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Management of the National Grasslands

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MANAGEMENT OF THE NATIONAL GRASSLANDS

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I. INTRODUCTION

The national grasslands cover nearly four million acres of federal lands within the United States.[1] A few national grasslands can be found in the Western states, however, most lie within the Great Plains states.[2] In fact, lying within the borders of one Great Plains state, North Dakota, is the largest national grassland, the Little Missouri National Grassland.[3]

The Little Missouri National Grassland's history is representative of the history of many other national grasslands in the Great Plains states. It originated as a land utilization project composed primarily of submarginal lands,[4] which Congress acquired through emergency relief legislation during the Great Depression.[5] Immediately following their acquisition, the

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1. U.S. Forest Service, U.S. Dep't of Agriculture, *The National Grasslands Story* at 1, *available at* http://www.fs.fed.us/grasslands/text.htm (last visited Sept. 17, 2002) [hereinafter *The National Grasslands Story*].

2. *Id.* at 4; H. H. WOOTEN, U.S. DEP'T OF AGRICULTURE, AGRICULTURAL ECONOMIC REPORT NO. 85, THE LAND UTILIZATION PROGRAM 1934 TO 1964: ORIGIN, DEVELOPMENT, AND PRESENT STATUS 76-77 (1965). The Crooked River National Grassland covers 111,348 acres in Oregon; the Curlew National Grassland covers 47,756 acres in Idaho; and the Butte Valley National Grassland covers 18,425 acres in California. ERIC OLSON, OFFICE OF THE GENERAL COUNSEL, U.S. DEP'T OF AGRICULTURE, NATIONAL GRASSLANDS MANAGEMENT—A PRIMER 5 (1997).

3. U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE NORTHERN GREAT PLAINS MANAGEMENT PLANS REVISION 1-3 (July 1999) [hereinafter DRAFT EIS]. The Little Missouri National Grassland incorporates 1,028,051 acres within its boundaries, comprising more than one-quarter of the total national grasslands acreage in the United States. *The National Grasslands Story*, *supra* note 1, at 4.

4. Memorandum for the Secretary Covering the Little Missouri Land Adjustment Project LU-ND-38-1 (Site I) [hereinafter Excerpt I]; Memorandum for the Secretary Covering the Little Missouri Land Adjustment Project (Billings) LU-ND-38-2 (Site II) [hereinafter Excerpt II]. According to a Federal Surplus Relief Corporation (FSRC) resolution dated January 13, 1934, submarginal lands are those "giving a return that is less than is to be properly expected from the labor expended with the result that the owners remain impoverished while working them." PHIL HOOKER, CHRONOLOGY OF THE LAND UTILIZATION PROGRAM 4 (1941).

5. *See* National Industrial Recovery Act of 1933, Pub. L. No. 73-67, § 202, 48 Stat. 200 (1933); *see also* Emergency Relief Appropriations Act of 1935, Pub. Res. 74-11, 49 Stat. 115 (1935); Emergency Relief Appropriations Act of 1936, Pub. L. No. 74-739, § 689, 49 Stat. 1608 (1936); Bankhead-Jones Farm Tenant Act of 1937, Pub. L. No. 75-210, § 32, 50 Stat. 522 (repealed Sept. 27, 1962) [hereinafter BJFTA]. The Secretary of Agriculture exercised his substantive acquisition authority under these acts pursuant to the procedural requirements set out in the

project lands were managed by a number of federal agencies, each for a very short period.[6] Then, following the enactment of the Bankhead-Jones Farm Tenant Act (BJFTA),[7] the law that has guided and directed national grasslands administration since 1937, the Soil Conservation Service (SCS)[8] administered the project lands for approximately sixteen years.[9]

During its administration, the SCS's primary objective was to control use of the grasslands within the land utilization projects and secure soil stability.[10] This led to improved ecological conditions, which in turn created an interest in purchasing these lands for private use. In 1954, the Secretary of Agriculture transferred these lands, along with most of the other land utilization project lands, to the Forest Service in order to facilitate their disposal to private individuals.[11] Over time, however, a new policy evolved for the disposal and management of these lands.[12] The Secretary of Agriculture decided to dispose of nearly six million acres of the land utilization project lands to states, colleges, individuals, the National Park System, the Bureau of Land Management, and the Forest Service under the auspices of his BJFTA authority.[13] As to the remaining acres, the Secretary classified them for retention in the Forest Service and named them the National Grasslands.[14] The lands within the Little Missouri National Grassland fell into this latter category.

Act of August 1, 1888, and the Declarations of Takings Act of 1931. 40 U.S.C. §§ 257, 258(a) (2000).

6. HOOKER, *supra* note 4, at 15-20. Between 1933 and 1960, the national grasslands were managed by the Federal Surplus Relief Corporation (1933-1934); the Federal Emergency Relief Administration through the Submarginal Land Committee and Rural Rehabilitation Division (general conduct of the land program and acquisitions) and the Agriculture Adjustment Administration (planning for agriculture projects) (1934-1935); the Resettlement Administration (1935-1937); the Bureau of Agricultural Economics (1937-1938); the Soil Conservation Service (1938-1954); and the Forest Service (1954-present). *Id.*

7. 7 U.S.C. §§ 1010-1012 (2000).

8. The Soil Conservation Service was renamed the Natural Resources Conservation Service in 1994. *See* The Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 246, 108 Stat. 3223 (1994).

9. CRAIG RUPP, HISTORY OF NATIONAL GRASSLANDS 3 (1975).

10. *Id.*

11. *Management and Disposition of Acquired Lands Under the Bankhead-Jones Act, 1954: Hearing Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 83d Cong. 2-5 (1954) (statement of Edward C. Crafts, Assistant Chief, United States Forest Service) [hereinafter 1954 Hearing]. In 1954, Congress was considering about half a dozen pending bills that would have disposed of individual tracts of land by giving the Secretary of Agriculture the authority to dispose of all Title III land. *Id.*

12. RUPP, *supra* note 9, at 4.

13. *Id.*

14. *Id.*; Administration of Lands Under Title III of the BJFTA by the Forest Service, 36 C.F.R. § 213.1 (1960).

Beginning with the classification of the national grasslands for permanent retention in 1960, the Forest Service started to apply its policies and laws to the national grasslands.[15] It seemed to reverse this practice somewhat with amendments to its regulations in 1963.[16] However, the reversal did not last. Perhaps as a result of increased pressure for recreational opportunities and environmental preservation,[17] or simply because it did not take time to understand and apply the laws enacted to guide the national grasslands administration,[18] the Forest Service again began to apply national forest laws, which by their plain language did not apply, to the national grasslands.[19] In the 1990s, the Forest Service seemed to fully embrace this approach to national grasslands management, in a National Grasslands Management Primer[20] and two other documents that specifically apply to the Dakota Prairie Grasslands, the Forest Service's 1999 Northern Great Plains Management Plans Revision (Revision) and Draft Environmental Impact Statement (Draft EIS).[21] Altogether, these documents reveal a management approach that dismisses the unique legal status and historical development of the national grasslands and ignores the purposes and uses for which they were acquired.[22]

This approach to national grasslands administration has the potential to destabilize agricultural operations dependent on forage from the national grasslands, oil and gas operations within the national grasslands, and local communities that receive revenues from these operations. Under the Forest Service's preferred management approach to the Dakota Prairie

15. Memorandum from Richard R. McArdle, Chief of the Forest Service, to Regional Foresters (Apr. 1, 1960) [hereinafter McArdle].

16. Administration of Lands Under Title III of the BJFTA by the Forest Service, 36 C.F.R. § 213.1.

17. Terry West, *USDA Forest Service Management of the National Grasslands*, 64 AGRIC. HIST. 86, 88-89 (1990).

18. RUPP, *supra* note 9, at 5, 9.

19. *See generally* McArdle, *supra* note 15 (stating that the policies and procedures from the Forest Service Manual appear applicable to the national grasslands). A good example of this is the Forest Service Chief's memorandum applying multiple use and sustained yield principles to the national grasslands notwithstanding the fact that the Multiple Use Sustained Yield Act (MUSYA) of 1960 applied to National Forests only. Memorandum from Richard E. McArdle, Chief Forest Service, to Regional Foresters 2 (June 2, 1960); Memorandum from Morris Hankins, Office of General Counsel, to Regional Foresters 33-34 (Oct. 25, 1977) [hereinafter Hankins].

20. OLSON, *supra* note 2, at 1-2.

21. DRAFT EIS, *supra* note 3, at 1-6 to -7.

22. *See infra* Part IV (explaining that when the federal government acquired the national grasslands, it became obligated to manage them pursuant to declarations of taking incorporated into the final judgments and orders created when the grasslands were condemned).

Grasslands,[23] the approach described as "alternative three" of the Forest Service's Draft EIS, the Forest Service says that it plans to reduce grazing by nearly ten percent.[24] However, some economists claim the true grazing reduction under this management approach will be much larger.[25] Dr. Leistritz and Dr. Bangsund, economists at North Dakota State University, estimate that the Forest Service's management changes could cause up to a seventy percent reduction in livestock grazing on parts of the Dakota Prairie Grasslands.[26]

In addition to reducing grazing on the Dakota Prairie Grasslands, the Forest Service's proposed management strategy will decrease oil and gas development activities on these grasslands.[27] Economists estimate that in North Dakota alone, these changes could reduce basic sector revenues from the energy industry by up to $51 million annually for ten years following implementation of the Forest Service's new management plan.[28]

As the opportunity for oil and gas development and the ability to access forage disappear, so will the families who populate the towns and counties within and near the Dakota Prairie Grasslands. With a smaller tax base, local governments will be less able to provide basic utilities and services,

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23. The Dakota Prairie Grasslands is a unit of the National Forest System that includes the Cedar River National Grassland, the Grand River National Grassland, the Little Missouri National Grassland, and the Sheyenne National Grassland. DRAFT EIS, *supra* note 3, at 1-1.

