10-1-2012

Cows, Congress, and Climate Change: Authority and Responsibility for Federal Agencies to End Grazing on Public Lands

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INTRODUCTION

Grazing on public lands has been a matter of considerable controversy for more than a century.[1] As the environmental, health, and additional negative impacts of raising non-human animals for food become more and more apparent and well-known, it has become clearer that using public lands in this way is contrary to public interest. While the number of cows and sheep grazing on public lands is small compared to the overall number of animals raised for food in the United States, grazing is the single largest use of federal lands, covering more than 250 million acres,[2] including ninety percent of Bureau of Land Management (BLM) lands.[3] And, in addition to the well-known environmental impacts—such as degradation of the land, destruction of ecosystems, and pollution of the water—animal agriculture is a significant producer of greenhouse gases, which contribute to global climate change.[4]

Congress and the federal agencies responsible for managing our federal lands have long recognized the detrimental impact that grazing has on the lands and the environment. This knowledge has been part of the underlying basis for the various statutes and regulations that have been promulgated to deal with grazing.[5] These attempts show a continually increasing desire to protect the natural environment and to address the damage caused by grazing.

Currently, as much as two-thirds of the rangeland is in unsatisfactory condition.[6] Nevertheless, the use of the range for grazing continues, and the

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1. *See* George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Common and the Taylor Act*, 13 ENVTL. L. 1, 22–23 (1982) (discussing the contentious, often violent, battles over range rights).

2. USDA ECONOMIC RESEARCH SERVICE, ENVIRONMENTAL INTERACTIONS WITH AGRICULTURE PRODUCTION: GRAZING LANDS AND ENVIRONMENTAL QUALITY (Nov. 2008), *available at* http://www.ers.usda.gov/briefing/agandenvironment/grazinglands.htm.

3. Joseph M. Feller, *Ride 'Em Cowboy: A Critical Look at BLM's Proposed New Grazing Regulations*, 34 ENVTL. LAW 1123, 1127 (2004).

4. *See* DEBRA L. DONAHUE, THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY 126 (Univ. of Okla. Press 1999) (asserting that grazing has indirect consequences on the environment, including emission of greenhouse gases).

5. *See* Public Rangelands Improvement Act of 1978, 43 U.S.C. § 1901(a) (1978) (addressing unsatisfactory rangeland conditions).

6. *See* U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED 91–191, RANGELAND MANAGEMENT: COMPARISON OF RANGELAND CONDITION REPORTS: REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON NATIONAL PARKS AND PUBLIC LANDS, COMMITTEE ON INTERIOR AND INSULAR

federal agencies responsible for overseeing the rangeland show little sign of stopping or significantly reducing this use of the land.[7]

The pressure to maintain grazing on public lands is substantial. Ranching is a significant part of United States history—particularly in the West—and Congress, agency leadership, federal land managers, and judges are loath to upset this tradition.[8] While environmental considerations have significantly affected numerous uses of federal lands, grazing has continued to be a prominent use of hundreds of millions of acres of land despite its negative environmental impact.[9] Not only is BLM failing to address the perilous health and environmental implications of global warming, but it is also subsidizing and contributing to them through its decisions on how to use the public lands. As explained in detail below, however, ending grazing on public lands is arguably within the power of BLM, the Forest Service, and other federal agencies. Ending grazing on public lands has also become an environmental imperative.

Part I of this article will address the substantial negative environmental impact of raising animals for food. Focusing on global climate change, Part I will address the need for federal agencies overseeing public lands to consider this impact in their planning decisions. Part II will address the laws passed by Congress to govern grazing on public lands, the backdrop that led to their enactment, and how they have evolved to make clear that protection of the natural environment is a primary objective of federal rangeland management. Part III of the article will analyze court decisions recognizing both the authority and the obligation of the public agencies overseeing grazing to take significant steps to protect the rangeland and the surrounding environment. Part IV will analyze authority requiring federal agencies to address global climate change, most significantly the Supreme

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AFFAIRS, HOUSE OF REPRESENTATIVES (1991) (discussing how federal land managers routinely authorize destructive livestock grazing without complying with federal environmental statutes).

7. *See* CENTER FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/programs/public_lands/grazing/index.html (last visited Nov. 11, 2012) (discussing the continued use of range land).

8. *See, e.g.*, Erik Schlenker-Goodrich, *Moving Beyond Public Lands Council v. Babbitt*, 16 J. ENVTL. L. & LITIG. 139, 140–41 (2001) (describing how courts, Congress, and BLM all discouraged the formation of a comprehensive public rangelands law).

9. *See* Joseph Feller, *The Comb Wash Case: The Rule of Law Comes to the Public Rangelands*, 17 PUB. LAND & RESOURCES LAW REV. 25, 26–27 (1996) (discussing how federal land managers routinely authorize destructive livestock grazing without complying with federal environmental statutes).

Court's decision in *Massachusetts v. EPA*. Finally, Part V will address obstacles to reform and ways to address those obstacles.

I. PUBLIC POLICY NECESSITY OF ENDING GRAZING: IMPACT ON SOCIETY OF RAISING ANIMALS FOR FOOD

As noted above, the negative impact on the range from grazing has been well known since the nineteenth century. Grazing has had detrimental impacts on the soil and water, as well as the plant and animal species on the range. The negative impacts of grazing include: "[R]eplacement of native perennial grasses by shrubs and annual weeds, soil erosion, degradation of stream channels, loss of riparian vegetation, water pollution, [and] destruction of wildlife habitat."[10] BLM itself has long recognized the harmful impacts of grazing. In 1974, the District Court for the District of Columbia pointed to BLM's report indicating the negative environmental impacts of grazing:

> Uncontrolled, unregulated or unplanned livestock use is occurring in approximately 85 percent of the State and damage to wildlife habitat can be expressly [sic] only as extreme destruction. Overgrazing by livestock has caused invasion of sagebrush and rabbitbrush on meadows and has decreased the amount of meadow habitat available for wildlife survival by at least 50 percent. The reduced meadow area has caused a decline in both game and non-game population. In addition, there are 883 miles of streams with deteriorating and declining wildlife habitat, thus making it apparent, according to the report, that grazing systems do not protect and enhance wildlife values.[11]

But the negative impacts of grazing go far beyond that. Grazing implicates critical issues of planetary and public health. Raising animals for food, in particular cows, has serious implications for our well-being as a society. Animal agriculture is one of the primary contributors to global climate change. A landmark study conducted by the United Nations Food and Agriculture Organization concluded that animal agriculture emits eighteen percent of human-caused global greenhouse gases, more than the

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10. Feller, *supra* note 9, at 1128

11. Natural Resources Defense Council v. Morton, 388 F. Supp. 829, 840 (D.D.C. 1974) (internal citations omitted).

entire transportation sector.[12] Other experts have concluded that this number fails to take into account the true impact of raising animals for food and that animal agriculture contributes closer to fifty-one percent of all global greenhouse gases.[13] Regardless, the number is significant and government agencies should be acting to address this dire threat, not contributing to it.

Cows in particular release significant amounts of methane and nitrous oxide, which are incredibly potent greenhouse gases. Methane has about twenty-three times the greenhouse effect of carbon dioxide; nitrous oxide has 296 times the effect.[14] Raising cows for food accounts for more global warming emissions than other foods.[15] In addition to the impact of greenhouse gases emitted directly by animals, animal agriculture in the United States contributes to climate change through methane released from fertilizer and manure decomposition; land use changes for grazing and to produce food for the animals; land degradation; and fossil fuels burned for fertilizer, animal food production, and transportation.[16]

Although much of the research has focused on cows in concentrated animal feeding operations (also called factory farms or CAFOs), that does not mean that grazed animals are not also contributing. In the United States, the majority of cows raised for food spend the beginning of their lives on pasture and their last few months of life in a factory farm.[17] While part of our vision of grazing on rangeland in the American West involves idyllic pastures with happy cows spending their lives eating grass until they are killed, that is not the reality. Cows that end up in factory farms are the same cows that graze on public lands. So using public lands for grazing contributes to the factory farm system, which has numerous issues beyond global climate change, including significant issues of animal cruelty, pollution, and public health.[18]

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12. HENNING STEINFELD ET AL., U.N. FOOD & AGRIC. ORG., LIVESTOCK'S LONG SHADOW: ENVIRONMENTAL ISSUES AND OPTIONS (2006).

13. Robert Goodland and Jeff Anhang, *Livestock and Climate Change: What if the Key Actors in Climate Change are . . . Cows, Pigs, and Chickens?*, WORLD WATCH MAGAZINE (Nov./Dec. 2009), *available at* http://www.worldwatch.org/files/pdf/Livestock%20and%20Climate%20Change.pdf.

14. DOUG GURIAN-SHERMAN, RAISING THE STEAKS: GLOBAL WARMING AND PASTURE-RAISED BEEF PRODUCTION IN THE UNITED STATES, UNION OF CONCERNED SCIENTISTS (2011).

15. *Id.*

16. Steinfeld, *supra* note 12, at 86.

17. Gurian-Sherman, *supra* note 14, at 6.

18. *See, e.g.*, Sarah C. Wilson, *Hogwash! Why Industrial Animal Agriculture is Not beyond the Scope of Clean Air Act Regulation*, 24 PACE ENVTL. L. REV. 439 (2010).

