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Creating New Opportunities for Ecosystem Restoration on Public Lands: An Analysis of the Potential for Bureau of Land Management Lands

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Creating New Opportunities for Ecosystem Restoration on Public Lands: An Analysis of the Potential for Bureau of Land Management Lands

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The northern high plains of the western central United States once housed one of the world's most spectacular aggregations of wildlife. As William Clark, standing near Great Falls on the Missouri River in north central Montana described it in 1805, "immence herds of Buffaloe, Elk, deer, & Antelopes feeding in one common and boundless pasture."[2] Today, the native short grass prairies that sustained this fecundity of animal biomass are dwindling. Yet large expanses of native vegetation in the Northern High Plains Steppe Ecoregion still remain intact.[3] The World Wildlife Fund (WWF) recognizes the ecoregion as "globally outstanding" in terms of potential for biodiversity conservation.[4] The WWF gives the region a high conservation priority due to the number of globally imperiled species inhabiting the area, the potential for supporting numerous conservation targets, and the threat of development from agricultural conversion.[5] The intact nature of the ecoregion's natural vegetation and land management provides an opportunity to link habitats and contribute to functional large-scale processes, while at the same time providing a buffer from incompatible activities.[6]

Bureau of Land Management (BLM) lands represent a unique class of public lands. In the northern plains states, these are lands that were not claimed or set-aside during the land settlement boom of the late Nineteenth and early Twentieth century.[7] As such, their value was historically regarded as economically circumspect, and their contribution to global bi-

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1. Hyalite Consulting, 9443 Cottonwood Rd, Bozeman, MT; JD, 1991, University of Washington School of Law; M.S., 1982 Yale University School of Forestry and Environmental Studies; BS, 1978, Oregon State University. The author thanks Bill Hedden, Mark Geydon, Walter Lujan, Cheryl Newberry, Russ Miller, Brian Martin, Mat Millenbach, Curt Freese, and Sunny Mavor. Research was conducted under grants from the World Wildlife Fund and the J.M. Kaplan Fund.

2. Richard H. Hart, *Where the buffalo roamed-or did they?*, 11 Great Plains Research 83, 87 (2001).

3. The Nature Conservancy, *Ecoregional Planning in the Northern Great Plains Steppe,* at 3 (Feb. 4, 1999)(Some 60 percent by Nature Conservancy estimates) (unpublished report of on file with author).

4. For the World Wildlife Fund Global 200 methodology generally, *See, e.g.*, David M. Olson and Eric Dinerstein, *The Global 200: A Representation Approach to Conserving the Earth's Distinctive Ecoregions*, 12 Cons. Biol. 502 (1998); For the index of Global 200 sites, see World Wildlife Fund at http://www/wwfus.org/global200/spacessection.cfm?sectionid=20(2002).

5. *Id.*

6. The Nature Conservancy, *supra* note 3 at 18.

7. GEORGE C. COGGINS ET AL, FEDERAL PUBLIC LAND AND RESOURCES LAW 743 (Foundation Press 2001).

odiversity as insignificant.[8] The conservation community largely ignored management of these lands until the latter part of the Twentieth century, when heightened awareness of their importance for wildlife habitat and increased interest in recreation opportunities brought them into the spotlight.[9] Those BLM lands overlooked in the development boom of the last century may now provide an opportunity to establish partnerships between private and public entities for the restoration of large tracts of prairie ecosystem.

Section one of this article provides an overview of the sociological and environmental context in which current BLM management occurs. Section two gives a brief overview of the BLM grazing lease permit system and its requirements. Section three describes why ownership of the base property controlling grazing leases is significant and how owners of these leases can induce positive change within the existing regulatory framework. Section four describes past and current strategies for securing ecosystem protection on BLM lands. Section five advocates for greater use of private land acquisition as a tool for providing protection for BLM lands. This article concludes that there are opportunities to make significant changes to the grazing regime by altering grazing intensities, retiring permits, and utilizing bison to promote habitat restoration for endemic prairie species by controlling BLM permits through base property acquisition. This paper summarizes how the BLM is developing the capacity to manage large-scale landscapes for conservation. It is argued that acquisition of base properties controlling BLM grazing leases offers a chance to redirect the BLM's management course towards establishing large-scale ecosystem restoration on the northern plains.

I. THE SOCIAL AND BIOLOGICAL CONTEXT OF BLM LANDS MANAGEMENT

At the turn of the Twenty-first century, the Great Plains is undergoing one of the most profound demographic shifts since its settlement during the latter half of the Nineteenth century. Depopulation of the region represents, as one reporter has stated, "nothing more than the dying of a dream."[10] At the same time, BLM lands comprise the last and largest contiguous blocks of intact prairie, which are critical for the support of endemic prairie species.[11] Arguably, as BLM lands play a less significant role in contributing to agricultural development and become more significant as repositories for

8. *Id.*

9. *Id.*

10. Glen Martin, *Where the Buffalo Roam, Again: Humans are Disappearing from the Great Plains and other Wildlife Return*, S.F. CHRON., April 22, 2001, at A-1.

11. Stephen V. Cooper et al., *Biological Survey of a Prairie Landscape in Montana's Glaciated Plains*, Rept. to the Bureau of Land Mgmt. Montana Natural Heritage Program, Helena, at 2.

biodiversity, the need to rethink the primary management objectives for these lands grows.

A. *Great Change on the Great Plains*

Frank and Deborah Popper popularized the concept of the "Buffalo Commons" in the late 1980's[12] in response to economic and demographic changes that were literally creating an exodus of capital and people from the Great Plains region. The Poppers postulated that the policies encouraging settlement of an arid and marginally productive region for agriculture would result in a depopulation of the region absent a reconsideration of the role of people in the plains economy.[13] Nearly three-quarters of plains counties– 322 of 443– have decreased in population since 1930.[14] According to the 2000 census, 272 of 443 of the Plains counties have experienced population declines since 1990.[15]

The exodus of people from the prairie is paralleled by the decreasing importance of public land livestock grazing to the economy of the region.[16] Livestock operations that rely on public lands constitute both a small fraction of the country's total livestock producers, and a declining source of income and employment both nationally and regionally.[17] Today, income from all agriculture represents 2.4 percent of total income in the sixteen western states.[18] Just three percent of United States beef production is derived from grazing on public land.[19] Only about a third of all cattle in the West graze on public lands.[20] In Montana, federal grazing provides about 1,085 jobs, or one-quarter of one percent of all Montana jobs.[21]

Even in areas dominated by public lands, grazing on these lands is becoming less important to local economies. Phillips County, Montana,

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12. Deborah E. Popper and Frank J. Popper, The Great Plains: From Dust to Dust: A daring Proposal for Dealing with an Inevitable Disaster, 53 Planning 12, 12-18 (Dec. 1987).

13. *Id;* DEBORAH E. POPPER AND FRANK J. POPPER, THE FATE OF THE PLAINS 98-113, in ED MARSTON, ed., REOPENING THE WESTERN FRONTIER, Island Press (1989).

14. Martin, *supra* note 10.

15. *Id.*

16. THOMAS M. POWER, LOST LANDSCAPES AND FAILED ECONOMICS 182 (1996).

17. Mark N. Salvo, *The Declining Importance of Public Lands Ranching in the West*, 19 PUB. LAND & RESOURCES L. REV. 103-112 (1998).

18. *Id.* at 107 (*citing* Bureau of Land Mngmt., U.S. DEP'T OF THE INTERIOR, RANGELAND REFORM '94 DRAFT ENVIRONMENTAL IMPACT STATEMENT 3-62 (1994) (hereinafter RANGELAND REFORM '94 DEIS)).

19. *Id.* (citing POWER, *supra* note 16, at 182).

20. RANGELAND REFORM '94 DEIS, *supra* note 18, at 3-68.

21. POWER, *supra* note 16 at 183.

TABLE 1. AREA OF BLM SURFACE MANAGEMENT IN THE 10 PRAIRIE STATES

State	Acreage of BLM Lands East of the Rocky Mountain Front (Total State BLM Acreage)
Montana	6,560,000* (8,000,000)
Colorado	62,500* (8,300,000)
Wyoming	2,850,000* (18,400,000)
New Mexico	3,640,000* (13,400,000)
Oklahoma	2,100
Texas	11,800
Nebraska	7,700
South Dakota	279,000
North Dakota	60,000
Kansas	0
TOTAL	**13,473,100***

***Estimate based on distribution of BLM acreage by county**

which has lost twenty-eight percent of its population since 1950,[22] is typical of many counties in the Great Plains containing large blocks of public land. BLM lands in Phillips County comprise approximately one third of the total county land base (approximately 1,000,000 acres).[23] BLM grazing allotments in Phillips County support about 225[24] of the approximately 480 farm and ranch operations in the county.[25] Livestock sales account for sixty percent of the annual market value[26] of agricultural products sold from Phillips County. Of that, BLM forage contributes about twenty percent of the total in Phillips County,[27] or about $4.9 million annually. However, transfer payments[28] alone in Phillips County in 1997 were $20.6 million, while net farm income in 1997 was actually negative $1.7 million.[29] Thus, the net contribution of sales from livestock raised on public forage to the total

22. U.S. BUREAU OF THE CENSUS, http://www.census/gov/population/cencounts/mt190090txt (last visited May 1 2002).

23. U.S. BUREAU OF LAND AND MNGMT., U.S. DEP'T OF THE INTERIOR, JUDITH-VALLEY-PHILLIPS RESOURCE MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT 121, Table 3.12 and 1, Table 1.1(1992) (hereinafter JUDITH-VALLEY-PHILLIPS PLAN).

24. *Id.*

25. U.S. DEPT. OF AGRIC., National Agricultural Statistics Service, 1997 Census of Agric Vol 1, Part 26, Ch. 2, http://www.nass.usda.gov/census/census97/volume 1/mt-26/mt2_06.pdf (last visited May 1, 2002).

26. *Id.* $40,865,000 in 1997.

27. JUDITH-VALLEY-PHILLIPS PLAN supra note 23 at 436.

28. Social security, Medicare and disability.

29. Ray Rasker and Ben Alexander, *Population, Employment, Earning and Personal Income Trends for Blaine County, Montana, Phillips County, Montana, Powder River County, Montana, Valley*

economy in this highly public land-dominated environment is small, if not negligible.[30]

B. *The Importance of BLM Lands for Biodiversity Conservation*

The federal government controls some seventeen million acres of prairie lands in the ten states that comprise the "Great Plains" east of the Rocky Mountain front.[31] The U.S. Forest Service ("USFS") manages seventeen National Grasslands with a combined acreage of approximately 3.5 million acres in the prairie states.[32] As the dominant manager of publicly owned prairie lands, the BLM manages approximately fourteen million acres of rangelands (Table 1) east of the Rocky Mountain Front.[33]

Federal public lands have played a key role in the maintenance of wildlife populations in the western United States for several reasons. First, federal laws mandate the use of these lands for the production of multiple uses or values, which include wildlife.[34] The National Forest Management Act (NFMA),[35] which governs Forest Service management of National Grasslands, is generally recognized as providing a significant core of protection for wildlife and their habitats.[36] The BLM's management regime is guided by the Federal Lands Policy Management Act ("FLPMA')[37] and the Taylor Grazing Act (TGA),[38] which are more ambiguous regarding the weight BLM management should give to wildlife protection in its multiple use mandate.[39] Nonetheless, as one commentator has noted, ". . .environ-

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County, Montana, Fall River County, South Dakota and Niobrara County, Wyoming at B-17, B-15 (2000) (unpublished report to World Wildlife Fund).

30. U.S. DEPT. OF AGRIC., *1997 Census of Agric.*, Vol. 2, Census Rankings of States and Counties, Table 20 (1997); *at* http://www.nass.usda.gov/census/census97/rankings (last visited May 1, 2002). The contribution of federal lands may be exaggerated even further in the case of Phillips County. Phillips County is ranked 14th nationally in terms of total private acreage removed from production under the Conservation Reserve Program (134,807 acres).

31. U.S. FOREST SERVICE, AMERICA'S NATIONAL GRASSLANDS, STATE BY STATE LISTING (1999), *at* http://www.fs.fed.us/grasslands (last visited May 1, 2002)(Oklahoma, Texas, New Mexico, Colorado, Kansas, Nebraska, South Dakota, North Dakota, Wyoming and Montana).

32. *Id.*

33. U.S. BUREAU OF LAND MNGMT, Payments in Lieu of Taxes, (2001) http://www.blm.gov/pilt/AcreageRpt (last visited May 1, 2002).

34. Alyson C. Flournoy, *Beyond the "Spotted Owl Problem": Learning from the Old-Growth Controversy*, 17 HARV. ENVTL. L. REV. 261, 271-75 (1993).

35. National Forest Management Act of 1974 (NFMA), 16 U.S.C. §§ 1600 et. seq. (2001).

36. Flournoy, *supra* note 34 at 279.

37. Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701 et. seq. (2001).

38. Taylor Grazing Act of 1934, 43 U.S.C. §§ 315 et. seq. (2001)(hereinafter TGA).

39. *See, e.g.*, DEBRA DONAHUE, THE WESTERN RANGE REVISITED, Univ. Oklahoma Press (1999) at 199; Flournoy, *supra* note 34; George C. Coggins and Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Grazing Act*, 13 Env. L. 1, 50-51

mental values are protected to some extent by FLPMA. The only question is to what extent."[40]

Second, federal lands are not required to maximize economic production, measured in forage production or crops, which is often responsible for displacing or competing with wildlife.[41] In practice, the BLM is often accused of tilting its management to favor commodity groups, particularly the livestock industry, who exert inordinate amounts of influence over the processes that guide BLM decision-making.[42] Although the BLM often appears to ignore the veneer of its environmental mandate in response to pressure from local grazing interests,[43] and often to the detriment of wildlife and other resources,[44] many BLM lands still remain more biologically intact than private lands.[45] The most important reason for this is that BLM lands are not tilled, and therefore their vegetation remains largely intact.

Finally, and perhaps most importantly, the federal government controls significant acreage under a unified management regime. These large blocks are critical for providing refugia for many of the West's more sensitive and wide-ranging species.[46] Habitat fragmentation is recognized as one of the primary causes of species extinction.[47] Preserving large landscapes is necessary because many ecological processes, like ungulate migration patterns and fire, occur only on large scales.[48] The prairie grasslands of North America are dominated by large-scale process[49] and provide habitat for

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(1982). Coggins and Lindeberg-Johnson are less sanguine, referring to the TGA as primarily a statute aimed to promote domestic livestock grazing.

40. Flournoy, *supra* note 34, at 283.

41. 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. 10021, 10039 (2001) (Ftn 26 citing Holechek et al., Grazing Studies: What we've learned, RANGELAND, Apr. 1999, at 12); *see generally* U.S. Government Accounting Office, *Public Land Management: Attention to Wildlife is Limited,* GAO/RCED-91-64, U.S. GAO, Washington, DC (1991).

42. *See* DONAHUE, *supra* note 39.

43. Feller, *supra* note 41 at 10035; Michael Axline, Symposium, *Local Communities and the Management of Public Forests: Federal Lands and Invisible Hands*, 25 Ecology L. Q. 611, 615 (1999). (The BLM is often cited as a classic example of an agency "captured" by the interests it is supposed to be regulating).

44. GAO, *supra* note 41.

45. *E.g.,* Cooper et al., *supra* note 11.

46. The Nature Conservancy, *supra* note 3; *See* Connor et al. *infra* note 51.

47. MONICA G. TURNER ET AL., LAND USE, 51-52, in MICHAEL J. MAC ET AL., EDS., STATUS AND TRENDS OF THE NATION'S BIOLOGICAL RESOURCES, VOL. 1, U.S. Dept. of Interior, U.S. Geological Survey, Reston Va.(1998).

48. David M. Olson et al., *Conservation Biology for the Biodiversity Crisis*, 16 Cons. Biol. 1-2 (2002).

49. FRED B. SAMSON ET AL., GRASSLANDS, 440, *in* MICHAEL J. MAC ET AL., EDS., STATUS AND TRENDS OF THE NATION'S BIOLOGICAL RESOURCES, VOL. 2, U.S. Dept. of Interior, U.S. Geological Survey, Reston Va.(1998).

many species that require extensive, contiguous habitat to survive.[50] While the biotic diversity of North American grasslands may be the most altered by human impact of any of the continent's terrestrial ecosystems,[51] there are still many areas that are functionally intact.[52] However, prairie ecosystems and ecological communities comprise a small percentage of protected areas in the United States.[53] BLM lands may represent one of the greatest opportunities for creating reserves that capture large-scale ecological processes remaining in the United States today.[54]

C. *Conservation Opportunities*

Opportunities to create large, contiguous functional ecosystems are rapidly disappearing as development pressures mount in all parts of the world.[55] The northern Great Plains is one of the few remaining places where the conjunction of high biodiversity potential and declining demographics may afford new conservation opportunities. Demographically, the average plains agriculturalist in Montana is aging. In 1997, the average age of the farmer/rancher in eastern Montana was estimated to be fifty-four.[56] Moreover, it appears few young farmers have the financial resources or interest to begin a career in agriculture.[57] Therefore, this region is likely to see thousands of acres of private land come on the market over the next decade as these aging landowners retire.[58]

Conversely, the amount of wealth created in the United States during the economic boom of the 1990's probably rivals that of turn of the century park-creating philanthropists like John D. Rockefeller, Jr.[59] At least some of

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50. SCOTT W. GILLIHAN AND SCOTT W. HUTCHINGS, BEST MANAGEMENT PRACTICES FOR SHORTGRASS PRAIRIE BIRDS: A LANDOWNERS GUIDE 24-27, Colorado Bird Observatory, Brighton, CO (Undated)(The grasshopper sparrow and Baird's sparrow are typical of declining prairie bird species with large area requirements).

