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Grazing Regulations: Changes by the Bureau of Land Management

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March 15, 2007

Abstract. BLM took a two-pronged approach to the 2003-2006 iteration of grazing reform on public lands, by issuing changes to grazing regulations and considering changes to grazing policies. Under this Sustaining Working Landscapes initiative, first announced in March 2003, BLM sought to create working landscapes that are both economically productive and environmentally healthy. Changes to grazing regulations and/or policies could affect more than 18,000 grazing permits on 162 million acres of BLM land. The specific regulatory changes that were adopted and the policy alternatives that were considered are discussed under separate headings in this report.

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Grazing Regulations: Changes by the Bureau of Land Management

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March 15, 2007

Summary

The Bureau of Land Management (BLM) issued changes to grazing regulations (43 C.F.R. Part 4100) on August 11, 2006, after a three year review. Some portions of the regulations have been enjoined. The previous major revision of grazing rules, which took effect in 1995, was highly controversial. The 2006 changes addressed many of the same issues, and received mixed reviews. BLM asserted that the 2006 changes were needed to increase flexibility for grazing managers and permittees, to improve rangeland management and grazing permit administration, to promote conservation, and to comply with court decisions. Critics contend that a need for change was not justified and that changes adopted removed important environmental protections and opportunities for public comment.

Under the 2006 changes, the BLM and a permittee could share title to structural range improvements, such as a fence. Permittees could acquire water rights for grazing, consistent with state law. The occasions on which BLM would be required to get input from the public on grazing decisions were reduced. The administrative appeals process on grazing decisions was modified and the extent to which grazing could continue in the face of an appeal or stay of a decision was delineated. The definition of *grazing preference* was broadened to include a quantitative meaning—forage on public land. Changes were made to the timeframe and procedures for changing grazing management after a determination that grazing is a significant factor in failing to achieve rangeland health standards. The three-year limit on temporary nonuse of a permit was removed, and permittees are able to apply for nonuse of a permit for up to one year at a time. Conservation use grazing permits were eliminated. Changes that have been enjoined relate primarily to public participation, sharing title to range improvements, and fundamentals of rangeland health. BLM also considered, but did not propose, certain changes due to adverse public reaction or other considerations.

On June 17, 2005, BLM had issued a final environmental impact statement (FEIS) analyzing the potential impact of proposed changes in the regulations, an alternative, and the status quo. On March 31, 2006, BLM published an addendum to the FEIS addressing public comment received after the closing date of March 2, 2004, primarily from the Fish and Wildlife Service. Final regulatory changes took effect August 11, 2006.

BLM also considered, but did not make, changes to its grazing policies, which the agency had believed could be carried out under existing rules. Potential changes that were examined included the establishment of reserve common allotments to serve as backup forage when permittees' regular allotments are unavailable; conservation partnerships between the BLM and permittees whereby permittees work to improve environmental health in return for certain benefits; voluntary allotment restructuring to allow multiple permittees to merge allotments; conservation easement acquisition to preserve open space; and landscape habitat improvement to promote species conservation and facilitate consultations under the Endangered Species Act.

Contents

History	1
Recent Efforts to Change Grazing Rules and Policies	2
Overview of Regulatory Process.....	3
Changes to Grazing Regulations.....	5
Share Title to Range Improvements.....	6
Acquire Private Water Rights.....	6
Reduce Requirements for Public Involvement	6
Modify the Administrative Appeals Process.....	7
Broaden the Definition of <i>Grazing Preference</i>	7
Remedy Rangeland Health Problems	7
Remove Limit on Permit Nonuse	8
Eliminate Conservation Use Grazing Permits	8
Other Changes.....	8
Litigation.....	9
Changes Not Proposed	9
Overview of Grazing Policy Process	10
Grazing Policy Changes Considered.....	11
Reserve Common Allotments (RCAs).....	11
Conservation Partnerships	11
Voluntary Allotment Restructuring	12
Conservation Easements	12
Endangered Species Act Mitigation.....	12
Conclusion.....	12
Author Contact Information	13

Contacts

Author Contact Information	13
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History

On August 11, 2006, revised grazing regulations of the Bureau of Land Management (BLM) took effect (43 C.F.R. Part 4100).¹ Some of the regulations have been enjoined.² The agency also considered related policy changes, but it appears that policy changes are no longer being considered. The previous revision of grazing regulations culminated in comprehensive changes effective August 21, 1995. The 1995 changes were the result of a several-year process of evaluating ideas and shaping alternatives, and occurred in the midst of a decades-long dispute over the ownership, management, and use of federal rangelands.

