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The Past, Present, and Future of Our Public Lands: Celebrating the 40th Anniversary of the Public Land Law Review Commission's Report, One Third of the Nation's Land (Martz Summer Conference, June 2-4)

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### SLIDES: Livestock Grazing on the Public Lands

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## *Livestock Grazing on the Public Lands*

### The Most Ubiquitous Use

- Livestock grazing is
  - by far, the most ubiquitous commercial use of federal public land
  - arguably, the most ubiquitous of all human uses of federal public land (possible exception: recreation)
- Grazing is authorized on
  - 159 million acres ( $\approx 90\%$ ) of BLM land in the lower 48 states (including Wilderness)
  - 88 million acres ( $\approx 60\%$ ) of National Forests in the lower 48 states (including Wilderness)
  - many National Wildlife Refuges
  - many National Monuments (newer ones)
  - some National Parks (newer ones)

*Livestock Grazing on the Public Lands*  
A Minor Economic Activity

- Approximately 20,000 permittees
- 51% are “hobby” ranchers (BLM Grazing Regulations EIS, 2005)
- Nationwide, public lands supply  $\approx$  2% of all livestock feed
- Nationwide, 3% of livestock producers use public lands
- In the eleven far western states, 22% of livestock producers use public land

*Livestock Grazing on the Public Lands*  
Origins: Facts on the Ground

- Nineteenth Century:
  - No federal legislation or agency regulating livestock grazing on federal public lands
  - “Everybody used the open, uninclosed country which produced nutritious grasses as a public common on which their horses, cattle, hogs, and sheep could run and graze.” *Buford v. Houtz* (Supreme Court, 1890)
  - “Historically, all public lands which could be physically negotiated by livestock have been grazed.” (PLLRC Report, 1970)

## *Livestock Grazing on the Public Lands*

### Origins: The Law

“There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the government did not cancel its tacit consent. [citing *Buford v. Houtz*] Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes. . . . The United States can prohibit absolutely or fix the terms on which its property may be used.” *Light v. United States* (Supreme Court, 1911).

*Livestock Grazing on the Public Lands*  
Assertion of Federal Authority I:  
The National Forests

- General Revision Act (1891) authorized President to set apart and reserve “public forest reservations” (National Forests) on the public lands.
- Forest Service Organic Act (1897) authorized Secretary of the Interior (later Agriculture) to make “rules and regulations . . . to regulate [the] occupancy and use” of the National Forests.
- Forest Service regulations (1906)
  - required permits for grazing
  - charged fees

Assertion of Federal Authority II:  
The Remaining Public Lands

- Taylor Grazing Act (1934):
  - authorized Secretary of the Interior to establish “grazing districts” on unallocated public lands that were “chiefly valuable for grazing and raising forage crops.”
  - authorized Secretary to issue grazing permits, specify livestock numbers, charge fees.
- Executive orders (1934 – 1935) withdrew virtually all unallocated public lands and placed them in grazing districts.
- These are the lands that are now managed by the Bureau of Land Management (BLM).



## *Livestock Grazing on the Public Lands*

### Are BLM Lands “chiefly valuable for grazing”?

- Despite terms of the Taylor Grazing Act, government never made explicit determinations that any, let alone all, of the unallocated lands were “chiefly valuable for grazing.”
- No survey or inventory of lands to determine their highest and best use
- In historic context, purpose of “chiefly valuable” classification was to distinguish grazing lands from lands suitable for farming, which were to be made available for homesteading. (See 1936 amendment to Taylor Grazing Act.)

## *Livestock Grazing on the Public Lands*

### Are BLM Lands “chiefly valuable for grazing”?

- Possibility that some lands were most valuable for recreation, wildlife conservation, watershed protection, or other non-consumptive uses was not considered when lands were placed in grazing districts.
- Under FLPMA (1976), all existing classifications are subject to review, modification, or termination through land use planning. (43 U.S.C. § 1712(d)).

## *Livestock Grazing on the Public Lands*

### Some Observations on the PLLRC Report

PLLRC report argues for the economic importance of public lands livestock grazing:

- recognizes that public lands provide only 3% (now 2%) of nation's livestock feed
- stresses importance of public lands to “individual ranch operations”
- (but vast majority of ranch operations do not use public lands)
- stresses importance of public lands grazing to “regional economy” (no data)

## *Livestock Grazing on the Public Lands*

### Some Observations on the PLLRC Report

PLLRC Report recommends that:

“Public land forage policies should be flexible , designed to attain maximum economic efficiency in the production and use of forage from the public lands and to support regional economic growth.”

