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## Recent Developments in the Law of Livestock Grazing on the Public Lands

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# RECENT DEVELOPMENTS IN THE LAW OF LIVESTOCK GRAZING ON THE PUBLIC LANDS\*

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## I. HISTORY<sup>1</sup>

The Property Clause of the United States Constitution gives Congress "the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."<sup>2</sup> Throughout the Nineteenth Century, Congress did not exercise its power with respect to management of the public lands<sup>3</sup> of the

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1. For a history of the development of the public range laws, see Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 MONT. L. REV. 155 (1967) [hereinafter cited as Scott].

2. U.S. CONST. art. IV, § 3.

3. The term "public lands" has many definitions, depending upon its use. The Federal Land Policy and Management Act of 1976 defined public lands as "[A]ny lands and interests in land owned by the United States within the several states and administered by

United States, except by disposition statutes such as the homestead and mining laws.

In the absence of specific Congressional enactments concerning management of the public lands, the lands were deemed to be available for grazing by domestic livestock owned by the general public. In 1890, the United States Supreme Court in *Buford v. Houtz*<sup>4</sup> recognized a public license to use the public lands and stated:

We are of the opinion that there is an implied license, growing out of the custom of nearly one hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.<sup>5</sup>

The Court further commented on the development of a practice of fattening private herds by allowing them to graze on the public lands:

[I]t became a custom for persons to make a business or pursuit of gathering herds of cattle or sheep, and raising them and fattening them for market upon these unenclosed lands of the government of the United States . . . . Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on which their horses, cattle, hogs and sheep could run and graze.<sup>6</sup>

With passage of the Forest Service Organic Act<sup>7</sup> in 1897 and the Taylor Grazing Act<sup>8</sup> in 1934, Congress belatedly took the necessary action to provide authority to close the public lands of the United States to grazing without permit. Needless to say, the change in the law and resultant closure of lands to "open" grazing caused great consternation among the nation's stock growers. In upholding regulations

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the Secretary of the Interior through the Bureau of Land Management." The Public Land Law Commission used the following definition of public lands:

[T]he term "public lands" includes (a) the public domain of the United States, (b) reservations, other than Indian Reservations, created from the public domain, (c) lands permanently or temporarily withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws . . . , (d) outstanding interests of the United States in lands patented, conveyed in fee or otherwise, under the public land laws, (e) National Forests, (f) wildlife refuges and ranges, and (g) the surface and subsurface resources of all such lands . . . .

This article encompasses publicly owned lands, regardless of whether they are "public domain, withdrawn, or acquired lands," owned by the United States and administered by the Bureau of Land Management, Fish and Wildlife Services, Forest Service, or other federal agencies, or owned and administered by the states. For purposes of clarity, we have used the terms "BLM Lands," "Forest Service Lands," "FWS Lands," or "State Lands."

4. 133 U.S. 320 (1890).

5. *Id.* at 326.

6. *Id.* at 327.

7. 16 U.S.C. §§ 551 *et seq.* (1976).

8. 43 U.S.C. §§ 315 *et seq.* (1976).

closing national forest lands to grazing except by permit and upholding trespass actions on national forest lands, the United States Supreme Court held, "The United States can prohibit absolutely or fix the terms on which its property may be used."<sup>9</sup>

Cases also arose dealing with the requirement of the United States to fence its lands to protect itself from trespass.<sup>10</sup> The Court in *Shannon v. United States* stated:

The United States have the unlimited right to control the occupation of the public lands, and no obligation to fence those lands, or to join with others in fencing them for the purpose of protecting its rights can be imposed on it by a State.<sup>11</sup>

The United States Supreme Court in *Light v. United States* refused to consider whether the United States necessarily must fence its lands as required under the laws of the state in which the lands are located. However, the Court, in dictum, stated:

Fence Laws do not authorize wanton and willful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing they were intended to graze upon the lands of another.<sup>12</sup>

The Taylor Grazing Act and the regulations promulgated pursuant to it in the Federal Range Code,<sup>13</sup> provided the authority and mechanics for the Grazing Service, which later became the Bureau of Land Management (BLM),<sup>14</sup> to manage the public lands.

Some commentators have concluded that the Taylor Act merely perpetuated the occupants' rights in the public domain.

In other words, in the Taylor Act, Congress recognized and bowed to the private interests that had grown up through the years. It gave the occupants of the land at the time of the passage of the Act the right to remain on that land and use it . . . . Leases can rarely be revoked and can be bought and sold in conjunction with the sale of adjoining private property. In the end, even as to the public domain, the practices of

9. *Light v. United States*, 220 U.S. 523, 536 (1911); *United States v. Grimaud*, 220 U.S. 506 (1911). In *Shannon v. United States*, 160 F. 870 (9th Cir. 1908), the alleged trespasser on a forest reserve relied on *Buford*, 133 U.S. 320, in claiming an implied license to pasture on the public lands in question. The Court stated that *Buford* recognized such a license to use the public lands where they are left open and unenclosed and no act of government forbids their use. However, when the lands are included in a forest reserve, an act of government does forbid their use and no implied license will be found.

10. *See, e.g.*, *Fraser v. United States*, 261 F.2d 282 (9th Cir. 1958).

11. 160 F. 870, 875 (9th Cir. 1908); *see also* *Fraser v. United States*, 261 F.2d 282, 285 (9th Cir. 1958).

