration's efforts to change public lands grazing. Babbitt's specific goals, however, do not seem to intend to subordinate grazing to other interests. Although the goals aimed to restore damaged lands and reflected Babbitt's earlier vision of a new western land ethic, they do not fully embrace that ethic because they do not clearly intend to make public purposes other than grazing dominant on the public lands. Babbitt seemed to envision the land, as Leopold did, as an interconnected whole, but his reforms were unable to question the dominance of grazing.¹²⁰ For example, the final reforms will continue to subsidize grazing on federal land.¹²¹ The proposed rules just try to improve management so as to allow grazing to continue on more or less the same scale as today. Babbitt basically said as much when he told Congress that he felt good ranchers are a key to maintaining good range condition, and that when ranchers go bankrupt, the environment suffers.¹²² Nevertheless, the Administration was able to propose reforms that, if kept intact, would have greatly changed public lands grazing. Proposing reforms is very different, however, from implementing them.

119. Bruce Babbitt, *Babbitt: Beyond Grazing Reform*, ROLL CALL, April 11, 1994 [hereinafter Babbitt, *Beyond Grazing*].

120. For additional comment on this issue, see Joseph M. Feller, 'Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Lands Grazing Policy, 25 ENVTL. L. 703, 712-14 (1995).

121. Karl Hess, Jr. and Jerry L. Holechek, *Babbitt's Range Plan Continues Subsidies, Hinders Real Reform*, SACRAMENTO BEE, September 3, 1994, at B7.

122. See *Babbitt: High Fees*, *supra* note 8, at 2.

IV. EVOLUTION OF REFORM EFFORTS

A. *Legislative Attempts*

Initially, the Administration tried to reform grazing legislatively. The 1993 budget would have raised the base grazing fee of \$1.86 per AUM by as much as one-third.¹²³ Babbitt hoped to use an incentive-based system to lower these higher fees for ranchers using good management practices.¹²⁴ At the same time, some members of Congress were attempting to pass more sweeping reforms.¹²⁵ These efforts suffered a fatal blow, however, when western Senators pressured Clinton to back away from raising fees.¹²⁶ Although for a time Congress had some hope of a compromise, procedural gridlock eventually froze the legislative process.¹²⁷ However, another avenue for reform remained and, by the middle of March 1993, the Administration was considering an administrative approach to grazing reform to bypass Congressional reluctance.¹²⁸

B. *Administrative Attempts: Rangeland Reform '94*

With legislative reforms foundering, the Administration pushed forward with its attempts to reform grazing by preparing new regulations for the BLM and the Forest Service. In August 1993, the BLM and the Forest Service outlined their proposed reforms in Advanced Notices of Proposed Rulemaking (1993 notice),¹²⁹ initiating a grazing reform effort

123. *GAO Eyes Money from Commodities, Warns on More Wilderness*, PUB. LANDS NEWS, Jan. 21, 1993, at 7.

124. *See Babbitt: High Fees*, *supra* note 8, at 1.

125. *Boxscore of Legislation*, PUB. LANDS NEWS, May 13, 1993, at 10. Senator Harry Reid (D-Nev.), Representative George Miller (D-Cal.), Rep. Bruce Vento (D-Minn.), and Rep. Mike Synar (D-Okla.) were the most active proponents of reform. *Reid, Friends Attack Babbitt Range Plan; Just Positioning?*, PUB. LANDS NEWS, Mar. 17, 1994, at 3 [hereinafter *Reid, Friends*].

126. HORNING, *supra* note 104, at 4.

127. *Babbitt, Hill Dems Agree on Grazing Fees, Range Policy*, PUB. LANDS NEWS, Oct. 14, 1993, at 1; *Senate Refuses to Consider Range Policy—Thus Far*, PUB. LANDS NEWS, Oct. 28, 1993, at 1 [hereinafter *Senate Refuses*]. The doomed compromise would have resulted in a smaller fee increase than the one Babbitt had proposed, and would have codified roughly two-thirds of Babbitt's policy proposals, including the elimination of rancher-dominated Grazing Advisory Boards (GABs), and imposed limits on rancher ownership of future range improvements and water rights. *See Babbitt, Hill Dems Agree on Grazing Fees, Range Policy*, *supra* at 1-2.

128. *Babbitt Takes Grazing Fee Hike on Road; Does He Need Hill?*, PUB. LANDS NEWS, Mar. 18, 1993, at 4.

129. BLM Grazing Administration Advance Notice of Proposed Rulemaking, 58 Fed. Reg. 43,208 (1993) [hereinafter *BLM Announcement*]; Forest Service, Grazing and Livestock Use and Grazing Fees Advance Notice of Proposed Rulemaking, 58 Fed. Reg. 43,202 (1993) [hereinafter *Forest Service Announcement*].

entitled "Rangeland Reform '94."¹³⁰ After receiving over 12,000 comments and holding public meetings across the West,¹³¹ the BLM and the Forest Service issued revised proposed rules in March and April 1994 (1994 proposal), respectively, and a joint draft Environmental Impact Statement (EIS) in May 1994.¹³² Then, after another 20,000 comments and forty-nine additional public meetings, the agencies issued their final EIS in December 1994 in anticipation of the publication of final rules.¹³³ The final rules were published in February 1995 and took effect August 21, 1995.¹³⁴ As the various stages of this process progressed, many revisions occurred, reflecting considerable influence by ranching interests and resulting in numerous changes to the reforms, most of which weakened the proposals.¹³⁵ An analysis of the major components of the reform shows how it evolved in response to public pressure.

1. Goals:

The Administration's announced goals were similar to Babbitt's earlier goals.¹³⁶ The stated intent of the changes proposed in the 1993 notice was 1) to improve administration of grazing permits and leases, 2) to place greater emphasis on stewardship of the rangelands, 3) to obtain fair and reasonable compensation for the grazing of public lands, and 4) to manage the rangelands using an ecological approach.¹³⁷ The Forest Service defined "ecological approach" as providing for multiple uses while managing lands to achieve a diverse, healthy, productive, and sustainable ecosystem.¹³⁸ The BLM expressed a similar ambition, couching its version of an ecological approach in terms of "ecosystem management," defined as "managing ecosystems to produce, restore, or sustain

130. BLM Announcement, *supra* note 129, at 43,208; Forest Service Announcement *supra* note 129, at 43,202.

131. DRAFT EIS, *supra* note 106, at 5-2 to 5-3.

132. BLM Grazing Administration Proposed Rules, 59 Fed. Reg. 14,314 (1994) [hereinafter BLM Proposed Rules]; Forest Service Proposed Rules, 59 Fed. Reg. 22,074 (1994) [hereinafter Forest Service Proposed Rules]; See DRAFT EIS, *supra* note 106.

133. BUREAU OF LAND MANAGEMENT AND UNITED STATES FOREST SERVICE, RANGELAND REFORM '94: FINAL ENVIRONMENTAL IMPACT STATEMENT 40 (1994) [hereinafter FINAL EIS].

134. BLM Final Rules, *supra* note 13.

135. See *Reid, Friends*, *supra* note 125, at 2.

136. See *supra* text accompanying notes 118-19.

137. BLM Announcement, *supra* note 129, at 43,208. Another common goal was to achieve greater consistency between the BLM and Forest Service regulations. The Forest Service included similar goals, including the additional explicit intention to change the system used to determine the fees for grazing of privately owned livestock on national forest lands. Forest Service Announcement, *supra* note 129, at 43,202.

138. *Id.* The Forest Service also noted that, because of greater demands from users of the public lands, other interests besides grazing also needed attention. *Id.* at 43,205.

ecosystem integrity and desired conditions, uses, products, values and services over the long term."¹³⁹ Although the agencies maintained these goals throughout the reform process, emphasis on the desire to reform grazing without adversely impacting grazing-dependent communities increased.¹⁴⁰

2. Money and Property:

One of the major focuses of the Administration's reform plan was to obtain a "fair return for the private use of publicly owned resources."¹⁴¹ The agencies believed that the government was not getting a "fair return" because of problems associated with grazing fees, subleasing arrangements, and range improvements by permittees. The agencies proposed to solve these problems by raising grazing fees for ranchers and by being more assertive landlords in the areas of subleasing and improvements.¹⁴² This policy reprised Pinchot's original view that those who take public resources should pay "reasonable compensation."¹⁴³

a. Grazing Fees

The agencies believed that a fundamental problem existed with the present grazing fee system: a wide disparity between rates charged for grazing on private and on federal lands.¹⁴⁴ In an attempt to narrow this disparity, the agencies proposed a formula that included a base value¹⁴⁵ that considered the cost differences of operating on public lands as compared to private lands. Additionally, to better approximate market conditions, this base value would be adjusted annually in proportion to changes in private grazing land lease rates.¹⁴⁶ Using the base value suggested in the 1993 notice, the price that ranchers would pay per AUM would have risen from \$1.86 to \$3.96 over three years.¹⁴⁷ Although this base value

139. *Id.*

140. DRAFT EIS, *supra* note 106, at 6.

141. Forest Service Announcement, *supra* note 129, at 43,204.

142. BLM Announcement, *supra* note 129, at 43,211-12.

143. See VOIGT, *supra* note 17, at 48; VOIGT *supra* note 61 and accompanying text.

144. BLM Announcement, *supra* note 129, at 43,209. The grazing fee reforms proposed by BLM and the Forest Service were essentially identical. *Id.*

145. Forest Service Proposed Grazing Fees, 59 Fed. Reg. 22,094, 22,095 (1994) [hereinafter Forest Service Fees]. Base value is a minimum charge assessed for each animal unit month (AUM) the permittee receives for a given year. *Id.*

146. BLM Proposed Rules, *supra* note 132, at 14,316. This adjustment would be made by multiplying the base value by the "forage index value," which represents the yearly change in the private lease rate in the 17 western states. *Id.*

147. BLM Announcement, *supra* note 129, at 43,210. Future fee increases, in any one year,

would still have been substantially below market rates,¹⁴⁸ Babbitt was satisfied because it reduced the disparity between private and public land lease rates while also reflecting the fact that public rangelands are less productive, and therefore should be less expensive, than private lands.¹⁴⁹ In addition to charging fees that approximated market rates, Babbitt wanted to encourage stewardship by imposing higher fees on those permittees who did not take care of their grazing allotments.¹⁵⁰ Thus, the proposed rules provided a 30 percent reduction in the grazing fee for ranchers who met certain criteria, which were to be set forth in a separate rule.¹⁵¹

The fee provision was one of the most controversial provisions of Rangeland Reform '94 from the beginning and generated extensive public comment, most of which focused either on the economic impacts of an increased fee or on the calculation of the fee formula.¹⁵² In January 1995, in response to these comments and perhaps daunted by the prospect of a Republican Congress (after the November 1994 election), the Administration decided to cancel the fee hike proposal and let Congress deal with the issue if it desired.¹⁵³ Consequently, the Administration eliminated the grazing fee increase and the incentive-based fee proposal from the final version of the new rules.¹⁵⁴

b. Subleasing

One of the prerequisites to obtaining a grazing permit is that the applicant must own property to which the federal grazing authorization is attached.¹⁵⁵ This private property is referred to as base property. Prior to Rangeland Reform '94, the BLM authorized its permittees,¹⁵⁶ free of

could not exceed 25% of the amount charged the previous year. *Id.*

148. See Tom Kenworthy, *Proposal to Raise Grazing Fees Is Sinking Slowly in the West*, THE WASH. POST, January 19, 1995, at A23. In the western 11 states, private grazing rates increased 33% from 1980 to 1993, from \$7.53 per AUM to \$10.03. Current rates for state lands range from \$3 per AUM in Wyoming to \$7.34 in Washington. *Id.*

149. *Babbitt Seeks Tough New Range Standards, Higher Fees*, PUB. LANDS NEWS, Aug. 19, 1993, at 3.