PLLRC Report contains:

- little consideration of adverse environmental impacts of livestock grazing
- virtually no consideration of conflicts between livestock grazing and other land uses and resources (e.g., wildlife, recreation)

## The Most Radical Recommendation in the PLLRC Report

Recommendation 42: Public lands (including National Forests) should be reviewed to determine which are chiefly valuable for grazing, and

- lands chiefly valuable for grazing and having “few or no other valuable uses” should be sold at auction
- other lands chiefly valuable for grazing should be retained but classified for grazing “as the dominant use”
- grazing should be prohibited on “frail and deteriorated lands”

## *Livestock Grazing on the Public Lands*

### Reflections on PLLRC Recommendation 42

- Implicit recognition that Taylor Grazing Act's mandate to determine which lands are "chiefly valuable for grazing" was never implemented
- *Opposite* prescription from the Taylor Grazing Act:
  - TGA: Lands "chiefly valuable for grazing" should be *retained*
  - PLLRC: Lands "chiefly valuable for grazing" should be *sold* (if they have "few or no other valuable uses")

*Livestock Grazing on the Public Lands*

Reflections on PLLRC Recommendation 42

Why the reversal of prescription?

1. (Unjustified) assertion that problems of overgrazing had largely been solved
2. Belief in need for government management of commodity production had declined. PLLRC report emphasized ability of free market to efficiently manage livestock production.
3. Belief in need for government management of non-commodity resources had arisen. PLLRC recognized that recreation, watershed, and wildlife interests could justify continued government ownership of public lands.

*Livestock Grazing on the Public Lands*  
PLLRC Recommendation 42

A radical proposal, but in which direction?

- Given PLLRC report's (unjustified) emphasis on the economic importance of public lands grazing, authors probably believed large areas of public lands would be determined to be "chiefly valuable for grazing" and therefore either
  - a. sold, or
  - b. classified for grazing as the dominant use.
- Recommendation for prohibition of grazing on "frail and deteriorated" lands is a brief afterthought; authors probably believed there were relatively few such lands.



## *Livestock Grazing on the Public Lands*

### PLLRC Recommendation 42

What would happen if PLLRC's recommendation for classification of public lands were implemented today?

- By any credible economic analysis, very few public lands would be classified as “chiefly valuable for grazing.”
  - Overall, economic models indicate that recreation value alone of BLM lands exceeds grazing value by an order of magnitude.
  - “It appears likely that recreational value will exceed livestock grazing value on most rangelands within the next 15 to 20 years.” HOLECHEK ET AL., RANGE MANAGEMENT, PRINCIPLES AND PRACTICES (1989).

*Livestock Grazing on the Public Lands*  
PLLRC Recommendation 42

What would happen if PLLRC's recommendation for classification of public lands were implemented today?

- Vast areas of BLM land can reasonably be characterized as “frail or deteriorated.”
  - Almost all BLM lands are arid or semi-arid, and thus vulnerable to irreversible damage from livestock grazing.
  - About half of BLM lands are classified as being in a “poor” or “fair” ecological state, meaning there is less than a 50% correspondence between current vegetation composition and the natural condition.

## *Livestock Grazing on the Public Lands*

### What We Got: FLPMA and PRIA

- No specific mandate for classification of public lands according to most valuable or dominant uses
- But, FLPMA's definition of "multiple use" calls for
  - "the combination [of uses] that will best meet the present and future needs of the American people"
  - "the use of some land for less than all of the resources"
  - "management of the various resources without permanent impairment of the productivity of the land and the quality of the environment"
  - "with consideration being given to the *relative values of the resources*"

## *Livestock Grazing on the Public Lands*

### What We Got: FLPMA and PRIA

- FLPMA's land use planning provisions (43 U.S.C. § 1712) require the BLM to:
  - “consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values”
- The Public Rangelands Improvement Act (PRIA) (1978) authorizes the Secretary of the Interior to
  - “determine[], and set[] forth his reasons for this determination, that grazing uses should be discontinued (either temporarily or permanently) on certain lands”

*Livestock Grazing on the Public Lands*  
What We Got: FLPMA and PRIA

Conclusion:

FLPMA and PRIA certainly authorize, and arguably require, the BLM to discontinue livestock grazing on areas of the public lands where its adverse impact on other, more valuable resources, are disproportionate to its economic benefits.

