

The National Agricultural
Law Center



University of Arkansas · School of Law · Division of Agriculture
NatAgLaw@uark.edu · (479) 575-7646

An Agricultural Law Research Article

**Ride ‘Em Cowboy: A Critical Look at BLM’s
Proposed New Grazing Regulations**

by

Joseph M. Feller

Originally published in ENVIRONMENTAL LAW
34 ENVTL. L. 1123 (2004)

www.NationalAgLawCenter.org

RIDE 'EM COWBOY:
A CRITICAL LOOK AT BLM'S
PROPOSED NEW GRAZING REGULATIONS

BY
JOSEPH M. FELLER*

On December 8, 2003, the United States Department of the Interior issued proposed amendments to the regulations governing livestock grazing on over 160 million acres of western public lands managed by the United States Bureau of Land Management (BLM). According to the Federal Register notice proposing the amendments, they are designed to "improve working relationships with permittees" and to "protect the health of rangelands." However, the amendments would exclude the non-ranching public from critical BLM decision making by deleting requirements for consultation with interested parties when BLM issues, modifies, or renews grazing permits. The amendments would also repeal some environmental standards applicable to public rangelands, delay implementation of others, and impose data collection requirements that would render most such standards unenforceable. Finally, by allowing livestock ranchers to hold title to range improvements and water rights on public lands, the amendments would limit BLM's ability to manage these lands for public purposes including wildlife conservation, recreation, and watershed protection. An internal draft of an environmental impact statement (EIS), prepared by BLM staff, revealed some of the negative environmental consequences of the proposed regulatory amendments. However, before it could be released to the public, the internal draft was replaced by a sanitized draft EIS with the critical portions removed.

* © Joseph M. Feller, 2004. Professor, College of Law, Arizona State University. The author thanks Tom Lustig, Johanna Wald, Daniel Feller, and Paul Bender for their invaluable assistance. This article is an expanded version of an essay prepared for the 50th Annual Institute of the Rocky Mountain Mineral Law Foundation. Joseph M. Feller, *The BLM's Proposed New Grazing Regulations: Serving the Most Special Interest*, 24 J. LAND RESOURCES & ENVTL. L. 241 (2004). Both that essay and this article draw on arguments first presented in comments on BLM's proposed new grazing regulations prepared by Tom Lustig, Johanna Wald, and the author on behalf of a coalition of 13 environmental organizations. See NATIONAL WILDLIFE FEDERATION ET AL., COMMENTS ON GRAZING ADMINISTRATION, PROPOSED RULE, AND DRAFT ENVIRONMENTAL IMPACT STATEMENT (2004), available at <http://www.rangebiome.org/headlines/nr/nwfAcomments.pdf>.

I. INTRODUCTION	1124
II. BACKGROUND.....	1127
A. <i>Livestock Grazing on BLM Lands</i>	1127
B. <i>BLM Grazing Administration</i>	1128
1. <i>Grazing Permits and Allotment Management Plans</i>	1128
2. <i>Land-Use Plans</i>	1130
III. THE PROPOSED NEW REGULATIONS.....	1130
A. <i>Exclusion of Public Participation</i>	1130
B. <i>Suspension of Environmental Standards</i>	1132
1. <i>Background: Rangeland Reform</i>	1132
2. <i>The Proposed Regulations</i>	1133
3. <i>The “Monitoring” Requirement</i>	1134
C. <i>Private Title to Water Rights and Range Improvements</i>	1137
IV. HIDING THE BALL	1140
V. CONCLUSION	1142

I. INTRODUCTION

President George W. Bush fancies himself a cowboy,¹ and his appointments to top positions in the United States Department of the Interior² seemed well-chosen to warm the hearts of the ten thousand or so ranchers who graze cattle and sheep on the western public lands administered by the Department’s Bureau of Land Management (BLM). It was therefore no surprise when, on December 8, 2003, Secretary of the Interior Gale Norton issued proposed amendments to BLM’s grazing regulations³ that were designed, in their own words, to “improve working relationships” between BLM and the ranchers.⁴ If anything, the proposed amendments seemed late in coming. The Bush Administration had already proposed regulatory amendments and legislation to relax environmental

¹ See, e.g., Steven R. Weisman, *Meanwhile, Back at the Ranch . . . and Other Vacation Tales*, N.Y. TIMES, Jan. 2, 2002, at A14 (discussing President George W. Bush’s Crawford, Texas ranch).

² President Bush appointed Gale Norton to be Secretary of the Interior and William Myers to be Solicitor of the Interior, the Department’s head lawyer. Ms. Norton spent four years (1979–1983) as a senior attorney for the Mountain States Legal Foundation, an organization known for, among other things, its representation of public lands livestock interests. U.S. Dep’t of the Interior, *Gale A. Norton—Biography*, at <http://www.doi.gov/secretary/biography.html> (last visited Nov. 14, 2004); Mountain States Legal Foundation, *Legal Cases—Access to Federal Land*, at http://www.mountainstateslegal.org/legal_cases_category_home.cfm?casecategoryid=2 (last visited Nov. 14, 2004). Mr. Myers was formerly director of federal lands for the National Cattlemen’s Beef Association and executive director of the Public Lands Council, an association of public land ranchers. U.S. Dep’t of the Interior, *Secretary Norton Praises Senate Action Confirming William Myers as Solicitor for the Interior Department*, at <http://www.doi.gov/news/010713d.html> (last visited Nov. 14, 2004).

³ *Grazing Administration—Exclusive of Alaska*, 68 Fed. Reg. 68,452 (proposed Dec. 8, 2003) (to be codified at 43 C.F.R. pt. 4100).

⁴ *Id.* at 68,452.

controls and ease access to federal lands by loggers, miners, and oil companies.⁵ The ranchers' turn seemed overdue.

To the ranchers, however, the proposed amendments should be worth the wait. Although the Federal Register notice proposing the amendments states that they are designed to "protect the health of rangelands,"⁶ as well as improve relationships with ranchers, a careful examination reveals that the proposed amendments are a virtual wish list for ranchers seeking liberation from environmental restraints and restoration of their historic position as dominant users of the western public lands. The amendments would repeal some environmental standards,⁷ delay implementation of others,⁸ and render most of the rest unenforceable.⁹ They would remove critical opportunities for public land users other than ranchers to provide input into management decisions,¹⁰ slant environmental analyses and appeals procedures to favor ranchers over environmentalists,¹¹ and even make it easier for ranchers convicted of environmental crimes to obtain grazing permits.¹² The proposed amendments would also allow ranchers to

⁵ See, e.g., Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, 117 Stat. 1887 (easing restrictions on timber cutting on National Forests); National Forest System Land and Resource Management Planning, 67 Fed. Reg. 72,770 (proposed Dec. 6, 2002) (to be codified at 36 C.F.R. pt. 219) (proposing amendments to the regulations governing National Forest planning); Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 54,834 (Oct. 30, 2001) (codified at 43 C.F.R. pt. 3800) (amending regulations governing mining on public lands); Eric Pianin, *Bush Energy Stands Portend Environment Battles*, WASH. POST, Jan. 14, 2001, at A4 (describing Bush proposals to boost fossil fuel production on public lands).

⁶ 68 Fed. Reg. at 68,452.

⁷ See *id.* at 68,466 (proposing, wherever applicable standards and guidelines are in place, to repeal requirement that fundamentals of rangeland health be achieved); NATIONAL WILDLIFE FEDERATION ET AL., COMMENTS ON GRAZING ADMINISTRATION, PROPOSED RULE, AND DRAFT ENVIRONMENTAL IMPACT STATEMENT 25-26 (March 1, 2004) (criticizing the proposed repeal) [hereinafter NWF COMMENTS], available at <http://www.rangebiome.org/headlines/nr/nwfAcomments.pdf>; see also *infra* Part III.B.2.

⁸ See 68 Fed. Reg. at 68,460, 68,466 (proposing 5-year phase-in for implementation of changes in numbers of livestock on top of 2-year delay in deciding to make such changes or to take other action to comply with rangeland health standards); NWF COMMENTS, *supra* note 7, at 20-25 (noting that the proposed rule would delay needed management changes); see also *infra* Part III.B.2.

