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An Agricultural Law Research Article

**Can North Dakota Grazing Survive a Wilderness
or Wild and Scenic Designation—Are there
Cattle In Nature?**

by

Agricultural Law/Economics Research Program

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CAN NORTH DAKOTA GRAZING SURVIVE A WILDERNESS OR WILD AND SCENIC DESIGNATION—ARE THERE CATTLE IN NATURE?

Agricultural Law/Economics Research Program*

I. INTRODUCTION

A group of environmental organizations has proposed that portions of North Dakota be designated as federal wilderness and that lengths of two rivers be designated as wild and scenic.¹ The proposal, entitled "Badlands on the Brink" [hereinafter Badlands Proposal], requests wilderness designation for more than 150,000 acres in the Little Missouri National Grasslands, 18,000 acres in the Sheyenne Grasslands, and 15,000 acres in the J. Clark Salyer National Wildlife Refuge.² The organizations also propose wild and scenic river designation for the Little Missouri River and a portion of the Pembina River.³

While most of the areas directly affected by the Badlands Proposal are federally-owned lands that are leased to ranchers for grazing purposes, other state and privately-owned lands also are affected. A concern that arises is whether the proposed designations would mandate a change

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1. BADLANDS ON THE BRINK, NORTH DAKOTA WILDERNESS AND WILD AND SCENIC RIVER PROPOSAL (Susan Richter, May 1993) (on file with Central Legal Research) [hereinafter BADLANDS PROPOSAL]. Sponsoring organizations of the proposal include the Dacotah Chapter of the Sierra Club, the North Dakota Wildlife Federation, the Three Affiliated Tribes of North Dakota, Clean Water Action, North Dakota Wildlife Society, the Bismarck-Mandan Bird Club, The UND Environmental Conservation Organization, NDSU Environmental Action Committee, Lewis and Clark Wildlife Club, the Sierra Club, the National Wildlife Federation, American Wildlands, American Rivers, National Parks and Conservation Association, The Wilderness Society, the National Audubon Society, and the Fargo-Moorhead Audubon Society. *Id.* at i.

North Dakota Governor Ed Schafer's proposal, "Vision 2020," is expected to offer a different view of wilderness designation in the Badlands. *Schafer Discusses Badlands Issues*, GRAND FORKS HERALD, Feb. 18, 1994, at 3A. The basis for Vision 2020 is a technical analysis written primarily by the United States Forest Service and the respective state division in North Dakota. Telephone interview with Tim Roby, News Relations-Governor's Office (Feb. 23, 1994). The technical analysis has probably ruled out "large-scale wilderness designation" due to private property rights, such as mineral rights, in the Badlands. Mike Jacobs, *Schafer Opens Way to Wilderness Accord*, GRAND FORKS HERALD, Mar. 4, 1994 at 4A.

2. BADLANDS PROPOSAL, *supra* note 1, at 2.

3. *Id.*

in the current use of these lands. The primary questions addressed in this discussion are:

1. whether current grazing activities are compatible with the land-use restrictions imposed by wilderness or wild and scenic designation, and
2. whether federally-owned land acquired and managed under the authority of one federal law can be designated as wilderness or wild and scenic according to subsequent federal legislation if the purposes of the two laws are not identical.

Focusing primarily on the legal implications that a wilderness or wild and scenic designation may have on existing grazing practices, this article examines three federal laws that influence the viability of the Badlands Proposal. Part II discusses the general provisions of the Wilderness Act⁴ and the Congressional guidelines for grazing activities in areas designated as wilderness. Part III describes the provisions of the Wild and Scenic River Act⁵ [hereinafter Scenic Act] and the impact that a wild and scenic designation would have on present grazing activities—whether on federal, state, or private land. Because the vast majority of land proposed for designation as wilderness is federally-owned National Grasslands,⁶ Part IV analyzes the federal range policy of the Bankhead-Jones Farm Tenant Act⁷ [hereinafter Bankhead-Jones], under which the National Grasslands are managed.⁸ Part V analyzes whether Bankhead-Jones land can be designated as wilderness or wild and scenic. The effects of wilderness and wild and scenic designation on the remaining nonfederal lands in the Badlands Proposal, specifically the North Dakota school trust lands, are briefly covered in Part VI.

