

March 2004

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### Repository Citation

S. L. Rundle, *The Once and Future Federal Grazing Lands*, 45 Wm. & Mary L. Rev. 1803 (2004),  
<https://scholarship.law.wm.edu/wmlr/vol45/iss4/8>

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# THE ONCE AND FUTURE FEDERAL GRAZING LANDS

## INTRODUCTION

The most recent brawl amongst federal land ranchers, environmentalists, and bureaucrats to tumble through the louvered barroom doors of the Supreme Court was *Public Lands Council v. Babbitt*<sup>1</sup> (PLC), a challenge by federal land ranchers to federal grazing regulation changes during the first term of President William Jefferson Clinton.<sup>2</sup> Inadvertently fingering the root source of contention, Justice Breyer observed that the “enormity of the administrative task”<sup>3</sup> facing the Secretary of the Department of the Interior (DOI) under the Taylor Grazing Act (TGA) led to the further delegation of rulemaking to the ranchers themselves back in the 1930s,<sup>4</sup> when the first Range Code was written.<sup>5</sup> Whether Justice Breyer meant enormity in the disfavored sense<sup>6</sup> or in fact adopted the warning of classic liberal economists and theoreticians

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1. 529 U.S. 728 (2000).

2. *See id.* at 738.

3. *Id.* at 734.

4. *See id.* (observing that boards of ranchers provided the DOI with advice).

5. The Range Code is an amorphous beast given a shifting incoherence by successive administrative agendas and a lack of central control over underlying policy. Karl N. Arruda & Christopher Watson, *The Rise and Fall of Grazing Reform*, 32 LAND & WATER L. REV. 413, 424 (1997). For example, in 1976, over three thousand laws governed the Bureau of Land Management’s regulatory task. Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 377 (1994).

6. *See* THEODORE M. BERNSTEIN, DOS, DON’TS & MAYBES OF ENGLISH USAGE 73 (1977) (“Enormity, Enormousness ... Did [the writer under criticism] mean the wickedness, the outrageousness, the monstrousness ...? Obviously not. But that’s what *enormity* means. What he had in mind was the vastness, the great size ... and the word he should have had in mind was *enormousness*.”); ROY H. COPPERUD, AMERICAN USAGE: THE CONSENSUS 86 (1970) (noting that “93 percent of the American Heritage panel rejects ... the divergent sense of *immensity*,” that “the Oxford English Dictionary defines *enormity* in the sense of *excess in magnitude* as an incorrect use,” and that the “consensus rejects the extended sense”). Perhaps Justice Breyer, seldom a sloppy writer, harbors latent sentiments similar to those expressed by F.A. Hayek in the footnote below.

against the inherent flaw of planning,<sup>7</sup> his import was clear. The Bureau of Land Management's (BLM) job—determining who should graze how many cows on which particular allotments<sup>8</sup> out of the more than 170 million acres of federal grazing land, and at what price—looms enormous.<sup>9</sup> It is complicated by the competing goals of ranchers (to maintain or expand current grazing levels) and environmentalists (to decrease or eliminate grazing), as both groups have a say in the drafting of grazing regulations.

This Note argues that the BLM's judicially frustrated attempt to abnegate its regulatory responsibilities in the 1980s,<sup>10</sup> along with the holding of *PLC* that the BLM cannot lawfully transform itself into a national wilderness reserve, have limited the BLM to the narrow task of allocating grazing privileges and managing range health. If the BLM were able to discharge this regulatory assignment effectively, while complying with the statutory gamut of policy goals, environmental and otherwise, it would have succeeded only in providing a service which, although once perhaps necessary, has become unnecessary over time. The common understanding being, however, that the BLM has not and does not properly manage the public range, this Note argues that the response to *PLC* has focused wrongly on the efficacy or optimal mix of particular grazing regulations and enforcement procedures. This Note offers a different reading of *PLC* that goes instead toward a nonregulatory, nonjudicial solution to the problem of the federal grazing lands: their sale.

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7. "There would be no difficulty about efficient control or planning were conditions so simple that a single person or board could effectively survey all the relevant facts." FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 48-49 (1944).

8. Before Rangeland Reform '94, see *infra* notes 104-14 and accompanying text, and probably thereafter as well, this decision was reached by "ocular estimation," meaning that the local range manager used his personal ability to estimate carrying capacity to guide his decisions. 3 GEORGE C. COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* § 19:28 n.5 (1990); see also Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1519 (1999) ("It is important to reiterate that there can be no truly optimal environmental governance because resource management as well as public health and ecological protection involve to some degree *measuring the unmeasurable* and comparing the incomparable.") (emphasis added).

9. This Note abstracts the grazing issue from federal land management; the BLM's other responsibilities relate to mineral resource administration. See 30 U.S.C. § 29 (2000) (issuing mineral patents); 43 U.S.C. § 1744 (2000) (recording claims).

10. See discussion *infra* Part I.F.

Part I outlines the history of the public domain, including a discussion of the shift in policy from disposal to retention of federal land holdings. Part II provides an overview of *PLC*. Part III surveys the common interpretation of *PLC*, which was that it generally affirmed the DOI Secretary's broad authority to regulate and that improved regulations can indeed solve the problems of the public range. Part IV then reviews some of the various proposals for range reform, especially one particular proposal that argues for maintaining federal land ownership and using lawsuits to achieve the policy goals of interest groups and private citizens. Part V offers an alternative solution based upon congressional reconsideration of the retention-disposal choice as it pertains to federal grazing lands.<sup>11</sup> The choice between state and private ownership<sup>12</sup> is a decision of pure, albeit highly politicized, legislative policy.<sup>13</sup> Ultimately, this Note argues that private ownership would resolve outstanding federal range issues without causing environmental disaster.

## I. HISTORY AND DEVELOPMENT OF THE PUBLIC DOMAIN

### A. *Early American Land Distribution*

Originally, the United States set out to transfer all of the "large part of the vacant Western territory ... by cession at least, ... the

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11. See Sally J. Kelley, *Agricultural Law: A Selected Bibliography*, 2001, 55 ARK. L. REV. 303, 379-82 (2002) (collecting thirty-four books and articles which address public lands issues in terms of preserving recreational access, removing cattle from federal land, and so forth, but none addressing the question of whether the federal government should retain BLM lands).

12. See 1 HAROLD DEMSETZ, *OWNERSHIP, CONTROL, AND THE FIRM: THE ORGANIZATION OF ECONOMIC ACTIVITY* 110-15 (1988) (discussing the communal, state, and private land ownership alternatives). Demsetz noted "an owner of a private right to use land acts as a broker whose wealth depends on how well he takes into account the competing claims of the present and the future." *Id.* at 111. Because of a failure to grasp the distinctions between forms of ownership, the argument for privatization of public lands has been classified incorrectly as "the ultimate act of decentralization" of management. See William E. Riebsame, *Ending the Range Wars?*, ENV'T, No. 38-4, May 1996, at 27.

13. See Michael C. Blumm, *Twenty Years of Environmental Law: Role Reversals Between Congress and the Executive, Judicial Activism Undermining the Environment, and the Proliferation of Environmental (and Anti-Environmental) Groups*, 20 VA. ENVTL. L.J. 5, 14 (2001) ("[A] principal conclusion of this essay is how much politics matters in environmental law.").

common property of the Union"<sup>14</sup> into private hands as quickly as possible. Although a few of the Founders argued for some federal land retention,<sup>15</sup> "[i]t is certain that the Founding Fathers had no intention of creating a large central government with huge land holdings."<sup>16</sup> The original public domain came into being after the seven colonies with western land claims acquiesced in the unified demand of the six colonies without claims,<sup>17</sup> and ceded to the new central government their western claims as a condition precedent to ratification of the Articles of Confederation.<sup>18</sup> Later, Congress rewarded veterans of the Revolutionary War, the War of 1812, and the Mexican-American War with roughly sixty-one million acres of land, or three percent of the U.S. landmass.<sup>19</sup>

As the country grew through war, treaty, and purchase, so did the area to be defended against internal and external threats. To protect against foreign invasion, the government encouraged citizens to settle the lands west of the Appalachians.<sup>20</sup> The presence of cattle and sheep drovers decreased the threat of foreign occupation<sup>21</sup> and helped suppress the Indians who otherwise would have interfered more widely with transcontinental travel.<sup>22</sup>

The greatest increase in grazing use came during the Gold Rush; heavy migration westward began in 1848, a year significant both for the end of the Mexican-American War and the discovery of gold in California. The disposition of federal lands unto the citizenry

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14. THE FEDERALIST NO. 7, at 35 (Alexander Hamilton) (Modern Library ed., 1961).

15. James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241, 247 n.32 (1994) (noting that President John Quincy Adams reserved oak forests for naval use).

16. Karin P. Sheldon, *The Thrilling Days of Yesteryear: Some Comments on the Settlement of the West and the Development of Federal Land and Resource Law*, S.F. 34 A.L.I.-A.B.A. 1, 9 (2000).

17. Huffman, *supra* note 15, at 246 & n.18.

18. Virginia was landed, Maryland was not. *See id.* at 246 n.19.

19. Harold J. Krent & Nicholas S. Zeppos, *Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls*, 52 VAND. L. REV. 1705, 1724 (1999).

20. GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 79 (1993); *see also* PAUL J. CULHANE, *PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT* 42, 76-79 (1981).

21. Frank J. Falen & Karen Budd-Falen, *The Right To Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 IDAHO L. REV. 505, 514 (1994).

22. *Id.* at 515.

continued<sup>23</sup> pursuant to the Homestead Act of 1862<sup>24</sup> and the Desert Lands Act of 1877.<sup>25</sup> The leading authority on federal land grazing, George C. Coggins, finds a direct causal link between the "rapid disposition of land" and the "patterns of western settlement that still impede coherent land management."<sup>26</sup> The United States continues to sell or transfer federal land, but at a relatively light pace and through a different process. In contrast to its past direct exercise of its Article IV, Section 3 powers,<sup>27</sup> Congress now allows agencies, with little oversight,<sup>28</sup> to exercise essentially unfettered discretion in leasing and selling government lands.<sup>29</sup>

In the nineteenth century, homesteaders, especially in the arid regions, staked claims around riparian areas, while grazing their animals on federal land.<sup>30</sup> During the 1880s and 1890s, heavy grazing began to curtail the range's regenerative capacity.<sup>31</sup> Concurrently, public sentiment about federal land policy, influenced by systemic abuses and fraud in the land disposal process, began to shift.<sup>32</sup>

In 1872, Congress withdrew Yellowstone from the public domain<sup>33</sup> and these lands became national forest. Thereafter, the

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23. See COGGINS ET AL., *supra* note 20, at 85 ("[I]n reality, large corporations got the bulk of the available land through dummies and fraud to the federal government.").

24. 43 U.S.C. §§ 161-164 (repealed 1976).

25. 43 U.S.C. §§ 331-339 (2000).

26. George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 6 (1982) (describing settlement and land distribution to individuals and corporations such as railroads during westward expansion).

