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GRAZING IN WILDERNESS AREAS⁺

BY
MARK SQUILLACE*

Domestic livestock grazing is naturally in tension with wilderness. Wilderness areas are not truly “untrammled by man” when they host managed livestock grazing. Yet the compromise that allowed livestock grazing in wilderness areas was surely one of the greatest in the history of the conservation movement. Without it, Congress might never have passed a wilderness bill or designated countless wilderness areas throughout the country. The grazing exception—and the Congressional Grazing Guidelines that afford specific protections for grazers—made it possible to secure bipartisan support for wilderness bills in even the most conservative western states.

Notwithstanding this success, the ecology of some wilderness areas would plainly benefit from reducing or removing livestock, and modest changes to current law could accommodate such reductions without undermining the essential compromise that has allowed wilderness to flourish. In particular, as livestock grazing has declined in importance to the economy and the culture of the western public lands states, opportunities abound for the voluntary retirement of grazing rights. Unfortunately, the law has not yet evolved in a manner that can assure that the voluntary retirement of grazing rights can be made permanent. Without such assurances parties

⁺ This is an Article that probably should have been written by my friend and colleague, Joe Feller. Joe was a professor of law at the Arizona State University College of Law and a passionate advocate for better management of public lands grazing. While he fought hard to keep cows out of places where he thought they didn't belong, *see* Joseph M. Feller, *The Comb Wash Case: The Rule of Law Comes to the Public Rangelands*, 17 PUBLIC LAND & RESOURCES L. REV. 25, 28 (1996), Joe was no ideologue, and I think he would have been very comfortable with the grazing compromise that was necessary to secure the passage of the Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136 (2006). More than once when I was writing this Article I wanted to call Joe to ask him a question or run something by him. Sadly, I was unable to ask Joe my questions because he was tragically struck by a car and killed near his home in Tempe, Arizona on April 8, 2013. I hope that Joe would have approved of this small contribution to the discussion of public lands grazing, but I know for sure that he would have reveled in the debate that it is designed to foster. I regret deeply that at least in this life Joe is not around to participate in that debate.

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interested in purchasing grazing rights to protect wilderness areas are unlikely to step forward.

This article reviews the history and legal status of livestock grazing on the wilderness lands. It includes a brief review of the beneficial and adverse impacts of livestock grazing on the ecological health of land systems and how those impacts might compromise wilderness values before discussing federal grazing policy, especially as applied to wilderness areas. It concludes with a modest plea to clarify the authority of the BLM and the Forest Service—the principal federal land management agencies—to reduce or remove livestock from wilderness lands where necessary to protect public lands resources, and to retire wilderness grazing rights permanently, where the existing permittee willingly accepts an offer to purchase such rights.

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I. INTRODUCTION

Domestic livestock grazing is naturally in tension with wilderness. Wilderness cannot truly meet the congressional mandate of being “untrammelled by man”¹ when managed livestock are allowed to freely graze wilderness lands. Yet the Wilderness Act expressly provides, without exception, that “the grazing of livestock, where established prior to September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture.”² Aside from conflicts with the very notion of wilderness, livestock grazing can also cause significant environmental harm.³ And unlike the other major concession in the Wilderness Act—which allowed mineral locations under the General Mining Law⁴ to continue, but only through December 31, 1983⁵—the law makes no provision for ever allowing a federal agency to reduce or remove livestock from public lands because those lands have been designated wilderness. On the contrary, the law actually precludes the

¹ 16 U.S.C. § 1131(c) (2006).
² *Id.* § 1133(d)(4).
³ See, e.g., Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 CONSERVATION BIOLOGY 629, 630–31 (1994).
⁴ General Mining Act of 1872, 30 U.S.C. §§ 22–24, 26–28, 29, 30, 33–35, 37, 39–43, 47 (2006).
⁵ 16 U.S.C. § 1133(d)(3) (2006).

curtailment of grazing rights where such a curtailment is intended to protect an area's wilderness character.⁶

This Article asks whether the congressional compromise that allows grazing in wilderness areas to continue indefinitely was the right result. It concludes, with some reservations, that the benefits of a vastly expanded network of wilderness areas were well worth the potentially substantial environmental costs. The Wilderness Act itself might never have been enacted, and much of the wilderness that we prize today would simply not have been designated absent some such compromise. Nonetheless, some modest changes to the way that the law is currently administered can and should be adopted as suggested below.

The Article begins with a brief discussion about the beneficial and adverse impacts of livestock grazing on the ecological health of land systems and how those impacts might compromise wilderness values. It then proceeds to a discussion of federal grazing policy generally to provide context for the more specific discussion and analysis of the law relating to range management in wilderness areas. It is hard to deny that the compromise to allow grazing to continue in wilderness areas was necessary to secure passage of the law.⁷ And grazing in wilderness areas can often be managed to protect and even enhance ecological conditions on the land.⁸

Nonetheless, there are times and conditions when the only sound ecological choice is to remove livestock from the land.⁹ Moreover, both the Bureau of Land Management (BLM) and the Forest Service, specifically provide for reducing or removing livestock from nonwilderness lands through a relatively straightforward process, even if reductions remain somewhat unusual.¹⁰ Somewhat oddly, however, the legal and political obstacles to removing livestock from wilderness areas actually make such a decision more challenging in these areas than it is for nonwilderness lands. But the law can and should evolve in a way that allows the reduction or

⁶ See *id.* § 1133(d)(4) (allowing continued grazing on wilderness lands if established prior to 1964).

⁷ See DOUG SCOTT, *THE ENDURING WILDERNESS: PROTECTING OUR NATURAL HERITAGE THROUGH THE WILDERNESS ACT* 50, 54 (2004). Scott argues that major land use concessions were necessary for House Interior and Insular Affairs Committee Chairman Wayne Aspinall (D-Colorado) to allow the bill out of committee. Aspinall had effectively stalled the bill in committee from 1960 through 1963. *Id.* at 52–54.

⁸ See, e.g., CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 104–06 (1992). Wayne Aspinall, Chairman of the House Interior and Insular Affairs Committee, ultimately supported a deal to pass the Classification and Multiple Use Act, the Public Land Sale Act, and the Wilderness Act, only by making the two former acts temporary, pending congressional study of public land laws, in order to maintain congressional authority regarding land policy and supervising agency action. JAMES MUHN ET AL., *OPPORTUNITY AND CHALLENGE: THE STORY OF THE BLM* 111 (U.S. Dept. Interior 1988).

⁹ See, e.g., *id.* at 108–09 (noting that fragile soils in some areas may become so degraded that “grazing must be cut back or eliminated altogether, perhaps for many years, perhaps permanently”).

¹⁰ See 43 C.F.R. §§ 4110.3–2, 4110.3–3 (2013) (BLM regulations); 36 C.F.R. § 222.4 (2013) (Forest Service regulations).

removal of livestock from wilderness without unduly compromising grazing rights that pre-dated wilderness designation.

To that end, the Article concludes with a modest plea to clarify the authority of the BLM and the Forest Service to reduce or remove livestock for reasons other than the fact that the land is designated wilderness. In addition, the agencies should recognize their existing authority to accommodate the voluntary but permanent retirement of grazing in wilderness areas. While some guidance may be needed to help agency officials understand existing law and process retirement applications, government policy should ultimately encourage such retirements, especially where they will promote the ecological health of affected wilderness areas.

II. THE ENVIRONMENTAL IMPACTS FROM LIVESTOCK GRAZING

While it might seem reasonable to assume that the impacts from livestock grazing on public lands are all negative, many studies have shown that properly managed grazing can actually promote healthy lands.¹¹ This is especially true for lands that have evolved with browsing by ungulates.¹² Where grazing practices are not carefully managed, or where the landscape is not suited to grazing, serious adverse environmental effects can occur.¹³ Public lands grazing is a particular problem on hot desert landscapes managed by the BLM.¹⁴

Currently, both the BLM and the Forest Service allow domestic livestock to graze on the vast majority of the lands that they manage.¹⁵

¹¹ See JENNIFER TAYLOR & STEVE NEARY, *How Does Managed Grazing Affect Wisconsin's Environment?* 1-2, 4, available at <http://www.cias.wisc.edu/wp-content/uploads/2008/10/grzgenvweb.pdf>.

¹² See U.S. Fish and Wildlife Serv., *Impacts of Grazing*, <http://www.fws.gov/invasives/stafftrainingmodule/methods/grazing/impacts.html> (last visited Apr. 12, 2014).

("The ecological forces—herbivory, physical impact, and deposition—of grazing ungulates have shaped natural grazing ecosystems around the world. Grazing ecosystems evolved with and depend upon herbivory, heavy hoof action, nitrogen deposits, and decomposing carcasses of large migratory ungulates. When introduced into ecosystems that did not evolve with frequent grazing, these forces can alter biological communities and ecosystem function.").

¹³ See generally DEBRA L. DONAHUE, *THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM THE PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY* 117-33 (1999) (discussing the impacts of grazing and grazing-related activities on rangelands).

¹⁴ See generally, U.S. GOV'T ACCOUNTABILITY OFFICE, *GAO/RCED-92-12, RANGELAND MANAGEMENT: BLM'S HOT DESERT GRAZING PROGRAM MERITS RECONSIDERATION* (1991), available at <http://www.gao.gov/products/GAO/RCED-92-12> (reviewing the federal grazing program in hot desert landscapes and concluding any economic benefits of grazing are minimal, while the long term environmental risk and present damage are substantial); see also DONAHUE, *supra* note 13, at 56.

¹⁵ See Joseph M. Feller, *What Is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 570 (1994). Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 7 CONSERVATION BIOLOGY 629, 630 (1994). Feller claims that the BLM allows grazing on approximately 94% of the land (167 out of 177 million

Perhaps the most important issue with livestock grazing is maintaining conditions that will allow native perennial grasses and other vegetation to thrive. Where conditions are suitable for grazing, and where grazing is properly managed, grazing may help to promote such conditions.¹⁶ But overgrazing,¹⁷ or grazing in fragile areas that have not historically been frequented by ungulates, often favors nonnative annual species such as cheat grass.¹⁸ Nonnative plants are generally unsuitable as forage for livestock and they often are less reliable for stabilizing fragile desert soils.¹⁹ A related problem is simply the loss or reduction in the amount of ground cover that can result from grazing. This adversely affects the ability of the soil to hold water, accelerates erosion, and can adversely impact stream hydrology.²⁰

Livestock grazing can also cause soil compaction and destroy cryptogamic soil crusts that are critical to stabilizing desert soils and promoting favorable conditions for plant growth.²¹ Cattle and sheep manure and urine provide organic material that can improve soil condition, but if not carefully managed, they can also contribute to water pollution.²²

Overgrazing livestock on lands that did not evolve with ungulate browsing also increases levels of dust particulate in the atmosphere. The lack of vegetation and soil disturbance has created a five to sevenfold increase in dust loading on the Colorado plateau and the Great Basin.²³ The increase in dust concentration accelerates snowmelt rates and adversely

acres) that the BLM manages in the 11 contiguous western states. Feller, *supra* note 15, at 558 n.6, 570.