The 1995 changes were highly controversial, with criticism from many ranching interests that those new rules weakened grazing privileges and would reduce livestock grazing on federal lands, and from environmental organizations that the changes did not go far enough in protecting public lands. Supporters saw the changes as improving resource and range management and broadening participation in public land decisionmaking. Congress considered many of the 1995 changes as part of legislative proposals or committee oversight. Congress also has examined the development of the 2006 regulatory changes and related policy options through committee oversight.

Among the changes made in 1995, many of which were reexamined by BLM during the development of the 2006 regulatory changes, are those that:

- separated grazing *preference* from *permitted use*, so that a permittee's³ preference for receiving a grazing permit was not tied to a specific amount of grazing based on historic levels (described as *Animal Unit Months*, or *AUMs*)⁴;
- allowed permittees up to three years of nonuse of their permits;
- authorized suspending or canceling a permit if a permittee is convicted of violating certain state or federal environmental laws;
- eliminated the express requirement that a permittee be engaged in the livestock business;
- replaced the term *affected interest* with *interested public*;
- allowed *conservation use* for the term of a grazing permit, thereby excluding livestock grazing from all or a portion of an allotment;
- required title of permanent structural improvements to be held in the name of the United States;
- required that water rights for livestock grazing be held in the name of the United States, to the extent allowed by state law;

¹ 71 Fed. Reg. 39402, July 12, 2006.

² See “Litigation” section below.

³ The term permittee is used throughout to refer to both permittees and lessees, and permit refers to both permits and leases.

⁴ An AUM is defined as the amount of forage necessary for the sustenance of one cow or its equivalent for a period of one month.

- imposed a surcharge on a permittee who allows livestock not owned by the permittee or the permittee's children to graze on public land;
- eliminated Grazing Advisory Boards and replaced them with the broader interest Resource Advisory Councils; and
- adopted rangeland management standards called *Fundamentals of Rangeland Health*.

In issuing these changes, the Secretary of the Interior dropped the most contentious proposal—to increase the grazing fee—due to the rancor this issue generated.⁵ However, dissatisfaction with the 1995 changes among ranching interests led to a lawsuit ultimately decided by the U.S. Supreme Court.⁶ The regulations, challenged on their face, were upheld by the courts as not exceeding the authority of the Secretary, with one exception. The court struck down the rule pertaining to conservation use for the term of a permit on the grounds that a grazing permit was for grazing and the Secretary could more appropriately accomplish conservation use through the land use planning process.

Recent Efforts to Change Grazing Rules and Policies

BLM took a two-pronged approach to the 2003-2006 iteration of grazing reform on public lands, by issuing changes to grazing regulations and considering changes to grazing policies. Under this *Sustaining Working Landscapes* initiative, first announced in March 2003, BLM sought to create *working landscapes* that are both economically productive and environmentally healthy. Changes to grazing regulations and/or policies could affect more than 18,000 grazing permits on 162 million acres of BLM land. The specific regulatory changes that were adopted and the policy alternatives that were considered are discussed under separate headings below.

Conflict over livestock grazing on public lands has become common. Critics of the latest reform effort asserted that the 1995 regulations were not in effect long enough to assess their effectiveness and that the policy issues were too vague to assess their potential effects. They also contended that BLM had not justified a need for regulatory and policy changes and that the changes adopted remove important environmental protections and opportunities for public comment. One concern voiced by environmentalists was that the changes would require more monitoring than would be feasible, thus possibly preventing changes in grazing practices. Another was that BLM and the Forest Service did not develop joint rules, advocated because many BLM and Forest Service lands are similar and adjoining and permittees often have permits for livestock grazing on both agencies' lands. There was also some disappointment among environmentalists that the reform effort did not encompass certain important issues such as altering grazing fees, controlling noxious weeds, retiring grazing permits, and establishing processes for identifying lands suitable for grazing.

Regulatory changes have been supported by some livestock organizations and range professionals as helping both ranchers and the range. BLM asserted that regulatory changes were needed to

⁵ For more information on grazing fees, see CRS Report RS21232, *Grazing Fees: An Overview and Current Issues*, by Carol Hardy Vincent.

⁶ For more information on the legal challenge to the 1995 regulations on livestock grazing, see CRS Report RS20453, *Federal Grazing Regulations: Public Lands Council v. Babbitt*, by Pamela Baldwin.

increase flexibility for grazing managers and permittees, to improve BLM's relationship with ranchers, to improve rangeland management and permit administration, to promote conservation, and to comply with court decisions. According to the agency, the changes are based on lessons learned in implementing the 1995 regulations and thus improve upon those earlier regulations. Further, the final rule recognizes the benefits of grazing, including the economic and social benefits to rural communities and the preservation of open space, according to BLM.