4. 16 U.S.C. §§ 1131-36 (1988).

5. *Id.* §§ 1271-87 (Supp. 1993) [hereinafter Scenic Act].

6. Compare BADLANDS PROPOSAL, *supra* note 1 (generally indicating the area of land encompassed by the proposal) with U. S. DEPT. OF AGRICULTURE, FOREST SERVICE, LITTLE MISSOURI NATIONAL GRASSLAND NORTH DAKOTA: FOREST VISITORS MAP (1986) (specifically indicating federal, state, or private ownership of land in North Dakota) [hereinafter FOREST VISITORS MAP]. The proposal entails predominately Little Missouri National Grassland with some North Dakota state school lands, a lesser amount of private inholdings, and 40 acres of Bureau of Land Management [hereinafter BLM] lands in the Long X Divide wilderness proposal. BADLANDS PROPOSAL, *supra* note 1, at 9. The remaining land proposed for wilderness designation is in the Shenyenne National Grasslands (with 200 acres of private inholdings) and portions of the J. Clark Salyer National Wildlife Refuge. *Id.* at 11-12.

7. 7 U.S.C. §§ 1001-40 (1988) [hereinafter Bankhead-Jones].

8. 36 C.F.R. §§ 213.1(a), (b) (1993) (specifying that “[t]he National Grasslands [are] part of the National Forest system and [are administered] under . . . the Bankhead-Jones Farm Tenant Act”); *see also* Frederick W. Obermiller, *The Past, Present, & Future of Grazing on the National Grasslands*, Speech at the 15th Annual Meeting of the Association of National Grasslands, Inc. 20 (Sept. 25, 1992) (transcript on file at Central Legal Research) (describing the creation of the first 19 National Grasslands in 1960) [hereinafter Obermiller Speech].

This article does not discuss

- whether Congress should designate the land as wilderness, and the rivers as wild and scenic;
- whether the physical features of the areas warrant a wilderness designation; and
- the ramifications for other activities, such as oil and gas enterprises in an area designated wilderness, or the construction of a dam if the river is designated wild or scenic.

II. THE WILDERNESS ACT

During the 1920s and 1930s, "the Secretary of Agriculture and the Chief of the Forest Service . . . set aside certain primitive areas of the national forests as wilderness-type areas" with the intention that they be managed to give greater protection from commercial enterprises and to preserve their primitive character.⁹ The lands were set aside by administrative action.¹⁰ The absence of statutory authority for the actions prompted concern in the late 1940s and early 1950s about "the federal officials' unrestricted power over, and the tenuous status of, these wilderness-type areas."¹¹ "[E]stablished by administrative action . . ., any of [these areas] could be similarly declassified and abolished by administrative action."¹² Thus, legislation was introduced "in 1956 to give statutory recognition to, and congressional control over, [these] wilderness-type areas."¹³ Congressional action resulted in the Wilderness Act of 1964.¹⁴

The Wilderness Act established a National Wilderness Preservation System to preserve and protect certain federal lands as "wilderness areas."¹⁵ "[T]he primary motivation of Congress . . . 'was to guarantee that these lands will be kept in their original untouched natural state' "16 and that they will "be protected rather than exploited for commercial purposes"17 Unless otherwise provided by Congress, a "wilderness area" will continue to be managed by the department or agency that had jurisdiction over the area immediately prior to the designation.¹⁸

9. *Sierra Club v. Block*, 622 F. Supp. 842, 849 (D. Colo. 1985).