¹⁶ See WILKINSON, *supra* note 8, at 104–06.

¹⁷ See 43 C.F.R. § 4100.0-5 (2013) (defining “livestock carrying capacity” as “the maximum stocking rate possible without inducing damage to vegetation or related resources. It may vary from year to year on the same area due to fluctuating forage production.”); see also Feller, *supra* note 15, at 561 (providing an explanation of overgrazing). Feller notes that under the theory of grazing capacity “if the number of livestock is kept within carrying capacity, then detrimental changes in vegetation of the type described above will not occur. Lands grazed in excess of carrying capacity are said to be ‘overgrazed.’” *Id.*

¹⁸ Steven Archer & Fred E. Smeins, *Ecosystem Level Processes*, in *GRAZING MANAGEMENT: AN ECOLOGICAL PERSPECTIVE* 109, 135 (Rod K. Heitschmidt & Jerry W. Stuth eds., 1991). See also JAMES STUBBENDIECK, ET AL., *NORTH AMERICAN RANGE PLANTS* 247, 253, 361 (5th ed. 1997) (noting that dense stands of rabbitbrush “may indicate poor range management” and describing snakeweed as an “indicator of overgrazing” and mesquite as “especially abundant on abused rangeland”).

¹⁹ See, e.g., KARL G. PARKER, *THE NATURE AND USE OF UTAH RANGE* 28 (1978); EPA, *LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS* 5 (1990) (discussing the effect of overgrazing on vegetation composition); Thomas L. Thurow, *Hydrology and Erosion*, in *GRAZING MANAGEMENT: AN ECOLOGICAL PERSPECTIVE* 141, 150, 155 (Rod K. Heitschmidt & Jerry W. Stuth eds., 1991) (discussing the increase in runoff associated with changed vegetation types).

²⁰ See, e.g., Thurow, *supra* note 19, at 148–50.

²¹ *Id.* at 151.

²² See *id.* at 152 (discussing the problems with grazing patterns designed to increase the amount of organic material in the soil); see, e.g., Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 *CONSERVATION ECOLOGY* 629, 634–36 (1994).

²³ Thomas H. Painter et al., *Dust Radiative Forcing in Snow of the Upper Colorado River Basin: 1. A 6 Year Record of Energy Balance, Radiation and Dust Concentrations W07521*, *WATER RESOURCES RES.*, July 2012, at 1.

impacts the water supply of the American west²⁴ by delivering the water supply to streams, rivers, and reservoirs earlier than desirable, resulting in late-season water shortages.²⁵

Grazing can also adversely impact wildlife. In addition to adversely affecting the composition of plant species that wildlife rely on, livestock may outcompete other species for water and forage.²⁶ Moreover, the mere presence of livestock can discourage other species from accessing water sources and breeding and forage areas.²⁷ Perhaps most importantly for wildlife, livestock grazing often harms riparian areas.²⁸ As with other animal species, livestock are often drawn to water sources, but their numbers and size makes it difficult to protect stream sides and stream beds from trampling, erosion, and pollution.²⁹

Livestock also impact archaeological sites. Grazing livestock can knock down walls and trample artifacts.³⁰ They can also contaminate sensitive archaeological sites with urine and manure.³¹

Finally, grazing can adversely impact recreational and aesthetic resources. This could be a particularly important factor in restricting or removing livestock from some public lands. The recreational value of public lands often far outweighs the value of the land for grazing.³² Yet grazing can reduce the recreational and aesthetic value of land by changing the native vegetation, damaging the aesthetic and functional value of riparian zones, and introducing manure and the inevitable flies that accompany that manure.³³ Following a simple application of the "chiefly valuable" standard from the Taylor Grazing Act (Taylor Act)³⁴ and the Federal Land Policy and

²⁴ J. S. Deems et al., *Combined Impacts of Current and Future Dust Deposition and Regional Warming on Colorado River Basin Snow Dynamics and Hydrology*, 17 *HYDROLOGY & EARTH SYS. SCI.* 4401, 4401–02 (2013).

²⁵ Jason P. Field et al., *The Ecology of Dust*, 8 *FRONTIERS IN ECOLOGY & ENV'T* 423, 427 (2010).

²⁶ See Susan M. Cooper et al., *Distribution and Interaction of White-tailed Deer and Cattle in a Semi-arid Grazing System*, 127 *AGRIC., ECOSYSTEMS & ENV'T* 85, 91 (2008).

²⁷ *Id.* at 92.

²⁸ Richard H. Braun, *Emerging Limits on Federal Land Management Discretion: Livestock, Riparian Ecosystems, and Clean Water Law*, 17 *ENVTL. L.* 43, 44 (1986).

²⁹ See, e.g., William S. Platts & Robert F. Raleigh, *Impacts of Grazing on Wetlands and Riparian Habitat*, in *NAT'L RESEARCH COUNCIL/NAT'L ACADEMY OF SCIENCES, DEVELOPING STRATEGIES FOR RANGELAND MANAGEMENT* 1105, 1110 (1984); see also EPA, *supra* note 19, at 2, 5.

³⁰ See ALAN OSBORN ET AL., *IMPACTS OF DOMESTIC LIVESTOCK GRAZING ON THE ARCHAEOLOGICAL RESOURCES OF CAPITOL REEF NATIONAL PARK, UTAH* 48 (F.A. Calabrese ed., 1987).

³¹ See, e.g., Feller, *supra* note 15, at 562.

³² See Erin Pounds, *State Trust Lands: Static Management and Shifting Value Perspectives*, 41 *ENVTL. L.* 1333, 1351–61 (2011) (discussing various state court opinions interpreting the state's fiduciary duty to maximize value from land trusts and comparing values generated by grazing, commercial, and conservation purposes).

³³ See Marya Torrez, *Cows, Congress, and Climate Change: Authority and Responsibility for Federal Agencies to End Grazing on Public Lands*, 14 *VT. J. ENVTL. L.* 1, 2–6 (2012) (discussing environmental impacts of grazing "well-known since the nineteenth century").

³⁴ 43 U.S.C. §§ 315–315o-1, § 315 (2006).

Management Act of 1976 (FLPMA),³⁶ the BLM and Forest Service could, and perhaps must, use their authority to remove or restrict livestock from certain tracts of public land to accommodate higher value public uses such as recreation.³⁶

III. GRAZING ON THE PUBLIC LANDS

Much of the debate over public lands in the early years of Western settlement was about whether the lands should remain in public ownership. Indeed, this was “the crucial conservation issue” in the minds of the general public.³⁷ Support for public ownership was a defining tenet of progressive era leaders like Theodore Roosevelt and Gifford Pinchot, and this debate played out largely between advocates for leasing grazing land and supporters of homesteading and making more land available for irrigation.³⁸ Among other things, these early leaders believed that public ownership was the only way to ensure the long term health of the range.³⁹ Still, in the early part of the twentieth century, while the government debated the establishment of a leasing policy,⁴⁰ grazing went largely unregulated. Ranchers enjoyed “an implied license” to graze their livestock on public lands,⁴¹ but it was not necessarily a permanent right,⁴² and it was likewise not a right that could be exercised in a manner that excluded others.⁴³

Many of the early conflicts on the Western rangelands involved fences and efforts by some of the large cattle barons to fence in vast tracts of public lands. In 1885, Congress responded to those efforts by some to dominate public land grazing by passing the Unlawful Enclosures of Public Lands Act, which made it unlawful for “any person, party, association, or corporation” to enclose federal public lands.⁴⁴ Two Colorado ranchers, Daniel Camfield and William Drury, tried to circumvent the law by buying up the private lands associated with a checkerboard railroad land grant⁴⁵ and building a

³⁵ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1787, § 1713(e) (2006).

³⁶ See *infra* notes 46-68 and accompanying text.

³⁷ SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY 69 (1999).

³⁸ See DONAHUE, *supra* note 13, at 22-23.

³⁹ See *id.* at 16, 22.

⁴⁰ *Id.* at 21-23.

⁴¹ *Buford v. Houtz*, 133 U.S. 320, 323 (1890).

⁴² *Id.* at 326. (“For many years . . . a very large proportion of the beef which has been used by the people of the United States is the meat of cattle thus raised upon the public lands without charge, without let or hindrance or obstruction. The government of the United States in all its branches has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement.”).

⁴³ *Id.* at 325, 332 (denying the plaintiffs an injunction based upon a claim of trespass that sought to exclude the defendants from grazing on 921,000 acres of mixed private and public land).

⁴⁴ 43 U.S.C. § 1061 (2006).

⁴⁵ Beginning in 1850 and continuing until 1871, Congress promoted railroad construction by granting railroads alternate sections of land for a specified distance on each side of the railroad

fence that only touched private lands.⁴⁶ The Camfield's fence effectively enclosed about 20,000 acres of public lands.⁴⁷ The ranchers claimed that the federal government lacked the authority to regulate fences built on private land. The Supreme Court disagreed. In *Camfield v. United States*, the Court noted that the federal government enjoyed "a power over its own property analogous to the police power of the several States" and that this power was sufficient to prohibit the construction of Camfield and Drury's fence.⁴⁸

As more settlers took advantage of the implied license to graze livestock on the public domain, the classic tragedy of the commons⁴⁹ unfolded. Overgrazing led to the deterioration of the public lands,⁵⁰ and eventually ranchers themselves came to recognize the need for government regulation.⁵¹ President Theodore Roosevelt appointed the Public Lands Commission (Commission) in 1903. The Commission, lead by Gifford Pinchot, head of the Forest Service, was charged to:

[R]eport upon the condition, operation, and effect of the present land laws, and to recommend such changes as are needed to effect the largest practical disposition of public lands to actual settlers who will build permanent homes upon them, and to secure in permanence the fullest and most effective use of the resources of the public lands.⁵²

The Commission surveyed western stockmen and found that a "large majority" of the respondents supported federal regulation of public lands grazing.⁵³ The Commission responded with a proposal for lands classified for agricultural purposes to be distinguished from those "chiefly valuable" for grazing and a program to grant grazing leases that were initially limited to five-year terms.⁵⁴

right-of-way, thus creating a "checker-board" of private and public lands. These railroad land grants originally extended for six miles on either side of the railroad right-of-way, but were in some cases allowed for a full 40 miles on either side of the right-of-way. See PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 356 (1968); see also JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 125-26 (2d ed. 2009).

