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An Agricultural Law Research Article

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by

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Originally published in JOURNAL OF LAND,
RESOURCES, AND ENVIRONMENTAL LAW
24 J. LAND RESOURCES & ENVTL L. 241 (2004)

www.NationalAgLawCenter.org

The BLM's Proposed New Grazing Regulations: Serving the Most Special Interest

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On December 8, 2003, the Department of the Interior, under the leadership of Secretary Gale Norton, issued proposed amendments to the regulations that govern livestock grazing on over 160 million acres of western public lands administered by the Bureau of Land Management (BLM). According to the Federal Register notice proposing the amendments, their first purpose is to “improve working relationships” between the BLM and the ranchers whose cattle and sheep are permitted to graze on the rangelands managed by the agency.² The notice lists “protect[ing] the health of rangelands”³ as another purpose, but 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, delay implementation of others, and render most of the rest unenforceable. They would remove opportunities for public land users other than ranchers to provide input into management decisions, would slant environmental analyses and appeals procedures to favor ranchers over environmentalists, and would even make it easier for ranchers convicted of environmental crimes to obtain grazing permits. The proposed amendments would also allow ranchers to obtain ownership of water rights, fences, wells, and pipelines on public land, thus crippling the BLM's ability to manage the land in the greater public interest.

Placing these proposed amendments in perspective as part of a larger pattern is not difficult. Historically, they can be seen as a “tit for tat” 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. Politically, they are simply another instance of governmental promotion of the interests of a group that is supportive of, and ideologically aligned with, the administration of President George W. Bush. Neither of these characterizations, however, fully captures the cynicism and venality of the proposed amendments.

The proposed amendments would indeed undo much of what was done by

¹ I would like to thank Tom Lustig, Johanna Wald, Daniel Feller, and Paul Bender for their invaluable assistance.

² Grazing Administration—Exclusive of Alaska; Proposed Rule, 68 Fed. Reg. 68,452, 68,453 (Dec. 8, 2003).

³ *Id.* at 68,457.

Secretary Babbitt. Some elements of Rangeland Reform would be explicitly reversed; others would be rendered ineffective in practice. But the proposed amendments would do much 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 opportunities for public input that even those rancher-friendly administrations dared not remove. In effect, the proposed amendments will return ranchers to the exclusive role in critical public lands decisionmaking that they enjoyed before the advent of modern legislation such as the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA).

While the promotion of favored interest groups over the general public is nothing new in the current administration (or many of its predecessors), the administration's generosity towards public lands ranchers stands out for its lack of any relation to their economic significance. The public lands livestock industry comprises a small minority of livestock producers, supports an insignificant portion of the western states' economy, and accounts for a tiny fraction of this country's livestock production. The ability of such a small and economically marginal group of people to control such vast public resources is, to this author's knowledge, unequaled in any other realm of public administration.

In the remainder of this essay, I will provide some information about public lands livestock grazing and then explicate two of the most offensive features of the Bush/Norton administration's proposed regulations: the exclusion of the non-ranching public from the key decisions that determine the conditions of public rangelands and the manipulation of data requirements to effect an indefinite *de facto* suspension of environmental standards. I will also relate the administration's suppression of the analysis, performed by the BLM's own staff, of the negative environmental impacts of the proposed regulations.

I. THE MOST SPECIAL INTEREST

The label "special interest" is perhaps overused these days; it can readily be attached to any group that supports a politician or policy with whom one disagrees. Still, the term does have some meaning. I would define a special interest as a group that wields political influence disproportionate to its numbers, and that uses that influence to promote its own interests at the expense of everyone else.

It is hard to find a group that fits this definition better than public land ranchers. About ten thousand individuals and corporations hold permits to graze livestock on BLM lands. (About the same number have permits to graze on National Forests.) Slightly more than half of BLM permittees are hobbyists; they ranch for recreation, not for a living. These hobby ranchers comprise less than one tenth of one percent of the tens of millions of recreational users of BLM lands, most of whom manage to enjoy themselves outdoors without the aid of herds of

cattle.

Public lands ranchers also comprise a very small segment of the livestock industry. Ninety-seven percent of cattle producers in the United States do not use either BLM or National Forest lands. Even in the far-western states where public lands are concentrated, less than a quarter of producers use public lands.