51. RICHARD CONNOR ET AL., UNITED STATES GRASSLANDS AND RELATED RESOURCES: AN ECONOMIC AND BIOLOGICAL TRENDS ASSESSMENT at 20 (2001), http://landinfo.tamu.edu/presentations.

52. Nature Conservancy, *supra* note 3.

53. DONAHUE, *supra* note 39, at 171.

54. *Id.* at 172.

55. Olson et al., *supra* note 48.

56. U.S. Dept. of Agriculture, Economic Research Service, *Montana State Fact Sheet* (2002), http://www.ers.usda.gov/StateFacts/MT.htm (last visited May 1, 2002).

57. Mike Lee, *Aging farmers gather debt, doubts,* TRI-CITY HERALD (Kennewick WA) (April 18, 2000), http://tri-cityherald.com/losingground/part3.htm (last visited May 1, 2002).

58. Interview with Brian Martin, Montana State Office, Nature Conservancy, in Helena (Oct. 8, 2001).

59. *See, e.g.*, ROBERT W. RIGHTER, CRUCIBLE FOR CONSERVATION: THE CREATION OF GRAND TETON NATIONAL PARK (1982).

this wealth is now being spent acquiring large blocks of land.[60] Among these new owners are "green investors" or "conservation buyers." These buyers are less interested in traditional ranching and wish to proactively improve these properties for conservation purposes[61] or for philanthropic purposes. This coincides with a rising interest in market-based approaches to conservation as public policy.[62] Where these private purchasers acquire BLM leases as part of their private property acquisition, new opportunities arise to reconfigure the predominant management relationship between the BLM and the base property owner.

II. Overview of the BLM Grazing System

The evolution of the current BLM grazing system began with passage of the TGA in 1934,[63] which was the first law to carve out "grazing districts" from the federal domain.[64] The federal domain consists of lands still in federal ownership because they have not been sold, given to the states, or withdrawn for other purposes such as National Forests, National Parks or Indian Reservations.[65] The TGA directed the Secretary of Interior to identify all public lands suitable for grazing, and establish grazing districts for their management.[66] These "section 3" lands comprise the bulk of BLM-administered grazing lands.[67] The TGA establishes preferences for obtaining a permit to graze the federal lands and sets the livestock numbers for each permit.[68]

In 1976, Congress enacted FLPMA, mandating that:

> ". . . the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeologi-

60. Tux Turkel, *Kingdom Sales May Create Conservation Opportunities*, Maine Sunday Telegram, June 17, 2001, at 4C.

61. *See,* American Conservation Real Estate, http://www.conservationrealestate.com (last visited May 1, 2002). A number of real estate brokers actively pursue conservation-minded buyers

62. *See, e.g.,* Secretary of Interior Gale Norton, *Conservation in the 21st Century: A new environmentalism*, Remarks prepared for the National Press Club (Feb. 20, 2002)(citing with approval the Nature Conservancy Tallgrass Prairie Preserve, Oklahoma as a paradigm for the "new" kind of privately owned protected area), http://www.doi.gov/news/020225.htm (last visited May 1, 2002).

63. For a history of the TGA, *see* Donahue, *supra* note 39, at 11-30.

64. 43 U.S.C. §315; *see* Donahue, *supra* note 39, at 36.

65. Feller, *supra* note 41, at 10022.

66. 43 U.S.C. §§ 315a, 315b, 315f.

67. Ronald W. Spahr and Mark A. Sunderman, *Additional Evidence on the Homogeneity of the Value of Government Grazing Leases and Changing Attributes for Ranch Values*, J. of Real Estate Research 601, 616 (1995). BLM also leases "Section 15" lands. These lands tend to be interspersed with private land and often are of low productivity.

68. *See, e.g.*, McNeil v. Seaton, 281 F.2d 931 (D.C. Cir. 1960).

> cal values: that, where appropriate, will preserve and protect certain public lands in their natural condition: that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use."[69]

Congress subsequently reinforced FLPMA with the Public Rangelands Improvement Act of 1978 (PRIA), which affirmed that multiple use values, including protection of wildlife and their habitats, must be considered in the development of plans for lands it manages.[70]

The land use plan, which is generally developed at the local level,[71] has become the key document guiding grazing management decisions on BLM lands.[72] Theoretically, the plan describes where and how much grazing occurs based on the relative values of the resources BLM is attempting to manage.[73] In practice, management plans often support the status quo by continuing with historic grazing uses that may be in conflict with wildlife conservation or other values.[74] Nonetheless, the land use plan controls the appropriation of BLM lands for grazing and other uses.

A. *The Current Regulations*

The most recent change to the BLM grazing management regime came in the form of amendments to federal regulations promulgated by the Clinton administration in 1994.[75] Carried out under the heading of "rangeland reform," the amendments to the BLM permitting system were intended to address and clarify a wide array of issues relating to livestock grazing on public rangelands.[76] A challenge to the amended regulations by a coalition of livestock industry groups eventually reached the United States Supreme Court in *Public Lands Council v. Babbitt*.[77] The Supreme Court unanimously reaffirmed the content of the regulations.[78] In its ruling the Court held that grazing permits are a privilege that may be modified or revoked at

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69. 43 U.S.C. §1701(a)(8).

70. Public Rangelands Improvement Act of 1978, 43 U.S.C. § 1901(a)(1) (2001).

71. Feller, *supra* note 41, at 10035. The BLM, unlike the Forest Service, maintains a fairly decentralized organizational system. A Resource Area Plan, for example, would cover a division of a state; each state office of the BLM, in turn, is fairly autonomous in that state directors report directly to Washington, D.C.

72. *Id.* at 10033.

73. *See, e.g.*, 43 U.S.C. §1702 (2001) (definition of multiple use).

74. Feller, *supra* note 41, at 10036.

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

76. *Id.*

77. Public Lands Council v. Babbitt, 529 U.S. 728 (2000) [hereinafter *Public Lands Council IV*].

78. *Id.*, at 772. *aff'g* Public Lands Council v. Babbitt, 167 F.3d 1287, 1302 (10th Cir. 1999) [here-

any time for a variety of reasons, and do not confer an absolute statutory right to graze on the public lands.[79] The primary elements of the current grazing system are described below.

1. *Permittee Qualifications*

There is no open bidding on contractual grazing rights on BLM lands, in part due to the history of the TGA.[80] This history stems from congressional acquiescence to unauthorized use of the federal domain and subsequent policies that favored landowners adjacent to federal range.[81] The TGA states, "grazing privileges recognized and acknowledged shall be adequately safeguarded,"[82] thus reinforcing the perception that an entitlement exists for those so situated.[83] Permit holders must meet specific criteria in order to qualify to graze on federal public lands.[84] These requirements were made in part to "safeguard" the status quo for those who have maintained or acquired permits since the TGA was passed, by excluding the general public.[85]

a. *"Residents. . .Engaged in the Livestock Business"*

Under the TGA, preference is given to "landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights."[86] Before the amendments, permittees had to be "engaged in the livestock business."[87] The elimination of this requirement was an issue raised in *Public Lands Council IV*.[88] The Supreme Court upheld the new language, recognizing that Congress expressly created a priority for those "landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights" elsewhere in the TGA.[89] Therefore, the Court held that Congress intended for a broad class of persons to qualify for permits, but that a narrower subclass would have priority.[90]

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inafter *Public Lands Council III*] (holding the permitted use rule was fully within the Secretary's authority under the TGA and the FLPMA)

79. Feller, *supra* note 41, at 10021.

80. COGGINS, ET AL., *supra* note 7, at 758-59.

81. *Id.*

82. 43 U.S.C. § 315(b).

83. COGGINS, ET AL., *supra* note 7, at 758-59.

84. 43 C.F.R. § 4110.1 (2002).

85. Red Canyon Sheep Company v. Ickes, 98 F.2d 308, 314 (D.C. Cir. 1938).

86. 43 U.S.C. § 315b.

87. Feller, *supra* note 41, at 10029; (citing 60 Fed. Reg. at 9925).

88. *Public Lands Council IV*, 529 U.S. at 745.

89. Feller, *supra* note 41, at 10031.

90. *Public Lands Council IV*, 529 U.S. at at 747.

Feller argues that eliminating the regulatory requirement requiring permit holders to be "engaged in the livestock business" has removed a significant impediment for acquisition of grazing permits by non-traditional owners, including conservation groups.[91] He states, "the elimination of the regulatory requirement. . .and the Supreme Court's affirmation of that change, makes clear that organizations whose primary purpose is protection and enhancement of wildlife habitat or other resources, rather than livestock production, can qualify for permits."[92] However, the fact that the TGA requires that permit holders be "stock owners," along with the provisions for "conservation use" which were struck down by the lower courts, suggests that "any environmental organization obtaining a grazing permit should be prepared to purchase some cattle."[93]

b. *Ownership of "Base Property"*

Importantly, *Public Lands Council IV* clarified that grazing preference attaches to "base property."[94] Under the new regulations, a grazing "preference" is "a superior or priority position against others for the purpose of receiving a grazing permit or lease."[95] "Base property" is defined as "[l]and that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year,"[96] or "water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing."[97] The new rules dictate that "preference" prescribes who gets the permits, not the number of livestock permitted to graze under the permit.[98] "Preference" extends to the owner of base property identified with a particular grazing allotment as described in the resource management plan.[99] Thus, when permits need to be renewed or revised, the current permittee has a statutory "first right" of renewal, providing stability to ranch operations dependant on BLM forage to maintain operability.[100] For all practical

91. Feller, *supra* note 41, at 10037.

92. *Id.*

93. *Id.* at 10038.

94. *Public Lands Council IV*, 529 U.S. at 739-742.

95. 43 C.F.R. § 4100.0-5 (2002).

96. *Id.*

97. Telephone Interview with Bill Hedden, Program Director, Grand Canyon Trust, Moab UT (May, 232001). In the extreme, state leases qualify as base property. Thus, some public land grazers operate with no tangible "ranch" at all.

98. 43 U.S.C. § 1752(c).

99. *Public Lands Council IV*, 529 U.S. at 739-742; *see* 43 U.S.C. § 1712 (2002); 16 U.S.C. § 1604 (2002).

100. 43 U.S.C. §1752(c) ("So long as . . . the lands for which the permit or lease is issued remain available for domestic livestock grazing in accordance with land use plans prepared pursuant to section

purposes, the owner of a "base property" has a perpetual lock on grazing leases attached to that property, so long as the owner uses it according to the conditions of the permit.

c. *Other Requirements*

Permittees must also meet certain mandatory qualifications set out in the regulations.[101] For example, a corporation must be authorized to do business in the state where it wants to hold the lease,[102]and the applicant must be a citizen of the United States.[103] Applicants must also have a "satisfactory record of performance,"[104] which means that the applicant is in substantial compliance with any existing federal grazing permit.[105] These requirements would pose little threat to conservationists' attempts to use permits in a more eco-conscious manner.

2. *Permitted Use*

Once a permittee qualifies for a permit, he is only allowed to graze within the context of the management regime described under the TGA, FLPMA, and PRIA.[106] Permitted use "means the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and is expressed in animal unit months (AUM)."[107] 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."[108]

The ruling in *Public Lands Council IV* upheld the primacy of the land use plan to describe the permitted use for each grazing allotment.[109] The land use plan is guided, in turn, by the state level "standards and guidelines for grazing administration" and national "fundamentals of rangeland health."[110] The standards and guidelines are intended to maintain a mini-

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202 of this Act [43 U.S.C.S. §1712] or section 5 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (88 Stat. 477; 16 U.S.C. §1601) [16 U.S.C.S. §1604) . . .").

101. Regulations set out numerous criteria permittees must satisfy before receiving a permit.

102. 43 C.F.R. §4110.1(a)(3); *See, e.g.,* Feller, *supra* note 41, at 10033. Thus, non-profit interest groups and land trusts, who in theory should be eligible to hold leases must be registered to do business in the state in which the leases are to be held.

103. 43 C.F.R. §4110.1(a)(1).

104. 43 C.F.R. §4110.1(a)(3)(b).

105. *Id.*

106. *Public Lands Council IV*, 529 U.S. at 735.

107. 43 C.F.R. § 4100.0-5.

108. *Id.*

109. *Public Lands Council IV*, 529 U.S. at 744.

110. FLPMA, 43 U.S.C.S. §1712.

mum of ecological health by which the permitted use should be judged.[111] Where it is determined that the existing grazing level is impairing achievement of the standards, reduction in livestock numbers may be warranted.[112] The regulations prescribe the level of documentation required to support a change in permitted use, which includes monitoring, field observations, ecological site inventory, or other data.[113] While FLPMA directs the BLM to determine what lands are available for grazing,[114] it is clear that the BLM can determine that certain lands are better suited for other purposes, such as wildlife habitat.[115] Arguably, if there is a mutual interest between the BLM and the base property owner in reducing the permitted use to meet other land use goals, the BLM is capable of approving those changes.

Finally, permitted use includes the concept of "suspended use."[116] Under the TGA, the Department of Interior's Grazing Service, which managed federal public lands directly prior to the creation of the BLM, determined the level of grazing on newly created allotments.[117] Over time, it was clear that, in many cases, the rangelands could not support the level of grazing specified in the original permits.[118] As the DOI and, later, the BLM, reduced the AUMs to reflect the condition of the range, these additional AUMs were regarded as "suspended."[119] Because there is no entitlement to a specific number of livestock, and because the BLM is obligated to protect the ecological health of its rangelands, these "suspended" AUMs are nothing more than "a kind of funny money that allowed ranchers to maintain that their entitlements were intact, while preserving the authority of the BLM to reduce the number of actual cows and sheep on the range."[120] However, the court in *Public Lands Council I* pointed out that "suspended" AUMs are often used to inflate the value of base property and serve as collateral for loans.[121] Thus, while these paper AUMs do not exist from a

111. 43 C.F.R. § 4180.2(e)(2002).

112. 43 C.F.R. § 4180.2(c).

113. 43 C.F.R. § 4110.3 (2002).

114. 43 U.S.C. § 1751(a).

115. U.S. BUREAU OF LAND MANAGEMENT, LAND USE PLANNING HANDBOOK, H-1601-1, Rel. 1-1667 (2000), *at* http://www.blm.gov/nhp/200/wo210/landuse_hb.pdf (last visited May 1, 2002) (Appendix C, at 11, *citing* "soil, vegetation, and watershed characteristics" to be used to identify lands available or not available for livestock grazing [hereinafter BLM PLANNING HANDBOOK].

116. Karl N. Arruda & Christopher Watson, *The Rise and Fall of Grazing Reform*, 32 LAND & WATER L. REV. 413, 444 (1997).

117. *Id.* at 441.

118. Feller, *supra* note 41, at 10024.

119. *Id.*, at 10028.

120. *Id.*, at 10027.

121. Public Lands Council v. United States Dep't of the Interior Sec'y, 929 F. Supp. 1436, 1441 (D. Wyo. 1996) [hereinafter *Public Lands Council I*], *aff'd in part rev'd in part sub nom.* Public Lands

management standpoint, they are often held out as the optimal level to which the permittee should be restored in the future, and are carried on the BLM books as if they existed.[122]

3. *Types of Allotments*

Each permit provides a given amount of grazing use within management delineations known as allotments.[123] In turn, base property may be associated with one or more allotment. Allotments may be categorized as "M" for maintain (these are allotments where condition and trend are satisfactory), "I" for "improve" (these are allotments that have highest need and priority for intensive management), and "C" for "custodial" (these are allotments with low management priority for varying reasons, but generally for the size of the allotment).[124] These categories only appear to be aspirational in terms of directing BLM management,[125] but could be useful in reaching mutual agreements for voluntary reductions in grazing use by the permittee.[126]

Current allotment management relies more on BLM's national "fundamentals of rangeland health" and state-level "standards and guidelines for grazing administration," which are intended to establish minimum criteria for the ecological health of BLM rangelands.[127] These could also provide a basis for adjusting grazing use.

4. *Terms of Permits Fees/Subleases*

While each permit may contain its own terms and fees, there are many universal rules that apply to all permits. As long as the permittee complies with the terms of the permit, the permit is valid for ten years before it must be renewed.[128] Temporary nonuse may be authorized by the BLM in order

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Council v. United States Dep't of the Interior Sec'y, 154 F.3d 1160 (10th Cir. 1998)(hereinafter *Public Lands Council II*).