12. 220 U.S. 523, 537 (1911). Fence laws are state statutes which provide that damage done by domestic animals cannot be recovered unless the land had been enclosed with a fence of the size and material necessary to restrain the animals.

13. 43 C.F.R. §§ 4100 *et seq.* (1979).

14. In 1946, the Grazing Service was renamed the Bureau of Land Management.

the cattlemen have been perpetuated by law.<sup>15</sup>

However, the Taylor Act, until 1976, provided the basic legislative authority governing the management and protection of the vacant public lands.<sup>16</sup> Among other things, the Taylor Act provided for the establishment of grazing districts,<sup>17</sup> issuance of grazing permits and leases,<sup>18</sup> authorization of range improvements, such as fences, wells, and reservoirs,<sup>19</sup> exchanges of public lands,<sup>20</sup> and examination and classification for disposal or retention of public lands.<sup>21</sup>

Pursuant to the Taylor Act, the Grazing Service determined the carrying capacity of the federal range and the historical use patterns of the range users. This process, called "adjudicating the federal range," resulted in many administrative appeals, the last of which were decided in the 1960's. These appeals received full Administrative Procedure Act treatment and often resulted in adversary hearings.

This entire history has resulted in a type of symbiotic relationship between the BLM and private owners of land adjacent to the public lands: the BLM is allowed to exercise a degree of dominion over unfenced private lands intermingled with public lands in exchange for the privilege of grazing the public lands.<sup>22</sup>

## II. RECENT DEVELOPMENTS

The management of grazing on the federal public lands is in the midst of rapid development. The National Environmental Policy Act (NEPA)<sup>23</sup> generated litigation and administrative modifications which have significantly affected the role of the federal land management agencies. Recently enacted statutes, recent litigation, increased demands by the nation (and the world) for the use and products of the public lands, and a greater public awareness of the ecological impacts of grazing on public lands have changed the role of the federal agencies in their administration of the public lands.

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15. Scott, *supra* note 1 at 183; Cox, *Deterioration of Southern Arizona's Grassland: Effects of New Federal Legislation Concerning Public Grazing Land*, 20 ARIZ. L. REV. 697, 714 (1978).

16. For a comprehensive discussion of the Taylor Act and associated regulations, see ONE THIRD OF THE NATION'S LANDS (June 20, 1970), (a report to the President and to the Congress by the Public Land Law Review Commission, pp. 105-118).

17. 43 U.S.C. § 315 (1976).

18. *Id.* §§ 315b and 315m.

19. *Id.* § 315c.

20. *Id.* § 315g.

21. *Id.* § 315f.

22. Leo Sheep Co., Int. GR. Dec. 629 (May 7, 1957); Alton Morrell and Sons, 72 I.D. 100 (Feb. 24, 1965); David Abel *et al.*, 78 I.D. 86 (Mar. 26, 1971).

23. 42 U.S.C. §§ 4321 *et seq.* (1976).

A. *Trespass*

The conviction of an Indian who was grazing cattle in Glacier National Park was upheld by the Federal District Court of Montana in July of 1976.<sup>24</sup> Judge Russell E. Smith ruled *inter alia* that the United States could not be compelled to fence its lands. He stated, "The requirement that persons fence their cattle out of federal lands though onerous, is legal."<sup>25</sup> This decision does not mark a change in prior law. It is instead an affirmation of past decisions dealing with trespass to public lands.

In the 1978 decision of *Roaring Springs Association v. Andrus*,<sup>26</sup> the Oregon Federal District Court dealt with the problem of trespass to private lands and ruled that mandamus will lie to require that wild horses that have strayed from public lands be removed from the open range and returned to the public lands.<sup>27</sup> Section 4 of the Wild Horse and Burros Protection Act<sup>28</sup> provides:

If wild free-roaming horses or burros stray from public lands onto privately owned lands, the owners of such land may inform the nearest federal marshal or agent of the Secretary, who shall arrange to have the animals removed . . . .

The privately owned land in *Roaring Springs* was adjacent to publicly owned lands managed by the BLM. The Secretary of the Interior's defense was based on a regulation,<sup>29</sup> promulgated pursuant to Section 4 of the Wild Horses and Burros Protection Act, which imposed a duty on the Secretary to remove wild horses from private lands enclosed by a legal fence or from private lands which were unfenced if such lands were in a "fence-in"<sup>30</sup> area. No duty was imposed by the regulation to remove wild horses from a fence-out or open range area, where the landowner had a duty to fence his land to protect it from trespassing livestock. The landowner in *Roaring Springs* was in an open range area but had not erected a fence. The court held that the regulation was inconsistent with the statute and was to that extent invalid. The court found a duty owed by the government toward all private landowners to remove wild horses or burros which have strayed onto pri-

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24. *United States v. Flammond*, CR 75-41-GF (July 20, 1976).

25. *Id.*

26. 12 E.R.C. 1557 (D. Ore. 1978).

27. Open range is defined in MCA § 81-4-203 (1979) as "all lands . . . not enclosed by a fence of not less than two wires in good repair." In other words open range refers to an area where livestock may roam freely.

28. 16 U.S.C. §§ 1331 *et seq.* (1976).

29. 43 C.F.R. § 4750.3 (1979).

30. A "fence-in" area is an area where livestock owners have a duty to fence their livestock in and a private landowner is not required to fence his land to protect it from trespassing livestock.

vate property, but limited the holding to instances where funds are currently available to carry out the removal.