10. Wilderness Act, Pub. L. No. 88-577, 1964 U.S.C.A.N. (78 Stat. 890) 3615, 3616 [hereinafter Wilderness Act, 1964 U.S.C.A.N.].

11. *Block*, 622 F. Supp. at 849.

12. Wilderness Act, 1964 U.S.C.A.N., *supra* note 10, at 3616.

13. *Block*, 622 F. Supp. at 849.

14. *Id.*

15. 16 U.S.C. § 1131(a) (1988).

16. *Block*, 622 F. Supp. at 850 (quoting 110 Cong. Rec. 17448 (statement of Rep. Cleveland) (discussing Congress' motivation in establishing the wilderness preservation system)).

17. *Id.*

18. 16 U.S.C. § 1131(b) (1985).

Only Congress has the authority to designate land as a "wilderness area."¹⁹ To qualify for inclusion in the National Wilderness Preservation System, land proposed for wilderness designation must meet the definition of wilderness and its qualifying characteristics;²⁰ that is, it must be an area in which natural forces predominate and man is a visitor.²¹

More specifically, wilderness is:

an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.²²

If state-owned or privately-owned land is included within a "wilderness area," the federal government grants adequate access to the owners or exchanges other federal lands of equal value in the state for the lands.²³ The federal government also has authority to acquire privately-owned lands either from willing sellers or by condemnation.²⁴

An area designated as wilderness is an area that is to be "devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."²⁵ A wilderness designation prohibits

- commercial enterprise,
- permanent roads,
- temporary roads,
- use of motor vehicles, motorized equipment, or motorboats,
- landing of aircraft,

19. *Id.* § 1131(a).

20. *Parker v. United States*, 309 F. Supp. 593, 599-600 (D. Colo. 1970).

21. 16 U.S.C. § 1131(c) (1988). "A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain." *Id.*

22. *Id.*

23. *Id.* § 1134(a) (1988); see generally BADLANDS PROPOSAL, *supra* note 1 (stating that approximately 7,100 acres of state-owned land and 2,300 of privately-owned land are included in the proposed wilderness areas).

24. *Id.* § 1134(c) (1988). "Subject to the appropriation of funds by Congress, the Secretary of Agriculture is authorized to acquire privately-owned land within the perimeter of any area designated by this chapter as wilderness if (1) the owner concurs in such acquisition or (2) the acquisition is specifically authorized by Congress." *Id.*

25. *Id.* § 1133(b) (1988).

- other forms of mechanical transportation, and
- structures and installations.²⁶

Some nonmotorized equipment also are proposed to be prohibited within wilderness areas.²⁷

Restrictions on uses in a wilderness area are in the original Wilderness Act.²⁸ Subsequent Congressional legislative enactments designating new wilderness areas implicitly incorporate the restrictions on uses because each new designation becomes part of the original Wilderness Act.²⁹ Therefore, any new wilderness area is subject to the Act's restrictions on uses.

With these prohibitions come a myriad of exceptions. For example, if necessary for the administration of the wilderness area, temporary roads, motorized equipment, mechanical transportation, landing of aircraft, structures, and installations will be permitted.³⁰ Exceptions are permitted when emergencies arise involving the health and safety of the persons within the area,³¹ and when it is necessary to control fire, insects, or diseases.³² The continued use of aircraft and motorboats established prior to the area's designation as wilderness is another permitted exception; however this continued use will be subject to restrictions by the Secretary of Agriculture,³³ or whomever has administrative responsibility for the designated area.³⁴

In addition to the exceptions previously mentioned, the wilderness prohibitions are subject "to existing private rights' . . . in the [Wilderness] Act."³⁵ Examples of existing private rights include privately-owned land, prior easements for public utilities, timber sale and harvesting con-

26. 16 U.S.C. § 1133(c) (1988).

27. 58 Fed. Reg. 56104 (1993) (proposing rule to be codified at 36 C.F.R. § 293.6(a)) (expanding the definition of prohibited motorized transport to include bicycles, hang gliders, and wheeled carts as well as prohibiting competitive events).