122. PHILLIP O. FOSS, POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN 197 (University of Washington Press 1960) ("... and capitalized into the value of the ranch so that ... a buyer actually pays for both the private and public lands ...").

123. 43 C.F.R. § 4100.0-5.

124. *See, e.g.*, Arizona Bureau of Land Management, Arizona Strip Field Office, *Rangeland Ecosystems on the Arizona Strip; Managing for Healthy Rangelands,* http://www.az.blm.gov/asfo/index.htm (last modified March 27, 2002).

125. JUDITH-VALLEY-PHILLIPS PLAN, *supra* note 23, at 122.

126. BLM PLANNING HANDBOOK, *supra* note 114, at 111.

127. 43 C.F.R. § 4180.1 (2002)(The standards and guidelines address such factors as condition and function of watersheds, riparian areas, soils, hydrologic and nutrient cycles, water quality, endangered and non-endangered species and plant and animal habitat.).

128. 43 C.F.R. § 4130.2(d) (2002).

to meet land management objectives.[129] A permittee may take temporary nonuse for no more than three consecutive years.[130] However, the "full fee shall be charged for each animal unit month of authorized grazing use" when nonuse is taken.[131]

Fees for any year "shall not be less than $1.35 per animal unit month."[132] Fees are based on a formula using the Forage Value Index, the Beef Cattle Price Index, and the prices paid by farmers for certain goods and services related to the cost of production.[133] In March 2002,[134] the average per acre cost for grazing on BLM lands was set nationally at $1.43/ animal unit month.[135] This compares to a 1990 estimate that the cost to the government of operating the grazing management program was $3.21 to $2.18/AUM.[136]

The BLM, unlike the Forest Service, allows subletting of permitted land.[137] This is accomplished in one of two ways: 1) A permittee may lease the base property to another private party and transfer, with BLM approval, the grazing permit to the other party (a base property lease) or; 2) the permittee may manage another private party's livestock on the permittee's grazing allotment (a management lease).[138] The BLM imposes a surcharge for management leases to recover some of the proceeds from these private transactions involving public land.[139] The management lease gives the permittee control of the livestock and is filed with, and approved by, the BLM grazing officer.[140] The surcharge is equal to thirty-five percent of the difference between the current year's federal grazing fee and the prior year's private grazing land lease rate per AUM for that state.[141] There is no

129. 43 C.F.R. § 4130.2(g)(1).

130. 43 C.F.R. § 4130.2(g)(2).

131. 43 C.F.R. § 4130.8-1(c) (2002).

132. 43 C.F.R. § 4130.8-1(a)(3).

133. 43 C.F.R. § 4130.8-1(a)(1).

134. U.S. Bureau of Land Management, *The 2002 Grazing Fee, surcharge rates, and Penalty for Unauthorized Grazing Use, Instruction Memo. No. 2002-092* (2002), http://www.blm.gov/nhp/efoia/wo/fy02/im2002-092.htm (last visited May 1, 2002).

135. In 2000, the average rate by AUM for private grazing fees in Montana was $14.10. U.S. Dept. of Agriculture, State Statistical Report; Private Grazing Fee Rate; Average Rates by Method of Payment, Montana, USA (January 31, 2002), http://www.nass.usda.gov/mt/economic/prices/grazefee.htm (last visited May 1, 2002)

136. Betsy A. Cooley, *Grazing Fees: An Overview*, CONG. RESEARCH SERVICE REPORT, 96-450 ENR (May 21, 1996), http://www.cnie.org/NLE/CRSreports/Agriculture/ag-5.cfm (last visited May 1, 2002).

137. ARRUDA, *supra* note 116, at 431-2.

138. *Id.*

139. *Id.*

140. 43 C.F.R. § 4130.7(d) (2002).

141. 43 C.F.R. § 4130.8-1(3)(d).

surcharge for a base property lease.[142] The rationale is that people often enter the ranching business by subleasing ranches, and a surcharge rate would make subleasing too expensive.[143]

Finally, there is no maximum lease provision.[144] In theory, a sublease could continue indefinitely. However, some BLM offices require a minimum term of a year to decrease the frequency of the paperwork associated with approval.[145]

5. *Permit Approval*

Whenever a permit is renewed following the ten-year lease term, or whenever a new permit is issued, the authorized officer is required to "consult, cooperate, and coordinate with affected permittees. . .and the interested public prior to the issuance or renewal of grazing permits."[146] In general, this procedure takes the form of an environmental assessment (EA) produced pursuant to the National Environmental Policy Act (NEPA) for each renewal.[147] The range of public involvement often depends on the issues raised during scoping. Some states, like Colorado, may provide a more in depth public participation strategy where significant issues are raised by an individual renewal.[148] The permits are reviewed against the existing land management plans, as well as other relevant BLM guidelines, and follow typical NEPA assessment thereafter.[149] The BLM manages about 18,300 permits nationwide, 4,300 of which are in Montana.[150] BLM attempts to renew about ten percent of the permits each year.[151]

6. *Land Use Plan Amendment*

A change in the kinds and number of livestock, season of use, or amount of use is often specified in the land use plan, typically called the

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142. *Id.*

143. ARRUDA, *supra* note 116, at 431.

144. *Id.* at 435.

145. Telephone Interview with Walter Lujan, Bureau of Land Management, Las Cruces District, BLM (May 30, 2001).

146. 43 C.F.R. § 4130.2(b).

147. 42 U.S.C. §§ 4321-4370(d) (2002).

148. U.S. Bureau of Land Management, Colorado, *Rangeland Management*, http://www.co.blm.gov/range/range.htm. (last modified March 4, 2002).

149. *Id.*

150. Government Accounting Office, *Rangeland Management: Profile of the Bureau of Land Management's Grazing Allotments and Permits*, GAO/RCED-92-213FS at 14 (1992); U.S. Bureau of Land Management, Public Land Statistics, Vol. 185, BLM/BC/ST-01/001+1165, Table 3-10 (2000), http://www.blm.gov/natacq/pls00 (last visited May 1, 2002).

151. U.S. Bureau of Land Management, *Permits/Leases Expired Before October 1, 1999*, http://www.blm.gov/nhp/what/leasestatus.htm (last updated Dec. 4, 2000).

Resource Management Plan (RMP). Therefore, changes to any of these values could require an amendment to the plan.[152] Particularly, a change in the number of permitted AUMs is a planning-level decision, and requires amendment of the RMP.[153] There may be several other tiers to the planning process, including a Watershed Management Plan, or an individual Allotment Management Plan (AMP).[154] The BLM is not required to revise or update its plans on any time period.[155] The BLM specifies that non-controversial amendments to the RMP should be completed within six months.[156] Only proposals affecting an entire RMP, or major portions of a RMP, prompt the BLM to consider a major revision.[157] Because the effort required to amend an RMP is less than the effort required to approve a new plan, BLM is more likely to amend a RMP.[158]

AMPs are implementation plans that are created under the grazing regulation,[159] as opposed to RMPs, which are created under the planning regulation.[160] Similar to RMPs, proposals to create or amend AMPs can be developed by any interested citizen, however their appeal processes are different.[161] AMPs can be revised or terminated with appropriate public involvement.[162] Thus, modifying the grazing regime may require one or more levels of plan amendment.

It is important to note that congressional approval is required for any BLM proposal to exclude "one or more of the principal or major uses. . ." in a land use plan affecting a tract of land of 100,000 acres or more.[163] Thus, elimination of grazing over a significant area could face a "concurrent reso-

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152. 43 C.F.R. § 1610.5-5 (2002).

153. BLM PLANNING HANDBOOK, *supra* note 115, at 11, Appendix C ("Decisions identifying lands available, or not available, for livestock grazing may be revisited through the amendment or revision process if the grazing preference or permit on those lands has been voluntarily relinquished, or if there are outstanding requests to voluntarily relinquish the grazing preference.")

154. *See generally*, GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW, at §10F.02 (2002).

155. BLM PLANNING HANDBOOK, *supra* note 115, at II.

156. *Id.* at VII-1.

157. 43 C.F.R. § 1610.5-6.

158. *Id.* Plan amendment only requires preparation of an EA, as opposed to a full Environmental Impact Statement under Plan revision. BLM PLANNING HANDBOOK, *supra* note 115, at VII-2.

159. 43 C.F.R. § 4100. In 1991, approximately 54% of BLM land in the Judith Valley Phillips Resource Area was included in AMPs. JUDITH-VALLEY-PHILLIPS PLAN, *supra* note 23, at 122.

160. 43 C.F.R. §§ 1600-1610.8 (2002).

161. *See*, 43 C.F.R. § 1610.5-2.

162. 43 C.F.R. § 4120.2(e)(2002).

163. 43 U.S.C. § 1712(e)(2) ("Any management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more shall be reported by the Secretary to the House of Representatives and the Senate.")

lution of non-approval" by Congress.[164] However, in the right political environment, Washington could be more receptive to these kinds of proposals.

7. *Protest and Appeal*

Any change in the kinds and numbers of livestock, season of use, the amount of use, or any other terms of a grazing permit, is protestable and appealable.[165] Protests can be filed with the local authorizing officer of the BLM by "any applicant, permittee, lessee or other interested public."[166] Essentially, the protest is an administrative appeal asking the local officer to reconsider issuance of a permit filed by the protester within fifteen days of the decision. Following a final decision of the officer, which matures after the protest period has lapsed or after the officer has responded to the protest, "any person whose interest is adversely affected by a final decision of the authorized officer" may appeal the decision.[167]

Appellants may request a stay of the decision pending final determination on appeal.[168] Less formal than the traditional court system, any interested party can protest or appeal a decision.[169] Under the grazing regulations, an appellant must first raise the appeal before an administrative law judge.[170] That decision is appealable to the Interior Board of Land Appeals (IBLA) for a final decision.[171] Protest and appeal under the grazing regulations are also available for any revision or adoption of a grazing AMP.[172] This differs from the process for protest of an amendment to a RMP.[173] An amendment to an RMP is subject to notice and comment, and a sixty day "Consistency Review" by the governor of the affected state.[174] The governor, along with any participant with standing, may then protest the decision to the director of BLM.[175] The decision of the director is final and not appealable to the IBLA.[176] Thus, depending on where the challenge takes place, there are several avenues down which the appeals can travel.

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164. *Id.*

165. 43 C.F.R. § 4160.2(2002); 43 C.F.R. § 4160.4(2002).

166. *Id.*

167. 43 CFR § 4160.4.

168. *Id.*

169. 43 CFR § 1610.5-2(a)(2002). There are no apparent standing issues, unlike protests to an RMP, which require that the protestor have "participated" in the planning process.

170. 43 C.F.R. § 4160.4.

171. PLANNING HANDBOOK, *supra* note 115 at Appendix F, 4.

172. 43 C.F.R. § 4120.2(c)

173. 43 C.F.R. § 1610.5-2; PLANNING HANDBOOK, *supra* note 115 at Appendix F-1.

174. PLANNING HANDBOOK, *supra* note 115 at III-7.

175. *Id.* at Appendix F, 3-5.

176. *Id.*

8. *Unused Forage*

Other qualified applicants may apply to use forage made available through nonuse, if the nonuse is compatible with the plan.[177] This provision provides tremendous incentive for the permittee to fully utilize the allowed grazing, and discourages owners who wish to unilaterally reduce grazing pressure on a BLM allotment,[178] as neighbors look across the fence at coveted forage. This "use it or lose it" provision is cited by the livestock industry as necessary to keep grazing the predominant use on BLM lands.[179] Moreover, Justice O'Connor took special pains to clarify her concerns about provisions in the regulation that were struck down by the lower courts regarding a proposed "conservation use" provision that would have allowed nonuse for conservation purposes.[180] Thus, Feller advises that conservation minded land owners should be prepared to buy some cows.[181] However, if the grazing permit can be tailored to meet objectives in one of the planning documents, the plan presumptively trumps any claim by others that forage is "unused,"[182] creating opportunities to reduce the impact of grazing on some allotments.

9. *Transfer*

Permits can be transferred to a new base property owner or to another person or entity, so long as the transferee is qualified. Qualification requires: 1) the transferee to be a citizen of the U.S., or an association or corporation authorized to conduct business in the state; 2) the transferee to have no record of previous grazing regulation violations; 3) the transferee to own base property; and 4) the primary purpose to be for livestock use.[183] The transferee must file an application for a grazing permit as well as a transfer application.[184] Because the transferee must file an application, the issuance of a permit after transfer is subject to notice and comment, protest, and appeal.[185] The transfer cannot be for a period of less than three years.[186]

177. 43 C.F.R. § 4130.2(h) *citing* 43 C.F.R. § 4130.6-3(2002).

178. Feller, *supra* note 41, at 10026, *citing* Mercer v. BLM, No. AZ-04-90-04 (U.S. DOI, Office of Hearings and Appeals, Hearings Div.) (Apr. 23, 1993); 43 C.F.R. §§4110.3-1(a), 4130.6-2. (authorizing the issuance of temporary, nonrenewable grazing permits when extra forage is available).

179. Karen Budd-Falen, *Memorandum – Public Lands Council v. Bruce Babbitt, Analysis of Opinion (2001), at* http://www.snowcrest.net/siskfarm/plcbab.htm.

180. *Id.*

181. Feller, *supra* note 41 at 10038.

182. *See, e.g., Id.* at 10033 (discussing the primacy of land use plans in determining grazing levels); *See also* 43 U.S.C. § 1752(c).

183. 43 C.F.R. § 4110.2-3 (2002).

184. 43 C.F.R § 4110.2-3(a)(4).

185. 43 C.F.R § 4160.1(a).

10. *Termination*

The BLM has the authority to terminate grazing permits for a variety of reasons. For example, a grazing permit can be modified or cancelled because of a change in the federal ownership in an allotment resulting in a decrease in land acreage.[187] A permit may also be terminated because of a change in the land use management plan.[188] While technically the BLM could change its land use management plan to unilaterally terminate a permit or eliminate grazing, Feller noted that it is unlikely to occur given the organizational and procedural impediments to determining that grazing is inappropriate on a given allotment.[189] The land use plan could change grazing by reducing or curtailing the number of AUMs to reflect resource protection, or withdrawing lands from grazing because they are "unsuitable."

A permit may be terminated for a violation of BLM regulatory standards and guidelines. In theory, the regulations require management changes where the standards and guidelines, which are developed by each state BLM office with help from state "Resource Advisory Committees" (RACs), are not being met.[190] Feller comments that grazing management modifications in response to violations of the standards and guidelines are unlikely because the BLM structure relies on local staff to make these modifications. These are the ". . .offices whose traditional subservience to the needs of livestock ranchers created the need for change in the first place."[191] However, compliance with the standards and guidelines are a basis for reducing grazing,[192] and if raised by the permittee would seem to be a compelling basis for the BLM to justify lowering its allowed use.

A permit can be terminated if the permittee violates the terms or conditions of the permit.[193] Permits specify the kinds and numbers of livestock, the period of use, and the amount of use in AUMs.[194] Permits may also include a number of other conditions, such as when reporting is to be done and where and how supplemental feeding can be carried out.[195] A permittee who fails to comply with the terms of a permit could have her permit

186. 43 C.F.R § 4110.2-3(f).

187. 43 C.F.R. § 4110.4-2(a)(1) (2002).

188. 43 C.F.R. § 4100.0-8 (2002).

189. Feller, *supra* note 41 at 10033.

190. *Id.*

191. Feller, *supra* note 41 at 10035

192. *Id.* at 10034.

193. 43 C.F.R. § 4130.3-1(b)(2002).

194. 43 C.F.R § 4130.3-2(2002).

195. *Id.*

terminated.[196]

The regulations describe other prohibited activities that are grounds for cancellation of a permit.[197] These include unauthorized vegetation alteration, littering, interfering with lawful users or uses, placement of poisoned bait, destruction or alteration of streams, and violations of the Endangered Species Act.[198] "[F]ailing to make substantial grazing use as authorized for two consecutive fee years," excluding approved temporary nonuse or use suspended by the officer, is a prohibited act.[199] Thus, a permittee who decides not to graze livestock, or fails to satisfy the allowed AUMs without approval, is in danger of jeopardizing the status of her permit. Therefore, anyone contemplating changes to the grazing regime should be prepared to negotiate.

III. CHANGING THE LAND USE REGIME

Land use on BLM lands has improved markedly since the days prior to the TGA, when the lands were described as terrifically overgrazed.[200] Nonetheless, commentators have expressed frustration at the backlog of allotments identified by the BLM as needing improvement due to failure to meet resource goals for range condition, wildlife, or water quality.[201] Much of the blame for this problem can be laid at the feet of livestock grazing on some BLM lands.[202] The BLM is complicit in this practice, due in part to the history of the organization[203] and because BLM employees often feel obligated to facilitate livestock grazing on BLM lands. Funding shortages have also been identified as a reason detailed assessments have not been conducted.[204]

For years, outsiders have tried to reform the current system. The Clinton Administration's failure to advance many of its 1995 reforms is one example of how formidable the obstacles to externally changing BLM grazing management are.[205] Moreover, the Clinton Administration's attempts to move some BLM lands into more protective designations, such as designat-

196. 43 C.F.R § 4130.3-1(b).