24. The 10% figure is derived by comparing the Forest Service's estimated forage consumption on the Dakota Prairie Grasslands of 418,000 animal unit months (AUMs) in 1999 and the approximately 376,000 AUMs allowed under preferred alternative three in the Draft EIS. U.S. Forest Service, U.S. Dep't of Agriculture, *Livestock Grazing*, 4 REVISION REP. 7, 10 (July 1999) [hereinafter REVISION REPORTER]; DRAFT EIS, *supra* note 3, at 2-13. One AUM is the amount of forage necessary to sustain a mature cow (1000 pounds), a cow-calf pair, or five sheep or goats for one month. JERRY L. HOLECHECK ET AL., RANGE MANAGEMENT: PRINCIPLES AND PRACTICE 190 (3d ed. 1998).

25. F. LARRY LEISTRITZ & DEAN A. BANGSUND, REGIONAL ECONOMIC EFFECTS OF PROPOSED REVISED MANAGEMENT PLANS FOR THE NATIONAL GRASSLANDS IN NORTH DAKOTA: A SUMMARY 4-5 (1999).

26. *Id.* at 1. Professors Leistritz and Bangsund believe the Forest Service's preferred alternative could result in a reduction of 64-70% of AUMs on the Sheyenne National Grassland and 36-48% of AUMs on the Little Missouri National Grassland. *Id.*

27. REVISION REPORTER, *supra* note 24, at 10. The Forest Service estimates a mere sixty-acre decrease in lands available for oil and gas leases. *Id.* However, the North Dakota State Industrial Commission estimates a loss of 136,537.8 acres for oil well drilling in the Little Missouri National Grassland alone. Memorandum from John Bluemle, State Geologist, to Members of the N.D. Industrial Commission 4 (Dec. 7, 1999).

28. LEISTRITZ & BANGSUND, *supra* note 25, at iv. According to Professors Leistritz and Bangsund, this reduction has the potential to eliminate up to 68.8 full-time employees per year in occupations directly associated with energy activities. *Id.* Secondary employment, which includes jobs dependent on the existence of energy activities, would drop from 1646 to 869 full-time jobs. *Id.*

including roads and schools.[29] These effects would likely force even those who could afford to remain, following implementation of the Forest Service's proposed management scheme, to leave.

The potential economic and social impacts of the management strategy set forth in the Revision and Draft EIS on the communities that rely on the Dakota Prairie and other national grasslands for their livelihood demand a thorough analysis of the Forest Service's proposed management strategy. To assist with that analysis, this paper discusses the legal basis for the Forest Service's development of the Revision and the Draft EIS. It also reconstructs and examines the process by which the federal government established the national grasslands. Finally, this paper analyzes whether the Forest Service's current approach to national grasslands administration comports with Congress's purpose for establishing the national grasslands and complies with federal law as it currently applies to the national grasslands.

II. THE NORTHERN GREAT PLAINS MANAGEMENT PLANS REVISION AND DRAFT ENVIRONMENTAL IMPACT STATEMENT

A. THE NORTHERN GREAT PLAINS MANAGEMENT PLANS REVISION

The 1974 Forest and Rangeland Renewable Resources Planning Act (RPA), as amended by the 1976 National Forest Management Act (NFMA),[30] requires the Forest Service to develop and amend[31] land and resource management plans (LRMPs) for each National Forest System unit.[32] In June 1987, the Forest Service implemented an LRMP for the Custer National Forest, a forest system unit that, at the time, included North Dakota's Little Missouri National Grassland.[33] Recently, the Forest Service decided to revise the part of the Custer National Forest LRMP pertaining to the Little Missouri National Grassland.[34] The Forest Service conducted this revision in conjunction with a larger project called the Northern Great Plains Management Plans Revision. Altogether the Revision includes

29. The Forest Service must pay local counties 25% of the annual net revenues received from the national grasslands. 7 U.S.C. § 1012 (2000). These revenues support local schools and county roads. *Id.* The loss of this revenue could exacerbate the impact of lowered tax revenues.

30. 16 U.S.C. §§ 1600-1614 (2000).

31. Federal law requires that the Forest Service revise LRMPs every fifteen years. 16 U.S.C. § 1604(f)(5).

32. 16 U.S.C. § 1604(a).

33. DRAFT EIS, *supra* note 3, at 1-1.

34. *Id.* at 1-2.

revised management plans for three national forest system units, two of which include national grasslands.[35]

B. THE NATIONAL ENVIRONMENTAL POLICY ACT AND ENVIRONMENTAL IMPACT STATEMENTS

The 1969 National Environmental Policy Act (NEPA) requires federal agencies to prepare environmental impact statements (EISs) for "major Federal actions significantly affecting the quality of the human environment."[36] An EIS is an agency document that details the environmental impact of a proposed action, including adverse and unavoidable environmental impacts, alternatives to the proposed action, the relationship between short-term uses and long-term productivity of the resources involved, and the potential irreversible and irretrievable commitment of resources involved in the proposed project.[37]

Notably, NEPA does not include substantive (as opposed to procedural) requirements.[38] However, federal agencies frequently modify their proposed actions based on the information obtained while preparing an EIS.[39] An agency usually designs and analyzes a spectrum of possible project modifications, each of which has a different environmental impact on the area where the proposed project will occur.[40] The proposed modifications become alternatives in a project's EIS.[41] Once analysis of these alternatives is complete, the agency will select one of them as its preferred approach to implementing the project.[42]

The Revision project is a major action for which the Forest Service has completed a Draft EIS.[43] The Draft EIS proposes six alternative courses of

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35. *Id.* at 1-1. The Northern Great Plains Management Plans Revision is a combined planning revision effort aimed at three National Forest System units: the Dakota Prairie Grasslands Unit, the Medicine Bow-Rutt National Forest Unit, and the Nebraska National Forest Unit. *Id.*

36. 42 U.S.C. § 4332(2)(C) (2000).

37. *Id.* § 4332(2)(C)(i)-(v).

38. "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." Methow Valley Citizens v. Robertson, 490 U.S. 332, 351 (1989); *see also* Strycke's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (stating NEPA was designed to insure a fully informed and well-considered decision, but does not require agencies to make a particular decision).

39. *See Methow Valley*, 490 U.S. at 350-52 (stating NEPA's requirement that agencies take a "hard look" at environmental consequences is almost certain to affect the agency's substantive decision, even though NEPA does not require any particular action).

40. 40 C.F.R. §§ 1502.15-.16 (1995).

41. *Id.* § 1502.14.

42. *Id.* § 1502.14(e).

43. *See* USDA Forest Service, *Proposed Land and Resource Management Plan for the Dakota Prairie Grasslands, Northern Region 1999 available at* http://www.fs.fed.us/ngp (last

action.[44] Each is a distinct approach to national grassland management, with varying environmental, social, and economic impacts. Out of the six alternatives, the Forest Service designated alternative three as its preferred approach to national grasslands management.[45] Alternative three reduces traditional and legally authorized grassland uses, supplanting them with special area designations, and increases recreational opportunities.[46] Under alternative three, approximately 49,000 acres of the Dakota Prairie Grasslands are set aside for special area designations.[47] In addition, parts of the Dakota Prairie Grasslands are designated for special wildlife habitats, ecosystem restoration, and other management activities purported to balance ecological values and human occupancy.[48] Unfortunately, not only does the Forest Service lack clear legal authority to make these designations,[49] but these designations are contrary to the historical purposes for which the national grasslands were acquired and the laws under which the Forest Service must administer them.[50]

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visited Oct. 5, 2002) (providing guidance for resource management of the Dakota Prairie Grasslands); DRAFT EIS, *supra* note 3, at 1-1.

44. DRAFT EIS, *supra* note 3, at 2-1, 2-5. A Final EIS has now been provided by the Forest Service and can be viewed at http://www.fs.fed.us/r2/whiteriver/rfp/EIS/FEIS.htm.

45. *Id.* at 2-5 to -6.

46. *Id.* at 2-5.

47. *Id.* at 2-43.

48. *Id.* at 2-39 to -43.

49. In the Draft EIS, the Forest Service bases its authority to create special interest areas on NEPA and 36 C.F.R. § 294.1 (2001). *Id.* at 3-269. Although NEPA describes the responsibility of federal agencies to preserve important historic, cultural, and natural aspects of our national heritage, NEPA is a procedural statute and does not give the Forest Service authority to designate special interest areas on the national grasslands. *See supra* note 38. In addition, 36 C.F.R. § 294.1 provides that areas within the National Forest System that should be managed principally for recreation may be specially classified. 36 C.F.R. § 294.1. This regulation does not give the Forest Service authority to "protect or enhance areas with unusual characteristics, such as scenic, historical, geological, botanical, zoological, paleontological or others," the purpose for which special interest areas are created according to the Draft EIS. DRAFT EIS, *supra* note 3, at 3-269.

Also, in the Draft EIS, the Forest Service claims the designation of Research Natural Areas (RNAs) is authorized under the Organic Administration Act of 1897, 16 U.S.C. § 551 (2000). *Id.* at 3-237; FOREST SERVICE MANUAL § 4063.01 (1990) However, this law and therefore this authority only extends to the national forests. 16 U.S.C. § 551 (2000). Therefore, the Secretary is exceeding the scope of his authority to the extent that he provided the Forest Service authority to designate RNAs on the national grasslands.

Similarly, wilderness designations may only incorporate lands within national forests, national parks, monuments, national wildlife refuges, and game ranges. 16 U.S.C. §§ 1131-1132 (2000); CONSTANCE E. BROOKS, HISTORICAL ANALYSIS OF NATIONAL GRASSLANDS: REBUTTAL TO U.S. FOREST SERVICE MANAGEMENT POLICY 27 (2000). Therefore, a recommendation for wilderness designations on the national grasslands is also outside the scope of the Secretary of Agriculture's and the Forest Service's delegated authority.

50. *See infra* Parts III-IV.