The *Roaring Springs* decision points out a potential problem area since for topographical, biological and ecological reasons,<sup>31</sup> wild horses or burros may continue to return to private lands. As the cost of removing the animals may be prohibitive, the government may begin fencing portions of the public lands notwithstanding the lack of a duty to do so.<sup>32</sup>

### B. *Property Rights*

In the 1973 decision of *United States v. Fuller*,<sup>33</sup> the United States Supreme Court continued existing precedent in the area of property rights. It held that a federal range permittee is not entitled to compensation for the taking of his permitted lands for another public use, nor is the permittee allowed additional compensation for the increased value of his fee lands as a result of the attachment of Taylor Act privileges. The Court based its ruling on the facts that the permits are revocable by their terms and do not create a property right.

### C. *BLM Administered Lands*

The BLM is responsible for administering more than 465 million acres of public domain lands that have not been set aside for particular uses. Almost two-thirds of the BLM-administered lands are located in Alaska with the remainder almost entirely within the 11 western states.

The BLM prepared a programmatic environmental impact statement on grazing on the public lands in accordance with the requirements of NEPA. The sufficiency of the impact statement was challenged by the Natural Resources Defense Council in Federal District Court in Washington, D.C.<sup>34</sup> The court held that livestock grazing on the public lands is a major federal action requiring the preparation of an environmental impact statement. The court pointed to the evidence of range land deterioration on public lands and emphasized the need to reverse the trend but noted that the impact statement did not include specific on-the-ground grazing data, and consequently held the

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31. Topography, in the form of cliffs, steep terrain, water sources, etc., in combination with the ecological requirements of wild horses and burros, i.e., forage, water, safety, and comfort, act to determine whether the animals will return to a specific area.

32. *Shannon v. United States*, 160 F. 870, 875 (9th Cir. 1908); *Fraser v. United States*, 261 F.2d 282, 285 (9th Cir. 1958).

33. 409 U.S. 488 (1973).

34. *Natural Resources Defense Council v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976).

Programmatic Grazing Environmental Impact Statement insufficient to comply with the NEPA requirements.

The court order required establishment of a schedule for the preparation of site-specific grazing environmental impact statements. Pursuant to a court-approved agreement, the BLM and the Natural Resources Defense Council prepared a schedule for in excess of 140 environmental impact statements covering over 100 million acres of public lands. This schedule has been affirmed by subsequent action of the same court.<sup>35</sup> For example, as applied to Montana, the agreement requires ten environmental impact statements through fiscal year 1987.<sup>36</sup>

35. Natural Resources Defense Council v. Andrus, 448 F. Supp. 802 (D.D.C. 1978).

36. The court-approved schedule for Montana is as follows:

Environmental Statements Status  
Current Environmental Statement Schedule

<u>Area</u>	<u>Priority</u>	<u>Final ES Due Date</u>	<u>Public Land Acres</u>	<u>Comments</u>
Missouri Breaks	1	79	2,189,000	
Mountain Foothills (Dillon)	2	80	938,000	Work on each EIS funded in fiscal year 1979.
Prairie Potholes (N. of Mo. River)	3	81	1,827,000	
Big Dry (N.E. Mt.)	4	82	1,324,000	
Headwaters (Three Forks)	5	83	278,000	
Powder River (S.E. Mt.)	6	84	1,072,000	Future Schedule, but not funded in fiscal year 1979.
Billings	7	84	441,000	
Garnet (Msla.)	8	85	151,000	
South Dakota	9	85	280,000	
North Dakota	10	87	67,000	

Missouri Breaks Environmental Statement:

Five public meetings were held in Havre, Malta, Lewistown, Jordan and Glasgow, April 2-6, 1979. Very little testimony was received. Written comments were received on the Draft Environmental Statement until April 30, 1979. Comments were analyzed for the Final Environmental Statement due mid-July 1979.

Departmental and Bureau clearance for printing the Final Environmental Statement was obtained July 13, 1979. Final Environmental Statement to be filed with the Environmental Protection Agency the last week in August. Final Environmental Statement was released September 10, 1979.

District managers and area managers will be developing the Range Management Program Decision document to be released by the end of 1979.

Mountain Foothills Environmental Statement:

A field tour was held June 14 and 15, with Departmental, Washington office, Montana State office, district and resource area personnel. The purpose was to familiarize key personnel with on-the-



The Environmental Impact Statements will examine the various options in grazing management:

- a. Elimination of livestock grazing.
- b. No change in current program.
- c. Maximization of livestock grazing.
- d. Various intermediate levels.

Recommendations will be based upon the Environmental Statements and the BLM's inventory and land use planning system. Upon completion of the Environmental Statements and the necessary planning, the BLM will implement the recommendations and issue decisions to each individual grazing permittee or lessee. Originally, the decisions were intended to be given full force and effect with the BLM to have authority to begin immediate implementation of the decisions regardless of appeal. The affected party would then have the option of going immediately to Federal District Court without the necessity of further administrative appeals or of pursuing administrative remedies.<sup>37</sup> The Department of Interior and Related Agencies Appropriation Act of 1980 restricted any reduction in the number of animals allowed to graze a particular allotment to not more than ten percent in 1980. The 1980 Fiscal Year Appropriation Act suspended imposition of the balance of any reduction pending administrative appeal and required processing of appeals within two years.<sup>38</sup>

The first Montana Environmental Statement, the Missouri Breaks Grazing Environmental Statement, was published in final form on September 10, 1979. The Environmental Statement proposes some modest

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ground resource values, problems and management implications. The Preliminary Draft Environmental Statement is due in the Washington office October 1979, with the Draft Environmental Statement expected to be released February 1980, and the Final Environmental Statement due September 1980.

