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The Comb Wash Case: The Rule of Law Comes to the Public Rangelands

by

Joseph M. Feller

Originally published in PUBLIC LAND & RESOURCES LAW REVIEW
17 PUB. LAND & RESOURCES L. REV. 25 (1996)

www.NationalAgLawCenter.org

ARTICLES

THE COMB WASH CASE: THE RULE OF LAW COMES TO THE PUBLIC RANGELANDS

Joseph M. Feller*

I. INTRODUCTION

On December 20, 1993, an administrative law judge (ALJ) in the Department of the Interior issued a decision concerning a grazing allotment on public land in southeastern Utah.¹ District Chief ALJ John R. Rampton, Jr., held that, in managing the Comb Wash Allotment, the United States Bureau of Land Management (BLM) had violated two federal statutes—the National Environmental Policy Act (NEPA),² and the Federal Land Policy and Management Act (FLPMA).³ Judge Rampton prohibited the BLM from authorizing grazing on a small but sensitive portion of the allotment until the BLM complies with the law.⁴

On its face, the decision is hardly newsworthy. It was rendered by a low-level administrative tribunal.⁵ The grazing prohibition only applies to

* Professor of Law, Arizona State University.

1. National Wildlife Fed'n v. Bureau of Land Management, No. UT-06-91-1 (U.S. Department of the Interior, Office of Hearings and Appeals, Hearings Div.) (Dec. 20, 1993) [hereinafter *Comb Wash II*].

The facts behind *Comb Wash II* are presented in detail in Joseph M. Feller, *What is Wrong With the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 586-95 (1994) [hereinafter Feller, *What is Wrong With the BLM's Management?*]. That article was written before the case was decided. The ALJ's decision was issued while the article was being edited and is briefly described in an Epilogue to the article. *Supra* at 599-600.

Comb Wash II was the second ALJ decision about the same grazing allotment. See Feller v. Bureau of Land Management, No. UT-06-89-02 (U.S. Department of the Interior, Office of Hearings and Appeals, Hearings Div.) (Aug. 13, 1990) [hereinafter *Comb Wash I*]. *Comb Wash I* is discussed *infra* at text accompanying notes 42-48 and in Joseph M. Feller, *Grazing Management on the Public Lands: Opening the Process to Public Participation*, 26 LAND & WATER L. REV. 571 (1991) [hereinafter Feller, *Grazing Management on the Public Lands*].

2. 42 U.S.C. §§ 4321-4370d (1994); *Comb Wash II*, *supra* note 1, at 17-22.

3. 43 U.S.C. §§ 1701-1784 (1988 & Supp. V 1993); *Comb Wash II*, *supra* note 1, at 23-25.

4. *Comb Wash II*, *supra* note 1, at 33-36.

5. The authority of Interior Department ALJs to review BLM grazing decisions is set forth at 43 C.F.R. §§ 4.470-4.477, 4160.4 (1995). The ALJ's decision is subject to further administrative re-

about ten square miles of land;⁶ those ten square miles only produce enough forage to support twenty-one cows.⁷ The decision broke no new legal ground; other judges have halted much larger and more important activities on public lands because of violations of NEPA and other environmental laws.⁸

Nonetheless, Judge Rampton's decision has created a stir among western public land managers and users.⁹ It was front-page news in a Salt Lake City newspaper, which described it as a "landmark legal decision."¹⁰ A leading treatise on public land law described the case as one of three "major developments in the 1990s" that are "rapidly and drastically" changing the pattern of BLM range management.¹¹ A livestock industry attorney warned that the decision might set a precedent that "would simply shut down grazing" on federal public lands.¹²

Why has such a minor case, applying such well-established law, triggered such strong reactions?

Because the law is so rarely applied on the public range. For the last three decades, while environmental statutes and court decisions have profoundly affected other uses of the public lands,¹³ livestock grazing has re-

view by the Interior Board of Land Appeals (IBLA). 43 C.F.R. §§ 4.410, 4.476 (1995). Decisions of the IBLA may be reviewed by the Secretary of the Interior. 43 C.F.R. § 4.5(a)(2) (1995). Decisions of the Secretary and the IBLA are subject to review by the federal courts under the Administrative Procedure Act. 5 U.S.C. §§ 701-706 (1994).

Judge Rampton's decision in *Comb Wash II* has been appealed to the IBLA. See *infra* note 191. The IBLA has ordered that Judge Rampton's decision will be in effect pending the IBLA's resolution of the appeal. *National Wildlife Fed'n v. BLM*, 128 I.B.L.A. 231, 237 (1994).

6. Transcript of Proceedings, Vol. 1, at 136, *Comb Wash II*.

7. Transcript of Proceedings, Vol. 4, at 82-83, *Comb Wash II*.

8. See, e.g., *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699 (9th Cir. 1993) (enjoining Forest Service timber sales in the Pacific Northwest for failure to comply with NEPA); *California v. Block*, 690 F.2d 753 (9th Cir. 1982) (enjoining development on sixty million National Forest roadless acres for failure to comply with NEPA); *Nez Perce Tribal Executive Comm.*, 120 I.B.L.A. 34 (1991) (preventing mining on BLM land for failure to comply with NEPA); *Michael Gold*, 115 I.B.L.A. 218 (1990) (preventing oil drilling on BLM land for failure to comply with NEPA). See also, e.g., *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (enjoining operation of \$100 million dam for failure to comply with the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994)); *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081 (W.D. Wash. 1991), *aff'd*, 952 F.2d 297 (9th Cir. 1991) (enjoining timber sales for failure to comply with the National Forest Management Act, 16 U.S.C. §§ 1600-1614 (1994)).

9. See Christopher Smith, *Cows are Evicted from Utah*, HIGH COUNTRY NEWS, Jan. 24, 1994, at 12; Ed Marston, *A Stark Victory in Utah*, HIGH COUNTRY NEWS, Jan. 24, 1994, at 16.

10. Christopher Smith, *Cattle May Lose Their Home on BLM Range*, SALT LAKE TRIBUNE, Dec. 24, 1993, at A-1, col. 5. See also Michael Riley, *Courts Become Weapons for Change*, CASPER STAR-TRIBUNE, June 28, 1994, at A-1, col. 1 (stating that this case and two others "suggest the opening of a second front in the 'war' over the federal range").

11. 3 GEORGE C. COGGINS & ROBERT L. GLICKSMAN, *Public Natural Resources Law* 19-18 to 19-18.2 (1995).

12. Smith, *supra* note 10, at A-2, col. 2 (quoting Glen Davies, attorney for the American Farm Bureau Federation and the Utah Farm Bureau Federation).

13. See, e.g., cases cited *supra* note 8. For a comprehensive treatment of the application of

mained a backwater.¹⁴ Federal land managers now understand that they may not authorize timber cutting,¹⁵ mining,¹⁶ or oil drilling¹⁷ on public lands without complying with environmental laws. Yet these same managers routinely authorize environmentally destructive livestock grazing¹⁸ without the environmental analysis required by NEPA,¹⁹ the assessment and consultation required by the Endangered Species Act,²⁰ or the certification required by the Clean Water Act.²¹ Just a few years ago, the BLM took the position that the issuance of a grazing permit is not even an "action" requiring compliance with its own regulations.²²

The BLM's failure to comply with environmental laws in its grazing program has left the agency vulnerable to administrative appeals and lawsuits. Until recently, however, few such challenges have been forthcoming. Two seminal cases in 1974²³ and 1985²⁴ established critical ground rules

environmental laws to activities on public lands, see COGGINS & GLICKSMAN, *supra* note 11, *passim*.

14. ROBERT L. GLICKSMAN & GEORGE C. COGGINS, MODERN PUBLIC LAND LAW IN A NUTSHELL 220 (1995) ("[M]any environmental laws and safeguards that have become common in other areas of modern public land law are still primitive on or absent from the federal range."). See also Riley, *supra* note 10, at A-8, col. 3 (quoting National Wildlife Federation attorney Tom Lustig: "Grazing is the truant of environmental law. It has gotten away and never been called to task.>").

15. For the application of environmental laws to timber cutting on public lands see 3 COGGINS & GLICKSMAN, *supra* note 11, § 20.02.

16. For the application of environmental laws to mining on public lands, see 3 COGGINS & GLICKSMAN, *supra* note 11, § 25.04.

17. For the application of environmental laws to oil and gas development on public lands, see 3 COGGINS & GLICKSMAN, *supra* note 11, § 23.02[4].

18. For summaries of the environmental impacts of livestock grazing on the western public lands, see LYNN JACOBS, WASTE OF THE WEST: PUBLIC LANDS RANCHING (1991); Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 CONSERVATION BIOLOGY 629 (1994); Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 560-63.

19. See 42 U.S.C. § 4332(C) (requiring environmental impact statements (EISs) for major federal actions significantly affecting the human environment); 2 COGGINS & GLICKSMAN, *supra* note 11, ch. 10G. See also *Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829, 841 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied*, 427 U.S. 913 (1976) (holding that the BLM must prepare EISs for livestock grazing permits).

20. See 16 U.S.C. § 1536(a)(3) (requiring consultation with the Secretary of the Interior on any prospective agency action that is likely to affect an endangered or threatened species); 16 U.S.C. § 1536(c) (requiring a biological assessment to determine whether an agency action is likely to affect an endangered or threatened species); 2 COGGINS & GLICKSMAN, *supra* note 11, ch. 15C.