⁴⁶ *Camfield v. United States*, 167 U.S. 518, 522-23 (1897).

⁴⁷ *Id.* at 519.

⁴⁸ *Id.* at 525, 527.

⁴⁹ See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) available at <http://www.sciencemag.org/content/162/3859/1243.full.pdf?sid=6621e930-77df-4357-9469-b19bc4d1bb3d>.

⁵⁰ See DONAHUE, *supra* note 13, at 117-33.

⁵¹ *Id.* at 20-21.

⁵² GIFFORD PINCHOT, U.S. DEP'T OF AGRIC., GRAZING ON THE PUBLIC LANDS: EXTRACTS FROM THE REPORT OF THE PUBLIC LANDS COMMISSION, S. DOC. NO. 58-189, at 7 (3d Sess. 1905), available at <https://archive.org/stream/grazingonpublicl62unit#page/6/mode/2up>.

⁵³ *Id.* at 24 ("In answer to the question as to whether or not Government control of the ranges under reasonable regulations made to meet local conditions, and providing for a proper classification of lands is favored, of the 1,400 stockmen heard from, 1,090 have expressed themselves in the affirmative and 183 in the negative, 127 having avoided answering the question.")

⁵⁴ *Id.* at 65-66. Lands classified as agricultural would be subject to annual permits and available for homesteading. Lands classified as chiefly valuable for grazing would have initial

Many of the reforms recommended by Roosevelt's Public Lands Commission eventually found their way into the Taylor Grazing Act⁵⁵ in 1934. The preamble to the Taylor Act describes as its purpose: "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, [and] to stabilize the livestock industry dependent on the public range"⁵⁶ The statute itself goes on to explain that the Taylor Act was enacted:

[T]o promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts . . . of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States . . . which in his opinion are chiefly valuable for grazing and raising forage crops.⁵⁷

Within these grazing districts, the Secretary is authorized to issue grazing permits "upon the payment annually of reasonable fees."⁵⁸ Grazing permits are available "only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, . . . , and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located."⁵⁹ Preference for permits is given to "those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them."⁶⁰

The preference right of existing landowners was, not surprisingly, a popular feature of the law and undoubtedly helped to secure its passage. Grazing permits are limited to ten-year terms but are "subject to the preference right of permittees to renewal in the discretion of the Secretary of the Interior."⁶¹ Importantly, the statute makes clear that grazing permits "shall not create any right, title, interest, or estate in or to the lands."⁶²

The Taylor Act ushered in a new era of conservation for public lands management, but the law was not designed and did not operate to protect

terms of five years but longer terms of 10 to 15 years were contemplated if experience showed that the lands were not going to be suitable for agriculture.

⁵⁵ 43 U.S.C. §§ 315–315o-1 (2006).

⁵⁶ Taylor Grazing Act of 1934, Pub. L. 73-482 ch. 865, 48 Stat. 1269, 1269 (1934).

⁵⁷ 43 U.S.C. § 315 (2006).

⁵⁸ *Id.* § 315b.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id. United States v. Fuller* involved the federal condemnation of 920 acres of Fuller's fee lands. 409 U.S. 488, 489 (1973). The issue was whether in awarding compensation, the Court should consider the enhanced value associated with the fact that Fuller held a preference right to a grazing permit on adjacent federal lands. *Id.* at 491. In a 5–4 decision that relied substantially on the quoted language from the Taylor Act, the Court held that compensation for the enhanced value was not required. *Id.* at 488.

the environment or the ecological health of public grazing lands.⁶³ The condition of the range may have improved somewhat after the law was passed but the improvement was measured only in terms of forage and rangeland health.⁶⁴

The first real opportunity to consider public land values more broadly came with the passage of the Multiple-Use Sustained-Yield Act of 1960 (MUSYA),⁶⁵ even though it only applied to national forest lands. MUSYA requires the Forest Service “to develop and administer the renewable surface resources of the national forests *for multiple use and sustained yield of the several products and services obtained therefrom.*”⁶⁶ “Multiple use” is defined as:

The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.⁶⁷

“Sustained yield” is defined as “the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.”⁶⁸

MUSYA essentially follows the utilitarian code popularized by Gifford Pinchot—the first head of the Forest Service—of “the greatest good for the greatest number, in the long run.”⁶⁹ And while it promoted the wise use of public land resources, it made clear that this was not strictly a financial

⁶³ See Torrez, *supra* note 33, at 12 (“[T]he TGA did very little to achieve its intended purpose of improving the environmental health of the range. The TGA still governs grazing on public lands, but subsequent statutes and regulations have added requirements for environmental considerations and protections.”).

⁶⁴ See DONAHUE, *supra* note 13, at 44–66 (discussing range conditions after the Taylor Grazing Act was passed, specifically the inadequacy of improvement measurements).

⁶⁵ 16 U.S.C. §§ 528–531 (2006).

⁶⁶ *Id.* § 531 (emphasis added).

⁶⁷ *Id.* § 531(a).

⁶⁸ *Id.* § 531(b).

⁶⁹ Pinchot is known not only for championing the utilitarian ideal “of the greatest good for the greatest number” but also for adding the phrase “in the long run.” See Forest History Society, *U.S. Forest Service History: Gifford Pinchot*, <http://www.foresthistory.org/ASPNET/people/Pinchot/Pinchot.aspx> (last visited Apr. 12, 2014); see also Char Miller & V. Alaric Sample, *Gifford Pinchot and the Conservation Spirit*, in GIFFORD PINCHOT, *BREAKING NEW GROUND* xi, xviii (commemorative ed. 1998).

calculation,⁷⁰ and moreover, that “some land will be used for less than all of the resources.”⁷¹

MUSYA also describes the purposes for which the national forests were established and for which they must be managed, including “outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”⁷² The law further makes clear that “areas of wilderness are consistent with the [MUSYA].”⁷³

After President Kennedy took office in 1961, he noted that federal lands suffered “from uncontrolled use and a lack of proper management.”⁷⁴ Kennedy directed the Secretary of the Interior to “develop a program of balanced usage designed to reconcile the conflicting uses—grazing, forestry, recreation, wildlife.”⁷⁵ The BLM got its own multiple use sustained yield mandate with the passage of the Classification and Multiple Use Act of 1964,⁷⁶ and it follows the approach taken in MUSYA very closely. While the 1964 law was modeled on MUSYA, it also required the BLM to promulgate regulations to determine whether lands should be disposed of because they were chiefly valuable for private uses,⁷⁷ or whether they should be retained and managed for a variety of possible uses that included:

- (1) domestic livestock grazing;
- (2) fish and wildlife development and utilization;
- (3) industrial development;
- (4) mineral production;
- (5) occupancy;
- (6) outdoor recreation;
- (7) timber production;
- (8) watershed protection;
- (9) wilderness preservation, or
- (10) preservation of public values that would be lost if the land passed from Federal ownership.⁷⁸

Somewhat remarkably, the 1964 Act also notes that in deciding about the appropriate uses of the public lands, the Secretary must “give due consideration to all pertinent factors, including . . . *ecology*, priorities of use,

⁷⁰ MUSYA requires that consideration be given “to the relative values of the various resources, and *not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.*” 16 U.S.C. § 531(a) (emphasis added).

⁷¹ *Id.*

⁷² *Id.* § 528.

⁷³ *Id.* § 529.

⁷⁴ D. Michael Harvey, *Public Land Management Under the Classification and Multiple Use Act*, 2 NAT. RESOURCES L. 238, 240 (1969).

⁷⁵ JOHN F. KENNEDY, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATIVE TO OUR NATURAL RESOURCES, H.R. Doc. No. 87-94, at 7 (1961).

⁷⁶ 43 U.S.C. §§ 1411–1418 (1970) (omitted as obsolete in 1976).

⁷⁷ *Id.* § 1411(a).

⁷⁸ *Id.*

and the relative values of the various resources.”⁷⁹ This directive plainly supports the government’s authority to restrict livestock grazing as necessary to protect these other uses.

The classification system mandated by the Classification and Multiple Use Act represented a first step toward comprehensive land use planning for public domain lands. However, it was not until 1976, when Congress passed both the FLPMA⁸⁰ and the National Forest Management Act (NFMA),⁸¹ that Congress imposed a specific land use planning requirement on the BLM and the Forest Service. NFMA applies specifically to national forest lands while FLPMA primarily addresses the public domain lands managed by the BLM.⁸² However, some of FLPMA’s requirements apply to both the Forest Service and the BLM.⁸³ FLPMA also expands the BLM’s obligations to manage public lands for multiple use and sustained yield.⁸⁴

FLPMA specifically addresses several important matters relating to range management. First, it establishes a ten-year permit term for all grazing leases on both BLM and Forest Service lands.⁸⁵ More importantly, it authorizes the BLM and Forest Service:

[T]o cancel, suspend, or modify a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof, or to cancel or suspend a grazing permit or lease for any violation of a grazing regulation or of any term or condition of such grazing permit or lease.⁸⁶

⁷⁹ See *id.* § 1411(b) (emphasis added).

⁸⁰ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2006).

⁸¹ National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1687 (2006).

⁸² *Id.* § 1600(3); *id.* § 1702(e) (2006).

⁸³ See *infra* notes 89–98 and accompanying text.

⁸⁴ See 43 U.S.C. § 1732(a)–(d) (2006). (“Multiple use” is defined in FLPMA somewhat more broadly than under MUSYA as

“[T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.”

Id. § 1702(c). “Sustained yield” is defined as “the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.” *Id.* § 1702(h)).

⁸⁵ 43 U.S.C. § 1752(a).