⁹ See 68 Fed. Reg. at 68,466 (proposing to require "monitoring" to demonstrate noncompliance with rangeland health standards); NWF COMMENTS, *supra* note 7, at 8-18 (arguing that the monitoring requirement is unjustified and would render the standards unenforceable); see also *infra* Part III.B.3.

¹⁰ See 68 Fed. Reg. at 68,459-63 (proposing to delete requirements for consultation with the interested public from 43 C.F.R. §§ 4110.2-4, 4110.3-3, 4130.2, 4130.3-3, and 4130.6-2); NWF COMMENTS, *supra* note 7, at 27-40 (criticizing proposed limits on public participation); see also *infra* Part III.A.

¹¹ See 68 Fed. Reg. at 68,459, 68,465 (proposing to require consideration of "social, economic, and cultural factors" in environmental analyses, and to disallow administrative law judges to stay decisions to initiate or increase livestock grazing); NWF COMMENTS, *supra* note 7, at 43-46, 52-53 (noting the proposed rule's bias in favor of ranchers).

¹² See 68 Fed. Reg. at 68,463-64 (proposing to allow a rancher who has been convicted of an environmental crime to retain his grazing permit, or obtain a new grazing permit, so long as the crime was not committed on the rancher's own grazing allotment); NWF COMMENTS, *supra* note 7, at 51-52 (criticizing the proposal).

obtain ownership of water rights, fences, wells, and pipelines on public land,¹³ thus crippling BLM's ability to manage the land in the greater public interest.

Historically, these proposed amendments can be seen as a response to Rangeland Reform, a more environmentally friendly round of amendments to the same regulations promulgated a decade ago by then-Secretary of the Interior Bruce Babbitt.¹⁴ The amendments would explicitly reverse some elements of Rangeland Reform and render others ineffective in practice. But the amendments would do more than return the law of the range to what it was at the end of the Reagan and first Bush Administrations. They would excise some opportunities for public input that even those Administrations, not known for their friendliness to environmental activists, had considered necessary.¹⁵ In effect, the proposed amendments would return ranchers to the exclusive role in critical public lands decision making they enjoyed before the advent of modern legislation such as the National Environmental Policy Act (NEPA)¹⁶ and the Federal Land Policy and Management Act (FLPMA).¹⁷

Part II of this Article provides background information about livestock grazing on BLM lands and about the administrative plans and decisions that regulate such grazing. Part III looks at specific provisions of the current Bush Administration's proposed regulations that exclude the non-ranching public from critical decisions, that nullify, weaken, or delay implementation of environmental standards, and that permit ranchers to obtain private title to water rights on public lands.¹⁸ Part IV relates the Administration's suppression of the analysis, performed by BLM's own staff, of the negative environmental impacts of the proposed regulations.

¹³ See 68 Fed. Reg. at 68,460 (proposing that the United States and permittees will share title to permanent structural range improvements, and proposing to delete requirement that water rights be acquired in the name of the United States); NWF COMMENTS, *supra* note 7, at 46-50 (criticizing private ownership of stockwater rights and structural range improvements). See also *infra* Part III.C.

¹⁴ Department Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration—Exclusive of Alaska, 60 Fed. Reg. 9894 (Feb. 22, 1995) (codified at 43 C.F.R. pts. 1780, 4100).

¹⁵ Compare, e.g., Grazing Administration—Exclusive of Alaska, 49 Fed. Reg. 6440, 6453 (Feb. 21, 1984) (codified as amended at 43 C.F.R. § 4130.3-3) (promulgating requirement of consultation with affected interests regarding modifications of terms and conditions of grazing permits), with 68 Fed. Reg. at 68,462 (proposing to delete requirement of consultation with the interested public regarding modifications of terms and conditions of grazing permits).

¹⁶ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370e (2000).

¹⁷ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785 (2000).

¹⁸ More detailed and comprehensive criticisms of these and other aspects of the proposed regulations can be found in NWF COMMENTS. See *supra* note 7. Issues addressed in the NWF COMMENTS, but not in this article, include the proposed regulations' redefinition of the "interested public" entitled to have input into BLM grazing decisions, *id.* at 30-32; the proposed requirement of consultation with state and local grazing boards, *id.* at 40-42; the proposed redefinition of "preference," *id.* at 42; stays of decisions pending administrative appeals, *id.* at 43-46; title to structural range improvements, *id.* at 48-50; the issuance of grazing permits to ranchers who have violated environmental laws or BLM regulations, *id.* at 51-52; and the proposed requirement for documentation of social, economic, and cultural effects of grazing decisions, *id.* at 52-53.

II. BACKGROUND

A. *Livestock Grazing on BLM Lands*¹⁹

BLM is heir to those federal public lands once known as the “public domain,” i.e., those large portions of the American West that 1) remain in federal ownership because they have not been sold or given away to states or to private parties and 2) have not been set aside as Indian Reservations, National Forests, National Parks, National Wildlife Refuges, or other forms of federal reservations.²⁰ BLM’s domain includes 176 million acres of mostly arid and semi-arid land in the eleven far-western states.²¹ Livestock grazing, mostly by beef cattle, is authorized on over 90 percent of BLM’s lands.²² Because of their aridity, however, these lands account for only a tiny fraction of the national beef supply,²³ and livestock production on these lands makes a relatively insignificant contribution to the regional economy.²⁴ Just over half of public lands ranchers are hobbyists; they ranch for recreation or out of tradition, not for a living.²⁵

¹⁹ This section is adapted from Joseph M. Feller, *Back to the Present: The Supreme Court Refuses to Move Public Range Law Backward, but Will the BLM Move Public Range Management Forward?*, 31 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,021 (2001).

²⁰ See generally 1 GEORGE C. COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* §§ 2:1–2:14 (Release No. 10, Oct. 2004) (discussing the history of the disposition and reservation of public lands).

²¹ See BUREAU OF LAND MANAGEMENT, U.S. DEP’T OF THE INTERIOR, *PUBLIC LAND STATISTICS 1999 13–14* (2000) [hereinafter *PUBLIC LAND STATISTICS*] (providing total acreages under BLM jurisdiction in each of the 11 far western states, which are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming). BLM also manages 86 million acres of land in Alaska and another 1.4 million acres scattered among 15 other states. *Id.* The discussion here pertains primarily to the far western states.

²² Joseph M. Feller, *What is Wrong with the BLM’s Management of Livestock Grazing on the Public Lands*, 30 *IDAHO L. REV.* 555, 570 (1994).

²³ See BUREAU OF LAND MANAGEMENT, U.S. DEP’T OF THE INTERIOR, *RANGELAND REFORM ‘94: DRAFT ENVIRONMENTAL IMPACT STATEMENT 3-68* (1994) (noting that federal public lands, including national forests as well as BLM lands, provide only two percent of the total feed consumed by beef cattle in the lower 48 states); Joseph M. Feller, *Til the Cows Come Home: The Fatal Flaw in the Clinton Administration’s Public Lands Grazing Policy*, 25 *ENVTL. L.* 703, 704 & n.6 (1995) (showing that, on average, it takes over 100 acres of BLM land to feed a cow). See also DEBRA L. DONAHUE, *THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY 250–63* (1999) (discussing the number of cattle grazing on BLM lands).

²⁴ THOMAS M. POWER, *LOST LANDSCAPES AND FAILED ECONOMIES: THE SEARCH FOR A VALUE OF PLACE 181–86* (1996) (showing that grazing on federal lands accounts for 0.06% of total employment and 0.04% of total income in the 11 far western states).

²⁵ See BUREAU OF LAND MANAGEMENT, U.S. DEP’T OF THE INTERIOR, *PROPOSED REVISIONS TO GRAZING REGULATIONS FOR THE PUBLIC LANDS, DRAFT ENVIRONMENTAL IMPACT STATEMENT DES 03-62*, at 3-45 to 3-46 (2003) (discussing several studies on the motivations of public land ranchers) [hereinafter *PROPOSED REVISIONS DEIS*], available at https://www.eplanning.blm.gov/us_grazing/builds/build45/index.htm; see also *id.* at 3-44 (“Ranching tends to be a low- or negative-profit enterprise, and public land ranchers are no exception.”).