21. See 33 U.S.C. § 1341(a) (1994) (requiring certification that federally-permitted activities will not cause violations of water quality standards). See also 33 U.S.C. § 1323 (1994) (requiring federal agencies to comply with federal, state, and local water pollution control requirements); 33 U.S.C. § 1329 (1994) (requiring nonpoint source management programs); 2 COGGINS & GLICKSMAN, *supra* note 11, § 11A.03.

22. Feller, *Grazing Management on the Public Lands*, *supra* note 1, at 589 & n.136.

23. *Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829, 841 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied*, 427 U.S. 913 (1976) (holding that the BLM must prepare EISs for livestock grazing permits).

24. *Natural Resources Defense Council, Inc. v. Hodel*, 618 F. Supp. 848, 866-71 (E.D. Cal. 1985) (holding that the BLM may not hand over control of grazing allotments to permittees).

for BLM range management, but there has been very little litigation to enforce those rules.²⁵ The Comb Wash case was the first instance in which any reviewing tribunal, administrative or judicial, was asked to halt livestock grazing on a piece of BLM land because the BLM had failed to comply with environmental laws.²⁶

In the absence of legal pressure, BLM managers and rancher-permittees have come to assume that livestock grazing on public lands may continue indefinitely without environmental compliance. The Comb Wash decision has evoked such strong reactions because it has disturbed that expectation. Despite the expressed fears of the livestock industry, the decision will not "shut down" public lands grazing. But it may help to bring grazing within the normal legal framework that governs other uses of the public lands.

Part II of this Article summarizes the Comb Wash case and Judge Rampton's decision. Part III places the decision in perspective by discussing the systemic, West-wide BLM practices that were reflected in the particular actions that Judge Rampton found unlawful on the Comb Wash Allotment. Part IV discusses Judge Rampton's application of the principle of "multiple use," a concept previously dismissed as contentless by some legal commentators. Finally, the Conclusion briefly speculates on the likely effect (or lack thereof) of the decision on BLM range management outside of the Comb Wash Allotment.

25. *But see* Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp 1045, 1062-63 (D. Nev. 1985), *aff'd*, 819 F.2d 927, 930 (9th Cir. 1987) (unsuccessful challenge to BLM land use plan for failure to comply with NEPA and FLPMA).

26. Subsequent to the filing of the *Comb Wash* appeal, two lawsuits were filed over the failure of the United States Forest Service to comply with NEPA in its management of grazing on two National Forests. *See* National Wildlife Fed'n v. Kulesza, No. CV 94-23-BU (D. Mont., filed March 30, 1994) (Beaverhead National Forest); California Trout v. United States Forest Service, Civil No. C 94 0563 BAC (N.D. Cal., filed Feb. 16, 1994) (Sierra National Forest). Although the complaints in both suits requested a halt to grazing in some areas pending NEPA compliance, both suits resulted in settlements that did not require any cessation of grazing. *See* Settlement Agreement, *National Wildlife Fed'n* (April 28, 1995); Stipulation of Dismissal, *California Trout* (filed Nov. 4, 1994). Two other subsequently-filed lawsuits over endangered salmon on National Forests in Oregon and Idaho resulted in orders that had the potential to halt grazing in some areas pending compliance with the Endangered Species Act. *See* Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994) (Wallowa-Whitman and Umatilla National Forests, Oregon); Pacific Rivers Council v. Thomas, 873 F. Supp. 365 (D. Idaho 1995) (Boise, Challis, Nez Perce, Payette, Salmon, and Sawtooth National Forests, Idaho). More recently, a lawsuit has been filed alleging that the BLM has failed to comply with the Endangered Species Act in its administration of livestock grazing in the Safford District in southeast Arizona. *See* Southwest Center for Biological Diversity v. BLM, No. CV96-11 TUC RTT (filed Jan. 3, 1996). The complaint requests a cessation of grazing in the district pending compliance with the Act.

II. THE COMB WASH CASE

A. Background

The Comb Wash grazing allotment²⁷ is on federal public land managed by the BLM²⁸ in southeastern Utah, near Natural Bridges National Monument.²⁹ Within the allotment are five deep, narrow, and spectacular red-rock canyons³⁰ that contain perennial streams, riparian wildlife habitat, and thousands of archaeological sites.³¹ The canyons have a national reputation for their scenic beauty and they attract thousands of visitors annually from around the country.³²

Because of their narrowness, the canyons contain very little livestock forage. Valued at prevailing market rates, the value of the livestock forage produced in the five canyons combined is only about \$2,500.00 a year.³³ Ninety percent of the allotment's forage is in other pastures, outside of the canyons.³⁴

In order to extract this small quantity of forage, the BLM has authorized the livestock permittee to periodically drive herds of cattle into the canyons. Cattle grazing has wrought havoc on the canyon floors, seriously degrading the vegetation, riparian areas, wildlife habitat, scenic beauty, and recreational opportunities there.³⁵ Conditions in the canyons have been so bad that a local recreational outfitter had to discontinue trips to two of them, and a representative of the AAA warned visitors to avoid them.³⁶

The Comb Wash Allotment is one of approximately seventy grazing allotments in the BLM's San Juan Resource Area, which comprises approximately 1.8 million acres of public land in southeastern Utah.³⁷ In 1991, the BLM adopted a land use plan,³⁸ called a Resource Management

27. For more detailed information on the Comb Wash Allotment and the facts behind the Comb Wash case, see Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 586-95.

28. For a brief description of the nature and extent of the lands and resources managed by the BLM, see Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 558-59.

29. A map showing the location of the allotment can be found in Smith, *supra* note 10.

30. The canyons are Arch Canyon, Mule Canyon, Fish Creek Canyon, Owl Creek Canyon, and Road Canyon. *Comb Wash II*, *supra* note 1, at 4; Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 587 & n.166.

31. *Comb Wash II*, *supra* note 1, at 11, 15; Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 587-88.

32. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 587-88.

33. Transcript of Proceedings, Vol. 9, at 116-18, *Comb Wash II*; Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 589.

34. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 589.

35. *Comb Wash II*, *supra* note 1, at 11-16; Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 589-91.

36. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 591.

37. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 592.

38. BLM land use plans are prescribed by section 202 of FLPMA, 43 U.S.C. § 1712. For dis-

Plan (RMP), for the San Juan Resource Area.³⁹ The RMP was accompanied by an environmental impact statement (EIS),⁴⁰ and the combination is known as the San Juan RMP/EIS. The RMP/EIS is a broad, general planning document that does not contain detailed information about, or management prescriptions for, individual grazing allotments within the Resource Area. In particular, the RMP/EIS does not identify or discuss the scenic, recreational, archaeological, or wildlife resources in the Comb Wash canyons, and it does not reveal the nature and extent of the impacts of grazing on those resources.⁴¹

B. *Comb Wash I*

In 1989, the BLM issued a ten-year grazing permit for the Comb Wash Allotment when the previous permit expired. The author appealed the issuance of the permit to an administrative law judge (ALJ),⁴² alleging that the BLM had failed to consult with affected parties as required by its regulations.⁴³ The appeal also alleged violations of NEPA, FLPMA, and the Clean Water Act.

In *Comb Wash I*,⁴⁴ ALJ Rampton held that the issuance of a grazing permit is an "action" within the meaning of the BLM's regulations, requiring notice to affected parties, a statement of reasons, and opportunity for protest.⁴⁵ Judge Rampton set aside the ten-year permit and remanded the matter to the BLM.⁴⁶ Because of the lack of an adequate factual record, Judge Rampton did not reach the NEPA, FLPMA, and Clean Water Act issues.⁴⁷ However, he instructed the BLM:

On remand, BLM should take care to set out in an articulate and rea-

cussions of BLM land use planning, see 2 COGGINS & GLICKSMAN, *supra* note 11, § 10F.04; Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 565, 571-73; Feller, *Grazing Management on the Public Lands*, *supra* note 1, at 576-78.

39. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PROPOSED RESOURCE MANAGEMENT PLAN FOR THE SAN JUAN RESOURCE AREA (1989). This proposed RMP became final when it was formally adopted in 1991. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, SAN JUAN RESOURCE AREA RECORD OF DECISION AND RANGELAND PROGRAM SUMMARY (1991).

40. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, SAN JUAN RESOURCE AREA PROPOSED RESOURCE MANAGEMENT PLAN FINAL ENVIRONMENTAL IMPACT STATEMENT (1987).

41. *Comb Wash II*, *supra* note 1, at 8-10, 21; Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 592.

42. See *supra* note 5.

43. See 43 C.F.R. § 4160.1-1 (1994) (requiring the BLM to send notice of proposed grazing decisions to "affected interests"); 43 C.F.R. § 4100.0-5 (1994) (defining "affected interest"); 43 C.F.R. § 4160.2 (1994) (requiring opportunity for affected interests to protest proposed decisions); Feller, *Grazing Management on the Public Lands*, *supra* note 1, at 580-82, 587.

44. *Comb Wash I*, *supra* note 1.

45. *Comb Wash I*, *supra* note 1, at 4.

46. *Comb Wash I*, *supra* note 1, at 6.