150. See *Babbitt: High Fees*, *supra* note 8, at 1.

151. BLM Proposed Rules, *supra* note 132, at 14,316-17. These criteria would focus on rangeland improvement programs characterized by best management practices, the furtherance of resource condition objectives, and comprehensive monitoring. *Id.* at 14,317.

152. BLM Final Rules, *supra* note 13, at 9,899.

153. *Babbitt Tosses Grazing Fee Hot Potato to Hill; Keeps Rest*, PUB. LANDS NEWS, Jan. 5, 1995, at 2.

154. BLM Final Rules, *supra* note 13, at 9,899.

155. BLM Announcement, *supra* note 129, at 43,212.

156. FINAL EIS, *supra* note 133, at 15. In contrast to the BLM, the Forest Service currently does not allow subleasing or management of other's livestock on national forest grazing allotments in western states. *Id.* While the Forest Service proposed to allow permittees to manage other private

charge, to either 1) lease this base property to another private party and transfer, with BLM approval, the federal grazing permit to the other party (a base property lease) or 2) allow the permittee to manage another private party's livestock on the permittee's grazing allotment (a management lease).¹⁵⁷ The proposed rules would have made both practices subject to a surcharge.¹⁵⁸ The administration justified this surcharge on the ground that it would allow the public to get its "fair share" of some of the profits ranchers get from subletting their subsidized grazing rights.¹⁵⁹

The BLM's final rules, however, revised both of these proposed surcharge provisions. First, the surcharge on base property leases was eliminated altogether.¹⁶⁰ This change was a compromise to ranchers concerned that because people often enter the ranching business by subleasing ranches, a surcharge on this practice would make becoming a rancher too expensive.¹⁶¹ Second, while the surcharge on management leases survived, the final rules made it adjustable to market rates.¹⁶² Thus, instead of being charged an additional fifty percent of the grazing fee, permittees who manage others' livestock on their federal grazing allotments will be charged thirty-five percent of the difference between the federal grazing fee and the private lease rate for the appropriate state.¹⁶³ The BLM believed that this surcharge would satisfy Babbitt's intent to establish a fair and reasonable return to the public because it allowed the BLM to recover its "landlord's share" of the proceeds from these private transactions that involve public resources.¹⁶⁴

parties' livestock on their allotments, this proposal was eventually dropped. See *infra* section IV(B)(4).

157. BLM Announcement, *supra* note 129, at 43,212.

158. *Id.* Ranchers that leased base property and transferred their permits would have been charged an additional 20% of their grazing fees, and ranchers that managed unowned livestock would have been charged an additional 50%. *Id.*

159. *Id.* Many comments stressed that children of ranchers often have their own livestock for educational projects or in anticipation of taking over their parents' operation and that such situations should not be subject to a surcharge. The BLM responded in the 1994 proposal by exempting from these surcharge provisions permittees who make base property and management leases with their sons and daughters. The BLM Proposed Rules, *supra* note 132, at 14,323; DRAFT EIS, *supra* note 106, at 2-13.

160. BLM Final Rules, *supra* note 13, at 9,900.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

c. Range Improvements and Water Rights

Rangeland Reform '94 proposed changes regarding title to certain improvements made by permittees, water rights for grazing on public lands, and the way range improvement funds were spent. The final rules adopted proposals that allow the federal government to assert title to all new permanent improvements on grazing allotments.¹⁶⁵ If a rancher's lease to an allotment is canceled, the government will compensate the rancher for money it had spent on any permanent improvement to the federal allotment.¹⁶⁶ Because this provision is prospective only, any valid existing rights to permanent improvements, and compensation for them, remain unaffected.¹⁶⁷ Similarly, the government will, under state law, acquire, maintain, and administer all new water rights obtained on public land for purposes of livestock grazing on those lands.¹⁶⁸ This provision also applies only prospectively; therefore, the rule will not affect existing water rights, nor will it create any new federal reserved water rights.¹⁶⁹ In addition, the rule will not affect water rights for uses other than livestock grazing on public lands, such as irrigation, municipal, or industrial uses.¹⁷⁰

Another aspect of the changes made in this area regarded the disbursement of range improvement funds. The BLM's Range Improvement Fund and the Forest Service's Range Betterment Fund consist of a portion of grazing fee receipts that are put toward range improvement programs. Prior to the reform, the BLM's policy was to return all range improvement funds to the same districts from where they came, without prioritizing on the basis of need.¹⁷¹ The BLM believed that this system was not in the best interests of the public because it prevented funds from being sent to places where they might be needed most.¹⁷² Under the final rules, 50 percent of these funds will be distributed to the state or local

165. *Id.* at 9,897. Title to temporary or removable improvements will remain with the permittee. *Id.* Temporary improvements include livestock handling facilities, such as corrals, creep feeders, loading chutes, and troughs for hauled water. BLM Proposed Rules, *supra* note 132, at 14,322. The legality of this new regulation is undecided at the time of this writing. See *infra* note 297.

166. BLM Final Rules, *supra* note 13, at 9,897. The permittee is entitled to compensation under section 402(g) of FLPMA, which provides compensation for a permittee's authorized permanent improvements whenever a permit is canceled to devote the land to another purpose. 43 U.S.C. § 1752(g) (1994).

167. BLM Final Rules, *supra* note 13, at 9,897. This provision was designed to make BLM policy on water rights consistent with BLM policy prior to the 1980's and with that of the Forest Service. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. BLM Proposed Rules, *supra* note 132, at 14,333.

172. *Id.*

district (or forest) from which the funds originated, and the other 50 percent will be distributed on a priority basis.¹⁷³ These rules assure that at least half of the improvement funds generated by grazing will be distributed on a priority basis.¹⁷⁴

3. Stewardship:

Many of the proposals in the 1993 notice arose from the Administration's concern about the health of public grazing lands and the resources of which they are comprised. The Forest Service's 1990 report, *The Forest Service Program for Forest and Rangeland Resources*, found that 27 percent of national forest rangelands were classified as "in unsatisfactory condition."¹⁷⁵ This report persuaded the Forest Service to commit to improving on-the-ground rangeland conditions.¹⁷⁶ Likewise, in 1991, the BLM's National Public Lands Advisory Council, reporting on methods to improve rangeland management, stressed that the basic components of soil, water and vegetation should be the BLM's "primary concern" in attempting to effectuate ecosystem management, since, as the Council put it, "without assurances for the future well-being of these basic natural resources, there is precious little to squabble about."¹⁷⁷ In response to the Administration's goal of protecting the lands themselves, the agencies proposed several reforms to encourage ranchers to take better care of the lands they lease. Among the reform proposals were term-length reductions, disqualification, or loss of preference rights for ranchers who violate permit conditions or fail to meet resource condition objectives; allowances for extended "nonuse" of lands for conservation purposes; and a set of national standards and guidelines for ecosystem conditions and rangeland management.

a. Tenure

In the 1993 notice, the agencies suggested making the length of a grazing permit contingent upon ranchers' compliance with the terms and conditions of their permits and demonstrated stewardship.¹⁷⁸ Under this proposal, a

173. BLM Final Rules, *supra* note 13, at 9,936.

174. *Id.* Range improvement funds would be spent not only on improvements and planning for grazing, but also monitoring ecosystem health, engineering, and environmental assessments. DRAFT EIS, *supra* note 106, at 12, 14, GL-16. This is in keeping with the spirit of FLPMA, which states that the purpose of the fund is to pay for improvements that can "arrest . . . continuing deterioration" of rangelands and, therefore, benefit wildlife, watershed protection, and livestock production. 43 U.S.C. § 1751(b)(1) (1994).

175. Forest Service Announcement, *supra* note 129, at 43,202.

176. *Id.*

177. BLM Announcement, *supra* note 129, at 43,208.

178. *Id.* at 43,211.

rancher seeking to renew a grazing permit would receive the standard ten-year permit only if he was in "substantial compliance" with all permit terms and conditions, and if his part of the range was "moving toward or maintaining desired ecological conditions."¹⁷⁹ If, however, the rancher was in "substantial compliance" with all permit terms and conditions, but was "failing to make significant progress toward resource condition objectives," a five-year permit would be issued.¹⁸⁰ This five-year permit would have effectively created a probationary period, during which the rancher could show compliance with permit terms and conditions and resource objectives.¹⁸¹ New permittees, who may or may not have had a record of compliance, would have automatically received the five-year permit, giving them an opportunity to prove their ability to be good stewards.¹⁸²

These permit tenure proposals were not carried forward in the 1994 proposal.¹⁸³ The agencies decided, based on public comments, but without any explanation,¹⁸⁴ that the threat of shorter tenures for poor performance and the opportunity for longer tenures for good stewards would not necessarily encourage good stewardship and would unfairly penalize new operators.¹⁸⁵ Thus, the agencies retreated from their proposals and decided to continue issuing permits for ten years.¹⁸⁶ Consequently, the final rules contain no discussion of limiting permit tenure on the basis of stewardship.

b. Prohibited Acts and Disqualification

Another of the Administration's methods to encourage ranchers to become good stewards of their grazing allotments was to consider a permit applicant's history for performance before granting new or renewed permits. The agencies first aimed to clarify the definition of a "prohibited act," so that ranchers would know what laws they must obey to maintain grazing permits.¹⁸⁷ Under the final rules, a violation of any federal or state conservation or resource protection law will be deemed a "prohibited act" that, as with violations of grazing permit terms and conditions, could lead to cancellation or suspension of a federal permit if the violation

179. *Id.* Although the BLM's treatment of the subject was more detailed, both agencies had substantially the same tenure proposals. See Forest Service Announcement, *supra* note 129, at 43,203.