197. 43 C.F.R. § 4130.3-1(a); 43 C.F.R. § 4140.1 (2002).

198. 43 C.F.R. § 4130.3-1.

199. 43 C.F.R. § 4140.1(a)(2).

200. Foss, *supra* note 122; DONAHUE, *supra* note 39 at 55-56.

201. U.S. General Accounting Office, *Public Land Management: Attention to Wildlife is Limited*, GAO Rept. RCED-91-64 at 20.

202. DONAHUE, *supra* note 39 at 117-160.

203. Foss, *supra* note 122.

204. Feller, *supra* note 41 at 10034-10035.

205. *Id.* at 10033.

ing them National Monuments, has also met resistance.[206] While some conservation groups have attempted to affect public policy on BLM grazing lands by acquiring rights to lease individual allotments, these efforts have often been thwarted as well.[207]

Demographic and economic change in prairie country suggests that a new suite of tenants of properties that are linked to BLM permits is on the horizon. These new owners are likely to have different expectations of the land than their predecessors, which, over time, will influence how the BLM perceives its primary charge. Who these new owners will be is anyone's guess at present, but if these new owners are philosophically inclined to improve biodiversity conservation, they could significantly change how the BLM conducts its grazing program.

Under the current regulatory framework, a permittee can use one of several options to improve the conservation of biodiversity on lands being leased from the BLM. These options include: 1) modifying grazing use under the terms of the permit; 2) retiring the grazing privilege; and, 3) using indigenous species as livestock.

A. *Modifying Grazing Use*

The regulations provide several types of opportunities to modify the grazing regime for a given allotment. There are numerous examples where overgrazing has detrimentally impacted native plants and animals.[208] In these cases simply reducing stocking rates, resting some allotments to allow them to recover, or changing the time and place of use, could yield positive benefits for wildlife and vegetation.[209]

1. *Nonuse*

As discussed previously, the BLM has the authority to allow temporary nonuse under specific circumstances.[210] Temporary nonuse can be

206. *See, e.g.*, Jim Robbins, *Debate Over a National Monument Emphasizes Old West-New West Divide*, N.Y. TIMES, Aug. 20, 2001, at A.13. Discusses the conflict over the Missouri River Breaks National Monument designation.

207. Feller, *supra* note 41 at 10038. (Feller cites the Nature Conservancy as one organization that, prior to the decision in *Public Lands Council IV*, was ousted from its permit because it was not "engaged in the livestock business." That is no longer the case following Public Lands Council.).

208. DONAHUE, *supra* note 39 at 117-134; B. Czech et al., *Economic Associations Among Causes of Species Endangerment in the United States*, 50 BioScience 594 (Table 1-182: species endangered by livestock grazing)(2000).

209. DONAHUE, *supra* note 39, at 183; *Cf.*, Charles G. Curtin, *Livestock grazing, rest and restoration in arid landscapes*, 16 Cons. Biol. 840 (2002) (arguing that rest alone may not restore vegetation on overgrazed western landscapes).

210. *See* discussion *supra* at notes 128-130.

used for up to three years to meet management objectives.[211] Nonuse requires authorization from the BLM, although a permittee could, in theory, unilaterally take nonuse for one year without penalty.[212] Two consecutive years of unauthorized nonuse is otherwise grounds for termination of the permit.[213] Improving range conditions, restoring wildlife habitat, and making more forage available to wildlife would seem to qualify as adequate grounds to authorize nonuse given the tenor of the planning guidance under FLPMA and the "standards and guidelines."[214] Due to the time limitation on how long a permittee can invoke nonuse, while nonuse may be capable of temporarily restoring range health, it falls short of providing a mechanism for establishing long-term range conservation goals.[215]

2. *Suspended Use*

As discussed above, prior to the development of land use plans, use was determined for most allotments under the TGA. As use was subsequently modified over time, these TGA "preferences" were "suspended" in favor of "active" use.[216] These "suspended AUMs" exist as paper rights that can be modified or retired.[217] The BLM is authorized to temporarily suspend AUMs due to "drought, fire, or other natural causes. . ."[218] Permitted grazing use can also be reduced where grazing is not complying with the "standards and guidelines", or when grazing is otherwise causing an unacceptable level of utilization.[219] Reductions in use require an opportunity for the public to comment and are protestable and appealable.[220] Thus, a conservation purchaser is in the position to request permanent suspension or retirement of the "nonactive" portion of his permit under the right circumstances. While this would have little practical effect on the immediate amount of use, it would prevent any future owner from increasing use at a later date based on the fiction of an entitlement to suspended AUMs.

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211. *Id.*

212. *See, e.g.*, 43 CFR § 4140.1(a)(2).

213. *Id.*

214. *See, e.g.*, U.S. Bureau of Land Management, Lewistown District, *Standards for Rangeland Health and Guidelines for Livestock Grazing Management*, Lewistown District, Lewistown, Montana at 1-8.

215. The BLM can authorize another qualified applicant "excess forage" (43 CFR § 4130.6-2), *see* discussion *supra* at notes 176-180.

216. Feller, *supra* note 41 at 10028.

217. *Id.*

218. 43 C.F.R. § 4110.3-2(a).

219. 43 C.F.R. § 4110.3-2(b).

220. 43 C.F.R § 4110.3-3(a).

3. *Modifications of the Allotment Management Plan or Resource Management Plan*

A permittee, the public, or the BLM can initiate AMP amendments to meet "specific resource objectives of the plan."[221] Thus, demonstrating that a change in the grazing regime would more readily accomplish an environmental objective of the plan, such as improvement in wildlife forage, would support modification. Modification requires development of an Environmental Assessment, opportunity to comment, consultation with other agencies, and is protestable and appealable following a final decision of the BLM.[222]

Similarly, for more aggressive changes, such as voluntary relinquishment or reduction in AUMs, an applicant could seek amendment of the RMP governing the area controlled by a permit by submitting a proposal to the BLM.[223] BLM land use plans should, in theory, provide many reasons to justify a change in the grazing regime to achieve other resource objectives.[224] Amendments to the RMP are protestable, but not appealable.[225]

As noted above, compliance with BLM's state-level "standards and guidelines for grazing administration" could serve as a basis to adjust the AMP, the RMP, or modify the grazing permit, if the permittee can demonstrate that she is failing to meet the guidelines. This provides an opportunity for the permittee and the BLM to mutually agree to modify the grazing regime to benefit wildlife, water quality, riparian areas, or a number of other ecological values covered under the Guidelines.[226] Arguably, a permit holder is in a better position than the general public to negotiate the kinds of grazing changes needed to achieve biodiversity improvements with BLM[227] because the permit holder is the one most likely to bear the burden of any economic reduction in value of the base property as a result of the reduction in AUMs.[228] If a permittee voluntarily reduces the asset value of their property by sacrificing forage value that was likely capitalized into the purchase price of the base property,[229] (or relinquishes grazing rights through purchase), a major impediment to BLM reluctance to act on behalf

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221. 43 C.F.R. § 4120.2(a)(4).

222. 43 C.F.R. § 4160.4.

223. 43 C.F.R. § 1610.5-5.

224. *See, e.g.*, Feller, *supra* note 41 at 10034.

225. 43 C.F.R. §1610.5-2.

226. 43 C.F.R. § 4180.1 (2001).

227. DONAHUE, *supra* note 39, at 80 (discusses examples where BLM managers ". . .feared the political power wielded by some permittees")

228. *See, e.g.*, Spahr and Sunderman, *supra* note 67.

229. Foss, *supra* note 122 at 197.

of the resource would seem to be removed.[230] Thus, the there is a greater potential to enter into any number of agreements with the BLM to change the grazing regime to emphasize biodiversity conservation.

4. *Modifications of the Permit*

Another potential vehicle for grazing reduction is permit modification.[231] Modification can be instigated by either the permittee or the BLM, and provides an opportunity for the public and affected agencies to comment.[232] Reducing the amount of grazing can benefit wildlife by providing additional forage, reducing the grazing pressure on sensitive places like riparian areas, and allowing recovery of plant communities. Either the transferee or the BLM can request modifications during the transfer of a permit.[233] The transfer of base property is an instant where a conservation-minded purchaser could instigate permit modification, emphasizing wildlife and ecosystem values.

5. *Special Rules*

Special rules are promulgated at the BLM State Director level, when the director determines that local conditions require a special rule.[234] Those rules are subject to public review and comment, and are published in the Federal Register.[235] Special rules could be employed to describe areas of particular environmental significance, which in turn could be used to justify changes in the grazing regime. Given the decentralized nature of BLM management,[236] it seems unlikely that special rules would be employed without concurrence of local BLM managers.

6. *Disposal*

Finally, the BLM may dispose of lands through exchange where it determines that the public interest will be served by making that exchange.[237] In order to be considered for disposal, land must be identified subject to certain criteria.[238] If lands are disposed of, all grazing permit rights are

230. *Cf.*, Budd-Falen, *supra* note 178. Some third parties may nonetheless object to reductions in federal grazing on philosophical grounds.

231. 43 C.F.R. § 4130.3-3 (2002).

232. 43 C.F.R § 4160.1.

233. 43 C.F.R. § 4110.2-3.

234. 43 C.F.R. § 4120.4.

235. *Id.*

236. Feller, *supra* note 41 at 10035.

237. 43 U.S.C. § 1716(a) (1994); Huljev v. BLM, IBLA 2000-114 (2000).

238. JUDITH-VALLEY-PHILLIPS PLAN, *supra* note 23 at 29, 436. ("BLM land will be retained unless

terminated.[239] If the BLM disposes of lands covered by a permit, or changes the "public purpose" of lands covered by a permit to exclude livestock grazing, the permit will be canceled or modified to reflect the change.[240]

The common thread running through all of the potential ways that a permittee could promote a change in grazing is the need for BLM approval. Without BLM's concurrence, changing the status quo through modification of a permit may be impossible. However, the regulations provide flexibility in initiating changes to the grazing system[241] that could benefit biodiversity. A BLM office that is committed to implementing its statutory obligations for conservation could make changing the permitted use through negotiation a somewhat straightforward process.

B. *Retiring Grazing Leases*

One of the more recent tools employed in the effort to change the existing grazing management regime on BLM lands is a "hybrid private/public transaction" in which permittees are paid to relinquish their permits and support amending the land use plan to terminate grazing.[242] The pioneer in this effort is the Grand Canyon Trust (Trust), who has negotiated removal of livestock from over 325,000 acres of BLM land in southern Utah,[243] and currently has another 500,000 acres under negotiation.[244]

The negotiations take the following form. First, there must to be a commitment within the BLM that grazing is an inappropriate use for some allotment.[245] Next, the Trust negotiates directly with the landowner to

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this plan determines that selling a particular parcel meets FLPMA disposal criterion exchanging the land is the public interest.").

239. 43 CFR § 4130.2(d)(1).

240. 43 C.F.R. §4110.4-2(a)(1); *See also,* 43 U.S.C. § 1752(g). Cancellation entitles the permittee to "reasonable compensation" and 2 years prior notice.

241. U.S. Bureau of Land Management, Memo from Henri R. Bisson, Assistant Director, Renewable Resources and Planning Protection, to all Field Officials, Instruction Memorandum No. 2002-124. ("It is imperative that deciding officials consider not only the need to take corrective action as a result of evaluating land health standards but the potential impacts on those who will be most directly economically affected.") http://www-a.blm.gov/nhp/efoia/wo/fy02/im2002-124.htm (last visited May 1, 2002).

242. *See, e.g.,* Feller *supra* note 41 at 10038 (citing, Utah State Office, Bureau of Land Mgmt., U.S. DOI, Approved Amendment and Decision Record for the Henry Mountain Management Framework Plan Regarding the Partial Relinquishment of Grazing Privileges in the Robbers Roost Allotment and Construction of Associated Fences and Cattleguard (June 1, 2000)); Grand Staircase-Escalante National Monument, Bureau of Land Mgmt., U.S. DOI, Environmental Assessment: Proposed Plan Amendment—Grazing (Dec. 8, 1998).

243. *Id.*

244. Telephone Interview with Bill Hedden, Program Director, Grand Canyon Trust, Moab, UT (May 23 2001).

245. *Id*

structure an agreement whereby the rancher relinquishes his or her grazing rights, typically in return for a payment from the Trust.[246] Outside appraisals serve as the basis for determining the grazing value for grazing retirement negotiations.[247] The Trust must have assurance that the BLM, in turn, will then amend its resource management plans to cancel the permit.[248] Competing resource uses in the plan, such as wildlife habitat, are thereby elevated to a more prominent position. If there are water rights associated with the permit, these are transferred in perpetuity to the state wildlife management agency.[249] While this does not guarantee that grazing will be eliminated forever, the agency generally agrees with the retirement and insures that any proposal to graze in the future would go through a "daunting" NEPA process with a right to public comment before approval.[250]

More recently, the Trust has formed a nonprofit subsidiary whose mission is to hold grazing leases and acquire BLM permits by controlling state land leases that qualify as "base property" under BLM regulations.[251] This provides the Trust with additional flexibility in reducing grazing without going through a plan amendment. In addition, the Trust now has forage available to act as a "grass bank"[252] to offer to permittees in exchange for reducing grazing pressure on other, more sensitive allotments. Because the mechanism for retirement depends on the voluntary execution of several steps, the Trust regards support at the agency level and by the permittee, as key elements to implementing this process. Absent one of these elements the technique is not viable.[253] The Trust also recognizes support from key decision makers, in one case a Utah county commissioner, as an important factor in ensuring early success and acceptance of the retirement program.[254]

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246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* (A grass bank is land maintained so that a person who would like to rest their rangeland for one or more years has a place to bring their cattle to graze.).

253. Telephone Interview with Bill Hedden, Program Director, Grand Canyon Trust (April 10, 2002) (Viability of the entire program may be in question for another reason. In April, 2002, a local group in Kanab, Utah, filed a protest with BLM Director Kathleen Clark on the RMP amendments that would have retired grazing on several allotments within the Escalante/Grand Staircase Monument (which is managed by BLM. Concerns raised by the group were impacts to local businesses from a reduction in livestock ranching activity and that BLM's process in retiring the permits was flawed. Since this is the first challenge to the permit retirement program, the Director's decision will have significant implications for future permit relinquishment proposals, although little precedential value unless the decision is challenged in court.).

254. *Id.*

C. *Using "Indigenous Species" - Bison Permitting*

Another recent trend utilizes bison, a potentially more ecofriendly species,[255] as the livestock component of a BLM permit. Bison are covered by a special grazing permit or lease:

> "Special grazing permits or leases authorizing grazing use by privately owned or controlled indigenous animals may be issued at the discretion of the authorized officer. This use shall be consistent with multiple-use objectives. These permits or leases shall be issued for a term deemed appropriate by the authorized officer not to exceed 10 years."[256]

Because the permit or land management plan specifies the kind, class, season of use and amount of use, BLM Districts that have approved allotment conversion to bison require development of an EA.[257]

Conversion of BLM allotments to bison grazing does not come without controversy. Fencing, for example, is typically a major concern for bison conversion proposals. Most proposals involve changing existing fences to three or four-strand barbed wire or up to six strands of electrified fence.[258] While electric fencing is generally believed to be more wildlife compatible than conventional barbed wire fencing, there is concern that electric fencing restricts the movement of elk.[259] Moreover, the public is often concerned with human health and safety issues related to electric fencing on public lands. In one extreme case, the Q Creek Land and Cattle Company installed an unauthorized electric fence in anticipation of a bison conversion in the Rawlins, Wyoming BLM district. This engendered so much public antipathy, that the bison conversion proposal was subsequently dropped.[260] Another concern is that doubling fencing along highway

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255. *See, e.g.*, Joe C. Truett et al, *Managing Bison to Restore Biodiversity*, 11 Great Plains Natural Resources J. 123, 123-44 (2001)(The "replacement" theory (that cattle are the ecological equivalents of bison in terms of grazing impacts) has not been fully resolved c.f., DONAHUE, *supra* note 39 at 134-136. However functional and physiological differences in forage consumption and use between bison and cattle have been noted that suggest bison may be superior in promoting biodiversity.).

256. 43 CFR § 4130.6-4.

257. *See* 43 CFR § 4120.2.

258. *See, e.g.*, U.S. Bureau of Land Management, *Sullivan Electric Fence Environmental Assessment*, WY-030-EA1-180, Rawlins Field Office, Rawlins, WY, (2001) http://www.wy.blm.gov/nepa/docs/SullivanEleFenceEA.pdf (last visited May 1, 2002).