Public lands forage supplies only about two percent of the nation's cattle feed. While the percentage is higher in some western states, such as Nevada, Utah, and Wyoming, these states are not major beef producers. The reason is simple: the public lands, being mostly arid or semi-arid, are lousy cattle country. On average, it takes well over one hundred acres of BLM range to feed a cow. In the East or Midwest, a cow can live on less than one acre of corn. Ranching in the desert may be fun, romantic, and even spiritually uplifting, but it is not very productive.

Economically and numerically small as it is, however, the public lands livestock industry has retained a remarkable hold on the people and policies that control the use of the public lands. President Clinton's Interior Secretary Bruce Babbitt came from a public land ranching family, his Reagan-era predecessor James Watt built his reputation representing public land ranchers, and Robert Burford, director of the BLM under Watt, was a public land rancher. Even President Bush likes to play the cowboy at his recently acquired ranch in Crawford, Texas. BLM managers who displease ranchers frequently find themselves transferred to other positions, or their decisions overridden, by political appointees in Washington. Removing livestock from environmentally sensitive areas is virtually a taboo subject in BLM planning.

The current administration's connection to the public lands livestock industry is exemplified by the appointment of William Meyers to the position of Solicitor of the Interior, chief lawyer for the Interior Department. Mr. Meyers 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. The Department's proposed amendments to the BLM's grazing regulations are well-designed to serve the interests of Mr. Meyers' former employers.

II. CUTTING OUT THE PUBLIC WHERE IT MATTERS

To grasp the impact of the proposed regulations on the public's voice in public land management, one has to know a little bit about how the BLM works. The BLM's rangeland management comprises a confusing web of plans and decisions, but these plans and decisions can be usefully grouped into three broad categories: (1) things that matter; (2) things that should matter, but don't; and (3) things that would matter if they happened, but hardly ever happen. The proposed regulations would cut the non-ranching public out of things that matter, while allowing them to waste their time on things that don't matter or don't happen.

Grazing permits matter. Grazing permits specify whether, where, when, how many, what type, for how long, and under what conditions livestock are permitted to graze. Grazing permits determine whether habitat for endangered species is protected or destroyed. A grazing permit can determine whether a trout stream runs cold, clear, and deep, or is a wide, warm, shallow, muddy mess. Grazing permits determine whether archaeological artifacts are trampled and shattered, ancient walls are toppled (cattle use them to scratch themselves), and sites are covered with urine and manure.

Land use plans should matter, but don't. FLPMA calls for the BLM to develop and maintain comprehensive land use plans that govern all aspects of public land management, including grazing administration. In theory, land use plans constrain grazing permits by determining where grazing will be allowed and where it won't be and by setting environmental standards that all grazing permits must meet. But in the 1980s, under President Reagan's infamous Interior Secretary Watt, the BLM neutered FLPMA's land use planning process. Plans developed under Watt and his successors in the Reagan and first Bush administrations, which are still in force today, are virtually devoid of meaningful content. George Coggins, Professor of Law at the University of Kansas and the country's foremost expert on the law of public rangelands, has described a typical BLM land use plan as a "nonplan," a "nugatory, meaningless exercise," and a "confused *mélange* of do-nothing motherhood statements which offered neither managers nor users much useful guidance on future management." Instead of making decisions about grazing management, most BLM land use plans defer such decisions to the future. Moreover, even in the unusual instance where a land use plan contains actual management direction, that direction is not effective unless and until it is incorporated in the terms and conditions of grazing permits, which it often isn't.

Allotment management plans (AMPs) might have mattered. An AMP is a sort of miniature land use plan that specifies grazing practices on one grazing allotment. FLPMA envisioned that AMPs would be common, and many of the BLM's land use plans, instead of actually making decisions about grazing management, call for the development of AMPs. AMPs would matter if they were in place, were up-to-date, and were followed, but they usually aren't. Most grazing allotments don't have AMPs, most AMPs are old and outdated, and the BLM is not developing many new ones. In the absence of AMPs, the terms and conditions of livestock grazing are specified in—you guessed it—grazing permits.

The bottom line is that, for now and the foreseeable future, grazing permits are all that really matter in public range management. Therefore, if you are a user of the public lands—a hiker, mountain biker, camper, hunter, angler, wildlife viewer, nature photographer, or just a concerned citizen—and you want to do something about the degradation of your favorite area by livestock grazing, then you want to be consulted when the BLM issues, renews, or changes a grazing

permit for that area. You want a chance to point out, for example, that the land is being overgrazed and the number of livestock should be reduced; that cattle ought to be kept out of riparian (streamside) areas, as required by the applicable land use plan; or that water pollution caused by grazing is exceeding established standards.