180. BLM Announcement, *supra* note 129, at 43,211.

181. Forest Service Announcement, *supra* note 129, at 43,203.

182. *Id.*

183. BLM Proposed Rules, *supra* note 132, at 14,322, 14,334.

184. *Id.* The agencies accepted, apparently on faith, the view of commentators that shorter tenure "would not contribute to the goals of improved rangeland health." *Id.*

185. *Id.*

186. *Id.*

187. BLM Announcement, *supra* note 129, at 43,211.

involves public land.¹⁸⁸ Further, any violation that resulted in a cancellation of a federal permit will automatically bar the violator for three years from receiving new or additional federal grazing permits.¹⁸⁹ Similar violations, however, will not necessarily disqualify the violator from renewing existing permits.¹⁹⁰ The BLM justified reviewing the applicant's compliance history on the ground that the public reasonably expects permittees on public grazing lands to take care of those lands.¹⁹¹ Thus, where permit applicants are found to be in violation of environmental laws or permit conditions, and therefore not exercising care for public lands, the BLM will be more selective in granting permits to those applicants.

c. Permitted Use and Preferences for Renewal

Prior to the reform, the BLM defined a permittee's grazing "preference" as a specified number of AUMs of forage to which a particular permittee would be entitled.¹⁹² The Forest Service, however, defined a "preference" as merely a permittee's priority to obtain or hold a grazing permit.¹⁹³ Under the Forest Service's approach, a permittee's number of AUMs represented his "permitted use," not his "preference."¹⁹⁴ In the final rules, the BLM adopted the Forest Service's definition of grazing "preference."¹⁹⁵ Thus, an applicant who is qualified to obtain a grazing permit receives a "preference," or priority right (over other applicants), to a renewal permit when the original permit expires.¹⁹⁶ Under the final

188. BLM Final Rules, *supra* note 13, at 9,898. These laws will be listed in the regulations and include federal or state laws concerning water pollution; predator control activities; application for storage of pesticides, herbicides, or other hazardous materials; alteration or destruction of natural stream courses; wildlife destruction; removal or destruction of archeological resources; and violations of state laws regarding the stray of livestock. *Id.* This change is simply a return to pre-1984 policy. BLM Announcement, *supra* note 129, at 43,211.

189. BLM Final Rules, *supra* note 13, at 9,898. Cancellation of a state permit or lease will disqualify an applicant for a new permit only if the permit was for land within the same federal allotment containing the federal permit at issue. *Id.* at 9,962.

190. *Id.* This is a change from the proposed rules, which would have automatically disqualified applicants for renewal of permits, as well as applicants for new permits. BLM Proposed Rules, *supra* note 132, at 14,323. A renewal applicant still must show "substantial compliance" with the terms and conditions of the permit and with BLM grazing regulations in general. BLM Final Rules, *supra* note 13, at 9,898. See 43 U.S.C. § 1752(c) (1994). The final rules give the authorized BLM officer discretion in making this determination. BLM Final Rules, *supra* note 13, at 9,898.

191. BLM Announcement, *supra* note 129, at 43,210.

192. *Id.* at 43,211.

193. *Id.*

194. *Id.*

195. BLM Final Rules, *supra* note 13, at 9,921.

196. Section 402 of FLPMA requires that existing permit or lease holders be given first priority for renewal of grazing permits, as long as the holder is in compliance with the Secretary of the Interior's rules and regulations and the terms and conditions of their permit or lease. 43 U.S.C. §

rules, to hold a preference to receive a renewed permit, a rancher will have to demonstrate "substantial compliance" with the terms and conditions of his previously held federal or state permits and laws and regulations pertaining to grazing.¹⁹⁷ Therefore, in addition to the potential for disqualification of new permit applicants because of poor stewardship,¹⁹⁸ applicants may also lose "preference" rights for renewed permits if they are not in compliance with stewardship conditions on their current allotments. The number of AUMs of forage the rancher receives (his "permitted use") will be determined not by his "preference," but by his allowed livestock use, which will be established through a land use plan.¹⁹⁹

d. Conservation Use

In the final rules, the BLM adopted a provision to allow ranchers to retain their permits while temporarily not using their land for grazing, but instead, leaving the land unused, for conservation purposes.²⁰⁰ Previously, BLM rules allowed this type of nonuse for only one year at a time.²⁰¹ The final rules, however, allow conservation use for up to the entire term of a permit (10 years).²⁰² With the expansion of allowable conservation use, the Administration hoped to improve range conditions by allowing ranchers to rest their lands.²⁰³ The final rules further this goal by allowing permittees to promote resource protection or enhancement (including making progress toward resource condition objectives) on all or part of their allotments.²⁰⁴

1752(c). Under the final rules, therefore, "preference" defines an applicant's relative standing for the award of a grazing privilege, as reflected in historic records. BLM Final Rules, *supra* note 13, at 9,922.

197. BLM Final Rules, *supra* note 13, at 9,921, 9,962. The legality of this change in the regulations is undecided at the time of this writing. See *infra* notes 297 and 304.

198. See *supra* section IV(B)(3)(b).

199. BLM Final Rules, *supra* note 13, at 9,921.

200. *Id.* at 9,898. Allotments in conservation use would not be subject to grazing fees; however, permittees requesting conservation use would be required to maintain existing improvements on conservation use allotments so that when the allotment is returned to grazing use, the improvements would be in working condition. *Id.*

201. DRAFT EIS, *supra* note 106, at 2-15.

202. BLM Final Rules, *supra* note 13, at 9,940. This practice is consistent with the Forest Service's current policy. DRAFT EIS, *supra* note 106, at 2-15. One significant limitation on conservation use is that it must conform with applicable land use plans. BLM Final Rules, *supra* note 13, at 9,940. BLM's land use plans consider all forms of uses to which permittees may put their grazing allotments. Such uses include grazing or livestock use, conservation use, nonuse, and temporary suspended use. BLM Announcement, *supra* note 129, at 43,211.

203. FINAL EIS, *supra* note 133, at 16.

204. BLM Final Rules, *supra* note 13, at 9,898. To assure that the use is consistent with resource management objectives and state or regional standards and guidelines (discussed in the next section), BLM will monitor allotments placed in conservation use. *Id.* at 9,939. BLM believed that monitoring would discourage ranchers from placing land in conservation use for purposes other than

Moreover, the final rules encourage conservation both by assuring permittees that they may resume grazing on conservation use allotments in the future and by not allowing any other permittees to use any forage resulting from allotments set aside for conservation use.²⁰⁵ Finally, the final rules clarify that conservation use is to be initiated at the request of a permittee; it may not be imposed on an unwilling permittee.²⁰⁶

e. National Standards and Guidelines

One of the more controversial proposals of Rangeland Reform '94 was the creation of national standards and guidelines for rangeland management. The agencies planned to establish standards and guidelines that would be used in forming the BLM's land use management plans, the Forest Service's forest plans, and in establishing permit conditions for permittees under either agency.²⁰⁷ The purpose in creating the standards and guidelines was to identify conditions that must be met to ensure healthy, sustainable, and productive ecosystems,²⁰⁸ thereby establishing a benchmark for rangeland protection and reducing ranchers' uncertainty about what they need to do to be good stewards.²⁰⁹

The final rules adopted national requirements, known as "fundamentals of rangeland health," designed to "address the necessary physical components of functional watersheds, ecological processes required for healthy biotic communities, water quality standards and objectives, and habitat for threatened or endangered species" as they relate to properly-functioning rangeland ecosystems.²¹⁰ These "fundamentals" are not na-

conservation. *Id.*

205. *Id.* at 9,898.

206. *Id.* The legality of the new conservation use regulation is undecided at the time of this writing. See *infra* notes 297 and 305.

207. The BLM Announcement, *supra* note 129, at 43,212; Forest Service Announcement, *supra* note 128, at 43,203. The Forest Service's discussion of these national standards and guidelines was quite general, and somewhat vague in detail. While the Service made repeated mention of "standards and guidelines from forest plans," it never defined what they would entail. It did seem clear, however, that the Forest Service would implement any such standards as part of the NFMA forest planning process. See, e.g., Forest Service Proposed Rules, *supra* note 132, at 22,078. BLM, on the other hand, covered this topic with much greater specificity and detail; therefore, the following discussion focuses primarily on the BLM's treatment of the national standards and guidelines.

208. BLM Announcement, *supra* note 129, at 43,212.

209. Forest Service Announcement, *supra* note 129, at 43,203.

210. BLM Final Rules, *supra* note 13, at 9,898. Guiding principles for the "fundamentals" include factors relating to "watershed function, threatened or endangered species and candidate species, habitat for native plant and animal populations, water quality, and the distribution of nutrients and energy flow." *Id.* at 9,899.

tional standards and guidelines, but rather, models for developing state or regional standards and guidelines.²¹¹ These state or regional standards and guidelines apply directly to permittees through the terms and conditions of their grazing permits.²¹² The final rules included a strict timetable for compliance with the “fundamentals:” state or regional standards and guidelines will be developed within eighteen months of the effective date of the final rules.²¹³ Moreover, if state or regional standards and guidelines have not been completed within that time, the Secretary of the Interior will impose “fallback” standards and guidelines, which will remain in effect until state or regional standards and guidelines are completed.²¹⁴ Because the standards and guidelines (whether state, regional, or fallback) will be part of a permittee’s permit terms and conditions, violations of the standards and guidelines will subject the permittee to permit modification or cancellation.²¹⁵ Further, where the BLM determines that existing grazing management practices are failing to meet the standards and guidelines, the final rules allow the authorized officer to “take appropriate action,” which could include reducing livestock stocking rates, adjusting the season or duration of livestock use, or modifying or relocating range improvements.²¹⁶

4. Public Involvement:

One of the central themes of Rangeland ‘94 was to increase public involvement in the management of public lands. The BLM, for example, believed that broader and more effective public involvement was critical

211. *Id.* at 9,898. The 1993 notice had envisioned a tiering system, with mandatory national standards and guidelines and more flexible regional standards and guidelines that could be customized to fit the needs of particular locales and regions. BLM Announcement, *supra* note 129, at 43,212. The proposed national standards and guidelines received many comments, most of which either questioned whether a set of “universal” standards could be established and applied to public grazing lands or suggested that standards and guidelines should only be established at a local level. BLM Proposed Rules, *supra* note 128, at 14,325. In response to these comments, BLM dropped the idea of national standards and guidelines that would apply directly to permittees (through permit conditions), replacing them with “national requirements” that would be used to provide guidance for the preparation of state or regional standards and guidelines. These national requirements became the “fundamentals of rangeland health” in the final rules. *Id.*

212. BLM Final Rules, *supra* note 13, at 9,966.

213. *Id.* at 9,899.