Moreover, the precise impact of grazing is significant. The Union of Concerned Scientists has looked specifically at the impact of pasture-raised cows.[19] Because these cows gain weight slower, they emit methane and nitrous oxide for a longer period of time and, therefore, emit more.[20] The impact is greater when the rangeland is in poor quality, as the majority of public rangelands are. Cows grazing on poor quality pasture produce four times more methane than those eating mostly grain.[21] Other commentators have estimated the output of grazing cattle just on public lands in the United States to be as much as 258,329,206,200 liters of methane per year.[22] This is equal to the greenhouse gas emissions of 705,342 passenger vehicles, 8,578,933 barrels of oil, or electricity consumed by 447,687 homes.[23]

Grazing also contributes to climate change because rangelands in poor quality are less able to store carbon.[24] Healthy grasslands and forests could mitigate much of the impact of climate change by sequestering carbon.[25] In the case of overgrazing, "land degradation is a sign of decreasing re-absorption of atmospheric [carbon dioxide] by vegetation re-growth. In certain regions, the related net [carbon dioxide] loss may be significant."[26] Scientists in India looked at the global warming impact of stopping grazing in the Barsey Rhododendron Sanctuary.[27] They found that removing cows (as well as a small number of sheep, buffalo, and yaks) from the area in question resulted in a difference of 585,000 tons of carbon over a twelve year period, which they calculated to translate into the equivalent of 2,142,000 tons of carbon dioxide.[28]

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19. Gurian-Sherman, *supra* note 14.

20. *Id.* at 3.

21. MICHAEL ABBERTON, RICHARD CONANT, AND & CATERINA BATELLO, U.N. FOOD & AGRIC. ORG., GRASSLAND CARBON SEQUESTRATION: MANAGEMENT, POLICY AND ECONOMICS: PROCEEDINGS OF THE WORKSHOP ON THE ROLE OF GRASSLAND CARBON SEQUESTRATION IN THE MITIGATION OF CLIMATE CHANGE 1, 170 (2010).

22. Mike Hudak, *Cattle Grazing on Public Lands Contributes to Global Warming*, http://www.all-creatures.org/articles/ar-cattlegrazing.html (last updated May 2010).

23. *Id.*

24. James C. Catlin, John G. Carter, & Allison L. Jones, *Range Management in the Face of Climate Change*, 17 NAT. RESOURCES & ENVTL. ISSUES 207 (2011).

25. *Id.*

26. Steinfeld, *supra* note 12, at 95.

27. SHWETA BHAGWAT, ET AL., INSTITUTE FOR FINANCIAL MANAGEMENT AND RESEARCH: CENTRE FOR DEVELOPMENT FINANCE, ANALYSIS OF GRAZING EXCLUSION POLICY THROUGH A CLIMATE CHANGE MITIGATION LENS: CASE FROM BARSEY RHODODENDRON SANCTUARY, WEST SIKKAM (Nov. 2011).

28. *Id.* at 17.

Another study in China similarly found that ending grazing for twenty years in the Leymus chinensis (grasslands in northern China) could increase carbon storage in the soil almost thirty-six percent.[29] The authors concluded, "By implementing [grazing exclusion], the temperate grasslands of northern China could facilitate significant [carbon] and [nitrogen] storage on decade scales in the context of mitigating global climate change."[30]

As the authors of the India study note, the "[v]alue of this carbon sequestration is not limited to the geographic area of study site but rather a contributor to global reduction in net carbon emissions."[31] Taking action in the United States to address the contribution that animals raised for food make to global climate change would have another international impact: It would encourage other nations to take similar measures.[32] This is particularly important because the global warming impact of animals raised for food in other countries is generally greater than in the United States.[33]

In addition, continuing to use public lands for grazing worsens other impacts of global climate change:

> The particular impacts consequent to livestock grazing have ever-growing significance in light of observed and predicted climate change impacts in the Southwest including higher temperatures; reduced snowpack and earlier snowmelt; longer droughts; more erratic, but more intense precipitation events rushing over drought-stressed lands and further incising channels; vegetation die-offs; and the spread of invasive, exotic species. . . . The grazing cannot meet the meaning of a FONSI, i.e., no significant impacts; and it cannot be justified in an [Environmental Impact Statement] vis-a-vis reasonable alternatives of no grazing or greatly reduced grazing. The impacts are too many, serious, irreversible, and unavoidable given the current levels, frequency, and geographic extent of the livestock grazing.[34]

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29. L. Wu, et al., *Storage and Dynamics of Carbon and Nitrogen in Soil after Grazing Exclusion in Leymus chinensis Grasslands of Northern China*, 37 J. ENVTL. QUAL. 663 (2008).

30. *Id*. at 667.

31. Bhagwat, Diwan, and Venkataramani, *supra* note 27, at 17.

32. Gurian-Sherman, *supra* note 14, at 7.

33. *Id.*

34. Mary O'Brien, *Uneasy Riders: A Citizen, a Cow, and NEPA*, 39 ENVTL. L. REP. 10,632, 10,634 (2009).

Global climate change threatens to end life, as we know it, with the impacts falling most heavily on the poor and inhabitants of the global south, and jeopardizes global stability. The well-known impacts of global climate change include: retreating glaciers, rising sea levels, thawing tundra, and increases in hurricanes and other severe weather events.[35] "Natural disasters, droughts, and other changes brought about by global warming 'are likely to become a major driver of war and conflict.' . . . Global temperature shifts may also hasten the speed at which infectious diseases emerge and reemerge."[36] Additional effects include "severe and irreversible changes to natural ecosystems."[37] Some regions of the world "are likely to suffer yield declines of major crops and some may experience food shortages and hunger. . . . The poor and disadvantaged, and more generally less advanced countries are the most vulnerable to the negative consequences of climate change because of their weak capacity to develop coping mechanisms."[38]

All of these factors, along with the authority analyzed below, provide significant reason for the United States to take the implications of raising animals for food seriously and for BLM to end grazing on public lands. The next section looks at the statutory authority governing grazing on public lands and the underlying reasons for the enactment of these statutes. It also argues that ending grazing is consistent with this authority.

II. HISTORY OF GRAZING ON PUBLIC LANDS AND ATTEMPTS TO ADDRESS THE DAMAGE: STATUTORY AUTHORITY FOR ENDING GRAZING

As noted previously, grazing is the most ubiquitous commercial use of public lands. The majority of land used for grazing is managed by BLM within the Department of the Interior. A small amount of rangeland is also managed by the Forest Service within the Department of Agriculture. In addition to BLM and Forest Service lands (including wilderness lands), some grazing takes place in national parks, national monuments, and

35. Gowri Koneswaran & Danielle Nierenberg, *Global Farm Animal Production and Global Warming: Impacting and Mitigating Climate Change*, 116 ENVTL. HEALTH PERSPECTIVES 578, 580 (May 2008); Steinfeld, *supra* note 12, at 80.

36. Koneswaran and Nierenberg, *supra* note 35, at 580.

37. Massachusetts v. Environmental Protection Agency, 549 U.S. at 521 (quoting declaration of climate scientist, Michael MacCracken).

38. Steinfeld, *supra* note 12, at 80–81.

national wildlife refuges.[39] Although this article deals primarily with BLM decisions regarding management of the range and legal challenges to those decisions, these laws and arguments apply equally to the Forest Service and other federal agencies.

For much of U.S. history, there were few attempts to regulate the use of public lands for grazing.[40] Entities raising cows and sheep for food basically had free range to use federal lands.[41] This use of the public lands was judicially sanctioned in the 1890 case of *Buford v. Houtz*. The Supreme Court held that "there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use."[42]

However, at the turn of the twentieth century, as the damage caused by grazing started to be recognized, there were attempts to limit and regulate the practice. The Forest Service started charging fees for grazing in 1905.[43] There were several legislative attempts to address the damage caused by grazing.[44] However, these attempts were largely unsuccessful. It was only after the environmental and economic devastation caused by the Dust Bowl, which was made worse by the long-term use of rangelands for grazing, that Congress finally acted.[45] In 1934, Congress responded with the Taylor Grazing Act (TGA). It attempted to limit and regulate grazing on public lands and to address some of the environmental issues that had arisen from the indiscriminate use of the lands for grazing.

Congress made additional attempts, through several subsequent major pieces of legislation, to address the environmental degradation caused by grazing on federal lands. Forty years after the TGA, Congress enacted the Federal Land Policy Management Act and the Public Rangelands

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39. *See* Mike Hudak, *To Graze or Not to Graze? Livestock Grazing on Public Lands Policy and the Sierra Club* (1999), *available at* http://www.mikehudak.com/Articles/Chesapeake9909.html; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 05-869, LIVESTOCK GRAZING: FEDERAL EXPENDITURES AND RECEIPTS VARY, DEPENDING ON THE AGENCY AND THE PURPOSE OF THE FEE CHARGED (2005).

40. *See* Coggins & Lindeberg-Johnson, *supra* note 1, at 27.

41. *Id.*

42. Buford v. Houtz, 133 U.S. 320, 326 (1890).

43. DEBRA L. DONAHUE, THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY 27–28 (1999).

44. *Id*. at 33–35.

45. *See* Coggins & Lindeberg-Johnson, *supra* note 1, at 47 (analyzing Congress' motivation to promulgate the Taylor Grazing Act).

Improvement Act. While each of these authorities assumes that grazing will continue to take place on public lands, none of them requires the use of the lands for that purpose. Likewise, each of them makes clear that preservation of the range and other environmental values are of paramount importance. Concurrently, provisions in other laws that bind federal agencies, including the National Environmental Policy Act, the Endangered Species Act, the Wild & Scenic Rivers Act, the Clean Air Act, and the Clean Water Act, illustrate that other countervailing policies must take precedence. Grazing is only one of many potential use of the rangeland and, because of its detrimental effects on humanity and the world, should be more stringently regulated.