More often than not, the rancher whose permit you are objecting to would prefer that you mind your own business. If the current administration gets its way, ranchers who want everyone else to just go away will soon get their wish, because the BLM's proposed amendments to the regulations would delete the requirements for the BLM to consult with interested members of the public when it issues, renews, or modifies a grazing permit.

The public will still be permitted to comment on (mostly meaningless) land use plans and (mostly non-existent) AMPs, but the amended regulations, as described in an internal administration summary, would "keep[] day-to-day stuff between the agency and permittee." In fact, the "stuff" that would be kept between the 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. And the "stuff" from which the public will be excluded includes all decisions that actually determine the numbers, types, places, and times of livestock grazing on the public lands; in other words, all the "stuff" that matters.

III. SUSPENDING ENVIRONMENTAL STANDARDS: THE "MONITORING" SCAM

The centerpiece of the Clinton/Babbitt administration's Rangeland Reform program was two sets of environmental yardsticks: the national Fundamentals of Rangeland Health (fundamentals) and the Standards and Guidelines for Grazing Administration (standards) developed by BLM offices in each of the far-western states.⁴ The fundamentals and the standards set minimum criteria for the condition of environmental resources, requiring, for example, that watersheds and riparian areas be in "properly functioning physical condition," that adequate vegetation be maintained to protect soils from erosion, that water quality meets legal standards, and that adequate habitat be maintained for wildlife.⁵ Pursuant to Rangeland Reform, the BLM has developed procedures and checklists for assessing the condition of rangelands to determine whether they meet the criteria. The Rangeland Reform regulations require prompt revisions to grazing permits (such as reductions in numbers of cattle, or restrictions on when and where they are permitted to graze) whenever grazing is found to cause violations of the fundamentals or the standards.⁶

The Bush/Norton administration's proposed new regulations purport to leave the fundamentals and the standards in place, but include provisions that would

⁴ 43 C.F.R. §§ 4180.1-4180.2 (2003).

⁵ *Id.* §§ 4180.1(a)-(d).

⁶ *See id.* § 4180.2(c).

effectively dismantle them. First, the amendments would explicitly render the national fundamentals unenforceable wherever state standards are in place, even though the former include critical requirements that are not subsumed by the latter. 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.

Finally, and most perniciously, the new regulations would impose a data-collecting requirement that would effectively suspend implementation of most of the standards for the foreseeable future. On its face, the requirement appears simple and innocuous: any determination of non-compliance must be documented by "monitoring" before a rancher can be required to change his ways.⁷ "Monitoring" is defined as "the periodic observation and orderly collection of data."⁸

The trick is in the word "periodic." The assessment methods that have been developed to implement Rangeland Reform work well, but they don't involve repeated periodic observations, so they don't qualify as "monitoring." Therefore, under the proposed amendments, the standards—the heart of Rangeland Reform—are essentially on ice unless and until the BLM collects "monitoring" data to prove non-compliance. But the reality is—and this is the second part of the trick—that the BLM does not collect, and will almost certainly never collect, the monitoring data required by the proposed regulations. The BLM has never had sufficient funds and personnel to comprehensively monitor the conditions of its rangelands. Many grazing allotments are not monitored at all, and where the BLM does monitor conditions, it measures only a few variables related to forage production and utilization. Most of the environmental conditions addressed by the standards—such as wildlife habitat, water quality, and soil conservation—are not monitored. 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 the 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.

IV. HIDING THE BALL

Career staffers in the 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

⁷ See *Grazing Administration—Exclusive of Alaska; Proposed Rule 68 Fed. Reg.* at 68,466.

⁸ 43 C.F.R. § 4100.0-5.

impacts statement (ARC-DEIS) was circulated for comment to BLM offices around the country. The ARC-DEIS, written by resource management professionals within the 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. . . .

. . . .

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.

This candid assessment was not released to the public. Instead, the administration assembled a replacement team to produce a hurried rewrite. A sanitized DEIS was released for public comment on January 2, 2004, more than three weeks after the publication of the proposed regulatory amendments. By discarding its professional staff's analysis and substituting a *post hoc* DEIS

designed to rationalize the proposed amendments, the administration flouted NEPA's mandate to take a "hard look" at the environmental consequences of its proposed action. One can only hope that the public will take a somewhat harder look at what is being done to their public lands.