214. *Id.* Factors for fallback standards proposed in the 1994 proposal included 1) soil stability and watershed function; 2) distribution of nutrients and energy; 3) the ability of plant communities to recover; and 4) indicators of healthy flood plain structure and condition. *Id.*

215. Any cancellations of state or federal permits within 36 months prior to application will disqualify an applicant for a new or additional grazing permit. See *supra* text accompanying notes 187-91.

216. BLM Final Rules, *supra* note 13, at 9,899.

to its move toward implementing ecosystem management.²¹⁷ Babbitt also believed that public input was necessary, both in managing rangelands and in the reform effort itself. During the information-gathering process that preceded Rangeland Reform '94, Babbitt took part in weekly conferences with western ranchers and environmentalists, trying to build a consensus on range reforms.²¹⁸ This focus on public involvement was reflected in the reform proposals.

a. Resource Advisory Councils

Under the final rules, the BLM is establishing new advisory committees, to be known as "resource advisory councils," that will provide the agency with advice and recommendations on "the full array of multiple use issues" associated with public lands.²¹⁹ These new resource advisory councils (RACs) replace the Grazing Advisory Boards established under the TGA.²²⁰ The grazing boards advised the BLM on management issues involving limited geographic areas, constrained by administrative boundaries.²²¹ The BLM believed that a shift to ecosystem management required committees with more diverse memberships that could advise the management of a broader area, delineated by the "commonalities of the public land resource."²²²

Resource advisory councils will consist of ten to fifteen members, representing a broad range of uses of, and interests in, the public rangelands.²²³ All members of RACs will be required to possess relevant experience or expertise, have a commitment to collaborative effort, and have a commitment to successful resolution of resource management issues.²²⁴

217. BLM Announcement, *supra* note 129, at 43,210.

218. See Babbitt, *Beyond Grazing*, *supra* note 119.

219. BLM Final Rules, *supra* note 13, at 9,896. Section 309 of FLPMA authorizes the Secretary of the Interior to establish advisory committees that conform to the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2 § 14). 43 U.S.C. § 1739(a) (1994). Because the Forest Service did not specifically address formation of RACs, the following discussion focuses entirely on the BLM's proposals.

220. BLM Final Rules, *supra* note 13, at 9,914.

221. BLM Announcement, *supra* note 129, at 43,210.

222. Under the final rules, the geographic jurisdictions of RACs may be based on state, BLM district, or ecoregion boundaries, depending on the model chosen. BLM Final Rules, *supra* note 13, at 9,959-60. Alternative models for RACs are discussed further, below, see *infra* notes 227-34 and accompanying text.

223. *Id.* One-third of the members would represent permittees, commodity industries (such as mineral and timber), and developed recreational activities; one-third would represent environmental or resource conservation groups, archeological and historical interests, and dispersed recreational activities; and one-third would represent state, county, or local elected offices, the public at-large, Indian tribes, natural sciences academia, and state agencies responsible for management of natural resources, land, or water. *Id.* at 9,959.

224. *Id.* at 9,896. With regard to minimum experience and expertise, each member will have to

Further, to ensure that all members of RACs have a common understanding of the scientific, economic, social, and legal issues involved in managing public lands, all members will be required to attend a training course in management of rangeland ecosystems.²²⁵ All of these measures, diverse membership, training in management issues, and commitment to collaborative problem-solving are intended to ensure that the RACs will be balanced and employ a consensus-building approach to developing recommendations for BLM managers.²²⁶

In order to provide flexibility in developing a system of RACs, the final rules offer a choice of three different models.²²⁷ Models A and B both incorporate three levels of groups, including mandatory RACs, optional rangeland resource teams and technical review teams created by the RACs.²²⁸ Rangeland resource teams will consist of five members: two resident permittees, one resident at-large community representative, one environmental representative, and one wildlife/recreation representative.²²⁹ All members of rangeland resource teams will be required to have knowledge and expertise of the land and communities where they serve.²³⁰ The RACs may also establish technical review teams to provide local level advice to the parent RAC on specific factual issues.²³¹ Membership of technical review teams is limited to federal employees and paid consultants, based on their knowledge of resource management or the specific issues for which the team has been formed.²³² Under model C of the final rules, neither rangeland resource teams nor technical review teams are required. Model C requires only an RAC and allows subgroups of "any

be a resident of the state in which the area covered by the RAC is located and will have to have experience or knowledge of the geographic area within the council's purview. *Id.*

225. *Id.*

226. BLM Proposed Rules, *supra* note 132, at 14,320. While RACs will be strictly advisory in nature, the final rules include a provision that allows the RAC, when it felt that its recommendations have been arbitrarily disregarded, to request that the Secretary of the Interior respond to the council's concerns within 60 days. BLM Final Rules, *supra* note 13, at 9,959.

227. *Id.* Although the 1994 proposal suggested a tiered system involving RACs and two classes of subgroups (rangeland resource teams and technical review teams), the final rules do not require a multilevel system. Under the final rules, only the RACs themselves will be required; other subgroups will be discretionary. *Id.* at 9,915. State Directors of the BLM, in consultation with affected governors and other interested parties (including the public), will decide among the alternative models. *Id.* at 9,896-97.

228. Subtle differences regarding geographic area of service, membership, and voting majorities distinguish these models from one another. *Id.* at 9,896.

229. *Id.* at 9,959. Rangeland review teams may be formed by a RAC on its own motion or in response to a petition by local citizens. *Id.*

230. *Id.*

231. Technical review teams may be established by the BLM authorized officer on the BLM's motion, or in response to a request from the RAC. *Id.*

232. *Id.* at 9,959-60.

type and number.”²³³ The BLM intended that the process for establishing RACs (including selecting a subgroup model) begin prior to the effective date of the final rules so that the BLM could begin using the RACs for advice soon after that date.²³⁴

b. Interested Public

Increasing the number of management positions open to certain members of the public (through resource advisory councils and subgroups) created “formal” public involvement. In addition, the Administration wanted to allow greater “informal” public participation in the evaluation of grazing management on public lands.²³⁵ Consequently, the agencies sought to broaden the definition of “interests” affected by grazing decisions and, therefore, able to participate in decision-making. Under the final rules, for example, the BLM will recognize, as a member of what the agency now calls the “interested public,” any individual, group, or organization that writes to the agency expressing concern regarding management of livestock on specific grazing allotments.²³⁶ In order to involve as many people as possible in the decision-making process, the “interested public” will be able to participate in decisions relating to initial allocations of forage, the development of management plans, renewals of grazing permits, and the placing of terms and conditions on grazing permits.²³⁷ The final rules also contain requirements for consultation with the “interested public” in various provisions, including those dealing with permit issuance, renewal and modification, increasing and decreasing permitted use, and development of activity plans and range improvement programs.²³⁸

5. Administrative Efficiency:

Several proposals in Rangeland Reform ‘94 were designed to make the regulations simpler and more efficient. The agencies’ goal was to “streamline . . . administrative functions.”²³⁹ Reform efforts aimed at

233. *Id.* at 9,896.

234. *Id.* at 9,897.

235. BLM Announcement, *supra* note 129, at 43,210.

236. BLM Final Rules, *supra* note 13, at 9,897.

237. BLM Proposed Rules, *supra* note 132, at 14,324. Previously, BLM officers first decided if a member of the public was a member of an “affected interest” and, thus, qualified to participate in the grazing decision-making process. The new “interested public” standard eliminates this discretion. BLM Final Rules, *supra* note 13, at 9,897.

238. *Id.* at 9,897.

239. BLM Announcement, *supra* note 129, at 43,208.

increasing agency efficiency included proposals to allow the BLM's field managers to put certain decisions into effect more quickly, to eliminate the BLM's concept of "suspended nonuse," and to reduce the Forest Service's administrative costs by combining two types of short-term permits and increasing the duration of those permits.

a. Implementing Decisions

Prior to the reform, the decisions of BLM field managers were subject to a thirty-day appeal period.²⁴⁰ If a decision was appealed within that period, the BLM would suspend the decision until it took final action on the appeal.²⁴¹ The BLM believed that, in some cases, this automatic stay of decisions with the filing of an appeal prevented field managers from taking necessary, responsible action.²⁴² Therefore, the BLM allowed its field managers to override this suspension and place their decisions in "full force and effect" during the thirty-day appeal period if the decision involved an "emergency situation."²⁴³ The reforms adopted by the final rules largely attempt to clarify the definition of an "emergency situation." Thus, the final rules allow decisions that are necessary to prevent damage to "soil, vegetation, or other resources" to be placed in full force and effect during the thirty-day appeal period.²⁴⁴ These decisions will become effective immediately and will remain in effect unless a stay is granted.²⁴⁵ The BLM believed that the reforms will allow field managers to react more appropriately and responsibly to situations that require immediate action.²⁴⁶

b. Suspended Nonuse

The BLM initiated the concept of "suspended nonuse" in the 1940s as a method for resting rangelands on which demand had exceeded the

240. A decision of a field manager became effective at the end of the 30-day appeal period if the decision had not been appealed. *Id.* at 43,210.