28. 16 U.S.C. § 1133 (1988) (outlining use of wilderness areas).

29. *E.g.*, Pub. L. No. 94-557, § 2(a), 90 Stat. 2634 (1976). The public law designating wilderness in Minnesota is codified at section 1132, title 16, of the United States Code, *id.*, which is one of the sections of the Wilderness Act. *See* 16 U.S.C. §§ 1131-1136 (1988).

30. 16 U.S.C. § 1133(c) (1988) (providing prohibitions and exceptions).

31. *Id.*

32. 16 U.S.C. § 1133(d) (1988).

33. *Id.* The Wilderness Act does not include an exception for motor vehicles in the special provisions section of the statute. *Id.* However, the federal regulations do address motorized equipment in Forest Service wilderness. *Id.*

34. For example, in the National Grasslands, the Secretary of Agriculture has delegated authority to manage the grasslands to the Chief of the Forest Service. 36 C.F.R. § 222.1(a) (1993). When a tract in the National Grasslands is designated as wilderness, the Chief of the Forest Service continues to manage the tract. *E.g.*, 36 C.F.R. § 293.3(a) (1993). Other managers of wilderness lands include the Director of the Fish and Wildlife Service and the Director of the Bureau of Land Management, both under the Secretary of the Interior. *See e.g.*, 50 C.F.R. §§ 35.1 to 35.14 (1992) (defining wilderness rules and regulations for Fish and Wildlife Service lands); 43 C.F.R. §§ 8560.0-1 to .5 (1992) (defining wilderness rules for the BLM).

35. *Minn. Pub. Interest Research Group v. Butz*, 541 F.2d 1292, 1297 (8th Cir. 1976) (quoting 16 U.S.C. § 1133(c) (1988)).

tracts, and water rights. The Wilderness Act explicitly provides for the treatment of some of these existing private rights. For example, if privately-owned land is included within a "wilderness area," the federal government must grant the property owner adequate access to the property or must purchase, exchange, or condemn the property.³⁶

Unless a previously established use in a wilderness area has been "grandfathered in" by reserving a right when the land is conveyed to federal ownership, a user seeking to continue an established use must petition for "occupancy and use" of the wilderness area.³⁷ The Forest Service, having administrative power over the National Grasslands, applies a discretionary standard of review on whether to grant the petition for occupancy and use.³⁸ Factors considered by the Forest Service include the "controversy surrounding the decision, the potential for litigation, and whether the . . . decision is precedential in nature or establishes new policy."³⁹

Related to the "previously established use" exception is another exception for grazing activities; that is, grazing established prior to September 3, 1964 is permitted to continue subject to reasonable regulation by the Secretary of Agriculture.⁴⁰ Because land managers of the national forest wilderness areas were discouraging or unduly restricting grazing,⁴¹ Congress, in 1979, clarified its intent to allow grazing. "The legislative history of [the Wilderness Act] is very clear in its intent that livestock grazing, and activities and the necessary facilities to support a livestock grazing program, will be permitted to continue in National Forest wilderness areas, when such grazing was established prior to classification of an area as wilderness."⁴²

To ensure that this intent would be implemented, Congress incorporated into the Wilderness Act grazing guidelines for administering national forest wilderness.⁴³ The guidelines specify that a wilderness

36. See *supra* notes 23-24 and accompanying text.

37. *E.g.*, 36 C.F.R. § 251.100(a) (1993) (requiring a petition for discretionary review by a Forest Service Reviewing Officer).

38. *Id.*

39. *Id.*

40. 16 U.S.C. § 1133(d)(4)(2) (1988); *but see* the following for dates determining the status of existing grazing when the area is designated as wilderness: 36 C.F.R. § 293.7 (1993) (allowing existing grazing to continue on wilderness-designated national forest lands); 43 C.F.R. § 8560.4-1 (1992) (allowing existing grazing to continue on wilderness-designated BLM lands); *see also* 50 C.F.R. § 35.9 (1992) (allowing existing grazing to continue on wilderness-designated United States Fish and Wildlife Service lands).