⁸⁶ *Id.*

At a minimum, FLPMA requires the agencies to invoke this authority whenever: 1) public lands are found to be chiefly valuable for some purpose other than grazing, and where existing grazing practices are not compatible with those other uses;⁸⁷ 2) grazing fails to meet multiple use and sustained yield criteria;⁸⁸ or 3) restrictions on grazing are necessary “to prevent the unnecessary or undue degradation (UUD) of the lands.”⁸⁹

While the “UUD” standard is somewhat vague it would seem to apply where grazing practices fail to maintain sustainable forage conditions or where grazing significantly impairs the ecological health of an area.⁹⁰ Furthermore, the agency can use the UUD standard to help inform the conditions imposed in grazing permits. For example, the agency can develop a standard for land conditions that might reflect undue degradation caused or exacerbated by grazing and insist that permits be canceled, suspended, or modified when those conditions exist. In addition to the UUD standard, grazing permits must include requirements to maintain adequate and sustainable forage levels, the monitoring and reporting of any listed species under the Endangered Species Act found on the allotment, and metrics that allow the agency to identify and mitigate ecological damage caused by grazing.⁹¹ Whenever the relevant signals suggest problems, or where a permittee violates the terms of the permit, the BLM will be in the position to respond quickly by cancelling, suspending, or modifying the relevant grazing permit or permits.

Not surprisingly since they were enacted in the same year, FLPMA and NFMA establish very similar land use planning requirements.⁹² Essentially both laws require the BLM and the Forest Service to carry out inventories and develop land use plans for their respective management units. Although the statutes do not mandate that the agencies develop plans at any specific planning level, the BLM has historically carried out planning for each Resource Management Area (RMA), while the Forest Service typically plans at the national forest level.⁹³ At its core, land use planning on the public

⁸⁷ FLPMA give the Secretary the authority to reclassify lands for other uses and to eliminate certain uses on certain tracts of land pursuant to the land use planning process. *Id.* § 1712(d)–(e). The FLPMA grazing provisions further recognize that grazing uses may be eliminated from certain tracts of BLM land where it was previously allowed. *Id.* § 1752(d).

⁸⁸ *Id.* § 1702.

⁸⁹ *Id.* § 1732(b).

⁹⁰ Professor Debra Donahue has argued that the UUD standard “must, at a minimum, mean that that resource condition may not be allowed to decline to a point that would interfere with the sustained yield of that, or any other resource. . . .” DONAHUE, *supra* note 13, at 205.

⁹¹ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. IV 2011); 43 U.S.C. § 1751(a).

⁹² Compare 43 U.S.C. § 1712 (2006), with 16 U.S.C. § 1604. Application of the UUD standard in the context of the General Mining Law of 1872 is described in Roger Flynn, *Daybreak on the Land: The Coming of Age of the Federal Land Policy and Management Act of 1976*, 29 VT. L. REV. 815, 831–43 (2005).

⁹³ See, e.g., BUREAU OF LAND MGMT., SCOPING/INFORMATION PACKAGE: WILD HORSE COORDINATED RESOURCE MANAGEMENT AREA GRAZING MANAGEMENT PLAN ENVIRONMENTAL ASSESSMENT 1 (2011), available at http://www.blm.gov/or/districts/spokane/plans/files/062311_Wild_Horse_CRM_EA_Scoping_Letter.pdf (summarizing the BLM’s proposal to authorize

lands is essentially a zoning exercise where the agencies make decisions about uses to allow and prohibit on tracts of land within the relevant planning unit. Thus, decisions about where to allow, and more importantly, where not to allow, public lands grazing, are made initially at the land use planning stage.

The implementation of proper land use planning requires careful monitoring to determine whether the management regime established by the plan and any instruments, such as grazing permits issued in the planning area, are achieving the goals and objectives set for the area. Where the land management strategies, including permit conditions, prove inadequate to meet those objectives, then the agency must adapt. Adaptation may require the agency to adjust the plan, and change the conditions imposed on the relevant permits and leases.

Both the BLM and the Forest Service generally manage grazing in allotments. The BLM regulations define an allotment simply as “an area of land designated and managed for grazing of livestock.”⁹⁴ Allotments are generally managed pursuant to allotment management plans, which are developed in consultation with the permit holder. The use of allotment management plans gives the agency substantial discretion to restrict grazing as necessary to promote other multiple use objectives.⁹⁵

Despite the significant changes in land management by these laws, especially FLPMA, the condition of the range on the public lands continued to deteriorate. Responding to these concerns, Congress passed the Public Rangelands Improvement Act (PRIA) in 1978.⁹⁶ In enacting PRIA, Congress found “vast segments of the public rangelands are producing less than their potential for livestock, wildlife habitat, recreation, forage, and water and soil conservation benefits, and for that reason [public rangelands] are in an unsatisfactory condition.”⁹⁷ The goal of PRIA is “to improve the range

cattle grazing on a designated RMA, and beginning the planning and development stages of that authorization). For planning purposes, the Forest Service sometimes combines two forests. *See, e.g., U.S. FOREST SERV., 1997 REVISION OF THE LAND AND RESOURCE MANAGEMENT PLAN: ARAPAHO AND ROOSEVELT NATIONAL FORESTS AND PAWNEE NATIONAL GRASSLAND (1997), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm91_057939.pdf.*

⁹⁴ 43 C.F.R. § 4100.0-5 (2013).

⁹⁵ FLPMA defines “allotment management plans” (AMPs) as:

“[A] . . . document prepared in consultation with the lessees or permittees involved, which applies to livestock operations on the public lands or on lands within National Forests in the eleven contiguous Western States and which: (1) prescribes the manner in, and extent to, which livestock operations will be conducted in order to meet the multiple-use, sustained-yield, economic and other needs and objectives as determined for the lands by the Secretary concerned; and (2) describes the type, location, ownership, and general specifications for the range improvements to be installed and maintained on the lands to meet the livestock grazing and other objectives of land management; and (3) contains such other provisions relating to livestock grazing and other objectives found by the Secretary concerned to be consistent with the provisions of this Act and other applicable law.”

43 U.S.C. § 1702(k).

⁹⁶ Public Rangelands Improvement Act 43 U.S.C. §§ 1901–1908 (2006).

⁹⁷ *Id.* § 1901(a)(1).

conditions of the public rangelands so that they become as productive as feasible."⁹⁸

The BLM interprets both FLPMA and PRIA as an authorization to adjust livestock numbers. In relevant part, the current BLM rules provide that:

When monitoring or documented field observations show grazing use or patterns of use are not consistent with the provisions of subpart 4180 [regarding rangeland health standards], or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory, or other acceptable methods, *the authorized officer will reduce active use, otherwise modify management practices, or both.*⁹⁹

The rules further provide that:

After consultation with, or a reasonable attempt to consult with, affected permittees or lessees and the state having lands or responsibility for managing resources within the area, the authorized officer will close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use . . . *when the authorized officer determines and documents that—*

(i) The soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, or insect infestation; or

*(ii) Continued grazing use poses an imminent likelihood of significant resource damage.*¹⁰⁰

Importantly, not only are restrictions authorized, they are in fact mandated when the conditions set out in the regulations are met.

Arguably, the most important law affecting grazing rights on public lands is the National Environmental Policy Act (NEPA),¹⁰¹ which was enacted six years before FLPMA and NFMA. NEPA requires federal agencies to prepare an environmental impact statement (EIS) on every major federal action that significantly affects the quality of the human environment.¹⁰² Unless the agency opts to prepare an EIS, the Council on Environmental Quality regulations requires the agency to prepare an environmental assessment (EA) on all proposed federal actions to help the agency decide whether an EIS is necessary.¹⁰³ The only exception to these requirements is for actions that are categorically excluded from NEPA compliance.¹⁰⁴

The BLM's initial effort to comply with NEPA for public lands grazing was to prepare a nationwide grazing EIS that offered to "provide an

⁹⁸ *Id.* § 1903(b).

⁹⁹ 43 C.F.R. § 4110.3-2(b) (2013) (emphasis added).

¹⁰⁰ *Id.* § 4110.3-3(b)(1) (emphasis added).

¹⁰¹ 42 U.S.C. §§ 4321–4370 (2006).

¹⁰² *Id.* § 4332(2)(C).

¹⁰³ 40 C.F.R. § 1501.4 (2013).

¹⁰⁴ *Id.* § 1508.4.

overview of the cumulative impact” of livestock grazing on all BLM lands.¹⁰⁵ This nationwide EIS did not, of course, address site-specific impacts from grazing on particular BLM lands. While the BLM had suggested that it might prepare additional NEPA documents for individual decisions like allotment management plans, it made no commitment to do so.¹⁰⁶ In *Natural Resources Defense Council, Inc. v. Morton*, a federal district court famously rejected the BLM’s claim to have complied with NEPA. The BLM’s apparent goal was to allow grazing on public domain lands to continue as it had before NEPA was enacted without any further NEPA compliance.¹⁰⁷ The court emphasized that NEPA required the BLM to develop site-specific impact assessment might be necessary for the agency to establish appropriate terms and conditions for individual grazing permits.¹⁰⁸

Following the decision in *Morton* in 1974 and the passage of FLPMA and NFMA two years later, NEPA compliance for grazing activities at the land use planning level was regularized through the land use planning process.¹⁰⁹ Yet the EISs prepared for land use plans often cover a million acres or more of public land and address numerous resource issues.¹¹⁰ Thus, these NEPA documents that support the plans are still not sufficiently specific enough to address the localized impacts from grazing. Consequently, the BLM continued to struggle with NEPA compliance in the context of permits for individual allotments.¹¹¹

In 2003, Congress passed a rider to an appropriations bill that allowed grazing permits on BLM and Forest Service lands to be renewed pending NEPA compliance through 2008.¹¹² Subsequently, in 2008, the BLM issued a new Handbook on NEPA compliance that included a categorical exclusion from NEPA compliance for most decisions involving the issuance and renewal of grazing permits.¹¹³ That exclusion applies to the:

¹⁰⁵ *Natural Res. Def. Council v. Morton*, 388 F. Supp. 829, 832 (D.D.C. 1974).

¹⁰⁶ *Id.* at 832–33.

¹⁰⁷ As the court found, “[w]hile the BLM may decide in the future to prepare specific impact statements on new activities, for the present grazing will continue on millions of acres without adequate individualized assessment of the impact of such grazing on local environments.” *Id.* at 840.

¹⁰⁸ “While the programmatic EIS drafted by the BLM provides general policy guidelines as to relevant environmental factors, it in no way insures that the decision-maker considers all of the specific and particular consequences of his actions, or the alternatives available to him.” *Id.* at 838.

¹⁰⁹ See Feller, *supra* note 15, at 40 (“This unification of *Morton’s* NEPA process and FLPMA’s land use planning was, in itself, logical and unobjectionable.”).