27. See *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (asserting that Congress' Article IV powers are "without limitation[]"). Whatever arguments might be raised against disposition, there is emphatically no barrier to Congress short-circuiting legal challenges. See *United States v. Coe*, 155 U.S. 76 (1894) (holding that claims arising from the disposal of public lands are within the jurisdiction of the courts only if Congress allows); THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 607 (Johnny H. Killian & George A. Costello eds., 1992) (same).

28. "The [Administrative Procedure Act] exempts property transactions from rulemaking constraints, and courts and agencies have limited third party access to much adjudication." Krent & Zeppos, *supra* note 19, at 1710.

29. *Id.* at 1707.

30. COGGINS & GLICKSMAN, *supra* note 8, § 19:2.

31. See *id.*

32. Kelly Nolen, *Residents at Risk: Wildlife and the Bureau of Land Management's Planning Process*, 26 ENVTL. L. 771, 784 (1996).

33. Act of March 1, 1872, 16 U.S.C. § 21 (2002).

western United States consisted of three components: public lands<sup>34</sup> grazed freely by all, privately claimed lands, and lands withdrawn from settlement. In 1890, the Supreme Court held that Congress, by its silence, had given anyone wishing to graze animals on the public lands the right to do so.<sup>35</sup> This was convenient for homesteaders, who "did not want title to ... the western range ... [except for] the best parcels."<sup>36</sup> Debra Donahue has asked the question as the homesteaders did: "Why pay taxes on these grazing lands if the federal government [would] allow their use for no charge or only a pittance?"<sup>37</sup> That is to say, there would be no federal grazing today, and none of the attendant regulatory disputes, if Congress had made taking title the rationally preferable, economically viable choice.

### *B. Range Overcrowding and the Dust Bowl*

Congress closed the public domain under the TGA and parceled out limited grazing privileges because of decreased available forage caused by (1) range overcrowding and (2) the Dust Bowl.<sup>38</sup> After a successful congressional experiment with a restricted access grazing district in Montana in the early 1900s,<sup>39</sup> ranchers throughout the West asked Congress to expand the system.<sup>40</sup> DOI Secretary Harld LeClair Ickes<sup>41</sup> overcame whatever residual resistance to the

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34. *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1290 (10th Cir. 1999) (noting the "millions of acres of unappropriated public lands in the western states, including Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming"); DYAN ZASLOWSKY & T.H. WATKINS, *THESE AMERICAN LANDS* 135 (2d ed. 1994) (describing public land as "the land no one wanted") (quoting William P. Clark, an Interior Secretary during the Reagan Administration).

35. See *Buford v. Houtz*, 133 U.S. 320, 332 (1890).

36. Debra L. Donahue, *Justice for the Earth in the Twenty-First Century*, 1 WYO. L. REV. 373, 390 (2001).

37. *Id.*

38. See E. LOUISE PEFFER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900-1950*, at 218-20 (1951).

39. The success of the grazing district implies a continuum of the number of users from high optimality—one or few users—to low optimality—unlimited users. At high optimality, further distinction could be made between sole users who do or do not have residual rights, such as personal ownership and the right of free alienability.

40. See PEFFER, *supra* note 38, at 215.

41. Ickes served under Presidents Roosevelt and Truman from 1933 to 1946.

TGA remained by promising to charge grazing fees sufficient only to recover administrative costs.<sup>42</sup> Ranchers, at least those who obtained grazing privileges, thus avoided the consequences of communal property without incurring the responsibilities of private ownership.

The Dust Bowl, a term referring to an environmental disaster emanating from 150,000 square miles in the contiguous corners of Kansas, Colorado, New Mexico, Oklahoma, and Texas between the years 1933 and 1939, was the consequence of heavy sodbusting by farmers anxious to capitalize on high grain prices.<sup>43</sup> When the abnormally high rainfall of the 1910s and 1920s<sup>44</sup> gave way to drought, winds swept significant amounts of topsoil into the air.<sup>45</sup> One dust storm in 1934 dumped "sands from Western deserts ... [onto] the sidewalks of New York and sifted them down around the dome of the [U.S.] Capitol."<sup>46</sup>

This environmental catastrophe is frequently mentioned as a force behind the TGA, passed soon after that particular 1934 dust storm.<sup>47</sup> Just as frequently, it is omitted that the Dust Bowl was rehabilitated by 1941.<sup>48</sup> One explanation for this omission is that the range's quick recovery weakens the trump card—that of inevitable earthly disaster—in the hands of those who prefer the outcome if environmental and federal land policy decisions are made with greater rather than lesser precaution. The dubious cause/effect understanding of the current grazing system, that the

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42. Coggins & Lindeberg-Johnson, *supra* note 26, at 71-72. Today grazing fees do not cover administrative expenses and most of the BLM's fee revenue is transferred back to state and local governments. COGGINS & GLICKSMAN, *supra* note 8, § 19:44; *see also* CHRISTOPHER MCGRORY KLYZA, WHO CONTROLS PUBLIC LANDS? MINING, FORESTRY, AND GRAZING POLICIES, 1870-1990, at 128 (1996) (showing BLM grazing fees from 1935 to 1985 peaked in 1980 at \$2.36/AUM). Some conclude the federal fees are actually "equivalent to private [pasture] rates when services and investment differences are accounted for." Riebsame, *supra* note 12, at 9. Others disagree and blame range degradation on "below-market prices reduc[ing] ranchers' incentives to manage rangeland wisely." Krent & Zeppos, *supra* note 19, at 1733.

43. *See* 9 ENCYCLOPEDIA AMERICANA 497-98 (1999).

44. ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT 30 (1995).

45. *See* PEPPER, *supra* note 38, at 220.

46. *Id.*

47. *See, e.g., id.* (noting, however, that the "dust storms received little mention in the Senate debates on the grazing bill").

48. 9 ENCYCLOPEDIA AMERICANA 498 (1999).



"West had been turned into wastelands due to their unregulated use ... [and that] the abuse forced the federal government to change its land policy from one of disposal to one of federal retention and management,"<sup>49</sup> takes too narrow a view of the situation as it was then and is now. Missing from this view are the considerations that (1) in private hands land is not necessarily converted to wasteland due to unregulated use<sup>50</sup> and (2) it was not the disposed, but the undisposed, lands which Congress retained for management and which have done so poorly.<sup>51</sup>

### *C. Taylor Grazing Act of 1934*

The uncodified Taylor Grazing Act (TGA) preamble specified three purposes: preventing overgrazing and soil erosion, stabilizing the "livestock industry dependent upon the public range," and providing for the "orderly use, improvement, and development" of the public grazing lands.<sup>52</sup> The TGA gives the DOI Secretary authority to "establish grazing districts or additions thereto and/or to modify the boundaries thereof, of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States."<sup>53</sup> Congress originally intended for this authority over the public lands to be temporary, "pending its final disposal."<sup>54</sup> Congress created the Division of Grazing<sup>55</sup> within the DOI and transferred to it about half of the land the BLM now manages.<sup>56</sup> The permits issued under the TGA were based on the permittees'

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49. Laura Scales, Note, *Grazing Our School Endowment Lands: Idaho Watershed Project v. State Board of Land Commissioners*, 20 J. LAND RESOURCES & ENVTL. L. 385, 388 (2000) (citing E. LOUISE PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL & RESERVATION POLICIES* 214-44 (1972)).

50. See DEMSETZ, *supra* note 12, at 53-54.

51. See *infra* note 69 and accompanying text.

52. Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934).

53. 43 U.S.C. § 315 (2000).

54. *Id.*

55. See DENZEL FERGUSON & NANCY FERGUSON, *SACRED COWS AT THE PUBLIC TROUGH* 36-37 (1983) (stating that the BLM replaced Division of Grazing after about ten years); see also Gary D. Libecap, *Bureaucratic Opposition to the Assignment of Property Rights: Overgrazing on the Western Range*, 41 J. ECON. HIST. 151 (1981) (discussing competition between Agriculture and Interior Departments for jurisdictional control of public domain between 1920 and 1934).

56. See FERGUSON & FERGUSON, *supra* note 55, at 37.

actual use from 1929 to 1934<sup>57</sup> and required that the permittee own near or adjacent "base" property.<sup>58</sup> The TGA provides that while grazing privileges on public land must be "adequately safeguarded," the permit itself can never create a "right, title, interest, or estate in or to the lands."<sup>59</sup>

In practice, the ranchers implemented the TGA themselves through stockmen's advisory boards.<sup>60</sup> Winners of the adjudication process obtained grazing privileges that in practice closely resembled land ownership rights, insofar as the permit holder held a ten year, automatically renewable, essentially rent-free right to an amount of forage corresponding to the amount of forage produced by a comparable parcel of privately owned pasture.<sup>61</sup> Adjudication winners obtained this, as noted, without assuming the property tax consequences of land ownership.

#### D. Natural Resource Defense Council v. Morton

The legal turning point for BLM livestock grazing programs came in 1974 when the District Court for the District of Columbia ordered the BLM to prepare one Environmental Impact Statement (EIS) for each of its 144 grazing districts, pursuant to Environmen-

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57. See Coggins & Lindeberg-Johnson, *supra* note 26, at 58 n.397.

58. Mandatory Qualifications, 43 C.F.R. § 4110.1(a) (2002) (requiring "base" property as a mandatory permit qualification prerequisite).

59. 43 U.S.C. § 315(b) (2000).

60. PAUL FOSS, *POLITICS AND GRASS* 98-200 (1960); see also COGGINS & GLICKSMAN, *supra* note 8, § 19:8 (noting that "[p]ermittee ranchers, through grazing advisory councils and general political clout, were able to dictate BLM management priorities to a considerable extent") (citations omitted); CULHANE, *supra* note 20, at 85 (stating that advisory boards were created because the BLM considered primarily local constituent opinion); Nolen, *supra* note 32, at 776 (arguing that local advisory boards "reinforced the relationships between BLM field staff and local individuals and groups, and created an agency orientation toward satisfying local needs"). The advisory boards actually "wrote the Range Code and established the preference permit system before the Congress authorized their existence in 1939." COGGINS & GLICKSMAN, *supra* note 8, § 19:11.

61. Permits entitle the permittee to a certain number of AUMs, or Animal Unit Months. An AUM is enough grass, 750-800 pounds, to feed one cow or five sheep for one month. George Cameron Coggins, *Law of Public Rangeland Management V: Prescriptions for Reform*, 14 ENVTL. L. 497, 531 n.184 (1984). "Managers have calculated that every AUM licensed actually costs the government about five or six dollars [in administrative expenses]." COGGINS & GLICKSMAN, *supra* note 8, § 19:44 n.2.

tal Protection Act (EPA) dictates.<sup>62</sup> In actions brought under the citizen suit provisions of the EPA, courts will enjoin the use of land because of an insufficient or missing EIS.<sup>63</sup> Twenty-five years after the decision, the BLM had yet to survey ninety million acres of its federal land holdings.<sup>64</sup> In *Morton*, the court held that a single nationwide plan would not adequately account for regional differences in geography and climate.<sup>65</sup> The court originally ordered the BLM to produce 212 separate EISs, but reduced the number to 144 (one per district) and later, after the BLM had failed to meet its deadline, extended the schedule to complete them until 1988.<sup>66</sup>

### *E. The Federal Land Policy and Management Act and the Public Rangelands Improvement Act*

Although grazing dropped by forty-five percent between 1955 and 1996,<sup>67</sup> overgrazing continued to prevent the range from achieving ideal forage cover. In 1976 Congress enacted the Federal Land Policy and Management Act (FLPMA)<sup>68</sup> because the range was not healthy in spite or because of forty years of federal management.<sup>69</sup> FLPMA explicitly superseded the policy announced in the TGA of

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62. See *Natural Res. Def. Council v. Morton*, 388 F. Supp. 829, 840-41 (1974); COGGINS & GLICKSMAN, *supra* note 8, § 19:10; see also 42 U.S.C. § 4332 (2000) (requiring all agencies to prepare reports describing "the environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided," "alternatives to the proposed action," "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented" whenever the proposed action might "significantly affect[] the quality of the human environment").