241. *Id.*

242. *Id.*

243. An "emergency situation" arose when a decision needed to be implemented immediately in order to stop resource deterioration. *Id.*

244. BLM Final Rules, *supra* note 13, at 9,963. This decision is in the discretion of the field manager. *Id.*

245. *Id.* at 9,898. This is consistent with the BLM's general appeals process, which allows decisions to be put in place unless a stay is granted. *Id.* at 9,950. The final rules do not take away any party's ability to file an appeal or request a stay of a decision. *Id.* In fact, the BLM acknowledged that the new rule would probably lead to an increase in stay petitions, but concluded that the benefits of making the grazing appeals process consistent with the general BLM appeals process were more important. *Id.*

246. BLM Announcement, *supra* note 129, at 43,210.

lands' sustainable forage production capacity, known as "carrying capacity."²⁴⁷ Lands placed in "suspended nonuse" were off limits to grazing; any forage on these lands was not allocated to any permittee. However, ranchers' permits and leases often still indicated AUMs of "suspended nonuse" forage, leading many ranchers to believe that they had a priority to future forage from the "suspended nonuse" lands once the lands were able to support grazing again.²⁴⁸ This belief may have been well-founded because the agency originally intended to return the forage to ranchers when the land recovered.²⁴⁹ However, the BLM's policy has been not to reallocate this forage for grazing use.²⁵⁰ The BLM's inconsistent treatment of suspended forage created confusion among prospective permittees, realtors, and brokers who deal in ranch properties.²⁵¹ To put an end to the intimation that the BLM might someday reallocate this forage to permittees, and also to reduce administrative costs, the BLM proposed to eliminate the concept altogether.²⁵²

In the 1994 proposal, however, the BLM abandoned its plan to abolish the concept of "suspended nonuse."²⁵³ In making this decision, the agency cited many comments arguing that eliminating the concept would affect permittees' property rights and financing agreements.²⁵⁴ Although the BLM disagreed with the conclusions reached by these comments, the agency apparently decided not to contest the issue further. Without much explanation, the BLM decided that, "given the contentious nature of the issue and the fact that the Department views the matter as merely an administrative record-keeping issue," the proposal would not be carried forward.²⁵⁵ Consequently, the final rules contain no reference to eliminating the concept of "suspended nonuse."

c. Short-term Permits

247. *Id.* at 43,213.

248. *Id.*

249. *Id.*

250. *Id.* at 43,212-13.

251. *Id.* at 43,213.

252. *Id.* at 43,212. Because permittees were not receiving the forage from these lands anyway, the BLM felt that it did not make sense to keep track of them. Therefore, the BLM proposed to remove references to "suspended nonuse" in permits and leases as they were renewed or transferred. *Id.* at 43212-13.

253. The BLM did rename the concept, for clarity purposes, "suspended use." BLM Proposed Rules, *supra* note 132, at 14,323.

254. *Id.* From the view of prospective buyers and lenders, having more AUMs of forage increases the value of a ranch. Therefore, because "suspended" AUMs were still included in permits, many permittees relied on them in valuing their property for the purposes of sale or loan agreements.

255. *Id.*

Prior to Rangeland Reform '94, the Forest Service issued "temporary grazing permits" for a period of up to one year under certain conditions.²⁵⁶ These temporary permits effectively allowed livestock grazing where it normally would not have been permitted. The Forest Service also issued "livestock use permits," which allowed grazing of unallocated forage by some livestock for up to one year.²⁵⁷ Both of these short-term permits were granted only when excess forage was available and circumstances called for more grazing in an area, such as when an unusually wet year resulted in extra forage.²⁵⁸ In order to reduce administrative costs, the Forest Service wanted to combine these two permit systems, allowing a single permit that would last up to three years.²⁵⁹

The 1994 proposal suggested that issuance of these short-term permits would be expressly contingent upon the applicant's good stewardship. If normally ungrazed land or unused forage became temporarily suitable for grazing, the agency could allocate it, but only to ranchers who have shown an ability to maintain healthy range conditions.²⁶⁰ In addition, the 1994 proposal sought to clarify that short-term permits for temporary grazing would have no priority for renewal.²⁶¹ Therefore, short-term allocations would not automatically become renewable AUM allocations. As indicated above,²⁶² the Forest Service has not yet issued final rules in this proposal.

6. Administrative Consistency:

One of the original goals of Rangeland Reform '94 was to achieve increased consistency between the BLM and Forest Service grazing rules and regulations.²⁶³ The Administration believed that greater consistency was necessary to simplify the regulations for grazing permittees, many of

256. Forest Service Announcement, *supra* note 129, at 43,204. These conditions included allowing livestock grazing 1) on allotments in nonuse status, 2) where excess forage is available after permitted use is achieved, 3) to respond to situations such as drought which affect current permits, and 4) for other purposes. *Id.*

257. "Livestock use permits" applied to commercial transportation livestock, livestock trailing across National Forest System lands, and research livestock. *Id.*

258. *Id.* FINAL EIS, *supra* note 133, at 144-45. Part of the decision of whether land was suitable for temporary grazing would be whether the allocation is compatible with agency land use plans. *Id.* at 145.

259. Forest Service Announcement, *supra* note 129, at 43,204. The BLM's final rules do not address the prospect of short-term permits for temporary grazing.

260. FINAL EIS, *supra* note 133, at 15-16.

261. Forest Service Proposed Rules, *supra* note 132, at 22,088.

262. *See supra* note 14.

263. *See supra* note 137.

whom have permits under both agencies.²⁶⁴ Under the 1993 notice, in order to become more consistent with the BLM, the Forest Service would not have required U.S. citizenship in order to obtain a permit, would have allowed permittees to manage other permittees' livestock on their allotments, and would have increased the penalty for willful unauthorized use of land.²⁶⁵ The Forest Service also proposed to adopt the BLM's policy of issuing permits to foreign corporations licensed to do business in the state in which the grazing allotment existed.²⁶⁶ Of these proposals, only the Forest Service's plan to allow ranchers to manage other permittees' livestock on their allotments did not survive in the 1994 proposal,²⁶⁷ but, as indicated above,²⁶⁸ the Forest Service has yet to issue final rules on the other proposals.

Similarly, the BLM proposed reforms that would make it more consistent with the Forest Service. The final rules adopted a proposal allowing for non-monetary settlements in cases where unauthorized uses were unintentional, incidental in nature, caused no resource damage, and resulted in no substantial forage consumption.²⁶⁹ In addition, as indicated above,²⁷⁰ the BLM adopted policies consistent with the Forest Service regarding water rights on public rangelands, definitions of grazing "preference," and length of conservation use.

264. BLM Announcement, *supra* note 129, at 43,209. An estimated 15% of permittees have both BLM and Forest Service permits. JACOBS, *supra* note 34, at 25.

265. Forest Service Announcement, *supra* note 129, at 43,203-04. Examples of unauthorized use included having excess numbers of livestock on an allotment or having livestock graze in nongrazing areas. Under the 1994 proposal, the penalty for a willful unauthorized use would be double the average monthly rate for pasturing livestock on privately-owned, non-irrigated land (based on rates in the eleven western states, as determined by the Department of Agriculture). The penalty for repeated willful unauthorized use would be triple that rate. *Id.* at 43,204.

266. Forest Service Proposed Rules, *supra* note 132, at 22,089. Individual foreign citizens ("aliens") must have petitioned for naturalization before a permit will be granted. However, it appears that a foreign individual may receive a permit through his foreign corporation. *Id.*

267. FINAL EIS, *supra* note 133, at 15.

268. *See supra* note 14.

269. BLM Proposed Rules, *supra* note 132, at 14,338; BLM Final Rules, *supra* note 13, at 9,905.

270. *See supra* text accompanying notes 165-74, 193-99, and 200-06.

V. EVALUATING THE PROPOSED REFORMS²⁷¹

A. Overview

From the initial announcements to the final BLM rules, the agencies' proposals evolved into generally weaker versions. The causes and effects of this weakening are numerous. Essentially, pressure from western members of Congress and ranching interests convinced the Administration to moderate its proposals,²⁷² such as narrowing the surcharge proposal,²⁷³ acquiescing to rancher concerns over "suspended nonuse,"²⁷⁴ and allowing agency guidelines to be developed on the local level,²⁷⁵ where ranchers may have more influence and with the Forest Service not putting any new rules into effect. Ranchers were initially willing to agree to some of the proposed rule changes, then got mobilized as they became more fearful that these changes would radically alter their way of life.²⁷⁶ The final regulations weakened the

271. Other options considered included no action, which would mean keeping the status quo; management for livestock production, management for environmental enhancement, and no grazing. DRAFT EIS, *supra* note 106, at 9-10.

With *no action*, AUMs would decline from current levels by approximately 5% in the short-term (5 years) and 18% in the long-term (20 years) due to current harmful practices that will cause the government to reduce grazing under current management principles. *Id.* at 4-19. This option would result in a loss of jobs ranging from 710 to 1,820 in the short-term, and 2,640 to 3,580 in the long-term, depending on the fee structure. *Id.* at 4-32.

The *livestock management* option would reduce AUMs from current levels by approximately 4% in the short-term (5 years) and 10% in the long-term (20 years). *Id.* at 4-64. This option would result in a loss of jobs ranging from 470 to 1,610 in the short-term, and 1,700 to 2,730 in the long-term, depending on the fee structure. *Id.* at 4-77.

The *environmental enhancement* option would reduce AUMs from current levels by approximately 50% in the short-term (5 years) and 30% in the long-term (20 years). *Id.* at 4-84 to 4-85. This option would result in a loss of jobs ranging from 7,240 to 7,820 in the short-term, and 4,390 to 5,200 in the long-term, depending on the fee structure. *Id.* at 4-100 to 4-101.

The *no grazing* option would phase out grazing permits over three years and the government would manage public lands for other values, such as recreation and wildlife. See FINAL EIS, *supra* note 133, at 9. Some grazing would occur to control weeds or stimulate forage for deer. This option would result in a loss of approximately 18,300 jobs, .1% of the west's employment. See DRAFT EIS, *supra* note 106, at 4-118 to 4-119. This number does not necessarily reflect the entire ranching industry that uses federal lands. Though many operations would fold, some might continue to operate with private and state lands.

272. *Westerners defeat Babbitt Range Policy—or Do They?*, PUB. LANDS NEWS, Nov. 25, 1993, at 3.

273. See *supra* text accompanying notes 155-64.

274. See *supra* text accompanying notes 247-55.

275. See *supra* text accompanying notes 207-16.

276. *Cowboys Take New Stand as Troubled Babbitt Range Plan Nears*, PUB. LANDS NEWS,

potential of the reforms to improve the range's condition, even though the extent of regulatory changes has remained substantial.

While some of the reforms will make grazing regulation more rational and more sensitive to ecosystem needs; in some ways, the proposals may be no better, and even worse, than no action at all because they attempt to sustain unsustainable grazing practices.²⁷⁷ By making moderate changes, the Administration might seem to be making meaningful reforms, but ecological damage will persist.