Overview of Regulatory Process

BLM proposed changes to its grazing regulations on December 8, 2003 (68 *Fed. Reg.* 68451), and on January 2, 2004, issued a draft environmental impact statement (DEIS) analyzing the potential impact of the proposed changes. The DEIS also assessed the impacts of a slightly different alternative and of keeping the existing grazing rules. Prior to proposing the changes, BLM reviewed more than 8,000 public comments on regulatory issues that were submitted in response to a March 3, 2003 advanced notice of proposed rulemaking.

In late January and early February of 2004, BLM held public meetings in the West and in Washington, DC, to gather public comments on the regulatory proposal and DEIS. The proposal and DEIS were open for public comment through March 2, 2004, during which time the agency received more than 18,000 comments. The BLM considered these comments, and on June 17, 2005, issued a final environmental impact statement (FEIS) on proposed changes and alternatives.⁷

The proposed revisions in the FEIS met with mixed reaction, like those in the earlier DEIS. A number of the key proposals, which were adopted, are discussed under "Changes to Grazing Regulations" below. With regard to the environmental effects of the preferred alternative, the FEIS stated (p. ES-5) that "most of the proposed regulatory changes have little or no adverse effects on the human environment. Some short-term adverse effects may not be avoided because of increases in timeframes associated with several components of this proposed rulemaking." This statement fueled concerns among environmentalists that the proposed changes could eliminate public land protections and lead to unsustainable grazing practices. The FEIS stated that to minimize the potential for adverse affects in the short-term, the BLM could "curtail grazing if resources on the public lands require immediate protection or if continued grazing use poses an imminent likelihood of significant resource damage." Further, the BLM asserted that the long-term outcome of the proposed changes would be better and more sustainable grazing decisions, and that the changes "would be beneficial to rangeland health."

A particular controversy surfaced over assertions by two members of the draft EIS team, a BLM hydrologist and a BLM biologist (both now retired), that their scientific conclusions were reversed by BLM because they did not support the new rules. Those conclusions apparently had asserted that the proposed new rules could harm water quality and wildlife, including endangered species. A BLM official is reported to have called the changes to the views of the two scientists a part of the standard editing and review process.⁸ Further, a statement by the BLM contended that the EIS team found their work to be "seriously lacking in the quality expected from each contributor to the environmental impact analysis." The statement alleged that the conclusions of

⁷ The FEIS is available on the BLM website at <http://www.blm.gov/grazing/>, visited on March 12, 2007.

⁸ Julie Cart, "Land Study on Grazing Denounced; Two Retired Specialists Say Interior Excised their Warnings on the Effects on Wildlife and Water," *Los Angeles Times* (June 18, 2005), sec. A, p. 1.

the two team members were “based on personal opinion and unsubstantiated assertions rather than sound environmental analysis. As a result, the work submitted by the two former BLM employees was rewritten.”⁹

BLM initially intended to publish a final grazing rule in the *Federal Register* in July 2005, with an effective date in August 2005. However, on August 9, 2005, BLM announced its intent to prepare a supplement to the FEIS. The delay was intended to allow the agency to address public comment received after the comment period ended on March 2, 2004, primarily the views of the Fish and Wildlife Service (FWS). On March 31, 2006, BLM issued an addendum to the FEIS that addressed the FWS and other public comment and made relatively minor changes to its proposed rules.¹⁰

In its comment to the BLM, the FWS asserted that the proposed changes would “fundamentally change the way BLM lands are managed temporally, spatially, and philosophically. These changes could have profound impacts on wildlife resources.”¹¹ The FWS expressed overall concern that the proposed revisions would make grazing a priority over other land uses, which could be detrimental to fish and wildlife habitats and populations, for instance, management of sage-grouse habitat. The agency further contended that the proposed changes could “constrain biologists and range conservationists from recommending and implementing management changes based on their best professional judgment in response to conditions that may compromise the long-term health and sustainability of rangeland resources.”¹²

In its addendum, BLM disagreed with the FWS assertion that the proposed rule would fundamentally change BLM management of rangelands and that there could be profound impacts on wildlife. BLM contended that the changes are primarily administrative and do not secure the dominance of grazing over other land uses. BLM also rejected the assertion that its proposals would constrain specialists from recommending changes, noting that changes can be made through varied means, including modification of the terms and conditions of grazing permits.

While supporting some of the proposed grazing changes, the FWS identified a number of areas of particular concern. They included potential effects of administrative inconsistencies between BLM and the Forest Service on their management of fish and wildlife resources across boundaries;¹³ diminished requirements for public consultation on site-specific actions, which have the greatest potential for impacts to fish and wildlife; a phase-in of decreases (or increases) in livestock use that are greater than 10%, which may not be immediate enough to prevent irreversible harm to vegetation and wildlife; including a quantity of forage in the definition of grazing preference, which may not account for other range attributes;¹⁴ allowing shared title to

⁹ U.S. Dept. of the Interior, Bureau of Land Management, *Statement of the Bureau of Land Management re: Los Angeles Times Article of June 18, 2005*, unpublished draft received from BLM, Aug. 12, 2005.