47. *Comb Wash I*, *supra* note 1, at 2, 6.

soned manner the basis for any decision regarding grazing in the Comb Wash allotment and, among other things, the decision should set forth the basis for asserting compliance with, or exemption from, the applicable provisions of law and regulation and should demonstrate consideration of any applicable monitoring studies.⁴⁸

C. *Comb Wash II: The Appeal*

On March 6, 1991, the BLM issued a Notice of Final Decision in response to Judge Rampton's remand.⁴⁹ In the Notice, the BLM claimed that the San Juan RMP/EIS satisfied the BLM's obligations under NEPA and FLPMA.⁵⁰

The BLM also announced its intention to develop an allotment management plan (AMP)⁵¹ for the Comb Wash Allotment through a Coordinated Resource Management (CRM)⁵² process.⁵³ In the interim, while the AMP was under development, the BLM would authorize continued grazing on the allotment by annual permits.⁵⁴ A new ten-year permit would be issued at the completion of the CRM process.⁵⁵

The National Wildlife Federation, the Southern Utah Wilderness Alliance, and the author (collectively NWF) appealed the Notice of Final Decision.⁵⁶ The permittee, the Ute Mountain Ute Indian Tribe, intervened in the appeal.⁵⁷ Two groups of livestock industry and agricultural associations also intervened.⁵⁸

Subsequently, NWF also appealed two annual grazing authorizations issued pursuant to the Notice of Final Decision in September, 1991 and September, 1992.⁵⁹ The three appeals, which were consolidated by Judge Rampton,⁶⁰ alleged that the BLM had violated the law in five ways:

48. *Comb Wash I*, *supra* note 1, at 6.

49. Moab District, U.S. Bureau of Land Management, Notice of Final Decision (March 6, 1991) [hereinafter Final Decision].

50. Final Decision, *supra* note 49, at 3.

51. See 43 U.S.C. § 1752(d); 43 C.F.R. § 4120.2 (1995).

52. CRM is a planning process adopted by the BLM and other agencies in Utah to address some site-specific land use problems. See Feller, *Grazing Management on the Public Lands*, *supra* note 1, at 595 n.180.

53. Final Decision, *supra* note 49, at 3-4.

54. Final Decision, *supra* note 49, at 4.

55. Final Decision, *supra* note 49, at 4.

56. *Comb Wash II*, *supra* note 1, at 3.

57. Order at 2, *Comb Wash II* (July 25, 1991) (granting motion to intervene).

58. *Id.* at 1 (granting motions to intervene by (1) the Public Lands Council, the National Cattlemen's Association, and the American Sheep Industry Association, and (2) the American Farm Bureau Federation and the Utah Farm Bureau Federation).

59. *Comb Wash II*, *supra* note 1, at 3.

60. *Comb Wash II*, *supra* note 1, at 3.

1. NEPA: NWF alleged that the BLM had violated NEPA by authorizing grazing on the Comb Wash Allotment without preparing and considering an EIS⁶¹ that evaluates the specific environmental consequences of the grazing.⁶²

2. FLPMA: NWF alleged that the BLM had violated FLPMA's principle of "multiple use"⁶³ by authorizing grazing in the five canyons on the allotment without making a reasoned and informed decision as to whether grazing in the canyons is in the public interest.⁶⁴

3. Stocking rate: NWF alleged that the BLM had violated FLPMA by considering only forage utilization and trend data⁶⁵ and ignoring such other factors as water quality, wildlife habitat, soil erosion, and natural scenery in setting the stocking rate for the allotment.⁶⁶

4. Public participation: NWF alleged that the BLM had violated its regulations⁶⁷ and Judge Rampton's order in *Comb Wash I*⁶⁸ by issuing annual grazing permits for the Comb Wash Allotment without consulting with affected parties.⁶⁹

5. Forage utilization limits: NWF alleged that the forage utilization limits that the BLM had set for the Comb Wash Allotment were excessive and contrary to the San Juan RMP.⁷⁰

As a remedy for the violations of NEPA and FLPMA, NWF requested that grazing be prohibited in the five canyons on the allotment until the BLM complies with the law.⁷¹

D. *Comb Wash II: The Motion to Dismiss*

The BLM moved to dismiss the appeal,⁷² arguing, among other things, that the appeal was premature because the BLM had not yet com-

61. See *supra* note 19.

62. *Comb Wash II*, *supra* note 1, at 4.

63. See 43 U.S.C. § 1732(a) (requiring management of the public lands "under principles of multiple use and sustained yield"); 43 U.S.C. § 1702(c) (defining "multiple use" as the combination of uses "that will best meet the present and future needs of the American people," including "the use of some land for less than all of the resources," and with "consideration being given to the relative values of the resources"). See also Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 566-67 (discussing BLM authority to discontinue grazing in selected areas).

64. *Comb Wash II*, *supra* note 1, at 4.

65. See Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 576-81 (describing BLM policy to rely exclusively on utilization and trend data to set stocking rates).

66. *Comb Wash II*, *supra* note 1, at 4.

67. See *supra* note 43.

68. See *supra* text accompanying notes 44-48.

69. *Comb Wash II*, *supra* note 1, at 4.

70. *Comb Wash II*, *supra* note 1, at 4; see 43 C.F.R. § 4100.0-8 (1995) (requiring livestock grazing to be in conformance with land use plans).

71. *Comb Wash II*, *supra* note 1, at 30.

72. Motion to Dismiss, *Comb Wash II* (May 24, 1991).

pleted the CRM planning process⁷³ for the allotment. Judge Rampton rejected the BLM's motion. He agreed with NWF that the decision to continue grazing on the allotment pending completion of the CRM process was final and appealable:

In his final decision, the District Manager issued a 1-year permit allowing grazing to continue at current levels, subject to modifications based on changing conditions. Issuance of a 10-year permit was denied until a Coordinated Resource Management Plan (CRMP) was completed. Respondent and intervenors contend that this appeal is not ripe since the new 10-year permit has not been granted and the study on which it will be based has not been completed.

This appeal is from a final decision issued by the District Manager whose decision did more than initiate a study. Grazing privileges were granted through annual permits. These grazing privileges are present interests, and challenges to the issuance of such permits are ripe.⁷⁴

...

The CRMP process will not provide an adequate forum for review. The CRMP will make recommendations for future allotments [sic], but it will not prevent the damage that appellants allege is occurring before the study is complete. The CRMP process may take several years and will likely not be completed before the next grazing season.⁷⁵

E. *Comb Wash II: The Decision*

In 1992 and 1993, Judge Rampton held eighteen days of hearings on the appeal.⁷⁶ Approximately twenty-five witnesses testified at the hearings, including scientific experts, BLM staff, a representative of the permittee, and recreational users of the canyons.⁷⁷

On December 20, 1993, Judge Rampton issued his decision on the consolidated appeals. He concluded that NWF had "presented overwhelming evidence that grazing has significantly degraded and may continue to degrade the quality of the human environment" in the Comb Wash canyons.⁷⁸ Judge Rampton held in favor of NWF on each of the issues raised in the appeal. The following is a summary of Judge Rampton's holdings.

73. See *supra* notes 51-53 and accompanying text.

74. Order at 2, *Comb Wash II* (July 25, 1991).

75. *Id.* at 5.

76. *Comb Wash II*, *supra* note 1, at 3.

77. For a list of the witnesses presented by NWF, see Answer to the Statements of Reasons Filed by the Ute Mountain Ute Tribe, Utah Farm Bureau Federation, and Bureau of Land Management at 20-21, *National Wildlife Fed'n v. BLM*, No. IBLA 94-264 (Interior Board of Land Appeals) (July 26, 1994).

78. *Comb Wash II*, *supra* note 1, at 4.

1. NEPA

Judge Rampton found that the “BLM has simply failed to perform any site-specific assessment” of the environmental impacts of grazing on the Comb Wash Allotment.⁷⁹ He found that the San Juan RMP/EIS⁸⁰ “is simply devoid of any site-specific information or analysis regarding the impacts of grazing on the resource values of the particular allotment in question”⁸¹ and that the “BLM has never completed the next step of conducting a site-specific NEPA analysis.”⁸²

Judge Rampton rejected arguments by the BLM and the intervenors⁸³ that the BLM was in the midst of a “tiered”⁸⁴ process that would eventually result in NEPA compliance:

BLM and/or intervenors argue that even if BLM was required to prepare, but has not yet prepared, an adequate EIS, BLM is in compliance with NEPA because it has prepared a general programmatic EIS [the San Juan RMP/EIS] and intends at some undetermined date in the future to “tier” to that EIS an environmental analysis of the site-specific impacts of its grazing authorizations. This argument is plainly contrary to the aforementioned [NEPA case] law, which requires an adequate EIS to be prepared prior to implementation of the proposed actions.⁸⁵

2. FLPMA

Judge Rampton held that the BLM had violated FLPMA by failing to make a “reasoned and informed decision” as to whether grazing in the canyons is consistent with FLPMA’s definition of “multiple use.”⁸⁶ He found that the BLM had never rationally addressed the issue of whether grazing should be permitted in the canyons. The decision to allow grazing in the canyons had been made as the result of a BLM staff member’s mistaken belief that the issue had already been decided in the San Juan

79. *Comb Wash II*, *supra* note 1, at 21.

80. *See supra* notes 38-41 and accompanying text.

81. *Comb Wash II*, *supra* note 1, at 9.

82. *Comb Wash II*, *supra* note 1, at 22.

83. *See supra* note 58 and accompanying text.

84. *See* 40 C.F.R. § 1508.28 (1995) (defining “tiering” as:

coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basin-wide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared).