On the other hand, these same lands, which were once considered virtually worthless for any purpose other than grazing,²⁶ are now valued for a wealth of noncommodity resources, including hundreds of thousands of archaeological sites; habitat for thousands of species of wildlife; spectacular desert, mountain, and canyon scenery; and recreational opportunities that attract tens of millions of visitors annually.²⁷ By conventional economic measures, the value of the recreational opportunities alone on these lands greatly exceeds their value for livestock production.²⁸

Over the last century and a half, livestock grazing has had a number of severe and pervasive impacts on the resources of the lands now managed by BLM. These impacts include replacement of native perennial grasses by shrubs and annual weeds, soil erosion, degradation of stream channels, loss of riparian vegetation, water pollution, destruction of wildlife habitat, trampling of archaeological sites, and spoliation of natural scenery and recreational opportunities.²⁹

B. BLM Grazing Administration

1. Grazing Permits and Allotment Management Plans

A rancher may graze livestock on BLM land only if, and to the extent that, he is authorized to do so by a permit issued by BLM.³⁰ A grazing permit specifies where, when, how many, and for how long livestock are allowed to graze.³¹ A grazing permit may also contain additional terms and conditions such as requirements for rotation of livestock between different pastures, removal of livestock when a certain level of forage consumption has been reached, or exclusion of livestock from environmentally sensitive areas.³²

²⁶ See 1 COGGINS & GLICKSMAN, *supra* note 20, §§ 2:1–2:14 (describing removal from the public domain of lands considered useful for other purposes, so that remaining lands were used mostly for livestock grazing).

²⁷ See Feller, *supra* note 23, at 704–05 (discussing noncommodity resources on BLM lands).

²⁸ Feller, *supra* note 22, at 559 n.15; see also DONAHUE, *supra* note 23, at 231–50 (showing that the value of livestock production on the public lands is low compared to other potential land uses).

²⁹ Feller, *supra* note 22, at 560–63. For reviews of the ecological impacts of livestock grazing on western rangelands, see DONAHUE, *supra* note 23, at 114–60; Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 CONSERVATION BIOLOGY 629 (1994).

³⁰ See 43 U.S.C. § 315b (2000) (authorizing the issuance of grazing permits). On certain BLM lands the grazing authorizations are called leases rather than permits. See *id.* § 315m (authorizing the issuance of grazing leases). See also Grazing Administration—Exclusive of Alaska, 68 Fed. Reg. 68,452, 68,461 (proposed Dec. 8, 2003) (to be codified at 43 C.F.R. pt. 4100) (clarifying that “it is the permit or lease that authorizes such grazing use and no other document”); 43 C.F.R. § 4140.1(b)(1) (2003) (prohibiting grazing without a permit or lease). Under current BLM regulations, permits and leases are treated identically. See generally 43 C.F.R. pt. 4100 (2003) (repeatedly referring to “grazing permit(s) or lease(s)”).

³¹ See 43 U.S.C. § 1752(e) (2000) (prescribing mandatory terms and conditions for federal grazing permits).

³² See *id.* (requiring that, in the absence of an allotment management plan (AMP), a grazing permit or lease shall include “such terms and conditions as [the Secretary of the Interior] deems

As an alternative to specifying terms and conditions in the permit itself, BLM may develop an allotment management plan (AMP) and incorporate it into the permit.³³ However, most grazing allotments do not have AMPs, most AMPs are old and outdated, and BLM is not developing many new AMPs.³⁴ Therefore, in most instances, the terms and conditions of the grazing permit determine the legal permissible extent of grazing.

Regardless of the legal limits imposed by a permit term or AMP, the decision of how many cattle or sheep will graze each year is often made unilaterally by the permittee or by informal agreement between the permittee and BLM. This informal decision making occurs because many BLM grazing permits authorize unrealistically high numbers of livestock. An unrealistic permit functions as a blank check, allowing the rancher to decide each year how many of the permitted number of livestock he will actually place on the range.³⁵ The difference between permitted and actual livestock numbers is termed "nonuse."³⁶ It is common for BLM managers to rely on the permittee's voluntary nonuse in lieu of modifying the permit to control grazing levels.³⁷ Although current BLM regulations limit voluntary nonuse to three years at a time,³⁸ this limit is rarely—if ever—enforced.³⁹

appropriate for management of the permitted or leased lands").

³³ See *id.* § 1752(d) (granting BLM authority to develop AMPs and incorporate them into grazing permits).

³⁴ U.S. GENERAL ACCOUNTING OFFICE, REPORT NO. RCED-88-80, RANGELAND MANAGEMENT: MORE EMPHASIS NEEDED ON DECLINING AND OVERSTOCKED ALLOTMENTS 40-41 (1988). See also Joseph M. Feller, *Grazing Management on the Public Lands: Opening the Process to Public Participation*, 26 LAND & WATER L. REV. 571, 575-76 (1991) (discussing how actual grazing practices are sometimes inconsistent with AMPs).

³⁵ Feller, *supra* note 34, at 576.

³⁶ See 43 C.F.R. § 4100.0-5 (2003) (defining "[t]emporary nonuse"); *id.* § 4130.2(g)(2) (authorizing approval of temporary nonuse for up to three consecutive years).

³⁷ See Feller, *supra* note 22, at 574-75 (discussing BLM reliance on permittee nonuse in lieu of reductions in active preference); Feller, *supra* note 34, at 575-76 (discussing annual BLM decisions on livestock numbers and grazing schedules); see also *Grazing Administration—Exclusive of Alaska*, 68 Fed. Reg. 68,452, 68,462 (proposed Dec. 8, 2003) (to be codified at 48 C.F.R. pt. 4100) (encouraging permittees to take voluntary nonuse, which may "preclude[] the need for BLM to issue a decision" reducing authorized grazing). In 2002, 38% of all authorized active animal unit months (AUMs) of livestock grazing on BLM lands were in nonuse. PROPOSED REVISIONS DEIS, *supra* note 25, at 3-43, T-15 tbl. 3.16.1. In other words, on average during that year there were only 62% as many livestock on BLM rangelands as authorized by BLM's permits. In some states, the level of nonuse was even higher. See *id.* at T-15 tbl. 3.16.1 (showing 46% nonuse in Arizona, 52% in California, 47% in Colorado, and 48% in New Mexico).

³⁸ 43 C.F.R. § 4130.2(g)(2) (2003). The new proposed revisions to the regulations would eliminate the three-year limit. See 68 Fed. Reg. at 68,462.

³⁹ In 2001, the author interviewed four BLM employees with extensive range management experience in five states. None of the interviewees had ever seen or heard of any instance in which a permittee's request for authorization of nonuse had been denied. There is one reported case from 1975 in which BLM, after approving a permittee's applications for 100% nonuse of a grazing permit each year for over a decade, disapproved the last such application and required the permittee to make use of the permit. The Interior Board of Land Appeals affirmed BLM's decision. Floyd and Corwin Silva, 20 I.B.L.A. 237 (1975). The author has found no example of denial of an application for nonuse more recent than 1975.

2. Land-Use Plans

The Federal Land Policy and Management Act (FLPMA) calls for BLM to develop and maintain comprehensive land-use plans that govern all aspects of public land management, including grazing administration.⁴⁰ In theory, land-use plans constrain grazing permits by determining where grazing will or will not be allowed and by setting environmental standards that all grazing permits must meet.⁴¹ But in the 1980s, under President Reagan's Interior Secretary James Watt, BLM neutered FLPMA's land-use planning process. Plans developed under Watt and his successors in the Reagan and first Bush Administrations—plans still in force today—are virtually devoid of meaningful restraints on livestock grazing.⁴² George Coggins, Professor of Law at the University of Kansas and the country's foremost expert on the law of public rangelands, described a typical BLM land-use plan as a "nonplan," a "nugatory, meaningless exercise," and a "confused melange [sic] of do-nothing motherhood statements which offered neither managers nor users much useful guidance on future management."⁴³ Instead of making decisions about grazing management, most BLM land-use plans defer such decisions to the future development of AMPs or the specification of terms and conditions of grazing permits.⁴⁴ Moreover, even where a land-use plan contains specific management direction, that direction is not effective unless and until it is incorporated into AMPs or grazing permits, which it often is not.