¹⁰ The addendum is available on the website of the BLM at <http://www.blm.gov/grazing/>, visited on March 12, 2007.

¹¹ U.S. Dept. of the Interior, Fish and Wildlife Service, *Comments on (1) Proposed Rule for Grazing Administration-Exclusive of Alaska (EC03/0049), and (2) Draft Environmental Impact Statement for the Proposed Revisions to Grazing Regulations for the Public Lands (EC04/0003)*, unpublished draft received from BLM, Aug. 12, 2005, p. 12.

¹² Ibid., p. 1.

¹³ A goal of the 1995 regulatory reform was to increase consistency of BLM and Forest Service grazing administration, perhaps reducing administrative costs. The FWS expressed concern that the 2006 regulatory reform effort, in pertaining exclusively to BLM, could lead to inconsistencies between the BLM and the Forest Service in several areas.

¹⁴ Under then-existing BLM regulations, grazing preference was defined as having a superior or priority position against others for the purpose of receiving a grazing permit. The FWS expressed opposition to adding a quantity of (continued...)

range improvements, which could make it more difficult to reallocate land use, such as to provide quality habitat for wildlife; sharing of water rights, as water is the most important resource for fish and wildlife; and requiring monitoring of rangeland standards, which has not been achievable due to BLM funding and staffing limitations.

In response, BLM stated in its addendum that while it will coordinate with the Forest Service, consistency of grazing regulations is not necessary and inconsistencies stem from the agencies' different statutory requirements. With regard to diminished public consultation, BLM responded that most if not all of the site-specific actions on grazing allotments that would affect fish and wildlife are included in allotment management planning and the planning of range improvements. Such planning requires public consultation. While the phase-in of reduced livestock use may affect special status species outside those federally listed, any adverse effects are expected to be limited to few grazing allotments, according to BLM. Changes can be made in a shorter time period or even immediately; for instance, to protect sensitive species or other resources. Further, a permittee's preference does not necessarily have the highest priority in evaluating possible uses of available vegetation, and shared title to range improvements does not diminish BLM's ability to redirect or reallocate land uses. With regard to sharing of water rights, BLM stated that water will benefit multiple uses and that rights for wildlife (and other uses) will usually be held in the name of the United States. The BLM does not anticipate that monitoring will overwhelm its capacity, in part because only about 15% of allotments evaluated were not meeting land health standards, due in significant part to livestock grazing.

Final grazing regulations were published on July 12, 2006, and took effect on August 11, 2006. The regulatory changes are summarized in the following section. Some of these changes have been enjoined, as described below in the "Litigation" section.

Changes to Grazing Regulations

BLM had asserted that some of the regulatory changes would be substantive while others were clarifications, but it was not clear which changes the agency believed would fall within each category. This added to the uncertainty over which proposals were intended to, and likely to, make major changes in public lands grazing. There had been a difference of opinion as to the extent to which the regulatory effort should reinstate pre-1995 grazing provisions or substantially modify other provisions of regulations. There continues to be disagreement as to the extent of the environmental impact of the final changes and whether that impact would be primarily beneficial or damaging in both the short- and long-terms.

Some of the key changes in the new regulations involve ownership of range improvements and water rights, and opportunities for public input and appeals. Other changes pertain to terms and conditions of permits and rangeland health. These areas were among the most controversial among affected interests. These and some of the other key regulatory changes are discussed below.

(...continued)

forage to that definition without consideration of other features of range resources that are not quantifiable in terms of forage, such as species diversity and soil condition.

Share Title to Range Improvements

The regulations reestablish a pre-1995 rule whereby title to a structural range improvement, such as a fence, well, or pipeline, is to be shared by the BLM and a permittee (or others) if it is constructed under a Cooperative Range Improvement Agreement. Title would be shared in proportion to each party's contribution to the cost of the improvement. The regulations also continue to require documentation of a permittee's contributions to improvements and compensation if a permit is cancelled or passes to another. However, some advocated that ranchers should receive more direct compensation for improvements, would be encouraged to undertake and maintain improvements if they get title, and should be able to include improvements as assets to secure loans for grazing. Opponents charged that shared title would create private rights on public land and could hinder action to correct grazing abuses. They contended that the government should hold title to improvements as they typically are important for other uses, such as recreation and wildlife habitat. Still others believed that improvements for grazing do not necessarily benefit other land uses, and thus permittees should not be rewarded with title.