See also 40 C.F.R. § 1502.20 (1995) (discussing the use of “tiering”).

85. *Comb Wash II*, *supra* note 1, at 22.

86. *Comb Wash II*, *supra* note 1, at 23-25; *see supra* note 63.

RMP/EIS.⁸⁷ “BLM’s decision to graze the canyons was not reasoned or informed, but rather, based upon [the staff member’s] misinterpretation of the RMP and a totally inadequate investigation and analysis of the condition of the canyons’ varied resources and the impacts of grazing upon those resources.”⁸⁸

3. *Stocking Rate*

Judge Rampton found that “BLM has ignored most multiple-use values other than grazing not only when authorizing grazing in the canyons, but also when setting the stocking rates for the Comb Wash Allotment, both in the canyons and elsewhere BLM’s failure to adequately consider many factors other than range utilization and trend data when setting stocking rates violates FLPMA’s mandate to protect the full spectrum of environmental, ecological, cultural, and recreational values.”⁸⁹

4. *Public Participation*

Judge Rampton chastised the BLM for refusing to consult with affected parties about the terms of the annual grazing permits that it was issuing for the Comb Wash Allotment. “BLM has violated several of its own regulations by excluding affected interests from participation in the management of the Comb Wash Allotment.”⁹⁰ He characterized the BLM’s closed-door policy as “open defiance” of his previous order in *Comb Wash I*.⁹¹ Judge Rampton ordered the BLM to provide affected parties advance notice, a statement of reasons, and opportunity for protest before issuing any future grazing authorization for the Comb Wash Allotment, “regardless of the form of the authorization.”⁹²

5. *Forage Utilization Limits*

Judge Rampton found that the forage utilization limits that the BLM had set for the Comb Wash Allotment were contrary to law because they were “far in excess of the limit specified in the applicable land use plan.”⁹³

87. *Comb Wash II*, *supra* note 1, at 23-24.

88. *Comb Wash II*, *supra* note 1, at 25.

89. *Comb Wash II*, *supra* note 1, at 25 (citing 43 U.S.C. §§ 1701(a)(8), 1702(c)).

90. *Comb Wash II*, *supra* note 1, at 27-28 (citing 43 C.F.R. §§ 4160.1-1, 4110.3-3(a), 4130.6-3).

91. *Comb Wash II*, *supra* note 1, at 27; *see supra* note 45 and accompanying text.

92. *Comb Wash II*, *supra* note 1, at 35.

93. *Comb Wash II*, *supra* note 1, at 28 (citing 43 C.F.R. §§ 4100.0-8, 1601.0-5(b)).

6. Remedy

As a remedy for the violations of NEPA and FLPMA, Judge Rampton prohibited the BLM from authorizing grazing in the five Comb Wash canyons unless and until the BLM prepares an adequate EIS and makes a reasoned and informed decision of whether grazing in the canyons is consistent with FLPMA's multiple-use mandate.⁹⁴

III. THE COMB WASH CASE IN PERSPECTIVE

A. *Grazing Without Laws*

Although public attention focused on Judge Rampton's final decision of December 20, 1993, Judge Rampton's rejection of the BLM's motion to dismiss two years earlier⁹⁵ was equally significant. In rejecting that motion, Judge Rampton undermined an unstated but critical assumption that has guided BLM range management throughout the modern era of environmental legislation.

Although the BLM has never explicitly asserted that grazing on the lands it manages is exempt from environmental laws, it has always acted on the implicit assumption that grazing may continue indefinitely without compliance with such laws. The BLM has never recognized an obligation on its part to ensure compliance with environmental laws at the time it authorizes grazing through issuance of a permit or lease,⁹⁶ or at any other particular time. Rather, the BLM has continued to issue grazing permits and leases without regard to environmental laws, while treating environmental compliance as a goal to be attained at such an indefinite future time as funding, personnel, and conflicting priorities allow.

Acting under this implicit assumption, the BLM has frequently attempted to address conflicts over the environmental impacts of grazing by initiating lengthy, open-ended processes in which it convenes various interested parties to attempt to reach a consensus. Regardless of whether consensus is ever reached, such processes provide a convenient delaying mechanism to defer difficult decisions. Invariably, grazing continues unabated during the indefinite pendency of the process.

The BLM's invocation of such a process in the Comb Wash case was entirely typical. Faced with the prospect of being held accountable for the environmental impacts of grazing on a particular place, the BLM convened the "CRM planning group" as an avoidance mechanism, while continuing to authorize grazing through annual permits. The BLM then

94. *Comb Wash II*, *supra* note 1, at 34, 36.

95. *See supra* text accompanying notes 72-75.

96. *See Feller, Grazing Management on the Public Lands*, *supra* note 1, at 582-86.

argued to Judge Rampton that any adjudication of the appellants' claims would be premature while the CRM process was ongoing.⁹⁷

Judge Rampton cut straight through the BLM's tactic. In rejecting the motion to dismiss, he held that the annual permits themselves were appealable BLM actions with potentially significant environmental consequences.⁹⁸ Regardless of the eventual outcome of the CRM process, the BLM could not authorize continued grazing on the Comb Wash Allotment without being held accountable for compliance with environmental laws.

The decision on the merits of *Comb Wash II* complemented and reinforced the disposition of the motion to dismiss. In ruling on the fourth issue raised by the appellants,⁹⁹ Judge Rampton held that the BLM's issuances of annual grazing permits for the Comb Wash Allotment were "actions" within the meaning of the BLM's regulations¹⁰⁰ requiring notice to affected interests, a statement of reasons for the action, and opportunity for protest.¹⁰¹

Judge Rampton's decision does not preclude the use of CRM or other group processes to assist the BLM in making decisions on controversial land management issues. But it does undercut the BLM's ability to use such processes to avoid accountability. Once the BLM, livestock permittees, and other participating parties understand that failure to resolve environmental issues will have real and immediate consequences, they will have a strong incentive to make such processes actually work, rather than just to consume time and divert energy.

B. Grazing Without NEPA

The Comb Wash case may mark the beginning of the end of a twenty-five-year cycle by which the BLM has avoided compliance with NEPA in its management of the public rangelands. NEPA, passed in 1969, requires each federal agency to prepare and consider an EIS for every "major Federal action[] significantly affecting the quality of the human environment."¹⁰² The EIS must include a "detailed" description of the environmental impacts of the proposed action and of alternatives to the action.¹⁰³

97. See Motion to Dismiss at 4, *Comb Wash II* (May 24, 1991).

98. See *supra* text accompanying note 74.

99. See *supra* text accompanying notes 67-69.

100. See *supra* note 43.

101. See *supra* text accompanying note 92. For discussions of the importance of public participation in annual BLM grazing management decisions, see Feller, *Grazing Management on the Public Lands*, *supra* note 1, at 575-76, 584-85, 592-93; Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 574-75, 594-95.

102. 42 U.S.C. § 4332(2)(C). For a discussion of the application of NEPA to federal public lands management, see 2 COGGINS & GLICKSMAN, *supra* note 11, ch. 10G.

103. 42 U.S.C. § 4332(2)(C).

1. NRDC v. Morton

Since the passage of NEPA, the BLM has sought ways to maintain the status quo of livestock grazing on virtually all the lands that it manages¹⁰⁴ without being held accountable for the detailed analysis of the grazing's impacts required by NEPA. The BLM's first approach was to nominally comply with NEPA by preparing a single, nationwide grazing EIS to "provide an overview of the cumulative impact" of livestock grazing on all BLM lands.¹⁰⁵ The nationwide EIS contained no specific information about the impacts of grazing in any particular area.¹⁰⁶ While the BLM stated that it might subsequently prepare more site-specific EISs for some areas,¹⁰⁷ the BLM apparently intended that those EISs would be triggered only when the BLM took new "actions,"¹⁰⁸ such as promulgation of allotment management plans (AMPs),¹⁰⁹ to alter the status quo. The BLM apparently believed that, so long as it didn't change anything, it could lawfully perpetuate continued grazing on all of its lands with no more NEPA documentation than the national EIS.

This approach was defeated in *Natural Resources Defense Council, Inc. v. Morton*,¹¹⁰ in which the court held that the BLM's continuing issuance and renewal of grazing permits constitutes a "major federal action[]" significantly affecting the quality of the human environment" within the meaning of NEPA,¹¹¹ regardless of whether the permits merely perpetuate existing grazing practices. The court also concluded that the national programmatic EIS that the BLM was preparing was grossly inadequate to fulfill NEPA's requirements.¹¹²

In determining that NEPA required more than a general, programmatic EIS, the court emphasized the need for site-specific information that would assist local BLM officials in setting the terms and conditions of individual grazing permits:

In the BLM grazing license program the primary decision-maker is generally the individual district manager, with his staff, who approves license applications. While the programmatic EIS drafted by the BLM

104. See Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 570.

105. *Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829, 832 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied*, 427 U.S. 913 (1976).

106. *Morton*, 388 F. Supp. at 838-39.

107. *Id.* at 832-33.

108. *Id.* at 833, 840.

109. *Id.* at 832, 833 n.3; see also 43 U.S.C. § 1752(d).

110. 388 F. Supp. 829, 832 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied*, 427 U.S. 913 (1976).

111. *Id.* at 833-34.