Prairie Pothole Environmental Statement:

The preplanning analysis and preparation plan have been submitted to the Bureau of Land Management Washington office for their review. Final due September 1981.

Big Dry Environmental Statement:

A vegetation inventory contract (transect sampling) and mapping contract have been prepared by the Miles City District Office.

Redwater vegetation inventory mapping has been completed and New Prairie mapping has been started by contractors. Vegetation sampling has begun for the same two areas by a contractor. Soil Conservation Service is completing soil surveys ahead of both mapping and vegetation sampling. Much of this work is being expedited by the use of helicopters. These contracts are critical in terms of timely completion and sequence. The inventory is progressing as planned.

37. 43 C.F.R. 4160.3(c) (1979); 43 C.F.R. 4477(b)(1) and (2) (1979); The Federal Range Code was revised in Federal Register, July 4, 1978, page 29067 *et seq.* Additional changes have been proposed in the Federal Register, July 30, 1979, page 44702 *et seq.* Appeals procedures were revised in Federal Register, July 18, 1979, page 41791 *et seq.*

38. 93 Stat. 954, 956 (November 27, 1979).

reductions in grazing levels, but for the most part, proposes little or no change. The plan includes provisions for construction of additional fences, livestock watering facilities, and the improvement of vegetation. An overall reduction of one percent of present livestock use is proposed. The change on individual allotments, however, ranges from increases in grazing levels of 158 percent to decreases of 58 percent. The proposed implementation schedule covers a four-year period. The BLM is currently estimating that at least \$2.1 million (\$6.2 million, 1979 costs) of range improvements will be required to implement the decisions of the Missouri Breaks Environmental Statement. Future implementation of decisions in the other Environmental Statement areas will require similar sums.

The BLM is proceeding through a similar process in other states. Interesting litigation has resulted. In Idaho Federal District Court, an association of range users has sought to enjoin the BLM from proceeding with preparation of a Final Environmental Impact Statement until the plaintiffs have had an additional ninety days in which to comment on the Draft Environmental Statement.<sup>39</sup> The trial court issued the injunction and the United States appealed. In an order "For Publication," the Ninth Circuit vacated the injunction, holding that prior Supreme Court decisions have "counseled the courts not to interfere with an agency's proceedings before the agency renders its decision."<sup>40</sup> The court further held that the time limitations were necessary to comply with the Environmental Statement preparation schedule.

In New Mexico, the BLM has completed the Rio Puerco Range Management Environmental Impact Statement and has issued decisions implementing it. The decisions have been put into full force and effect. The Rio Puerco statement was one of the first environmental statements to be completed and to have its implementation begun. Local grazing permittees have challenged the implementation program. The New Mexico Federal District Court, in dissolving a temporary restraining order granted February 27, 1979, ruled that no injunction should issue against the United States as the plaintiffs had not shown a likelihood of prevailing on the merits, nor had they shown irreparable injury resulting from implementation of the program.<sup>41</sup> On appeal, the Tenth Circuit issued a temporary injunction against the United States' implementation of the program and set the case for hearing to show

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39. *Bennett Hills Grazing Association v. United States of America*, D.C. #79-1110, Boise, Idaho.

40. *Bennett Hills Grazing Association v. United States of America*, #79-4397, 13 ERC 1527 (9th Cir. 1979); *see also* *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978).

41. *Valdez v. Appelgate*, Civil No. 78-944-C (D.N.M. 1979).

cause why a permanent injunction should not issue.<sup>42</sup> In a slip opinion dated March 5, 1980, the Tenth Circuit Court reversed the District Court's decision, instructed the District Court to issue a temporary injunction, and remanded for a trial on the merits of the grazing decisions. The Department of Interior relied on the 1980 Fiscal Year Appropriation Act as mooted the "full force and effect" decision issue. The Court stated:

Immediate effectiveness is not consonant with judicial review, absent exceptional circumstances, which the Secretary has not even claimed in his brief. Plaintiff's contention that immediate implementation of the grazing reductions up to 10% must be justified by "the orderly administration of the range" remains viable.<sup>43</sup>

### 1. *Federal Land Policy and Management Act (FLPMA)*<sup>44</sup>

The passage of the BLM Organic Act (FLPMA) has had a significant impact on BLM and Forest Service range administration. FLPMA authorized many new BLM responsibilities and codified or repealed thousands of existing public land laws. The scope of its coverage can be seen in a brief overview. Some of the provisions:

1. Authorize wilderness area designations on BLM administered lands.<sup>45</sup>
2. Place into law the land use planning concept of the BLM.<sup>46</sup>
3. Codify the multiple use and sustained yield philosophy of the BLM.<sup>47</sup>
4. Provide a range use fee computation procedure.<sup>48</sup>
5. Provide for the expenditure of range betterment funds notwithstanding the provisions of NEPA.<sup>49</sup>
6. Provide for permits or leases having a duration of 10 years,<sup>50</sup>

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42. *Valdez v. Appelgate*, Civil No. 79-1636 (10th Cir. 1979).