Promoting public involvement through the regional meetings held during the reform process, the new advisory councils, and an expanded definition of "interested public" are positive steps. The reforms recognize that many people use public lands,²⁷⁸ and that, at approximately 23,000 in number, federal lands ranchers are a small group.²⁷⁹ As Senator Harry Reid (D-Nev.) said, "I like my cowboys. I think the world of them. But there are 20,000 of them in the entire West, compared to 46.3 million people The ranchers do not have a free hand to all that land anymore. There are competing interests."²⁸⁰

By making the advisory councils flexible in their representation, instead of having a fixed number from the various interests, local grazing interests could dominate them and appeal decisions by reform-minded local officials to the Secretary, swamping him with recommendations and complaints.²⁸¹ However, if the councils do have diverse representation and do consider multiple interests, they could become useful tools in range protection. The Clinton Administration intends for this to happen. Its final EIS called for a "broad and balanced membership" of diverse perspectives and reflective of the general public so that no interest group can dominate another group.²⁸² Why the Forest Service did not plan to have advisory councils is not clear. If the councils prove successful, the Forest Service should consider establishing them.

Feb. 17, 1994, at 5-6.

277. See Hess & Holechek, *supra* note 121: "In fact, Babbitt's plan keeps the system afloat in a sea of burgeoning budgets and swelling subsidies, all geared toward sustaining the unsustainable." John Cushman, Jr., *Administration Gives Up On Raising Grazing Fees*, N.Y. TIMES, Dec. 22, 1994, at B12 (quoting Johanna Wald of the NRDC, "I think this is worse than doing nothing. The Secretary has in essence invited Congress to perpetuate subsidies for welfare cowboys").

278. The BLM recorded over 74 million visitors in 1992, mostly in areas open to grazing. See DRAFT EIS, *supra* note 106, at 27.

279. See *supra* note 111 and accompanying text. These ranchers do have families and employees which raises the number of affected people.

280. See *Senate Refuses*, *supra* note 127, at 2.

281. See *Reid, Friends*, *supra* note 125, at 3.

282. FINAL EIS, *supra* note 133, at 142. Thus far, the RACs have been a success for the BLM. According to Tim Salt, the BLM had high hopes for the RACs' ability to bring different interests together, and they have been even more successful at working together as groups than the BLM expected. See Salt, *supra* note 101.

B. Money and Property

The Republican takeover of the Congress caused the abandonment of the fee increase, but, it was never Secretary Babbitt's highest priority. Babbitt seemed to be willing to give up a fee increase in return for the rest of the reforms. More recently, Babbitt has said "[g]overnance is about making sensible compromise We didn't get the grazing fee, . . . but new environmental regulations are being implemented across the West quite nicely."²⁸³ This tactical retreat has helped to save the other reforms, but even this is in doubt as Congress may attempt in the future to de-fund, suspend, or eliminate the new regulations, as it tried already.²⁸⁴ An earlier Republican alternative would have included a small fee increase,²⁸⁵ indicating that stricter

283. *The Diane Rehm Show* (WAMU-FM radio broadcast, February 27, 1997).

A Congressional fee increase is still possible. Senator Ben Nighthorse Campbell (formerly D, now R-CO) introduced a bill (S. 193) in the 104th Congress that would have increased the base fee from \$1.86 to \$2.36 per AUM. This bill had support from ranchers. *Campbell Introduces Grazing Fee Bill Liked by Ranchers, GOP*, PUB. LANDS NEWS, Jan. 19, 1995, at 5.

In addition, Rep. Jerry Nadler (D-NY) introduced a bill (H.R. 676) in the 104th Congress that would have charged fair market value for grazing permits, but would exempt individual ranchers with less than \$50,000 in gross income or corporations with less than \$1 million in assets. *19 Percent Drop in Grazing Fee Not All Good News for Ranchers*, PUB. LANDS NEWS, Feb. 2, 1995, at 4. In the 105th Congress, Rep. Nadler has introduced a similar bill (H.R. 547), the Free Market Grazing Fees Act. As of this writing, Congress has not taken any action on this bill or on another bill which would affect grazing fees, H.R. 515, the Corporate Welfare Elimination Act, introduced by Rep. Robert Andrews (D-NJ). (Search of Library of Congress Legislation Tracking database, Feb. 26, 1997.)

284. Telephone Interview with Kelly Johnston, Staff Director, Senate Republican Policy Committee, Nov. 16, 1995; Tom Kenworthy, *Ranchers Drive Land Bill Through Friendlier Hill*, WASH. POST, July 20, 1995, at A25; *Congress Fails to Pass Range Policy; Senate Votes Regs Bar*, PUB. LANDS NEWS, Aug. 17, 1995, at 2-3; *Hill GOP Moves on Range Reform on Three Different Fronts*, PUB. LANDS NEWS, Sept. 28, 1995, at 5-6 [hereinafter *Hill GOP Moves*].

285. Senator Pete Domenici (R-N.M.) sponsored S. 852 in the 104th Congress, which, among other things, would have limited grazing permits to those engaged in the livestock business, prescribe civil penalties for failure to make substantial grazing use of an allotment, eliminate NEPA reviews of individual permits, and establish advisory boards with an emphasis on grazing interests. *Senate Panel Wants to Move Quickly on New Grazing Policy*, PUB. LANDS NEWS, July 6, 1995, at 2-4; Karl Hess, Jr., *Grazing at the Public Trough*, WALL ST. J., July 12, 1995, at A14. The Senate passed, on Mar. 21, 1996, S. 1459, the Public Rangelands Management Act, which would eliminate the new BLM rules and introduce substantially the same changes as S. 852. The vote was 51-46. The House did not pass the bill. Rose Ellen O'Connor, *Senate Bill Would Kill Grazing Rules*, PORTLAND OREGONIAN, Mar. 22, 1996, at B1.

Also during the 104th Congress, Representative Wes Cooley (R-OR) sponsored H.R. 1713, which was similar to the Senate bills. See *Hill GOP Moves*, *supra* note 284, at 5-6. The bills would have applied to both the BLM and the Forest Service. See Johnston, *supra* note 284.

The BLM expects the 105th Congress to attempt some modification of the grazing regulations once again. See Salt, *supra* note 101. In addition, rancher organizations filed suit against the government, claiming violations of the TGA, FLPMA, PRIA and NEPA. On October 2, 1995, they asked for summary judgment against the government. *Ranchers Ask Court to Stop Rangeland Reform*, PR Newswire, July 27, 1995; *Ranchers Pursue All Options; Ask Court to Stop BLM Range Plan*,

regulations worry rancher interests more than a higher fee.

Subsidizing grazing doesn't make economical or ecological sense. In the eastern U.S., the Forest Service uses competitive bidding to issue grazing permits.²⁸⁶ This approach, which would result in market value rates for government land, seems worth trying in the West, at least in some areas, as an experiment. Bidding would avoid an across-the-board fee increase that could be unfair to ranchers who lease marginal land. If federal land is less valuable than private land, the final bid price would reflect that. As the final EIS stated, "[c]ompetitive bidding would give the best indication of the market value of federal forage . . ." ²⁸⁷ The final EIS, although acknowledging the success of bidding in the eastern national forests and on Montana's state lands, failed to explain why it was not adopted for the West.²⁸⁸ The report did state that bidding might not be feasible for federal tracts landlocked by private lands, but also stated that bidding is probably feasible for lands that do not have a grazing preference, such as lands acquired by purchase or exchange.²⁸⁹ Competitive bidding is a sound, proven system that would provide a fair return to the government and would alleviate ranchers' fears of excessive prices for marginal land.

As long as the government continues to spend more than it collects on rangelands, it should spend that money to promote ecosystem protection.²⁹⁰ Because subsidizing actions which damage the public lands, then spending money to restore those lands and the species that depend on them costs taxpayers twice—first to damage the environment, then to fix it. In addition to allowing extended nonuse of grazing allotments for conservation purposes, the government should consider subsidizing such nonuse and other good stewardship practices, in the same way that farm subsidies used to pay farmers not to grow certain crops to support prices and protect soil.²⁹¹

PUB. LANDS NEWS, Oct. 12, 1995, at 4-5. See also *infra* note 297.

286. FINAL EIS, *supra* note 133, at 107-08.

287. *Id.* at 108.

288. *Id.*

289. *Id.* The Draft EIS stated that legislative changes might be needed to implement bidding everywhere because it would eliminate or at least modify the TGA's grazing preferences for adjacent properties. See DRAFT EIS, *supra* note 106, at 2-40.

290. Such a program could even include private ranchers who do not have permits.

291. The subsidies were provided by various sections of the Agriculture Adjustment Act of 1938, 7 U.S.C. § 1281 (1994) and the Agriculture Act of 1949, 7 U.S.C. § 1421 (1994). The Agriculture Market Transition Act of 1996, Pub. L. No. 104-127, 110 Stat. 888., signed by President Bill Clinton on April 4, 1996, will phase out the subsidies for many crops over the next seven years with declining levels of payments to farmers. If Congress does not take action to continue the new system after the seven year period, the old subsidy system will return. William Neikirk, *So Long Subsidies*;

The surcharges for subleasing and livestock management were mainly money-raising proposals. The weakening of this measure does not affect ecosystem protection much because charging a fee would not help the environment, only the federal treasury. The goal, according to the BLM, was to collect a fair "landlord's share" from ranchers who profit from subleasing and livestock management.²⁹² The BLM did not intend to use the fee to discourage any environmentally damaging practices. The Forest Service's decision to continue not allowing any management of others' livestock²⁹³ prevents ranchers from having short-term flexibility to adjust livestock numbers in response to changes in forage conditions and requires the Service to expend time and money enforcing the rule.²⁹⁴ Allowing this flexibility would save the cost of enforcement and would make the Forest Service and the BLM consistent, simplifying the regulatory system. The BLM stated that it considers subleasing valuable because it allows permittees who are ill or nearing retirement to lease the permit and, thus, "retain the integrity of the ranching unit until it can be transferred to their families."²⁹⁵ This argument has merit, but it also shows how the BLM was not able to question the dominance of grazing on public lands. One comment on subleasing was that the BLM should forbid it in order to give others a chance to obtain permits.²⁹⁶ The BLM did not directly respond to this comment, showing an apparent lack of interest in having permits go to non-ranchers.

The government's assertion of ownership of new, permanent range improvements and new water rights seems justified because those improvements and rights will remain if the rancher leaves.²⁹⁷ Although

Farmers Turned Loose on a Freer Market; New Law Has a Little Bit for Everyone; CHI. TRIB.; Apr. 5, 1996, at 1.