III. THE FORMATION AND MANAGEMENT OF THE NATIONAL GRASSLANDS

A. SETTLEMENT AND DECLINE OF THE GREAT PLAINS

During the nineteenth and early twentieth century, the United States focused on "getting the lands into the hands of the pioneer, the individual farmer seeking a new life on the frontier."[51] In the 1841 Preemption Act[52] and again in the 1862 Homestead Act,[53] Congress provided settlers with a relatively cost-free means to obtain title to public lands. Although these Acts encouraged quick settlement of the United States' vast land base, they were based on unrealistic expectations for land productivity and, as evidenced by the Dust Bowl, ultimately resulted in the reduced productivity of many lands.[54]

The environmental and economic impact of the homesteading laws was particularly evident in the Great Plains. Coupled with a few years of substantial rainfall, these laws encouraged overly dense settlement in the Great Plains.[55] The homesteaders profited for a time, but when the economy soured in the 1920s, low prices, high taxes, and declining crop yields led to significant property devaluation, crop failure, and tax delinquency.[56] These dismal economic conditions caused some population decline, but not in numbers sufficient to stabilize the poor economic and environmental conditions on the Great Plains.[57]

During the early 1930s, the combined effects of prolonged drought, economic depression, and technological developments, which provided more opportunities to plow and develop the land, further aggravated the situation for small landowners continuing to farm in the Great Plains and elsewhere.[58] By 1935, approximately 454,000 of the farms in the United States were "on land so poor that operators [had] practically no chance [to

51. GEORGE C. COGGINS, FEDERAL PUBLIC LAND AND RESOURCE LAW 79 (3d ed. 1993).

52. Preemption Act of 1841 §§ 2257-2281, 5 Stat. 453 (repealed 1891).

53. Homestead Act of 1862 §§ 161-162, 42 U.S.C. §§ 161-284 (repealed 1974).

54. Keith A. Argow, *Our National Grasslands: Dustland to Grassland* 3, *reprinted from* AM. FORESTS, Jan. 1962.

55. LOYD GLOVER, AGRICULTURAL ECONOMICS DEPARTMENT, AGRICULTURAL EXPERIMENT STATION, SOUTH DAKOTA, THE FUTURE OF LAND USE PURCHASE PROJECTS IN SOUTH DAKOTA 6 (1957). During this time, counties incurred large debts to build the infrastructure necessary to support public facilities, roads, and schools in these overpopulated areas. *Id.*

56. *Id.*

57. *Id.* The population decline failed to ease debts acquired by school districts and counties. *Id.* at 6-7. Instead, their debts rose as property values fell and the tax base shrunk. *Id.*

58. *Id.* at 6.

secure] a decent living,"[59] and submarginal farms covered nearly seventy-five million acres, twenty million of which were in crops.[60] These conditions created strong support for the submarginal land purchase program proposed and implemented in the 1930s.[61]

B. INITIAL DEVELOPMENT OF THE LAND PROGRAM

Congress's initial response to the increasing number of submarginal lands was to pass the 1929 Agricultural Marketing Act (AMA).[62] This Act provided the Federal Farm Board with the authority to investigate the possible reduction of marginal acres in cultivation.[63] Three years after the AMA became law, Secretary of Agriculture Arthur M. Hyde responded to mounting distress among submarginal farmers by arranging a National Conference on Land Utilization.[64] "The Conference adopted a series of resolutions, many of which [ultimately became] guidelines" for the federal land utilization program.[65]

Then, early in 1933, President Hoover personally requested that Congress implement a recommendation from Secretary Hyde that the government lease submarginal lands in order to convert them to other uses.[66] Soon thereafter, the National Land Use Planning Committee,[67] a by-product of Secretary Hyde's National Conference on Land Utilization, released a report addressing the public acquisition, retention, and management of submarginal lands.[68] These events culminated in the enactment of the 1933 National Industrial Recovery Act (NIRA),[69] which provided the President with the authority to create an official land program.[70]

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59. M. L. Wilson, Assistant Secretary of Agriculture, *The Report on Land of the National Resources Board*, 17 J. FARM ECON. 41, 44 (1935).

60. *Id.*

61. GLOVER, *supra* note 55, at 8.

62. WOOTEN, *supra* note 2, at 4.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. The National Land Use Planning Committee included representatives from federal bureaus and land grant colleges. *Id.*

68. *Id.* The National Land Use Planning Committee proposed "retirement of 75,345,000 acres of 'land where physical and economic conditions are so unfavorable that the lands should be retired from arable farming and devoted to other uses.'" HOOKER, *supra* note 4, at 1.

69. National Industrial Recovery Act of 1933, Pub. L. No. 73-67, § 202, 48 Stat. 201 (1933).

70. It is Congress, not the Executive, who holds the power to acquire lands. U.S. CONST. amend. V. However, in this instance, Congress delegated its power to condemn private property to the President. Interestingly, this delegation was not explicit. Title II, § 202(c) of the NIRA authorized the Federal Emergency Administration of Public Works to "make such expenditures . . . as are necessary to carry out the provisions of this title." National Industrial Recovery Act of

Following passage of the NIRA, the Special Board of Public Works (the Board) authorized and approved the land program, also denoted as the "land utilization program," which was to be administered by the Federal Surplus Relief Corporation (FSRC).[71] The Board allotted $25 million to the land program from the Fourth Deficiency Act, an Act passed for the purpose of carrying the provisions of the NIRA into effect.[72]

Soon after acquiring administrative responsibility for the land utilization program, the FSRC issued a resolution describing three goals for the land program: "(1) The purchase of lands[,] (2) The conversion of land purchased to a use beneficial to the people of the United States[, and] (3) The permanent rehabilitation of the population at present living on land purchased."[73] Lands acquired under the program had to be in cultivation and growing crops at a submarginal rate of production.[74] The lands also had to be "available or suitable for development as forests, or as parks or recreation spaces, or as grazing ranges, or as bird or game refuges."[75] Once the government acquired the lands, the FRSC designated agencies to create development plans for the lands. Those plans were to indicate the specific

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1933, Pub. L. No. 73-67, § 202, 48 Stat. 201 (1933). Another provision in Title II required that the President establish "a comprehensive program of public works, which shall include among other things . . . conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion." *Id.* Together these provisions might lead one to imply that the funds required to acquire the national grasslands were expenditures necessary to carry out the comprehensive plan provided for under the NIRA. However, these provisions did not give the President or federal agencies explicit authority to acquire lands. Notwithstanding this fact, on March 6, 1935, President Roosevelt decided to "authorize and designate the Federal Emergency Relief Administrator, and Director of the Land Program as he may be authorized by the Administrator, to acquire by purchase or by the exercise of the power of eminent domain any real or personal property or any interest therein." HOOKER, *supra* note 4, at 13 (citing Exec. Order No. 6983 (Mar. 6, 1935)).

71. HOOKER, *supra* note 4, at 3.

72. *Id.* Following enactment of the NIRA, Congress enacted the Emergency Relief Appropriations Acts of 1935 and 1936. These acts continued appropriations for "rural rehabilitation and relief in stricken agricultural areas," and "rural rehabilitation, loans and relief to farmers and livestock growers," respectively. Emergency Relief Appropriations Act of 1935, Pub. Res. 74-11, 49 Stat. 115 (1935); Emergency Relief Appropriations Act of 1936, Pub. L. No. 74-739, § 689, 49 Stat. 1608 (1936). Funds available to acquire lands under these laws expired June 30, 1939. GLOVER, *supra* note 55, at 10. By that time, the United States Department of Agriculture (USDA) had purchased 9,091,570 acres at the cost of $46,277,273. *Id.*

73. Edward G. Grest, Chief, Division of Land Utilization Projects, U.S. Forest Service, *Brief History of the Land Utilization Program* 2 (Sept. 21, 1954) [hereinafter Grest, *Brief History*].

74. HOOKER, *supra* note 4, at 4. Later policy instructions allowed the federal government to acquire intervening or adjacent unoccupied lands and lands not in cultivation to facilitate the efficient operation and conservation of the land utilization project areas. Memorandum from L. C. Gray, Assistant Chief, Bureau of Land Utilization, to Divisional Leaders, Regional Directors and Officials Acting in Charge of Regions, Land Utilization Program 2 (June 2, 1938) [hereinafter Gray].

75. HOOKER, *supra* note 4, at 5.

public works activities, including "the type of planting, such as forest or ground cover for erosion control, and . . . the use, such as range on the public domain or for Indian reservations," to be undertaken on the acquired lands.[76]

In February 1934, the Board transferred the FSRC's funds for land purchases to the Federal Emergency Relief Administration (FERA).[77] At that time, administration of the land program became the general responsibility of the Directors of the FSRC and Submarginal Land Committee, a group composed of representatives from the Department of Agriculture, the Department of the Interior, the FERA, and the FSRC.[78] During its administrative oversight of the land program, the Submarginal Land Committee created four types of land utilization projects: agricultural adjustment projects, Indian lands, recreation projects, and wildlife refuges.[79] Following the FSRC's example, the Committee delegated administration of each type of land utilization project to a particular agency for planning and development. The Land Policy Section of the Agricultural Adjustment Administration (AAA) received authority to administer and plan the agricultural adjustment projects, the precursors to the national grasslands.[80]

C. PURPOSES FOR CREATING THE LAND UTILIZATION PROGRAM

The overall objective of the land program was to purchase lands to prevent the cultivation of lands ill-suited for farming.[81] Other reasons for purchasing these lands included concerns about the poverty and distress of the landowners, the strong potential for continued misuse of the lands, the need to control use of the lands until their productivity could be restored,

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76. *Id.*

77. *Id.* at 4. Although the FSRC transferred these funds to the Federal Emergency Relief Administration (FERA) in February 1934, the President did not give FERA authority to acquire submarginal lands until March 6, 1935. Exec. Order No. 6983 (Mar. 6, 1935). However, it is clear that FERA did not wait until March 1935 to acquire lands. The government had set up many of the land utilization projects and had taken a number of options on lands within the projects by the time the President transferred the land program to the Resettlement Administration in 1935. HOOKER, *supra* note 4, at 20. These facts lead one to speculate whether the true purpose of Exec. Order No. 6983 was to squelch public criticism that FERA was acquiring lands without legal authority to do so. *See supra* note 70.