43. *Id.* (March 5, 1980).

44. 43 U.S.C §§ 1701 *et seq.*

45. *Id.* at § 1782. § 1782(c) indicates that grazing can be allowed to continue within wilderness study areas "in the manner and to the extent existing prior to FLPMA." See Int. Sol. Op. M-36910, *Interpretation of Section 603 of the Federal Land Policy and Management Act of 1976 — BLM Wilderness Study*, 86 I.D. 89, 102-22, particularly 111-113, February 13, 1979. In Montana, by a decision of 9 August 1979, 2.2 million acres of public lands, 26 percent of all BLM lands, were set aside for intensive wilderness study. A decision recommending wilderness study designation is due in 1980. Until that decision is made, the lands will be managed for grazing as allowed.

46. 43 U.S.C. §§ 1711 and 1712 (1976).

47. *Id.* § 1732.

48. *Id.* § 1751(1).

49. *Id.* § 1751(b)(1).

50. *Id.* § 1752(a).

except as specifically authorized.<sup>51</sup>

7. Authorize allotment management plans.<sup>52</sup>

8. Provide for a two-year notice of termination plus compensation to permittees for authorized permanent improvements should the United States terminate leases in order to put the lands to another public use.<sup>53</sup>

9. Reauthorize Grazing Advisory Boards until 1985, at which time they terminate if the law is not amended to provide for an extended life.<sup>54</sup>

10. Provide for wild horse and burro management authorizing the use of helicopters in roundups and the use of motorized vehicles to transport captured animals.<sup>55</sup>

## 2. *The Public Rangelands Improvement Act*<sup>56</sup>

The Public Rangelands Improvement Act, enacted in 1978, also significantly impacts grazing on the public lands. As with FLPMA, Congress first found that the public rangelands were deteriorating and in serious need of rehabilitation.<sup>57</sup> Congress declared that the deteriorated condition of the rangelands could be corrected by an intensive management, maintenance and improvement program which would involve increased levels of rangeland management and improvement funding for multi-use values.<sup>58</sup> In essence, the Public Rangelands Improvement Act supplements FLPMA.

The Public Rangelands Improvement Act authorizes the investment of up to \$15 million in fiscal years 1980 and 1981, and somewhat more from 1982 to 1999, for rangeland improvement measures.<sup>59</sup> Eighty percent of the new funds must be used for on-the-ground range rehabilitation, maintenance and construction of range improvements. These funds augment those already approved by the Congress in the four-year authorization for the BLM.<sup>60</sup>

The Public Rangelands Improvement Act determines, at least for the next several years, how the controversial fee that livestock operators pay for the use of public lands and National Forest lands will be assessed. The legislation authorizes a fee based in part on the cost of

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51. *Id.* § 1752(b).

52. *Id.* § 1752(d)-(f).

53. *Id.* § 1752(g).

54. *Id.* § 1753.

55. *Id.* § 404; 16 U.S.C. § 1338(a) (1976).

56. 43 U.S.C. §§ 1901 *et seq.* (1976).

57. *Id.* § 1901(a)(1)-(4).

58. *Id.* § 1901(a)(4).

59. *Id.* § 1904(a).

60. *Id.*

livestock production and livestock market costs. The fee increase in any given year cannot exceed the previous year's fee by more than 25 percent and 50 percent of the fees or \$10 million—whichever is greater—is to be used for range rehabilitation and improvement.<sup>61</sup>

The Public Rangelands Improvement Act also:

1. Limits the number of wild horses and burros a single applicant can adopt to four animals in any given year, unless the Secretary can determine that the individual can properly care for more, and provides for transfer of title to four animals, provided the individual has provided humane care and treatment for one year.<sup>62</sup>

2. Reaffirms a national policy of protecting wild horses and burros and provides better methods for managing horse and burro populations through adoption and humane disposal.<sup>63</sup>

3. Requires careful consultation and coordination with district grazing advisory boards and other range users concerning rangeland planning and use of range improvement funds.<sup>64</sup>

4. Requires preparation of environmental statements when the Secretary determines a proposed range improvement will have a significant impact and provides for less complex environmental assessments for actions having less significant effects.<sup>65</sup>

5. Directs the Secretaries of Interior and Agriculture to consider implementation of an experimental range stewardship program that rewards or provides incentives for grazing permittees to improve public range conditions.<sup>66</sup>

6. Reaffirms and strengthens the commitment of the Interior Department under FLPMA for ten-year leases for grazing allotment permittees.<sup>67</sup>

7. Makes mandatory the creation of district multiple-use advisory councils to consult with the Department on such local issues as land use planning, land classification, retention, and disposal, and other management actions.<sup>68</sup>

8. Applies to Kansas, Nebraska, Oklahoma, South Dakota and North Dakota, as well as the other eleven Western states covered by FLPMA.<sup>69</sup>

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61. *Id.* § 1705. Under the President's current wage and price limitations, increases may be limited to 7 percent.

62. *Id.* § 14; 16 U.S.C. § 1333(b)(1)-(d)(5).

63. 43 U.S.C. § 1901(a)(6) and (b)(4).

64. *Id.* §§ 1903 and 1904(c).

65. *Id.* § 1903(d).

66. *Id.* § 1908.