A. Taylor Grazing Act

Despite its name, the TGA was not passed to authorize grazing on federal lands: grazing was already taking place on federal lands and had been for more than a century. The TGA provided BLM with the authority to issue permits for grazing and obtain "reasonable fees" from ranchers who wanted to use the public lands.[46] As explained in further detail below, obtaining adequate compensation for the right to use federal lands for grazing has been an ongoing and largely unsuccessful process. The TGA also made clear that permits to graze did not convey any "right, title, interest or estate" in the land itself.[47] Courts have consistently held that no legal rights inhere in grazing permits.[48] This history makes clear that, regardless of traditional use for grazing, the lands remain the property of the United States for it to do as it sees fit.

Most importantly, the TGA authorized the Secretary of the Interior to establish grazing districts on lands "which in his opinion are *chiefly valuable for grazing* and raising forage crops."[49] Therefore, by the plain

46. 43 U.S.C. § 315b (1976).

47. *Id*.

48. *See, e.g.*, United States v. Fuller, 409 U.S. 488, 494 (1973) (establishing that Congress did not intend to vest property rights when BLM issues permits); Swim v. Bergland, 696 F.2d 712, 719 (9th Cir. 1983) (contrasting tribal rights to land with those not inherent in permits issued to non-Indians); Osborne v. United States, 145 F.2d 892, 896 (9th Cir. 1944) (affirming that Congress may extend land rights while executive agencies may not); Diamond Bar Cattle Co. v. United States, 168 F.3d 1209, 1217 (10th Cir. 1998) (maintaining that licenses to graze on federal lands are revocable and have never vested property rights); Alves v. United States, 133 F.3d 1454 (Fed. Cir. 1998) (explaining that fee simple land owners do not have a compensable property interest in adjacent federal lands).

49. 43 U.S.C. § 315 (emphasis added).

text of the legislation, nothing in the TGA requires the Secretary to establish grazing districts, and grazing districts should only be established on lands that are not suitable for other uses. Moreover, the law gave the Secretary the authority to withdraw land from grazing entirely if it could be utilized for a more valuable or suitable use.[50]

The Department of the Interior has long recognized that grazing is not intended to be the primary use of the land. In response to a challenge regarding water rights, the Department stated in 1966:

> The Taylor Grazing Act is not just a grazing statute. On the contrary, it is a statute providing for an inventory of public lands and for the disposal of the lands in accordance with their highest use. Thus, section 7 of the act . . . provides for the classification of lands in grazing districts which are more valuable for agriculture than for forage or more valuable for any other use than that provided under the act (grazing). . . . Note that in the scheme of classification grazing is the lowest use.[51]

In reality, however, the TGA did little to impact the way that rangelands were managed. Neither BLM nor the Grazing Service, the federal office in the Interior Department responsible for enforcing the law before BLM, ever undertook the necessary appraisal of the lands to determine whether they were "chiefly valuable for grazing."[52] Most of BLM-managed lands in the West were simply classified as grazing districts, grazing continued, and some narrow restrictions were placed on entities using the lands. In addition to the permit requirement to use public lands for grazing, the number of animals that could graze on a given plot of land was limited. But, for the most part, grazing continued, the damage to the lands and the surrounding environment continued, and BLM did little to stop the practice.[53]

Even if lands had been found to be chiefly valuable for grazing, as the law requires, there is evidence that removing cows and sheep from lands

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50. *Id.* § 315f.

51. Thomas Ormachea and Michael P. Casey, 73 I.D. 339, 346–347 (I.D. 1966).

52. *See* Schlenker-Goodrich, *supra* note 8, at 179 (explaining the Secretary of the Interior's broad discretion when determining if land is suitable for grazing); Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 755 (2005).

53. Donahue, supra note 52, at 755–56.

devastated by grazing could restore the ecosystems of the range.[54] Additionally, these lands "are now valued for a wealth of noncommodity resources, including hundreds of thousands of archaeological sites; habitat for thousands of species of wildlife; spectacular desert, mountain, and canyon scenery; and recreational opportunities."[55] This reality calls into question whether any public lands could truly be classified as chiefly valuable for grazing today.

As a result of BLM's failure to fully implement all the provisions of the law, the TGA did very little to achieve its intended purpose of improving the environmental health of the range. The TGA still governs grazing on public lands, but subsequent statutes and regulations have added requirements for environmental considerations and protections. Later statutes make even clearer that public lands should not be managed for grazing alone, particularly if there are more beneficial uses.

B. Federal Land Policy Management Act

The Federal Land Policy Management Act (FLPMA) was passed in 1976, and, among numerous other provisions, amended or superseded and built upon certain portions of the TGA.[56] It is the primary law governing BLM activity and deals with the management of the public lands generally. The law provides a number of policy statements and directives to indicate Congress' strong environmental preference, and to aid BLM in overseeing the lands. Individually and taken together, it is evident from these provisions that use of the public lands for grazing is not necessarily consistent with the other dictates of FLPMA. FLPMA makes explicit that protection of the natural environment is of the utmost importance:

> Congress declares that it is the policy of the United States that the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat

54. *See* Debra L. Donahue, *Trampling the Public Trust*, 37 B.C. ENVTL. AFF. L. REV. 257, 264–67 (2010) (analyzing case studies where reducing the number of grazing animals on public lands lessened environmental damage).

55. *See* Feller, *supra* note 3, at 1128.

56. 43 U.S.C. § 1701 (1976).

> for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.[57]

While this policy statement does refer to providing habitat for domestic animals, it does not reference grazing specifically, and to the extent that grazing is considered, it is only one of many important uses of the land. This understanding is strengthened by other provisions of the law.

FLPMA requires that BLM develop land use plans for the various lands it manages.[58] Any decisions regarding these lands must fit within the land use plan for the area, and must be made according to the principles of "multiple use" and "sustained yield."[59] Multiple use means that all possible uses of the land must be considered. FLPMA defines multiple use as the:

> [M]anagement of the public lands and their various resource values so that they are utilized in the combination that will best meet the *present and future needs* of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the *long-term needs of future generations* for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources *without permanent impairment of the productivity of the land and the quality of the environment* with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.[60]

This requirement builds upon the TGA's requirement that grazing take place only on lands chiefly valuable for grazing. Using lands for grazing

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57. *Id.* § 1701(a)(8).
58. *Id.* § 1732(a).
59. *Id.* § 1732(a).
60. *Id*. § 1702(c) (emphasis added).

often means that their ability to support other uses is significantly deteriorated if not eliminated entirely.[61] This fact provides added authority for the idea that grazing is not compatible with a multiple use requirement. While using lands for grazing generally only allows for that single use, removing grazing from public lands would allow for multiple uses such as recreation, timber, watershed, and wildlife, all of which would be more in keeping with the intent of the statute.[62]

Sustained yield means "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."[63] This requires that the land be used in a way that will ensure its continuing viability for future generations. The Supreme Court has described the obligation as a requirement to "control depleting uses over time, so as to ensure a high level of valuable uses in the future."[64]

Moreover, FLPMA requires that, in "managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."[65] Two of the requirements in developing land use plans are that BLM "give priority to the designation and protection of areas of critical environmental concern"[66] and "weigh long-term benefits to the public against short-term benefits."[67] The law also contemplates the total elimination of certain uses of the lands.[68]

Only a small portion of FLPMA deals with grazing specifically. The rangeland provisions of FLPMA apply to grazing on Forest Service lands as well as BLM lands. FLPMA, like the TGA, requires the Secretary to assess the lands and make a determination of their suitability for grazing. The law then makes provisions for grazing fees "which [are] equitable to the United States and to the holders of grazing permits and leases on such lands."[69] The

61. *See* DONAHUE, *supra* note 40, at 114–59 (discussing the adverse effects of grazing on the ecological landscape).
62. *Id.*
63. 43 U.S.C. § 1702(h) (1976).
64. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 58 (2004).
65. 43 U.S.C. § 1732(b).
66. *Id.* § 1712(b)(3).
67. *Id.* § 1712(b)(7).
68. *Id.* §§ 1712 (e)(1)–(e)(2).
69. *Id.* § 1751(a).

Secretary retains broad authority to remove lands from grazing, and to put them to other uses and to cancel grazing permits.[70]

Taken together, these provisions make clear that BLM must manage the rangeland in a way that allows for multiple uses, does not unnecessarily degrade the lands, and preserves the use of the land for future generations. Grazing does not comply with these important and overarching provisions.

C. Public Rangelands Improvement Act

Shortly after passing FLPMA, Congress passed the Public Rangelands Improvement Act (PRIA) in 1978 as a further attempt to improve the health of the range. PRIA was passed because Congress found that, despite previous efforts, "vast segments of the public rangelands are producing less than their potential . . . and . . . are in unsatisfactory condition."[71] PRIA provides added support for the proposition that grazing cannot be the only use of the public lands by requiring the lands to be managed, maintained, and improved for increased productivity "for all rangeland values."[72] PRIA further expands on the power of the Secretary of the Interior to withdraw lands from grazing by providing that it is within the power of the Secretary to determine that "grazing uses should be discontinued (either temporarily or permanently) on certain lands . . . in accordance with . . . the land use planning process required" by FLPMA, or as otherwise determined by the Secretary.[73]

In addition, PRIA builds upon the system for collecting grazing fees for the use of the public lands. PRIA requires that "the Secretaries of Agriculture and the Interior shall charge the fee for domestic livestock grazing on the public rangelands which Congress finds represents the economic value of the use of the land to the user."[74] The law then establishes a process for determining the fair market value of land permits.

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70. *See* 43 U.S.C. § 1752(a), (b), (f) (1976). FLPMA does contain a provision requiring that any "management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more shall be reported by the Secretary to the House of Representatives and the Senate" and allows Congress to disapprove of such a decision. 43 U.S.C. § 1712(e)(2). While this may put some limits on BLM's ability to eliminate grazing on large tracts of land on which grazing is a major use, there are no similar restrictions for smaller tracts of land.

71. Public Rangelands Improvement Act, 43 U.S.C. § 1901(a) (1978).

72. *Id.* § 1901(b)(2).