63. See, e.g., Eric Montalvo, Comment, *Operational Encroachment: Woodpeckers and Their Congressmen*, 20 TEMP. ENVTL. L. & TECH. J. 219, 224 n.16 (2002) (collecting cases).

64. Krent & Zeppos, *supra* note 19, at 1714.

65. Arruda & Watson, *supra* note 5, at 423 (citing *Morton*, 388 F. Supp. at 838-39, 841).

66. *Natural Res. Def. Council v. Andrus*, 448 F. Supp. 802, 806-07 (D.D.C. 1978).

67. Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 155 (1999).

68. 43 U.S.C. §§ 1701-1785 (2000). The FLPMA injected new interests into the BLM's management calculus. See George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 4 (1983).

69. 43 U.S.C. § 1751(b)(1) (2000) ("Congress finds that a substantial amount of the Federal range lands is deteriorating ... and that installation of additional range improvements could arrest much of the continuing deterioration ....").

dispossessing the government of the public domain.<sup>70</sup> FLPMA instructed the Secretary to manage the range for multiple uses:<sup>71</sup> economic, recreational, and scientific;<sup>72</sup> and to achieve the goal of sustained yield—"achievement and maintenance in perpetuity of a high-level of annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."<sup>73</sup> Finally, the FLPMA ordered production of land use plans covering all federal land.<sup>74</sup>

Two years after FLPMA, Congress passed the Public Rangelands Improvement Act<sup>75</sup> (PRIA), which contained findings that the range was no healthier than before<sup>76</sup> and that the solution was "intensive" management<sup>77</sup> and a "significant increase in ... funding."<sup>78</sup> At that

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Until the FLPMA expressly stated in 1976 that federal policy was one of retention in federal ownership of the rest of the public lands, the question of possible eventual federal relinquishment *was* an open one; all remaining federal lands were "pending final disposal" in the hopeful sense in which the phrase apparently was used. Furthermore, as discussed above, the TGA does allow for disposal of lands in districts, but also expressly states that lands are not to be subject to the disposal laws until the lands are reclassified to make them so.

Pamela Baldwin, *Livestock Water on Federal Rangelands*, 1 GREAT PLAINS NAT. RESOURCES J. 351, 403 (1996).

71. Multiple use's "heyday" began in 1930 and ended in 1970. Laitos & Carr, *supra* note 67, at 149-50.

72. 43 U.S.C. § 1701(a)(7), 1702(c), 1732(a) (2000); *see also* Natural Res. Def. Council v. Hodel, 624 F. Supp. 1045, 1058 (D. Nev. 1985) (holding that a multiple use mandate is not grounds for injunction against grazing).

73. 43 U.S.C. § 1702(h) (2000); *see also* 43 U.S.C. § 1732(a).

74. 43 U.S.C. § 1712(a) (2000); *see also* Natural Res. Def. Council v. Hodel, 618 F. Supp. 848, 857 (E.D. Cal. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987) (discussing the goals of the FLPMA).

75. 43 U.S.C. §§ 1901-1908 (2000).

76. *Id.* "[R]anching can damage the range ecosystem through a 'slow, insidious process.'" Arruda & Watson, *supra* note 5, at 419 (citation omitted). The range which is damaged slowly recovers slowly.

77. 43 U.S.C. §§ 1901-1908. *But see* Karl Hess Jr. & Jerry L. Holechek, *Beyond the Grazing Fee: An Agenda for Rangeland Reform*, Cato Policy Analysis No. 234 (July 13, 1995), at <http://www.cato.org/pubs/pas/pa-234.html> (arguing that "decisions by self-interested bureaucrats lead to inherently unstable private use rights to the range" and that the "associated insecurity of tenure results in non-optimal land use and lower long-term levels of production").

78. *See* 43 U.S.C. § 1901(a)(4) (2000); *see also* 43 U.S.C. § 1901(a)(1), (3) (2000) (finding that "vast segments" of public range are in "unsatisfactory condition" and therefore "present a high risk of soil loss, desertification," and consequent underproductivity).

time, 7000 BLM employees<sup>79</sup> managed 14,000 permittees.<sup>80</sup> The PRIA decreed the primary goal of range management to be forage productivity enhancement, consistent with land use plans,<sup>81</sup> but also through reduction of permitted livestock.<sup>82</sup>

#### F. Natural Resource Defense Council v. Hodel

For a short time during the early 1980s, the sometimes anti-regulatory Reagan administration experimented with Cooperative Management Programs (CMPs).<sup>83</sup> A permittee party to a CMP was allowed to manage his share of the range "essentially as [he chose], without grazing limits, accountability, or penalties."<sup>84</sup> The CMP, in fact, was the mere codification of the reality of on-the-ground grazing management. "Neither active policing of livestock grazing nor punishing permittees for violations," states Coggins, "have been high public priorities in western ranching communities."<sup>85</sup> Nevertheless, upon the challenge of environmental organizations, the District Court for the Eastern District of California had no difficulty nullifying the CMPs as a plain and illegal abnegation of the BLM's statutory responsibility to regulate specific seasons of use, number of cattle per area, and the like.<sup>86</sup> Two years later, the Ninth Circuit

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79. KLYZA, *supra* note 42, at 125.

80. Marion Clawson, *Multiple-Use Considerations*, in *MANAGING PUBLIC LANDS IN THE PUBLIC INTEREST* 21, 26 (Benjamin C. Dysart III & Marion Clawson eds., 1988). In 2001, the BLM had 11,629 employees. OFFICE OF PERSONNEL MANAGEMENT, FEDERAL CIVILIAN WORKFORCE STATISTICS, EMPLOYMENT AND TRENDS AS OF SEPTEMBER 2001, at <http://www.opm.gov/feddata/etsept01.pdf>. In 2002, just over 18,000 leases and grazing permits were in force. PUBLIC LAND STATISTICS 2002, BUREAU OF LAND MANAGEMENT, Table 3-9c, available at <http://www.blm.gov/natacq/pls02>. All but 1.5 million of the nation's 120 million cows did not graze on public lands in 1980. Steve Johnson, *BLM's Grazing Program Is a National Scandal*, HIGH COUNTRY NEWS, Dec. 23, 1985, at 15. Ten percent of permit holders graze ninety percent of BLM lands. JANG. LAITOS, NATURAL RESOURCES LAW § 8.01, at 265 (Hornbook Series 2002).

81. 43 U.S.C. § 1903(b) (2000).

82. *Id.*

83. KLYZA, *supra* note 42, at 133-34. CMPs are also known as Cooperative Management Agreements (CMAs).

84. COGGINS & GLICKSMAN, *supra* note 8, § 19:9; see also 43 C.F.R. § 4120.1 (1985) (explaining cooperative management agreements).

85. COGGINS & GLICKSMAN, *supra* note 8, § 19:8.

86. See *Natural Res. Def. Council v. Hodel*, 618 F. Supp. 848, 869-70 (E.D. Cal. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987).

affirmed,<sup>87</sup> the practical result of which has been that so long as the BLM has taken care in preparing a district's EIS, an environmental plaintiff may not challenge negligent or wrongful management of the land in that district.<sup>88</sup>

### G. The 1990s and 2000s

Although Professor Joseph Feller has shown how the "BLM's written and unwritten policies and procedures ... placed substantial barriers in the path of" those members of the public wanting to participate in the BLM decision-making process during the 1980s,<sup>89</sup> Coggins has identified three trends in the 1990s signaling a change in direction.<sup>90</sup> Congress and interest groups watered down the "program of somewhat radical change"<sup>91</sup> to the Range Code that DOI Secretary Bruce Babbitt propounded, but the trend in the BLM itself towards considering nongrazing values and the increasingly pro-environmentalist decisions of administrative law judges<sup>92</sup> and Interior Board of Land Appeals have continued.<sup>93</sup> Nevertheless,

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87. *Natural Res. Def. Counsel v. Hodel*, 819 F.2d 927 (9th Cir. 1987).

88. LAITOS, *supra* note 80, § 8.01, at 266-67 (discussing the *Hodel* decision).

89. See Joseph M. Feller, *Grazing Management on the Public Lands: Opening the Process to Public Participation*, 26 LAND & WATER L. REV. 571, 576 (1991) (decrying exclusion of, and lack of notice to, public regarding BLM permit renewal decisions); see also Krent & Zeppos, *supra* note 19, at 1711 ("Public participation, however, should be encouraged in adjudications in which nonfinancial concerns, whether programmatic or distributional, play a part."). Professor Feller's interest in public lands ranching surpasses the merely academic. See *Feller v. Bureau of Land Mgmt.*, No. UT-06-89-02 (1990) (granting Feller standing in an administrative proceeding as an affected interest in his effort to enjoin grazing in sensitive areas).

90. "The harder BLM line against offenders, the recognition that some environmental concerns and values must be weighted in the process, and, especially, the 1995 regulations premised on rangeland health, all point in the direction of less grazing and more amenity protection." COGGINS & GLICKSMAN, *supra* note 8, § 19:46.

91. *Id.* § 19:19.

92. See, e.g., *Nat'l Wildlife Fed'n*, 151 IBLA 66 (1999) (reversing BLM decision to permit grazing at wilderness area spring because BLM disregarded state law preventing damage to "unique waters"); *Nat'l Wildlife Fed'n v. Bureau of Land Mgmt.*, No. UT 06-01 (1993) (holding BLM violated law by renewing grazing permit); *Feller v. Bureau of Land Mgmt.*, No. UT-06-89-02 (1990) (finding EIS deficient under NEPA for want of site specific analysis; remedy was to suspend grazing until EIS complete).

93. COGGINS & GLICKSMAN, *supra* note 8, § 19:20 ("[T]he agencies have embarked on oblique attacks against traditional grazing 'rights,' and the judicial bodies largely concur.").