259. U.S. Bureau of Land Management, *Roe Allotment Change in Class of Livestock from Cattle to Bison*, Environmental Assessment No. MT-076-97-04, Dillon Resource Area, Dillon, MT (March 20, 1997) (Mitigation in this case included lowering the top wires to 42 inches, reducing the number of strands, and installing crossing locations.).

260. Telephone Interview with Mary Apple, Public Affairs Officer, Rawlins BLM District (May 23, 2001)(The public may have been predisposed to oppose the proposal because it was locally observed to be a flagrant permit violation by a recent buyer who proposed to shut off traditional public access to public lands.).

rights-of-way might create wildlife traps.[261] The BLM appears to address fencing concerns on a case-by-case basis.[262]

Public access is another area of concern regarding proposals for bison grazing on public lands. Where hunters or other recreationists have access to the allotment, there is some concern that bison present a danger to the public land users, and thus inhibit access to the public lands. Areas that have gone through conversion without public comment are typically BLM lands that receive little or no public access.[263]

Bison are also known to carry brucellosis, which is a potentially devastating disease if spread to domestic animals. Ranchers often raise disease as a concern when bison are proposed as potential livestock by neighboring ranchers.[264] While the assessments produced by the BLM often respond to this concern, it appears that the risk of brucellosis being spread can be addressed through normal livestock husbandry and vaccination procedures.[265] So, while the initial concern is legitimate, brucellosis can be addressed through simple remedial measures.[266]

The stocking rate for a bison to cattle conversion may also be problematic, but has not proven to be an obstacle for conversion to date. The BLM generally considers AUMs for bison as equal to cattle; establishing a one to one conversion from cattle to bison.[267] Occasionally, both cattle and bison occupy the same allotment under a permit.[268] The one to one conversion has yet to be challenged, and it is not clear whether a permittee could negotiate a reduction in AUMs where bison are used rather than cattle. The permit conversion process could take as little as ninety days, allowing thirty days for scoping, a protest period of thirty days, and an appeals period of thirty days.[269] However, in some cases the process has taken up to eighteen

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261. U.S. Bureau of Land Management, *Sullivan Electric Fence*, *supra* note 258; U.S. Bureau of Land Management, *Rawlins Field Office Revised Interim Electric Fence Policy* (May 2001).The Rawlins District has subsequently produced an electric fencing policy to which future bison conversions will have to conform.

262. *See, e.g.*, US Bureau of Land Management, Roe Allotment Change, *supra* note 259.

263. Mary Apple, *supra* note 260; U.S. Bureau of Land Management, *Renewal of Grazing Permit for the Elk Mountain Ranch*, #493254, EA No. WY-030-EA9-118, Rawlins Field Office, Rawlins, WY (October 1999).

264. *See*, U.S. Bureau of Land Management, Roe Allotment *supra* note 259.

265. *Id.*

266. Craig J. Knowles, *Suitability of Montana Wildlands for Bison Reintroduction*, Unpubl. Rept. To Montana Fish, Wildlife and Parks, Helena 27 (2001)(Knowles states that there are no known brucellosis infected bison outside of the Yellowstone ecosystem.).

267. *See, e.g.*, U.S. Bureau of Land Management, *Elk Mountain, supra* note 262.

268. *Id.*

269. *See generally* 43 CFR §§ 4160.1-4160.4.

months.[270]

Finally, the regulations require that bison be "privately owned or controlled."[271] Thus, creating a "wild" bison herd on BLM leased lands may be problematic. Moreover, because states have significant roles in the management of wildlife,[272] any proposal to create a free-ranging publicly-owned bison herd would involve significant state involvement beyond involvement with the BLM.[273] Thus, a permittee who wants to restore bison to BLM lands for their ecological value will have to manage them, at least initially, as domestic stock.[274]

D. *Conclusion*

A conceptual model of the BLM permitting process described above is shown in Figure 1. The permitting process, while straightforward, is nonetheless imbedded with many "risk points." Risk points represent places where changes to permitted grazing use by a conservation-minded permittee could be thwarted by an unfavorable public response, or where the BLM could slow or block changes to the grazing reduction regime. Protest and appeal may occur when: a permit is transferred; when temporary nonuse is granted; when the permit is modified; when there are changes to the AMPs or RMPs controlling permitted uses; and finally, at every interval (usually ten years) that the permit is renewed. The most ambitious of the above techniques, grazing lease retirement, has faced strong resistance.[275] Proponents of grazing on public lands have repeatedly asserted the principle that public lands are critical to the ranching "culture" and local communities.[276] These proponents can be expected to exert a continuous counter pressure for making "underutilized" grass available for livestock grazing. Grazing reductions, despite being acceptable to the permittee, will likely meet oppo-

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270. Email from Russell Miller, Western Properties General Manager, Turner Enterprises, Bozeman, MT (May 24,2001).

271. 43 C.F.R. § 4130.6-4.

272. COGGINS, ET AL., *supra* note 7 at 847.

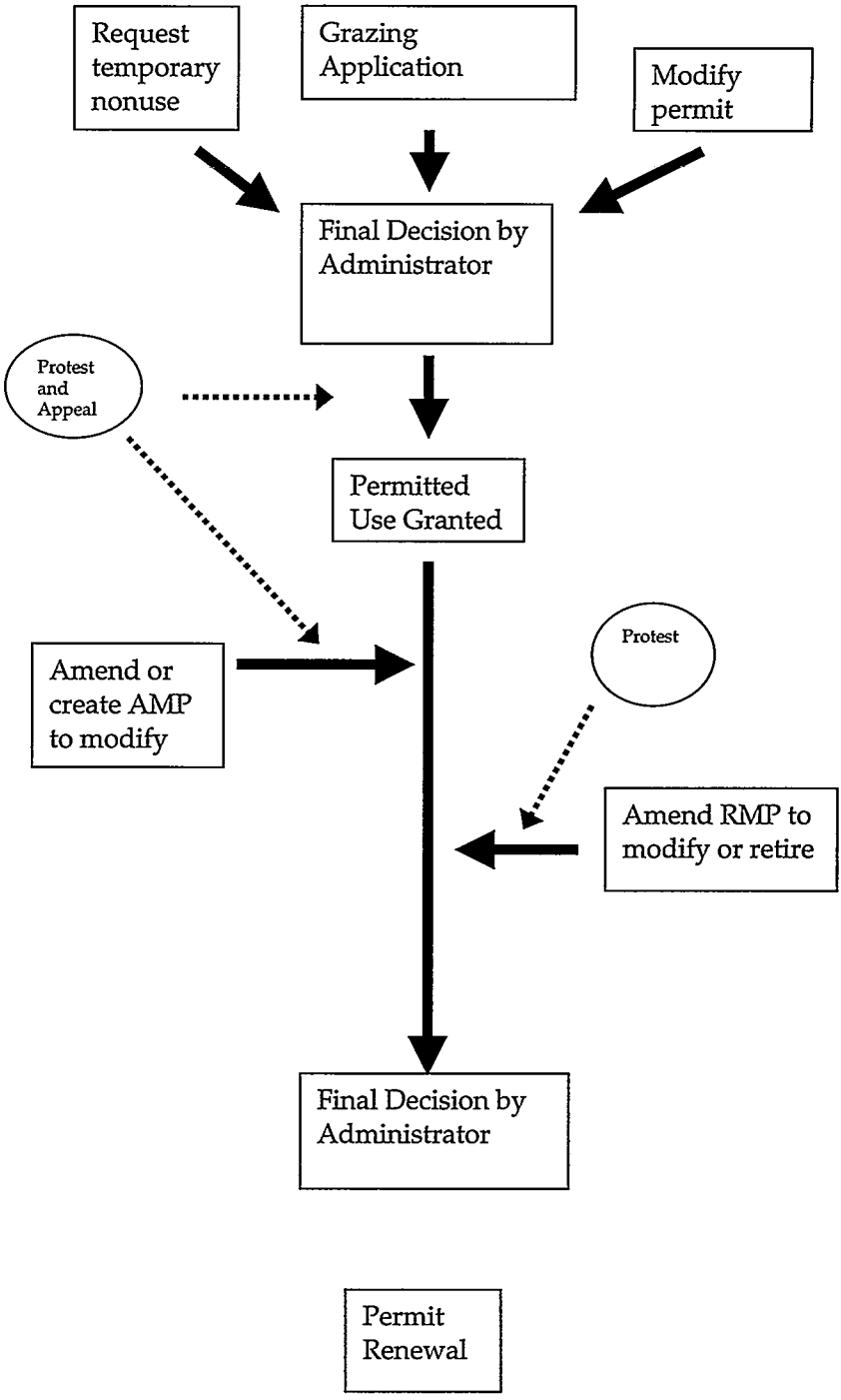
273. *See, e.g.*, MONT. CODE ANN. § 87-5-711(1)(2001)("Except as otherwise provided, the importation for introduction or the transplantation or introduction of any wildlife is prohibited unless the commission determines, based upon scientific investigation and after public hearing, that a species of wildlife poses no threat of harm to native wildlife and plants or to agricultural production and that the transplantation or introduction of a species has significant public benefits.")

274. E-mail from Craig Knowles, Consultant, Fauna West Consultants, Boulder, MT (Dec. 21, 2001)(The Montana Dept. of Fish, Wildlife and Parks has recently rejected a proposal to create a free-roaming bison herd outside of Yellowstone Park. The proposal identified three blocks of land greater than 600,000 acres in which federal/state ownership was greater than 90%.); Knowles, *supra* note 266.

275. *See* Hedden, *supra* note 253.

276. DONAHUE, *supra* note 39 at 268-272.

FIGURE 1. SCHEMATIC VIEW OF THE BLM GRAZING PERMIT PROCESS



sition elsewhere.[277]

While the ownership of base property controlling a BLM lease can provide opportunities to improve biodiversity and conservation through modifications of the grazing regime, temporary resting of permit lands, replacement of cattle with bison, and outright retirement of grazing, there are obvious limits to how far controlling grazing management alone can go to restore biodiversity on a large scale. BLM multiple use principles also control transportation planning, vehicle use, public access for recreation, oil and gas development, mineral leasing, watershed use, and a host of other activities that impact ecosystem-wide processes.[278] The following discussion summarizes the current state of land classification systems attempting to provide conservation protection to large tracts of land.

IV. Moving Toward Prairie Ecosystem Recovery Through Innovative Public/Private Land Use Combinations

While ownership of base property can result in significant management control over leased federal lands, there are limits to what can be accomplished through changes to the grazing management regime alone. Ultimately, a new management context for BLM lands emphasizing biodiversity and habitat protection is necessary if these lands are to be successfully integrated into an ecosystem protection scheme.

A. *Traditional Land Conservation Systems*

The use of BLM lands for conserving biodiversity on an ecosystem scale is a work in progress. In recent years BLM lands have been transferred to other governmental and quasi-governmental entities (e.g., the National Energy Laboratory, Idaho), and have even been proposed for outright transfer to the public.[279] Before suggesting an entirely new vehicle to accomplish transfers of BLM lands or changes to their management emphasis, it is useful to examine models for ecosystem-scale protection that draw on existing institutional structures. While most people understand what a "National Park" designation means, many "alternative" management schemes that accommodate private/public partnerships now exist. The following is a brief description of the menagerie of land use classifications and management structures that exist for putting large landscapes to conservation use.

The Property Clause of the United States Constitution gives ultimate

277. Bill Hedden, *supra* note 253. (The party to the challenge of grazing retirement in Utah was not one of the principals to the transaction.).

278. *See generally*, 43 U.S.C. § 1701-1708 (2002).

279. *See, e.g.*, Coggins et al., supra note 7 at 755-56.

control over the public lands to Congress.[280] Decisions to withdraw public lands for a particular use, and designate them as a national park or wilderness area, reside in Congress. The Antiquities Act of 1906 is a rare exception where Congress has delegated this authority to the another governmental branch.[281] The Antiquities Act gives authority to the executive branch to make withdrawals for national monuments, which historically has served as an important conservation tool.[282] The Secretary of the Interior is also authorized to make limited withdrawals for various purposes unless Congress disapproves.[283] Despite the availability of these alterative avenues to instigate changing the designation of lands currently managed by the BLM, congressional approval or ratification will continue to play a key role in any future land management changes.

1. *National Parks*

When most people think of large conservation areas, they envision National Parks. National Parks are generally large natural places containing a wide variety of attributes, often times, including significant historic assets. The National Park System (NPS) consists of a large number of specially designated lands. Many of these designated lands were initially carved from the public domain, including BLM lands.[284] Hunting, mining and consumptive activities are generally not authorized in National Parks.[285] In 1970, the NPS was broadly defined as, "any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational or other purposes."[286] Today, National Parks include a variety of designations with a variety of management goals, including National Historic Sites, National Historical Parks, National Memorials, National Battlefields, National Cemeteries, National Recreation Areas,[287] Seashores, Lakeshores, Rivers, Park-

280. U.S. CONST., art. IV, § 3, cl. 2.

281. 16 U.S.C. §§ 431-433 (2001).

282. James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U.COLO.L.REV. 483, 499-507 (1999).

283. 43 U.S.C. § 1714(c)(1) (2001).

284. *See, e.g.*, 16 U.S.C. § 402(c) (Bryce Canyon National Park); 16 U.S.C. § 410fff-2(b) (Black Canyon of the Gunnison National Park).

285. U.S. National Park Service, *NPS Management Policies, Chapter 8*, National Park Service, Washington, D.C. (2001) at http://www.nps.gov/policy/mp/chapter8.htm (§8.2.2.6-hunting and fishing; §8.6.7-agricultural use; §8.6.8.1-livestock; §8.7-mineral exploration (currently closed in all parks subject to existing rights); §8.7.1-new mining claims (prohibited in all parks); §8.7.2-new federal mineral leasing (closed in all parks); §8.7.3-oil and gas (NPS may deny if it cannot meet standards at 36 C.F.R. Part 9, Subpart B)).

286. 16 U.S.C. § 1c(a) (1994).

287. National Recreation Areas also occur within the National Forest System, e.g. Sawtooth National Recreation Area, Idaho.

ways, and National Scenic Trails.[288]

The ten largest National Parks in the lower forty-eight states were either designated as monuments or national parks prior to 1948.[289] Death Valley and Yellowstone National Park each contain more than two million acres of land.[290] The combined annual budget of the ten largest parks in FY 2002 was approximately $133 million.[291] The largest national park in the prairie region is Badlands National Park, at 244,000 acres.[292] Badlands received 974,333 visitors in 2001.[293] The ten-dollar admission fee[294] therefore raises about $9.7 million annually.[295]

2. *Wildlife Refuges*

National Wildlife Refuges, managed by the U.S. Fish and Wildlife Service, represent another traditional protected area designation.[296] Most refuges were created by a land withdrawal pursuant to an Executive Order, by Presidential Proclamation, Public Land Order, by a purchase approved

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288. U.S. National Park Service, *Designation of National Park System Units*, http://www.nps.gov/legacy/nomenclature.htm.) (last visited May 1, 2002)

289. *Id.* The 10 largest parks in the lower 48 states as of 2001 were (in order of size, millions of acres): Death Valley, CA (3.3); Yellowstone, WY, MT, ID (2.2); Everglades, FL (1.3); Grand Canyon AZ (1.2); Joshua Tree, CA (1.0); Glacier, MT (1.0); Olympic, WA (0.9); Big Bend, TX (0.8); Yosemite, CA (0.7); Great Smoky Mtns, NC, TN (0.5). U.S.National Park Service, *Visit Your Parks, Park Guide*, under Facts/Docs tab for each listed park, at www.nps.gov/parks.html.The largest NPS unit is the Wrangell-St. Elias National Park and Preserve, AK.At 13.2 million acres it contains 16 percent of the area of all national parks.US National Park Service, *Wrangell-St. Elias National Park and Preserve General Management Plan* (1986) at http://www.nps.gov/wrst/GMP1986/GMP.htm (last visited May 1, 2002).

290. U.S. National Park Service, *Death Valley,* http://www.nps.gov/deva/index.htm (last visited May 1, 2002);
and, *Yellowstone National Park,* http://www.nps.gov/yell/technically/yellfact.htm (last visited May 1, 2002).

291. See, U.S. National Park Service, *Greenbook: Budget Justifications, FY2002, Statebook* (2002) by state tabs for park units listed *supra* note 289 at http://www.165.83.219.72/budgetweb/fy2002/sbtoc.htm. See also Richard J. Ansson, Jr. and Dalton L. Hooks, Jr., *Protecting and preserving our National Parks in the twenty first century: Are additional reforms needed above and beyond the requirements of the 1988 National Parks Omnibus Management Act?* 62 Montana L. Rev. 213, 262 (2001)(With many reports that the parks are under-funded, the true operating expenses are likely greater.).

292. U.S. National Park Service, *Badlands National Park, at* http://www.nps.gov/badl/pphtml/facts.html(last visited May 1, 2002). Also see Knowles, *supra* note 266 at 10-11 (Badlands is also one of a number of park units that maintain bison herds, including Yellowstone, WY, Wind Cave, SD, and Theodore Roosevelt, ND.)