73. *Id.* § 1903(b).

74. *Id.* § 1905.

Despite this requirement, BLM has never received fair market value for permits granting the right to graze on public lands. Rather, BLM has subsidized the use of the lands for this purpose, contributing to the detrimental environmental impacts.

Finally, in its findings and declaration of policy for PRIA, Congress points to a long list of environmental and economic impacts that result from using public lands for grazing. Among those impacts, Congress expressed its concern that "unsatisfactory conditions on public rangelands . . . may ultimately lead to unpredictable and undesirable long-term local and regional climatic and economic changes."[75] By specifically mentioning the climatic issues created by non-sustainable uses of the land, Congress expressed its desire for BLM to act to address these issues. Since that time, the need to respond to the pressing climatic changes has become even more urgent, and our knowledge about the contribution of animal agriculture to these changes has become much greater. While the substantive law of PRIA does not add much to the previously existing law, it provides additional ammunition for the argument that continuing to use the public lands for grazing is not consistent with congressional policy or public interest.

Taken together, these statutes express Congress' strong preference to limit grazing on public lands and to address the environmental imperatives of managing these lands. While Congress undoubtedly passed these laws expecting grazing to continue, it provided BLM with significant discretion to end this practice if the environmental damage failed to be addressed and the lands could be put to better use. Nevertheless, BLM has been reluctant to use its power to take a strong environmental stand in regards to grazing. The powerful interests that want grazing on public lands to continue have limited BLM's ability to act. For the most part, grazing on public lands has continued even though it is incompatible with other uses, contributes to severe degradation of the lands, and limits sustained yield of the lands going forward. Even when grazing clearly conflicts with the mandates of land use plans, BLM is reluctant to significantly reduce or eliminate it.

75. *Id.* § 1901(a)(3).

III. GIVING MEANING TO BLM OBLIGATIONS AND AUTHORITY TO LIMIT GRAZING UNDER EXISTING LAW

Prior to the mid-1990s, BLM acted on the assumption that its decisions regarding grazing need not comply with federal environmental law.[76] While numerous other uses of the federal lands were significantly impacted by environmental laws and, as noted above, Congress made clear that environmental degradation was a significant priority in passing laws to regulate the rangelands, BLM continued to issue grazing permits without considering their environmental impact.[77] And, as a general rule, courts allowed this practice to continue.[78] Moreover, FLPMA's multiple use mandate was considered meaningless by many.[79] As a result, "BLM managers and rancher-permittees [had] come to assume that livestock grazing on public lands [might] continue indefinitely without environmental compliance."[80] However, in the 1990s, BLM began to take its authority to protect the environment more seriously. At the same time, courts began to enforce BLM obligations to make decisions regarding grazing permits that took into account the environmental impacts and were consistent with land use plans.

The cases analyzed below look at how courts have dealt with BLM management decisions regarding the lands under its control and what its obligation and authority are to protect the environment under FLPMA, the TGA, PRIA, and other laws that govern agency action. The first section below looks at court decisions recognizing BLM's authority to comply with the multiple use mandate of FLPMA and otherwise manage the rangeland as it sees fit. The second part summarizes court decisions recognizing limitations on BLM's discretion and holdings that BLM has failed to make grazing decisions that adequately enforce the underlying statutes.

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76. *See* Feller, *supra* note 9, at 36 (explaining that BLM has never explicitly asserted that grazing on the lands it manages is exempt from environmental laws, but that, prior to the 1990's, BLM acted on the implicit assumption that grazing may continue without compliance with such laws).

77. *Id.*

78. *Id.* at 27–28.

79. *See id.* at 48 (explaining the argument of some legal commentators that the statutory language is too vague to be enforceable).

80. *Id.* at 28.

A. It's Up to the Agency: BLM Authority to Use Public Lands as it Sees Fit, Including to Protect the Range from Grazing

One of the most significant modern-day cases dealing with BLM's ability to protect public lands from the damage caused by grazing is *Public Lands Council v. Babbitt*. The Tenth Circuit, and subsequently the Supreme Court, dealt with BLM's authority under the TGA, FLPMA, and PRIA to issue regulations that aimed in part to protect the environment and called into question the long-standing privileges of grazing permit holders. Ranchers challenged portions of 1995 regulations issued by the Secretary of the Interior as violating the underlying laws.[81] One of the primary challenges involved the Secretary's decision to redefine grazing preferences under the TGA. A portion of the TGA states: "So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded."[82] Ranchers had long taken the position that this language required their use of the land for grazing to be given preference over other possible uses of the land.[83] The Department of the Interior took the position that ranchers with existing permits would be given priority over other entities wishing to use the land to graze; however, they would not be given preference over other potential uses.[84] Existing permit holders were concerned that their permits might not be renewed if grazing were not given priority over other uses.

In upholding most parts of the regulation, the Tenth Circuit noted that one of the purposes of FLPMA was to require that grazing permits conform to land use plans. The court went on to identify the purposes of the TGA as: "regulat[ing] the occupancy and use of the federal lands, . . . preserv[ing] the land and its resources from injury due to overgrazing, and . . . provid[ing] for the orderly use, improvement, and development of the range."[85] The court rejected arguments made by the plaintiff, Public Lands Council, finding that the privileges provided under a grazing permit entail nothing more than the authorization to graze for a specific period of time and a priority of renewal over other permit applicants.[86] The court also rejected the argument that this interpretation threatened the goal of

81. Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1292–93 (10th Cir. 1999).
82. 43 U.S.C. § 315b (1976).
83. Babbit, 167 F.3d at 1293.
84. *Id.* at 1294.
85. *Id.* at 1290.
86. *Id.* at 1298.

"stabilizing the livestock industry," stating, "The Act clearly states that the need for stability must be balanced against the need to protect the rangeland."[87] The court further pointed out that "the Act treats stabilizing the livestock industry as a secondary goal. . . . [T]he actual text of the statute references only safeguarding the rangeland and providing for its orderly use as primary objectives."[88] The court added that "such privileges will be adequately safeguarded as long as they are consistent with the purposes and provisions of the TGA."[89]

The court went on to find that reading the TGA in concert with FLPMA further strengthened the argument that protecting the lands is the primary obligation of BLM and that the lands must be managed "for many purposes in addition to grazing and for many members of the public in addition to the livestock industry." [90] The court also upheld regulations maintaining United States ownership of range improvements[91] and removing a requirement that applicants for grazing permits be "engaged in the livestock business."[92] As explained in further detail below, the court agreed with Public Lands Council that BLM was not permitted to issue grazing permits solely for the purpose of conservation.[93]

On appeal, the Supreme Court unanimously affirmed the Tenth Circuit's decision.[94] The Court reiterated BLM's significant authority to decide how to manage the public lands and to ensure that the rangelands are protected for future generations. The Court pointed out that "FLPMA strengthened the Department's existing authority to remove or add land from grazing use, . . . while specifying that existing grazing permit holders would retain a 'first priority' for renewal so long as the land use plan continued to make land 'available for domestic grazing.'"[95] The Court noted that, even prior to the 1995 regulations, "the Secretary has always had the statutory authority under the Taylor Act and later FLPMA to reclassify and withdraw range land from grazing use."[96] The Court went on to hold

87. *Id*.
88. *Id.* at 1299, n. 5.
89. *Id.* at 1299.
90. *Id.* at 1300.
91. *Id.* at 1305.
92. *Id.*
93. *Id.* at 1308.
94. Public Lands Council v. Babbitt, 529 U.S. 728, 750 (2000). BLM did not appeal the Tenth Circuit's decision regarding the conservation permits.
95. *Id.* at 738.
96. *Id.* at 742.

that it was in the Secretary's discretion to determine how to "safeguard" grazing privileges in terms of the entire purpose of the TGA.[97]

Babbitt made explicit the idea that grazing can take place only if it fits within BLM's land use plan for the area in question. Both of these opinions make clear that grazing is not the principal purpose of any of the three statutes. While each of these decisions assumes that grazing will continue and leaves open the question of challenging the regulations as applied, given the ever-increasing damage to the environment, both of these decisions provide an opportunity for BLM to show adequate reason to end grazing on public lands and still comply with the underlying laws. Courts have also upheld Forest Service decisions to remove land from grazing in order to protect the environment under similar requirements of the National Forest Management Act.[98]

Other cases, while rejecting claims from environmental plaintiffs and upholding BLM decisions, have not foreclosed the possibility that BLM could act differently, limit grazing, or otherwise act in ways that are more protective of the environment. One of the most significant Supreme Court cases dealing with BLM decisions not to act to protect the environment was *Norton v. Southern Utah Wilderness Area*.[99] In *Norton*, environmental plaintiffs challenged BLM's failure to limit off-road vehicle use in potential wilderness areas in Utah as violating the National Environmental Policy Act (NEPA) and BLM's land use plan under FLPMA. In rejecting the challenge, the Court stated, "The principal purpose of the [Administrative Procedure Act] limitations . . . is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve."[100]

Similarly, lower courts have deferred to BLM decisions allowing grazing to continue.[101] In rejecting a challenge by environmental plaintiffs,

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97. *Id.*

98. *See* Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713 (9th Cir. 1993) (upholding the Land Resource Management Plan's and its goal to improve the conditions of rangelands.); Perkins v. Bergland, 608 F.2d 803, 804 (9th Cir. 1979); *see also* Nw. Motorcycle Ass'n v. U.S. Dept. of Agric., 18 F. 3d 1468, 1481 (9th Cir. 1994) (upholding Forest Service authority to close areas to off-road vehicle use).

99. 542 U.S. at 55 (2004).

100. *Id*. at 66.