¹¹⁰ Feller, *supra* note 15, at 39. Moreover, the BLM is not required to establish specific management prescriptions for grazing at the planning level. See *Natural Res. Def. Council v. Hodel*, 624 F. Supp. 1045, 1060 (D. Nev. 1985).

¹¹¹ An administrative appeal filed by Professor Joe Feller over the allotment for the Comb Wash in southeastern Utah became the primary vehicle for forcing the BLM to address site-specific impacts from grazing. See *Nat’l Wildlife Fed’n v. Bureau of Land Mgmt.*, 140 I.B.L.A. 85 (1997); see also Feller, *supra* note 15, at 42–43.

¹¹² Blue Ridge National Heritage Area Act of 2003, Pub. L. No. 108-108, 117 Stat. 1307 (2003).

¹¹³ U.S. DEP’T. OF THE INTERIOR, BLM NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK app. 4-147 (2008), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1.pdf.

Issuance of livestock grazing permits/leases where:

- a. The new grazing permit/lease is consistent with the use specified on the previous permit/lease, such that
 - (i) the same kind of livestock is grazed,
 - (ii) the active use previously authorized is not exceeded, and
 - (iii) grazing does not occur more than 14 days earlier or later than as specified
 - (iv) on the previous permit/lease, and
- b. The grazing allotment(s) has been assessed and evaluated and the Responsible Official has documented in a determination that the allotment(s) is
 - (i) meeting land health standards, or
 - (ii) not meeting land health standards due to factors that do not include existing livestock grazing.¹¹⁴

While the BLM Handbook on NEPA compliance may appear to undercut BLM's responsibility to analyze thoroughly the environmental impacts for grazing decisions that may adversely impact the environment, the Handbook can also be seen as a glass half full rather than half empty. A clear implication of the Handbook is that if the allotment has not been assessed and evaluated, or if the allotment is not meeting land health standards due to livestock grazing, then full NEPA compliance is required before permits may be issued or renewed. To be sure, livestock grazing continues on the vast majority of BLM public domain lands in the eleven contiguous public lands states.¹¹⁵ Indeed, Professor Feller laments that BLM has a policy of "universal grazing."¹¹⁶ However, the picture that emerges from a review of current law suggests that livestock grazing on nonwilderness lands can and must be restricted. Furthermore, livestock must even be removed where such actions are necessary to meet range health standards or the multiple use and sustained yield requirements of the law.¹¹⁷ Ironically, and as described in detail below, restricting or removing livestock from wilderness lands could prove much more challenging than removing livestock from nonwilderness lands.

IV. GRAZING IN WILDERNESS AREAS

Section 1133(d)(4)(2) of the Wilderness Act provides in relevant part that "the grazing of livestock, where established prior to September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are

¹¹⁴ *Id.* at app. 4-151.

¹¹⁵ Feller, *supra* note 15, at 570.

¹¹⁶ *Id.* ("BLM grazing permits in the eleven far western states cover approximately 167 million acres, or 94% of the land managed by the BLM. The ten million acres land on which grazing is not authorized consists mostly of lands on which there is so little vegetation that grazing is not economically feasible, or where grazing is not practical because of physical inaccessibility or lack of drinking water for livestock.")

¹¹⁷ See *supra* notes 103-104 and accompanying text.

deemed necessary by the Secretary of Agriculture.¹¹⁸ The original law established wilderness areas only on national forest lands¹¹⁹ but provided for review of national parks and wildlife refuges by the Secretary of the Interior and a report to the President regarding the suitability of any such land for wilderness protection.¹²⁰ A similar review and reporting was extended to public domain lands managed by the BLM with the passage of FLPMA in 1976.¹²¹ Notwithstanding this language the management of wilderness areas gave rise to concerns that federal land management agencies might be discouraging grazing in wilderness, or restricting activities that might be necessary for proper grazing management. In response to these concerns, Congress developed the Congressional Grazing Guidelines (Grazing Guidelines)¹²² that agencies must follow when managing grazing in wilderness areas.

The Grazing Guidelines were expressly designed “[t]o clarify any lingering doubts” regarding the livestock grazing provision of the Wilderness Act.¹²³ The Grazing Guidelines set out five particular standards that the Congress expects agencies to follow in administering wilderness areas:

1. There shall be no curtailments of grazing in wilderness areas simply because an area is, or has been designated as wilderness, nor should wilderness designations be used as an excuse by administrators to slowly “phase out” grazing. Any adjustments in the numbers of livestock permitted to graze in wilderness areas should be made as a result of revisions in the normal grazing and land management planning and policy setting process, giving consideration to legal mandates, range condition, and the protection of the range resource from deterioration.

It is anticipated that the numbers of livestock permitted to graze in wilderness would remain at the approximate levels existing at the time an area enters the wilderness system. If land management plans reveal conclusively that increased livestock numbers or animal unit months (AUMs) could be made available with no adverse impact on wilderness values such as plant communities, primitive recreation, and wildlife populations or habitat, some increases in AUMs may be permissible. This is not to imply, however, that wilderness lends itself to AUM or livestock increases and construction of substantial new facilities that might be appropriate for intensive grazing management in non-wilderness areas.

2. The maintenance of supporting facilities, existing in an area prior to its classification as wilderness (including fences, line cabins, water wells and lines, stock tanks, etc.), is permissible in wilderness. Where practical alternatives do not exist, maintenance or other activities may be accomplished

¹¹⁸ 16 U.S.C. § 1133(d)(4)(2) (2006).

¹¹⁹ Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as 16 U.S.C. §§ 1131-1136).

¹²⁰ *Id.* at § 3(c), 78 Stat. 892.

¹²¹ 43 U.S.C. § 1782 (2006).

¹²² H.R. REP. NO. 96-617, at 10 (1980).

¹²³ *Id.* at 11.

through the occasional use of motorized equipment. This may include, for example, the use of backhoes to maintain stock ponds, pickup trucks for major fence repairs, or specialized equipment to repair stock watering facilities. Such occasional use of motorized equipment should be expressly authorized in the grazing permits for the area involved. The use of motorized equipment should be based on a rule of practical necessity and reasonableness. For example, motorized equipment need not be allowed for the placement of small quantities of salt or other activities where such activities can reasonably and practically be accomplished on horseback or foot¹²⁴ Such motorized equipment uses will normally only be permitted in those portions of a wilderness area where they had occurred prior to the area's designation as wilderness or are established by prior agreement.

3. The replacement or reconstruction of deteriorated facilities or improvements should not be required to be accomplished using "natural materials", unless the material and labor costs of using natural materials are such that their use would not impose unreasonable additional costs on grazing permittees.

4. The construction or new improvements or replacement of deteriorated facilities in wilderness is permissible if in accordance with these guidelines and management plans governing the area involved. However, the construction of new improvements should be primarily for the purpose of resource protection and the more effective management of these resources rather than to accommodate increased numbers of livestock.

5. The use of motorized equipment for emergency purposes such as rescuing sick animals or the placement of feed in emergency situations is also permissible. This privilege is to be exercised only in true emergencies, and should not be abused by permittees.¹²⁵

The Grazing Guidelines conclude with the following language:

[S]ubject to the conditions and policies outlined in this report, the general rule of thumb on grazing management in wilderness should be that *activities or facilities established prior to the date of an area's designation as wilderness should be allowed to remain in place* Thus, if livestock grazing activities and facilities were established in an area at the time Congress determined that the area was suitable for wilderness and placed the specific area in the wilderness system, they should be allowed to continue.¹²⁶

¹²⁴ The Guidelines do suggest, however, that it might be appropriate "to permit the occasional use of motorized equipment to haul large quantities of salt to distribution points," or where "under the rule of reasonableness" motorized equipment is occasionally needed and "where practical alternatives are not available and such use would not have a significant adverse impact on the natural environment." *Id.* at 12.

¹²⁵ *Id.* at 11–12.

¹²⁶ *Id.* at 12–13.

The Grazing Guidelines were first appended to the Colorado Wilderness Act of 1980¹²⁷ and subsequently have appeared in numerous wilderness bills since then. These Guidelines were reproduced verbatim as Appendix A to the Arizona Desert Wilderness Act of 1990.¹²⁸ Wilderness legislation adopted after 1990 frequently incorporates Appendix A by referencing it in the statutory text, effectively making the Grazing Guidelines a binding legal standard for any wilderness areas included in the legislation.¹²⁹

While the BLM and the Forest Service—the chief agencies dealing with grazing in wilderness areas—have both promulgated rules and other standards for managing grazing in wilderness areas, the Grazing Guidelines remain the chief policy prescription for managing livestock in wilderness grazing areas. For example, the BLM has a very brief regulation that simply mirrors the main points in the Grazing Guidelines.¹³⁰ More extensive standards are set out in the BLM Manual,¹³¹ but those standards too are fundamentally based on the Grazing Guidelines. The Manual does, however, attempt to explain and expand on the language in the Grazing Guidelines, especially as relates to motor vehicle use. In particular, the Manual provides, among other things, that:

Maintenance may be done by the occasional use of motorized equipment where:

- A. practical non-motorized alternatives do not exist; and
- B. the motorized use is expressly authorized in the grazing permit and advanced written permission for each maintenance activity is granted by the BLM; and
- C. the motorized use was allowed prior to wilderness designation.¹³²

But the Manual then goes on to provide that: “The use of motor vehicles, motorized equipment, or mechanical transport is *not allowed for herding animals or routine inspection of the condition of developments or the condition of the range.*”¹³³

This particular provision in the BLM Manual raises an interesting legal question regarding the historic use of motor vehicles for herding.¹³⁴ According to a wilderness specialist with the BLM, this issue has become a

¹²⁷ Pub. L. No. 96-560, 94 Stat. 3265 (1980) (codified at 16 U.S.C. § 1133 (1982) (citing H.R. Rep. No. 96-617 (1980)); *id.* at 94 Stat. 3271.

¹²⁸ Pub. L. No. 101-628, 104 Stat. 4469 (1990) (codified at 16 U.S.C. § 1132 (1990) (citing H.R. Rep. No. 101-405 (1990)); *id.* at 104 Stat. 4473.

¹²⁹ See H.R. REP. NO. 101-405, at 41–43 (1990). For example, the Omnibus Public Land Management Act of 2009, which established the Owyhee River Wilderness, includes a reference to the Appendix in House Report 101-405 at Section 1503(b)(3)(A). Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (2009).

¹³⁰ 43 C.F.R. § 6304.25 (2013).