78. HOOKER, *supra* note 4, at 6.

79. WOOTEN, *supra* note 2, at 5.

80. *Id.* at 5-6. Administration of and planning for Indian land projects was the immediate responsibility of the Bureau of Indian Affairs; administration of and planning for park (recreation) projects was the immediate responsibility of the National Park Service; and administration of and planning for wildlife areas was the immediate responsibility of the Department of Biological Survey (now called the United States Fish and Wildlife Service). *Id.*

81. Edward G. Grest, *The Range Story of Land Utilization Projects*, 6 J. RANGE MGMT. 44, 44-45 (Jan. 1953) [hereinafter Grest, *The Range Story*].

and the need to remove and resettle part of the population living on submarginal lands.[82] In addition, the federal government purchased land for its "demonstrational value."[83] The government hoped farming practices modeled on acquired lands would spread to private lands as the benefits of improved management practices came to fruition.[84]

The AAA emphasized specific aspects of these goals in the agriculture adjustment projects. Its primary goal was to shift submarginal land from cultivation to other agricultural uses for which the land was better suited.[85] To accomplish this goal in the Great Plains, where the federal government purchased the largest quantity of land,[86] the AAA worked to eliminate wheat or other arable farming and replace it with grazing uses.[87] In some cases, the AAA encouraged families to enlarge their farms to accommodate these grazing uses, but because it faced a fixed land supply, the AAA also "resettled" many families in areas outside the Great Plains where they would no longer be dependent on arid land unfit for cultivation.[88] This accomplished a second goal of the land program—reducing the population dependent on submarginal lands for their livelihood.[89]

During the AAA's oversight of the agriculture projects, the federal government created two agriculture projects in North Dakota, the Land Utilization-North Dakota-1 (LU-ND-1) project and the Land Utilization-North Dakota-2 (LU-ND-2) project.[90] Like other agricultural projects in the Great Plains, these projects provided "the means for stabilization of land use . . . through the purchase of submarginal operating units and the subsequent leasing of the purchased acreage to the remaining resident operators to aid in building up satisfactory operating units."[91] Through these projects, a system was created under which the individuals who remained on the grasslands retained private land for their ranch headquarters

82. GLOVER, *supra* note 55, at 9-10.
83. *Id.* at 10.
84. *Id.*
85. *Id.* at 4.
86. *Id.*
87. *Id.*
88. *Id.* at 6.
89. *Id.*
90. E. H. AICHER & S. M. LINGE, U.S. DEP'T OF AGRICULTURE, INSTITUTIONAL ADJUSTMENTS SURVEY, LAND UTILIZATION PROJECT MCKENZIE COUNTY, NORTH DAKOTA, *LU-ND-1* 1 (1941); SOIL CONSERVATION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, STATEMENT OF ADJUSTMENTS, PROJECTS LU-ND-1 AND LU-ND-2, MCKENZIE, BILLINGS, AND GOLDEN VALLEY COUNTIES, NORTH DAKOTA 2 (1934). These two projects were established in 1934.
91. AICHER & LINGE, *supra* note 90, at 30. The operation units were better known as ranches. *Id.* at 26-29.

and to grow supplemental feed, but relied on the government-owned grasslands to supply much of the forage necessary to feed their livestock.[92]

D. TRANSFER OF THE LAND UTILIZATION PROGRAM PRIOR TO THE 1937 BANKHEAD-JONES FARM TENANT ACT

By 1935, the Submarginal Land Committee had established a large number of land utilization projects and taken purchase options on a considerable percentage of the lands within these projects.[93] As a result, the President transferred the projects and the land program to the newly created Resettlement Administration (RA) in order to place more emphasis on resettling families located on the acquired lands.[94] Under the RA's administration, the President separated the resettlement operations from the land utilization project activities, the latter of which were placed in the RA's Land Utilization Division.[95] Dr. L.C. Gray, former Chief of the Land Policy Section in the AAA, directed this Division.[96] He applied nearly the same policies as those applied by the Submarginal Land Committee to the acquired lands.[97]

E. THE BANKHEAD-JONES FARM TENANT ACT OF 1937

Congress enacted the BJFTA to establish "a more permanent status for the land utilization program" as it existed under the administration of the Resettlement Administration,[98] "promote more secure occupancy of farms and farm homes," and "correct the economic instability resulting from some present forms of farm tenancy."[99] To carry out these purposes, Title III of the BJFTA authorized and directed the Secretary of Agriculture to "develop

92. Grest, *The Range Story*, *supra* note 81, at 47. The federal government recognized many years ago that unless individual operators on the national grasslands have "the use of sufficient land resources to make an adequate living, . . . there would be the urge to use it too intensively. This would eventually result in a distressed condition for both the land and the people and be detrimental to a sound permanent agricultural economy." *Id.* As a result, the federal government took specific actions to help families headquartered on privately-owned lands in the national grasslands secure grazing permits for an area of land sufficient to make an adequate living under average conditions. *Id.*

93. HOOKER, *supra* note 4, at 20.

94. *Id.* at 15-17; Exec. Order No. 7027 (Apr. 30, 1935); Exec. Order No. 7028 (Apr. 30, 1935).

95. Grest, *Brief History*, *supra* note 73, at 2.

96. HOOKER, *supra* note 4, at 18.

97. Grest, *Brief History*, *supra* note 73, at 2. The President transferred the RA to the Department of Agriculture on December 31, 1936. Exec. Order 7530 (Dec. 31, 1936); Grest, *Brief History*, *supra* note 73, at 2.

98. WOOTEN, *supra* note 2, at 12.

99. BJFTA of 1937, Preamble, Pub. L. No. 75-210, § 517, 50 Stat. 522 (1937).

a program of land conservation and land utilization."[100] It also directed the Secretary to protect lands acquired under the BJFTA and to adapt them to their best use.[101]

The BJFTA did not change the basic structure of the existing land program, but it did narrow its scope. New projects developed under the BJFTA were limited to agricultural projects, isolated settler projects, and water conservation projects.[102] In reality, however, "[n]early all new projects [established under the BJFTA] were similar to the agricultural adjustment projects established prior to fiscal year 1938."[103] This was due in part to the fact that during fiscal year 1938, the Secretary of Agriculture allocated approximately eighty percent of the money available under the BJFTA to the Great Plains area for agricultural projects planned and options taken during the two preceding years.[104] The Secretary used the remaining twenty percent to lock in existing projects in other parts of the country and to complete projects that had already begun.[105]

The BJFTA did not explicitly apply to lands acquired before 1937. However, in 1938 the President directed the Secretary of Agriculture to administer all lands acquired, or in the process of acquisition, as part of the land utilization projects under Title III and the relevant parts of Title IV of the BJFTA.[106]

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100. 7 U.S.C. § 1010 (2000).

101. 7 U.S.C. § 1011(b) (2000).

102. Gray, *supra* note 74, at 2. Agricultural projects provided for the purchase and improvement of submarginal land as a means of developing an economically sound pattern of land use for a maximum number of families. WOOTEN, *supra* note 2, at 12. They were not established for forestry, wildlife, or recreation uses. Gray, *supra* note 74, at 2. Isolated settler projects allowed the agency to purchase scattered farms on submarginal lands to permit "the effectuation of certain economies in public administration and adjustment to some better adapted use such as forestry, game conservation, grazing, recreation, or a combination of such uses." WOOTEN, *supra* note 2, at 12. Finally, water conservation projects provided for the purchase of land and the construction of water developments in areas where conservation of water was essential to proper land use. *Id.*

103. WOOTEN, *supra* note 2, at 13. In all, 2.6 million acres, or 22% of the land utilization acres, were acquired under the BJFTA. *Id.* at 14. Most of these acres were within projects established before 1937. *Id.* However, the Secretary of Agriculture did establish several new projects and made large additions to old projects in the Great Plains. *Id.* at 13-14.

104. *Id.* at 13.

105. *Id.* The BJFTA provided $10 million for the fiscal year ending June 30, 1938, and $20 million for each of the following two fiscal years. BJFTA of 1937, Pub. L. No. 75-210, § 34, 50 Stat. 526 (1937). However, funding for the two later fiscal years was cut to $5 million. WOOTEN, *supra* note 2, at 12.

106. Exec. Order No. 7906 (June 9, 1938), 3 Fed. Reg. 1358 (1938). Congress provided the President with authority to make this instruction in Title IV of the BJFTA. BJFTA of 1937, Pub. L. No. 75-210, § 45, 50 Stat. 530 (1937), *repealed by* Pub. L. No. 87-128, § 341, 75 Stat. 318 (1961).

F. AGENCY TRANSFERS FOLLOWING ENACTMENT OF THE BJFTA

On September 1, 1937, Secretary of Agriculture Wallace changed the name of the Resettlement Administration to the Farm Security Administration (FSA), and vested the FSA with authority to administer Titles I, II, and IV of the BJFTA.[107] The same day, the Secretary transferred the land utilization program and authority to administer Title III of the BJFTA to the Bureau of Agricultural Economics (BAE).[108]

During the BAE's oversight, Dr. Gray, then the Assistant Chief of the BAE, and the Secretary of Agriculture sought to "conserve the land resources of the project area[s], and . . . [to] [u]tilize the land to furnish a maximum number of families with an improved basis for making a living."[109] Working in harmony with these themes, the Assistant Chief and Secretary also required that developments adapt land resources to the program of use required in individual land utilization projects.[110]

G. THE SOIL CONSERVATION SERVICE'S ADMINISTRATION OF THE LAND PROGRAM

By October 1938, the Secretary of Agriculture and the BAE had transferred most of the non-agriculture projects to other federal departments.[111] As a result, when the Secretary transferred the land program to the SCS in November 1938, the SCS obtained responsibility for administration of 7.1 million acres of project lands, the use of which was "closely associated with the operation of farms or ranches."[112] The SCS also received plans for the acquisition of an additional 2.2 million acres, mainly in the Great Plains states, that had been approved under Title III of the BJFTA.[113]

The SCS administered these land utilization projects and acquired lands for sixteen years. During this time, it made significant efforts to implement the BJFTA in accordance with congressional intent.