101. *See In re* Mont. Wilderness Ass'n, 807 F. Supp. 2d 990 (D. Mont. 2011); Wilderness Soc'y v. BLM, 2011 U.S. Dist. LEXIS 113961 (D. Ariz. 2011); Natural Res. Def. Council v. Hodel, 624 F. Supp. 1045 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987). Similar issues have arisen in regards to off-road vehicle use with similar results. Gardner v. BLM, 638 F.3d 1217 (9th Cir. 2011) (stating that

one court stated, "Although I might privately agree with plaintiffs that a more aggressive approach to range management would be environmentally preferable, or might even be closer to what Congress had in mind, . . . 'courts are not at liberty to break the tie choosing one theory of range management as superior to another.'"[102] Courts have given the Forest Service similar discretion to make land management decisions involving grazing.[103]

Each of these cases makes clear that BLM has substantial authority to make the choices it feels are best in its land planning decisions. While BLM has often been reluctant to exercise this authority to limit grazing, that does not mean that the authority does not exist. Nothing in these opinions, however, requires BLM to take any particular action, including ending or significantly limiting grazing on public lands. The next section examines situations in which courts have held that BLM has failed to adequately take environmental considerations into account in making grazing decisions.

B. Limits on Agency Discretion: BLM's Obligations to Act to Protect the Public Lands from Grazing

As noted above, until relatively recently, BLM generally did not account for environmental consequences when making grazing permit decisions, and courts did not require it to do so. One notable exception was *Natural Resources Defense Council, Inc. v. Morton*. In 1974, the U.S. District Court for the District of Columbia found that BLM had failed to adequately take into account the environmental impacts of grazing and that BLM was required to comply with NEPA in making grazing decisions.[104]

BLM has significant discretion in taking steps to prevent unnecessary or undue degradation of public lands); Sierra Club v. Clark, 756 F.2d 686 (9th Cir. 1985).

102. Hodel, 624 F. Supp at 1058.

103. *See* Forest Guardians v. U.S. Forest Service, 329 F.3d 1089, 1099–1100 (9th Cir. 2003).

104. Natural Res. Def. Council, Inc. v. Morton, 388 F. Supp. 829 (D.D.C. 1974), *aff'd without opinion*, 527 F.2d 1386 (D.C. Cir. 1976); *cert. denied*, 427 U.S. 913 (1976). Many cases address BLM's alleged failure to comply with NEPA. National Environmental Policy Act of 1969 42 U.S.C. § 4321(1970). NEPA is a procedural, not a substantive, statute. It requires federal agencies to comply with a number of requirements to consider the environmental impact of their proposed activities. It does not require federal agencies to take any given action. Nevertheless, challenges brought under NEPA require federal agencies to take a closer look at their activities, and they give courts an opportunity to explain the steps that they believe are adequate for agencies to take to protect the environment. Therefore, while NEPA itself does not provide BLM with authority to end grazing on public lands, analyses under NEPA are useful to look at steps that BLM could and should be taking to protect the environment.

Unfortunately, much of the promise of *Morton* was hindered by the "Sagebrush Rebellion" (discussed below) and backlash from ranchers and their supporters.

A minor but significant shift occurred in 1993 when an administrative law judge held that BLM had failed to comply with NEPA and with FLPMA's multiple use requirement in renewing grazing permits in the Comb Wash area of Utah and enjoined renewal of the permits. In 1997, the Interior Board of Land Appeals (IBLA) upheld that decision. The IBLA stated that, while "FLPMA does not require a 'specific' public interest determination for grazing . . . FLPMA's multiple-use mandate requires that BLM balance competing resource values to ensure that public lands are managed in the manner 'that will best meet the present and future needs of the American people.'"[105] Although some previous cases recognized BLM's authority and obligation to protect the environment, this case took seriously FLPMA's multiple use mandate and BLM's obligation to consider the impacts of grazing in land use plans. Since that time, while imposing environmental limitations on BLM and on ranchers remains highly inadequate, courts have been more willing to require BLM to comply with environmental laws in making grazing permit decisions.[106]

In 2010, the Ninth Circuit addressed the issue of whether BLM had adequately considered the possibility of other uses in developing a land use plan that allowed for significant portions of land in southeastern Oregon to be used for grazing and off-road vehicles.[107] The court found that BLM had

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105. Nat'l Wildlife Fed'n v. Bureau of Land Mgmt., 140 IBLA 85, 101 (1997).

106. This advance has been limited by Congress, however. Since 1998, because of the bureaucratic difficulties in conducting Environmental Assessments and Environmental Impact Statements under NEPA, Congress has attached riders to the Department of the Interior budget appropriations, which allow BLM to renew grazing permits without complying with NEPA. *See* Consolidated Appropriations Act, Pub. L. No. 112-74, 125 Stat. 786 (2011); Dep't of the Interior Act, Pub. L. No. 108-108, § 325, 117 Stat. 1241, 1308 (2003). While this issue has made it more difficult to bring cases under NEPA, *see* Great Old Broads for Wilderness v. Kempthorne, 452 F. Supp. 2d 71, 75–76 (D.D.C. 2006) (explaining that BLM was burdened by an unusually large number of permit renewal, and because Congress was unwilling to impose the costs of BLM's backlog on the region's ranchers, it issued a series of appropriation riders that provided for the renewal of all expiring permits pending the completion of requisite review procedures); W. Watersheds Project v. BLM, 629 F. Supp. 2d 951, 957 (D. Ariz. 2009), and indicates the powerful interests that make reform difficult, BLM is still required to engage in the necessary environmental review when possible. In addition, other decisions made by BLM and occasions when BLM has made an effort to comply with NEPA are still challengeable. Moreover, the Supreme Court has held that Congress' action in an appropriation bill is not an indication of its attempt to amend a conflicting statute. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190 (1978) (explaining that the Appropriations Committees had no jurisdiction over the subject of endangered species and that the appropriation measures are "Acts of Congress" with limited and specific purposes).

107. Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092 (9th Cir. 2010).

violated NEPA by failing to adequately consider the potential wilderness use of the land in question.[108] Even though the court addressed off road vehicle use and did not directly address the issue of alternatives to grazing, the court did state that "BLM must consider closures of significant portions of the land it manages, including, if found appropriate on remand, lands with wilderness characteristics."[109]

Similarly, lower courts have enjoined BLM grazing decisions that did not adequately take into account the environmental impacts.[110] In *Western Watersheds Project v. Bennett*, the court found that BLM had violated its duties under NEPA and FLPMA by renewing grazing permits despite substantial evidence that the range conditions were continuing to deteriorate and that issuing these permits was contrary to BLM's land use plan for the area.[111] The court enjoined further grazing on twenty-eight parcels on which ranchers had applied for renewals of their permits.[112] The reasoning in this case has been followed by other courts who have agreed that federal agencies have failed to take sufficient account of the environmental impacts of grazing. In February 2012, a federal judge in Idaho considered whether BLM's decision to renew grazing permits violated NEPA and FLPMA despite the agency's own recognition of the detrimental environmental impact that grazing was having.[113] The court pointed out that the decision to reissue the grazing permits was not consistent with the land use plan and, therefore, violated FLPMA.[114] In 2011, a court held that BLM had failed to comply with the requirements under NEPA, in part by not considering ending grazing on the land in question:

> BLM's purported "No Action" Alternative involves grazing; that alternative required agency action through issuing new ten-year grazing permits. If BLM truly did take no action, then the old grazing permits would expire, no new permits would issue, and no range improvements would occur. No action would be no action.

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108. *Id.* at 1124.

109. *Id.*; Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 531 F.3d 1114, 1145 (9th Cir. 2008).

110. *See, e.g.*, Soda Mt. Wilderness Council v. Norton, 424 F. Supp. 2d 1241, 1261, 1263, 1271 (E.D. Cal. 2006) (providing that BLM failed to conduct adequate environmental review by preparing an inadequate environmental assessment with respect to an amended land management plan).

111. W. Watersheds Project v. Bennett et al., 392 F. Supp. 2d 1217, 1225–29 (D. Idaho 2005).

112. *Id*. at 1229.

113. Western Watersheds Project v. Salazar, 843 F. Supp. 2d 1105, 1109 (D. Idaho 2012).

114. *Id.*

> This is a reasonable, and obvious, alternative to issuing new grazing permits. BLM, however, dismissed a real no action alternative out of hand based on a mistaken understanding of its authority.[115]

While the court allowed the permits to continue temporarily based on the permittees' detrimental reliance, it instructed BLM to consider all alternatives, including no grazing. Similarly, courts have enjoined grazing on Forest Service lands when the Forest Service has failed to comply with environmental mandates.[116]

At the same time, courts have been unwilling to recognize BLM authority to issue regulations that do not adequately protect the environment. In 1984, the National Resources Defense Council and other environmental organizations challenged regulations promulgated by the Reagan Administration that would have limited BLM control over lands leased for grazing and would have limited the environmental protection obligations of the agency.[117] In particular, the plaintiffs objected to provisions in the new rule that provided for "Cooperative Management Agreements," which would have allowed "selected ranchers to graze livestock on the public lands in the manner that those ranchers deem appropriate."[118] The court struck the regulations down as "contrary to Congressional intent and . . . enacted without proper regard for the possible environmental consequences which may result from overgrazing on the public lands."[119]

More recently, in 2011, the Ninth Circuit refused to uphold regulations that would have significantly undercut the protections put in place by the 1995 regulations discussed above.[120] The 2006 regulations were challenged as contrary to the TGA, FLPMA, and other federal law because they would have limited public participation in rangeland management decisions;

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115. Western Watersheds Project v. Rosenkrance, 2011 U.S. Dist. LEXIS 1288, at *28 (D. Idaho 2011); *see also* Western Watersheds Project v. Salazar, 2011 U.S. Dist. LEXIS 111728 (D. Idaho 2011) (holding that "the EIS's failure to consider any alternative that would have reduced grazing violates NEPA's requirement, discussed above, that it 'rigorously explore' all 'reasonable alternatives.' . . . [T]he refusal to analyze a "no grazing" alternative was arbitrary and capricious.").