112. *Id.* at 836-41.

provides general policy guidelines as to relevant environmental factors, it in no way insures that the decision-maker considers all of the specific and particular consequences of his actions, or the alternatives available to him. The proposed EIS does not provide the detailed analysis of local geographic conditions necessary for the decision-maker to determine what course of action is appropriate under the circumstances.¹¹³

The court required the BLM to prepare and consider environmental impact statements "which discuss in detail the environmental effects of the proposed livestock grazing, and alternatives thereto, in specific areas of the public lands which are or will be licensed for such use."¹¹⁴

The court did not require a separate EIS for each permit. Rather, it left the BLM discretion to determine the geographic scale of the EISs, so long as they contained within them the requisite detail about the impacts of the permits:

[P]laintiffs have not sought an impact statement for each permit. The crucial point is that the specific environmental effects of the permits issued, and to be issued, in each district be assessed. It will be initially within the BLM's discretion to determine whether to make this specific assessment in a separate impact statement for each district, or several impact statements for each district, or one impact statement for several districts or portions thereof, or indeed by other means. So long as the actual environmental effects of particular [grazing] permits or groups of permits in specific areas are assessed, questions of format are to be left to [the BLM].¹¹⁵

2. *The Aftermath of Morton*

Pursuant to the decree in *Morton*, the BLM established a multi-year schedule for preparation of approximately 150 grazing EISs.¹¹⁶ A typical EIS was to cover an area of roughly one million acres of BLM land encompassing on the order of one hundred grazing allotments.

Observers and critics of the BLM held high hopes for the salutary effect of the EISs required by *Morton*.¹¹⁷ The leading casebook on public lands law declared that *Morton* "promised to reverse traditional grazing management."¹¹⁸

113. *Id.* at 838-39.

114. *Id.* at 841.

115. *Id.*

116. GEORGE C. COGGINS, ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 717 (3d ed. 1993).

117. 3 COGGINS & GLICKSMAN, *supra* note 11, § 19.05[1].

118. GEORGE C. COGGINS & CHARLES F. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES

The first EISs prepared pursuant to *Morton* resulted in sufficient prescriptions for change to keep these hopes alive. Some of the early EISs called for substantial reductions in authorized grazing levels on overgrazed allotments.¹¹⁹ At least one EIS even prescribed removal of livestock from some areas where grazing was having unacceptable impacts on valuable ecological and recreational resources.¹²⁰

Two post-*Morton* events, however, radically altered the nature of the EISs that were being prepared pursuant to *Morton*. The first event was the passage of FLPMA in 1976. The second event was the election of Ronald Reagan, a self-proclaimed "sagebrush rebel," as President in 1980 and his appointment of James Watt, a long-time advocate of ranching interests and foe of environmentalists, as Secretary of the Interior.

FLPMA instructed the BLM to develop comprehensive land use plans for all of its lands.¹²¹ These land use plans were to guide the management of all activities on BLM land, including, but not limited to, grazing.¹²² The land use plans mandated by FLPMA made a natural match to the EISs required by *Morton*.

The BLM wedded the two processes. In those areas for which grazing EISs had not yet been prepared, the BLM integrated *Morton's* requirements into its land use planning.¹²³ Each land use plan was accompanied by an EIS. These EISs purported to fulfill *Morton's* mandate with respect to grazing as well as satisfying NEPA's requirements for environmental analysis of other aspects of the plans.¹²⁴

This unification of *Morton's* NEPA process and FLPMA's land use planning was, in itself, logical and unobjectionable. But it created a danger that *Morton's* mandate for specificity in the EISs—that the "actual environmental effects of particular [grazing] permits or groups of permits in specific areas" be "discuss[ed] in detail"¹²⁵—might be lost in the gener-

LAW 711 (2d ed. 1987).

119. See COGGINS, ET AL., *supra* note 116, at 719-21.

120. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT: PROPOSED DOMESTIC LIVESTOCK GRAZING PROGRAM FOR THE COWHEAD-MAS-SACRE PLANNING UNIT 1-12 (1980).

121. See 43 U.S.C. § 1712.

122. For a discussion of BLM land use planning under FLPMA, see George C. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 86-109 (1983).

123. Transcript of Proceedings, Vol. 8, at 10, 12, 21, *Comb Wash II*. The witness describing the integration of *Morton's* requirements into the BLM's land use planning process also stated, erroneously, that related changes in the BLM's range management policy were mandated by a court order. *Id.* at 10.

124. *Id.* at 21; see, e.g., BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, SAN JUAN RESOURCE AREA DRAFT RESOURCE MANAGEMENT PLAN ENVIRONMENTAL IMPACT STATEMENT 1-1 (1986).

125. *Morton*, 388 F. Supp. at 841 (emphasis added).

ality of the land use planning process.

This danger was manifested in the 1980s under the Reagan/Watt administration, which effectively neutered FLPMA's land use planning process. Most BLM land use plans developed under the Reagan administration and the subsequent Bush administration contained few or no specific prescriptions for livestock grazing management.¹²⁶ Relying on an alleged lack of adequate data, the BLM also eschewed any near-term reductions in livestock numbers, even on allotments that were overstocked according to the best available information.¹²⁷ Instead, the Reagan/Watt era land use plans simply classified allotments into broad categories according to their overall condition and general need for improvement, and called for collection of additional data about range conditions and forage utilization.¹²⁸ Under the Reagan/Watt land use plans, no reductions in grazing levels were made unless they were proven necessary by such data.¹²⁹ The land use plan for the BLM's San Juan Resource Area in Utah, which was at issue in the Comb Wash case, was typical of the genre.¹³⁰

The EISs accompanying these vacuous land use plans were, for the most part, equally devoid of specifics. In the EISs, the BLM did not attempt to assess the condition of, or the impacts of grazing on, vegetation, water quality, wildlife habitat, riparian areas, or recreational or archaeological resources in any particular place or on any particular grazing allotment.¹³¹ The EISs did not evaluate the carrying capacity of allotments to determine which were overstocked,¹³² or consider specific alternative measures to address conflicts between grazing and other resources and land uses.¹³³ In short, the EISs accompanying the Reagan-era land use plans did not contain the type of information needed to make informed decisions about actual grazing practices in specific places. In content, if not in form, they resembled the nationwide grazing EISs that the *Morton* court had found insufficient to satisfy the requirements of NEPA.

126. Feller, *Grazing Management on the Public Lands*, *supra* note 1, at 578 & nn.51-52; Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 572-73.

127. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 576-78.

128. Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp 1045, 1050-51 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987); Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 572-73.

129. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 576-77.

130. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 592-93.

131. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 572-73; Feller, *Grazing Management on the Public Lands*, *supra* note 1, at 579.

132. *Hodel*, 624 F. Supp. at 1051-52, 1055, 1057-58.

133. *Id.* at 1051.

3. NRDC v. Hodel

Seeking to vindicate the principle it had established in *Morton*, the Natural Resources Defense Council returned to court in 1984 to challenge a typical Reagan-era BLM land use plan and its accompanying EIS. The challenge failed. In *Natural Resources Defense Council, Inc. v. Hodel*,¹³⁴ the United States District Court for the District of Nevada held that FLPMA does not require BLM land use plans to contain specific management prescriptions for individual grazing allotments. According to the court, such a plan would be an “administrative straight-jacket” that was not envisioned by Congress.¹³⁵

Once the court decided not to require the BLM to make specific management decisions in its land use plans, it concluded in turn that the EISs accompanying the land use plans need not contain the type of information necessary to assist in making such decisions. “[B]ecause the scope of the EIS is determined by the scope of the proposed action, it is unreasonable to expect the EIS to analyze possible actions in greater detail than is possible given the tentative nature of the [land use plan] itself.”¹³⁶ The court rejected all of the plaintiff’s specific allegations of inadequacies in the land use plan and the EIS,¹³⁷ and the Ninth Circuit affirmed in a cursory opinion.¹³⁸

On its face, the *Hodel* decision seemed to represent a successful end-run by the administration around the requirements of *Morton*. By shifting the NEPA focus from “particular [grazing] permits or groups of permits”¹³⁹ to land use plans, and then convincing the court that land use plans do not require site-specific environmental analysis, the administration seemingly avoided *Morton*’s requirement to evaluate and disclose “in detail the environmental effects” of livestock grazing “in specific areas of the public lands.”¹⁴⁰

4. *The Comb Wash Case*

The Comb Wash case was built on the theory that *Hodel* only deferred, and did not reduce or eliminate, the BLM’s responsibility under NEPA and *Morton* to evaluate, disclose, and consider the specific impacts of the grazing that the BLM authorizes. Regardless of *Hodel*’s conclusions

134. 624 F. Supp. 1045 (D. Nev. 1985), *aff’d*, 819 F.2d 927 (9th Cir. 1987).

135. *Hodel*, 624 F. Supp. at 1060.

136. *Id.* at 1051.

137. *Id.*, *passim*.

138. 819 F.2d 927 (9th Cir. 1987); 3 COGGINS & GLICKSMAN, *supra* note 11, § 19.05[2].

139. *Morton*, 388 F. Supp. at 841.

140. *Id.*

about the limited role of the BLM's land use planning process, the undisputable fact remains that the issuance of a grazing permit is a "federal action" within the meaning of NEPA, and that such permits, collectively if not individually, may have very significant environmental impacts. The theory of the Comb Wash case was that, if the BLM chooses not to address these impacts in its land use plans or their accompanying EISs, then it must address them in other, more site-specific NEPA documents. These documents could be either EISs for individual allotments or groups of allotments, or environmental assessments¹⁴¹ that demonstrate that the impacts of grazing on particular allotments or groups of allotments are insignificant.