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107. Titles I and II established farm finance programs. BJFTA of 1937, Pub. L. No. 75-210, §§ 1-23, 50 Stat. 527-33 (1937). Title IV created the Farmers' Home Corporation and provided and reaffirmed the Secretary's general powers under the BJFTA. *Id.* §§ 40-55, 50 Stat. 522-25.

108. HOOKER, *supra* note 4, at 33. The BAE received 131 projects that included more than eight million acres altogether. WOOTEN, *supra* note 2, at 13. Twenty-five projects were non-agricultural adjustment projects scheduled for transfer to other agencies on June 30, 1938. *Id.*

109. Gray, *supra* note 74, at 2.

110. *Id.* at 4.

111. WOOTEN, *supra* note 2, at 13.

112. SOIL CONSERVATION SERVICE, POLICIES REGARDING CONSERVATION AND DEVELOPMENT OF LAND UTILIZATION PROJECT LANDS 1 (1952) [hereinafter POLICIES]; WOOTEN, *supra* note 2, at 13.

113. WOOTEN, *supra* note 2, at 13.

Congress designed the land program codified in the BJFTA for the purpose of restoring and applying the acquired lands to their most beneficial use.[114] It also intended implementation of the BJFTA land program to "reestablish livestock, farm, and ranch enterprises on a secure land tenure base."[115] To accomplish these purposes, the SCS developed important objectives for grassland management, which included the following: (1) "graze the land within its capacity in order to produce forage and maintain productive capacity," and (2) maximize use of the land to contribute to a "sound, permanent agriculture economy for the area."[116]

Working within the parameters of these objectives, the SCS strove to restore entire national grassland ecosystems, including those parts of the grassland ecosystem that existed on state, county, and private lands. It implemented a practice of cooperative land management that allowed grazing associations, created under state enabling acts,[117] to administer grazing programs on project lands so long as they allowed the SCS to proscribe management requirements for all lands acquired or leased by grazing associations.[118] This practice recognized the obvious: Sound land management requires planning for land use based on resource location and terrain, not on the arbitrary and artificial boundaries of land ownership.

H. TRANSFER TO THE FOREST SERVICE

As a result of a departmental reorganization, in 1954 the Secretary of Agriculture transferred the project lands from the SCS to the Forest Service.[119] The intent at that time was to dispose of these lands to private individuals.[120] Although the Forest Service attempted to obtain authority to sell the project lands to private individuals, it could not do so.[121] As a result,

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114. 7 U.S.C. § 1011(b) (2000).

115. POLICIES, *supra* note 112, at 1.

116. Grest, *The Range Story*, *supra* note 81, at 46. These objectives were also articulated as a goal of helping ranchers reclaim and conserve their permitted grazing lands and achieve economic and social stability for their communities. KARL HESS, JR., VISIONS UPON THE LAND: MAN AND NATURE ON THE WESTERN RANGE 88 (1992).

117. Grest, *The Range Story*, *supra* note 81, at 47.

118. Grazing associations lease state, county, and private lands. GLOVER, *supra* note 55, at 17. Therefore, under the SCS's cooperative management program, federal controls extended to the broader grassland ecosystem. *Id.*

119. RUPP, *supra* note 9, at 4; Secretary of Agriculture Administrative Order (Dec. 24, 1953, effective January 2, 1954); West, *supra* note 17, at 88-89; 1954 Hearing, *supra* note 11, at 19-20. The Forest Service had control over nearly nine million acres of utilization project lands following the 1954 transfer. WOOTEN, *supra* note 2, at 29.

120. RUPP, *supra* note 9, at 4; West, *supra* note 17, at 88-89; 1954 Hearing, *supra* note 11, at 4-12.

121. 1954 Hearing, *supra* note 11, at 19.

the Secretary turned to his limited authority under Title III of the BJFTA, which allowed the transfer of Title III lands to federal and state agencies,[122] and transferred many project lands to public agencies outside the Department of Agriculture.[123] The Secretary transferred eighteen utilization projects composed of 2,464,000 acres to the Bureau of Land Management, Department of the Interior in 1958.[124] He also transferred about one million acres to state and local agencies between 1954 and 1961.[125] The Secretary retained approximately four million acres of the project lands, renaming them the "National Grasslands"[126] and requiring that they be permanently retained under Forest Service administration.[127]

Retention of the national grasslands created significant internal confusion in the Forest Service.[128] Some Forest Service administrators believed that the national grasslands should be managed like national forests, some thought they should manage them as big cattle pastures, and others simply wanted to continue efforts to dispose of them.[129] Some of the Forest Service administrators were also very reluctant to work with grazing associations and districts even though the associations had successfully administered grazing practices, including issuing permits, collecting fees, controlling trespass, and fighting fires on the national grasslands for over fifteen years.[130] Other Forest Service administrators recognized the benefits of continuing the SCS's policies and practices.

In the end, the transfer of SCS employees to the Forest Service led to the acceptance and continued application of the SCS's management practices on the national grasslands.[131] In 1962, the Forest Service incorporated the SCS's grazing policies into the Forest Service manual.[132]

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122. 7 U.S.C. § 1011(c) (2000).

123. WOOTEN, *supra* note 2, at 29.

124. *Id.* at 33; Exec. Order No. 10787, 23 Fed. Reg. 8717 (Nov. 6, 1958).

125. WOOTEN, *supra* note 2, at 34.

126. *Id.* at 29; 36 C.F.R. § 213.1 (1960).

127. WOOTEN, *supra* note 2, at 29.

128. West, *supra* note 17, at 89.

129. *Id.* (citing RUPP, *supra* note 9, at 5).

130. *Id.* at 90. Grazing associations are incorporated under state law for the purpose of managing livestock grazing on a mix of state, county, and federal land. *See, e.g.*, N.D. CENT. CODE § 36-08-02 (1987). The BJFTA authorizes the Secretary of Agriculture to lease federal lands managed under the BJFTA directly to grazing associations. 7 U.S.C. § 1011(c) (2000). Forest Service rules require the grazing associations to adopt and enforce rules of management for the members who lease their lands; plan, approve, contract for, and complete various land conservation and improvement projects on lands administered by the association; and collect fees for use of the federal and other leased lands within the association's boundaries. FOREST SERVICE MANUAL § 2209.13 (1990).

131. West, *supra* note 17, at 90.

132. WILLIAM D. ROWLEY, UNITED STATES FOREST SERVICE GRAZING & RANGELANDS: A HISTORY 228 (1985).

Then, in 1963 the Secretary of Agriculture amended Forest Service regulations in order to reinforce the original mission of the land utilization projects, to promote grassland agriculture and sustained yield management while demonstrating sound land use practices to adjacent landowners.[133] Local Forest Service rangers and grazing associations implemented these policies with relatively few problems until the early 1970s.[134]

I. AN UNCLEAR COURSE

During the 1970s, it became increasingly apparent that the Forest Service no longer had a clear picture of how it should manage the national grasslands.[135] This, along with increased public scrutiny of the national grasslands administration and a heightened interest in recreation and environmental conservation, may explain the Forest Service's decision to place increased emphasis on wildlife, watershed, and recreation within national grasslands.[136] It may also explain the Forest Service's decreased emphasis on the original purposes for which the national grasslands were acquired.[137]

Following enactment of the NFMA in 1976, the Forest Service combined grazing regulations for the national grasslands with those designed for the national forests.[138] After this, the Forest Service continued, for a few years, to administer the national grasslands under distinct management

133. West, *supra* note 17, at 90.

134. *Id.* at 91. During this time, however, some grassland employees continued to harbor extremely negative attitudes toward the grazing associations. *Id.* Partly because of these attitudes, by the 1970s the grazing associations in New Mexico, Oklahoma, and Texas had dissolved. *Id.* Individual grazing permits were issued in their stead. *Id.* Although some thought this change was a "logical adaptation to the region's ecology and land use patterns," it did not necessarily provide for better national grasslands management. *Id.* Without the forum of the grazing associations, the Forest Service's grassland employees found themselves having "to preach the message [of conservation] to each individual rancher." *Id.* Because of this difficulty, some grassland managers abandoned efforts to extend conservation to adjacent private land and dismissed efforts to maintain a holistic approach to grassland management. *Id.* The grazing associations did not disappear from the Great Plain states where the larger national grasslands were located. In fact, grazing associations continue to play a vital role in the Great Plains national grasslands management today.

135. *Id.* at 96.

136. *Id.*

137. *Id.* at 96-97.

138. Brooks, *supra* note 49, at 11. The only mention of the national grasslands made by Congress in the language and extensive legislative history of NFMA is that which is now codified. 16 U.S.C. § 1609(a) (2000) (stating "[t]he 'National Forest System' shall include all national forest lands . . ., the national grasslands and land utilization projects administered under Title III of the Bankhead-Jones Farm Tenant Act"). This language clearly did not give the Forest Service authority to modify the national grasslands management to a scheme other than one that promotes grassland agriculture as the most beneficial use of these acquired lands. *See infra* Part IV.D.2.

objectives, as required by their unique legal history.[139] However, eventually the Forest Service began to manage the national grasslands pursuant to the same principles and objectives it applied to the other lands it administered. Acceptance of this management approach grew throughout the 1990s, and is clearly reflected in the Revision and the Draft EIS.

IV. LEGAL MANAGEMENT OF THE NATIONAL GRASSLANDS

A. PURPOSES FOR ACQUIRING THE NATIONAL GRASSLANDS

The Fifth Amendment to the United States Constitution gives Congress the power and authority to condemn private property for a public purpose.[140] Use of this power rests wholly within the Legislature's discretion.[141] However, Congress may delegate its authority to condemn and acquire private lands to the executive and administrative branch of the federal government.[142] When Congress makes this type of delegation, federal officers must exercise their acquisition authority in accordance with congressional intent and only to the extent that it is necessary or advantageous to do so.[143]

Between 1933 and 1936, Congress delegated authority to acquire land by means of multiple Emergency Relief Acts.[144] The Secretary of Agriculture relied on this authority to condemn large areas of land for land utilization projects.[145] In 1937, Congress again provided the Secretary with power to acquire lands under Title III of the BJFTA.[146] The Secretary acquired land, primarily for agricultural uses, under this authority as well.[147]

The 1931 Declaration of Takings Act (DTA) played an important role in these land condemnation processes. The DTA recommended that federal

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139. *See, e.g.*, FOREST SERVICE MANUAL § 2203.2 (1980) (indicating that national grasslands were not required to conform with grazing policies established for national forests).