Congress's vision of "rational, scientific, step-by-step management," as the FLPMA and PRIA requires, remains elusive.<sup>94</sup>

### *H. Federal Lands Ranchers Today*

"[D]own from [twenty] million head in 1900," western ranchers in 1998 ran fewer than two million cattle on the public domain.<sup>95</sup> About 70% of cattlemen in the West own all the land their herds graze on; 22% have federal grazing permits.<sup>96</sup> Federal land ranchers typically graze cattle on permit lands in the spring and summer, then move them to private pasture for the balance of the year.<sup>97</sup> About 3000 (10%) of permittees "control" 50% of BLM acreage in the continental United States.<sup>98</sup> Permittees have no property interest in the land itself or in the permit which grants license to use the land.<sup>99</sup> Western communities are not financially dependent on public lands ranching.<sup>100</sup> Typically one rancher/permittee uses each BLM allotment.<sup>101</sup> By and large, federal lands ranchers ranch not for income but because "they enjoy the lifestyle."<sup>102</sup>

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94. *Id.* § 19:46.

95. Laitos & Carr, *supra* note 67, at 155. The public domain yields 2% of feed consumed by cattle in the United States. Joseph M. Feller, *Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Lands Grazing Policy*, 25 ENVTL. L. 703, 704 (1995).

96. Donahue, *supra* note 36, at 392-93. For an overview of the different kinds of ranchers who utilize the public domain, see Arruda & Watson, *supra* note 5, at 456-57.

97. All public lands ranchers must own private land; cattle still must be fed once the grass dies back in the fall. Laitos & Carr, *supra* note 67, at 154.

98. Timothy Egan, *Wingtip "Cowboys" in Last Stand To Hold On to Low Grazing Fees*, N.Y. TIMES, Oct. 29, 1993, at A1.

99. See, e.g., *United States v. Fuller*, 409 U.S. 488, 494 (1973) (holding "no compensable property right can be created in the permit lands themselves as a result of the issuance of the permit"); *Alves v. United States*, 133 F.3d 1454, 1457 (Fed. Cir. 1998) (holding "grazing preferences that are attached to fee simple property are not compensable property interests under the Fifth Amendment"); *LaRue v. Udall*, 324 F.2d 428, 430-32 (D.C. Cir. 1963) (finding that permittees have no license or vested interest in land).

100. Donahue, *supra* note 36, at 392 (discussing communities in the Southwest).

101. Joseph M. Feller, *Back to the Present: The Supreme Court Refuses To Move Public Range Law Backward, but Will the BLM Move Public Range Management Forward?*, 31 ENVTL. L. REP. 10021, 10033 n.165 (2001).

102. Donahue, *supra* note 36, at 390.

### *I. Summary of Federal Grazing Land's History*

The American government began dispensing the western lands freely or cheaply under the presumption that it would increase the wealth of the new nation and provide additional, nonmilitary protection against foreign occupation. The choicest parcels of land were easily disposed of while the poorest parcels went unclaimed. Because the unclaimed lands were open to public use, a tragedy of the commons scenario unfolded which led to the closure of the public domain and the establishment of the federal grazing program in 1934. This program developed into today's BLM grazing system under which ninety percent of about 175 million acres of BLM land is foraged under private leases and permits. Increased pressure from private citizens since the 1970s<sup>103</sup> has led to statutory and regulatory provisions under which the BLM theoretically must consider both the impact of grazing upon particular areas and alternative land uses such as recreation. The continually high volume of environmental litigation answers in the negative the question whether the new laws have had their intended effect.

### *II. PUBLIC LANDS COUNCIL V. BABBITT*

In the first Clinton administration, DOI Secretary Bruce Babbitt announced his intention to mend the Range Code.<sup>104</sup> He had made clear his view that ranching was not the best use of the public domain before his appointment.<sup>105</sup> Babbitt sent a copy of *Rangeland*

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103. See *infra* notes 184-91 and accompanying text.

104. The main points of the plan went to raising fees, placing environmentalists on advisory boards, eliminating "preference," reducing permit longevity for permittees not improving their allotments, taking over state water rights, charging subleasing permittees higher fees, and establishing national permittee standards. COGGINS & GLICKSMAN, *supra* note 8, § 19:22; see also Departmental Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration, 60 Fed. Reg. 9894 (Feb. 22, 1995) (to be codified at 43 C.F.R. pts. 1780 & 4100) (stating that the purpose of regulations was to "ensure proper administration of livestock grazing on the public rangelands").

105. The "most productive use of Western public land will usually be for public purposes—watershed, wildlife and recreation." James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENVTL. L. 1, 30 (2001) (reprinting remarks of then-Governor Babbitt to Sierra Club); see also Carl M. Cannon, *The Old-Timers*, 1999 NAT'L J. 1386, 1390 (stating that "environmentalists' strategy was to place high enough hurdles in the paths of ... cattle growers to make ... cattle grazing on arid and



*Reform '94*<sup>106</sup> to those likely to be affected or interested in the plan,<sup>107</sup> read reply letters from over 8000 people,<sup>108</sup> and held twenty meetings with "western governors, State and local officials, ranchers, environmentalists, and other public land users" before publishing proposed rules in March of 1994.<sup>109</sup> The DOI published the final rules in February 1995 with an effective date of August 21, 1995.<sup>110</sup> Babbitt's proposed tripling of the grazing fee, to just under \$4 per month per animal, fell out before Congress approved the final rules.<sup>111</sup> Considered by some the centerpiece of the reforms, Babbitt called for Resource Advisory Councils (RACs)<sup>112</sup> comprised of representatives from the ranching industry, environmental groups, and state/local governments to advise the DOI on the state of individual grazing districts.<sup>113</sup> The RACs would make policy recommendations to the DOI Secretary who could follow or disregard them.<sup>114</sup>

The Public Lands Council (PLC)<sup>115</sup> sued on July 27, 1995,<sup>116</sup> to enjoin enforcement of the new regulations, indicating Babbitt's understandably limited success in drafting regulations accommodating all of the concerns voiced in the twenty meetings he conducted and 12,600<sup>117</sup> letters he received.

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easily damaged public land unprofitable. Then the land could be taken out of production, and set aside for conservation....").

106. For a review of Rangeland Reform '94, see Arruda & Watson, *supra* note 5, at 428-46.

107. Departmental Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration, 60 Fed. Reg. at 9894 (35,000 copies distributed).

108. *See id.*

109. Departmental Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration, 59 Fed. Reg. 14,314 (Mar. 25, 1994).

110. Departmental Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration, 60 Fed. Reg. at 9894.

111. *See Hess & Holechek, supra* note 77.

112. *See infra* note 151.

113. Resource Advisory Councils—Requirements, 43 C.F.R. § 1784.6-1(a), (h) (2002).

114. *See id.* § 1784.6-1(i) (noting the procedure if the DOI Secretary arbitrarily disregards the RACs' advice).

115. The Public Lands Council tracks public lands issues on behalf of the National Cattleman's Beef Association. *See* Anita P. Miller, *Public Lands and Waters: Who Will Prevail—Man or Beast?*, 31 URB. LAW. 883, 885 (1999).

116. *Regional News Briefing*, DEN. ROCKY MOUNTAIN NEWS, July 28, 1995, at 10A.

117. Departmental Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration, 60 Fed. Reg. act 9894.

*A. Wyoming District Court*

In the Wyoming District Court, PLC sought the declaration that several of the 1995 Regulations were unlawful.<sup>118</sup> District Judge Brimmer reviewed the regulatory changes under the Administrative Procedure Act (APA), which requires “uphold[ing] agency action unless it is arbitrary and capricious, exceeds statutory authority, or violates the Constitution.”<sup>119</sup> The regulations would fail only if they were “arbitrary and capricious,” had “no rational basis,” or if the BLM did not “consider important relevant factors.”<sup>120</sup>

The court first held that Babbitt exceeded his statutory authority under the TGA by replacing the term “grazing preference” with “permitted use”<sup>121</sup> because it endangered ranchers’ presumptive grazing privileges, instead of safeguarding them, which the Secretary has an affirmative duty to do under the TGA.<sup>122</sup> Although the government argued the change was solely one of form,<sup>123</sup> the court stated that the “term ‘permitted use’ ha[d] no connection to the painstakingly adjudicated ‘grazing preferences’” referred to in the TGA and that it “eliminate[d] the adjudicated grazing preferences.”<sup>124</sup>

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118. *Pub. Lands Council v. U.S. Dep’t of Interior Sec’y*, 929 F. Supp. 1436, 1439 (D. Wyo. 1996), *aff’d*, 167 F.3d 1287 (10th Cir. 1999).

119. *Id.* at 1440 (citing 5 U.S.C. § 706(2) (1994)).

120. *Id.* (citing *Woods Petroleum Corp. v. Dep’t of Interior*, 47 F.3d 1032, 1037 (10th Cir. 1995)).

121. *Id.* at 1441. Before 1995, grazing preference meant “the total number of animal unit months [AUMs] of livestock grazing on public lands apportioned and attached to base property owned or controlled by the permittee or lessee.” Definitions, 43 C.F.R. § 4100.0-5 (1985). After 1995, it meant “a superior or priority position against others for the purpose of receiving a grazing permit or lease. This priority is attached to base property owned or controlled by the permittee or lessee.” Definitions, 43 C.F.R. § 4100.0-5 (2002). Permitted use means “the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and is expressed in AUMs.” *Id.*

122. *Pub. Lands Council*, 929 F. Supp. at 1440-41 (citing 43 U.S.C. § 315b (1994) and *Oman v. United States*, 179 F.2d 738, 742 (10th Cir. 1949)).

123. *Id.* at 1440.

124. *Id.* at 1441. “[T]he Department of Interior engaged in a lengthy adjudication process to determine who was eligible for a grazing preference. This process began in the 1930’s and took nearly 20 years to complete.” *Id.* at 1440.

After upholding a regulation requiring good land stewardship as a precondition to permit renewal,<sup>125</sup> the court disallowed the government's taking title to "structural range improvements (like fences, wells, stock tanks, and pipelines) on public lands"<sup>126</sup> paid for and installed by permittees because it "exceed[ed] statutory authority and lack[ed] a reasoned basis."<sup>127</sup> The DOI's "expressed desire to return to common law precepts about ownership,"<sup>128</sup> although perhaps admirable from a disinterested, administrative tidiness perspective, was inconsistent with congressional intent as indicated by certain provisions of the TGA<sup>129</sup> and FLPMA.<sup>130</sup>

The 1995 Regulations added "conservation use" to the list of uses constituting "active use."<sup>131</sup> The court struck down this regulation because the

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125. *Id.* at 1441-42 (upholding Mandatory Qualifications, 43 C.F.R. § 4110.1-1(b)(1) (1995)).

126. *Id.* at 1442.

127. *Id.* at 1443. The government also took title to "non-structural range improvements such as seeding, spraying, and chaining." Cooperative Range Improvement Agreements, 43 C.F.R. § 4120.3-2(c) (2002).

128. *Pub. Lands Council*, 929 F. Supp. at 1443. The court cited 60 Fed. Reg. 9897 for the proposition that at common law, "permanent improvements [were retained] in the name of the party that [held] title to the land." *Id.* at 1442. Here, the court wrongly concluded that the government's common law argument failed on its own terms because "the range improvements usually could be severed from the land without adversely affecting the land ... [t]herefore the permittee ... would still hold title to the improvements." *Id.* at 1443. *But see* BLACK'S LAW DICTIONARY 652 (7th ed. 1999) (defining tenant's fixture as "[r]emovable personal property that a tenant affixes to the leased property but that the tenant can detach and take away"). Among "fences, wells, stock tanks, and pipelines," only a stock tank is a tenant's fixture. *See supra* note 126 and accompanying text. If the stock tank had to be mounted by helicopter, it would not be a tenant's fixture, either, insofar as either the installation or removal cost exceeded the value of the tank.