III. THE PROPOSED NEW REGULATIONS

A. Exclusion of Public Participation

Recognizing the critical role of grazing permits in determining grazing practices, and thereby the condition of public rangelands, existing regulations provide a mechanism for interested citizens to be informed of, and to provide input into, BLM decisions about grazing permits. Upon request, any person can be designated as a member of the "interested public" with respect to a particular grazing allotment.⁴⁵ The regulations require BLM to consult with the interested public whenever it issues, renews, or modifies a grazing permit.⁴⁶ The consultation requirement allows, for example, a

⁴⁰ 43 U.S.C. § 1712 (2000).

⁴¹ See *id.* § 1732(a) (requiring management "in accordance with the land use plans"); *id.* § 1752(c)(1) (conditioning renewal of grazing permits on lands remaining available for grazing in accordance with land-use plans).

⁴² See Joseph M. Feller, *The Comb Wash Case: The Rule of Law Comes to the Public Rangelands*, 17 PUB. LAND & RESOURCES L. REV. 25, 41 (1996); Feller, *supra* note 22, at 571-73; Feller, *supra* note 34, at 578.

⁴³ 2 COGGINS & GLICKSMAN, *supra* note 20, § 10F:25.

⁴⁴ See, e.g., Feller, *supra* note 34, at 578 n.52 (describing BLM's land-use plan for the San Juan Resource Area in Utah as a "typical example of a BLM land use plan that places virtually no constraints on the management of individual grazing allotments").

⁴⁵ See 43 C.F.R. § 4100.0-5 (2003) (defining "interested public").

⁴⁶ See *id.* §§ 4130.2(b), 4130.3-3, 4130.6-2 (requiring consultation with the interested public

hunter to point out that a proposed permit would lead to overgrazing of critical wildlife habitat, a recreationist to point out the permit's impacts on popular camping and hiking areas, or an angler to argue that the permit contains insufficient terms and conditions to protect trout streams from the impact of cattle. Consultation also allows interested citizens to raise a red flag when a proposed permit or permit modification fails to conform with a land-use plan or to other legal mandates, such as water quality standards or requirements for protection of endangered species.

The current Bush Administration's proposed amendments to the regulations, however, would eliminate these critical opportunities for interested and affected citizens to influence the management of their public lands. The amendments would delete the "interested public" from the list of those required to be consulted when BLM issues, renews, or modifies a grazing permit.⁴⁷ Requirements for consultation with ranchers and state governments will remain,⁴⁸ but environmentalists, wildlife enthusiasts, and recreationists will be assured no seat at the table when decisions affecting their interests are made.⁴⁹

The proposed amendments would retain requirements for consultation with the interested public when BLM prepares or modifies an AMP⁵⁰ and when BLM apportions "additional forage" above and beyond the amount historically used by permittees.⁵¹ These opportunities for public input,

for issuance of permits, modification of existing permits, and issuance of nonrenewable permits, respectively); *see also id.* §§ 4110.2-4, 4110.3-3 (requiring consultation with the interested public regarding designation and adjustment of grazing allotment boundaries and implementation of reductions in permitted numbers of livestock).

⁴⁷ *See* Grazing Administration—Exclusive of Alaska, 68 Fed. Reg. 68,452, 68,461–63 (proposed Dec. 8, 2003) (to be codified at 43 C.F.R. pt. 4100) (describing proposed elimination of requirements for consultation with the interested public in 43 C.F.R. §§ 4130.2(b), 4130.3-3, and 4130.6-2); *see also id.* at 68,459–60 (describing proposed elimination of requirements for consultation with the interested public in 43 C.F.R. §§ 4110.2-4, 4110.3-3); PROPOSED REVISIONS DEIS, *supra* note 25, at ES-11 (listing BLM actions for which the proposed regulations would remove the requirement to consult with the interested public, and summarizing a proposed narrower definition of "interested public").

⁴⁸ *See* 68 Fed. Reg. at 68,469–72 (proposing retention of the requirements to consult with permittees and state governments in 43 C.F.R. §§ 4110.2-4, 4110.3-3, 4130.2(b), 4130.3-3, and 4130.6-2).

⁴⁹ The Federal Register notice proposing these regulatory changes claims that the public will be adequately consulted "as part of the process of completing NEPA analysis" for issuance and modification of grazing permits. 68 Fed. Reg. at 68,461. But BLM does not always conduct a NEPA analysis when it issues or modifies a grazing permit. *See* BUREAU OF LAND MANAGEMENT, U.S. DEPT OF THE INTERIOR, NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK, ch. III (1988), <http://www.blm.gov/nhp/efoia/wo/handbook/h1790-1.pdf> (providing for a determination by BLM, without public notice or input, that a proposed action has been adequately covered by a NEPA analysis prepared in connection with a previous action). Moreover, even when BLM prepares an environmental assessment, it may not allow public involvement. *See id.* ch. IV.B.4.a (providing that public review of an environmental assessment is "usually only necessary under certain limited circumstances as defined in [Council on Environmental Quality] regulations (40 CFR 1501.4(e)(2))."); *see also* 40 C.F.R. § 1501.4(e)(2) (2003) (providing for public review only when the action "is, or is closely similar to, one which normally requires the preparation of an environmental impact statement" or is "without precedent").

⁵⁰ 43 C.F.R. § 4120.2(a), (e) (2003).

⁵¹ 68 Fed. Reg. at 68,470 (proposing amendments to § 4110.3-1(b)). The proposed

however, will rarely occur. Given its limited staff and funding, BLM has largely gone out of the business of developing AMPs, and historical levels of grazing on BLM lands were so high that apportionments of additional forage beyond those levels are very unlikely.⁵²

As described in an internal Bush Administration summary, the amended regulations would “[k]eep[] day-to-day stuff between the agency and permittee.”⁵³ In fact, the “stuff” that would be kept between BLM and ranchers would not be just “day-to-day.” “Decade-to-decade” would be more accurate, since grazing permits have a ten-year term.⁵⁴ And the “stuff” from which the public will be excluded includes the decisions that actually determine the numbers, types, places, and times of livestock grazing on the public lands⁵⁵—in other words, the “stuff” that matters.

The Administration’s proposed elimination of longstanding provisions for public participation in rangeland management is especially galling in light of Secretary Norton’s highly public proclamations of her dedication to what she calls the “Four Cs”: “communication, consultation, cooperation, all in the service of conservation.”⁵⁶ The proposed regulations make clear that the Administration wants to communicate, consult, and cooperate with a favored few, while closing the door on those who might question or threaten the privileges those few enjoy.

B. Suspension of Environmental Standards

1. Background: Rangeland Reform

The centerpiece of the Clinton Administration’s Rangeland Reform program, put in place by then-Secretary of the Interior Bruce Babbitt, was two sets of environmental yardsticks: the Fundamentals of Rangeland

amendments would also retain a requirement for public consultation in “the planning of the range development or range improvement programs,” 43 C.F.R. § 4120.3-8(c), and would continue to allow the interested public “to the extent practical” to review and comment on range evaluation reports, 68 Fed. Reg. at 68,472 (proposing amendments to 43 C.F.R. § 4130.3-3(b)).

⁵² The proposed regulations would allow substantial increases in grazing above *current* levels by authorizing the activation of “suspended” grazing allocations without public consultation. See 68 Fed. Reg. at 68,470 (proposing amendments to 43 C.F.R. § 4110.3-1(b)(2) that would require public consultation only “if additional forage remains after ending all suspensions”). “Suspended” allocations represent levels of grazing that were authorized at some time in the past but were subsequently determined to be too high. See Feller, *supra* note 19, at 10,026–27. Reactivation of suspended animal unit months (AUMs) is extremely rare. Availability of additional forage above and beyond suspended AUMs is virtually unheard of. See Department Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration—Exclusive of Alaska, 59 Fed. Reg. 14,314, 14,323 (Mar. 25, 1994) (“[O]nly in rare instances has forage placed in [the category of suspended nonuse] been made available for livestock consumption.”).