41. H.R. REP. NO. 617, 96th Cong., 1st Sess. 11 (1979) (discussing Congress' motive for adopting guidelines on grazing in national forest wildernesses) [hereinafter H.R. 617]; *see also* Mitchell P. McClaren, *Livestock in Wilderness: A Review and Forecast*, 20 ENVTL. L. 857, 865-877 (1990) (discussing the adoption of grazing guidelines for national forest wildernesses). *See infra* Appendix I for a complete reproduction of the guidelines.

42. H.R. 617, *supra* note 41, at 10.

43. *See* Pub. L. No. 96-560, § 108, 94 Stat. 3271 (1980).

designation shall not curtail grazing in national forests nor expand it unless there will be no adverse impact on the wilderness.⁴⁴ They also specify that the reasonableness and necessity of existing practices are to be considered.⁴⁵

The guidelines attempt to prevent permanent change or further distractions from the wilderness appearance by developing a balance between 1) the limited human activities envisioned for wilderness areas and 2) the level of activities involved in grazing livestock. Although grazing practices will be subject to the dominant wilderness values, Congress stated in the guidelines that a wilderness designation will not be used by administrators as an excuse to "phase out" existing grazing activities.⁴⁶

The guidelines, for example, permit the use of motorized equipment, such as "backhoes to maintain stock ponds" "on a rule of practical necessity and reasonableness," but also suggest that "motorized equipment need not be allowed for the placement of small quantities of salt or other activities where such activities can reasonably and practically be accomplished on horseback or foot."⁴⁷ As another example, when replacing or reconstructing livestock management facilities, such as fences and corrals, grazing permittees are not required to use "natural materials" if "the material and labor costs of using [such] materials . . . impose unreasonable additional costs"⁴⁸ However, new improvements should be built "primarily for . . . resource protection and the more effective management . . ." rather than to expand grazing capacity.⁴⁹

Congress formalized these grazing guidelines as part of the Colorado Wilderness Act.⁵⁰ Though the guidelines were directed at Forest Service lands, Congress continues to reaffirm the guidelines in subsequent legislation designating wilderness areas.⁵¹

The Congress hereby declares that, without amending the Wilderness Act of 1964, with respect to livestock grazing in National Forest wilderness areas, the provisions of the Wilderness Act relating to grazing shall be interpreted and administered in accordance with the guidelines contained under the heading 'Grazing in National Forest Wilderness' in the House Committee Report (H. Report 96-617) accompanying this Act.

Id.; see also H.R. 617, *supra* note 41, at 10-12 (outlining the grazing guidelines); *infra* Appendix I (reproducing the complete grazing guidelines).

44. H.R. 617, *supra* note 41, at 11-12.

45. *Id.*

46. See *infra* Appendix I.

47. *Id.*

48. *Id.*

49. *Id.*

50. Pub. L. No. 96-560, 94 Stat. 3265 (1980) (designating certain national forest system lands as wilderness in the states of Colorado, South Dakota, Missouri, South Carolina, and Louisiana).

51. See McClaren, *supra* note 41, at 876-89 (detailing Congressional references to the guidelines, for example, with respect to the United States Department of Agriculture's grazing policies in Arizona, Utah, Wyoming, and Nebraska); see also *supra* note 40 (discussing land management regulations allowing existing grazing in national forest, BLM, and United States Fish and Wildlife Service lands); Arizona Wilderness Act, Pub. L. No. 98-406, § 101(f)(1), 98 Stat. 1485, 1489 (1984); Utah Wilderness Act, Pub. L. No. 98-428, § 301(a), 98 Stat. 1657, 1660 (1984);

In summary, land designated as wilderness is intended to be preserved in its primitive character by restricting man's activities. Certain uses, such as permanent roads, are absolutely prohibited, while other uses established before the wilderness designation, such as grazing, may continue subject to restrictions imposed by the Secretary of Agriculture or the authorized administrative agency. Since only federally-owned land can be designated wilderness, private or state-owned land within the targeted area must be acquired by the federal government or the owners must be granted adequate access to their property.