67. *Id.* § 7(a); 43 U.S.C. § 1752 (1976).

68. *Id.* § 13; 43 U.S.C. § 1739 (1976).

69. *Id.* § 3(b) and (c)1; 43 U.S.C. § 1702(k) (1976).

It has been suggested that the major weakness of FLPMA and the Public Rangelands Improvement Act is the subordination of "nonuser" interests and values such as aesthetics, wildlife, and outdoor recreation, to historic user values.<sup>70</sup> Congress' concern for the livestock grazing industry is reflected in the two Acts. However, it is apparent in the "Declaration of Policy" sections of both Acts that Congress was largely concerned with the rangelands themselves, not necessarily with the user. By improving the quality of the rangelands, perhaps by incorporating various methods of deferred livestock grazing or eliminating domestic livestock grazing entirely in some areas, benefits to the user, human or otherwise, may accrue.

### 3. *Conclusions Regarding BLM Administered Rangelands*

In considering recent litigation, recent legislation and historic uses, several fundamental conclusions can be drawn concerning BLM administered rangelands:

1. There will be more direct governmental supervision of the use of the public lands, that is, more "stewardship" as opposed to "custodial" supervision.

2. Depending on land use planning and Environmental Impact Statement findings, there may be less authorized use of public lands for cattle grazing, *vis-a-vis* other public land uses, such as wilderness, wildlife, and recreation.

3. Substantial federal funding will be necessary to implement recommendations regardless of the level of grazing use. Significant range improvements are necessary.

4. Extensive appeals and litigation will be forthcoming as the BLM begins to implement grazing changes.

### D. *Forest Service Administered Lands*

The Secretary of Agriculture has authority to permit, regulate, or prohibit livestock grazing on all lands administered by the Forest Service. This authority is based on the Organic Act of June 4, 1897,<sup>71</sup> the Act of April 24, 1950,<sup>72</sup> Title III of the Bankhead-Jones Farm Tenant Act,<sup>73</sup> the Transfer Act of 1905,<sup>74</sup> the Multiple-Use Sustained-Yield Act of 1960,<sup>75</sup> FLPMA,<sup>76</sup> and the Public Rangelands Improvement

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70. Cox, *supra*, note 20.

71. 16 U.S.C. § 551 (1976).

72. The Granger-Thye Act; 16 U.S.C. § 580 (1976).

73. 7 U.S.C. § 1011 (1976).

74. 16 U.S.C. § 472 (1976).

75. 16 U.S.C. § 528 (1976).

76. 43 U.S.C. §§ 1752, 1753 (1976).

Act.<sup>77</sup> Under regulations promulgated by the Secretary, the Forest Service allows use of the National Forest ranges for grazing that is properly coordinated with other uses such as timber production, watershed protection, recreation and wildlife.<sup>78</sup>

### 1. *Recent Litigation*

Courts in recent decisions have held regulations promulgated under 16 U.S.C. § 551 prohibiting the pasturing of livestock on National Forest Lands without a permit to be enforceable. These prohibitions had been held enforceable by a number of earlier cases,<sup>79</sup> some of which have been discussed earlier.<sup>80</sup>

In a 1968 decision, dismissal of a complaint seeking to enjoin the Forest Service from impounding trespassing cattle<sup>81</sup> was upheld by the Eighth Circuit Court of Appeals.<sup>82</sup> The court noted that the Secretary of Agriculture's authority to permit impoundment of trespassing cattle had to be based either on statutory provisions dealing with the authority to make regulations to prevent trespass on lands acquired for conservation purposes,<sup>83</sup> or on statutory provisions requiring the Secretary of Agriculture to protect the National Forest from depredation.<sup>84</sup> Since the second provision deals specifically with National Forests, the court found it to be the applicable authority. The United States was analogized to a landowner at common law in order to show that even though the right to impound for trespass had not been specifically granted by Congress, the United States necessarily has the remedies available to a common law landowner. Therefore, the court reasoned, the Secretary had implied authority to use the remedy of impoundment.

The Tenth Circuit Court of Appeals in 1970 reiterated the proposition that while grazing permits are valuable to ranchers, they are not an interest protected by the Fifth Amendment of the United States Constitution against the taking by the Government which granted them with

77. 43 U.S.C. §§ 1901 *et seq.* (1976).

78. Generally, the following Code of Federal Regulation sections deal with the general subject indicated:

36 C.F.R. § 222 — Range Management

36 C.F.R. § 213 — Bankhead—Jones Lands

36 C.F.R. § 261 — Prohibitions

36 C.F.R. § 262.2 — Unauthorized Livestock

79. *United States v. Johnson*, 38 F.Supp. 4 (D.W.Va. 1941); *United States v. Gurley*, 279 F. 874 (D.Ga. 1922); *United States v. Bule*, 156 F. 687 (D.S.D. 1907); *Dasteivignes v. United States*, 122 F. 30 (9th Cir. 1903); *United States v. Deguirro*, 152 F. 568 (D. Cal. 1906); and *Bell v. Apache Maid Cattle Co.*, 94 F.2d 847 (9th Cir. 1938).

80. *Supra*, note 8.

81. 36 C.F.R. § 262.2 (1979).

82. *Jones v. Freeman*, 400 F.2d 383 (8th Cir. 1968).

83. 7 U.S.C. § 1101(f) (1976).