⁵³ BUREAU OF LAND MANAGEMENT, U.S. DEP’T OF THE INTERIOR, SUMMARY OF PROPOSED GRAZING REGULATIONS CHANGES (Sept. 30, 2003) (on file with author).

⁵⁴ See 43 U.S.C. §§ 315b, 1752 (2000).

⁵⁵ See *supra* Part II.B.1.

⁵⁶ See, e.g., U.S. DEP’T OF THE INTERIOR, SECRETARY OF THE INTERIOR GALE A. NORTON, *at* <http://www.doi.gov/welcome.html> (last visited Nov. 14, 2004).

Health (fundamentals) and the Standards and Guidelines for Grazing Administration (standards and guidelines).⁵⁷ The fundamentals are set out in BLM's regulations and apply nationwide.⁵⁸ The standards and guidelines are developed by BLM offices in each of the far-western states.⁵⁹

The fundamentals and standards set minimum criteria for the condition of environmental resources, requiring, for example, that watersheds and riparian areas be in proper functioning condition,⁶⁰ adequate vegetation be maintained to protect soils from erosion,⁶¹ water quality meet legal standards,⁶² and adequate habitat be maintained for wildlife.⁶³ The guidelines include direction for grazing practices designed to achieve compliance with the fundamentals and the standards. For example, the guidelines for Oregon call for "periodic rest from grazing for rangeland vegetation during critical growth periods to promote plant vigor, reproduction and productivity,"⁶⁴ and the guidelines for the Butte District in Montana require BLM to "[l]ocate facilities (e.g., corrals, water developments) away from riparian areas and wetlands when possible."⁶⁵

When BLM determines that grazing is causing violations of fundamentals or standards, or that grazing practices do not conform to guidelines, the Rangeland Reform regulations require corrective action "as soon as practicable but not later than the start of the next grazing year."⁶⁶ Corrective action may include reductions in numbers of cattle or restrictions on when and where they are permitted to graze.

2. The Proposed Regulations

The Bush Administration's proposed new regulations purport to leave the fundamentals and the standards and guidelines in place, but include

⁵⁷ For a comprehensive discussion of the fundamentals and the standards and guidelines, see Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513 (1997).

⁵⁸ See 43 C.F.R. § 4180.1 (2003).

⁵⁹ *Id.* § 4180.2(a). Each state office has the option of either developing one set of standards and guidelines for the entire state or of developing separate sets for different areas within the state. *Id.*

⁶⁰ *Id.* § 4180.1(a).

⁶¹ See, e.g., BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, ARIZONA STANDARDS FOR RANGELAND HEALTH AND GUIDELINES FOR GRAZING ADMINISTRATION 5 (1997), http://www.az.blm.gov/mines/3809/AZS_n_G.pdf.

⁶² 43 C.F.R. § 4180.1(c) (2003).

⁶³ *Id.* § 4180.1(d).

⁶⁴ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, *Guidelines for Livestock Grazing Management, Livestock Grazing Management*, in STANDARDS FOR RANGELAND HEALTH AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT FOR PUBLIC LANDS ADMINISTERED BY THE BUREAU OF LAND MANAGEMENT IN THE STATES OF OREGON AND WASHINGTON ¶ 6 (Aug. 12, 1997), <http://www.or.blm.gov/Resources/Rangelands/s-gfinal.htm>.

⁶⁵ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, *Butte Guideline #6*, in STANDARDS FOR RANGELAND HEALTH AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT: BUTTE DISTRICT (1998), <http://www.mt.blm.gov/lands/sandg.html>.

⁶⁶ 43 C.F.R. §§ 4180.1, 4180.2(c) (2003).

provisions that would effectively dismantle them. First, the amendments would explicitly render the national fundamentals unenforceable wherever state-level standards and guidelines are in place, even though the former include critical requirements that are not subsumed by the latter.⁶⁷ Since standards and guidelines are now in place in all the western states, the amendments would effectively repeal the fundamentals.

Second, the current requirements for prompt reform of noncompliant practices would be replaced by provisions that will permit years of delay while destructive grazing continues. Instead of requiring corrective action within one year, the new regulations would allow two years for BLM to make a *decision* to take action, followed by a third year to *implement* the decision.⁶⁸ Moreover, if the corrective action involves a reduction in livestock numbers by ten percent or more, the reduction would be phased in over a period of five years.⁶⁹ Overall, therefore, the proposed regulations would create an eight-year timeline for management changes that the current regulations require be implemented within one year.

3. The "Monitoring" Requirement

Even the eight-year timeline is illusory, because another provision of the proposed regulations virtually ensures that most of the standards and guidelines will never be enforced at all. Under the proposed regulations, a BLM assessment that reveals noncompliance with standards and guidelines on an allotment will not, by itself, trigger corrective action. Rather, any such determination must be further supported by "monitoring" before changes in

⁶⁷ See *Grazing Administration—Exclusive of Alaska*, 68 Fed. Reg. 68,452, 68,474 (proposed Dec. 8, 2003) (to be codified at 43 C.F.R. pt. 4100) (proposing amendment to 43 C.F.R. § 4180.1 that would eliminate federal fundamentals when state guidelines exist); see also *id.* at 68,466 (describing proposed change to 43 C.F.R. § 4180.1). An example of a requirement in the fundamentals that is not subsumed by the state-level standards and guidelines is the fundamentals' requirement that watersheds, including their upland, riparian-wetland, and aquatic components must be in, or making significant progress toward, properly functioning physical condition. 43 C.F.R. § 4180.1(a) (2003). The state-level standards are required to "address" watershed function, *id.* § 4180.2(d)(1), but do not all require that watersheds be in proper functioning condition, see, e.g., BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, *Standard No. 2, in STANDARDS FOR HEALTHY RANGELANDS AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT FOR THE PUBLIC LANDS ADMINISTERED BY THE BUREAU OF LAND MANAGEMENT IN THE STATE OF WYOMING*, at <http://www.wy.blm.gov/range/sandgstext.htm> (last visited Nov. 13, 2004) (not requiring that riparian areas or other watershed components be in proper functioning condition); BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, *Standard No. 2, in UTAH'S STANDARDS FOR RANGELAND HEALTH*, at <http://www.blm.gov/utah/resources/grazing/standards.htm> (last visited Nov. 13, 2004) (requiring that riparian areas, but not aquatic or upland components of watersheds, be in proper functioning condition).

⁶⁸ 68 Fed. Reg. at 68,474 (proposing amendment to 43 C.F.R. § 4180.2(c)(1), (2)).

⁶⁹ *Id.* at 68,470 (proposing amendment to 43 C.F.R. § 4110.3-3(a)(1)).

management will occur.⁷⁰ “Monitoring” is defined as “the periodic observation and orderly collection of data.”⁷¹

The trick is in the word “periodic.” BLM has developed methods for assessing rangeland conditions⁷² and has used those methods to determine compliance with standards and guidelines. However, those methods often do not involve repeated periodic observations,⁷³ so they do not qualify as “monitoring.” Therefore, under the proposed amendments, the standards—the heart of Rangeland Reform—are essentially on ice unless and until BLM collects “monitoring” data to prove noncompliance.

But the reality is—and this is the second part of the trick—that BLM does not collect, and will almost certainly never collect, the monitoring data required by the proposed regulations. BLM has never had sufficient funds and personnel to comprehensively monitor the conditions of its rangelands.⁷⁴ Many grazing allotments are not monitored at all, and where BLM does monitor conditions it usually measures only the degree of forage utilization by grazing animals and the abundance of various species of vegetation.⁷⁵ Most of the environmental conditions addressed by the standards—wildlife habitat, water quality, soil erosion, and the condition of riparian (streamside) areas—are not monitored. And, given the competing demands on BLM’s flat budget and limited staff, they never will be. Therefore, by limiting enforcement of the standards to just those parameters measured by BLM’s monitoring, the proposed amendments effectively suspend most of the standards indefinitely, ensuring that ranchers will be able to carry on their business largely unhampered by environmental constraints.