140. U.S. CONST. amend. V.

141. Shoemaker v. United States, 147 U.S. 282, 298 (1893); United States v. Forbes, 259 F. 585, 589 (D.C. Ala. 1919). This discretion is subject to the condition that Congress justly compensate private landowners for property taken. U.S. CONST. amend. V.

142. Chappell v. United States, 160 U.S. 499, 510 (1896); Kohl v. United States, 91 U.S. 367, 374 (1876); United States v. Certain Lands in Narragansett, R.I., 145 F. 654, 656 (D.R.I. 1906).

143. 40 U.S.C. § 257 (2000) (originally enacted as Act of August 1, 1888, ch. 728, § 1, 25 Stat. 357).

144. *See supra* note 5; Exec. Order No. 7345 (Apr. 15, 1936) (authorizing the purchase or rental of land for emergency conservation work).

145. Grest, *Brief History*, *supra* note 73, at 4.

146. BJFTA of 1937, Pub. L. No. 75-210, § 32(a), 50 Stat. 522 (1937) (repealed by Pub. L. No. 87-703, § 102(b), 76 Stat. 607 (1962)).

147. *See supra* Part III.E.

officials who exercised their acquisition authority include specific information about a proposed acquisition in a formal "declaration of taking" and file it with the initial condemnation pleadings.[148] This declaration of taking stated the legal authority and the public use for which the federal government was condemning the lands at issue.[149] It also described the lands to be condemned and stated the specific estate or interest in the lands the federal government planned to condemn.[150] Furthermore, a declaration of taking included an estimate of just compensation for the land to be condemned.[151]

Like other national grassland condemnation proceedings, the initial condemnation pleadings for the Little Missouri National Grassland included declarations of takings.[152] The declaration of taking for 17,463 acres of land in McKenzie County, North Dakota is an example of these documents.[153] It included the following language:

> [T]he Secretary of Agriculture has duly selected for acquisition by the United States the lands hereinafter described, for use in connection with [the Little Missouri Land Adjustment Projects]. . . and . . . the said lands are necessary in his opinion: To provide for the prevention and control of soil erosion; conservation and development of water resources; establishment of a demonstrational area for the proper grazing of livestock; control of the destructive animal life; and relief of unemployment by providing useful work in the reseeding, terracing and fencing of said land and the construction thereon of roads and structures necessary and appropriate to said project.[154]

This language, which was duplicated in final orders condemning these lands, demonstrates a clear intent for the use of these national grasslands.[155]

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148. 40 U.S.C. § 258(a) (2000).

149. *Id.*

150. *Id.*

151. *Id.*

152. The general principles of this section apply to all national grasslands. However, in order to give them context, the principles are specifically applied to North Dakota's Little Missouri National Grassland, a grassland whose history has been well researched and documented.

153. United States v. 17,463.13 Acres of Land, More or Less, in McKenzie County, North Dakota, At Law No. 1002, at 2-3 (D.N.D. 1937).

154. *Id.*

155. *See, e.g.*, United States v. 10,683 Acres of Land, More or Less, in McKenzie County, N.D., Judgment No. 1000 At Law, at 8 (D.N.D. 1939). This judgment stated

> [t]hat the use to which the said lands are being acquired by the United States of America, the said petitioner, is a proper public use, to-wit: to provide for the prevention and control of soil erosion; conservation and development of water resources; establishment of a demonstrational area for the proper grazing of livestock; control of

Because the federal government acquired national grasslands in North Dakota for use in connection with the Little Missouri Land Adjustment Projects, the United States' purpose for acquiring these lands may be further illuminated by examining the Secretary of Agriculture's directions for the Little Missouri Land Adjustment Projects, LU-ND-1 and LU-ND-2, and their supplements, LU-ND-38-1 and LU-ND-38-2 (collectively, Little Missouri Projects).[156] The Secretary designed the Little Missouri Projects to stabilize agriculture in the projects' areas.[157] This purpose was to be accomplished by "correcting serious maladjustments in land use and effecting readjustments which will prevent their recurrence."[158] The focus of these readjustments was to return acquired submarginal lands to grazing purposes, the "very best use to which these lands can be put,"[159] and to change the farm economy of the area from one based on crop production to one emphasizing the production of livestock.[160] In addition to adjusting grazing and other land uses in the Little Missouri Projects' areas, the federal government established the Little Missouri Projects to demonstrate improved methods of land management to ranchers using the Little Missouri Projects' lands.[161] The government hoped that as the land management techniques demonstrated on federal lands resulted in improved production, neighboring ranchers would employ the techniques on their private lands.[162]

In sum, the federal government acquired the grasslands within the Little Missouri National Grassland to prevent and control soil erosion, conserve and develop water resources, demonstrate proper grazing techniques, control destructive animal life, provide relief for unemployment, and stabilize agriculture by returning the land to grazing uses. These purposes

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destructive animal life; and relief of unemployment by providing useful work in the reseeding, terracing and fencing of said land and the construction thereon of roads and structures necessary and appropriate to said projects.

Id.

156. *See supra* note 4 and accompanying text. Unless the declaration is ambiguous, the court will not apply a meaning that is contrary to the plain meaning of the declaration's words. 29A CJS Eminent Domain § 211(a) (1992); United States v. 21.54 Acres, 491 F.2d 301, 305-06 (4th Cir. 1973); United States v. Pinson, 331 F.2d 759, 760-61 (5th Cir. 1964); Bumpus v. United States, 325 F.2d 264, 266-67 (10th Cir. 1963); United States v. 76.208 Acres of Land, 580 F. Supp. 1007, 1010 (E.D. Penn. 1983). However, in construing a declaration, the intention of the United States as author of the declaration should be gathered from the language of the entire declaration and its surrounding circumstances. 29A CJS Eminent Domain § 211(a); *21.54 Acres*, 491 F.2d at 305-06; *Pinson*, 331 F.2d at 760-61; *Bumpus*, 325 F.2d at 266-67; *76.208 Acres of Land*, 580 F. Supp. at 1010.

157. Excerpt I, *supra* note 4, at 1; Excerpt II, *supra* note 4, at 1.

158. Excerpt I, *supra* note 4, at 1; Excerpt II, *supra* note 4, at 1.

159. AICHER & LINGE, *supra* note 90, at 21.

160. Excerpt I, *supra* note 4, at 1; Excerpt II, *supra* note 4, at 1.

161. Excerpt I, *supra* note 4, at 2; Excerpt II, *supra* note 4, at 2.

162. Excerpt I, *supra* note 4, at 2; Excerpt II, *supra* note 4, at 2.

are important to consider when evaluating the Forest Service's management of the lands.

B. FEDERAL LAW REQUIRES THE FOREST SERVICE TO ADMINISTER THE NATIONAL GRASSLANDS FOR THE PURPOSES FOR WHICH THEY WERE ACQUIRED

When the federal government acquires land for a particular public purpose, only Congress has the power to change that purpose or dispose of the acquired land.[163] As a result, federal agencies must manage and administer acquired lands according to the purpose for which the federal government acquired them, unless Congress has authorized otherwise.[164] This principle prohibits Forest Service management practices that deviate from the original purposes for acquiring the national grasslands.

In *Rawson v. United States*,[165] the Ninth Circuit recognized that the national grasslands, which were "reacquired by the United States are not by mere force of the reacquisition restored to the public domain. Absent legislation or authoritative directions to the contrary, they remain in the class of lands acquired for special uses, such as parks, national monuments, and the like."[166] The Ninth Circuit also denied the President, and by implication any federal agency, the authority to impute uses to the acquired national grasslands other than those for which the federal government acquired the lands.[167]

In *United States v. Three Parcels of Land*,[168] the Ninth Circuit reaffirmed the principle espoused in *Rawson*.[169] The Postmaster conveyed property acquired for postal uses to the Alaska Housing Authority for a purpose other than that anticipated by the United States when it acquired the property.[170] However, the Ninth Circuit upheld the Postmaster's action because he acted pursuant to a statute that gave him express authority to

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163. Reichelderfer v. Quinn, 287 U.S. 315, 318-20 (1932).

164. *Id.*; *see also* United States v. Three Parcels of Land, 224 F. Supp. 873, 876 (D. Alaska 1963) (determining that the court is without authority to revest title to premises once vested in the United States, and the matter is entrusted by Congress to the discretion of the Attorney General under the Declaration of Takings Act, 40 U.S.C. § 258(f)); United States v. 10.47 Acres of Land, 218 F. Supp. 730, 733 (D.N.H. 1962) (stating that title to acquired property vested in the United States cannot be returned to original landowners without congressional authorization).

165. 225 F.2d 855 (9th Cir. 1955).

166. *Rawson*, 225 F.2d at 858. Three of the twenty national grasslands are included within the Ninth Circuit: Oregon's Crooked River Grassland (the subject of *Rawson*), Idaho's Curlew National Grassland, and California's Butte Valley National Grassland. *See supra* note 2.

167. *Rawson*, 255 F.2d at 858.

168. 224 F. Supp. 873 (D. Alaska 1963).

169. *Three Parcels of Land*, 224 F. Supp. at 877.