129. *See* 43 U.S.C. § 315c (2000) (allowing permittees to construct range improvements on public lands and requiring successor permittees to compensate constructor of range improvements for reasonable value).

130. *See id.* § 1752(g) (requiring compensation to holder of cancelled permit for his interest in range improvements if cancellation was so land could be devoted to other use).

131. *Compare* Definitions, 43 C.F.R. § 4100.0-5 (1985) (containing no definition for conservation use), *with* Definitions, 43 C.F.R. § 4100.0-5 (2002) (defining conservation use as "an activity, excluding livestock grazing"). The BLM uses a device similar to conservation use, a reduction in the permitted number of cattle called "suspended nonuse," to rest overgrazed range, but the suspended AUMs are almost never reactivated. Feller, *supra* note 101, at 10028.

[TGA] is, as its name indicates, a grazing act .... The [TGA] ... does not authorize the Secretary to issue permits allowing permittees to remove public lands from grazing for ten-year periods .... Such permits ... circumvent the decision Congress made when enacting the [TGA] that certain lands were best suited for grazing.<sup>132</sup>

The Tenth Circuit upheld this ruling<sup>133</sup> and the government did not appeal to the Supreme Court. Of the six challenged regulations, only this provision for conservation use permits had any significant chance of providing a useful tool to environmentalists opposed to federal range administration.

After upholding permit cancellation triggered by three consecutive years of nonuse,<sup>134</sup> the court disallowed the deletion from the permittee qualification provisions that the applicant be “engaged in the livestock business.”<sup>135</sup> The government argued the change was necessary so banks and conservation groups could obtain permits; the court stated that they already could.<sup>136</sup>

In addition to the challenged grazing and permit regulations, PLC also objected to the Fundamentals of Rangeland Health, which instructs range managers to ensure the health of watersheds and riparian areas,<sup>137</sup> maintenance of or progress towards healthy “[e]cological processes, including the hydrologic cycle, nutrient cycle, and energy” cycle,<sup>138</sup> compliance with state water quality standards,<sup>139</sup> and maintenance or restoration of habitats for

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132. *Pub. Lands Council*, 929 F. Supp. at 1443. In fact, Congress was not so much deciding that certain lands were best suited for grazing as it was indicating that certain lands were not good for much else.

133. *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999).

134. *See Cooperative Range Improvement Agreements*, 43 C.F.R. § 4130.2(g)(2) (2002). The government said available, unused, and therefore unpaid for AUMs cost it \$1,000,000 in 1984. *Pub. Lands Council*, 929 F. Supp. at 1444.

135. *Pub. Lands Council*, 929 F. Supp. at 1444-45 (citing frustration of congressional intent). *Compare Mandatory Qualifications*, 43 C.F.R. § 4110.1 (1995), *with Mandatory Qualifications*, 43 C.F.R. § 4110.1 (2002), *and Base Property*, 4110.2-1(a)(1) (2002).

136. *Pub. Lands Council*, 929 F. Supp. at 1445 (citing *Forgey Ranch Co. v. Bureau of Land Mgmt.*, 116 IBLA 32 (1990) (granting permit to bank engaged in livestock business) and *Defenders of Wildlife*, 19 IBLA 219 (1975) (granting permit to environmental group engaged in livestock business)).

137. *Fundamentals of Rangeland Health*, 43 C.F.R. § 4180.1(a) (2002).

138. *Id.* § 4180.1(b).

139. *Id.* § 4180.1(c).

threatened and endangered species.<sup>140</sup> The court found that the BLM adequately complied with public notice and public comment period rules.<sup>141</sup>

### *B. Tenth Circuit*

Unlike the district court, the Court of Appeals for the Tenth Circuit applied *Chevron* principles.<sup>142</sup> On the government's appeal, the Tenth Circuit reversed the district court on three of the four appealed rulings. The court upheld the order invalidating the provision allowing issuance of conservation permits.<sup>143</sup> It reversed on the "grazing preference" versus "permitted use," title to range improvements, and mandatory qualifications regulations.<sup>144</sup>

On the permitted use issue, the court found that it did not conflict with an unambiguous statute<sup>145</sup> and that the "district court erred in characterizing the permitted use rule as deviating from past regulation" as "the Secretary [had] long had the authority to specify permitted grazing use upon the renewal of a permit."<sup>146</sup>

### *C. The Supreme Court*

The Supreme Court affirmed the Court of Appeals in upholding Babbitt's changes to the definition of "preference,"<sup>147</sup> the elimination of the engaged-in-livestock-business requirement,<sup>148</sup> and the grant of title in future range improvements to the United States.<sup>149</sup> The

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140. *Id.* § 4180.1(d).

141. *Pub. Lands Council*, 929 F. Supp. at 1448.

142. *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1293 (10th Cir. 1999) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

143. *Pub. Lands Council*, 167 F.3d at 1289.

144. *Id.*

145. *Id.* at 1294.

146. *Id.* at 1298.

147. *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 745-47 (2000).

148. *Id.* at 747-48. The Court rejected the argument that nonranchers would get permits and "mothball" them. *Id.* at 747. The TGA authorizes the Secretary to issue permits only to "bona fide settlers, residents, and other stock owners"; the regulation did not override the TGA's requirement of stock ownership. *Id.* at 745.

149. *Id.* at 750. Ranchers, however, are free to contract with the BLM around this regulation. *See id.*

DOI did not appeal the Tenth Circuit's holding on the conservation use permits.<sup>150</sup>

The Court's decision in *PLC* has two important components. The first component is that it affirmed the broad discretionary powers the Secretary enjoyed in carrying out his duties. This was manifested by the three upheld regulations. The second component of the decision was the limitation the Court recognized upon the ends to which the Secretary may direct his broad discretionary power. After *PLC*, the Secretary's deliberations of conservation vel non are moot until Congress modifies or repeals the TGA.

### III. RESPONSE TO *PUBLIC LANDS COUNCIL V. BABBITT*

After Rangeland Reform '94 was announced and before *PLC* reached the Supreme Court, three views emerged regarding Babbitt's regulatory overhaul. First, that the regulations signaled the dawn of a new era—an era of cooperative land management<sup>151</sup>—second, that the BLM was warming to ecological holism,<sup>152</sup> and

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The ranchers' underlying concern is that the ... regulations ... allow individuals to "acquire a few livestock ... obtain a permit for what amounts to a conservation purpose and then effectively mothball the permit." But the regulations do not allow this .... New regulations allowing issuance of permits for conservation use were held unlawful by the Court of Appeals ... and the Secretary did not seek review of that decision.

*Id.* at 747 (internal quotes and citations omitted).

151. Tom Melling, *Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-Term Report Card*, 30 LAND & WATER L. REV. 57, 80 & n.129 (asserting that RACs were the "centerpiece" of Rangeland Reform '94); Todd M. Olinger, Comment, *Public Rangeland Reform: New Prospects for Collaboration and Local Control Using the Resource Advisory Councils*, 69 U. COLO. L. REV. 633, 635 (1998) (calling Rangeland Reform '94 "the first sketch of a process by which complex and deeply conflicting public interests may be incorporated into meaningful land management reform"). *But see* Hess & Holechek, *supra* note 77 (arguing that "councils would be largely cosmetic" and lack "power to change how decisions about public lands are made, ... the breadth of membership needed to truly open decisionmaking about federal lands to broad public participation, and ... the lines of accountability and responsibility that are essential to good land stewardship and protection").

152. Arruda & Watson, *supra* note 5, at 459 ("[R]eforms will introduce the concept of Leopold's 'ecological conscience' into public lands management."); Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513, 525 (1997); *see also* Brian L. Frank, Comment, *Cows in Hot Water: Regulation of Livestock Grazing Through the Federal Clean Water Act*, 35 SANTA CLARA L. REV. 1269, 1308 (1995) (positing that regulations should have focused on riparian area use under Clean Water Act

third, as Professor Feller and others criticized, the reforms did not go far enough because they failed "to admit that substantial portions of the public lands are poorly suited to livestock production and therefore should be retired from grazing in favor of other resources and uses."<sup>153</sup> Additionally, there was discussion of ranchers' recalcitrance and resistance to government oversight.<sup>154</sup>

The *PLC* discussion, range administration not having changed spectacularly in the five interceding years, assumed a technical tone. Four views of the decision were advanced.

#### *A. Upholding the Secretary's Discretion Under the TGA*

Without citing *Chevron*, the Supreme Court affirmed the holding of the Tenth Circuit that the Secretary had not exceeded his discretionary power.<sup>155</sup> *PLC* was received as a predictable "reiteration of well-established principles," the principal among principles being the Secretary's relative freedom to manage the range as he sees fit.<sup>156</sup>

#### *B. Harbinger of Environmentalism Taking Root at the BLM*

The BLM's first topdown pro-environment agenda came from Babbitt, although President Carter had attempted similar reforma-

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authority).

153. Feller, *supra* note 95, at 712. Hess and Holecheck concurred, predicting failure because the "new rules ... offer no substantial change in the institutions and policies that have fostered and promoted degradation of public grazing lands for the past 125 years." Hess & Holechek, *supra* note 77 (arguing for a market, not judicial or regulatory, solution); see also RICHARD MANNING, *ONE ROUND RIVER* 62 (1997) (stating that American cattle are not bred for arid climates).

154. Robert H. Nelson, *Government as Theater: Toward a New Paradigm for the Public Lands*, 65 U. COLO. L. REV. 335, 338 n.24 (1994); Phillip Stover, Note, *Three Congressional Mandates, an Environmental Impact Statement, and the Bureau of Land Management: Can an Old Dog Be Taught New Tricks?*, 2 DRAKE J. AGRIC. L. 297, 311 (1997).

155. *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 739-50 (2000).

156. See also Andy L. Adams, *Annual Administrative Law Survey*, 23 U. ARK. LITTLE ROCK L. REV. 1017, 1020 (2001); Allen E. Shoenberger, *October Term, 1999: The Supreme Court's Last Term of the Twentieth Century, Increasing Deference to Administrative Agencies*, 21 J. NAT'L ASS'N OF ADMIN. L. JUDGES 213, 223 (2001); Ryan Waterman, *In Brief*, 28 ECOLOGY L. Q. 552, 554 (2001). But see Julie Anderson, Note, *Public Lands Council v. Babbitt: Herding Ranchers Off Public Land?*, 2000 BYU L. REV. 1273, 1302-03 (arguing that 1995 regulations violated the TGA).

tory efforts. Hopeful of a reordering of priorities at the BLM flowing from Babbitt's tenure,<sup>157</sup> several writers stressed the importance of *PLC* on the future willingness and ability of the BLM to consider seriously the best use of fragile or alternatively valuable range.<sup>158</sup>

### C. Regulatory Platform

As noted, the commonplace of the Secretary's broad discretion was the predominant aspect of *PLC*. From there, commentators suggested other discretionary regulations<sup>159</sup> and congressional actions to reform the grazing program such as raising fees to reflect market value<sup>160</sup> or ability to pay,<sup>161</sup> removing cattle entirely from arid lands to comply with FLPMA,<sup>162</sup> encouraging those involved in the use of federal grasslands to think like Indians,<sup>163</sup> or adopting a presumption that regulatory/statutory reform should reflect a supposed original intent of the TGA: binding local communities to the land.<sup>164</sup> The reception of *PLC*, all in all, was a perfect example of how "often, little attention gets paid to the opportunities to design rules ... [that] thereby eliminat[e] the need for regulation."<sup>165</sup>

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157. Erik Schlenker-Goodrich, *Moving Beyond Public Lands Council v. Babbitt: Land Use Planning and the Range Resource*, 16 J. ENVTL. L. & LITIG. 139, 202 (2001) (noting that "the potential for this momentum to build upon itself is significant").