¹³¹ BUREAU OF LAND MGMT., BLM MANUAL 6340—MANUAL OF BLM WILDERNESS pt. 1.6(C)(8) (2012) [hereinafter BLM MANUAL].

¹³² *Id.* pt. 1.6(C)(8)(d).

¹³³ *Id.* pt. 1.6(C)(8)(e).

¹³⁴ Conversation with Christopher Barns, Wilderness Specialist, BLM, (Jan. 23, 2014).

significant problem for the agency.¹³⁵ The example that illustrates this problem involves two ranchers operating in remote portions of the Owyhee Canyonlands Wilderness in Idaho.¹³⁶ They have requested permission to use motor vehicles—in one case a motorcycle and in another case, an all-terrain vehicle—to let out and round up their cattle for a limited time during the year, as they had historically done.¹³⁷ The BLM has initially indicated that in accordance with the terms of the BLM Manual, motor vehicle use will not be allowed for this purpose in the wilderness area although the agency has also indicated that it will consider these issues in conjunction with the development of a management plan for the wilderness area.¹³⁸

The BLM's initial position seems at odds with the Grazing Guidelines. Whereas the Grazing Guidelines preserve the right to continue "*activities or facilities established prior to the date of an area's designation as wilderness*" the BLM Manual only reference "*facilities.*"¹³⁹ Motor vehicle use is clearly an activity and not a facility and thus this omission is significant. It would appear that motor vehicle use for herding animals that occurred before an area was designated wilderness is an activity that Congress expressly intended to allow to continue provided that motor vehicle use was allowed before the designation. Interestingly, national and local conservation groups are supporting continued motor vehicle use by the two ranchers operating in the Owyhee Canyonlands Wilderness.¹⁴⁰

If challenged in court, the BLM's position is unlikely to prevail because it is likely that it will not be accorded deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.¹⁴¹ The U.S. Supreme Court has frequently confronted the question of how to treat an agency's interpretation of a statute. In *Chevron*, the Court reviewed an EPA rule that interpreted a phrase from the Clean Air Act.¹⁴² The Court upheld the rule based upon the agency's interpretation of the statute and in so doing established the now famous *Chevron* two-step test.¹⁴³ According to the Court, when an agency interprets a statute it must first ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹⁴⁴ If, however, "the statute is

¹³⁵ See Letter from Craig Gehrke, The Wilderness Society, to Neil Kornze, Principal Deputy Director, Bureau of Land Management (July 18, 2013) (on file with author).

¹³⁶ *Id.* at 1.

¹³⁷ *Id.*

¹³⁸ Letter from Edward L. Roberson, Assistant Director, Renewable Resources, BLM, to Chris Gehrke and others (Dec. 11, 2013) [hereinafter "Gehrke Letter"] (on file with author).

¹³⁹ H.R. REP. NO. 101-405, at 43 (1990); see *supra* notes 131-132 and accompanying text (describing reference to the Arizona Desert Wilderness Act in the Omnibus Public Land Management Act of 2009, which established the Owyhee River Wilderness). Compare Arizona Desert Wilderness Act, 16 U.S.C. § 460ddd note (2006), with 43 C.F.R. § 6304.25(c) (2013).

¹⁴⁰ See Gehrke Letter, *supra* note 138, at 1.

¹⁴¹ 467 U.S. 837, 842-43 (1984).

¹⁴² Clean Air Act, 42 U.S.C. §§ 7401-7671 (2006); *id.* §§ 7411(a)(3), 7502(b)(6), 7602(j); *Chevron*, 467 U.S. at 837.

¹⁴³ *Chevron*, 467 U.S. at 842-43.

¹⁴⁴ *Id.*

silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."¹⁴⁵ A permissible construction is understood to mean a reasonable construction, even if it differs from the court's interpretation of the statute.¹⁴⁶

If *Chevron* deference does apply to a case involving a rancher's historic use of a motor vehicle in a wilderness area, then the case would likely turn on whether or not the Court thought that the text of the original statute was clear. As previously described, the Grazing Guidelines were expressly incorporated into the statute in the law that created the Owyhee Canyonlands Wilderness.¹⁴⁷ Thus, the Grazing Guidelines are essentially considered statutory language. Since the plain language of those Guidelines seems to allow limited, historic motor vehicle use to continue after the land is designated as wilderness, it seems unlikely that a court would even reach the second step of *Chevron*, assuming that *Chevron* applies in the first place. The government would only stand a chance of prevailing if the court reached the second step of the *Chevron* test. In this case, however, *Chevron* most likely does not apply.

As the law has evolved, courts have wrestled with the question of whether agencies are entitled to *Chevron* deference for every decision they make that requires statutory interpretation.¹⁴⁸ While the law is not entirely clear on this issue and some disagreement remains among the members of the Court, a majority of the Court takes the view that *Chevron* deference applies *only* where the agency decision is accompanied by a sufficient public process to ensure some degree of reliability.¹⁴⁹ Thus, the notice and comment rulemaking decision to which the Court deferred in *Chevron* itself, or an agency decision reached after a formal hearing, is generally sufficient to warrant *Chevron* deference. However, when agency decisions are made with little public process, courts often employ a far less deferential standard derived from *Skidmore v. Swift Co.*¹⁵⁰ In *Skidmore*, a decision that predates *Chevron*, the Court considered whether an overtime claim was valid under

¹⁴⁵ *Id.* at 843.

¹⁴⁶ *Id.* at 844.

¹⁴⁷ Omnibus Public Land Management Act of 2009, *supra* note 134, § 1503(b)(3)(A).

¹⁴⁸ See, e.g., Thomas J. Fraser, *Interpretive Rules: Can the Amount of Deference Accorded Them Offer Insight into the Procedural Inquiry?*, 90 B.U. L. REV. 1303, 1303 (2010) ("[T]here is some ambiguity regarding the level of deference that courts should give to agency pronouncements that do not carry the force of law."); Thomas J. Byrne, *The Continuing Confusion over Chevron: Can the Nondelegation Doctrine Provide A (Partial) Solution?*, 30 SUFFOLK U. L. REV. 715, 734 (1997) ("[L]ower courts have had difficulty properly interpreting *Chevron* because the Supreme Court has not consistently, or even coherently, applied the standard. Given the Court's indeterminate standard, and its susceptibility to different readings, one may safely assume that no multi-member reviewing body can consistently apply *Chevron*.").

¹⁴⁹ Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1108 (2001) ("Given the complexity and divisiveness surrounding judicial review of agency legal interpretations, it is rare when the Supreme Court speaks about the issue with near unanimity. In *Christensen v. Harris County*, eight justices agree that interpretive rules and statements of policy . . . are not entitled to *Chevron* deference.").

¹⁵⁰ 323 U.S. 134 (1944).

Fair Labor Standards Act.¹⁵¹ The agency had adopted a flexible approach regarding how to classify overtime but did not engage in a formal rulemaking or adjudication process in reaching its decision.¹⁵² The Court held that such agency determinations, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”¹⁵³ The extent to which the court would be influenced by such determinations, however, depends upon “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹⁵⁴

In *Christensen v. Harris County*,¹⁵⁵ also involving the Fair Labor Standards Act, the Supreme Court held that *Skidmore* remains good law notwithstanding the *Chevron* decision. More specifically, the Court held that an “opinion letter” issued by the agency was not entitled to *Chevron* deference. According to the Court, “opinion letters—like interpretations contained in policy statements, *agency manuals*, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”¹⁵⁶ “Instead, interpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore v. Swift & Co.*, but only to the extent that those interpretations have the ‘power to persuade.’”¹⁵⁷ Importantly, the Court specifically singles out agency manuals as a type of policy statement that is entitled to only *Skidmore* respect and not *Chevron* deference.

The upshot of these cases is that the BLM Manual provision that prohibits the use of motor vehicles for herding animals is not likely to receive the broad deference that courts would normally accord to agency interpretations that are reached after a robust public process. Rather, a court would, at most, accord the manual provision *Skidmore* respect. Under this standard, the BLM’s decision to prohibit motor vehicles in wilderness lands even where there is a historic use of them for is not likely to stand in the face of the somewhat inconsistent statutory language of the Grazing Guidelines.

The Forest Service’s standards are similar to BLM’s—a very simple regulation¹⁵⁸ with more extensive Manual provisions.¹⁵⁹ Unlike the BLM Manual, the Forest Service Manual defers almost entirely to the Grazing

¹⁵¹ Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (2007).

¹⁵² *Id.* at 138–39. It is important to note that the decision in *Skidmore v. Swift* (1944) predates the formal rulemaking processes set forth in the Administrative Procedure Act (1946).

¹⁵³ *Skidmore*, 323 U.S. at 138–39.

¹⁵⁴ *Id.*

¹⁵⁵ 529 U.S. 576 (2000).

¹⁵⁶ *Id.* at 587 (emphasis added).

¹⁵⁷ *Id.* (citations omitted).

¹⁵⁸ 36 C.F.R. § 293.7 (2013).

¹⁵⁹ U.S. FOREST SERV., FOREST SERVICE MANUAL, pt. 2323.2 (2007).

Guidelines.¹⁶⁰ As a result, any issue arising with respect to grazing in Forest Service Wilderness Area is likely to be resolved under the terms of the Grazing Guidelines themselves and requirements in the relevant wilderness legislation.

The larger question about the Congressional Grazing Guidelines is whether they undermine the ability of the BLM and the Forest Service to reduce or remove livestock under the general grazing rules that apply to all public lands. As previously described, FLPMA, PRIA, and the BLM regulations all provide ample authority for the BLM and the Forest Service to reduce or remove livestock from the public lands when certain conditions are met.¹⁶¹ In some cases, livestock restrictions are mandatory, such as where “grazing use is otherwise causing an unacceptable level or pattern of utilization, or when use exceeds the livestock carrying capacity.”¹⁶² Likewise grazing must be curtailed where “[c]ontinued grazing use poses an imminent likelihood of significant resource damage.”¹⁶³ While in theory these restrictions should apply equally to wilderness lands, it is not clear that they can be enforced consistent with the Congressional Grazing Guidelines.