III. THE WILD AND SCENIC RIVERS ACT

The initial impetus for preserving streams and rivers in their natural state came from the National Park Service in 1960.⁵² Recognizing water scarcity and countering an anticipated increase in demand for water projects, "the National Park Service recommended '[t]hat certain streams be preserved in their free-flowing condition because their natural scenic, scientific, esthetic and recreational values outweigh their value for water development and control purposes'"⁵³

The Scenic Act was patterned after the Wilderness Act.⁵⁴ "Congress' goals were decidedly preservationist"⁵⁵ for both laws.⁵⁶ Passed in 1968, the Scenic Act provided a national wild and scenic rivers system for preserving and protecting selected rivers and their immediate environments.⁵⁷

Including a river in the preservation system will depend on the "character of the river"⁵⁸ For example, inclusion of a river may be based solely on its value as a completely natural river, while another river may be included based on its recreational opportunities.⁵⁹ To accommodate these different reasons, the Scenic Act provided for three classes of rivers.⁶⁰ These classes are: (1) wild river areas, which "represent vestiges

Wyoming Wilderness Act, Pub. L. No. 98-550, § 501, 98 Stat. 2807, 2813 (1984); Nebraska Wilderness Act, Pub. L. No. 99-504, § 102(b)(1), 100 Stat. 1802 (1985). Each of these public laws directly referred to the grazing guidelines. These public laws are codified in section 1132 of title 16 of the United States Code, a section of the Wilderness Act. 16 U.S.C. §§ 1131-1136.

52. Wild and Scenic Rivers Act, Pub. L. No. 90-542, 1968 U.S.C.C.A.N. (82 Stat. 906) 3801, 3801-02 [hereinafter Scenic Rivers, 1968 U.S.C.C.A.N.].

53. *Id.*

54. *Id.* at 3822.

55. *Wilderness Society v. Tyrrel*, 701 F. Supp. 1473, 1482 n.8 (E.D. Cal. 1988) (discussing the policy of the Wild and Scenic Rivers Act), *rev'd*, 918 F.2d 813 (1990).

56. *Id.*; *Sierra Club v. Block*, 622 F. Supp. 842, 850 (D. Colo. 1985) (discussing Congress' primary motivation in enacting the Wilderness Act).

57. *Wilderness Society v. Tyrrel*, 918 F.2d 813, 815 (9th Cir. 1990); *see also* 16 U.S.C. §§ 1271-72 (1988).

58. Scenic Rivers, 1968 U.S.C.C.A.N., *supra* note 52, at 3803 (stating that "different streams need to be protected and preserved for different reasons").

59. *Id.*

60. 16 U.S.C. § 1273(b) (1988).

of primitive America;" (2) scenic river areas, which are largely primitive and undeveloped but have some road accessibility; and (3) recreational river areas, which are readily accessible by road.⁶¹ Regardless of the reason for including a river in the system, that river must "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values"⁶² The Badlands Proposal urges that the targeted area of the Pembina River be designated scenic and that alternating segments of the Little Missouri River be designated wild or scenic.⁶³

If a river meets the criteria for designation, there are two methods by which that river may be included in the national wild and scenic rivers system⁶⁴—an act of Congress⁶⁵ or an act of the legislature of the state through which the river flows with approval of the Secretary of the Interior.⁶⁶ North Dakota's Little Missouri River, although designated a state scenic river, has not been included in the national system.⁶⁷

A river included in the preservation system is protected from the construction of any new federal dam or other water resource project⁶⁸ on or directly affecting that river.⁶⁹ For example, on the federally designated

61. *Id.*

62. *Id.* § 1271.