158. John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 31 ENVTL. L. 199, 222 (2001); Lois J. Schiffer & Sylvia Quast, *Public Lands Litigation in the Geography of Hope*, 1 WYO. L. REV. 413, 425 (2001); Schlenker-Goodrich, *supra* note 157, at 202.

159. "Better environmental results depend ... on improving regulatory performance." Esty, *supra* note 8, at 1495.

160. Michelle M. Campana, Student Article, *Public Lands Grazing Fee Reform: Welfare Cowboys and Rolex Ranchers Wrangling with the New West*, 10 N.Y.U. ENVTL. L.J. 403, 452 (2002). *But see* Natural Res. Def. Council v. Hodel, 618 F. Supp. 848, 856 (E.D. Cal. 1985) (observing that TGA only requires fees be reasonable).

161. *See* Arruda & Watson, *supra* note 5, at 457.

162. Donahue, *supra* note 36, at 388; *see also* Shannon Rigsby, *Public Lands Council v. Babbitt, Secretary of the Interior: Challenging the Evolution of Public Lands Grazing Regulations*, 5 GREAT PLAINS NAT. RESOURCES J. 161, 175 (2001) (asserting that the "state of the commons now dictates the number of animals allowed, instead of the other way around").

163. *See* Schiffer & Quast, *supra* note 158, at 425.

164. *See* Rasband, *supra* note 105, at 83.

165. Esty, *supra* note 8, at 1498.



#### IV. PROPOSALS TO SOLVE THE RANGE PROBLEM

The economically predictable problems attending public ownership of an asset privately used, and contemporary environmental concerns, converge in BLM lands to create a tricky problem. On the one hand, federal land ownership provides a central pressure point upon which environmentalists and recreational land users can exert disproportionate influence over how land use decisions are made and, thereby, what the decisions are. Privately owned land, dispossessed land such as it is, is not so susceptible, except in cases where nuisance or trespass actions or statutorily created private causes of action (for example, to remedy environmental harm) might lie. On the other hand, because of *PLC*'s clear holding that the BLM cannot be a conservatory agency, environmentalists can pressure the BLM litigiously only so far before the discretionary limit provided by the TGA prevents further marginal benefit from such pressure.

The proposals for resolving the range problem share in common several tenets. First, permittees have a bare license to graze cattle, which is revocable at the BLM's discretion after certain procedural requirements are observed. In other words, if the BLM were to end or curtail grazing, affected ranchers would not have takings claims. Second, the BLM historically prefers the interests of ranchers over the interests of the environment. Third, federal grazing does not contribute significantly to national food production<sup>166</sup> and, therefore, could be done away with altogether. From these understandings proceed three main reformatory themes, periodically refined over the last several decades.

##### *A. Reforming the Regulations*

Two groups of commentators have addressed the range mismanagement problem in terms of regulatory reform, those who prefer federal ownership of BLM lands and those who have accepted continued federal ownership as inevitable. In the latter group,

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166. Feller, *supra* note 95, at 704 (noting that BLM land produces two percent of cattle feed nationwide; one BLM cow requires one hundred or more acres of forage compared to just one acre in the eastern United States).

adjusting the fees to represent market value is perhaps the most commonly suggested solution, the theory being ranchers could not afford environmentally damaging ranching practices in a quasi-competitive system.<sup>167</sup>

Babbitt's RACs promised to open the decision-making process to the public and facilitate dialogue and understanding between commodity users and recreational or conservationist users of BLM lands. The problem with the RACs is that, although the point is not universally taken, people can have disagreements unreconcilable through dialogue.<sup>168</sup> Regardless of whether the RACs were theoretically sound,<sup>169</sup> they seem to face difficulties in implementation. For example, Arizona's RAC has never complied with the membership requirements and generally has had no environmentalist representatives.<sup>170</sup>

Two other problems with regulatory reform are its costs and the slow process by which reform comes. Recently, the U.S. House of Representatives allocated \$826,932,000 for general BLM expenses and another \$230 million for the payment in lieu of taxes

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167. Arruda & Watson, *supra* note 5, at 457 (arguing that "the government could establish different fee rates and perhaps different regulations or standards for different size ranches").

168. "The natural approach to human relations presumes that to know any person well enough is to love him ... [that] the only human problem is a communication problem. It refuses to admit the possibility that people might be separated by basic, deeply held, genuinely irreconcilable differences-philosophical, political, or religious." JUDITH MARTIN, *COMMON COURTESY: IN WHICH MISS MANNERS SOLVES THE PROBLEMS THAT BAFFLED MR. JEFFERSON* 12 (1985).

169. "The legislative and judicial processes giving us the evolving corpus of environmental statutes during the past 20 years have reinforced the belief that *citizens have a right to participate in federal decision making which affects the environment*." Don L. Klima, *The Consequences of Change Without Dialogue: An Historic Preservation Perspective*, in *MANAGING PUBLIC LANDS IN THE PUBLIC INTEREST*, *supra* note 80, at 99, 102 (emphasis added). Passing over the violence this belief does to the republic/democracy distinction, the logistical implications are stupefying. See also Riebsame, *supra* note 12, at 28 (categorizing environmentalist view of RACs as being "no more likely than the bureaucracy to address the thorniest range problem—[overgrazing]").

170. See Resource Advisory Councils, Requirements, 43 C.F.R. § 1784.6-1(c), (d) (2002) (stating that councils are to consist of ranchers, environmentalists, and public figures, with "balanced and broad representation from within each category"); Feller, *supra* note 101, at 10035 & nn.197-98 (noting that "meetings are sometimes forums for bashing environmentalists, the Endangered Species Act (ESA), and agency decisions that offend ranchers").

program.<sup>171</sup> In October of 2000, the BLM estimated that it would need \$500 million between 2000 and 2010 to update all 144 land use plans.<sup>172</sup> Many existing land use plans pre-date the Clinton administration.<sup>173</sup> Moreover, various laws have mandated different kinds of management plans including RMPs,<sup>174</sup> HMPs,<sup>175</sup> and AMPs.<sup>176</sup> This expensive and unwieldy policy-generating mechanism has not yet produced compliance with its own administrative requirements, let alone successful improvement of environmental quality on BLM lands.

### *B. Buying Out the Ranchers*

Some environmental groups have sought alternatives to lobbying the BLM or Congress or suing to achieve what they deem to be appropriate public domain use. A few such organizations have gone into ranching for the sake of obtaining grazing permits and managing their allotments with environmental responsibility.<sup>177</sup>

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171. H.R. 5093, 107th Cong. (2d Sess. 2002). The BLM wants \$1.7 billion for 2004. See Bureau of Land Management, News, Feb. 3, 2003, available at [http://www.blm.gov/nhp/news/releases/pages/2003/pr030203\\_budget.htm](http://www.blm.gov/nhp/news/releases/pages/2003/pr030203_budget.htm).

172. Congress authorized \$19 million in 2000. Pub. L. No. 106-291 (Oct. 11, 2000).

173. See Feller, *supra* note 101, at 10034 n.178.

174. In 1976, Congress ordered the BLM to prepare one Range Management Plan (RMP) for each grazing district. 43 U.S.C. § 1712 (2000). By 1993, just over half had been completed. Nolen, *supra* note 32, at 815. In 1987, the BLM estimated the cost of preparing one RMP at \$450,000. David C. Williams, *Public Land Management: Planning, Problems, and Opportunities*, in *THE PUBLIC LANDS DURING THE REMAINDER OF THE 20TH CENTURY: PLANNING, LAND, AND POLICY IN THE FEDERAL LAND AGENCIES* 22 (1987). When the RMPs will be finished, if ever, is unclear. In 1993, the BLM moved its target date from 1997 to 2013 to complete all 144 RMPs. Nolen, *supra* note 32, at 815. When 2013 arrives, many of the first RMPs completed will be outdated.

175. The Sikes Act required Habitat Management Plans (HMPs), which are low level BLM plans that address wildlife conservation. 16 U.S.C. §§ 670g-670o (1994). The BLM had written four hundred HMPs for fifty million acres of its land by 1985. BLM, *FISH & WILDLIFE 2000: A PLAN FOR THE FUTURE* 11 (1987). In 1996, the BLM's budget justifications indicated it would update sixty of them. U.S. Dep't of Interior, Budget Justifications, F.Y. 1995, 3-57 (1995).

176. Allotment Management Plans (AMPs), required with every permit issuance and renewal, are tailored to particular parcels. See 43 U.S.C. § 1752 (2000).

177. See Jason S. Johnston, *On the Market for Ecosystem Control*, 21 VA. ENVTL. L.J. 129, 186-87 (2001):

Groups such as the Nature Conservancy have in fact already begun to play such a market-making role by virtue of their involvement in both negotiating and enforcing Habitat Conservation Plans under the Endangered Species Act and

This applaudable approach requires substantial dedication. Although private market transactions that circumvent the BLM's permit system are in some cases disfavored by the government,<sup>178</sup> the BLM does appear to sanction one new approach which combines private and public transactions to remove cattle from sensitive areas. In the typical transaction, a private organization approaches a permittee and offers to pay him the profit value of his permit if the permittee will "support an amendment to the applicable land use plan terminating grazing on the public lands covered by the permit."<sup>179</sup> An alternative method for buying out ranchers to remove cattle from public lands, offered by Donahue,<sup>180</sup> would feature ending grazing outright, and offering "deserving public-land ranchers transition payments, conservation easements or incentives, and/or purchase options."<sup>181</sup> These approaches, although possibly achieving the limited goal of stopping further range damage in some locations, do nothing to address either the bureaucratic waste problem or the proper allocation of actual use rights. On the other hand, privately owned, freely alienable land will presumptively wind up in the possession of the user who values it most highly.

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wetlands mitigation agreements under Section 404 of the Clean Water Act. Further expansion in the role played by such groups is not only likely but a crucial element of effective privatized provision.

*Id.*

178. See COGGINS & GLICKSMAN, *supra* note 8, § 19:7 (discussing BLM documentation of [illegal] grazing permit sales at multiples of the AUM rate).