Acquire Private Water Rights

The new regulations allow permittees to acquire water rights, consistent with state law. Previous rules required the federal government to follow state procedural and substantive law regarding livestock watering rights, but directed that title to the rights be held by the United States to the extent state law permitted. Before 1995, practices as to water rights for livestock grazing varied and in some states could be acquired in the name of the permittee. Language allowing private individuals to hold water rights was supported by some as providing an incentive for private water development on public land, and protecting permittees from being denied water. It was opposed by others who believed water rights should be in federal ownership to facilitate multiple uses and to preclude private claims for compensation for water rights, and because states typically do not allow grazing permittees on state lands to obtain water rights. Still others were concerned that public resources will be given away at no cost.

Reduce Requirements for Public Involvement

BLM reduced the occasions on which it is required to involve the public in its decisions. For instance, the agency is no longer required to get input from the public regarding designation and adjustment of grazing allotment boundaries, the issuance or renewal of grazing permits, or modification of the terms and conditions of permits that are not meeting management objectives or the fundamentals of rangeland health. The agency also modified the definition of "interested public" so that only individuals, groups, and organizations who participate in the decisionmaking process on management of a specific allotment are maintained on the list of interested publics. Supporters maintained that the changes would prevent delays and facilitate timely decisions. Also, the agency viewed additional consultation as redundant, because the public already has opportunities to participate during the planning processes and reviews under the National Environmental Policy Act of 1969 (NEPA).¹⁵ The changes were criticized as restricting public input which could lead to ill-considered decisions. They were further opposed on the grounds that decisions at the planning level are too general and broad to allow specific evaluation and

¹⁵ P.L. 91-190; 42 U.S.C. §§ 4321-4347.

comment. Still others contended that environmental reviews under NEPA are not required for some grazing decisions and where required are backlogged, and as a result public participation under NEPA often is delayed.

Modify the Administrative Appeals Process

The agency modified the administrative appeals process on grazing decisions and defined the extent to which grazing should continue in the face of an appeal or stay of a decision. For instance, the new rule provides that when a stay is granted on appeals to decisions involving renewing, modifying, suspending, or canceling a permit or on transferring preference, the affected permittee usually would continue grazing under the immediately preceding grazing authorization. The changes were sought to provide permittees with continuity of operations when a decision affecting their operations is appealed. They were opposed by some as limiting the ability of the public to participate in grazing decisions, reducing the flexibility of land managers to take certain actions based on what is best for resource conditions, and potentially continuing damaging grazing practices.

Broaden the Definition of *Grazing Preference*

Another rule change broadened the definition of *grazing preference* to include a quantitative meaning—forage on public lands, measured in AUMs—tied to a permittee’s base property of land or water. The definition continues to include a qualitative meaning—a superior or priority position to obtain a permit. The revised definition, which is similar to pre-1995 rule language, was intended to link forage allocations to base property, give ranchers certainty as to the size of operations, and eliminate confusion as to the meaning of *preference*. Further, preference includes both active use, defined as use currently available for livestock grazing based on livestock carrying capacity and resource conditions, and *suspended use*, which is use that has been allocated for livestock grazing in the past but is currently unavailable. The new definition was opposed as infringing on the discretion of land managers to determine the extent of grazing that should be allowed.

Remedy Rangeland Health Problems

The new rules require both assessments and monitoring of resource conditions to support agency determinations that grazing practices or levels of use are significant factors in failing to achieve rangeland health standards or conform with guidelines on an allotment. They amend the timeframe and procedures for changing grazing management after a determination that grazing practices or levels are significant factors in failing to achieve standards or conform with guidelines. One change allows a maximum of 24 months, rather than the current 12-month limit, for developing remedial changes in grazing practices. However, BLM could extend the deadline if responsibilities of another agency prevent completion within 24 months. Further, a change would phase in grazing increases or decreases of more than 10% over a five-year period, unless the changes must be made sooner under law (e.g., the Endangered Species Act¹⁶) or the permittee agrees to a shorter period. BLM maintained that these changes would provide a sound basis for agency determinations and give the agency more time and flexibility in working with permittees who are not meeting the standards. For instance, by allowing permittees to make gradual

¹⁶ P.L. 93-205; 16 U.S.C. §§ 1531-1540.

reductions in grazing, adverse economic impacts would be minimized. The changes were opposed as potentially allowing damaging practices to continue and requiring excessive documentation even when damage is obvious. Opponents also claimed that BLM lacks staff and funds to collect the necessary information formally.

Remove Limit on Permit Nonuse

The final rule removed the three-year limit on temporary nonuse of a permit by allowing permittees to apply for nonuse of all or part of a permit for up to one year at a time, for as many years as needed. The change was promoted as allowing for recovery of the land and providing flexibility to ranchers who may not be able to graze for reasons including financial hardship, drought, or overgrazing. Critics argued that the change did not address the underlying problem—permitting grazing that exceeds the capacity of allotments. Others were concerned that conservationists will obtain grazing permits and opt for extended nonuse. However, temporary nonuse is allowed only if authorized by BLM and for no longer than one year at a time.