The essential directive of the Grazing Guidelines is that “[t]here shall be no curtailments of grazing in wilderness areas simply because an area is, or has been designated as wilderness.”¹⁶⁴ Furthermore, “wilderness designations [should not] be used as an excuse by administrators to slowly ‘phase out’ grazing.”¹⁶⁵ The Guidelines also provide that “[a]ny adjustments in the numbers of livestock permitted to graze in wilderness areas should be made as a result of revisions in the normal grazing and land management planning and policy setting process, giving consideration to legal mandates, range condition, and the protection of the range resource from deterioration.”¹⁶⁶

This provision seems to preserve the authority of the agencies under FLPMA and PIRA to restrict grazing on wilderness lands. But the Guidelines go on to explain “[i]t is anticipated that the numbers of livestock permitted to graze in wilderness would remain at the approximate levels existing at the time an area enters the wilderness system.”¹⁶⁷ They further express as a “general rule of thumb . . . that activities or facilities established prior to the date of an area’s designation as wilderness should be allowed to remain in place.”¹⁶⁸ Therefore, if livestock grazing activities and facilities were established in an area at the time at the time it became placed in the

¹⁶⁰ Compare *id.* at pt. 2323.22, with BLM MANUAL, *supra* note 136, at pt. 1.6(C)(8). See *supra* text accompanying notes 136–137.

¹⁶¹ See *supra* notes 89–122, 135–142 and accompanying text.

¹⁶² See 43 C.F.R. § 4110.3–2(b) (2013).

¹⁶³ *Id.* § 4110.3–3(b)(1)(ii).

¹⁶⁴ H.R. REP. NO. 101-405, at 41.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 43.

wilderness system and placed the specific area in the wilderness system, they should be allowed to continue.¹⁶⁹

While there is enough ambiguity in the Guidelines to entitle federal agencies to *Chevron* deference in creating rules that authorize grazing restrictions in wilderness areas, the agencies may lack the will to do so.¹⁷⁰ If the agency restricts or proposes to restrict grazing in wilderness areas, even for reasons unrelated to wilderness protection, the agency will likely face significant political pressure to withhold those restrictions based on the Grazing Guidelines. Not surprisingly, the BLM and the Forest Service have only rarely mandated the reduction or removal of livestock from designated wilderness areas.¹⁷¹ The lack of agency action suggests that additional guidance is necessary if there is to be any realistic prospect of restricting grazing in wilderness areas.¹⁷²

Since the passage of the Wilderness Act in 1964, nearly 110 million acres of federal land has been designated as wilderness.¹⁷³ Grazing has been allowed to continue on virtually all of the wilderness areas located in the eleven contiguous public land states.¹⁷⁴ This is not likely to change in any significant way, even if the modest reforms proposed below are adopted.

It is not hard to imagine how the political calculus would change if enacting wilderness legislation caused ranchers to lose their grazing rights when an area became designated as wilderness. Many proposals to protect land would never be made, while other wilderness areas now protected would have likely failed to make it through the legislative process. Grazing in wilderness is a compromise. While this compromise may detract from wilderness values, allowing grazing offers more or less permanent protection for undeveloped lands from most forms of resource development.

V. REFORMING THE LAW ON GRAZING IN WILDERNESS AREAS

It would be a mistake to think that grazing in wilderness areas does not pose any serious environmental problems. While grazing is sometimes compatible with the management of other public land resources, and while grazing can be carried out sustainably on many lands, it can also cause

¹⁶⁹ *Id.*

¹⁷⁰ See *supra* notes 145–163, and accompanying text (discussing *Chevron* and *Skidmore* deference).

¹⁷¹ See Donahue, *supra* note 13, at 172.

¹⁷² Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 724–27 (2005) (reiterating BLM and Forest Service statements about the havoc wrought on public lands by livestock grazing and the agencies' failure to address it).

¹⁷³ University of Montana, *The Beginnings of the National Wilderness Preservation System*, <http://www.wilderness.net/NWPS/fastfacts> (last visited Apr. 12, 2014).

¹⁷⁴ U.S. BUREAU OF LAND MGMT., *Frequently Asked Questions: The Wilderness Idea*, http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/wilderness2/Wilderness_FAQ.html (last visited Apr. 12, 2014). The 11 states include Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. Mitch Toban, *What is the West? 5 Ways the Region Stands Out*, <http://www.ecowest.org/2013/04/26/what-is-the-west-five-ways-the-region-stands-out/> (last visited Apr. 12, 2014).

substantial harm to those resources and may prove environmentally unsustainable even at relatively modest levels. Moreover, as the reality of climate change becomes more apparent it will almost certainly become more difficult to protect sensitive lands from the adverse effects associated with grazing. Against this backdrop, the question that looms is whether some realistic reforms can be put into place that would help ensure the ecological health of wilderness lands. Two reforms that could prove enormously beneficial seem possible.

First, BLM and the Forest Service should adopt joint rules, following a notice and comment process, that set out the circumstances whereby the agencies will require new restrictions, reductions, or removal of livestock from wilderness lands. The rules might simply confirm the requirements previously described in the BLM rules about restricting grazing to protect range health and other such things.¹⁷⁶ However, because controversy will likely ensue following any changes to existing allotments, the rules should also include a commitment to prepare an EA or EIS with full public participation rights, before any significant changes to an existing allotment are made. Among the items that must be provided in the NEPA document is a clear explanation of why any proposed changes to the existing grazing regime are deemed necessary and why these changes are not related specifically to the fact that the lands are designated wilderness. This will help ensure that the decision complies with the Congressional Grazing Guidelines.

A second and more complicated recommendation that has been popularized by others, although not specifically in the context of grazing in wilderness, is to authorize the permanent retirement of grazing leases through a voluntary buyout program.¹⁷⁶ Such a program is not currently feasible for at least four reasons. First, leases may only be sold to persons who are in the business of grazing livestock.¹⁷⁷ Yet, the whole point of buying out grazing rights is to take these lands out of livestock grazing. The Supreme Court in *Public Lands Council v. Babbitt* directly addressed this problem.¹⁷⁸ In *Babbitt*, representatives from the livestock industry expressed their concern over new Interior Department regulations that allowed parties

¹⁷⁶ See, e.g., *supra* text accompanying notes 102-104.

¹⁷⁶ See, e.g., John D. Leshy and Molly S. McUsic, *Where's the Beef? Voluntary Retirement of Federal Lands from Livestock Grazing*, 17 N.Y.U. ENVTL. L. J. 368 (2008) (proposing a two-sentence proposal for legislation to facilitate such retirements); David G. Alderson, *Buyouts and Conservation Permits: A Market Approach to Address the Federal Public Land Grazing Problem*, 12 N.Y.U. ENVTL. L.J. 903, 930 (2005) (suggesting legislation that would establish conservation permits); Robert H. Nelson, *How to Reform Grazing Policy: Creating Forage Rights on Federal Rangelands*, 8 FORDHAM ENVTL. L.J. 645, 649 (1977) (proposing the establishment of transferable forage rights).

¹⁷⁷ Under the Taylor Act, grazing permits may be issued only to "bona fide settlers, residents, and other stock owners." 43 U.S.C. § 315b (2006) (emphasis added). See also *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 745 (2000). A related problem could be that the rules give a preference to the existing grazer. Since the proposed reform is for a voluntary buyout this should not present a problem, although a related idea that would allow private nongrazers to bid for grazing leases at an auction would need to overcome the preference rules.

¹⁷⁸ *Babbitt*, 529 U.S. at 747.

to “acquire a few livestock, . . . obtain a permit for what amounts to a conservation purpose and then effectively mothball the permit.”¹⁷⁹ In response, the Interior Department essentially conceded, and the Court found, that “[p]ermitted livestock use is not simply a symbolic upper limit. . . . [A] permit holder is expected to make substantial use of the permitted use set forth in the grazing permit.”¹⁸⁰

Second, only persons who own or control base property are eligible to purchase grazing permits or leases.¹⁸¹ The problem this presents is that any person who wants to see grazing rights retired has no need for base property. Unless this requirement is removed, the government is hard pressed to allow the voluntary retirement of grazing rights to people or organizations whose only interest is to remove livestock from the public lands.

Third, parties interested in retiring grazing rights are dealing with a management legacy where the vast majority of public lands are deemed chiefly valuable for grazing under the Taylor Act. According to the Interior Department Solicitor, the BLM cannot retire grazing rights on lands that have historically been deemed chiefly valuable for grazing without first changing that finding and amending the relevant land use plan.¹⁸² Thus, retiring grazing rights ultimately means changing land use plans to prohibit grazing in specific areas—something that the BLM seems loath to do. Further complicating this is the fact that the default designation for most of the public lands since the Taylor Act was passed in 1934 has been a “chiefly valuable” for grazing designation.¹⁸³

Finally, even if a party is able to negotiate the sale of grazing rights to a private party who does not want to graze, the government agency has the

¹⁷⁹ *Id.* (quoting from the brief of the Public Lands Council).

¹⁸⁰ *Id.* (emphasis added). The Court also noted approvingly that “the Secretary has represented to the Court that ‘[a] longstanding rule requires that a grazing permit be used for grazing.’” *Id.* at 748.

¹⁸¹ See BUREAU OF LAND MGMT., FACT SHEET ON THE BLM’S MANAGEMENT OF LIVESTOCK GRAZING (2013), available at <http://www.blm.gov/wo/st/en/prog/grazing.html>; see also 43 C.F.R. § 4.100.0–5 (2013) (defining base property as:

“(1) Land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or (2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing”).

¹⁸² See DEP’T OF THE INTERIOR, SOLICITOR’S OPINION M-37008 (2003), available at <http://www.doi.gov/solicitor/opinions/M-37008.pdf>

“(A) permittee may relinquish a permit but, barring a better use as determined by the Secretary through land use planning, the forage attached to the permit remains available for other permittees until the TGA classification is terminated or the land is removed from the grazing district. As long as the boundary of the grazing district remains in place and the classification and withdrawals remain in effect, there is a presumption that grazing within a grazing district should continue.”)

¹⁸³ Taylor Grazing Act of 1934, 43 U.S.C. § 315 (2006); see DONAHUE, *supra* note 13, at 193–203 (arguing exhaustively that the legislative history of the Taylor Act does not support the BLM’s historic preference for designating lands as chiefly valuable for grazing).

authority—and perhaps even the duty—to lease the land to a third party who does want to graze, which effectively undermining any effort to achieve a permanent retirement of grazing rights. This risk played out in the experience of the Grand Canyon Trust (“Trust”), which pioneered efforts to establish a grazing buy-out program.