116. *See* Or. Natural Desert Ass'n v. Tidwell, 716 F. Supp. 2d 982, 1004, 1008 (D. Or. 2010) (issuing injunction forbidding Forest Service to issue grazing permits because of its failure to comply with the Endangered Species Act).

117. Natural Res. Def. Council v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985).

118. *Id*. at 852.

119. *Id*. at 852–53.

120. W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 477–78 (9th Cir. 2011).

limited BLM's environmental enforcement powers; and given the holders of grazing leases greater ownership rights to improvements on public grazing lands.[121] The court found that the regulations were "arbitrary and capricious" and not in keeping with the underlying law: BLM had downplayed the environmental impacts of the regulations in the Environmental Impact Statement prepared under NEPA.[122] The court stated that BLM's decision to limit its role and the public's role in overseeing range management was "inconsistent with the 1995 Regulations and discordant with the lessons learned from the history of rangeland management in the west, which has been moving towards multiple use management and increased public participation."[123] The court also found that the regulations violated provisions of the Endangered Species Act. While the court did not reach the challenge under FLPMA, the decision makes clear that BLM has significant authority to protect the environment but less authority to fail to protect the environment. In discussing the history of the case, the court noted that the TGA's purpose was to "stop injury to the public grazing lands" and "promote the highest use of the public lands."[124] The court further noted that subsequent laws and regulations have further strengthened these priorities. The Supreme Court declined to review the decision.[125]

These cases make clear that BLM has an obligation, not just the authority, to restrict grazing when continuing this use conflicts with other uses of the land and leads to continuing degradation of the range. These cases also make clear that land planning, not grazing, is BLM's statutory mandate under FLPMA and other federal laws. If grazing does not fit within a land use plan, then it cannot be allowed to continue. As land use plans have grown more protective of the environment, grazing has a lower and lower priority as compared to other uses.

IV. BUILDING ON EXISTING LAW: REQUIREMENTS TO ADDRESS GLOBAL CLIMATE CHANGE IN MAKING LAND USE DECISIONS

The cases and regulations detailed above deal with traditional arguments about the damage grazing caused to the range. But, as noted in

121. *Id*. at 479.
122. *Id*. at 492–93.
123. *Id*. at 494.
124. *Id*. at 478.
125. Public Lands Council v. W. Watersheds Project, 132 S. Ct. 366 (2011).

detail in Part I of this article, grazing contributes to other pressing global issues, particularly global climate change. This is an issue that obviously cannot be addressed by ending grazing on public lands alone. Despite the vast amount of land that is used for grazing of animals, the number of animals raised for food on public lands is relatively insignificant. Of the more than 35,000,000 cows killed each year for food in the United States,[126] only as many as eight percent are raised on public lands.[127] Ending grazing on public lands will not end the raising of animals for food, and animal agriculture is only one contributor to global climate change. Nevertheless, that does not mean that it is not a necessary and important step. The federal government should manage the lands in the public interest, using them in a way that is beneficial to society. At the very least, actions taken in our name should not be detrimental to our well-being.

The Supreme Court dealt with a similar issue in *Massachusetts v. U.S. Environmental Protection Agency*.[128] The Environmental Protection Agency (EPA) had refused to regulate greenhouse gases released by cars under the Clean Air Act. Lacking the power to control global climate change on their own, the state of Massachusetts as well as other states, local governments, and environmental organizations filed a citizen petition urging EPA to act.[129] In rejecting the citizen petition, EPA argued that it did not have the authority to regulate a naturally occurring gas under the Clean Air Act.[130] It further argued that, even if it did have the power, it did not believe that regulating greenhouse emissions from vehicles was a wise policy decision.[131] In addition, it argued that it was powerless to control global climate change, a worldwide phenomenon with many disparate and uncontrollable causes.[132]

The Supreme Court found those arguments inadequate. The Court pointed to the dire effects of climate change including "a precipitate rise in

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126. *See* USDA NATIONAL AGRICULTURE STATISTICS SERVICE, LIVESTOCK SLAUGHTER 2010 SUMMARY (April 2011), *available at* http://usda.mannlib.cornell.edu/usda/current/LiveSlauSu/LiveSlauSu-04-25-2011.pdf.

127. USDA ECONOMIC RESEARCH SERVICE, AGRICULTURE OUTLOOK (June–July 2002), *available at* http://webarchives.cdlib.org/sw1rf5mh0k/http://www.ers.usda.gov/publications/agoutlook/JuneJuly2002/ao292.pdf, L. ALLEN TORELL, ET AL., THE IMPORTANCE OF PUBLIC LANDS TO LIVESTOCK PRODUCTION IN THE U.S. iv (1992).

128. 549 U.S. 497 (2007).

129. *Id*. at 504.

130. *Id*. at 511.

131. *Id*.

132. *Id*. at 513.

sea levels by the end of the century, severe and irreversible changes to natural ecosystems, a significant reduction in water storage . . . and an increase in the spread of disease."[133] The Court rejected EPA's argument that "curtailing motor-vehicle emissions would reflect 'an inefficient, piecemeal approach to address the climate change issue.'"[134] The Court held that, while it is certainly true that EPA is without power to end climate change or to address the innumerable causes of climate change taking place outside of United States borders on its own, EPA has a duty to implement the laws passed by Congress and to protect the citizens and inhabitants of the United States to the extent of its ability.[135] The Court also rejected EPA's argument that, because another federal agency was tasked with setting mileage standards, it was without power to address vehicle emissions.[136]

In affirming EPA's obligation to regulate global greenhouse gases, the Supreme Court pointed to ongoing attempts by Congress to address global climate change, including the National Climate Protection Act, the Global Climate Protection Act, and the ratification of the United Nations Framework Convention on Climate Change.[137] The Court rejected arguments that these efforts evinced the totality of congressional action to address climate change. Rather, it looked to such efforts as evidence of Congress' priority on this issue.

The Court also pointed out that, "reducing domestic automobile emissions is hardly a tentative step. . . . [T]he United States transportation sector emits . . . more than six percent of worldwide carbon dioxide emissions."[138] The Court further noted that "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[139]

As noted previously, animal agriculture is a greater contributor to global climate change than transportation. While ending grazing on federal public lands is a small step, it is a crucial one and one that BLM must take to address this pressing environmental crisis. According to the Union of Concerned Scientists, addressing the climate change impact of raising cows for food "offers an opportunity to curb a small, but measurable, amount of

133. *Id*. at 521–22 (internal citations omitted).
134. *Id*. at 533.
135. *Id*. at 524.
136. *Id*. at 532.
137. *Id*. at 507–09.
138. *Id*. at 522.
139. *Id*. at 526.

U.S. heat-trapping emissions."[140] And, as other experts have noted, "this approach would have far more rapid effects on [greenhouse gas] emissions and their atmospheric concentrations—and thus on the rate that the climate is warming—than actions to replace fossil fuels with renewable energy."[141]

BLM and other federal agencies operate under the same framework as EPA. The fact that the Department of the Interior is not the federal agency specifically tasked with addressing environmental degradation does not relieve it of responsibility to address global climate change when directly implicated by its land use decisions. This reality is all the more true given the environmental mandates in all of the statutes governing grazing on public lands. The statutes and regulations governing management of the range make clear that environmental protection is a priority, and numerous additional statutory provisions make clear that that includes global climate change. Continuing to use federal lands in a way that is detrimental to the environment and to public health violates those duties.

The power of the Court's holding in *Massachusetts v. EPA* is buttressed by the fact that the Government Accountability Office (GAO) has concluded that federal agencies have the authority to alter their practices to respond to climate change. In a 2007 report, GAO concluded: "Because there is growing evidence that climate change is likely to have wide-ranging consequences for the nation's land and water resources, elevating the importance of the issue in their respective strategies and plans would enable BLM [and the Forest Service] to provide effective long-term stewardship of the resources."[142]

In addition, BLM is bound by the Clean Air Act. One of the main purposes of the Clean Air Act is to "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of the population."[143] The Act requires the Administrator of the EPA to "cooperate with and encourage cooperative activities by all Federal departments and agencies having functions relating to the prevention and control of air pollution, so as to assure the utilization in the federal air pollution control program of all appropriate and available

140. Gurian-Sherman, *supra* note 14, at 5.

141. Goodland and Anhang, *supra* note 13, at 11.

142. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-863, CLIMATE CHANGE: AGENCIES SHOULD DEVELOP GUIDANCE FOR ADDRESSING THE EFFECTS ON FEDERAL LAND AND WATER RESOURCES 45 (2007).

143. Clean Air Act, 42 U.S.C. § 7401(b)(1) (1990).

facilities and resources within the Federal Government."[144] Thus far, EPA regulation of animal agriculture under the Clean Air Act has been limited, and in its regulations carrying out the Supreme Court's dictates following *Massachusetts v. EPA*, it has exempted certain entities including animal agriculture.[145] But that does not mean that it does not have the power.[146] And opponents of such regulation seemingly concede that EPA has that authority.[147] In June, a representative of the American Farm Bureau Federation argued that by identifying greenhouse gases as pollutants under the Clean Air Act, EPA is obligated at some point to require permits for most animal agriculture entities under current law.[148] He further pointed out that the vast majority of animal agriculture operations, including seventy-two percent of entities raising cows for food, would be required to obtain permits (at significant expense) under the existing requirements.[149]

BLM has recognized its obligation to comply with the Clean Air Act and to protect air quality and climate, including under FLPMA's mandate to prevent "unnecessary or undue degradation of the lands."[150] BLM's Air Resource Management Manual states, "incorporating climate information into the BLM's programs, projects, activities, and decisions . . . is critical for effective management and relevant environmental review."[151] The manual goes on to identify BLM policy in regards to climate change: "BLM should consider climate and potential or documented climate change as part

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144. *Id.* § 7402(b).

145. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits, 77 Fed. Reg. 41051, 41052 (July 12, 2012) (to be codified at 40 C.F.R. pt. 52).

146. Wilson, *supra* note 18.

147. *See, e.g.*, *EPA Proposes "Cow Tax": "Cow Tax" will Greatly Impact Ranchers with Strict Regulations*, BEEF MAGAZINE, Nov. 24, 2008, *available at* http://beefmagazine.com/government/1124-epa-proposes-cow-tax (demonstrating that EPA has considered regulating the emissions associated with cattle grazing); NAT'L CATTLEMEN'S BEEF ASS'N, OVERVIEW OF GREENHOUSE GAS REGULATIONS UNDER THE CLEAN AIR ACT (JUN 20, 2011), *available at* http://www.beefusa.org/CMDocs/BeefUSA/Issues/NCBA-Overview-Greenhouse-Gas-Regulations_Clean-Air-Act.pdf; AMERICAN FARM BUREAU FED'N, GREEN HOUSE GAS REGULATION, THE CLEAN AIR ACT AND POTENTIAL IMPLICATIONS FOR PRODUCTION LIVESTOCK (Nov. 20, 2008), *available at* http://www.fb.org/newsroom/nr/nr2008/11-20-08/ANPR_Title_V_Justification_Final.pdf; Megan Stubbs, CONG. RESEARCH SERV., R41622 , ENVIRONMENTAL REGULATION AND AGRICULTURE (2012).

148. *See The American Energy Initiative: A Focus on EPA's Greenhouse Gas Regulations: Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce*, 112th Cong. 6 (2012) (statement of Carl Shaffer, President, Pennsylvania Farm Bureau).

149. *Id.* at 5.

150. U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MANAGEMENT; AIR RESOURCE MANAGEMENT PROGRAM MANUAL 7300 § .02C (2009).

151. *Id.* § .01.

of its planning and decision making process."[152] The manual then identifies a number of areas that the Bureau should evaluate covering, "how BLM management practices may or may not contribute to the potential effects of climate change, including but not limited to emissions, sequestration, or mitigation of greenhouse gases."[153]

In addition, the Department of the Interior has taken other steps that evince its responsibilities to address climate change. The Secretary has issued orders "requiring Interior bureaus to analyze climate change in plans and policies;" and requiring "coordination among federal agencies to promote . . . carbon capture and storage, and climate adaptation."[154] Moreover, Department regulations require BLM to assess the conditions of the rangeland and make changes in livestock management if grazing is a factor in creating poorly functioning conditions.[155]

As noted above, the federal statutes governing grazing on public lands already provide BLM and the Forest Service with authority to restrict or end grazing on the lands. The vital need to address global climate change, and the authorities described in this section provide added weight to BLM's ability to act and additional and important confirmation of BLM's obligation to end grazing on public lands.

V. HOW DO WE GET FROM HERE TO THERE: ADDRESSING OBSTACLES TO REFORM

The above analysis provides significant basis and purpose for BLM to end grazing on public lands. The environmental impact of using public lands for grazing is severe, long-lasting, and has been recognized for more than a century. Animal agriculture's considerable contribution to the global devastation caused by climate change makes that impact more profound. Congress has provided BLM with authority to address this serious issue on several occasions. Additionally, courts have recognized BLM's authority and obligation to act. This paper builds on that of experts who have, for decades, pointed to BLM's authority and obligation to end grazing on public lands:

152. *Id.* § .06C2.
153. *Id.*
154. Catlin, Carter, and Jones, *supra* note 24, at 209.
155. *Id.* at 210.

> None of the aforementioned laws pose an obstacle to BLM taking the necessary steps to end grazing on public lands. This includes, where necessary, BLM removing livestock from the area to be protected. On the contrary, affirmative steps to conserve biodiversity would facilitate BLM compliance with several legislative mandates, including: managing the public lands for sustainable uses (FLPMA), avoiding unnecessary or undue degradation of public lands (FLPMA), conserving threatened and endangered species (ESA), and restoring the biological integrity of surface waters (CWA). A biodiversity conservation strategy calling for reduction or elimination of livestock grazing on arid BLM lands would enhance BLM's ability to comply with the letter and spirit of the CWA, state water quality law, NEPA, ESA, and FLPMA.[156]

Nevertheless, the chance of ending grazing on public lands remains at most a remote possibility. Despite the legal authority and the perils of failing to act, powerful interests prevent reform from taking place. The final section of this paper addresses three obstacles to reform: ranchers and the position they hold in the American mystique, concerns about the economic impact of ending grazing on public lands, and conflicting theories about the limits of BLM authority.

A. Changes to a Way of Life (Who's Really in Charge?)

For the most part, the desire to maintain grazing on public lands arises from a romanticization of a way of life that Americans see as central to our view of ourselves as a country. The idea of cowboys on the range is a key part of that vision. However, to the extent that that way of life ever existed, it is a thing of the past. The majority of ranches are not run by families or individuals; they are run either by large corporations[157] or by wealthy hobbyists who do not need or want to make a living from ranching.[158] Debra L. Donahue has explained in detail the way in which grazing on

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156. DONAHUE, *supra* note 41, at 227–28.

157. *See* LYNN JACOBS, WASTE OF THE WEST: PUBLIC LANDS RANCHING 26 (1991) (explaining that corporate ranchers dominate grazing on public lands); John A. Tanaka et al., *Who Are Public Land Ranchers and Why Are They Out There?*, 4 W. ECON. F., Fall 2005, at 14, *available at* http://waeaonline.uwagec.org/WEForum/WEF-Vol.4-No.2-Fall2005.pdf.

158. *See* Tanaka et al., *supra* note 157; Feller, *supra* note 3, at 1127.

public lands continues despite the small numbers of ranchers, low economic impact, and detrimental environmental consequences.[159] Donahue details how the animal agriculture industry has "captured" the management of the public lands through establishing property rights in the resource, controlling the agencies that are supposed to regulate the industry, and capturing American life and culture through the cowboy myth.[160] She argues that the way the "range livestock industry has exploited the capture metaphor is unequalled and that, unless checked, it is likely to be disastrous for public lands."[161]

This is a way of life that many in the west and their advocates are willing to protect at nearly any cost. The so-called Sagebrush Rebellion in the 1970s, in which several western state legislatures—responding to federal law and successful court cases—passed bills purportedly taking state ownership of BLM lands, exemplified this fact.[162] The Sagebrush Rebellion culminated in the election of Ronald Reagan, who brought its theories and individuals with him to Washington.[163] While the "rebels" did not succeed in transferring significant portions of BLM lands to state or private ownership, they did succeed in significantly weakening BLM and Forest Service management of the range.[164] That mindset continues to exist within ranchers and representatives of western states. And some are willing to engage in or threaten violence to maintain this way of life.[165]

This reality represents the greatest obstacle to reforming public rangeland policy and ending grazing on public lands. However, as explained in detail above, this obstacle is not a legal obstacle. Federal courts have refused to recognize a right in the public lands that states and ranchers have demanded. Similarly, there is no legal requirement for grazing to retain its special status under existing law. Rather, the reverse is true: BLM's obligations do not change despite the considerable political pressure to maintain the status quo.

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159. Donahue, *supra* note 52, at 803–04.

160. *Id*.

161. *Id*. at 723.

162. *See* Jacobs, *supra* note 157, at 456–57 (providing a description of the Sagebrush Rebellion).

163. *Id.*

164. *Id.*

165. *See* Donahue, *supra* note 43, at 106 (relaying stories of western lawlessness, specifically violent confrontations between ranchers, farmers, and agency officials); ERIK MARCUS, VEGAN: THE NEW ETHICS OF EATING 181–82 (2001); Keith Rogers, *BLM Warns It Will Round Up Rancher's Cattle From Public Land*, LAS VEGAS REV.-J., http://www.lvrj.com/news/blm-warns-it-will-round-up-rancher-s-cattle-from-public-land-146948495.html (last updated Apr. 11, 2012).

B. Purported Economic Impacts of Ending Grazing

Often, concerns about ending grazing on public lands stem from the economic impact this decision would have on local communities. As Debra L. Donahue has pointed out, and as fully documented above, the relevant agencies have not:

> [R]easonably justified livestock grazing under the planning or management criteria of their principal land management statutes. . . . Instead, grazing is rationalized as a means of sustaining small communities, maintaining open spaces on private lands, and preserving an important western way of life and culture. The governing statutes, however, confer on BLM and Forest Service no authority, much less a mandate, to promote local economic or lifestyle concerns or to regulate development on private lands.[166]

In *National Resources Defense Council v. Hodel*, the court seemed to confirm that ending grazing on public lands was not a viable economic alternative. The court stated:

> [T]he complete abandonment of grazing in the Reno planning area is practically unthinkable as a policy choice; it would involve monetary losses to the ranching community alone of nearly 4 million dollars and 290 jobs, not to mention unquantifiable social impacts. Of course, compared with the economy of the Reno area as a whole, ranching plays only a negligible role. Nevertheless, eliminating all grazing would have extreme impacts on this small community. A 'no grazing' policy is simply not a 'reasonable alternative' for this particular area.[167]

As noted previously, BLM has acted under an assumption that it does not have the authority to seriously consider ending grazing on public

166. Donahue, *supra* note 52, at 729 (internal citations omitted).
167. Hodel, 624 F. Supp. at 1054 (internal citations omitted).