179. Feller, *supra* note 101, at 10038. The Grand Canyon Trust "has negotiated to remove cattle from over 325,000 acres of BLM land in southern Utah." *Id.* at 10038 n.237; see also Leshy, *supra* note 158, at 222 (observing that "in an increasing number of fragile areas—especially in the hot deserts of the Southwest—grazing is being eliminated altogether, through consensual buyouts of private ranches funded by nonprofit conservation groups").

180. Removing cattle from riparian areas could have an immediately beneficial impact on "60 to 80% or more of western vertebrate species." Donahue, *supra* note 36, at 395. Donahue argues that "current federal law would authorize, if it does not actually mandate, the removal of livestock from arid public lands to prevent irreparable ecological damage to those areas." *Id.* at 387. Donahue, curtsying to realpolitik, does not attempt to reconcile the argument that the law requires the BLM to remove cattle from the public range with her suggestion that ranchers be bought off.

181. *Id.* at 395.

*C. Litigating Against the Government*

Private lawsuits seeking injunctive relief against the federal government, in the absence of physical sickness or financial harm, are a relatively recent cultural phenomenon. The most enthusiastic environmentalists argue that, properly pled, no case motivated by good environmental intentions is unwinnable as a matter of law.<sup>182</sup> Of especial popular appeal are cases involving animals.<sup>183</sup> The last thirty years<sup>184</sup> have seen "dramatic increases in Endangered Species Act litigation, regulatory takings cases, and challenges to national forest management."<sup>185</sup> This wave of litigation has greatly altered the BLM's decision-making process.<sup>186</sup> The approaches activists take vary, from Earthfirst! announcing its goal of removing cattle from all federal land by 1993<sup>187</sup> to a single hiker seeking standing as an "affected interest" so as to enjoin grazing on a particular

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182. For example: "Properly framed, federal regulation of either dredge and fill activities or discharges of pollutants into waters of the United States, no matter how broadly defined, is well within Congressional Commerce Clause authority ...." Richard J. Lazarus, *Environmental Law and the Supreme Court: Three Years Later*, 19 PACE ENVTL. L. REV. 653, 662 (2002). "[T]here is something distinctively 'environmental' about environmental law and the Court's increasing inability to appreciate that dimension was leading to more poorly-reasoned decisions and results [between 1970 and 1999]." *Id.* at 655.

183. "Wildlife ... provides what may be termed 'psychic' benefits. Many species, such as the panda and the tiger, occupy a special place in people's hearts and minds." Nolen, *supra* note 32, at 780 (saving observation from irrelevance to the United States by also including the bald eagle).

184. The era of the environmental plaintiff began with the Supreme Court's 1972 decision in *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (holding that environmental plaintiff met the standing requirement by alleging he made recreational or aesthetic use of the resource in question).

185. Schiffer & Quast, *supra* note 158, at 417; see also Gary D. Libecap, *Competing for the Rental Value of Federal Land: The Assignment of Use Rights and Their Regulation*, 1 CATO J. 391, 400 (1981):

In the 1960s recreation and conservation groups began demanding access to federal land and restrictions on livestock use. As zealous, cohesive groups, they lobbied for voter and congressional backing. Because they weakened the political power of ranchers, conservationists supplemented the attempts of bureaucrats within the Department of the Interior to expand the BLM's role.

*Id.*

186. See Krent & Zeppos, *supra* note 19, at 1753.

187. *Earthfirst Group Says to Shoot Cows; Drug-sniffing Dogs on Overdosing*, ST. PETERSBURG TIMES, Oct. 12, 1990, at A4.

grazing allotment.<sup>188</sup> Given the continuing growth in the number of wild animal activists,<sup>189</sup> outdoor enthusiasts,<sup>190</sup> and the annual increase of young, idealistic lawyers going into environmental law, "regional and local proliferation [of environmental groups who] have decided that they must litigate to be taken seriously ... is likely to continue."<sup>191</sup>

Environmental plaintiffs suing the BLM face two hurdles before having their arguments heard, one being the standing requirement<sup>192</sup> and the second is the DOI Secretary's and the BLM's broad discretion under *Chevron*.<sup>193</sup> The Tenth Circuit alone has dealt with over four hundred standing and discretion cases.<sup>194</sup> So long as the

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188. Donald K. Majors, 123 IBLA 142 (1992) (holding that hiker in area has an affected interest).

189. Usually it is about wolves. In *Gibbs v. Babbitt*, the Fourth Circuit upheld as a valid exercise of the Commerce Clause power an ESA regulation which forbade landowners from killing red wolves on their land. 214 F.3d 483 (4th Cir. 2000). The court relied on the substantial effects test defined by the Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). The private sector can solve the wolf-spillover cost problem. For instance, Defenders of Wildlife maintains a fund from which it reimburses private losses by predator animals. See Schiffer & Quast, *supra* note 158, at 414. Wolves can turn ranchers into environmentalists, or perhaps just ranchers in environmentalists' clothing. See Miller, *supra* note 115, at 890-91 (reporting that "eleven Mexican gray wolves set free ... on the Arizona/New Mexico border have become a symbol of the conflict between ranchers [and environmentalists] .... The pièce de résistance is the argument [of ranchers] that the wolves will take food away from the Mexican Spotted Owl .... [R]anchers say that they 'derive substantial enjoyment' from the spotted owl").

190. Some say that BLM lands, aside from their general desolation, also include areas of scenic canyon, desert, and mountain vistas. See generally EDWARD ABBY, *DESERT SOLITAIRE: A SEASON IN THE WILDERNESS* (1968).

191. Blumm, *supra* note 13, at 13.

192. ZYGMUNT J. B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 398 (2d ed. 1998). For a discussion of standing as defined by the U.S. Supreme Court, see Andrew C. Lillie, *Agency Law Barriers to Successful Environmental and Natural Resources Litigation: Tenth Circuit Approaches to Standing and Agency Discretion*, 78 DENV. U. L. REV. 193, 195-200 (2000). "Environmental cases provide the backbone of the Supreme Court's efforts to refine standing requirements during the last thirty years." *Id.* at 196.

193. PLATER ET AL., *supra* note 192, at 430.

194. Lillie, *supra* note 192, at 194. The cases generally involve "agency decisions about popular local issues." *Id.* Justice Scalia, writing for the Court, cracked down in the 1990s on environmental plaintiffs failing to take seriously the standing requirement. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasizing the standing requirements); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 875 (1990) (holding environmentalist cannot sue until BLM makes a decision about a grazing district and that a plaintiff must allege that his own use and enjoyment of the land suffered thereby). In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), the Court upheld a citizen suit under the Clean Water Act seeking injunctive relief and civil penalties, thereby reversing the

government owns land upon which it suffers continuing capitalist undertakings, be they grazing, mining or whatever, it would seem that this flood of litigation will continue.

## V. RESURRECTING THE PREJUDICE TOWARD A FINAL DISPOSITION

*PLC* stands for the proposition that the BLM cannot manage public lands for conservation. Moreover, as has been persuasively argued, multiple use management is and has been a practical impossibility.<sup>195</sup> On the other hand, some argue that multiple use suffers not from impossibility but rather from "increasing irrelevance" and thus should be replaced by management for two goals: preservation and recreation.<sup>196</sup> Much as with managing for multiple use, however, managing for both preservation and recreation creates problems. For example, preservation and recreation users conflict over the use of motorized vehicles, especially snowmobiles and four wheelers, in national parks and on public lands.<sup>197</sup>

Jan Laitos and Thomas Carr have argued that the multiple use doctrine is outdated and that the two dominant uses which have replaced resource extraction on the public lands—recreation and preservation—should be the ends of land management policy.<sup>198</sup> Laitos and Carr conclude that (1) the majority of public land value lies in its preservation and recreation value and (2) preservation and recreation users do not view their respective uses as entirely compatible.<sup>199</sup> Although Laitos and Carr by no means advocate a final disposal of the public lands, a final disposal would accomplish the shift from extraction to recreation/preservation, assuming Laitos and Carr rightly compare the relative use values.<sup>200</sup> In light

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Court's trend toward stricter standing requirements. It was a "significant victory for the environmental community." Lazarus, *supra* note 182, at 658. Justice Ginsburg, for the Court, held that an environmental plaintiff suing over pollution need only "aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened.'" *Friends of the Earth*, 528 U.S. at 183.

195. *Cf.* Hardt, *supra* note 5, at 386 (asserting that "multiple use is a viable land management directive as long as it is implemented within an ecologically sound framework").

196. Laitos & Carr, *supra* note 67, at 165.

197. *See, e.g.*, Schiffer & Quast, *supra* note 158, at 414.

198. Laitos & Carr, *supra* note 67, at 143-44.

199. *Id.* at 144.

200. Feller would agree that Laitos and Carr have made an accurate comparison. "The economic value of the recreational use of BLM land alone far exceeds the value of the

of the continued failure of the BLM to achieve its statutory mandates, and the problems inherent in attempting to implement an effective management scheme, Congress should embark upon a new course, or rather, return to its original course. After reserving some lands with relatively high recreation and conservation value—to be administered by various national and state level park/wilderness agencies—Congress should order the remainder of the public domain to be sold at auction.<sup>201</sup>

### *A. Problems with the Land Disposal Process*

Serious structural inefficiencies arising from the lack of incentive to maximize revenue in a bureaucratic organization inhere in the sale of U.S. public assets.<sup>202</sup> As noted,<sup>203</sup> public policy shifted towards retaining some federal lands not just because of inefficiency, but because of outright inequity and fraud in the land disposal process. Criminality seems to have marred much of the transfer of North America's landmass into private hands.<sup>204</sup> Congress has not yet implemented laws which ensure that agencies sell public assets for their true value,<sup>205</sup> nor does it seem likely that such legislation is even possible, insofar as the administrative cost of the additional oversight would have to be counted against the

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livestock forage that the same land provides." Joseph M. Feller, *What Is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 559 (1994).

201. Two conditions on this solution are that the government should retain mineral rights and that a substantial percentage of riparian BLM lands should go into park or wilderness agency management.

202. "Below-market dispositions of government assets likely rob taxpayers of billions of dollars each year." Krent & Zeppos, *supra* note 19, at 1780; see also Esty, *supra* note 8, at 1510 ("[R]egulatory bodies may operate inefficiently or ineffectively. Bureaucracies in general and government entities in particular frequently lack incentives to act otherwise.").

203. See *supra* note 32 and accompanying text.

204. For example, Richmond, Virginia's capital city, is built upon land given by the "most successful of the Indian traders," the patriarch whose descendants sat in the Virginia legislature for most of three and one half centuries, William Byrd I. SOPHY BURNHAM, *THE LANDED GENTRY* 68 (5th ed. 1978). As the Commonwealth's escheator, Byrd acquired over forty square miles of land (26,000 acres) and held on by forgiving himself the taxes. *Id.*

205. See, e.g., Nicholas G. Vaskov, *Continued Cartographic Chaos, Or a New Paradigm in Public Land Reconfiguration? The Effect of New Laws Authorizing Limited Sales of Public Land*, 20 UCLA J. ENVTL. L. & POL'Y 79, 87 (2001) (discussing a Nevada land exchange wherein, "after completing an exchange with the BLM valued at \$763,000, the private party turned around and sold the same 70 acre property for \$4.6 million").



sale price. Although the order to sell the public lands must initially come from Congress, the actual sale should be conducted by a private firm with a stake in maximizing sale price. Compensation via commission would maximize this incentive.