Moreover, even if BLM did have the staff and funding to collect the requisite data, the proposed requirement that all determinations of noncompliance with standards and guidelines be based on periodic monitoring of range conditions makes no sense. As the name “guidelines” suggests, and as noted above, many of the guidelines developed pursuant to

⁷⁰ *Id.* at 68,474 (proposing amendment to 43 C.F.R. § 4180.2(c)(1)); *see also id.* at 68,466 (describing proposed amendment in 43 C.F.R. § 4180.2).

⁷¹ 43 C.F.R. § 4100.0-5 (2003).

⁷² *See, e.g.*, BUREAU OF LAND MANAGEMENT, U.S. DEP’T OF THE INTERIOR, TECHNICAL REFERENCE 1734-6, INTERPRETING INDICATORS OF RANGELAND HEALTH (Version 3, 2000), <http://www.blm.gov/nstc/library/pdf/1734-6.pdf>; BUREAU OF LAND MANAGEMENT, U.S. DEP’T OF THE INTERIOR, TECHNICAL REFERENCE 1737-9, RIPARIAN AREA MANAGEMENT: PROCESS FOR ASSESSING PROPER FUNCTIONING CONDITION (1993) [hereinafter RIPARIAN PFC PROCESS].

⁷³ NWF COMMENTS, *supra* note 7, at 11–12; Letter from Robert Ohmart, Juliet Stromberg, Robert Beschta, William Platts, Thomas Fleischner, Allison Jones, & Elizabeth Painter to Director, Bureau of Land Management 4–5 (Mar. 1, 2004) (on file with author) [hereinafter Seven Scientists’ Letter].

⁷⁴ U.S. GENERAL ACCOUNTING OFFICE, REPORT NO. RCED-92-51, RANGELAND MANAGEMENT: INTERIOR’S MONITORING HAS FALLEN SHORT OF AGENCY REQUIREMENTS 14 (1992); *see also* NWF COMMENTS, *supra* note 7, at 15–18 (quoting reports from BLM offices in Idaho, Utah, and Nevada and from BLM headquarters in Washington, D.C., that BLM lacks adequate funds and staff to systematically monitor its grazing allotments).

⁷⁵ Joseph M. Feller & David E. Brown, *From Old-Growth Forests to Old-Growth Grasslands: Managing Rangelands for Structure and Function*, 42 ARIZ. L. REV. 319, 329–35 (2000); Feller, *supra* note 22, at 578–79.

Rangeland Reform refer to *grazing practices* rather than to rangeland conditions.⁷⁶ Periodic monitoring of rangeland conditions is not necessary, or even helpful, in determining whether existing grazing practices conform to such guidelines.

Even with respect to standards that refer to rangeland conditions, periodic monitoring is often unnecessary to determine whether such standards are being met.⁷⁷ BLM has developed a protocol for assessing whether riparian areas are in proper functioning condition—arguably the most important requirement of many states' standards⁷⁸—that does not require repeated periodic observations.⁷⁹ Compliance with numerous other provisions of states' standards and guidelines—such as requirements that evidence of accelerated soil erosion in the form of rills, gullies, or pedestals be minimal,⁸⁰ that there be a variety of age-classes of vegetation,⁸¹ or that wildlife habitat areas be large enough to support viable populations of special status species⁸²—can also be assessed without repeated, periodic observations.

In fact, it is far from clear how BLM can or will make use of repeated, periodic observations in assessing whether current grazing practices are causing violations of its standards and guidelines. The principal advantage of extended monitoring, as compared to “one point in time” evaluations, is that periodic monitoring permits an assessment of trends, that is, how rangeland conditions are (or are not) changing over time. But most BLM rangelands have already been grazed by livestock for a century or more,⁸³ the damage

⁷⁶ See *supra* Part III.B.1.

⁷⁷ Seven Scientists' Letter, *supra* note 73, at 4–6. This letter, from seven scientists prominent in the study and restoration of western riparian areas, states that the proposed monitoring requirement “is not justified either by scientific research or by practical experience, and it will seriously retard ongoing efforts to restore degraded riparian areas and other rangelands.” *Id.* at 4. For a more extensive discussion of the misguidedness of the proposed requirement for monitoring data, see NWF COMMENTS, *supra* note 7, at 8–18.

⁷⁸ On the importance of riparian areas, and on their degradation by livestock grazing, see generally ED CHANEY ET AL., LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS (1990); U.S. GENERAL ACCOUNTING OFFICE, REPORT NO. RCED-88-105, PUBLIC RANGELANDS: SOME RIPARIAN AREAS RESTORED BUT WIDESPREAD IMPROVEMENT WILL BE SLOW (1988); Robert D. Ohmart, *Historical and Present Impacts of Livestock Grazing on Fish & Wildlife Resources in Western Riparian Habitats*, in RANGELAND WILDLIFE 245, 245–66 (Paul R. Krausman ed., 1996).

⁷⁹ See RIPARIAN PFC PROCESS, *supra* note 72, at 4–14 (setting out procedures for determining whether an area is functioning properly and making no reference to periodic observations). Elsewhere in this Technical Reference, BLM encourages monitoring, but does not require it. See *id.* at 16.

⁸⁰ See, e.g., BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, IDAHO STANDARDS FOR RANGELAND HEALTH AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT 4 (1997), <http://www.id.blm.gov/publications/data/SGFinal.pdf>.

⁸¹ See, e.g., BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, CENTRAL CALIFORNIA STANDARDS FOR RANGELAND HEALTH AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT 3 (1999), http://www.ca.blm.gov/pdfs/caso_pdfs/Central-Grazing.pdf.

⁸² See, e.g., BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, RAC STANDARDS AND GUIDELINES, SIERRA FRONT-NORTHWESTERN GREAT BASIN [NEVADA] AREA, app. b, at <http://www.nv.blm.gov/rac/Standards/NWstandard.htm> (last visited Nov. 13, 2004).

⁸³ See, e.g., WILLIAM VOIGHT, JR., PUBLIC GRAZING LANDS: USE AND MISUSE BY INDUSTRY AND GOVERNMENT 20–30 (1976) (describing the spread of livestock grazing across the West in the

has already been done. Therefore, most trends in rangeland condition are static; an area that has been grazed for 105 or 110 years typically looks about the same as it did after being grazed for 100 years. The difficult and important question is how such an area might change if grazing pressure is reduced or eliminated. Repeatedly measuring the condition of such an area without changing existing grazing practices will never answer that question.⁸⁴ Therefore, the principal effect of the proposed requirement that determinations of noncompliance with BLM's standards and guidelines be supported by monitoring data will be simply to forestall implementation of those standards and guidelines.

C. Private Title to Water Rights and Range Improvements

In the arid and semi-arid rangelands managed by BLM, water is a critical and sparse commodity. Without water, neither livestock, wildlife, nor people can survive. Control of water is therefore essential to the proper management of the land.

BLM's management of federal public lands has been complicated by the law and history of water rights in the West. The western states' doctrine of prior appropriation vests a right in one who puts water to a beneficial use, regardless of who owns the land on which the source of the water is located.⁸⁵ The specific procedures for establishing an appropriative right are generally specified by state law and implemented by a state administrative

latter half of the 19th century).

⁸⁴ See Seven Scientists' Letter, *supra* note 73, at 5 ("[W]here grazing practices are unchanging, monitoring over time does not reveal how conditions would change if those practices were altered."). BLM's regulations define monitoring as "the periodic observation and orderly collection of data to evaluate: (1) *Effects of management actions*; and (2) *Effectiveness of actions in meeting management objectives*." 43 C.F.R. § 4100.0-5 (2003) (emphasis added). Therefore, according to BLM's own definition, monitoring is useful *after* some "action" has been taken. See, e.g., BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, TECHNICAL REFERENCE 1737-15, A USER GUIDE TO ASSESSING PROPER FUNCTIONING CONDITION AND THE SUPPORTING SCIENCE FOR LOTIC AREAS 21-23 (1998) (listing monitoring as a process to be instituted *after* functionality has been assessed and management actions have been initiated to restore riparian areas that are not functioning properly), http://www.or.blm.gov/nrst/Tech_References/Final%20TR%201737-15.pdf. In the absence of any "action," i.e., any change in existing management, there is really nothing to monitor.