63. BADLANDS PROPOSAL, *supra* note 1, at 16-17.

64. *Tyrrel*, 918 F.2d at 815.

65. *Id.* (discussing 16 U.S.C. § 1273(a)(i) (1988)).

66. *Id.* (discussing 16 U.S.C. § 1273(a)(ii)(1988)). Upon application from the governor of the state to the Secretary of the Interior, a state can designate a river for inclusion in the national wild and scenic rivers system provided the Secretary of the Interior finds that the river meets the established criteria and approves the river for inclusion in the system. *Id.*

North Dakota legislatively designated the Little Missouri River as a State Scenic River in 1975. N.D. CENT. CODE §§ 61-29-01 to -06 (1985). The intent of the Little Missouri State Scenic River Act was to preserve the river from the South Dakota state line to Lake Sakakawea, *id.* § 61-29-03, "as nearly as possible in its present state . . . mean[ing] that the river will be maintained in a free-flowing natural condition" *Id.* § 61-29-02. The law does not allow any "impoundment, diversion, straightening, or other modification" to the river. *Id.* § 61-29-03(2). "Channelization, reservoir construction, or diversion" is allowed for "agricultural or recreational purposes." *Id.* § 61-29-06. Apparently water reservoirs are not prohibited along the Little Missouri River as long as the construction does not impound the mainstream of the river. Arguably, the state law does not prohibit impoundments outside the mainstream nor the deepening of the river to pool additional water. Flood control dikes, and "[d]iking and riprapping for bank erosion control" also are allowed. *Id.*

Unlike the federal Scenic Act, the North Dakota law has no provision to condemn land, and instead allows private property owners "to use the waters for domestic purposes, including livestock watering" *Id.* Grazing activities and livestock use of the Little Missouri River are not prohibited by the current state law. *Id.*

The Badlands Proposal specifies that the state scenic designation "offers only limited protection" for the river and is thus the rationale for proposing a federal wild and scenic designation for the Little Missouri River. BADLANDS PROPOSAL, *supra* note 1, at 16.

67. Telephone conversation with employee of North Dakota Department of Game and Fish, July 6, 1994.

68. 16 U.S.C. § 1278(a) (1988). Examples of other water resource projects include water conduits, reservoirs, powerhouses, and transmission lines. *Id.*

69. *Id.* The area upstream or downstream from a river included in the preservation system is not subject to the prohibition on the construction of dams or other water resource projects unless the dam or other water resource project would "invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values . . ." the river possesses. *Id.*; *but see* Swanson Mining Corp.

portion of the Pembina River, construction of an impoundment would be prohibited.⁷⁰

Other uses of the river that “do not substantially interfere with public use and enjoyment” of the river are permitted with primary emphasis on “protecting [the river’s] esthetic, scenic, historic, archeologic, and scientific features.”⁷¹ If a designated wild and scenic river also is within the boundaries of a “wilderness area,” the river is subject to the provisions of the Wilderness Act.⁷² When a conflict arises between these provisions, the stricter provision controls.⁷³

A wild or scenic designation applies to the river and its “*immediate environments*.”⁷⁴ But what is the immediate environment of the river and which activities are permitted to occur within it? The answers to these questions are critical in understanding the impact that a wild or scenic river designation will have on current grazing practices.

The statute does not specifically define the immediate environment of a wild or scenic river except that it includes the river’s “related adjacent land area”⁷⁵ Thus, the type of designation, as well as the physical characteristics of the area, influence the scope of the river’s immediate environment.