Eliminate Conservation Use Grazing Permits

Regulations allowing BLM to issue long-term *conservation use* grazing permits were eliminated to comply with court decisions that permits should be issued for grazing and that conservation needs should be met through alternatives. Advocates of conservation use observed that the practice allowed overgrazed land to be rested and that BLM should develop a legal alternative to the conservation use language.

Other Changes

Other changes include:

- restricting BLM to taking action against a permittee convicted of breaking laws while engaged in grazing only if the violation occurred on the permittee's allotment;
- emphasizing that reviews under NEPA will consider the social, economic, and cultural impacts of proposed changes in grazing preference, in addition to the ecological impacts;
- increasing administrative fees for livestock crossing permits, billings, and preference transfers;
- providing that a biological assessment or evaluation by BLM under the ESA is not an agency decision for purposes of protests and appeals;
- specifying that BLM will cooperate with state, tribal, local, and county grazing boards in reviewing range improvements and allotment management plans on public lands;
- stating that the temporary changes that BLM can make within the terms and conditions of permits involve the number of livestock and period of use that would result in temporary nonuse and/or forage removal; and

- requiring BLM to document observations supporting a reduction in grazing intensity, and providing that reductions will be made through temporary suspensions of active use rather than through permanent reductions.

Litigation¹⁷

Two lawsuits were filed to stop implementation of portions of the grazing regulations. Both cases were filed in the U.S. District Court for the District of Idaho. Two different claims were made: first, that the proposed regulations thwarted public participation,¹⁸ and second, that portions of the regulations were adopted despite an inadequate review under NEPA.¹⁹ On August 11, 2006, the district court ruled in favor of the plaintiffs in both lawsuits regarding the public comment disputes but rejected the other claims pertaining to NEPA.²⁰ One of the two plaintiffs filed a renewed motion addressing the NEPA claims.²¹ On September 25, 2006, the district court stayed other regulations based on the plaintiff's NEPA claims.²² Those other regulations pertained to the fundamentals of rangeland health, including standards and guidelines, and ownership of range improvement.

Because of these lawsuits, BLM cannot use the 2006 regulations that were enjoined. Instead, the 1995 regulations apply in these areas. BLM issued an Instruction Memorandum to its field offices explaining BLM procedure as a result of the injunctions.²³ An attachment to the memorandum shows what changes were made to the final regulations as a result of the injunctions.²⁴

Changes Not Proposed

BLM considered but did not propose many other changes to grazing regulations, according to the proposed rule and FEIS. For instance, the agency considered adopting rule language to support establishing and operating a new type of grazing unit, called a *reserve common allotment*, but did not do so because of negative public reaction to the idea. The BLM also considered the issue of forage reserves as part of its consideration of policy changes. (See below under "Grazing Policy Changes Considered" for a discussion of reserve common allotments.) The agency also considered allowing permit holders to temporarily lock gates on public lands, for instance to

¹⁷ This section was prepared by Kristina Alexander (7-8597) of the CRS American Law Division.

¹⁸ The public participation aspects of the following regulations were enjoined: 43 C.F.R. §§ 4100.0-5 (definitions); 4110.2-4 (allotments); 4110.3-3 (implementing changes in active use); 4130.2 (grazing permits or leases); 4130.3-3 (modification of permits or leases); 4130.6-2 (nonrenewable grazing permits and leases). Also, BLM was enjoined from issuing nonrenewable grazing permits or leases.

¹⁹ The regulations challenged on the basis of an inadequate NEPA, which were subsequently enjoined, are 43 CFR 4120.3-2(b) (cooperative range improvement agreements); 43 CFR 4180.1 (fundamentals of rangeland health); and 43 CFR 4180.2(b)&(c) (standards and guidelines for grazing administration).

²⁰ Western Watersheds Project v. Kraayenbrink, No. CV-05-297-E-BLW, 2006 WL 2348080 (D. Idaho Aug. 11, 2006); Maughan v. Rosenkrance, No. CV-06-275-E-BLW, 2006 WL 2348077 (D. Idaho Aug. 11, 2006). The court issued nearly identical opinions in these cases.

²¹ Western Watersheds, but not Maughan, filed a renewed motion for an injunction on the NEPA claims.

²² Western Watersheds Project v. Kraayenbrink, No. CV-05-297-E-BLW, 2006 WL 2735772 (D. Idaho Sept. 25, 2006).

²³ BLM Instruction Memorandum No. 2007-004 (Oct. 10, 2006), <http://www.blm.gov/nhp/efoia/wo/fy07/im2007-004.htm>.