lands.[168] However, even taking the economic impact into account, grazing on public lands cannot be justified:

> Federal grazing fee revenues . . . are swamped by the costs of administering the range program. Average returns to ranchers range from negative to two to four percent. Only two percent of U.S. beef cattle production is attributable to public lands, an amount easily replaceable by other regions and private-land operators. Similarly, the 18,000 low-wage jobs directly related to federal land grazing could be replaced in a matter of days by normal job and income growth in the national economy. . . . [F]ew if any western communities are dependent economically on public-land grazing. On the contrary, the services and employment opportunities afforded by small towns help sustain public land ranchers.[169]

A 1994 Department of the Interior Draft Environmental Impact Statement, issued in regards to the regulations discussed in Part III. A. above, estimated that stopping all grazing on federal lands would only result in job losses of 18,300 and would negligibly affect the cost of cow flesh.[170]

As noted above, the laws governing grazing on public lands all call for grazing fees to be paid by permittees. However, the grazing fees have never been high enough to achieve their objective of helping to provide better care of the lands. The grazing fee has seldom been raised since PRIA was enacted.[171] In 1986, President Reagan issued an executive order setting the fee at no less than $1.35 per animal unit month (AUM, the amount of forage needed by one cow for one month).[172] That amount, substantially less than the fair market value in 1986, has remained relatively constant for

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168. *See, e.g.*, W. Watersheds Project v. Salazar, 2009 U.S. Dist. LEXIS 39364 (D. Idaho 2009) (noting that BLM has concluded that it has no legal authority to consider a "no grazing" alternative.); Rosenkrance, 2011 U.S. Dist. LEXIS 1288 (describing BLM's "No Action Alternative" and the agency's subsequent rejection of said alternative).

169. Donahue, *supra* note 52 at 728–730.

170. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, RANGELAND REFORM, '94: DRAFT ENVIRONMENTAL IMPACT STATEMENT 4-118 to 4-121 (1994).

171. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-869, LIVESTOCK GRAZING: FEDERAL EXPENDITURES AND RECEIPTS VARY, DEPENDING ON THE AGENCY AND THE PURPOSE OF THE FEE CHARGED 83, 85 (2005) (outlining fee data from 1979-2004 and fee results for 1980-2005).

172. Exec. Order No. 12548, 51 Fed. Reg. 5985, (1986).

the last twenty-five years.[173] In 1980, BLM charged $2.36 and the Forest Service $2.41 per AUM.[174] That amount was gradually reduced until it fell to $1.35 in 1985.[175] The rate has been raised on several occasions since that time, but has not risen above $2 since 1981.[176] Most years, it has remained at $1.35,[177] and that is where the rate currently sits.[178]

As a result, entities who use public lands for grazing receive a substantial government subsidy. GAO has estimated that taxpayers pay approximately $144 million per year managing federal lands for grazing.[179] Only $21 million is recouped in grazing fees.[180] The government would need to charge at least $7.64 per AUM for grazing on BLM lands and $12.26 for grazing on Forest Service lands just to recoup the investment made.[181] States and private entities charge significantly more for use of their lands for grazing.[182]

Clearly, using public lands for grazing—in addition to having detrimental environmental effects—is not the best economic use of the lands:

> In 1991, public land grazing fees for the entire U.S. raised just under 30 million dollars. The beneficiaries of this government bonanza are a relative handful of elite range ranchers. Research by Fortune magazine reveals that the nation's 28,700 livestock permits are controlled by only 2.5 percent of all American ranchers, and half of the permits go to just a quarter of a percent of all ranchers. These permit holders pay one-quarter the price that they would pay for comparable leases on private land.[183]

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173. U.S. Gov't Accountability Office, *supra* note 142; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-869, LIVESTOCK GRAZING: FEDERAL EXPENDITURES AND RECEIPTS VARY, DEPENDING ON THE AGENCY AND THE PURPOSE OF THE FEE CHARGED 83, 85 (2005) [hereinafter GAO-05-869].

174. GAO-05-869, *supra* note 173, at 83.

175. *Id*.

176. *Id*.

177. *Id*.

178. *See* Press Release, U.S. Dep't of the Interior, BLM and Forest Service Announce 2012 Grazing Fee (Jan. 31, 2012), *available at* http://www.blm.gov/wo/st/en/info/newsroom/2012/january/NR_01_31_2012.html.

179. U.S. Gov't Accountability Office, *supra* note 142, at 5.

180. *Id*. at 6.

181. *Id*. at 7.

182. *Id*.

183. Marcus, *supra* note 165, at 183.

However, simply looking at what ranchers would be paying under a fair market system is not a realistic analysis of the economic impact of ending grazing. Even if the rates were raised to the amount necessary to manage the lands, the environmental and public health impacts of this use of the land would not be taken into account. As a result, the economic vitality of continuing to engage in this industry is propped up. Requiring ranchers to pay the true value of grazing on public lands would change the calculus for them and for courts assessing the economic considerations of continuing to use the lands in this fashion. There are many more economic benefits to ending grazing on public lands, both to the United States and to local communities, than to continuing it. And, regardless of the economic impact, there is nothing in FLPMA or other federal laws that requires the economic impact on the rancher or the surrounding community to be a consideration in issuing grazing permits.

C. Limitations on BLM's Authority to Protect the Range?

As noted above, many courts have found that BLM has acted outside of its authority in failing to protect the environment. Few courts have held that BLM exceeded its authority in making decisions to protect the environment. Moreover, cases in which courts, including the Supreme Court, have held that BLM need not act to protect the environment, do not preclude it from doing so. Courts have long held that, while the land management decisions of BLM may be questionable, making decisions about grazing remains in the Secretary's discretion.

One case in which a court held that BLM had exceeded its authority under the TGA is the Tenth Circuit's decision, discussed previously, in *Public Lands Council v. Babbitt*. The court held that BLM did not have the authority to issue grazing permits for the purpose of conservation. The regulations would have allowed BLM to issue permits for a use that specifically excluded livestock grazing.[184] The purported authority for this provision was section three of the TGA, which allows the Secretary to "issue permits to graze livestock" on public lands.[185] The court found that the intent of Congress on this point was unambiguous and that there was no room for the agency to interpret it differently: "[L]and that [the Secretary] has designated as 'chiefly valuable for grazing livestock' will be completely

184. Babbit, 167 F.3d at 1307.
185. *Id.*

excluded from grazing use."[186] However, this holding says nothing about BLM's authority to remove land from grazing entirely, an authority, which—as fully documented above—it clearly has. The court went on to state that "the Secretary [has] very broad authority to manage the public lands, including the authority to ensure that range resources are preserved. Permissible ends such as conservation, however, do not justify unauthorized means."[187]

As noted above, BLM has taken the position that it cannot end grazing on public lands. But the limits on BLM's authority are largely self-imposed. BLM decisions are entitled to substantial discretion and should be upheld unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[188] or unless they are contrary to the unambiguous intent of Congress.[189] The underlying statutes provide BLM with significant discretion to act as it sees fit; the language of FLPMA "breathes discretion at every pore."[190] Other commentators have noted that:

> Conservation-oriented actions, such as the designation and management of areas of critical environmental concern, and management for scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values, are authorized in broad but definitive strokes. Conversely, resource exploitive actions such as grazing are authorized in more narrow strokes due to functional limitations imposed by FLPMA's mandate to not permanently impair the productivity of the land and quality of the environment or cause unnecessary or undue degradation.[191]

Each of the authorities explored above gives BLM responsibility for protecting the environment as a primary objective. A decision to end grazing on public lands is clearly beyond the power that BLM considers it has or the power thus far recognized by the federal courts. Nevertheless, protecting the environment and public health for future generations is a

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186. *Id.* at 1308.

187. *Id*.

188. Administrative Procedure Act, 5 U.S.C. § 706 (1966).

189. Chevron v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984).

190. Hodel, 624 F. Supp. at 1058; *see also* Perkins, 608 F.2d at 806 (interpreting similar language in the law governing the Forest Service).

191. Schlenker-Goodrich, s*upra* note 8, at 166.

fundamental objective of Congress and of the agencies carrying out its objectives. The statutes providing authority to BLM and the Forest Service, other federal laws requiring protection of the environment, and the cases interpreting these laws and authorities all provide ample support for significantly reducing or ending grazing on public lands. BLM has the authority to act to truly protect the rangelands from the long-term damages of overgrazing. It simply has to do so.

CONCLUSION

Congress has long recognized the detrimental effects that grazing has on the public lands. For this reason and others, Congress has given BLM, the Forest Service, and other public agencies ample authority to make decisions that are protective of the environment. Those agencies, however, have not always been willing to take this authority and use it to improve environmental conditions. However, the issues facing the world are growing and serious. Congress is not always able to act quickly and effectively to address some of the major issues of our time. Administrative agencies, however, are better able to act quickly and should take the authority given to them to take actions in the public interest and in the interests of the natural environment and humanity.

While ending grazing is not a sufficient step to address these serious and intractable problems, it is a necessary and a significant step. At the very least, the federal government should not be using its lands and subsidizing activities so harmful to the earth and all its inhabitants. The statutes and regulations governing the use of public lands for grazing allow—and arguably compel—the end of the use of lands for this purpose. The environmental crisis facing the U.S. and the world necessitates that federal agencies take all available steps to mediate the impacts of global climate change and to use their resources in a way that is not detrimental to the natural environment and human health. Use of public lands for grazing undermines both of these considerations. Eliminating grazing on public lands will allow the lands to begin to recover. This will address many of the negative environmental effects of overgrazing and poor range management. At the same time, it will eliminate a significant cause of global climate change from the public lands, and allow the rangeland to ameliorate the impacts of climate change through sequestration of carbon. These are all goals that are in the public interest of the country going forward. It is time for BLM to act.