170. *Id.* at 876.

dispose of real property acquired for postal purposes under such terms as he deemed in the best interest of the United States.[171]

The Sixth Circuit endorsed the same principle in *Higginson v. United States*.[172] The court upheld the Secretary of the Army's decision to abandon property acquired for a military camp and transform it into surplus property because the Secretary acted pursuant to a law that specifically authorized him to modify the use of acquired military lands.[173] In contrast, in *Forbes v. United States*,[174] an Alabama federal district court overturned the Secretary of War's decision to dispose of real estate acquired by the United States for military purposes because the Secretary lacked express power to dispose of such property.[175] In its decision, the Alabama court stated: "It is not within the province of the court to say what shall be done with the land or to what use it shall be put. This is reserved to the Congress, which, of course can act, or authorize the Secretary of War to act."[176]

Altogether, these decisions affirmed the principle that federal agencies cannot act to modify the purposes for which lands were acquired without express congressional authorization to do so. As demonstrated in the following sections, at one time Congress authorized the Secretary of Agriculture to dispose of or apply the national grasslands for purposes other than those for which they were acquired. However, the Secretary failed to act before Congress repealed that authority and now has no authority to use the national grasslands for purposes other than those for which they were acquired. Therefore, the Forest Service must administer the national grasslands solely for the purposes for which they were acquired.[177]

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171. *Id.* at 876-77.

172. 384 F.2d 504 (6th Cir. 1967).

173. *Higginson*, 384 F.2d at 507.

174. 259 F. 585 (D.C. Ala. 1919).

175. *Forbes*, 259 F. at 592. Congress had authorized the Secretary of War to transfer property "not required by the War Department, as may be required by the public health service." *Id.* However, the Secretary of War did not seek to transfer the property, but to dispose of it. *Id.* Because the Secretary was not authorized to dispose of the land, his action was beyond the scope of his delegated authority and offended the separation of powers doctrine. *Id.*

176. *Id.*

177. In parts of the national grasslands, the Secretary of Agriculture condemned less than a fee simple interest in the land. For example, in pursuing "friendly condemnations" against North Dakota counties, the United States agreed the counties should receive a 6.25% royalty in the minerals on the acquired federal grasslands. McKenzie County v. Hodel, 467 N.W.2d 701, 702 (N.D. 1991); McKenzie County v. Hodel, Civil No. A4-87-211 (D.N.D. June 24, 1991). When the federal government acquires less than a fee simple interest, "use of the property taken must be for and in accordance with the purposes which justified its taking and which was the basis for assessing damages." United States v. Burmeister, 172 F.2d 478, 480 (10th Cir. 1949). As a result, the Forest Service must administer all national grasslands, whether they were acquired as fee simple or as less than a fee simple, for the purposes they were acquired.

C. THE BJFTA AND NATIONAL GRASSLAND ADMINISTRATION

1. The Preamble

The preamble to the BJFTA states that Congress enacted the law to "create the Farmers' Home Corporation, to promote more secure occupancy of farms and farm homes, to correct the economic instability resulting from some present forms of farm tenancy, and other purposes."[178] Although preambles are not operative parts of statutes and do not confer or enlarge powers of administrative agencies or their officers, "[a] preamble no doubt contributes to a general understanding of a statute."[179] Therefore, in construing the meaning of the BJFTA, a court may look to the preamble to resolve ambiguity arising from the meaning of particular words or from the general scope of the BJFTA.[180] Here, the preamble's directive to promote more secure farm occupancy and to correct instability confirms the general understanding set forth in the agricultural land use project documents, namely that the Secretary of Agriculture must administer these lands in a way that promotes grassland agriculture and provides stability for communities dependent on these lands.

2. The Old and New Project Lands

Title III of the BJFTA authorized and directed the Secretary of Agriculture to develop a program of land conservation and land utilization, which was to be accomplished through the retirement of submarginal lands and correction of maladjustments in land use.[181] To accomplish this program, Congress provided the Secretary with power to acquire submarginal lands and protect, improve, develop, administer, and construct structures on such lands in order to adapt them to their most beneficial use.[182] The lands acquired under these provisions became known as the "new project lands." The "old project lands" acquired prior to the BJFTA, became a part of the BJFTA's program of land conservation and land utilization pursuant to Presidential transfer eleven months after Congress enacted the BJFTA.[183]

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178. BJFTA of 1937, Preamble, Pub. L. No. 75-210, § 517, 50 Stat. 522 (1937).

179. Ass'n of Am. R.R.s v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977).

180. Coosaw Mining Co. v. South Carolina, 144 U.S. 550, 563 (1892).

181. 7 U.S.C. § 1010 (2000).

182. 7 U.S.C. § 1011(b) (2000).

183. Exec. Order No. 7908, 3 Fed. Reg. 1389 (June 9, 1938); *see also* Grest, *Brief History*, *supra* note 73, at 4. This transfer was authorized by Congress in Title IV of the BJFTA. BJFTA of 1937, Pub. L. No. 75-210, § 45, 50 Stat. 530 (1937).

3. *The BJFTA Required the Secretary of Agriculture to Adapt Newly Acquired Project Lands to Their Most Beneficial Use*

The land utilization and conservation program set out in the BJFTA was intended to assist in controlling soil erosion, preserving natural resources, protecting fish and wildlife, developing and protecting recreational facilities, and accomplishing many other objectives.[184] Congress did not, however, expect that each project undertaken by the Secretary as part of the land utilization and conservation program would accomplish each of these environmental objectives. Rather, Congress required the Secretary to adapt land acquired under the BJFTA to its most beneficial use.[185] This directive implicitly limited environmental improvements on acquired lands to those that complemented the lands' most beneficial use.

For example, in North Dakota, the SCS adapted new lands acquired within the Little Missouri Projects to grazing, which was stated to be those lands' most beneficial use.[186] The SCS built stock watering facilities and fences and undertook specific conservation measures such as reseeding and building structures to prevent soil erosion to promote this use.[187] Not surprisingly, such measures not only provided improved grazing use, but conserved natural resources, enhanced wildlife habitat,[188] and created opportunities for recreation on the national grasslands.[189] Although these enhancements were not the intended consequences of the adaptation of the lands within the Little Missouri Projects or other projects, they complemented the SCS's efforts to adapt the land to its most beneficial use.

Once the Secretary of Agriculture acquired the new lands and adapted them to their most beneficial use, the BJFTA did not provide authority for the Secretary to modify them to another use so long as the lands remained under his control.[190] For a time, the Secretary could recommend sale, lease, or exchange of lands acquired under the BJFTA to state and federal public agencies.[191] However, these actions are now precluded by laws that require the Secretary to retain the national grasslands permanently under his

184. 7 U.S.C. § 1010.
185. *Id.* § 1011(b).
186. Excerpt I, *supra* note 4, at 6; Excerpt II, *supra* note 4, at 6.
187. Excerpt I, *supra* note 4, at 6-7; Excerpt II, *supra* note 4, at 6-7.
188. RUPP, *supra* note 9, at 6.
189. Argow, *supra* note 54, at 4.
190. 7 U.S.C. § 1011.
191. 7 U.S.C. § 1011(c).

administration.[192] As a result, the Secretary has a legal duty to ensure the national grasslands acquired under the BJFTA are permanently retained within the Department of Agriculture and managed for the purposes for which they were acquired.

4. *Old Project Lands Under Title IV of the BJFTA Must Be Administered for the Purposes for Which They Were Acquired*

The President transferred the old project lands to the Secretary of Agriculture so the lands could be administered under Title III and Title IV of the BJFTA. In contrast to Title III, the sole title under which the new lands were administered, Title IV authorized the Secretary to use and dispose of the old project lands in such manner as would best carry out the objectives of the BJFTA.[193] These provisions could be interpreted as authorizing a change in use of the national grasslands.[194]

However, at the time the Secretary transferred the old and new project lands to the Forest Service, he apparently was not aware of his authority to administer the old project lands under Title IV of the BJFTA.[195] In 1954, the Forest Service, with the President's support, backed numerous proposals and made statements before Congress requesting legislative authority to dispose of all project lands, including the old project lands, to individuals and private organizations.[196] This request was quite surprising in light of the fact that Title IV remained good law and specifically authorized the Secretary to dispose of the old project lands in any manner the President saw fit, which ostensibly would have included disposal to private individuals.[197]

Before the Secretary realized the scope of his authority, Congress repealed Title IV of the BJFTA in 1961, removing any opportunity for the Secretary to modify the uses or the terms and conditions of use for the old projects lands, which had become part of the national grasslands.[198] As a

192. *See* NFMA of 1976, 16 U.S.C. § 1609 (2000) (preventing the Secretary of Agriculture from returning land in the National Forest System, which includes the national grasslands, to the public domain).

193. BJFTA of 1937, Pub. L. No. 75-210, § 45, 50 Stat. 530 (1937).

194. *Id.*

195. *Id.*; 1954 Hearing, *supra* note 11, at 3.

196. 1954 Hearing, *supra* note 11, at 3.

197. BJFTA of 1937, Pub. L. No. 75-210, § 45, 50 Stat. 530 (1937).

198. Pub. L. No. 87-128, § 341, 75 Stat. 318 (1961). Arguably, the Secretary's 1960 regulations requiring the Forest Service to administer the national grasslands for outdoor recreation, range, timber, watershed, and wildlife and fish purposes could have modified the administration of the national grasslands. MUSYA, 36 C.F.R. § 213.1(c) (1960). However, the regulations only allowed development of multiple uses on the national grasslands if those uses promoted grassland

result, the Secretary has no authority under the BJFTA to administer the national grasslands for purposes other than those for which they were acquired, namely to promote grassland agriculture and to stabilize local grassland-dependent communities.

D. APPLICATION OF NATIONAL FOREST SYSTEM LEGISLATION: THE MULTIPLE USE SUSTAINED YIELD ACT AND THE NATIONAL FOREST MANAGEMENT ACT

1. The Multiple Use Sustained Yield Act of 1960 Did Not Provide Legal Authority to Modify National Grasslands Administration

Six years after the Secretary of Agriculture transferred the national grasslands to the Forest Service, Congress enacted the Multiple Use Sustained Yield Act of 1960 (MUSYA).[199] The MUSYA requires the Forest Service to manage *national forests* for five uses: grazing, timber, recreation, watershed, and wildlife and fish resources.[200] Regulations promulgated soon after the MUSYA became law directed the Forest Service Chief to apply multiple use principles to the national grasslands.[201] However, because the MUSYA did not provide legal authority for the application of multiple use principles to the national grasslands, those regulations do not appear to be legally enforceable.[202]

The lack of authority to promulgate these regulations may explain the conditional language employed by the Secretary in the regulations, which approved the Forest Service's implementation of multiple uses, but only to

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agriculture. 36 C.F.R. § 213.1(d). This limiting factor suggests that the multiple uses, if developed at all, would have had to be secondary to the dominant use of grassland agriculture.