By focusing on a single allotment with nationally significant resources that were being severely degraded by the impacts of grazing,¹⁴² the Comb Wash case highlighted the abject failure of the BLM to evaluate, consider, or address those impacts *anywhere* in its management process. When confronted with evidence of serious environmental impacts that were not even mentioned, let alone addressed, in the applicable land use plan or its accompanying EIS, the BLM lapsed into confusion and contradiction. The BLM had insisted in its Notice of Final Decision that the San Juan RMP/EIS fully satisfied the agency's NEPA obligations with respect to grazing on the Comb Wash Allotment.¹⁴³ Similarly, at the hearing in front of Judge Rampton, the BLM's NEPA expert testified that the San Juan RMP/EIS contained sufficient information to support reasoned and informed decisions about grazing on the allotment.¹⁴⁴ But when pushed to identify where in the document site-specific information on the myriad impacts that had been the subject of many days of testimony at the hearing could be found, the BLM was unable to do so.¹⁴⁵ Instead, the BLM argued, in contradiction to its Notice of Final Decision, that the RMP/EIS was just the first step in a "tiered"¹⁴⁶ NEPA process that would include a

141. See 40 C.F.R. § 1508.9 (1995); 2 COGGINS & GLICKSMAN, *supra* note 11, § 10G.02[1].

142. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 586-91.

143. Final Decision, *supra* note 49, at 1 ("[T]he levels of grazing on the Comb Wash Allotment were analyzed in the Final San Juan Grazing Environmental Impact Statement (EIS) dated September 1987. The EIS analyzed a range of alternatives which covered the impacts related to . . . grazing The proposed decision stated livestock grazing, as analyzed in the EIS, is in compliance with appropriate laws, policy, and regulations."); Final Decision, *supra* note 49, at 3 ("A Draft EIS and RMP was issued in May of 1986 which specifically addressed livestock grazing on the Comb Wash Allotment An evaluation of the environmental and economic costs were [sic] presented in the Draft RMP and EIS.").

144. Transcript of Proceedings, Vol. 8, at 42-44, *Comb Wash II* (testimony of Daryl Trotter). Mr. Trotter was the coordinator responsible for overseeing the NEPA process in the BLM's Moab District, which covers all of southeastern Utah. *Id.* at 6.

145. See *id.* at 44-59.

146. See *supra* note 84.

subsequent, site-specific analysis of grazing on the allotment.¹⁴⁷ The BLM, however, was unable to offer any finite time frame for completion of that process.¹⁴⁸

The BLM's shifting stance reflected the agency's pattern of avoidance of the requirements of NEPA and *Morton*. This avoidance has taken the form of a shell game, in which the BLM always claims that those requirements have been satisfied, or will be satisfied, in some process other than the one that is currently under scrutiny.¹⁴⁹ In *Hodel*, the BLM argued that its land use planning process was not the appropriate place for detailed, site-specific consideration of the environmental impacts of grazing.¹⁵⁰ This argument succeeded in winning judicial approval of virtually contentless land use plans and accompanying EISs.¹⁵¹ But when affected parties subsequently demand that the BLM follow up the land use plans with more detailed, site-specific analyses, the BLM argues that those same land use plans and their accompanying EISs have satisfied the BLM's obligations under NEPA and that no further analysis is required. This claim, however, becomes untenable when a typical *Hodel*-style plan and its EIS are examined in light of the real impacts of grazing in a particular place.

Judge Rampton's decision ended the shell game, at least with respect to the Comb Wash Allotment. He held that, at the time a grazing permit is issued or renewed, the BLM becomes accountable for its compliance with NEPA with respect to that allotment.¹⁵² Like the holding nineteen years previous in *Morton*, this holding does not imply that a separate NEPA document is required for each permit.¹⁵³ Nor does it prevent the BLM from relying on a multi-level "tiered" process for NEPA compliance.¹⁵⁴

147. *Comb Wash II*, *supra* note 1, at 21-22; Transcript of Proceedings, Vol. 8, at 22, *Comb Wash II* (testimony of Daryl Trotter). See also *id.* at 51, 53, 57 (referring to the "next step" and the "next document").

148. *Comb Wash II*, *supra* note 1, at 10; Transcript of Proceedings, Vol. 9, at 148, 153, *Comb Wash II*; Deposition of Edward Scherick, BLM San Juan Resource Area Manager at 46, *Comb Wash II*.

149. For a description of a similar shell game regarding the evaluation of the suitability of lands for livestock grazing, 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, 708 (1995).

150. See *supra* text accompanying note 136.

151. See 2 COGGINS & GLICKSMAN, *supra* note 11, § 10F.04[4][b] (characterizing the land use plan approved in *Hodel* as a "non-plan" and "little more than a confused melange of do-nothing motherhood statements which offered neither managers nor users much useful guidance on future management").

152. *Comb Wash II*, *supra* note 1, at 19 ("It is axiomatic that when an appellant challenges an action on NEPA grounds, the reviewing tribunal must determine whether the agency's existing NEPA documentation is adequate to support that action.").

153. See *Morton*, 388 F. Supp. at 841.

154. See 40 C.F.R. § 1508.28.

But it does imply that, when it issues or renews the permit, the BLM may be required to identify precisely where and when it has analyzed the site-specific environmental consequences of that permit.

C. *Grazing Without Thought*

1. *Confusion in the Ranks*

While the BLM had difficulty identifying exactly where and when it had analyzed the environmental consequences of livestock grazing on the Comb Wash Allotment, it had even greater difficulty identifying when and how it had made the decision to allow grazing in the sensitive canyons that were the focus of the litigation. The responsible BLM official, the Area Manager, testified that he exercised his discretion to authorize grazing in the canyons on the advice of the range conservationist on his staff.¹⁵⁵ The range conservationist, however, testified that he had acted under the belief that the decision to allow grazing in the canyons had already been made in the land use plan.¹⁵⁶ The Area Manager, who was responsible for the development of the land use plan, believed that the plan had left the issue undecided.¹⁵⁷

It would be easy to dismiss this episode of mutual finger-pointing as a simple breakdown in communication or in lines of authority in one particular BLM office. To do so, however, would be a serious mistake. A similar inquiry in virtually any BLM office in the West would yield similar results. BLM employees are unable to identify exactly who makes decisions to perpetuate grazing in particular areas for the simple reason that no one consciously makes such decisions. Rather, almost everyone involved operates under the unstated and unquestioned assumption that grazing will continue unless and until someone makes a decision to stop it.¹⁵⁸ Therefore, grazing takes place on virtually all of the lands managed by the BLM without any official being required to explain why grazing is justified in any particular place or to consider the possibility that it might be discontinued. Since grazing proceeds by assumption rather than by conscious decision, inquiries into the decisionmaking process inevitably yield confused and confusing answers.

155. *Comb Wash II*, *supra* note 1, at 8.

156. *Comb Wash II*, *supra* note 1, at 8.

157. *Comb Wash II*, *supra* note 1, at 8.

158. *See, e.g.*, Transcript of Proceedings, Vol. 17, at 35-36, 44, *Comb Wash II* (testimony of BLM range conservationist that he believed the canyons on the Comb Wash Allotment should be grazed because the applicable land use plan did not say that they should not be).

2. Avoiding the Question

BLM planning is structured in a way that usually precludes consideration of the appropriateness of grazing in particular areas. In developing land use plans, the BLM generally does not attempt to compare the harms and benefits of grazing in specific places and does not consider alternatives that attempt to discriminate between lands suitable and unsuitable for grazing.¹⁵⁹ Moreover, the EISs accompanying BLM land use plans generally lack the information that would be necessary to weigh the advantages and disadvantages of grazing in specific locations. For example, the EIS accompanying the San Juan Resource Management Plan, which included the Comb Wash Allotment, did not reveal or discuss the nature or extent of the extraordinary scenic, archaeological, and recreational resources in the Comb Wash canyons, the small quantity of the livestock forage there, the relative importance to the local economy of the various resources in the canyons, or the damage being done by livestock grazing to the other resources in the canyons.¹⁶⁰ Without this type of site-specific information, rational decisions about where grazing is appropriate and where it is inappropriate are not possible. Therefore, the suitability of particular lands for grazing is generally not discussed in BLM land use plans. Nonetheless, the plans leave lands open for grazing and, once a land use plan is completed, the BLM will refuse to consider the possibility of terminating grazing in any area covered by the plan on the grounds that the issue was already decided in the plan.¹⁶¹ Thus, like NEPA compliance, the issue of the suitability of lands for grazing is lost in a shell game where it is never really addressed.¹⁶²

159. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 571-72. See also *Hodel*, 624 F. Supp. at 1054-55 (upholding a BLM decision not to consider a no-grazing alternative in a land use plan).

160. *Comb Wash II*, *supra* note 1, at 24.

161. See, e.g., Transcript of Proceedings, Vol. 17, at 21-23, *Comb Wash II*; Phoenix District Office, Bureau of Land Management, U.S. Department of the Interior, Notice of Final Decision 3 (May 31, 1991) (declaring that "a decision not to graze these lands would be inconsistent with [the] land use plan," despite the fact that the lands in question were not even under BLM administration at the time the plan was promulgated).