293. *Id.* at http://www.nps.gov/badl/exp/home/htm (last visited May 1, 2002).

294. *Id.*

295. Compare this estimate to the $4.9 million raised by public lands livestock grazing on 1 million acres of public lands in Phillips County, MT. *See supra* notes 23-28.

296. Fish and Wildlife Act of 1956, 16 U.S.C. §742(b). The Refuge System is about 100 years old.(http://refuges.fws.gov/centennial).

through Congress, or by donation.[297] The National Refuge System also includes a large amount of land that is leased or conserved through other agreements, such as conservation easements, outside of a refuge boundary.[298]

In the eight prairie states, the U.S. Fish and Wildlife Service controls about five million acres under the National Refuge System. An estimated forty percent of these lands are held in leases and easements.[299] In Montana, there are some twenty-two refuges, totaling approximately 1.1 million acres, or about a third of the fee title land held in all the prairie states by FWS.[300] The bulk of that acreage, nearly one million acres, is in the CM Russell/UL Bend Wildlife Refuge.[301] Refuge lands are usually obtained pursuant to the Migratory Bird Treaty Act,[302] Fish and Wildlife Coordination Act,[303] Endangered Species Act,[304] North American Wetlands Conservation Act,[305] or specific legislation. Refuges may be subject to reservations or exceptions (mineral development), or they may be overlays on other lands and waters managed by other agencies (e.g., Corps of Engineers or Bureau of Reclamation) and subject to the purpose for which the primary agency acquired the lands.

3. *National Monuments*

National Monuments are created by presidential proclamation under the Antiquities Act, and include landmarks, structures, and other objects of historic or scientific interest situated on lands owned or controlled by the government.[306] Traditionally, National Monuments have been transferred

297. U.S. Fish and Wildlife Service, *How Refuge Units Are Acquired* (2001), http://refuges.fws.gov/general/establishment.htm (last visited May 1, 2002).

298. U.S. Fish and Wildlife Service, Report of Lands Under Control of the U.S. Fish & Wildlife Service as of September 30, 1999 at 8, Division of Realty, Arlington, VA, http://realty.fws.gov/093099.pdf (last visited May 1, 2002)

299. *Id.*

300. *Id.*; ERNEST CALLENBACH, BRING BACK THE BUFFALO!, Island Press (1996) (The National Bison Range at Moise, Montana, was created in 1908 following a donation from the American Bison Society (16 U.S.C. §671). Fort Niobrara National Wildlife Refuge, Nebraska has also maintained a bison herd since 1912).

301. *Id.* at 16.

302. 16 U.S.C. § 715 et seq. (1994).

303. 16 U.S.C. § 661.

304. 16 U.S.C. § 1531 et seq. (1994).

305. 16 U.S.C. § 3922

306. U.S. Bureau of Land Management, *National Monuments,* http://www.blm.gov/nles/monuments/index.htm (last visited May 1, 2002)(With the exception of Wyoming, where national parks and monuments may only be established there by Congress pursuant to legislation. Righter, *supra* note 59).

to the Park Service jurisdiction when designated.[307] However, of the twenty-odd monuments designated during the Clinton Administration fifteen remain under management of the BLM.[308] As former Secretary of the Interior Bruce Babbitt stated, this was intentionally done, "because, by continually robbing the BLM of its 'crown jewels,' we're reinforcing this kind of defeatist image that the BLM is nothing but livestock and mining."[309]

The BLM recently created a new designation for a class of land use called the National Landscape Conservation System (NLCS).[310] These lands are predominantly withdrawn for a specific class of uses. NLCS lands include National Monuments, Wilderness Areas, and National Conservation Areas.

National Monuments typically allow existing uses such as grazing to continue, but generally prohibit mineral exploration and leasing.[311] Some of the largest National Monuments are now managed by the BLM.[312] Moreover, the newly created national monuments are moving away from the strict national park model. California's 250,000-acre Carrizo Plains National Monument,, created in January 2001, typifies the new brand of National Monument.[313] Carrizo Plains is home to plain and vernal pools, and houses the largest concentration of federally listed endangered species in California.[314] The Monument is withdrawn from oil and gas development.[315] Uses still permitted include hunting and grazing, though grazing is restricted in a 27,000-acre no-grazing zone.[316] The monument incorporates joint management by the Nature Conservancy, the California Fish and Game Department, and the BLM,[317] although the National Monument designation applies only to public lands managed by the Bureau of Land Man-

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307. *See generally*, U.S. National Park Service, hhtp://http://www.nps.gov/index.htm (last visited May 1, 2002).

308. *Id.* The Forest Service manages National Monuments as well (*see e.g.* Mt. St. Helens National Volcanic Monument, WA) *at* http://www.fs.fed.us/gpnf/mshnvm.

309. Ed Marston, *Interior View, Bruce Babbitt took the Real West to Washington*, High Country News, Feb. 12, 2001, at p. 9.

310. U.S. Bureau of Land Management, *National Landscape Conservation System*, http://www.blm.gov/nlcs (last visited May, 1 2002).

311. *See, e.g.*, U.S. BLM, *National Monuments*, *supra* note 306.

312. U.S. Bureau of Land Management, *Grand Staircase-Escalante National Monument, at* http://www.ut.blm.gov/monument/.

313. U.S. Bureau of Land Management, *Carrizo Plain National Monument, at* http://www.ca.blm.gov/bakersfield/mission.html (last visited May 1, 2002).

314. *Id.* Including the San Joaquin kit fox, giant kangaroo rat, antelope squirrel, blunt nose leopard lizard, and two listed plants.

315. *Id.*

316. Sam Kennedy, *California Monument Welcomes Cattle*, High Country News, June 4, 2001 at 6, http://www.hcn.org/servlets.hcn.Article?article_id=10563 (last visited May 1, 2002).

317. *Id.*

agement.[318]

4. *National Preserves*

National preserves share characteristics associated with national parks, the difference being that Congress permits continued public hunting, trapping, and limited oil and gas exploration and extraction within preserves.[319] Created by Acts of Congress, many existing national preserves, would qualify for national park designation absent hunting.[320] While hunting is permitted, for flora and fauna protection and other prescribed reasons, the Secretary may designate no hunting zones and restrict hunting or trapping.[321] Inholdings and other aspects specific to the preserve are typically addressed in legislation.[322] California's Mojave National Preserve, is the largest in the lower 48 states at 1.6 million acres.[323] Kansas' Tallgrass Prairie National Preserve is the only National Preserve in the prairie region.[324]

To date, no national preserves have been designated from BLM lands. However, on July 25, 2000, President Clinton signed legislation establishing a new type of National Preserve, one in which title is held by the U.S. Forest Service, but management authority is wholly vested in a government controlled trust.[325] Approximately 94,000 acres of the Valles Caldera, formerly the Baca Ranch, were acquired for $1.1 million and will be managed as a trust.[326] A nine-member board of trustees will manage the preserve.[327]

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318. U.S. BLM, *Carrizo Plain National Monument, National Monument Designation, Questions and Answers, at* http://www.ca.blm.gov/Bakersfield/qanda (last visited May 1, 2002)("Existing private lands within the monument boundaries are not affected by the designation. The overall Carrizo Plain, which includes some state owned land, will continue to be jointly managed by the Bureau of Land Management, the California Department of Fish and Game and The Nature Conservancy.")

319. U.S. National Park Service, *supra* note 288.

320. *Id.*; *Compare*, Alaska National Interest Lands Conservation Act of 1980 16 U.S.C. § 3201 ("A National Preserve in Alaska shall be administered and managed as a unit of the National Park System in the same manner as a national park except. . .that the taking of fish and wildlife for sport purposes and subsistence uses, and trapping shall be allowed in a national preserve under applicable State and Federal law and regulation. . .the Secretary may designate zones where and periods when no hunting, fishing, trapping, or entry may be permitted for reasons of public safety, administration, floral and faunal protection, or public use and enjoyment. Except in emergencies, any regulations prescribing such restrictions. . .shall be put into effect only after consultation with the appropriate State agency having responsibility over hunting, fishing, and trapping activities.")

321. *Id.*

322. *Id; see also* 16 U.S.C. § 410hh-2 (1994).

323. U.S. National Park Service, *Mojave National Preserve,* http://www.nps.gov/moja/index.htm (last visted May 1, 2002).

324. U.S. National Park Service, *Tallgrass Prairie National Preserve,* http://www.nps.gov/tapr/home.htm (last visted May 1, 2002).

325. U.S. Forest Service, *Valles Caldera,* http://www.fs.fed.us/r3/sfe/valles (last visited May 1, 2002).

326. *Id.*

The trust is intended to become financially self-sustaining after fifteen years.[328] Thus, at least a portion of the preserve will be managed as a working ranch, permitting hunting, pursuant to multiple use management.

5. *National Reserves*

National reserves are another type of affiliated designation that has emerged recently under more than one jurisdictional authority. In the NPS, a national reserve is defined as an area of nationally significant resources protected through a program of local land use management. Reserves are supported by federal financial and technical assistance.[329] The three existing national reserves under the NPS are the New Jersey Pine Barrens National Reserve, New Jersey, which includes approximately one million acres and numerous municipalities; Ebey's Landing National Historical Reserve, Washington, which includes several towns and historic sites and is managed jointly with the Washington State Parks on Whidbey Island[330]; and City of Rocks National Reserve, Idaho, along the Utah border, which is jointly managed with the state of Idaho.[331] Typically, a reserve has elements of joint management with local government, multiple ownership interests, and flexible protection elements.

In 1999, Congress established the Headwaters Forest Reserve in California.[332] The BLM co-manages the reserve with the state of California.[333] Creation of the reserve came about following acquisition of Pacific Lumber Company by MAXXAM Corporation. MAXXAM's plans to liquidate much of its old growth redwood forests sparked public protests and disagreements regarding the impact on habitat of the threatened marbled

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327. *Id.*

328. *Id.*

329. U.S. National Park Service, *National Reserves,* http://www.nps.gov/pine/index.htm (last visited May 1, 2002)(National Reserves under the National Park System should not be confused with National Research Reserves established pursuant to the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451-1464) and managed by the National Oceanographic and Atmospheric Agency (NOAA). Examples of these reserves are the South Slough National Estuarine Research Reserve, Oregon, which is managed jointly with the Oregon Division of State Lands and the Elkhorn Slough National Research Reserve, California.)

330. Laura McKinley, *An unbroken historical record: An administrative history of Ebey's Landing National Historical Reserve, The Reserve Concept,* U.S. National Park Service, Cultural Resources Division, Pacific Northwest Region, Seattle, WA (1993) at http://www.nps.gov/ebla/adhi/adhi4h.htm (last visited May 1, 2002).

331. U.S. National Parks Service, *City of Rocks National Reserve,* http://www.nps.gov/ciro/ (last visited May 1, 2002).

332. U.S. Bureau of Land Management, *Headwaters Forest Reserve Fact Sheet,* http://www.ca.blm.gov/arcata/headwaters_factsheet.htm (last visited May 1, 2002).

333. *Id.*

murrelet.[334] An agreement was negotiated by the federal and state governments, and Senator Dianne Feinstein, which bought 7,400 acres of Pacific Lumber holdings for $380 million—$250 million appropriated by the federal government and $130 million by the state.[335]

6. *National Conservation Areas*

National Conservation Areas (NCAs) are created by Congress to conserve, protect, enhance, and manage public land areas for the benefit and enjoyment of present and future generations.[336] NCAs feature exceptional natural, recreational, cultural, wildlife, aquatic, archeological, paleontological, historical, educational, and/or scientific resources.[337] The twelve NCAs created to date are managed by the BLM as part of the NCLS.[338] They increasingly rely on advisory councils to guide management (see, e.g., Colorado Canyons NCA, CO).[339] They often address comprehensive management over a large geographic area. For example, wilderness designation, continued grazing, and withdrawal from mineral and oil and gas exploration are typically addressed in NCA legislation.[340]

7. *Cooperative Management and Protection Areas*

The newest addition to the land classification menagerie is the Steens Mountain Cooperative Management and Protection Area (SMCMPA), Oregon.[341] As a recent participant in the development of this area noted; "We didn't want it classified as a national monument. . .because that immediately shows up on your Rand McNally travel map and everybody comes to see the monument. We wanted a name that was unattractive for the average person."[342]

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334. *Id.*

335. *Id.* (The deal was slightly more complex than indicated. . .the transaction also involved some purchase of adjacent land owned by a different company, some of those lands going to Pacific Lumber and some as a portion of the Headwaters Reserve.)

336. U.S. Bureau of Land Management, *National Conservation Areas, at* http://www.blm.gov/nlcs/conservation.

337. *Id.*

338. U.S. Bureau of Land Management, *National Landscape Conservation System, supra* note 310.

339. U.S. Bureau of Land Management, *Colorado Canyons National Conservation Area,* http://www.co.blm.gov/colocanyons/ccncainfo.htm.

340. *Id; See also,* Black Rock Desert-High Rock Canyon Emigrant Trails National Conservation Area Act of 2000, Page 114 STAT. 2763 Page 114, (U.S. Statutes at Large, page 114 ff.), Public Law 106-554, Signed into Law December 21, 2000 as Amended November 6, 2001 at http://www.blackrockhighrock.org/ncaLegis.asp.

341. U.S. Bureau of Land Management, *Steens Mountains Facts: Legislative Summary,* http://www.or.blm.gov/steens/facts/facts_page.htm (last visited May 1, 2002)

342. Patricia Filip, *The Struggle for Steens Mountain,* Oregon Stater 23, 26 (April, 2001).

Created in October 2000, the designation was the result of negotiations between environmentalists and local landowners.[343] The designation involves some 425,000 acres of BLM land, but includes a basket of provisions: 900,000 acres of lands withdrawn from geothermal and mineral development; 175,000 acres of wilderness, where grazing is eliminated entirely on about 97,000 acres; a redband trout reserve established on two streams; wild and scenic river designation for about 103 additional miles of streams; and a 4,000 acre wild-land juniper management area.[344] The deal included land exchanges in which the local ranchers got about 100,000 acres of arid federal land for some 18,000 acres of high elevation private land plus about $5.2 million in cash.[345] Included in the legislation is about $25 million for future land acquisition.[346] Although all federal lands within the area are to be managed by the BLM subject to FLPMA,[347] the Steens Mountain Advisory Council will advise the BLM regarding management of the SMCMPA.[348] Thus, while the Secretary of the Interior retains ultimate discretionary authority, the Advisory Council could wield considerable political clout over local managers.

8. *Other Kinds of Protection Areas*

There are other land conservation schemes that are essentially land-use-planning-based models for protection. Among these, are is New York's six million acre Adirondack State Park, consisting of forty percent state land and sixty percent private inholdings.[349] The Adirondack Park Agency determines land use and zoning for both state and private lands, and zoning categories control the intensity of use, from unlimited development in existing towns to very restricted development in resource management areas.[350]

B. *Trends in Management Structure of Neo-traditional Land Protection Schemes*

The notion that areas of great natural importance can be set apart from

343. *Id.*

344. U.S. Bureau of Land Management, *Steens Mountains Facts, supra* note 341.

345. Filip, *supra* note 342 at 24.

346. *Id.* at 27.

347. 16 U.S.C. § 460nnn-21 (2001).

348. U.S. Bureau of Land Management, *Steens Mountains Facts*, *supra* note 341; 16 U.S.C. § 460nnn-51.

349. Adirondack Park Agency, *Adirondack Park Land Use Area Statistics,* http://www.northnet.org/adirondackparkagency/gis/colc0008.htm (last visited May 1, 2002).

350. Adirondack Park Agency, *Adirondack Park Agency*, at www.northnet.org/adirondackparkagency.

commercial exploitation and development is little more than a century old in this country. It is little wonder that the models used to conserve land are evolving to meet the political realities that have sometimes run conservation proposals into a dead end. Several of the management themes that are emerging include: multiple or co-management, advisory management boards, grandfathered uses, and private ownership.

1. *Multiple or Co-management*

Many new protected areas involve multiple management entities.[351] For example, the BLM, the California Fish and Game, and the Nature Conservancy jointly manage Carrizo Plains National Monument.[352] The Tallgrass Prairie National Preserve is predominantly owned by the National Park Trust, a non-profit land trust that controls ninety percent of the preserve, and jointly managed with the National Park Service.[353] Headwaters Reserve is a jointly managed by the state of California and the BLM.[354] Arizona's newly created Grand Canyon/Parashant National Monument will be a joint management effort between the National Park Service and the BLM.[355]

Due to the infancy of these co-management models, their long-term performance remains to be seen. Co-management potentially offers benefits in terms of synergizing funding and broadening constituencies. Pitfalls could include increased conflict among competing organizational philosophies, fragmented decision-making, and dilution of mission due to compromise.