²⁴ The attachment is available online at <http://www.blm.gov/nhp/efoia/wo/fy07/im2007-004attach1.pdf>.

protect private property by preventing cattle from leaving grazing allotments and to minimize disturbances during lambing and calving seasons. The idea was opposed as preventing access by other land users, such as hunters and recreationists; giving a special privilege to permittees; and being currently prohibited by law.

BLM also did not propose altering the existing provisions under which a grazing fee surcharge is placed on permittees who allow livestock neither they nor their children own to graze on public land. The current surcharge provision was incorporated in 1995 to address concerns regarding the potential for a permittee to make a substantial profit when subleasing grazing privileges. BLM asserted that the current surcharge provision is equitable and that it did not want to address fee-related issues as part of the reform effort.

Overview of Grazing Policy Process

The BLM originally had expected to address final grazing policy changes when the rulemaking process was “substantially completed,” according to the agency. However, it appears that policy changes are no longer being actively considered because some policy issues were discussed during the regulatory process and there are competing priorities and resources.

On March 25, 2003, BLM first announced possible grazing policy changes as a complement to the regulatory changes that were being considered.²⁵ According to BLM, the focus was on policy changes that could be carried out under existing rules. The agency was seeking policy reforms to promote citizen stewardship of public lands, provide flexibility to managers of livestock grazing, and increase innovative partnerships. Policy changes considered included conservation partnerships, voluntary allotment restructuring, conservation easement acquisition, endangered species mitigation/landscape habitat improvement, and reserve common allotments (RCAs).²⁶ RCAs would serve as livestock forage for permittees while their normal allotments undergo rest or improvements, and might be used for unplanned needs. BLM also examined the establishment of RCAs as a regulatory change, but did not propose rule language in this area. Some had asserted that other policy options under consideration might have necessitated the adoption of new rules, which would require opportunities for public comment. The distinction between policies and regulations is not always clear, and when an agency must take action through formal rulemaking can be an issue.²⁷

BLM solicited public feedback on the policy options it considered through a series of public workshops. While some support for policy changes was expressed, many members of the public asserted that available information was inadequate to assess the policy changes, raised concerns about the outlined options, or viewed the initial schedule for considering policy and rules changes as too short. In response, BLM announced that it had extended the timeframe for developing policy changes, but did not issue a schedule for completing actions. The agency also developed and published on its website more detailed information on RCAs, conservation partnerships, and

²⁵ The announcement took the form of a press release, now contained on the BLM website at http://www.blm.gov/nhp/news/releases/pages/2003/pr030325_grazing.htm, visited on March 12, 2007.

²⁶ For more information on policy options, see the BLM website at <http://www.blm.gov/nhp/efoia/wo/fy03/im2003-214ch1.htm> and <http://www.blm.gov/nhp/efoia/wo/fy03/im2003-214.htm>, visited on March 12, 2007.

²⁷ See 5 U.S.C. § 551(4).

voluntary allotment restructuring. It noted that conservation easements were no longer being pursued as a major policy tool, and that the concept of endangered species mitigation had evolved to the broader notion of *landscape habitat improvement*. As part of its consideration of policy reforms, BLM reviewed the advice and recommendations of its Resource Advisory Councils.²⁸ Key policy changes that had been considered are discussed below.

Grazing Policy Changes Considered

Reserve Common Allotments (RCAs)

RCAs would be created to provide livestock forage to permittees whose allotments undergo rest or improvements, and might be used when drought, fire, flood, or other unplanned needs make normal allotments unusable. BLM asserted that existing regulations allow the creation of RCAs but with impediments. RCAs were supported as encouraging improvements (such as prescribed burning) and recovery from heavy grazing, and necessary in emergencies so that ranchers would not have to reduce herd size or sell out for lack of forage. Conservationists were concerned that this approach did not address what they view as the fundamental issue—overstocking or grazing unsuitable lands—and that RCAs would benefit ranchers who mismanaged their allotments. Livestock groups feared a reduction in grazing and loss of water rights through nonuse, coercion to participate, and use of RCAs as a subterfuge for conservation use. Key issues for both supporters and critics included how much land, and which lands, would become part of RCAs (e.g., vacant allotments, areas of nonuse); what would trigger their use; their term; how many permittees would be allowed to graze simultaneously; and how forage would be allocated.