162. For a description of a similar shell game on the National Forests, see Feller, *supra* note 149, at 708.

The implicit assumption that grazing should continue unquestioned is also manifested in other ways. According to the BLM's Grazing Administration Handbook, for example, a BLM official must go through formal decisionmaking procedures if and when she *rejects* an application for a grazing permit, but not when she *grants* one. See BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, GRAZING ADMINISTRATION HANDBOOK § H-4160-1.1 (1984); *but see supra* part II.B of this Article (describing *Comb Wash I* decision requiring such procedures when a grazing permit is issued). And in environmental assessments of grazing management proposals, year-round grazing is implicitly assumed to be the baseline to which all other alternatives are compared. Thus, grazing on a seasonal or periodic basis is said to improve resource conditions, even if the resources would be better off with

3. Hodel Again

The BLM's refusal to consider the suitability of lands for grazing was seemingly affirmed in *Hodel*, in which the court held that the BLM was not required to consider a no-grazing alternative when it developed its land use plan for the Reno, Nevada planning area.¹⁶³ According to the *Hodel* court, complete elimination of grazing on all public lands in the area would be "practically unthinkable" because of the loss of jobs and income that would result.¹⁶⁴

Hodel, however, discussed only the reasonableness of terminating grazing on an entire planning area comprising 700,000 acres of public land and encompassing fifty-five different grazing allotments. The plaintiffs in *Hodel* did not raise the issue of whether the BLM should be required to consider intermediate alternatives under which portions, but not all, of the planning area would be closed to grazing.

4. The Comb Wash Case

As with the NEPA issue, the Comb Wash case stands for the proposition that *Hodel* only deferred, and did not eliminate, the BLM's responsibility to address difficult questions concerning livestock grazing on the public lands. Issues avoided by the BLM in its land use planning must be addressed somewhere else in the management process. Specifically, Judge Rampton held that, before authorizing grazing in the canyons on the Comb Wash Allotment, the BLM must make a "reasoned and informed" determination of whether grazing in those canyons is in the public interest.¹⁶⁵ Moreover, he held that, in order to make such a reasoned and informed decision, the BLM must address the type of site-specific questions about the economic and environmental impacts of grazing that were not explored in the development of the area-wide land use plan.¹⁶⁶

no grazing at all. See, e.g., ED CHANEY, ET AL., *MANAGING CHANGE: LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS* 21 (1993) (stating that winter grazing is "beneficial" to riparian ecosystems because it provides rest during the growing season); BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, *ENVIRONMENTAL ASSESSMENT FOR LIVESTOCK USE AUTHORIZATION ON THE SANTA MARIA RANCH ALLOTMENT 15* (1991) (stating that riparian vegetation would "benefit" from the proposed initiation of livestock grazing because riparian areas would receive rest during spring and summer months).

163. *Hodel*, 624 F. Supp at 1054-55.

164. *Id.* at 1054.

165. *Comb Wash II*, *supra* note 1, at 23-25.

166. *Comb Wash II*, *supra* note 1, at 24.

IV. GIVING MEANING TO "MULTIPLE-USE"

A. *Multiple Use and Reasoned Decisionmaking*

Judge Rampton's holding, that the BLM must rationally evaluate the appropriateness of grazing in the Comb Wash canyons, was based on the principle of "multiple use." That principle is defined in the Federal Land Policy and Management Act (FLPMA) as follows:

The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.¹⁶⁷

Over the years, the concept of multiple use has been much maligned, much misunderstood, and little litigated. Many BLM and Forest Service employees who have never read the statutory definition believe that the concept requires them to allow all feasible uses of a given piece of land, or to maximize the number of uses. Some legal commentators have argued that the statutory definition itself is nothing more than a collection of "vacuous platitudes,"¹⁶⁸ too vague and discretionary to be judicially enforceable.¹⁶⁹ The paucity of litigation arising under the definition has

167. 43 U.S.C. § 1702(c). See also 43 U.S.C. § 1732(a) (requiring the BLM to manage public lands under principles of multiple use and sustained yield). A nearly identical definition of multiple use is applied to the National Forests in the Multiple Use-Sustained Yield Act. See 16 U.S.C. §§ 529, 531(a) (1994). For discussions of the history and meaning of multiple use, see 3 COGGINS & GLICKSMAN, *supra* note 11, ch. 16; Coggins, *supra* note 122, at 15-16, 32-74; George C. Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. COLO. L. REV. 229 (1982).

168. Christopher C. Curtis, Comment, *Managing Federal Lands: Replacing the Multiple Use System*, 82 YALE L.J. 787, 788 (1973).

169. See, e.g., Comment, *supra* note 168; Robert H. Strand, *Statutory Authority Governing Management of the National Forest System—Time for a Change?*, 7 NAT. RES. L. 479, 489 (1974); Charles A. Reich, *The Public and the Nation's Forests*, 50 CALIF. L. REV. 381, 386 (1962).

tended to reinforce that view.¹⁷⁰

Professor George Coggins of the University of Kansas, however, has cogently argued that the above-quoted definition, along with the statutory definition of the related concept of "sustained yield,"¹⁷¹ holds more content than its critics have admitted:

[A] close reading of those [multiple use, sustained yield] statutes demonstrates that they are not like Oakland; there is some *there* there. The multiple use laws contain a series of "shalls" and "shall nots" that ought to be binding on public land managers. They demand an equality of resource treatment, and they forbid practices that detract from the future productivity of the land. They demand thought and foresight, and they prohibit economic optimization of single resources.¹⁷²

Professor Coggins concluded that, if the multiple use mandate were judicially enforced, then "[i]n defending their actions, the agencies would have to confront their actual reasoning and bases for decision."¹⁷³ This author, following Professor Coggins' lead, has argued that the multiple use principle requires the BLM to permit grazing only where grazing's economic, social, and environmental benefits exceed its harms.¹⁷⁴

Professor Coggins' prediction came true in the Comb Wash case, albeit in an administrative, quasi-judicial forum rather than in a court. In defending its decision to authorize livestock grazing in the Comb Wash canyons, the BLM had to confront the fact that the decision was based on default rather than on deliberation. Judge Rampton found that this failure of rationality violated the multiple use principle, which "'requires that the values in question be informedly and rationally taken into balance' to determine whether the proposed activity is in the public interest."¹⁷⁵ Under the principle, the BLM must "weigh[] the benefits and harms" of grazing in the canyons.¹⁷⁶

170. See Coggins, *supra* note 167, at 243-50.

171. See 16 U.S.C. § 531(b); 43 U.S.C. § 1702(h).

172. Coggins, *supra* note 167, at 279.

173. Coggins, *supra* note 167, at 280.

174. See Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 566; Feller, *supra* note 149, at 706-07.

175. *Comb Wash II*, *supra* note 1, at 23 (quoting *Sierra Club v. Butz*, 3 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,292, 20,293 (9th Cir. 1973)).

176. *Comb Wash II*, *supra* note 1, at 23.

Judge Rampton also wrote that the BLM must make a reasoned and informed decision as to whether "the benefits of grazing . . . outweigh the costs." *Comb Wash II*, *supra* note 1, at 23. Focusing on these words, some readers of the opinion have concluded that Judge Rampton was requiring the BLM to perform a "cost-benefit analysis." See Statement of Reasons and Memorandum in Support Filed by Utah Farm Bureau Federation, *National Wildlife Federation v. BLM*, No. IBLA 94-264 (Interior Board of Land Appeals, Statement filed May 19, 1994); GLICKSMAN & COGGINS, *supra* note 14,

B. Multiple Use and Livestock Numbers

Judge Rampton also found that the BLM had violated the principle of multiple use in its determination of the *number* of livestock that it would permit to graze on the Comb Wash Allotment, both inside and outside of the canyons that were the focus of the case.¹⁷⁷ Following the policy established during the administration of President Ronald Reagan and Interior Secretary James Watt,¹⁷⁸ the BLM had based the authorized number of livestock exclusively on measurements of forage “utilization,” which indicates how severely individual plants are being grazed, and of rangeland “trend,” which reflects changes in the numbers and types of plants.¹⁷⁹ This author has argued that these indicators, which are related primarily to the condition of the livestock forage resource, fail to take into account the often severe impacts of grazing on other public land resources such as soils, water quality, wildlife habitat, archaeological resources, and natural scenery.¹⁸⁰ Judge Rampton reached a similar conclusion, holding that the BLM’s refusal to consider information other than utilization and trend data “violate[d] FLPMA’s mandate to manage the public lands to protect the full spectrum of environmental, ecological, cultural, and recreational values.”¹⁸¹

Judge Rampton’s decision should serve as a caution for land managers to avoid the common mistake of assuming that livestock numbers are acceptable whenever they are within the “grazing capacity” or the “carrying capacity”¹⁸² of the land.¹⁸³ Grazing capacity, as usually determined through measurements of forage production and utilization, is the number of livestock that an area could sustainably support if it were to be managed for livestock production and nothing else. On lands managed for multiple use, grazing capacity should be considered an outside, upper limit on livestock numbers, not a desirable level or a goal. Grazing by a number of livestock equal to, or even below, an area’s measured grazing capacity can, and often does, seriously degrade other resources and seriously affect

at 220. Taken in context, however, these words clearly were intended to require a weighing and balancing of factors, not necessarily a quantitative cost-benefit analysis. Before making this statement, Judge Rampton discussed numerous non-monetary factors that the BLM must consider. See *Comb Wash II*, *supra* note 1, at 11-16 (discussing the impacts of grazing on riparian areas, wildlife habitat, archaeological resources, recreation, and aesthetic values). His opinion required the BLM to weigh these impacts against the benefits of grazing, but not necessarily to measure them in dollars and cents.