2. *Advisory or Management Boards*

Advisory boards and management boards vested with policy-making authority for the protected area are another new trend seen in land management.[356] The presidentially appointed board of trustees for the Valles Caldera Trust includes the local forest supervisor and the Superintendent of

351. The Santa Rosa/San Jacinto Mountains National Monument, created in 2000, is managed by no fewer than 6 entities, including the Coachella Valley Mtns. Conservancy. See U.S. Bureau of Land Management, *Santa Rosa/San Jacinto Mountains National Monument*, http://www.ca.blm.gov/palm springs/santa_rosa_national_monument.htm (last visited May 1, 2002).

352. U.S. Bureau of Land Management, *Carrizo Plains*, *supra* note 313 at http://www.ca.blm.gov/bakersfield/carrizoplain.htm (last visited May 1, 2002).

353. *Tallgrass Prairie National Preserve, supra* note 324.

354. U.S. Bureau of Land Management, *Headwaters Forest Reserve,* http://www.ca.blm.gov/Arcata/plan.htm (last visited May 1, 2002).

355. Grand Canyon Trust, http://www.grandcanyontrust.org/ggc/azstrip/parshant.htm (last visited May 1, 2002).

356. *See, e.g.*, U.S. Forest Service Information *at* http://www.fs.fed.us/r3/sfe/valles (last visted May 1, 2002); National Park Service Information *at* http://www.nfs.gov/tapr/home.htm (last visted May 1, 2002).

Bandelier National Monument, as well as representatives from the grazing, recreation, environmental and business communities.[357] Steens Mountain has a twelve member Advisory Board, including: one private land owner, two grazing permittees, one person interested in fisheries, two environmental representatives, one member of the Burns Paiute Indian tribe, one dispersed recreationist, one commercial outfitter, one consumptive recreation user, one person interested in wild horses, and one person with "financial interest in the CMPA" to represent statewide interests.[358] The newly proposed Great Sand Dunes National Park will also have a temporary advisory board to craft a management plan for the park,[359] while the Tallgrass Prairie National Preserve has a permanent advisory board.[360] The newly created Canyons of the Ancients[361]and Carrizo Plain[362] National Monuments will have advisory boards as well.

While advisory or management boards could provide important synergy for funding, constituency building, and support networking for a protected area, a cautionary note is that the makeup of these boards is somewhat circumspect, given the representation of members whose sole qualification is "financial interest."[363] If these boards seek to improve resource management, then one would contemplate that the positions would reflect areas of expertise relevant to managing resources.[364] While a carefully chosen board could be helpful in implementing the protected area's goals, if positions are chosen to "balance" resource interests with economic or political interests, problems can arise.[365] Miller has described numerous instances in endangered species recovery efforts where "stacked" advisory teams have hampered recovery issues because members chosen for political reasons have advanced, or defended agendas tangential to the recovery effort.[366] Some environmental groups remain skeptical of the Valles Caldera model because of the potential for the trust to become captive to local ex-

357. *Id.*

358. *See, e.g., Steens Mountain Facts*, *supra* note 341.

359. 16 U.S.C. § 410hhh-8.

360. *Tallgrass Prairie National Preserve*, *supra* note 324.

361. 67 Fed. Reg. 20147, April 24, 2002.

362. U.S. Bureau of Land Management, *Canyons of the Ancients National Monument Advisory Committee; Notice of Intent to Establish and Call for Nominations.* 67 Fed. Reg. 20147-20148 (April 24, 2002).

363. *Steens Mountain Facts*, *supra* note 341.

364. *Id.* The SMCMA legislation ameliorated this concern somewhat by establishing a parallel Science Council. See16 U.S.C. § 460nnn-53(2001). However, the Advisory Council has an advisory role in appointing members of the Science Council as well.

365. Brian Miller et al., *Improving Endangered Species Programs: Avoiding Organizational Pitfalls, Tapping the Resources, and Adding Accountability,* Environmental Mgmt. 18, 637-645 (1994).

366. *Id.*

traction interests.[367] If this experiment proves successful, however, it is likely that the model will be repeated in future public land use management contexts.[368]

3. *Grandfathered Existing Uses*

Hunting, grazing, mining, oil development, and even military bombing are all examples of activities currently permitted within different protected areas.[369] These grandfathered uses appear to be a necessary part of the political process to gain acceptance for the higher level of protection afforded by a change in land use designation. While it is possible that some activities may have negligible or even beneficial impacts, grandfathered uses present a non-trivial problem for some areas. Dinosaur Monument, for example, still struggles with grazing-induced resource damage on grazing allotments incorporated into the monument when it was created in 1938.[370] Attempts to bring grazing within the monument into regulatory compliance have resulted in at least one lawsuit in the 1990s.[371]

While the Supreme Court has clarified that grazing on public lands is a privilege, not a right, there lingers an aura of legal protection for existing permittees that is probably not politically extinguishable simply by redesignating BLM lands as new categories.[372] Thus, unless grazing privileges are relinquished voluntarily, grazing will likely continue as part of any strictly government-led effort to create a protected area out of BLM lands. Optimistically, virtually all of our national parks, arguably the most protected landscapes in the United States, were once public lands managed for other uses that potentially conflicted with the mission of the parks.[373] The ultimate resolution of these conflicts in the past suggests that time and money

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367. Matt Jenkins, *Can 'Charter Forests' Remake an Agency?*, 34 High Country News, March 18, 2002 *at* 3.

368. *Id.* (The Valles Caldera model is already being touted as a model for the management of proposed "charter forests."). *See also*, 16 U.S.C. § 410hhh-8. Creation of an advisory board to draft the management plan for the new Great Sand Dunes National Park, CO, while presenting more balanced representation and a sunset provision, is further evidence that Congress is considering this model more often when it designates protected areas.

369. Sonoran Desert Park Project (April 28, 2002) at http://www.sonorandesertnp.org (last visited May 1, 2002).The Sonoran Desert Park Project includes within its proposed boundaries the Barry Goldwater Air Force Range.

370. Matt Jenkins, *Park Boss Gored by Grazing Feud*, 33 High Country News, Oct 22, 2001 at 3.

371. Steve Petersburg, *Retiring Superintendent Knows the Value of Resource Management*, Natural Resource Year in Review-1996, National Park Service, Publ. D-1182 (1997), http://www.165.83.32/pubs/yr_inw96/chapter8/thuffman.htm (n.d.).

372. *See, e.g., Public Lands Council IV*, 529 U.S. at 751(Justice O'Connor concurring).

373. *See generally*, U.S. National Park Service, Untitled, (April 28, 2002) at http://www.nps.gov/parks.htm (last visited May 1, 2002).

present the greatest barrier to complete protection.[374]

4. *"Private" Ownership*

Private ownership of protected lands that benefit the public, such as the Carrizo Plains National Monument, is not a new idea. The Navajo Nation owns New Mexico's Canyon de Chelley National Monument, which has operated under the auspices of the National Park Service since 1931.[375] Private foundation ownership, the model represented by Tallgrass Prairie National Preserve, and quasi-public foundation control as in Valle Caldera National Preserve, are newer versions of public/private partnerships for controlling and managing protected areas. In the case of the Tallgrass Prairie National Preserve, the National Park Trust holds title to ninety percent of the Preserve's property.[376] However, the legislation authorizing the cooperative agreement allows the federal government to spend management funds on the private half of the reserve,[377] but also requires the establishment of an advisory committee to advise the NPS on management of the whole preserve.[378] Thus, while there is nominal control by the Trust (which has its own Board of Directors), outsiders control critical funding influencing preserve programs.[379] Also, a critical distinction here is that in both cases private lands are being brought under quasi-public control. Thus, these arrangements differ markedly from proposals to "privatize" existing public lands,[380] which are often viewed critically.

In conclusion, protected areas increasingly incorporate elements of private management, control and ownership into their design. While these models have yet to be tested, the trend suggests that many view private/public partnerships favorably, as one means to further land protection,[381] in contrast to the traditional model of government ownership and control. Moreover, mixed ownership may provide a means to avoid the "multiple use" trap binding some federal agencies by offering the opportunity to designate private components of reserves as exclusively protected areas for

374. *Cf.*, the list of inholdings in designated National Parks is fairly substantial. National Park Trust, *Saving the Legacy of the National System of Parks*, Annual Report, 2001 at 5 (2001) http://www.parktrust.org/npt-report3/NPT_AR_2001.pdf (last visited May 1, 2002).

375. 16 U.S.C. § 445, 445a, 445b.

376. *Tallgrass Prairie*, *supra* note 324.

377. 16 U.S.C. § 698u-3(f)(1).

378. 16 U.S.C. § 698u-5.

379. *Id.* The thirteen-member advisory committee holds three positions for the Trust, but also includes three positions for "local landowners, cattle ranchers, or other agricultural interests", one range management specialist, one member from the local County Commission, one member appointed by the Governor, and one member appointed from a list supplied by the two local towns.

380. *See, e.g.*, COGGINS ET AL., supra note 7 at 755-56.

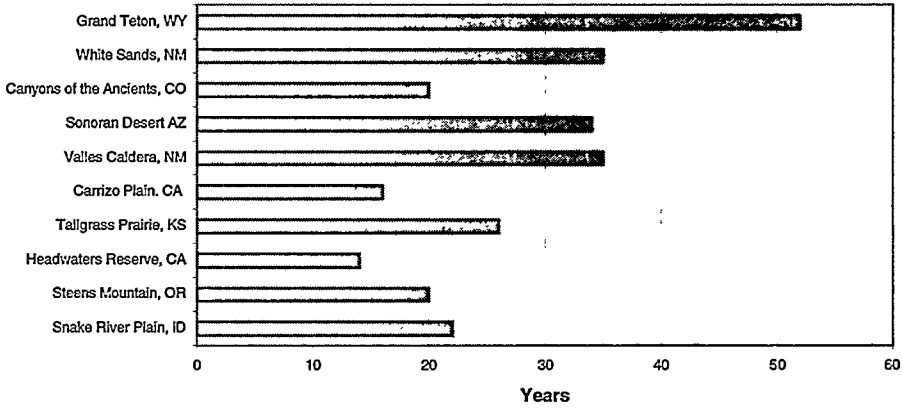
381. *See*, Jenkins, *supra* note 366.

wildlife or other environmental features.[382] In addition to withdrawal from mineral, oil and gas development, which virtually all of the designations embrace, plans that redirect the dominant management direction to ecosystem concerns and protect important features of the landscape contribute in securing the public lands within reserves from further degradation. While recent designations tend to incorporate existing uses, there are many instances where negotiation or purchase of some rights significantly changed BLM management. For example, the Black Rock-High Rock NCA in Nevada closed some 378,000 acres to motorized use following designation.[383] The Snake River Birds of Prey NCA in Idaho has closed two areas to hunting year round.[384] Restrictions like these clearly benefit biodiversity protection. However, whether these changes go far enough to conserve biodiversity remains to be seen.

C. *Practical Realities of Large-Scale Ecosystem Protection*

From a practical standpoint, proponents of large-scale ecosystem protection need to be cognizant of a number of realities involved in assembling the land base to accomplish this end. Common issues are time, opposition, support, competition and cost.

NUMBER OF YEARS TO REALIZE VISION FOR SELECTED PRESERVE PROJECTS



1. *Time*

Even under the most favorable circumstances, the time from conceptualization to realization of large-scale land protection projects can be pro-

382. *Cf.*, The redband trout reserve, Steens Mountain. *Steens Mountains Facts*, *supra* note 341.

383. U.S. BLM, Black Rock Desert, *supra* note 340.

384. U.S. Bureau of Land Management, *Snake River Birds of Prey NCA*, http://www.id.blm.gov/bopnca/overview.htm (last visited May 1, 2002)

tracted (Figure 2).[385] Proponents of creating protected areas can expect realization of their vision to take twenty to thirty years. Thus, patience is a prime requisite in moving protected area designation forward. A proponent's ability to survive changes in administrations, internal changes and fickle public sentiment, is another consideration in attempting to initiate large protected area designation.

2. *Opposition*

Traditionally, some economic interests such as grazing, mining, and other extractive industries oppose parks, monuments, and special areas.[386] On the other hand, proponents of parks and protected areas historically have included local boosters and other diverse business groups ranging from retailers and service providers to real estate speculation.[387] More recently, protected area development has tended to be promoted on more philosophical than economic grounds. However, these economic arguments remain the most compelling to local constituencies.[388] Thus, proponents often need to address local economic interests in their biological or aesthetic arguments for preservation.[389]

One contemporary creation story revolves around the establishment of Tallgrass Prairie National Preserve in 1996, as reported by Niki Christopher. The Tallgrass Prairie National Preserve emerged from the National Park Service's desire to preserve a part of the remaining prairie and its impact on American culture.

In the 1950s, the NPS initiated a search for undisturbed native prairie that would exemplify the former native grasslands of the Midwest.[390] For

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385. Snake River – U.S. BLM, *Snake River Birds of Prey*, *supra* note 383; Steens Mountain – Filip, *supra* note 342 at 26; Headwater Reserve – U.S. BLM, Headwaters, *supra* note 353; Tallgrass Prairie – Christopher, *infra* note 386; Carrizo Plain – Kennedy, *supra* note 316; Valles Caldera – U.S. Forest Service, Valles Caldera, *supra* note 325; Sonoran Desert – Sonoran Desert National Park Project: http://www.sonorandesertnp.org (last visited May 1, 2002); Morris K.Udall, *A National Park for the Sonoran Desert*, 68 Audubon 105-109 (1966); Canyons of the Ancients – U.S. Bureau of Land Management, Canyons of the Ancients, *at* http://www.co.blm.gov/canm/canmfacts.htm (last visited May 1, 2002); White Sands – Michael Welsh, *Dunes and Dreams: History of White Sands National Monument*, Professional Paper No. 55 *at* http://www.nps.gov/whsa/adhi/adhi.htm (last visited May 1, 2002); Grand Teton – Righter, *supra* note 59.

386. *See generally* Welsh, *supra* note 384.

387. *Id.*

388. *See, e.g.*, Niki Christopher, Note, *Cattle Ranch with Park Rangers: the Battle for a Tallgrass Prairie National Park in Kansas*, 18 Stan. Envtl. L.J. 211 (1999).

389. San Luis Obispo Chamber of Commerce, *Ryan foiled by community drive to save Carrizo Plain*, July 2001 *at* http://www.slo-business.com/2001/7carrizo.htm. (last visited May 1, 2002). For example, the Carrizo Plain National Monument has found support from the San Luis Obispo Chamber of Commerce when local elected officials have tried to rescind the Monument designation.

390. Christopher, *supra* note 387, at 218.

historical and geographical reasons, the search soon focused on the Flint Hills of Kansas and Oklahoma, an area that had remained in prairie because of soil and other conditions unique to that area.[391] In 1963, a landowner ran, then Secretary of Interior Stuart Udall, off a private pasture by gunpoint when he landed his helicopter on the pasture during a survey of Chase County, Kansas.[392] Echoing sentiments dating from the earliest time of land preservation,[393] some Chase county residents sported bumper stickers that read "Keep the Grasslands Free: No Government Acquisition".[394] All this occurred despite the fact that the NPS was only going to acquire land in a willing buyer/seller transaction. In response to the lack of interest local communities expressed for the plan during the 1970s and 1980s, the National Audubon Society purchased an option on the 11,000 acre Z-Bar Ranch in one of the target areas.[395] Audubon called for development of a National Monument on the site.[396]

The announcement of the proposal created immediate and distinct fissures between those in the community who supported the proposal and those who opposed it. The largest division was between the local supporters and rural ranchers who opposed it.[397] Over the next four years, an attempt to introduce monument legislation and an attempt by Senator Nancy Kassebaum to resolve the conflict by organizing a private foundation to buy the Z-Bar both failed after the Audubon's option had lapsed.[398] Finally, in 1994, the National Parks Conservation Association loaned the National Park Trust $1.79 million of the $4.79 million purchase price for the ranch.[399] Under the new plan, however, the monument proposal was dead, and the new designation became National Preserve.[400] Charles Cushman, a founder of the Wise Use movement, came to Kansas early on in the debate over the Tallgrass Prairie. According to Christopher:

> "Wise Use claims that the ability of the nation's producers to provide food, sustenance, and jobs is further eroded by the federal government's ownership of large portions of the na-

391. *Id.*

392. *Id.* at 220.

393. Welsh, *supra* note 384 (William Hawkins, an early 20th century anti-park critic in New Mexico in 1929 was heard to remark that "we have enough things locked up in New Mexico now.").

394. Christopher, *supra* note 387 at 220.

395. *Id.* at 222.

396. *Id.*

397. *Id.* at 225-27 (Opponents included the Chase County Livestock Association, the Kansas Farm Bureau, and pro-ranching grassroots groups).

398. *Id.* at 226-27.

399. *Id.* at 227.

400. *Id.* at 227-28.