292. See *supra* text accompanying notes 155-64.

293. See *supra* text accompanying note 156.

294. Forest Service Announcement, *supra* note 129, at 43,204.

295. FINAL EIS, *supra* note 133, at 146.

296. *Id.* at 145. Conservation groups interested in obtaining permits to rest the land is one example of those who would have an easier time getting permits if subleasing did not occur.

297. In *Public Lands Council v. U.S. Dep't of Interior*, 929 F. Supp. 1436 (D. Wyo. 1996), the Wyoming District Court held that the 1995 regulation regarding title to range improvements contradicted the Taylor Grazing Act. Under 43 U.S.C. § 315(c), if a permittee receives a grazing permit for land on which a prior occupant had constructed a range improvement, the new permittee is required to pay the prior occupant reasonable compensation for the improvement. Citing this section of the TGA, the court concluded that this compensation requirement "strongly suggests that the individual who constructed the improvement should own it." 929 F. Supp. at 1442-43.

The court also struck down regulations regarding "conservation use" and the substitution of "permitted use" for "grazing preference." See *infra* notes 304 and 305. Other regulations challenged by the petitioners, but upheld by the court, dealt with limits on temporary non-use, non-exclusive use of water diversions by permittees, the fundamentals of rangeland health, and the new definition of "affiliate." 929 F. Supp. at 1442-48.

Senator Hank Brown said the policy would discourage them from conserving water,²⁹⁸ other incentives for good stewardship, such as eligibility for short-term permits, would probably be sufficient to prevent wasting water. Also, if a permittee contributed money as part of a cooperative development with the government, he or she would have a proportional interest in the development.²⁹⁹

C. Stewardship

The final rules weakened, but did not eliminate, the government's ability to encourage stewardship, defined as an "individual's responsibility to manage natural resources on public land."³⁰⁰ The expansion of the definition of "prohibited acts" to include most resource protection laws will prevent those who damage the environment from grazing the federal lands.³⁰¹ However, the potential of shorter tenures for those who do not care for the land would have provided added encouragement for good stewardship.³⁰² Ranchers complained that such instability would hinder their ability to get stable funding from banks, and this led to a return to standard ten-year permits.³⁰³ Likewise, the ability to disqualify current permittees from renewals would have been a powerful tool. The withdrawal of these proposals is unfortunate because ranchers will have less incentive to comply with the agencies' ecosystem management initiatives. If ecological stability is to be a main goal of the government, it needs to structure all its policies to help achieve that goal.

The delinking of grazing preferences and a specified amount of forage is a sound policy.³⁰⁴ The ecology and climate of the West is highly

The Department of Interior is not satisfied with the court's decision, and the government has appealed the case. Meanwhile, two additional cases brought by ranching interests are pending against the government in Utah Federal District Court. *See Salt, supra* note 101.

298. Deborah Frazier, *Rangeland "Reform" is a Disaster, Rancher Says*, ROCKY MTN. NEWS, June 2, 1994, at 6A.

299. FINAL EIS, *supra* note 133, at 17.

300. DRAFT EIS, *supra* note 106, at GL-19.

301. *See supra* text accompanying notes 187-91.

302. *See supra* text accompanying notes 178-86.

303. *See Babbitt, supra* note 119.

304. *See supra* text accompanying notes 194-200. As indicated in note 297, the Wyoming Federal District Court struck down the regulation regarding the elimination of "grazing preference." *Public Lands Council v. U.S. Dep't of Interior*, 929 F. Supp. 1436 (D. Wyo. 1996). In doing so, the court relied heavily on the history of the TGA, stressing the importance of the lengthy adjudication process used by the Department of Interior to award grazing preferences to qualified applicants between the 1930s and 1950s. As a result of these adjudications, the court stated, the term "grazing preference" came to represent "an adjudicated right to place livestock on public lands." *Id.* at 1440. Whereas the TGA (43 U.S.C. § 315(h)) requires an evidentiary hearing before a "grazing preference"

variable, and ranchers should not expect the same amount of forage every year. The expansion of conservation use permits³⁰⁵ will allow more flexibility for local officials, but whether they will use that flexibility will depend on those officials' attitudes and the views of the resource councils. Officials should aggressively use their authority to encourage conservation and resting of damaged areas. One potential impediment to conservation is the language in the final EIS indicating that once resource goals are met, an area will no longer be eligible for conservation use.³⁰⁶ Resource goals are set in management plans and, therefore, if a management plan does not call for conservation, then the BLM may be unable to approve conservation use of a grazing allotment covered by that plan. The potential consequences of this are unclear. It seems contradictory for the BLM to increase flexibility for conservation and at the same time add a new requirement for those same permits, but management plans themselves may be flexible enough to allow expanded conservation. Even if an allotment is already in satisfactory condition, if a permittee wants to continue conserving the land, then that option should exist because conservation is inherently not damaging to the land and the BLM should allow such good stewardship.

Reorganizing short-term permits for normally ungrazed areas seems like an administrative improvement that will encourage stewardship, since any extra forage will go to those who are good stewards. How often the agencies should grant these short-term permits is an unanswered question. Even if the government could award a short-term permit, the better choice might be to leave those AUMs unallocated to help rest damaged land.

D. Bureaucracy

The Forest Service and the BLM did not fully achieve their goal of consistency in their rules. This was a complaint in the final EIS

could be cancelled or otherwise modified, the court felt that a "permitted use," being only a "right of renewal" would provide less protection. *Id.* at 1441. Consequently, the court held that the BLM's attempt to eliminate the term "grazing preference" in favor of the term "permitted use" failed to safeguard "grazing preferences," as the TGA requires in 43 U.S.C. § 315(b). *Id.*

305. See *supra* text accompanying notes 200-06. The Wyoming District Court also struck down the regulations expanding "conservation use." 929 F. Supp. at 1443-44. According to the court, "the Taylor Grazing Act authorizes the Secretary to issue permits to graze these lands, but it does not authorize the Secretary to issue permits allowing permittees to remove public lands from grazing for ten-year periods." *Id.* The court also found that the concept of "conservation use" contradicted FLPMA's definition of livestock grazing as a "principal or major use." *Id.* In the court's opinion, livestock grazing could not be the "principal or major use" of land that had been set aside for conservation purposes; therefore, by allowing permits for uses other than livestock grazing, the BLM had exceeded its statutory authority under the TGA. *Id.* at 1444.

306. FINAL EIS, *supra* note 133, at 16.

comments,³⁰⁷ but the agencies did not really respond to it. They simply stated consistency was a goal, and some rules were made consistent,³⁰⁸ such as the national and regional standards and guidelines,³⁰⁹ the penalty policy for unintentional unauthorized uses,³¹⁰ the short-term permit policy,³¹¹ and range improvement and water right ownership policy.³¹² Other policies would remain different, such as advisory councils, "suspended use," and subleasing. Neither the draft nor the final EIS justified these discrepancies.³¹³

Increasing the Forest Service's penalties for willful violations, exempting minor unintentional violations, and allowing decisions to go into effect immediately to counter frivolous appeals seem like sensible changes to improve the government's ability to enforce its rules.³¹⁴ Whether the penalties would be enough to deter violations, and whether the agencies will have adequate funding for enforcement remain unanswered questions. The potential exemption from fines for unintentional trespasses³¹⁵ could lead to decreased oversight of livestock by ranchers, producing more unintentional violations, but, on the whole, the exemption probably will be beneficial by reducing enforcement costs. The Forest Service's decision not to amend its rules³¹⁶ makes consistency between the agencies impossible to ascertain.

The BLM abandoned its attempt to abolish the concept of "suspended nonuse" for administrative purposes because of complaints from ranchers. Ranchers worried the abolition would adversely impact property values by taking away something that had been part of the measure of a ranch's value.³¹⁷ The BLM argued that it rarely makes suspended AUMs available again for livestock, that it has no need to keep track of them anymore, and that the abolition would reduce the BLM's record-keeping burden, but the agency simply withdrew the proposal due to the "contentious nature of the issue."³¹⁸ This strong opposition to what was merely an administrative house-keeping measure illustrates the depth of suspicion

307. The Final EIS did not identify the authors of any comments. *Id.* at 48-153.

308. *Id.* at 48.

309. *See supra* text accompanying notes 207-16.

310. *See supra* text accompanying notes 263-70.

311. *See supra* text accompanying notes 256-62.

312. *See supra* text accompanying notes 165-74.

313. *See generally* DRAFT EIS, *supra* note 106, and FINAL EIS, *supra* note 133.

314. *See supra* text accompanying notes 263-70 and 240-46.

315. *See supra* text accompanying notes 263-70.

316. *See supra* text accompanying notes 10-14.

317. FINAL EIS, *supra* note 133, at 144.

318. BLM Proposed Rules, *supra* note 132, at 14,323.

and fear ranchers have of federal agency reforms. Of course, as indicated earlier,³¹⁹ the BLM's inconsistent treatment of "suspended use" contributed to the confusion regarding the concept and may have created some of this suspicion. Nevertheless, "suspended use" seems like an anachronistic term that the BLM should eliminate. Allocation of forage could be subject to a much more simple system. Permittees should receive AUMs based on current ecological conditions of their allotments. If the BLM allocates temporary forage, it should go to those permittees who are being good stewards of their lands, not those who have "suspended use" AUMs dating from years ago.

The plan to let local BLM and Forest Service officials formulate guidelines for grazing permits could increase local flexibility,³²⁰ but whether this is ecologically beneficial would depend on how the local officials interpret their mandates. The standards in the Final EIS are rather specific in some cases,³²¹ and the requirements for state standards and the fallback standards are actually very similar with many sections having identical wording.³²² However, the standards are vague enough to allow creative interpretation by local officials and RACs,³²³ which could allow weaker standards. On the other hand, the final EIS states that state guidelines must meet the national requirements, including ensuring that watersheds are properly functioning and ensuring that state water quality standards are met.³²⁴ Water quality standards could be useful in protecting riparian areas, assuming they are placed in permit terms and conditions, as the final EIS contemplates.³²⁵ If the BLM or Forest Service decided not to put water quality requirements (or some other requirement) in some permits or gave an excessively long period of time to comply with the standards, administrative or judicial review of this decision could be difficult, since the standards and guidelines are not part of the Code of Federal Regulations.³²⁶ Considering the general theme of the guidelines,

319. See *supra* text accompanying notes 247-55.

320. See Babbitt, *supra* note 119.

321. See *supra* note 224.

322. FINAL EIS, *supra* note 133, at 170-73.

323. The standards have some discretionary terms, such as calling for "adequate amounts of ground cover" and "permeability rates appropriate to climate and soils." *Id.* at 170 (emphasis added).