### *B. Past Attempts to Create a Disposal Scheme*

In 1982, Steven Hanke argued that the federal government should privatize grazing lands by transferring surface rights<sup>206</sup> to current permittees at a price based on future rental value to the government, less rent paid.<sup>207</sup> Hanke based this argument on the IRS's recognition of grazing rights as a taxable component of a decedent's estate<sup>208</sup> and the banking sector's willingness to collateralize permits.<sup>209</sup> He proposed two possible privatization methods, either an option of first refusal auction or a straight public auction.<sup>210</sup> In both scenarios, ranchers would receive credit for the value of their "lease-hold" rights, either as a credit against the purchase price, or as compensation under a quasi-paid-in-capital theory if another party purchased the land.<sup>211</sup> He concluded that the DOI and Department of Agriculture should apply "*genuine asset management*" and overcome the bureaucratic tendency toward

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206. Transferring only the surface rights would avoid complicating the disposal with mineral prospecting. Robert H. Nelson has taken this a step further, arguing for the creation of freely transferable property interests in the grass itself. See Robert H. Nelson, *How To Reform Grazing Policy: Creating Forage Rights on Federal Rangelands*, 8 FORDHAM ENVTL. L.J. 645 (1997).

If forage rights were defined and made legally transferable to any new owner, environmental organizations could purchase the forage rights to federal lands that are now available only to ranchers. Environmental groups seeking to reduce livestock grazing on federal lands would have a realistic way to accomplish their goals, other than by seeking to influence the exercise of government commands-and-controls. A clear delineation of rights would also encourage existing ranchers to invest in long-run improvement and productivity of the federal rangeland ... but by the competitive workings of the marketplace.

*Id.* at 690.

207. Steven H. Hanke, *The Privatization Debate: An Insider's View*, 2 CATO J. 653, 657-58 (1982).

208. *Id.* at 657.

209. *Id.*

210. *Id.* at 658-59.

211. *Id.*

“asset hoarding” by requiring the privatization of lands returning less than a real 10% rate of return.<sup>212</sup>

Two issues with Hanke’s proposal are that the weight of judicial authority clearly indicates that ranchers do not have any “paid-in-capital” rights to rent money paid in exchange for federal land use privileges or any right to demand or receive the right of first refusal. Second, keying privatization to a 10% real rate of return would be a de facto decision to privatize all BLM grazing lands. Even highly productive farm and pasture lands return less than 10% per annum. Additionally, a problem would arise in attempting to value the land, in the absence of a market to set the price. The government, through the very bureaucrats with the “asset hoarding” tendency, would set the land’s value, and set it artificially low to maintain its sphere of power.<sup>213</sup> A third, derivative problem, caused by the asset valuation problem, arises from the increasingly well-funded environmental groups who stand willing and able to purchase BLM lands simply to remove cattle from them. If the BLM set land values artificially low in order to meet its 10% target, environmentalists foreseeably could challenge the valuations by alleging willingness to pay more than the BLM’s valuation. On the other hand, valuing the land at anywhere near its true market value would rile political opposition in the Senate, which favors rancher interests.<sup>214</sup>

To illustrate further, a 10% return on 177 million acres valued at, arguendo, \$38 an acre exceeds \$670 million per year.<sup>215</sup> In 1993, the Departments of Agriculture and Interior generated less than \$35 million in grazing fees combined.<sup>216</sup> To meet a 10% target in 1993, the BLM would have had to value its land at less than \$3 an acre.

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212. *Id.* at 662.

213. *See, e.g.*, Hess & Holechek, *supra* note 77 (noting that “[t]en million dollars was spent by the federal government between 1985 and 1994 to study fair-market-value grazing fees .... [w]hatever fee is arrived at ... will be the outcome of political rather than market forces”).

214. *See, e.g.*, Robert H. Smith, *Livestock Production: The Unsustainable Environmental and Economic Effects of an Industry Out of Control*, 4 *BUFF. ENVTL. L.J.* 45, 116 (1996) (noting Senate’s opposition to grazing fee increase in 1994).

215. One estimated value of BLM and Forest Service lands is \$160 billion. CATO INSTITUTE, CATO HORNBOOK FOR CONGRESS, 105TH CONGRESS, 296 (1997).

216. Nelson, *supra* note 207, at 664-65; *see also* Hess & Holechek, *supra* note 77 (noting that BLM fee revenues totaled \$20 million in 1994). In 2002, grazing generated \$13 million in revenue. ANNUAL REPORT, BUREAU OF LAND MANAGEMENT 17 (2002), available at <http://www.blm.gov/nhp/info/stratplan/AR02.pdf>.

Clearly, capitalist or environmental groups would clear the federal land market of 177 million acres at \$3 an acre.

One rough proxy useful for valuing the public lands is the amount spent by users on traveling to and using them. Gross national product attributable to expenses tangentially related to outdoor recreation on the Forest Service's (192 million acres) and BLM's (177 million acres) combined 369 million acres is \$140 billion per year.<sup>217</sup> Using the proportional fraction of \$67 billion as a proxy for the value of the BLM's holdings, a 10% return target translates into \$6.7 billion per year, over 190 times the BLM's 1993 fee revenue.

*C. Reconciling the TGA and FLPMA Presumptions with the BLM's Failure To Successfully Manage the Range*

In the TGA, Congress presumed that the secretary would temporarily parcel out privileges until the disposition<sup>218</sup> of the remaining lands mooted the tragedy of the commons problem. Then, in the FLPMA, Congress adopted a policy of retention while authorizing disposition in three limited circumstances.<sup>219</sup> The third and relevant circumstance is that any "tract, because of its location or other characteristics is difficult and uneconomic to manage as part of the public lands and is not suitable for management by another Federal department or agency" may be sold by the DOI Secretary.<sup>220</sup> Although some argue that the policy shift reflected Congress' desire to "prevent undue commercial development"<sup>221</sup> of the public lands, this explanation is at best no more likely than the hypothesis that Congress desired to increase or maintain the size of the federal power pie.

Congress has not foreclosed the possibility of selling off the public range, and yet the mechanism by which disposal occurs clearly

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217. Laitos & Carr, *supra* note 67, at 146 (noting recreational use of public lands is responsible for \$140 billion of GNP).

218. Today, congressional talk of "disposition" relates to fee money, not land. *See, e.g.*, 147 CONG. REC. 1680 (2001) (statement of Rep. Hefley) (discussing the "disposition of grazing fees arising from use of such lands").

219. Authority, 43 C.F.R. § 2710.0-3(a) (2002).

220. *Id.* § 2710.0-3(a)(3).

221. Laitos & Carr, *supra* note 67, at 173.

milittates toward retention.<sup>222</sup> If, on the other hand, Congress adopted the attitude that the BLM is unnecessary and inefficient in disposing of the public domain, Congress could capitalize on environmental nonprofit organizations' time, resources, and most importantly, their motivation to actually inventory the public domain as the BLM should have done under its myriad legislative mandates.<sup>223</sup> That is, by ordering the auction of the public domain—after reserving whatever parcels at the state and federal levels for parks and other such uses—Congress reasonably could presume that these organizations would purchase much of the public domain, especially those parts that should not be grazed. Likewise, ranchers could obtain private sector financing to purchase land that is viable ranchland.<sup>224</sup>

There is no colorable private legal objection to Congress taking this path. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, the Supreme Court reiterated its past holding that private citizens do not have standing to sue the federal government for its decision to dispossess itself of land.<sup>225</sup>

### CONCLUSION

Federal administration of the public rangelands no longer serves a necessary purpose. Neither the public at large, public lands ranchers, environmentalists, nor the government have a legitimate need for this land to remain under federal control that could not be more efficiently met through the market. Indeed, principles of efficiency and fairness require the termination of federal dominion over an asset that can be administered for the benefit of only a few.

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222. Congress passed recent legislation specifically enabling land managing agencies to sell land and retain the proceeds to enlarge federal conservation land holdings. See 31 U.S.C. § 6901 (2000); 43 U.S.C. § 2301 (2000).

223. For an example of environmental groups uncovering mismanagement of riparian and watershed areas in Idaho, see *Idaho Watersheds Project v. State Board of Land Commissioners*, 982 P.2d 371 (Idaho 1999) (holding that the state unconstitutionally excluded land bids from an environmental group trying to obtain grazing lands for nongrazing purposes).

224. Banks make loans to ranchers based on the market value of grazing permits.

225. 454 U.S. 464 (1982) (upholding government's power to give land to private, religiously affiliated college). The Court rejected standing based on taxpayer status, *id.* at 476-82, regardless of whether the land transfer violated the Establishment Clause. *Id.* at 469; see also *supra* note 27.

The beneficiary of the windfall may reap his loot in the form of discounted pasture, to the disadvantage of the majority of beef growers in the United States who pay full fair market value to raise their cattle. Or the beneficiary may enjoy free solitude, natural beauty, and the company of wilderness beasts. The cost to the public is the same. Equally unfair is the burden borne by the public in supporting the BLM fiefdom. The probability of a BLM chief voluntarily conceding the uselessness of his agency and calling on Congress to undertake the process this Note proposed is extremely low.

The impetus to divest must come from Congress. Congress should excuse the BLM from the process of identifying lands to be sold because the BLM could not legitimately be expected to execute the task with dispassion.<sup>226</sup> In 1968, the BLM reviewed its land holdings for retention or disposal pursuant to the Classification and Multiple Use Act of 1968. Surprisingly, the BLM concluded that two percent of its land holdings should be liquidated or otherwise managed by a different agency.<sup>227</sup> Although this Note concludes that this figure was low by a factor of about fifty, the BLM's self-analysis was a step in the right direction. Congress should rededicate itself to the path originally taken by the United States and remove itself from the litigation-prone and unproductive business of public lands ranching.

*S.L. Rundle*

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226. Krent & Zeppos, *supra* note 19, at 1771-72 (arguing that "Government disposition programs, particularly when they are not framed on market principles, require greater public participation and more public scrutiny" and nominating the Office of Management and Budget to do the monitoring); *see also* Vaskov, *supra* note 205, at 79 (quoting a congressman that said the BLM gets "snookered" when it negotiates land exchanges).

227. The surprise was that it was not zero percent. Veronica Larvie, *Federal Land Planning Issues: Ecosystem Analysis, Forests, Oceans, and Public Lands*, S.F. 34 A.L.I.-A.B.A. 127, 131 (2000). As has been noted:

Once assets are under government ownership and control, they are viewed by bureaucrats as being free—nothing must be given up for the assets' use and retention.... [T]here are no bureaucratic or budgeted benefits that flow from the liquidation of government property. But, there may be significant costs to bureaucrats from public asset liquidation. For example, if the Bureau of Land Management (BLM) and the U.S. Forest Service liquidated the lands they manage, they would significantly reduce their employment opportunities and growth potentials, since the Forest Service's and BLM's *raison d'être* is to manage federal land.

Hanke, *supra* note 207, at 660.