By most measures, the Trust has engaged in some of the most innovative efforts to retire grazing rights on public lands.¹⁸⁴ The Trust embarked on an ambitious campaign to buy out grazing rights on some key sections of high value lands on the Colorado Plateau in southern Utah.¹⁸⁵ They established a separate corporation—the Canyonlands Grazing Corporation (CGC)—with the goal of purchasing and then retiring these grazing rights. However, the legal issues facing the Trust proved challenging. It was simple enough for the CGC to purchase grazing rights from willing ranchers; apparently there are many ranchers who are prepared to sell their rights and get out of the livestock business.¹⁸⁶ But because the lands for which the grazing rights are purchased remain open to livestock grazing under the applicable land use plan, the BLM might be forced to issue a new grazing permit to another party, thwarting the Trust’s efforts.¹⁸⁷ So, when the BLM indicated that it was preparing to lease the unused grazing rights on two of the allotments that the CGC had purchased, the Trust and the CGC responded by getting themselves into the ranching business.¹⁸⁸ The Trust decided to graze the lands but at reduced levels, well below the permitted use.¹⁸⁹ This prompted several local ranchers to seek abandonment rights to the unused AUMs.¹⁹⁰

The BLM denied the ranchers’ request and the ranchers appealed to an administrative law judge (ALJ) within the BLM’s Office of Hearings and Appeals.¹⁹¹ The ALJ affirmed the BLM’s decision and the ranchers appealed to federal court claiming that CGC was not a qualified party to hold a grazing lease.¹⁹² The federal district court rejected this claim and affirmed the ALJ’s

¹⁸⁴ See RASBAND ET AL., *supra* note 45, at 1005–11.

¹⁸⁵ See *id.* at 1005 (citing Bill Hedden, Grand Canyon Trust Grazing Retirement Program).

¹⁸⁶ Ralph Maughan, *Bill Would Allow Ranchers to Voluntarily End Their Grazing Allotments in Exchange for Private Compensation*, WILDLIFE NEWS, May 29, 2013, <http://www.thewildlifeneews.com/2013/05/29/bill-would-allow-ranchers-to-voluntarily-end-their-grazing-allotments-in-exchange-for-private-compensation/> (last visited Apr. 12, 2014).

¹⁸⁷ At the very end of the Clinton Administration in 2001, Interior Department Solicitor John Leshy wrote a legal opinion in which he suggested that Section 4 of PRIA authorizes the Secretary to retire grazing rights “either temporarily or permanently,” outside of the land use planning process. Memorandum from John D. Leshy, Solicitor, U.S. Dep’t. of the Interior, to Dir. and Assistant Dir., Renewable Res. & Plan, Bureau of Land Mgmt. (Jan. 19, 2001). About 20 months later, however, the new Solicitor William Myers wrote a second opinion rejecting the position taken by Solicitor Leshy and arguing that the BLM could retire grazing permits only by amending the relevant land use plan and determining that the lands were no longer “chiefly valuable” for grazing. See Memorandum from William M. Myers, Solicitor, Dep’t. of the Interior, to the Secretary, Dep’t. of the Interior (Oct. 4, 2002).

¹⁸⁸ RASBAND ET AL., *supra* note 45, at 1009.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Stewart v. Kempthorne*, 593 F. Supp. 2d 1240, 1243 (D. Utah 2008).

¹⁹² *Id.* at 1246.

decision. The court found that CGC was a “stock owner” within the meaning of the Taylor Grazing Act and therefore qualified to hold a grazing lease.¹⁹³

The Grand Canyon Trust has continued to pursue the unusual strategy of trying to reduce livestock grazing on the Colorado Plateau through its grazing program. The Trust now owns and manages the Kane and Two Mile ranches in northern Arizona through a Trust subsidiary, North Rim Ranch LLC.¹⁹⁴ The Trust’s website notes that these ranches encompass:

[A]pproximately 850,000 acres of public lands administered by the U.S. Forest Service (USFS), Bureau of Land Management (BLM), and Arizona State Land department. The permits include important conservation areas such as the Vermilion Cliffs National Monument, the Paria River Wilderness, and the Marble Canyon Area of Critical Environmental Concern. The ranches also include about 1,000 acres of deeded land, numerous water rights, buildings, and range improvements including stock water pipelines, fences, corrals, tanks, and wells.¹⁹⁵

The Trust has “developed a set of strategies to graze livestock in the most ecologically responsible manner possible.”¹⁹⁶

To be sure, the Trust’s work can provide valuable information to other ranchers and relevant government agencies about best grazing practices. But the Trust never intended to get into the grazing business, and it is fair to ask whether one should have to do so in order to retire grazing rights. This question has special salience for wilderness areas.

As previously noted, proposals for making grazing rights available to people who might want to retire those rights are not new.¹⁹⁷ But thus far, none of these proposals has borne fruit. A better alternative to a new grazing retirement program might be to simply follow the approach outlined by Interior Department Solicitor William Myers.¹⁹⁸ This approach requires BLM to amend its land use plans and find that certain lands are not chiefly valuable for grazing, but this does not seem like too big of a stretch. Compelling evidence supports the idea that desert lands that receive less than twelve inches of annual rainfall, and lands that have not historically been used by ungulates, are more valuable for conservation and protection of the ecological health of the lands.¹⁹⁹ The case for such a claim would seem particularly compelling for wilderness lands, which, after all, are supposed

¹⁹³ *Id.* at 1249. The court further rejected ranchers’ claims that CGC had to show that it was engaged in the livestock business with an intent to graze. *Id.* at 1250.

¹⁹⁴ Information about the Kane and Two Mile Ranches is available on the Grand Canyon Trust website at Grand Canyon Trust, *Kane and Two Mile Ranches*, <http://www.grandcanyontrust.org/kane/index.php> (last visited Apr. 12, 2014).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See *supra* notes 179 and 190. Note especially the simple proposal by Leshy and McUsic in Appendix A of the article cited at note 176.

¹⁹⁸ Memorandum from William M. Meyers, *supra* note 187. Mr. Myers was the Interior Department Solicitor under the George W. Bush Administration.

¹⁹⁹ See DONAHUE, *supra* note 13, at 6.

to be “untrammeled by man.”²⁰⁰ But relying too heavily on the wilderness status of lands could easily run afoul of the Congressional Grazing Guidelines.

Still, it is not hard to imagine a scenario in which a group like the Grand Canyon Trust might test this approach. It might work much like the approach originally taken by the Trust. First, the group would identify a rancher grazing on sensitive lands who was willing to sell her rights. The group would then approach BLM about amending the relevant land use plan to designate the lands as chiefly valuable for conservation and ecological health. Ideally, the request would be accompanied by a detailed scientific analysis identifying the important ecological values of the land and how those values would be compromised by continued grazing. If BLM was willing to commence the process of amending the plan, the Trust could then purchase the grazing rights. The amendment process would have to include a thorough NEPA analysis and an opportunity for the interested to public to engage. Once the claim is verified and the lands are found to be chiefly valuable for conservation and the protection of ecological values, a voluntary retirement could take place. The purchase might even be made contingent on a final decision redesignating the lands.

A significant advantage to this approach is that it can be carried out under existing law. There is no need to adopt new laws or regulations to establish “conservation permits”²⁰¹ or “forage rights.”²⁰² What is needed, however, is leadership at BLM and the Forest Service to promote, test, and refine the approach. Creating amendments to the agency manuals that outline the procedures agencies might use for handling applications to retire grazing rights might be useful. In particular, where applications are made to retire grazing rights in wilderness areas, the agencies should provide guidance to ensure that agency officials understand that decisions must be justified for reasons unrelated to the fact that the lands are designated wilderness.

A recent Instruction Memorandum issued by the Department titled *Relinquishment of Grazing Permitted Use on the Bureau of Land Management Administered Lands* illustrates the Department’s awareness of the need for additional agency guidance.²⁰³ Unfortunately, the Memorandum offers little to suggest that BLM recognizes the need to consider seriously the need for permanent grazing retirements at least in some circumstances. For example, the Memorandum provides that where grazing rights are relinquished “the forage should be allocated to other qualified applicants. . . [so long as] . . . the most recent allotment evaluation still reflects the current situation and conditions, and rangeland health standards or other criteria

²⁰⁰ Wilderness Act of 1964, 16 U.S.C. § 1131(c) (2006).

²⁰¹ See Alderson, *supra* note 176, at 905.

²⁰² See Nelson, *supra* note 176, at 649.

²⁰³ INSTRUCTION MEMORANDUM 2013-184 (2013), available at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2013/im_2013-184_relinquishment0.html, (last visited Apr. 12, 2014).

established by the [Authorized Officer] are being met.”²⁰⁴ Indeed, the Memorandum emphasizes that “[n]o further analysis is needed.”²⁰⁵ Even “where upon receiving a relinquishment, the manager would be expected to evaluate whether livestock grazing is in the best interest of achieving management plan goals,” the preference seems to be to try to find ways to continue to allow grazing. According to the Memorandum, “a . . . decision to no longer authorize livestock grazing on the subject area should be used only following a BLM determination that there are no feasible and practicable solutions readily available that can resolve livestock grazing issues in a timely manner.”²⁰⁶

VI. CONCLUSION

Livestock grazing in wilderness areas may seem incongruous, but without the decision to allow such grazing to continue there likely would not have been a Wilderness Act and it seems almost certain that far fewer wilderness areas covering far less land would have been the result. Likewise, while the Congressional Grazing Guidelines might reasonably be seen as overly protective of grazing rights in wilderness areas, they also provided the assurance that some lawmakers needed as a condition for offering their support for wilderness bills.

As we celebrate the success of the Wilderness Act on the fiftieth anniversary of its passage, we can view with approval the grazing compromise that was so critical to that success. That is not to say that the BLM and Forest Service could not implement some modest changes to grazing management that might better protect the ecological values of designated lands. In particular, the agencies should clarify their authority to reduce or retire livestock on wilderness lands by developing rules through a notice and comment rulemaking for reasons unrelated to the fact that the lands are designated wilderness. Moreover, the agencies should welcome efforts by interested third parties to purchase and retire grazing rights on lands where ecological concerns make grazing on those lands problematic. While the entrenched culture that seems to favor the continuation of grazing rights, especially inside the BLM, may seem difficult to overcome, changing economic conditions for public lands grazing and the evolving values of the people in the western public lands states offer a realistic prospect for retiring grazing rights that degrade wilderness values.

²⁰⁴ *Id.*

²⁰⁵ *Id.* The Memorandum goes on to provide that “BLM is not required to analyze whether the area covered by the relinquished permit is ‘chiefly valuable for grazing’ unless the Bureau is considering a recommendation to the Secretary of the Interior to remove public lands from, or add public lands to, a grazing district established under Section 1 of the Taylor Grazing Act.”

²⁰⁶ *Id.*