> tion's richest resources, and its never-ending efforts to acquire even more land under the guise of environmental protection and wilderness preservation. . ."[401]

Whether Cushman actually turned opinion against the proposal is questionable, but clearly local groups utilized tactics from the Wise Use book in furthering their opposition.[402]

Local opponents to the Preserve continually ignored the fact that the ranch was purchased through an arm's length transaction by a willing seller. Opponents claimed the monument would not preserve the Flint Hills "in the manner for which God intended them, [sic] as prime grazing land for cattle."[403] Another opponent stated that the Pope "is for property rights" and would deplore the effort to "cut off so much land from work and devote it to idleness."[404]

Christopher postulates that local support was, and continues to be, critical for furthering conservation at the Preserve.[405] Christopher claims that the presence of national environmental groups within the park proponent's camp provided a lightning rod for Wise Use attacks that weakened the ultimate preserve designation.[406] However, she fails to recognize that absent the action of the national groups, the Audubon Society and Nation Parks Conservation Association, the first steps towards conservation may never have been taken.[407] So, while local advocacy is critical to countering opposition to land protection in most protected area designations, support from national conservation groups can serve an important role as well.[408] Moreover, proponents of protected areas should anticipate opposition regardless of the merits of their proposal.

3. *Support*

Virtually all successful efforts to create parks or other protected areas

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401. *Id.* at 241-42.

402. *Id.* at 245-46 (According to Christopher, Cushman advises local groups to create controversy, to never miss a meeting, and to seize every opportunity to speak out. He recommends intimidating speakers, exaggerating the issues, and taking names. These included: a) an obsessive search to identify those in favor and those against the proposal at meetings; b) listing local landowners supportive of the proposal in letters to the editor; c) videotaping meetings; and d) personal threats and threats of boycotts at hearings against those in support of the proposal.).

403. *Id.* at 254. Donahue states that religion plays a role in influencing range conservation debates because religion has helped shaped the utilitarian attitudes held by many western livestock operators. DONAHUE, *supra* note 39 at 98-104.

404. *Id.*

405. *Id.* at 257-68.

406. *Id.*

407. *Id.* at 224-228.

408. *See generally,* Rasband, *supra* note 282.

have a history of an extensive base of support. Public support is usually coupled with the presence of an "angel" taking the form of a highly placed administration official, an influential congressperson, or other influential person.[409] In the case of White Sands National Monument, for example, Albert Fall, an early proponent of the park idea, failed to usher park legislation through Congress even after he became Secretary of Interior.[410] Failure to gain support of the fledgling National Park Association, and the fact that legislation was coupled with seizure of Indian lands, spelled the demise of attempts to legislate the park into existence.[411] Later, proponents sought a more focused proposal that relied more heavily on NPS involvement, and were successful at obtaining National Monument designation for a portion of the White Sands Dunes.[412]

Similarly, legislators are often influential in moving projects to completion. Despite the appearance that the Clinton administration's monument designations were unilateral acts of a lame duck administration, many of the monuments were proposed for special protection prior to being designated,[413] indicating general recognition of their importance. Protected area proponents need to consider how they will develop public support to improve their chances of success.[414]

4. *Competition for the Public's Imagination*

Another common hurdle that developers of all protected areas face is the limited availability of public attention for a given proposal at any one time. Proponents are often competing for the dollars and public attention that moves legislators and others to act. Moreover, the "marketplace" of

409. *See generally*, Welsh, *supra* note 384.

410. *Id,* at Chapter 2.

411. *Id.*

412. *Id.*

413. *See, e.g.*, Kennedy, *supra* note 316 (For example, a bill was introduced in 1999 to declare the Carrizo Plain a national conservation area by Democratic Rep. Lois Capps, cosponsored by Republican Rep. Bill Thomas, whose district also overlapped the plain); *See also*, U.S. Bureau of Land Management, *Canyons of the Ancients, supra* note 384 (Republican Senator Ben Nighthorse Campbell introduced national conservation area legislation in February, 2000 (S. 2034)); U.S. Bureau of Land Management, *California Coastal National Monument, Fact Sheet*, at http://www.ca.blm.gov/news/2000/01/nr/coastal_monument_factsheet.html (In June, 1999, a bill (H.R. 2277) was introduced by Congressman Sam Farr to designate the same coastline as national wilderness); U.S. Bureau of Land Management, *Santa Rosa and San Jacinto, supra* note 351 (The Santa Rosa and San Jacinto Mountains National Monument was considered for National Monument status as early as the 1920's, and was designated a National Scenic area in 1990).

414. *Cf.*, The Nature Conservancy, *Tallgrass Prairie Preserve*, http://nature.org/wherewework/northamerica/states/oklahoma/preserves/tallgrass.htm (last visited May 1, 2002). The Nature Conservancy has been largely successful in protecting thousands of acres without any large-scale campaign of public involvement. The Conservancy presently owns a larger tallgrass prairie "preserve" (38,000 acres) than Tallgrass Prairie National Preserve.

conservation proposals is crowded. Analysis of a few of the large-scale projects currently being advocated (Table 9) suggests that competition is fierce for the public's attention. Proponents of new projects will increasingly have to rely on sound financial analysis and conservation planning[415] to justify the conservation value and viability of their proposed projects to distinguish them from many other deserving conservation efforts. Coordination between proponents may be an effective manner in which competing for the public sentiment can be reduced.

5. *Cost*

Traditionally, only an entity as large as the federal government possessed the resources capable of making significant acquisition and reclassification of land possible. More recently, private and nonprofit wealth has reached levels that rival the personal wealth of some of our nation's early park-creating philanthropists.[416] In most cases, however, outright purchase can be prohibitively costly, particularly in areas with high resource or amenity values. For example, buyout costs for Headwaters Reserve were $51,351/acre.[417] Estimates for the Arroyo Hondo Ranch, CA, a 782-acre part of the Gaviota Coast Acquisition, is proposed at $5115/acre.[418] In other areas such as the Maine woods and Kansas prairie per acre real estate prices are low enough ($400-$900/acre) that large-scale acquisition is feasible.[419] Current land prices over much of the northern high plains are similarly low.[420] Thus, prairie land acquisition is highly competitive relative to the per acre costs for other potential conservation properties in other ecosystems, making prairie conservation attractive from a cost to conservation efficiency standpoint.

Management costs are also significant. Per acre management costs of managing the largest national parks, monuments, and preserves range from $2.03/acre (Death Valley) to $38.26/acre (Tallgrass Prairie).[421] While costs

415. Nick Salafsky, Richard Margoluis, and Kent Redford, *Adaptive Management: A tool for Conservation Practitioners* 37 (2001), Biodiversity Support Program, Washington, D.C. ("Project managers have to understand the complicated ecosystems that they are working in. If this were not enough, they also have to understand the cultural, social, economic, and political systems that influence the behavior of the many stakeholders at the project site.").

416. *See generally,* Righter, *supra* note 59.

417. U.S. BLM, *Headwaters Reserve, supra* note 332.

418. U.S. National Park Service, *Gaviota Coast Feasibility Study* (2001), *at* http://www.nps.gov/pwro/gaviota (last visited May 1, 2002).

419. Turkel, *supra* note 60; *Tallgrass Prairie, supra* note 324.

420. Telephone Interview with Curt Freese, Director, Northern High Plains Ecoregion, World Wildlife Fund (March 25, 2002)

421. *See generally*, U.S. National Park Service, *National Parks, supra* note 307.

may be significantly less for the prairie region, these ongoing costs need to be addressed in any protected area development strategy.

TABLE 10. SOME CURRENT LARGE-SCALE ECOSYSTEM PROTECTION PROPOSALS.

Project Name	Location	Approximate Scale - acres	Federal Lands	Land Type	Desired Outcome
Owyhee/ Bruneau Canyons[422]	ID, OR	3 million	2.7 million	High desert, 344 miles-River	National Monument
Hell's Canyon[423]	ID, OR	1.5 million	1.5 million	Canyon, surrounding mountains	-High Wallowas Nat'l Park, -Chief Joseph Nat'l Preserve, -Snake River Breaks NRA
Prairie Preserve[424]	SD, WY, NB	ca. 1-2 million	Majority	Prairie	National Preserve
Gaviota Coast[425]	CA	200,000	Some	Coastline, Mountains	National Seashore
Sonoran Desert[426]	AZ	3 million	3 million	Desert	Cabeza Prieta NWR and Organ Pipe Cactus NM-Nat'l Park; Barry Goldwater Air Force Range (BLM)-Nat'l Preserve
Loess Hills[427]	IA	Mixed ownership	None	Unique geology, mixed grass prairie	National Park
Great Sand Dunes N.M.[428]	CO	200,000 (added)	Mostly private	Unique geology	Monument addition; National Park
Petrified Forest[429]	AZ	97,800 (added)	Mixed	Desert	Park addition
Canyonlands[430]	UT	544,000 (added)	Majority	Desert	Park addition
Yellowstone to Yukon[431]	Canada, ID,MT, WY,WA	Millions	Mixed	Mountains	General land use protection

422. Owyhee Canyonlands, http://www.owyheecanyonlands.org (last visisted May 1, 2002).

423. Hell's Canyon Preservation Trust, http://www.hellscanyon.org (last visted May 1, 2002).

424. Conservation Alliance of the Great Plains, at http://www.coservationalliance.org (last updated Nov. 27, 2001).

425. Gaviota Coast Conservancy, at http://www.gaviotacoast.org/news.htm (last visited May 1, 2002); U.S. National Park Service, *supra* note 418.

426. Sonoran Desert National Park Project, *supra* note 373; Todd Wilkinson, *National Parks: The Next Generation*, National Parks Conservation Association Magazine, Sept.-Oct. 2000, at 30 http://208.226.1212/publications/magazine/September_October/Next_Generation.asp (last visited May 1, 2002).

427. *See*, Wilkinson, *Id.*

428. The Nature Conservancy, *The Nature Conservancy signs agreement to buy 97,000-acre Baca Ranch*, http://nature.org/aboutus/press/press501.htm (last visited May 1, 2002); Mark Hunter, *Baca Ranch purchase paves way for new park,* Denver Post, Jan 31, 2002.

429. *See* Wilkinson, *supra* note 425.

430. *Id.*

431. Yellowstone to Yukon Conservation Initiative, http://www.rockies.ca/y2y (last visited May 1, 2002).

IV. USING PRIVATE LANDS TO LEVERAGE PUBLIC LANDS CONSERVATION

Historically, the conventional wisdom indicated that the BLM was neither inclined, nor politically capable, of taking a dominant role in the ultimate disposition of its lands. Thus, in the past, the BLM was often simply divested of its lands or management authority, which were given to another government agency.[432] However, many recent innovative changes in the public land base have been forged from BLM lands. Moreover, the BLM is developing the capacity to manage large landscapes for conservation purposes through the NLCS.[433] In terms of assessing the feasibility of establishing an ecosystem-scale protected area that involves BLM lands, one would have to conclude, from the examples above, that public/private conservation efforts are both feasible and increasingly more attractive as land conservation models.

Putting aside the issue of whether grazing can be conducted in a way that benefits biodiversity conservation, it is fair to say that the grazing permit system was designed to give tremendous leverage to permit holders to the detriment of any other resource use.[434] Grazing continues to be the one use that is most often grandfathered into the neo-traditional land protection schemes, suggesting that local permittees still exert inordinate influence over the political process.[435]

Moreover, a permit holder is in a unique position to influence ongoing BLM management. First, being a permittee gives the landowner a seat at the BLM management table.[436] As an "insider," permittees enjoy intimate contacts with the agency that the general public does not.[437] Second, if BLM wishes to move forward positively, a conservation-minded permittee can facilitate the changes the BLM would like to make simply by acquiescing to them. Third, with constituents few and far between on the prairie, simply changing the ratio of conservation-minded to business-as-usual permittees will affect how the BLM sees its role and defines its mission.[438] Fourth, having a legal interest in the surface use of the land provides permittees with judicial standing to challenge the actions of the BLM, or others, that might adversely affect the BLM lands leased by the permittee.

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432. *See* Marston, *supra* note 309.

433. *See* discussion *supra*, notes 305-347.

434. COGGINS, ET AL., *supra* note 7 at 763.

435. *See, e.g.,*, US BLM, *National Conservation Areas*, *supra* note 336.; *Steens Mountain*, *supra* note 341. Grazing will continue in all of the 15 BLM Monuments designated during the Clinton administration as well as all currently existing NCAs.

436. DONAHUE, *supra* note 39 at 80.

437. *Id.*; *See also*, Feller, *supra* note 41 at 10035 (BLM managers "must rely. . .on recommendations from. . .grazing specialists. . .whose closest working relationships are often with the permittees.")

438. *See, e.g.,* DONAHUE, *supra* note 39 at 80.

Particularized harm is increasingly difficult for conservation-minded plaintiffs to establish, so this is not a trivial advantage.[439]

This is not to say that permit holders have carte blanche with respect to what goes on with BLM lands that they lease. BLM land users include a number of other established constituencies, including hunters, recreationists, grazers, miners, scientists, and the general public, who ultimately need to be persuaded that a change in management direction is appropriate. Moreover, the BLM permit renewal and planning process gives such individuals ample opportunity to challenge proposed changes.[440] Thus, while permit ownership does not guarantee that the BLM will undertake new directions in management, it is certainly reasonable to assume that the process would be facilitated by a compliant group of permittees. Moreover, the BLM has exhibited a willingness to move toward more aggressive conservation measures on many of the lands it manages. Changing ownership base may provide the impetus to make these changes sooner rather than later.

V. RECOMMENDATIONS

Private/public partnerships are one way to make large-scale ecosystem protection a reality on the Great Plains. Initially, the impetus for change on BLM lands will have to come from conservation-minded permittees, who can utilize the existing management system to address biodiversity concerns, either through modifications of the grazing regime, retiring grazing where appropriate, or utilizing indigenous species like bison. These actions alone could result in immediate improvements to about forty percent of the range identified by the BLM as needing improvement.[441] Perhaps more importantly, the BLM has the legal authority and capacity to undertake management changes to improve biodiversity conservation where permittees acquiesce in the modification or retirement of use.[442]

However, individual changes to some BLM allotments in and of itself will not accomplish ecosystem-scale protection. The most direct path to assembling a large protected area is through outright acquisition and management of large blocks of private lands. With the BLM as a willing partner, a private entity could accomplish ecosystem restoration within a sizeable area, assuming adequate endowment funding and modest BLM coopera-

439. Sam Kalen, *Standing on its Last Legs: Benet v. Spear on the Past and Future of Standing in Environmental Cases*, 13 J. LAND USE & ENVTL. L. 1, 47 (1997).

440. *See* discussion, *supra*, notes 273-278.

441. JUDITH-VALLEY-PHILLIPS PLAN, *supra* note 23 at 122, Table 3.14. Of 2,800,000 acres in BLM allotments on the Judith-Valley-Phillips Management Area, 1,696,178 ac (59%) were classified as Category I, needing improvement.

442. *See* discussion, *supra* notes 208-278; Feller, *supra* note 41 at 10038.

tion. While in the past these arrangements relied on federal legislative authority, recent transactions give reason to believe that privately funded efforts could produce wide public acceptance and more favorable outcomes where private landowners have a seat at the management table.

The BLM has broad management discretion over its lands, and for the most part, resistance from the grazing constituency is the primary hurdle for more ambitious conservation efforts on BLM lands. Moreover, a strictly private venture avoids various pitfalls such as legislative dilution of the mission and manipulation by opponents through the political process. Management agreements and memoranda of understanding could describe the management responsibilities of the parties that fall outside of the existing regulatory context. With the BLM as a more interested partner, large-scale ecosystem objectives could be realized through changes to BLM resource and management plans, special management designations, land exchanges, purchase and retirement of livestock grazing permits, conservation easements, and joint management agreements between BLM and the land owner. Because fragmentation is one of the most critical aspects to landscape conservation, ownership of interspersed private lands would create a seamless management regime over a much larger area. This would serve to connect public lands critical for wildlife habitat, to create corridors between habitats, and other consolidation beneficial to biodiversity conservation.

With the BLM as an indifferent, or, at worst, adversarial landlord, base property ownership nonetheless puts the owner in a strong position to advocate on behalf of change in BLM management direction. The base property owner can undertake management strategies, such as reduced predator control on leased BLM lands with minimal BLM cooperation or involvement. At the other end of the spectrum, the base property owner is in a better position than the general public to advocate more stringent regulation of the allotments controlled by the owner, or even divestiture, if the lands are of national significance to biodiversity conservation. Moreover, ownership of base property within a proposed protected area provides assurance that the outcome will be superior to those existing examples reviewed in this report because: 1) grazing privileges controlled by the base property owner can be bartered for elimination or exchange; 2) the base property owner will have a source of endowment revenue to fund a portion of the costs of creating the protected area; 3) the private property inholdings of the base property owner will be available to create refugia, no hunting zones, and specially protected areas within the protected area; and 4) the base property owner will be in a position to either direct management or co-manage the protected area based on its strategic land ownership.

In short, combining BLM base property leases with privately held conservation properties represents a potentially powerful vehicle to leverage

large-scale ecosystem conservation, with or without the BLM's cooperation. Either path could lead to ecosystem protection, with perhaps superior outcomes both in terms of public cost and conservation outcomes. If resource management permitting significant private land acquisition by conservation-minded becomes a reality in the northern Great Plains, it may prove to be a powerful conservation tool.