84. 16 U.S.C. § 551 (1976).

the understanding that they could be withdrawn.<sup>85</sup> Also of interest in the *Pankey Land and Cattle Co.* decision is the contention made by the plaintiffs that a document entitled *Western Livestock Grazing Survey* did not adequately consider the interest of the operator when comparing pasture fees on private lands and public lands. The court decided that the method of determining grazing fees was a matter of discretion to be exercised by the appropriate agency, and since statutory authority for setting fees exists, to prevail, the plaintiff had the burden to show that the agency had abused its discretion.

Another Fifth Amendment attack was made on the impoundment regulation in a Fifth Circuit 1973 decision.<sup>86</sup> The case involved cattle that Forest Service personnel had impounded. Notice had been sent to the owner of the cattle informing him that redemption could be made upon payment of the Government's expenses. After the owner did not redeem the cattle, notice by publication was made by the Forest Service announcing that the impounded cattle would be auctioned at public sale. Plaintiff then brought an action alleging that the impoundment regulation was unconstitutional because it did not provide for notice and a hearing prior to impoundment, or for an opportunity to contest the validity of the expenses incurred. The court found that the regulation provided for ample notice both before and after the cattle were impounded, and was not, therefore, constitutionally invalid.

In a 1978 Arizona Federal District Court decision, the Secretary of Agriculture's decision to reduce the authorized utilization of National Forest lands under a grazing permit was held to be agency action which is committed to agency discretion by law and is not subject to judicial review.<sup>87</sup>

#### E. *U.S. Fish and Wildlife Service (FWS) Administered Lands*

The current regulations<sup>88</sup> governing the management of National Wildlife Refuge Systems<sup>89</sup> allow grazing at the discretion of the FWS:

Public or private economic use of the natural resources of any wildlife refuge area may be authorized . . . where the use

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85. *Pankey Land and Cattle Co. v. Hardin*, 427 F.2d 43, 45 (10th Cir. 1970). The court in making the Fifth Amendment determination cited *United States v. Cox*, 190 F.2d 293, 296 (10th Cir. 1951) and *Porter v. Resor*, 415 F.2d 764, 766 (10th Cir. 1969).

86. *McVay v. United States*, 418 F.2d 615 (5th Cir. 1973).

87. *Perkins v. Berglund*, 455 F.Supp. 937 (D.Ariz. 1978).

88. 50 C.F.R. §§ 25,26,29 (1979).

89. The "National Wildlife Refuge System" means all lands, water and interests therein administered by the FWS as wildlife refuges, wildlife management areas, waterfowl production areas, and other areas for the protection and conservation of fish and wildlife.



may contribute to or is related to the administration of the area.<sup>90</sup>

Grazing is allowable only at the discretion of the FWS as mandated by the stated purpose of wildlife refuges:

All national wildlife refuges are maintained for the primary purpose of developing a national program of wildlife and ecological conservation and rehabilitation.<sup>91</sup>

Therefore, grazing and other kinds of private economic uses may be, and commonly are, allowed on wildlife refuges. However, no public or private economic use is permissible if it is not compatible with the primary purpose of the refuge.

The major "recent development" involving grazing and the FWS in Montana has been that agency's administration of the Charles M. Russell National Wildlife Refuge (hereinafter referred to as the Refuge). The Refuge encompasses the 245,000 acre Fort Peck Reservoir and the Missouri River "breaks" in portions of six northeastern Montana counties (Phillips, Valley, McCone, Garfield, Petroleum and Fergus). The Refuge extends approximately 125 miles from east to west. Since its establishment in the 1930's, the Refuge had been jointly administered by the FWS, the BLM and the Army Corps of Engineers.

In 1975, the Secretary of the Interior proposed to transfer to the BLM exclusive management of the Refuge and two other Wildlife Ranges.<sup>92</sup> Public outcry resulted in the passage of legislation by Congress in 1976 vesting the FWS with sole jurisdiction of the Refuge.<sup>93</sup>

Under the original order, the BLM had scheduled a grazing environmental statement on the Refuge.<sup>94</sup> The FWS later agreed to prepare the statement in place of the BLM. The FWS is now working on a master plan including grazing. A final Environmental Impact Statement is due in the spring of 1980.

The transfer of the Refuge to exclusive FWS jurisdiction has resulted in substantial changes in grazing administration and grazing use:

1. Grazing leases or permits are less permanently vested in the user due to the different authorities of FWS.
2. Grazing is subordinate to wildlife needs.
3. The FWS has different authorities for grazing,<sup>95</sup> trespass,<sup>96</sup> and different appeals procedures<sup>97</sup> concerning permits.

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90. 50 C.F.R. § 29.1 (1979).

91. 50 C.F.R. § 26.11(b) (1979).

92. Federal Register, Vol. 40, No. 85, page 18,996 (May 1, 1975).

93. 16 U.S.C. § 668dd (Feb. 27, 1975).

94. Natural Resources Defense Council v. Morton, 388 F. Supp. 829 (1974), *aff'd*, 527 F.2d 1386 (1976), *cert. denied*, 427 U.S. 913 (1976).

95. 50 C.F.R. § 29.1 (1979).

96. 50 C.F.R. § 26.21 (1979).

97. 50 C.F.R. § 25.44 (1979).