⁸⁵ See *generally* DAVID H. GETCHES, WATER LAW IN A NUTSHELL 74-189 (3d ed. 1997) (summarizing the prior appropriation doctrine). The United States has acquiesced to the application of the doctrine of prior appropriation to water on lands owned by the federal government. See *id.* at 79-81; Desert Land Act of 1877, 43 U.S.C. § 321 (2000) (providing that water on public lands is available for appropriation subject to existing rights); Mining Act of 1866, 43 U.S.C. § 661 (2000) (providing that vested water rights shall be maintained); Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154-58 (1935) (holding that the Desert Land Act of 1877 and the Mining Act of 1866 effectively granted states the power to dispose of water on federal lands); JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 287-89, 306-09 (3d ed. 2000) (describing the evolution of the prior appropriation doctrine). For a comprehensive review of the legal history of livestock water rights on federal rangelands, see Pamela Baldwin, *Livestock Water on Federal Rangelands*, 1 GREAT PLAINS NAT. RESOURCES J. 351 (1996).

agency.⁸⁶ Because ownership of the underlying land is not a prerequisite to the establishment of a water right under state law,⁸⁷ many ranchers were able to perfect rights to water used by their stock on federal public lands before BLM came into existence. When the Taylor Grazing Act⁸⁸ initiated the Interior Department's management of livestock grazing on the public lands in 1934, and when BLM was created within the Department and assumed that function in 1946,⁸⁹ many ranchers already owned water rights on the lands that BLM took over.

Although BLM had no authority to cancel or modify state-created water rights that pre-dated the Taylor Grazing Act, until the early 1980s BLM typically required that any *new* livestock water rights on BLM-managed lands be in the name of the United States, thus precluding the establishment of additional private stockwater rights on those lands.⁹⁰ BLM's sister agency, the United States Forest Service, maintained an explicit policy of obtaining water rights on the National Forests in the name of the United States.⁹¹

BLM changed course in the 1980s under President Reagan and his Interior Secretary, James Watt. The Reagan Administration not only allowed but encouraged ranchers to file for stockwater rights on BLM lands in their own names.⁹² The agency changed course again under the Clinton Administration. The Rangeland Reform regulations promulgated by Interior Secretary Bruce Babbitt in 1995 reestablished the pre-1980s policy and conformed BLM's policy with that of the Forest Service by providing that stockwater rights on BLM land "shall be acquired, perfected, maintained, and administered in the name of the United States" to the extent permitted by state law.⁹³

The current Bush Administration's proposed new grazing regulations would change the rules concerning public-land stockwater rights once again. The proposed regulations would delete the requirement that new water rights be in the name of the United States.⁹⁴ This change would allow rancher-permittees to acquire rights in their own names, while leaving BLM the "option" of acquiring water rights in the federal government's name where permitted by state law.⁹⁵

The preamble to the proposed regulations claims that the amendment would "provide BLM greater flexibility in negotiating arrangements" with

⁸⁶ See GETCHES, *supra* note 85, at 135–55.

⁸⁷ See *id.* at 74–75, 182.

⁸⁸ 43 U.S.C. §§ 315–315r (2000).

⁸⁹ See GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND & RESOURCES LAW* 138, 138–39 (5th ed. 2002) (describing the formation of BLM).

⁹⁰ Baldwin, *supra* note 85, at 364–67.

⁹¹ *Id.* at 369.

⁹² *Id.* at 367.

⁹³ Grazing Administration—Exclusive of Alaska, 60 Fed. Reg. 9960, 9965 (Feb. 22, 1995) (codified at 43 C.F.R. § 4120.3-9).

⁹⁴ Grazing Administration—Exclusive of Alaska, 68 Fed. Reg. 68,452, 68,471 (proposed Dec. 8, 2003) (to be codified at 43 C.F.R. pt. 4100) (proposing amendment to 43 C.F.R. § 4120.3-9); *id.* at 68,460 (discussing effect of proposed change to 43 C.F.R. § 4120.3-9).

⁹⁵ *Id.* at 68,460–61.

ranchers for the construction of watering facilities,⁹⁶ but it is difficult to see what legitimate management purpose is served by allowing ranchers to establish private water rights on their public land grazing allotments. Ranchers' ownership of water rights can be a substantial impediment to BLM's ability to manage the land for a variety of uses that include, but are not limited to, livestock grazing.⁹⁷ A rancher's water right in a stream or spring may make it difficult for BLM to provide water for fish, wildlife, or recreationists.⁹⁸ State law on transfer of water rights may permit ranchers to sell their water rights for off-site transport and use,⁹⁹ thus depriving public lands of needed water. If a rancher's grazing permit is canceled for violations of environmental laws or BLM regulations,¹⁰⁰ the rancher may nonetheless hold on to his water rights, making it difficult or impossible for the next permittee to operate on the same allotment.

The greatest problem created by the existence of private stockwater rights on public land grazing allotments, however, is the confusion it creates regarding the government's authority to control the use of the land. The law is clear that the use of public lands for livestock grazing is a privilege, not a right, and that the government may withdraw that privilege at any time without incurring liability for a "taking" of any property right.¹⁰¹ Nonetheless, some ranchers allege that their ownership of water rights entitles them to graze livestock on the surrounding lands. Although such arguments have largely been rejected by the federal courts,¹⁰² one judge in the Court of

⁹⁶ *Id.* at 68,460.

⁹⁷ See 43 U.S.C. § 1732(a) (2000) (requiring the BLM to manage the land under the principles of "multiple use and sustained yield"); *id.* § 1702 (c), (h) (defining "multiple use" and "sustained yield").

⁹⁸ See, e.g., *Fallini v. Hodel*, 963 F.2d 275, 278–79 (9th Cir. 1992) (overturning BLM attempt to ensure that wild horses will have access to a rangeland water development).

⁹⁹ See, e.g., ARIZ. REV. STAT. § 45-172 (2003) (detailing the circumstances under which a water right may be severed and transferred from land). See generally GETCHES, *supra* note 85, at 155–76 (discussing the law governing transfers of water rights).

¹⁰⁰ See 43 C.F.R. §§ 4140.1, 4170.1-1(a) (2003) (listing prohibited acts on public lands and providing that a grazing permit may be withheld, suspended, or cancelled for a violation).

¹⁰¹ See, e.g., *Taylor Grazing Act*, 43 U.S.C. § 315b (2000) (noting that "the issuance of a permit . . . shall not create any right, title, interest, or estate in or to the lands"); *Public Lands Council v. Babbitt*, 529 U.S. 728, 742 (2000) (noting that "the Secretary has always had the statutory authority . . . to reclassify and withdraw rangeland from grazing use"); *United States v. Fuller*, 409 U.S. 488, 492–93 (1973) ("The provisions of the Taylor Grazing Act . . . make clear the congressional intent that no compensable property might be created in the permit lands themselves as a result of the issuance of the permit."); *Light v. United States*, 220 U.S. 523, 535 (1911) (holding that the federal government's prior tacit consent to grazing on public lands "did not confer any vested right . . . , nor did it deprive the United States of the power of recalling any implied license under which the land had been used"); *Osborne v. United States*, 145 F.2d 892, 896 (9th Cir. 1944) (stating that grazing on public lands is "a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation").

¹⁰² See *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209, 1215 (10th Cir. 1999) ("The [Mining] Act [of 1866] cannot fairly be read to recognize private property rights in federal lands, regardless of whether proffered as a distinct right or as an inseparable component of a water right."); *id.* at 1217 ("Plaintiffs do not now hold and have never held a vested private property right to graze cattle on federal public lands."); *Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967) ("[The plaintiff] urges that the adjoining lands provide the means to use the water

Federal Claims has allowed a takings claim, based in part on the theory that a revocation of federal grazing privileges works a taking of private water rights, to proceed to trial.¹⁰³ While precedent suggests that the government should ultimately prevail, it may take an appeal to the Federal Circuit to reach that result. Meanwhile, *Hage v. United States* has dragged on for over a decade,¹⁰⁴ and its defense has consumed substantial government resources. Furthermore, the rancher-plaintiff in that case, Wayne Hage, has published a book¹⁰⁵ and has gone on the speaking circuit, encouraging other ranchers to assert property rights in federal rangelands based on their water rights and to challenge the government's authority to control their use of those rangelands.¹⁰⁶

By authorizing the establishment of additional private stockwater rights on lands managed by BLM, the proposed new grazing regulations promise to foment additional conflict and litigation over the control and use of federal public lands. BLM managers threatened with *Hage*-type lawsuits may well hesitate to make decisions that might embroil them in years of litigation, regardless of the infirmity of Hage's legal theory. Far from providing "greater flexibility" to federal land managers,¹⁰⁷ the proposed regulations will create new obstacles to efficient performance of their jobs.