More importantly, the regulations were adopted under the authority of Title III, not Title IV. *Id.* The Forest Service has no authority under Title III to modify the purposes for acquiring the old project lands. In fact, the only authority the Secretary of Agriculture has under Title III with respect to old project lands was that enumerated in Public Law Number 75-210, § 32(d): The Secretary may make dedications or grants of these lands for any public purpose, and may grant licenses and easements on the lands under such terms as he deems reasonable. Pub. L. No. 75-210, § 32(d), 50 Stat. 526 (1937). Because the Secretary did not have the authority to change the purpose of the national grasslands under Title III of the BJFTA, the 1960 regulations could not have legally modified the purposes of the national grasslands. The regulations also cite to the Multiple Use Sustained Yield Act (MUSYA) as authority for their promulgation. However, as discussed in Part IV.D., the MUSYA did not give the Forest Service authority to promulgate the regulations.

199. 16 U.S.C. §§ 528-531 (2000).

200. *Id.* § 528.

201. MUSYA, 36 C.F.R. § 213.1 (1960).

202. 16 U.S.C. § 528; Hankins, *supra* note 19, at 4. Title III of the BJFTA was also cited as legal authority for the promulgation of the 1963 regulations. However, Title III does not support application of multiple use principles to the national grasslands. *See supra* text accompanying note 190.

the extent it would not interfere with the purposes for which the federal government created the national grasslands.[203] The regulations also required the Forest Service to promote the development of grassland agriculture,[204] thereby restricting multiple uses to the extent they did not promote grassland agriculture on the national grasslands.

When the Secretary amended the regulations in 1963, he stressed that the Forest Service should implement demonstrations of sound and practical principles of land use on national grasslands.[205] He also required the Forest Service to manage the national grasslands in such a way as to exert a favorable influence over associated public and private lands.[206] Noticeably, these requirements were purposes for which the government had acquired the national grasslands, but were clearly unrelated to the multiple use principles espoused in the MUSYA. Thus, this amendment would seem to support the understanding, which for some reason was clearer at that time than now, that the MUSYA does not apply to the national grasslands.

In summary, any attempt to rely on the MUSYA to modify management of the national grasslands was and remains legally ineffective because the MUSYA did not authorize the Forest Service to implement multiple use management on the national grasslands. The Forest Service must administer the national grasslands for the purposes they were originally acquired—to promote grassland agriculture and stabilize local grassland-dependent communities.

2. *The National Forest Management Act of 1976 Did Not Provide Legal Authority to Modify National Grasslands Uses*

In 1974, Congress incorporated the national grasslands into the National Forest System.[207] The outstanding purpose of this action was to simply declare that the diverse lands administered by the Forest Service were part of a unitary system.[208] Nevertheless, one former Forest Service attorney claimed that integrating the national grasslands into the National

203. MUSYA, 36 C.F.R. § 213.1.

204. *Id.*

205. 28 Fed. Reg. 6268 (June 19, 1963); 36 C.F.R. § 213.1 (1960).

206. *Id.*; WOOTEN, *supra* note 2, at 33.

207. 16 U.S.C. § 1609(a) (2000). The 1976 National Forest Management Act amended the 1974 Renewable Resource and Planning Act in which Congress officially added the national grasslands to the national forest system. 16 U.S.C. §§ 1601-1676.

208. *See* S. Rep. No. 686 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4060, 4080. Interestingly, including the national grasslands in the National Forest System was not a new concept for the Forest Service. The Forest Service had been administering the national grasslands as part of the National Forest System since 1960, nearly fifteen years before Congress enacted the NFMA. *See* 25 Fed. Reg. 5845 (June 24, 1960), 36 C.F.R. § 213.1 (1960) (stating that the national grasslands shall be a part of the National Forest System).

Forest System also subjected the national grasslands to a number of laws that have historically been applied to National Forest System lands, but not to the national grasslands.[209] This assertion is unfounded for at least two reasons. First, these laws specifically do not apply to the national grasslands,[210] and second, the phrase used in the NFMA to incorporate the national grasslands into the National Forest System states that the national grasslands are administered under the BJFTA.[211] Therefore, the NFMA did not modify the purposes and uses for which the national grasslands are to be administered.

A by-product of including the national grasslands in the National Forest System was to subject them to the same planning process used on the national forests and other lands administered by the Forest Service.[212] During the planning process, the Secretary of Agriculture must "take such action as will assure that the development and administration of the renewable resources of the National Forest System are in full accord with the concepts for multiple use and sustained yield of products and services."[213] This language requires the Forest Service to provide for the five multiple uses listed in the MUSYA throughout the National Forest System; however,

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209. OLSON, *supra* note 2, at 21.

210. *See, e.g.*, Organic Administration Act, 16 U.S.C. §§ 473-539k (2000) (applying its provisions to the national forests only). Over the years, Congress has repeatedly recognized the unique legal status of the national grasslands and excluded them from laws applicable to other National Forest System Lands. As noted previously, even though the Secretary of Agriculture transferred the national grasslands to the Forest Service in 1954, Congress did not apply the sweeping requirements of the MUSYA to the national grasslands. The MUSYA only applied to national forests. 16 U.S.C. §§ 528-539k. Congress also recognized the unique nature of the national grasslands by including the national forests but excluding the national grasslands from the broad rangeland and grazing provisions of the 1976 Federal Land Policy and Management Act (FLPMA) and the Public Rangelands Improvement Act, which supplemented FLPMA. 43 U.S.C. §§ 1751-1753 (2000). This is especially important in light of the fact that the national grasslands are some of the most productive rangelands in the country. HOLECHECK ET AL., *supra* note 24, at 75, 81-83.

Finally, as recent as October 30, 2000, Congress excluded the national grasslands from a law that made payments to counties from all other National Forest System lands more stable and predictable. Pub. L. No. 106-393, § 3(1)(A) (Oct. 3, 2000). As Congress has repeatedly treated the national grasslands as separate and distinct from other National Forest System lands, it has memorialized the unique legal status of the national grasslands. No matter how the Forest Service might try to justify its actions, the plain language of the NFMA does not give the Forest Service the legal authority to act contrary to congressional intent and modify the unique purposes and distinct management requirements for the national grasslands.

211. 16 U.S.C. § 1609(a). The NFMA states that the "National Forest System shall include . . . the national grasslands and land utilization projects *administered under title III of the Bankhead-Jones Farm Tenant Act*." 16 U.S.C. § 1609(a) (emphasis added). This language directly contradicts the Forest Service's claim that it can administer the national grasslands under a panoply of laws enacted to govern the national forests. *See* OLSON, *supra* note 2, at 21.

212. 16 U.S.C. §§ 1609-1676; *see also supra* Part II.A.

213. 16 U.S.C. § 1607.

it does not require the Forest Service to implement each of these multiple uses on every parcel of land within the National Forest System.[214]

As a result, adding the national grasslands to the National Forest System and including them in NFMA's planning process did not modify the purpose for which the individual national grasslands were acquired. It simply incorporated these lands into the National Forest System and allowed them to contribute their unique uses to the range of uses developed on lands within the National Forest System. Doing more than incorporating these lands into a broad scheme of multiple use applied to the entirety of the National Forest System would fly in the face of the BJFTA requirement that the national grasslands be adapted to their single, most beneficial use. It would be disturbing to see the Forest Service rely on the NMFA's planning provisions, which do not require a change in the uses of the national grasslands, to act in direct contradiction of the BJFTA, which the NFMA explicitly recognized as being the law under which the national grasslands are to be administered. Because the NFMA does not require the Forest Service to convert the national grasslands to new uses and the NFMA's planning provisions do not require the Forest Service to manage for more MUSYA uses on the national grasslands than those uses (or that one use) for which they were acquired, the Forest Service must continue to administer the national grasslands for the purposes they were acquired.

To summarize, case law has prohibited the Forest Service from modifying uses of the national grasslands to uses other than those for which they were originally acquired. As to the new and old project lands that became national grasslands, the BJFTA, MUSYA, and NFMA did not provide the Forest Service with authority to modify the purposes for which the national grasslands were acquired. In addition, although the BJFTA provided the Secretary of Agriculture with authority to make use modifications for a limited time on old project lands, he failed to make any such modifications. As a result, the Forest Service must also manage all project lands that became national grasslands for the original purposes for which they were acquired, namely to promote grassland agriculture and stabilize local national grasslands communities.

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214. *See* H.R. Rep. No. 1551, *reprinted in* 1960 U.S.C.C.A.N. 2377, 2379 (supporting this application of multiple use principles). A recent federal decision that the Forest Service cannot comply with the MUSYA or the NFMA without planning on an ecosystems basis also supports this interpretation of the NFMA. Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1311 (W.D. Wash. 1994).

V. CONCLUSION

Because the Secretary of Agriculture lacks authority to modify the original purposes for which the federal government acquired the national grasslands, the Forest Service must administer national grasslands for the purposes they were acquired. Unfortunately, the Forest Service is failing to administer the Little Missouri National Grassland in accordance with this well-established legal principle. By implementing alternative three, or for that matter any other specific alternatives set forth in the Draft EIS accompanying the proposed Revisions, the Forest Service will unlawfully divert the Little Missouri National Grassland to uses other than those for which it was originally acquired. Specifically, implementation of alternative three will interfere with efforts to demonstrate the proper grazing of livestock and to maintain a stable agriculture economy through grazing uses, which are purposes for which the Little Missouri National Grassland was acquired.

Although the Forest Service may espouse eloquent and lofty reasons for its proposed modifications, the stark reality is that implementation of the Forest Service's proposed management strategy on the Little Missouri National Grassland would be a clear violation of federal law. The Forest Service must manage the Little Missouri National Grassland for the purposes it was originally acquired. The law simply allows no other alternative.

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