Conservation Partnerships

The goal of conservation partnerships between permit holders and the BLM would be to improve environmental health. A permittee could enter into a performance-based contract with BLM to undertake projects to restore streambanks, wetlands, and riparian areas; enhance water quantity and quality; improve wildlife or fisheries habitat; support the recovery of threatened or endangered species; and other actions. In return, the permittee could receive management flexibility, increased livestock grazing, and stewardship grants to pay for investments in conservation practices. Advocates noted that these arrangements would give permittees credit for improvements they have been making, encourage and reward good stewardship, and enhance the role of permittees in managing grazing allotments. Opponents contended that private property rights could be impaired, the amount of available funding was unclear, the extent of resource improvement was uncertain, permittees might receive benefits for little or no resource improvement, and partnerships may not be entirely voluntary. Differences of opinion existed as to a role for third parties, rewards for permittees, and dealing with intermingled private land.

²⁸ BLM has two dozen Resource Advisory Councils (RACs) in western states to provide the agency advice on managing public lands. Each RAC consists of some 12-15 citizens representing diverse interests, including ranchers, environmental groups, tribes, academia, and state and local governments.

Voluntary Allotment Restructuring

Voluntary allotment restructuring would allow two or more grazing permittees to merge allotments. One or more of the permittees would not graze temporarily, while the others grazed over the entire area, to achieve lighter grazing. Such restructuring was supported as improving range conditions while maintaining the economic viability of permittees. Concerns included that restructuring would reduce grazing and could already occur informally, operator to operator. Issues involved when restructuring would be used and whether and how to compensate ranchers who give up grazing privileges.

Conservation Easements

Conservation easements—land use restrictions—were being considered to preserve open space. Under this arrangement, BLM would place conservation easements on its land identified for disposal. Permittees would similarly restrict development on their private land in exchange for acquiring the BLM lands with the easements. These easements were advocated as benefitting the land, land managers, and permittees. However, BLM subsequently asserted that because they are limited in their ability to use conservation easements, such easements were not currently a major policy option. Easements have been opposed as reducing land values, limiting the management discretion of private landowners, not necessarily providing a public benefit, and encumbering land disposal.

Endangered Species Act Mitigation

BLM viewed the policy options listed above as providing opportunities to mitigate the effects of livestock grazing on species listed under the ESA. Mitigation banks also were contemplated to preserve or create habitat for listed species in exchange for mitigation credits. Such credits could be sold to other land users to offset the impacts of development on listed species. This idea raised concerns among livestock groups that grazing would be subordinated to conservation and private property rights could be weakened, and among environmentalists that permittees would be compensated for something the BLM already is obligated to protect. This concept was later considered as *Landscape Habitat Improvement*, to promote species conservation and facilitate ESA consultations. Habitat management would be pursued on a landscape basis, perhaps involving lands under various ownerships, which presumes a larger geographic area than a grazing allotment. Grazing permittees could form partnerships to promote species conservation and maintain or improve habitat while continuing to graze public lands.

Conclusion

BLM pursued grazing reform for more than three years after notifying the public in 2003 of its consideration of changes under its *Sustaining Working Landscapes* initiative. During that time, evaluations of possible regulatory and policy changes proceeded on separate tracks. Changes to regulations became effective August 11, 2006, although some of the changes were subsequently enjoined. No policy changes were made as a result of this effort, and it appears that there is no longer an initiative to review and revise grazing policies.

Many of the key regulatory changes contained in the final rule deal with provisions that took effect in 1995, during the previous revision of grazing rules. Among them are changes to allow

shared title to range improvements, allow private acquisition of water rights, reduce requirements for public involvement, modify the administrative appeals process, broaden the definition of grazing preference, change the timeframe and procedures for remedying rangeland health problems, remove the limit on permit nonuse, and eliminate conservation use grazing permits. The changes met with mixed reaction. The revisiting of issues dealt with a decade ago, together with other changes, was generally supported by livestock organizations and some range professionals who see benefits both to the range and those grazing on public land. By contrast, many environmental organizations and other range experts opposed the changes on the grounds that a need for change had not been demonstrated and the particular changes could harm the environment.

Public comment on the proposed regulatory changes, together with the DEIS assessing their impact, was accepted through March 2, 2004. BLM evaluated the comments over many months, before publishing an FEIS on June 17, 2005. The agency postponed developing a final grazing rule to consider public comment received after the closing date, particularly from the Fish and Wildlife Service. The BLM addressed this comment in an addendum issued March 31, 2006. Final grazing regulations were published on July 12, 2006, and took effect a month later. Some of the new regulations are not being implemented as a result of lawsuits, primarily changes regarding public participation, sharing title to range improvements, and fundamentals of rangeland health.

BLM had expected to focus on final policy changes after the completion of the rulemaking process, but it appears that policy changes are no longer under consideration. Public feedback on possible policy changes had shaped the proposals that were examined and extended the timeframe for considering changes. Key policy issues that were considered related to RCAs, conservation partnerships, voluntary allotment restructuring, conservation easement acquisition, and landscape habitat improvement.

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