324. *Id.* at 56, 60, 168.

325. FINAL EIS, *supra* note 133, at 60, 168-70, 172, 173. For example, state guidelines "will meet the following requirements . . . 5) Management actions will maintain, restore, or enhance water quality to meet or exceed State water quality standards . . ." *Id.* at 170.

326. The final rules affirm that terms and conditions of permits will be the principle vehicle for implementing standards and guidelines. BLM Final Rules, *supra* note 13, at 9,941. *But cf.* Parker v. United States, 448 F.2d 793, 797 (10th Cir. 1971) (quoting from the Forest Service Manual as if it were an enforceable regulation).

the BLM should aggressively use its discretion to require improved water quality and riparian area management.

VI. CONCLUSION

What should be the goals of grazing reform? The government and ranchers need to realize that public lands cannot support the current amount of grazing. The GAO has stated that, based on the best available information, 20 percent of grazing allotments are being grazed beyond a sustainable level.³²⁷ Even with no grazing or an "environmental enhancement" option,³²⁸ some land would still be non-functioning or not meeting goals after twenty years.³²⁹ This reflects the degree of damage 140 years of overgrazing has done to the West.

Those who wish to reduce grazing need to realize there are different kinds of ranchers. Ranchers who use only private land have more incentive to be good stewards because it is their land, and they raise livestock only if they can afford to. Small family ranchers who use private and public land often want to do a good job of caring for land and are afraid of losing their businesses.³³⁰ However, small operations may not be able to afford to take care of land as well as they should.³³¹ Larger operations apparently spend more money than smaller ones on range improvements.³³² On the other hand, large ranchers with permits, often corporations, have less incentive and less personal desire to care for land because they do not rely on the ranch for their personal income. Spending money on improvements does not necessarily mean they spend it with an ecological approach to the land. Instead, they maintain marginal ranch operations to have the opportunity to search for minerals, to use ranch losses as tax breaks for their corporate profits, or as vacation retreats where making profits is unimportant.³³³ Much of the land corporations lease is in poor

327. See MORE EMPHASIS NEEDED, *supra* note 102, at 3.

328. See *supra* note 271.

329. DRAFT EIS, *supra* note 106, at 48-51. The new rules, the livestock production option, and prior management methods would all result in similar improvements in upland conditions, while the new rules should result in somewhat better riparian conditions than the other two methods would produce. These three alternatives would all leave significant areas in poor condition after 20 years, from 16% to 24% of riparian areas and about 12% of upland areas. The environmental enhancement and no grazing options result in almost identical land conditions after 20 years, which would be significantly better than the other three options, with only 2% to 3% of riparian areas not functioning or not meeting goals and 5% of upland areas in the same situation. *Id.*

330. Elliot Diring, *Rough Times on the Range*, S.F. CHRON., Dec. 13, 1994, at A1.

331. *Reforming the Western Range*, DIFFERENT DRUMMER, Spring 1994, at 29.

332. *Id.*

333. See Diring, *supra* note 330.

condition.³³⁴ Environmentalists and small ranchers can at least find common areas of interest, such as the desire for preserving open space and a simple way of life.³³⁵ Those interested in reform need to see the distinctions among different permittees and aim criticism selectively because, otherwise, the targets (intended and unintended) of the criticism may feel unfairly attacked or feel that the critic does not understand the circumstances of western grazing.

Considering the different problems created by different kinds of permit holders, the government could establish different fee rates and perhaps different regulations or standards for different size ranches. Those with a small ranching operation could get a low fee and larger operations would get a higher, market rate fee.³³⁶ A lower rate for small ranches would reduce the fear of small ranches going out of business, but would produce some extra money for the government. In addition, in implementing the local standards and guidelines, the government could consider the size of the operation when developing timelines for compliance, allowing more time for small operations. The fear of small ranchers going bankrupt should not stop the agencies from requiring a fair fee and improved stewardship from permittees who have no other incentive to take care of their allotments.

Many ranchers might not realize, because of a lack of accurate information or simple disbelief, the ecological problems with overgrazing or realize the small contribution western ranching makes to the nation's economy. Some comments in the final EIS express fear that beef prices and imports would increase if the proposed rules and fees went into effect. However, the agencies responded that even under a no grazing option, the impact on beef prices would be negligible, since such a small

334. For example, J.R. Simplot, president of Ore-Ida Potato, had permits for over a million acres of BLM land in 1991, and, according to the government, 85% of it was in unsatisfactory condition. The Metropolitan Life insurance company had 800,000 acres, 85% in unsatisfactory condition. See Belsky, *supra* note 111.

335. Brad Knickerbocker, *Bruce Babbitt and the East-West Political Showdown*, CHRISTIAN SCI. MONITOR, June 21, 1994, at 11.

336. The authors still see competitive bidding as a preferable method, but in lieu of bidding, or where bidding may not work, this sliding-scale fee system may work well. See *supra* text accompanying notes 286-89. The Final EIS briefly discussed a tiered fee system, but the government argued that it would be too costly and impractical. See FINAL EIS, *supra* note 133, at 110. Because the current fee is costly to the government in terms of the subsidy ranchers receive, the government should look more closely at this tiered method, since the Final EIS claimed that it would provide relief to small operations. *Id.*

In the 104th Congress, Senator Dale Bumpers (D-Ark.) offered an amendment to S. 1459 which would have required large ranches to pay fees similar to what they would pay under state fee systems. The amendment lost 52-47. See O'Connor, *supra* note 285, at 1.

percentage of U.S. beef comes from federal land.³³⁷ Some argued that livestock are beneficial because they reduce the threat of fire. The agencies explained that livestock do reduce fire by consuming potential fuel, but that fire is an integral part of functioning ecosystems and, because of livestock, prescribed burning is often needed to sustain desirable ecosystems.³³⁸ Better education of ranchers and the public in general would increase support for changes in grazing practices. Many ranchers think they are doing a good job of conserving range resources, and therefore want the government to leave them alone. The final EIS acknowledges that range management has improved significantly since the passage of the Taylor Grazing Act and that much of the existing damage to riparian areas probably occurred prior to the TGA.³³⁹ A major problem, however, is that riparian areas need still better protection to achieve their ecological potential.³⁴⁰ Even if management today is much better than before enactment of the TGA sixty years ago, and even if most damage occurred before modern grazing regulation, the problem is that the land has not had enough rest to recover from decades of abuse.³⁴¹ Ranchers may think they are doing a good job with what they have, but even when this is true, they do not realize that the land they have now is a poor comparison to what once was the open, ungrazed range. Support for less grazing or ecologically-sensitive grazing will increase only if the government makes a more convincing argument that changes will improve the range over the long run.

While the agencies acknowledge that the reforms would hurt some ranchers,³⁴² the reality is that even under the current system (or a system geared towards livestock production) income, jobs, and grazeable land would decline.³⁴³ Nevertheless, other than stating that the economic effects would be smaller than many feared and small overall,³⁴⁴ the agencies failed to respond to concerns that some ranchers would go out of busi-

337. See FINAL EIS, *supra* note 133, at 130 and see *supra* text accompanying notes 109-12.

338. FINAL EIS, *supra* note 133, at 70, 95. Western ecosystems are not adapted to livestock because they evolved without any large herbivores, unlike the Midwest prairie, which evolved with the bison. *Id.* at 75. As a result, western grasses do not reproduce well when grazed upon by livestock. See Belsky, *supra* note 111.

339. FINAL EIS, *supra* note 133, at 103.

340. See generally, SOME RIPARIAN AREAS RESTORED, *supra* note 102.

341. See *supra* text accompanying notes 16-69.

342. DRAFT EIS, *supra* note 106, at 4-14.

343. See *supra* note 271. The proposed rules and fees would cause an estimated net loss of 2,167 jobs in the first five years and a net loss of 3,195 jobs over twenty years. In comparison, the status quo would lead to a loss of 710 jobs over five years and 2,643 jobs over twenty years. DRAFT EIS, *supra* note 106, at P-2, P-3.

344. FINAL EIS, *supra* note 133, at 113-14, 132-33.

ness. A better, more comprehensive reform proposal would offer consulting and counseling services to ranchers as to how to adjust to the world of ecologically-sensitive or fair market value ranching. Small ranches, lacking information or funds to allow good stewardship, could be eligible for subsidies and training on how to take better care of the public rangelands. In cases where better stewardship means a marginal ranch goes out of business, the government could ease the transition with information and training to facilitate conversion of the business to tourism or recreation or for entering a new employment field. After allowing ecological damage and even encouraging it with subsidies for so long, the government should help guide ranchers away from such practices.

The "environmental enhancement" option considered by the agencies, which would have greatly reduced the AUMs available to ranchers in favor of conservation,³⁴⁵ combined with competitive bidding³⁴⁶ for grazing rights, seemed to be the most reasonable options presented in the EISs. Ending all grazing would not result in more improvement in the environment and would cause significantly more economic and social displacement. Sustainable public lands grazing is possible if ranchers manage the land with an ecological perspective, recognizing that the arid West was never and will never be able to support many livestock, that only with a great reduction in livestock numbers can federal lands achieve ecological stability, and that the public lands have many values for different people. Ranchers must also recognize that ecological stability is in their own long-term interest. They should realize that ignoring the historical damage to the range will cause a continual decline in the industry, whereas the environmental enhancement option provides the hope of a stable, though smaller public lands ranching system. Finally, the reality is that other uses, such as recreation and watershed protection, are placing great demands on public lands. The environmental enhancement option would have placed grazing as a legitimate, but smaller, part of the public land constituency.

Bruce Babbitt's once strong calls for public use of western lands have turned into a set of bureaucratic reforms that will improve the way grazing occurs but will not seriously question the dominance of grazing on public lands. The reforms will introduce the concept of Leopold's "ecological conscience" into public lands management,³⁴⁷ and will give the BLM more tools and opportunities to limit grazing's damage to the land. However, unless radically changed to provide for environmental

345. See *supra* note 271.

346. See *supra* text accompanying notes 271-325.

347. LEOPOLD, *supra* note 1, at 207.

enhancement, they will not go far enough towards providing for non-commodity uses of federal lands and making ranchers more ecologically minded, so that they may share Leopold's ambition of being "proud to be the custodian of a reasonable portion of such areas, which add diversity and beauty to his . . . community."³⁴⁸

348. *Id.* at 212.