*Livestock Grazing on the Public Lands*

The Comb Wash Case

(National Wildlife Federation v. BLM) (IBLA, 1994)

- Administrative appeal challenging BLM's renewal of a grazing permit for five narrow canyons in southeastern Utah
- Canyons contain
  - extraordinary redrock scenery
  - abundant archaeological sites
  - heavy recreational use
  - riparian wildlife habitat
  - relatively little livestock forage

## *Livestock Grazing on the Public Lands*

### The Comb Wash Case

(National Wildlife Federation v. BLM)(IBLA, 1994)

- ALJ held, and IBLA affirmed, that  
“BLM violated FLPMA, because it failed to engage in any reasoned or informed decisionmaking process concerning grazing in the canyons in the allotment. That process must show that BLM has balanced competing resource values to ensure that the public lands in the canyons are managed in the manner that will best meet the present and future needs of the American people.”

*Livestock Grazing on the Public Lands*

The Comb Wash Case

(National Wildlife Federation v. BLM)

(IBLA, 1994)

- ALJ ordered, and IBLA affirmed, that BLM must halt grazing in the canyons unless and until it
  - (a) prepared an EIS, and
  - (b) made a “reasoned and informed decision” as to whether grazing in the canyons was consistent with multiple use
- On remand, BLM permanently discontinued grazing in the canyons



*Livestock Grazing on the Public Lands*

The Comb Wash Case

(National Wildlife Federation v. BLM) (IBLA, 1994)

Additional areas that have been closed to grazing following the precedent of the Comb Wash decision:

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## *Livestock Grazing on the Public Lands*

### Life Goes On . . .

- Despite the Comb Wash precedent, BLM decisions to close areas to grazing are extraordinarily rare
- No systematic evaluations of relative resource values
- No comparisons of costs and benefits of grazing
- In NEPA analyses, “no grazing” option is often summarily dismissed as an alternative “considered but not analyzed”
- BLM employees often (erroneously) assert, both orally and in decision documents, that grazing is required by the Taylor Grazing Act, FLPMA, or other laws

## *Livestock Grazing on the Public Lands*

### Life Goes On . . .

Appropriations riders passed by Congress every year since mid-1990s:

A grazing permit or lease issued by the Secretary of the Interior or . . . the Secretary of Agriculture . . . that expires . . . during fiscal year \_\_\_\_ shall be renewed . . . . The terms and conditions contained in the expired . . . permit or lease shall continue in effect under the renewed permit or lease until such time as the Secretary . . . completes processing of such permit or lease in compliance with all applicable laws and regulations . . . .

## *Livestock Grazing on the Public Lands*

### Life Goes On . . .

In other words –

- BLM and Forest Service will bring grazing into compliance with NEPA, FLPMA, and other laws if, and when, they get around to it
- In the meantime, existing grazing practices may (and do) continue indefinitely

## *Livestock Grazing on the Public Lands*

### Rangeland Reform

- New BLM grazing regulations issued in 1995 by Interior Secretary Bruce Babbitt
- Included “Fundamentals of Rangeland Health” (national) and “Standards and Guidelines” (state) to ensure healthy conditions of
  - soils
  - vegetation
  - wildlife habitat
  - water quality
- Where conditions violate standards, corrective action must be taken within one year.



*Livestock Grazing on the Public Lands*

Rangeland Reform: Can the Standards be Enforced?

2002 – National Wildlife Federation filed administrative protests of five proposed BLM grazing permit renewals in Arizona, alleging fraudulent determinations that allotments were meeting standards and guidelines

2010 – BLM has still not issued final decisions on the five permits

Meanwhile, grazing continues unchanged pursuant to the grazing permit renewal riders.

## *Livestock Grazing on the Public Lands*

# Why is Grazing So Impervious to Reform?

- Classic special interest politics
  - highly concentrated benefits v highly diffuse costs
- The power of the status quo
  - legally, politically, and socially much harder to stop existing use than to oppose a new one
  - damage has existed so long that it is perceived as normal
- Damage is slow, long term
- Popularity of cowboy image
- Ranching lifestyle is attractive, sympathetic
- Ranching families are well-connected, influential



# The Future of Public Lands Livestock Grazing

- There will be no major, widespread reform or reconsideration driven by
  - FLPMA
  - land use planning
  - Rangeland Reform regulations
  - any initiative from within the federal government
- Century-long steady decline of public lands livestock production will continue due to
  - poor economics
  - deteriorating resource base
    - soil loss
    - invasive weeds
    - climate change
  - generational change

# The Future of Public Lands Livestock Grazing

Grazing will be discontinued in relatively small, selected areas because of

- endangered species
  - desert tortoise
  - fish
  - sage grouse
- “buyouts”
  - hybrid public-private transactions
  - very awkward fit to existing law
  - they work where no one objects (not in Utah)
- Western Watersheds Project