IV. HIDING THE BALL

Career staffers in BLM, who know how the agency works, understand very well the ways in which the proposed amendments are designed to exclude non-ranchers from management decisions and stall implementation of environmental standards. Just three weeks before the amendments were published in the Federal Register, an "administrative review copy" of a draft environmental impact statement (ARC-DEIS) was circulated for comment to BLM offices around the country.¹⁰⁸ The ARC-DEIS, written by resource

beneficially and must therefore be deemed appurtenant to it. He claims too much.").

¹⁰³ See *Hage v. United States*, 35 Fed. Cl. 147, 180 (1996) (holding that plaintiffs may proceed with a portion of their taking claim if plaintiffs can prove prior vested rights in the water at issue).

¹⁰⁴ The case was filed in 1991 and, as of this writing, is still pending. It has so far generated four published opinions: *Hage v. United States*, 51 Fed. Cl. 570 (2002); *Hage v. United States*, 42 Fed. Cl. 249 (1998), *rescinded in part by* 51 Fed. Cl. 570 (2002); *Hage v. United States*, 35 Fed. Cl. 737 (1996); *Hage v. United States*, 35 Fed. Cl. 147 (1996).

¹⁰⁵ WAYNE HAGE, *STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS* (3d ed. 1994).

¹⁰⁶ See, e.g., Brodie Farquhar, *Activist Claims Property Rights on Federal Lands*, CASPER STAR-TRIBUNE, May 18, 2003, <http://www.casperstartribune.net/articles/2003/05/18/news/wyoming/3c655682c205d2d4d17453dc71be088a.txt>. See also STEWARDS OF THE RANGE, WAYNE HAGE BIOGRAPHY, at <http://www.stewards.us/favauthors/fav-authors-wh.htm> (last visited Nov. 13, 2004).

¹⁰⁷ Grazing Administration—Exclusive of Alaska, 68 Fed. Reg. 68,452, 68,460 (proposed Dec. 8, 2003) (to be codified at 43 C.F.R. pt. 4100).

¹⁰⁸ See Instruction Memorandum No. 2004-044 from the Assistant Director, Renewable Resources and Planning, Bureau of Land Management, to all Washington Office Officials and State Directors (except Alaska and Eastern States Office) (Nov. 17, 2003) (requesting comments from BLM offices on the ARC-DEIS), <http://www.rangebiome.org/headlines/nr/nwfbcomments.pdf>. The ARC-DEIS itself was posted

management professionals within BLM, had the following to say about the impacts of the proposed rule changes:

The Proposed Action will have a slow, long-term adverse impact on wildlife and biological diversity in general. . . .

....

... [B]y establishing ownership of water or range improvements the livestock operator will have the right to graze and greatly diminishes [sic] the ability of the BLM to regulate grazing and will create long-term impacts to wildlife resources.

....

The additional provision that determinations that existing grazing management practices or levels of grazing use are significant factors in failing to achieve standards and conform with guidelines must be based on not only the standards and guidelines assessment, but also include monitoring data will further delay the grazing decision process. Present BLM funding and staffing levels do not provide adequate resources for even minimal monitoring and the additional monitoring requirement will further burden the grazing decision process, thus adversely impacting wildlife resources and biological resources in the long-term.

....

The deletion of the requirements to consult, cooperate and coordinate with or seek review and comment from the "interested public" for designating and adjusting allotment boundaries, reducing permitted use, emergency closures or modifications, renewing/issuing grazing permit/leases, modifying a permit/lease and issuing temporary non-renewable grazing permits will further reduce the ability of environmental groups and organizations to participate in weigh in and support wildlife and special status species with regard to public land grazing issues. This should result in long-term adverse impacts to wildlife and special status species on public lands.

....

The proposed action will provide additional tools to exacerbate long term impacts on riparian habitats, channel morphology and water quality. Degradation of channel morphology and water quality will continue in watersheds with declining vegetative cover due in-large to the increasing and burdensome administrative procedural requirements for assessment and for acquisition of monitoring data.¹⁰⁹

This candid assessment was not released to the public. Instead, the Bush Administration assembled a replacement team to produce a hurried rewrite. A sanitized DEIS was released for public comment on January 2,

in electronic form on a BLM password-protected website. *Id.* Chapter 3 (Affected Environment) and Chapter 4 (Environmental Consequences) of the ARC-DEIS were obtained by representatives of a coalition of environmental organizations that commented on the proposed regulations. *See* NWF COMMENTS, *supra* note 7, at 4-7. These chapters were incorporated by reference in the coalition's comments, and are available at <http://www.rangebiome.org/headlines/nr/nwfComments.pdf>.

¹⁰⁹ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PROPOSED REVISIONS TO GRAZING REGULATIONS FOR THE PUBLIC LANDS, DRAFT ENVIRONMENTAL IMPACT STATEMENT ch. 4 (Administrative Review Copy, Nov. 17, 2003), <http://www.rangebiome.org/headlines/nr/nwfComments.pdf>.

2004, more than three weeks after the publication of the proposed regulatory amendments.¹¹⁰

The Administration has made a mockery of the environmental analysis and consideration required by NEPA. NEPA was designed to require a federal agency to take a “hard look” at the environmental consequences of a proposed course of action¹¹¹ *before* committing itself to that course. As bluntly stated in the federal regulations implementing NEPA, “The [environmental impact] statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.”¹¹² Here, BLM staff took the requisite hard look, but their superiors, having already decided to forge ahead with the proposed regulations, discarded the results of that hard look and substituted a post hoc DEIS designed to rationalize their decision.

V. CONCLUSION

In a previous article,¹¹³ I wrote that the decision in *Public Lands Council v. Babbitt*,¹¹⁴ which upheld the Clinton Administration’s Rangeland Reform regulations, reaffirmed BLM’s longstanding authority to limit or restrict livestock grazing in order to protect environmental resources or promote other uses of the public lands. Neither the decision nor the reformed regulations that it affirmed, however, guarantee that BLM will exercise that authority.¹¹⁵ Even were the Rangeland Reform regulations to remain intact, it is far from clear that they would bring about significant change on the ground. The new regulations proposed by the current Bush Administration, on the other hand, seem designed to ensure that BLM will *not* use its powers to promote the public interest in healthy rangelands, functioning riparian areas, viable wildlife populations, or clean water. The proposed regulations would render most environmental standards for rangelands unenforceable, exclude voices other than those of ranchers from critical decisions, and allow the establishment of additional private water rights on public lands that will interfere with the ability of BLM managers to do their jobs.

Although BLM’s professional staff has recognized the harm that the proposed regulations would do, their candid analysis of the environmental impacts of these regulations has been suppressed. I hope that this paper will help expose the degree to which the proposed regulations would close the door to improved management of the public lands, and that it may encourage reconsideration of those regulations before they become final.

¹¹⁰ See *Grazing Administration—Exclusive of Alaska*, 69 Fed. Reg. 569 (Jan. 6, 2004) (announcing availability of DEIS); PROPOSED REVISIONS DEIS, *supra* note 25, at 12.

¹¹¹ See, e.g., *Baltimore Gas & Electric Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97, 100 (1983) (discussing the “hard look” standard).

¹¹² 40 C.F.R. § 1502.5 (2003); see also 42 U.S.C. § 4332(2)(C) (2000) (requiring that the EIS “accompany the proposal through the existing agency review process”).

¹¹³ Feller, *supra* note 19.

¹¹⁴ 529 U.S. 728 (2000).

¹¹⁵ Feller, *supra* note 19, at 10,038.