Litigation has recently been filed contesting the FWS management of grazing, fencing, and other programs on the Refuge.<sup>98</sup>

#### F. *Lands Administered by the States*

For convenience in discussing grazing on State lands, only the Montana situation will be discussed. Other states may administer their lands differently due to differences in state constitutions, laws, and the origin of the lands.<sup>99</sup>

The Montana Attorney General has determined that state school lands are held in trust for the production of income for the state school fund. Consequently, no interest in state school lands can be disposed of by lease, sale, or any other transfer to other state agencies, unless and until the school trust fund is fully compensated in money for the full market value of the interest transferred.<sup>100</sup> This opinion may foreclose the dedication of school lands to non-revenue producing uses such as wilderness or recreation.

Grazing on state lands is under the control and supervision of the Department of State Lands<sup>101</sup> pursuant to rules adopted by the State Board of Land Commissioners.<sup>102</sup> Leasing is based upon a forage capacity appraisal by the Department<sup>103</sup> and is pursuant to competitive bidding.<sup>104</sup> A prior lessee has a preference right to match the highest bid or request an administrative hearing to determine whether the bid is excessive.<sup>105</sup> Leases may be cancelled for cause<sup>106</sup> or for changes in use of the land by the Department.<sup>107</sup> Lessees may place improvements on the leased premises<sup>108</sup> and are compensated for the improvements upon transfer to a new lessee.<sup>109</sup>

Unless a herd district has been created,<sup>110</sup> or lands are fenced, Montana is an open range state.<sup>111</sup> Consequently, livestock are permit-

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98. *Schwenke v. United States Department of Interior, Fish and Wildlife Service*, Civ. No. 79-133-BLG (D.Mont. 1979).

99. Arizona and New Mexico for instance; see *Cox supra*, note 20.

100. Mont. Att. Gen. Op. Vol. 36, No. 92 (July 7, 1976); see also Memorandum by Leo Berry, Commissioner of State Lands, *Compensation to School Trust*, (November 28, 1975); MONT. CONST., art. X, §§ 3 and 11; Montana Enabling Act, 25 Stat. 676 (Feb. 22, 1889); and the Montana Natural Areas Act of 1974, MCA § 76-12-101 *et seq.*

101. MCA § 77-6-102 (1979).

102. *Id.* § 77-6-104.

103. *Id.* § 77-6-201.

104. *Id.* § 77-6-202.

105. *Id.* § 77-6-205.

106. *Id.* §§ 77-6-113, 208, 210.

107. *Id.* § 77-6-209.

108. *Id.* § 77-6-301.

109. *Id.* § 77-6-302.

110. *Id.* §§ 81-4-301 *et seq.*

111. *Id.* § 81-4-203. See also note 27, *supra*.

ted to run at large.<sup>112</sup>

The Montana Supreme Court, in *Jerke v. Department of State Lands*,<sup>113</sup> recently considered the former lessee's preference right. Prairie County State Grazing District, operating pursuant to MCA, §§ 76-16-102, *et seq.*, was the lessee of certain state lands. When the lease term ended, plaintiff-appellant submitted the only bid for the new term. The Grazing District first challenged the bid as unreasonable. The Department determined the bid to be bona fide. The District then exercised its right to meet the highest bid and the new lease was awarded. The District then subleased to a third party.

Plaintiff-appellant sued, challenging the constitutionality of the preference right in that the preference right prevents the State from obtaining full market value for the land, and sought to have the lease and sublease set aside and the lease awarded to him. The District Court ruled against plaintiff-appellant.

On appeal, the Montana Supreme Court, after discussing the public trust ownership of public lands by the State, the Constitutional requirement for the production of revenue from state lands, and the sustained yield philosophy, held that the preference right as applied to the above facts was unconstitutional. The premise of the Court's holding was that the sublessee of the District, the actual range user, would have no motivation to further the policy of sustained yield. Further, the District would be substituted for the State as trustee of the lands and would determine who would occupy the lands.

To allow an existing lessee who does not use the land to exercise a preference right constitutes an unconstitutional application of the preference right statute . . . . The only way full market value can be obtained in such a situation is by pure competitive bidding.<sup>114</sup>

### III. CONCLUSION

In spite of litigation, new statutes, new regulations and the planning and environmental impact statement process, one thing has remained constant—the basic qualifications to hold grazing leases or permits on BLM administered lands. These are:

1. Citizenship.
2. Engagement in the livestock business.
3. Ownership or control of land or water base property.<sup>115</sup>

The reaction to the efforts of the BLM to comply with the Natural

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112. MCA § 81-4-201 (1979) restricts sheep, swine, and goats from running at large.

113. *Jerke v. Department of State Lands*, — Mont. —, 597 P.2d 49 (1979).

114. *Id.* — Mont. —, 597 P.2d at 51.

115. 43 C.F.R. 4110.1(a)-(c) (1979).

Resources Defense Council Court Order, FLPMA, the Public Rangelands Improvement Act, and NEPA has been widespread. At least one state, Nevada, has passed legislation creating a procedure to contest federal ownership and management of the public lands in Nevada.<sup>116</sup> Other states are expected to follow suit in their 1980 legislative sessions. Additionally, a bill has been introduced in Congress to authorize and provide for the conveyance of public lands to the states.<sup>117</sup>

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116. N.R.S. Ch. 321. Nevada is approximately 87 percent federally owned and in large part BLM administered.

117. S. 1680, 96th Cong, 1st Sess., August 3, 1979.