177. *Comb Wash II*, *supra* note 1, at 25.

178. See *supra* text accompanying notes 128-29.

179. See Feller, *What is Wrong With the BLM’s Management?*, *supra* note 1, at 578.

180. See Feller, *What is Wrong With the BLM’s Management?*, *supra* note 1, at 561-63, 576.

181. *Comb Wash II*, *supra* note 1, at 25 (citing 43 U.S.C. §§ 1701(a)(8), 1702(c)).

182. See 43 C.F.R. § 4100.0-5 (1995) (defining livestock carrying capacity).

183. Even Professor Coggins has made this mistake. See 3 COGGINS & GLICKSMAN, *supra* note 11, § 19.05[1].

other land uses that are not taken into account in the measurements used to determine capacity.¹⁸⁴ The need to provide forage for wildlife, to restore or enhance wildlife habitat, to protect archaeological resources, to maintain water quality, to preserve natural scenery, or to reduce conflicts between livestock and recreational use may require levels of livestock use substantially below grazing capacity.¹⁸⁵

The relationship between levels of livestock use and land management goals is illustrated in the following table:

Land Abuse	Cattle Ranch Management	Multiple Use Management	Preservation
Grazing occurs wherever feasible. Livestock numbers allowed to exceed grazing capacity.	Grazing occurs wherever sustainable. Livestock numbers set equal to grazing capacity.	Grazing occurs in selected areas. Livestock numbers held below grazing capacity to accommodate other uses and resources.	No grazing.

Faithful implementation of the multiple use concept requires abandonment of the Reagan era policy of basing authorized livestock numbers exclusively on range utilization and trend data.¹⁸⁶ It also requires an end to the stalling tactic of endlessly perpetuating historic livestock numbers while awaiting the collection of more and better data.¹⁸⁷ Many of the impacts of livestock grazing—visual degradation, trampling of vegetation and stream banks, deposition of manure in campsites and water sources, and denudation of the landscape¹⁸⁸—are readily apparent and do not require extensive data-gathering to document. Judge Rampton's decision affirms

184. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 561-62.

185. See, e.g., FOREST SERVICE, U.S. DEP'T OF AGRIC., ENVIRONMENTAL IMPACT STATEMENT FOR DIAMOND BAR ALLOTMENT MANAGEMENT PLAN 10-13 (1995) (describing ten alternatives for management of a grazing allotment, with livestock numbers ranging from zero to 1188 cattle).

A recent unpublished district court decision confirms that NEPA requires land management agencies to consider alternative scenarios with fewer livestock than an area's grazing capacity. Reporter's Transcript of Proceedings at 31, *Seidman v. Gunzel*, No. CIV 94-2266 PHX-RGS (D. Ariz., Jan. 16, 1996) (oral decision requiring the Forest Service to "consider[] the full range of alternatives, that is not only from zero to status quo, and/or the number determined in the production/utilization survey, but all other numbers in between coupled with a consideration of all of the competing values that are involved in any government lands' use, including all of the recreational and wildlife concerns as well as the grazing concerns").

186. See *supra* text accompanying notes 128-29.

187. See *supra* text accompanying note 127.

188. See Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 590.

that these types of impacts are lawful grounds for reductions in livestock numbers.

V. CONCLUSION

The decision in the Comb Wash case was a vindication of the principle of multiple use and an indictment of the BLM's range management policies and practices. The case gave meaning to multiple use by revealing a pattern of management that is so irrational and so oblivious to values other than livestock production that it cannot be reconciled with even such a broad and vague concept. This pattern is not an aberration; it reflects BLM policies and practices in effect throughout the West.¹⁸⁹ It simply stood out in bolder relief in the Comb Wash canyons than in some other places because of the gross imbalance there between enormous scenic, ecological, and archaeological resources and a paltry amount of livestock forage.¹⁹⁰

It remains to be seen, however, whether the case will have a significant effect on BLM practices outside of the Comb Wash Allotment. As noted at the outset of this Article, the decision was rendered by a low-level administrative tribunal. Even if, as is likely, the decision is affirmed by the Interior Board of Land Appeals,¹⁹¹ it may not be broadly heeded. Precedents are not self-enforcing, especially in public land management, where traditions and habits are deeply entrenched, and where decentralized decisionmaking may be influenced more by local social and economic pressures than by legal rules.¹⁹² On the majority of allotments, the Comb Wash decision may have little or no effect unless—and maybe even if—the national BLM administration undertakes to incorporate the lessons

189. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 586.

190. Feller, *What is Wrong With the BLM's Management?*, *supra* note 1, at 587-89.

191. *See supra* note 5. Affirmance by the IBLA seems likely for two reasons. First, the BLM's appeal of Judge Rampton's decision leaves most of the decision, including the order prohibiting grazing in the canyons pending compliance with NEPA, unchallenged. *See* Bureau of Land Management Statement of Reasons for Appeal and Request for Modification of Decision, National Wildlife Fed'n v. BLM, No. IBLA 94-264 (filed May 20, 1994). The BLM's appeal takes issue only with Judge Rampton's description of the analysis required by FLPMA's definition of multiple use. *See id.* The intervenors in the case have filed more extensive appeals. *See* Statement of Reasons/Opening Brief of the Ute Mountain Ute Indian Tribe, and Statement of Reasons and Memorandum in Support Filed by Utah Farm Bureau Federation, National Wildlife Federation v. BLM, No. IBLA 94-264 (filed March 30, 1994, and May 19, 1994). However, these appellants are now in the awkward posture of defending BLM positions that the BLM is no longer defending.

Second, the IBLA may have given some indication of its leaning on the merits when it exercised its discretion to overturn an automatic stay, 43 C.F.R. § 4.477(a) (1995), and place Judge Rampton's decision into full force and effect pending the IBLA's resolution of the appeal. *See supra* note 5.

192. *See, e.g.*, PHILIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* (1960).

of the decision into its regulations or into other guidance that it offers to local BLM offices.

To date, the two primary holdings of the Comb Wash case—the requirement for site-specific environmental analysis under NEPA and the mandate to weigh the pros and cons of grazing in particular areas—have not been reflected in any change in BLM regulations or guidance. Although the national administration has recently promulgated “Rangeland Reform ‘94,”¹⁹³ a broad re-writing of the grazing regulations, Rangeland Reform ‘94 has not altered the BLM’s NEPA process for grazing. In most instances, the BLM still does not evaluate or consider the site-specific impacts of grazing either in land use plans or when permits are renewed. Nor does Rangeland Reform ‘94 include any direction or process for questioning the appropriateness of grazing in economically marginal or environmentally sensitive areas.¹⁹⁴

In the (likely) absence of further initiatives from the administration, the Comb Wash decision will be significant primarily as a tool in the hands of dedicated individuals who are willing to spend the time and energy to press local BLM officials to follow it in their administration of individual grazing allotments. Opportunities for such public involvement at the allotment level have long been required by BLM regulations,¹⁹⁵ though only in recent years have those aspects of the regulations been exercised. The new regulations established by Rangeland Reform ‘94 preserve and clarify these opportunities, though they don’t significantly expand them.¹⁹⁶

The ranks of citizen activists who have the time and commitment to immerse themselves in the details of grazing management at the allotment level are growing,¹⁹⁷ but they are still small compared to the thousands of BLM grazing allotments across the West.¹⁹⁸ On allotments where the

193. See 60 Fed. Reg. 9894 (1995). Rangeland Reform ‘94 is described and criticized in Feller, *supra* note 149, *passim*.

194. See Feller, *supra* note 149, at 712-14.

195. See Feller, *Grazing Management on the Public Lands*, *supra* note 1, at 578-82, 591-93.

196. For example, the regulations promulgated by Rangeland Reform ‘94 provide opportunities for participation by the “interested public,” which is inclusively defined. See 60 Fed. Reg. at 9961 (definition of “interested public”). However, the previous regulations already required similar opportunities for participation by “affected interests,” see 43 C.F.R. § 4100.0-5 (1994), which had been interpreted to include conservationists and recreationists, see Donald K. Majors, 123 IBLA 142 (1992); Feller, *Grazing Management on the Public Lands*, *supra* note 1, at 581 & n.76. The new regulations explicitly provide for consultation with the interested public when the BLM issues or renews a grazing permit, see 60 Fed. Reg. at 9966 (new 43 C.F.R. § 4130.2(b)), but the previous regulations had already been interpreted to require the same thing. See Feller, *Grazing Management on the Public Lands*, *supra* note 1, at 573, 589.

197. COGGINS, ET AL., *supra* note 116, at 768.

198. See Feller, *Grazing Management on the Public Lands*, *supra* note 1, at 573 n.18, 591 n.152 and accompanying text.

only voices heard by the BLM are those of the permittees, significant change should not be expected.¹⁹⁹ There is one place, however, where the Comb Wash decision has already had an effect. On the Comb Wash Allotment, five magnificent red-rock canyons, with over fifty miles of stream riparian habitat, have begun the process of recovery from decades of devastation by inappropriate and ill-considered livestock grazing. They are doing well.

199. Feller, *Grazing Management on the Public Lands*, *supra* note 1, at 593-94.