The statute provides that the agency charged with studying an area for designation is limited to considering “an average of not more than 320 acres of land per mile . . . on both sides of the river”⁷⁶ The boundaries apparently can be expanded or contracted, depending on the land’s physical features and the area necessary to fulfill the purpose of the Act, as long as the total acreage does not exceed the number of miles of the designated river times 320.⁷⁷ This could be substantial acreage for a meandering river.⁷⁸

Unlike the federal ownership requirements of the Wilderness Act, the immediate environment of a wild or scenic river need not be feder-

v. Fed. Energy Regulatory Comm., 790 F.2d 96, 102 (D.C. Cir. 1986) (explaining the Federal Energy Regulatory Commission’s distinct restrictions and stating that it is prohibited by Congress “from issuing an exemption for construction ‘on or directly affecting a wild and scenic river’ as well as construction having an ‘adverse effect’ on scenic values,” while other federal agencies can “assist in the construction of a water resources project unless the project ha[s] ‘a direct and adverse effect on the values for which such river was established.’”).

70. See BADLANDS PROPOSAL, *supra* note 1, at 17.

71. 16 U.S.C. § 1281(a) (1988).

72. *Id.* § 1281(b).

73. *Id.*

74. 16 U.S.C. § 1271 (1988) (emphasis added).

75. *Id.* § 1273(b).

76. *Id.* § 1274(b) (Supp. 1994); see also *id.* § 1275(d) (providing that boundaries of study areas generally will comprise one-quarter mile on each side of the river).

77. See *id.* § 1271 (providing Congressional intent to “preserve [a river’s] . . . free flowing condition to protect the water quality . . . and to fulfill other vital national conservation purposes.”).

78. See BADLANDS PROPOSAL, *supra* note 1, at 16 (urging wild or scenic designations for 356 miles of the Little Missouri River for a maximum of 113,920 acres).

ally-owned. If the land adjacent to a designated river is state or privately-owned, the administering federal agency may decide, in its discretion, whether to acquire such land.⁷⁹

State-owned land only can be acquired under this Act by donation or exchange.⁸⁰ An alternative to federally acquiring state-owned land is to have the state agree to manage the area in a manner consistent with the goals of the wild or scenic designation.⁸¹ Privately-owned land can be acquired by donation, exchange of land, voluntary sale, or involuntary sale/condemnation.⁸²

Fee acquisition, whether from state or private ownership, is limited per mile of river to no more than an average of 100 acres on both sides.⁸³ Fee acquisition is further limited to not more than fifty percent of the designated area being owned by federal and state governments.⁸⁴ Once a limit is reached, federal acquisition of land necessary for the designation can be obtained only through a scenic easement.⁸⁵ A scenic easement can be acquired by negotiation or condemnation.⁸⁶

If a scenic easement is acquired by condemnation, prior regular uses must be allowed to continue.⁸⁷ For example, regular uses, including grazing activities, can continue indefinitely.⁸⁸ The land, however, remains subject to condemnation if funds subsequently become available and the limits have not yet been reached.

Other than the "regular use" exception,⁸⁹ the Scenic Act, unlike the Wilderness Act with its grazing exception and guidelines, does not explicitly address whether grazing can occur within the immediate environment of a designated river. But the "regular use" exception clarifies that there will be situations in which livestock grazing and watering can occur along a wild or scenic river and in its immediate environment. The question that remains is in what situations will grazing be allowed after designation. Some observations can be made about this issue, despite the absence of statutory resolution.

79. *Schultz v. United States*, 5 Cl. Ct. 412, 414 (1984).

80. 16 U.S.C. § 1277(a) (1988).

81. *Id.* § 1281(e).

82. *Id.* § 1277(a), (d).

83. *Id.* § 1277(a).

84. *Id.* § 1277(b).

85. 16 U.S.C. § 1277(b). A scenic easement is the right to control the use of the land for the purpose of protecting the area's natural qualities. *Id.* § 1286(c).

86. *Id.* § 1286(c).

87. *Id.*

88. *Id.* § 1286(c); *see also* *United States v. 55.0 Acres of Land*, 524 F. Supp. 320, 324 (W.D. Mo. 1981) (defining "regular use" as "steady or uniform in course, practice, or occurrence"). *Id.* at 322. The parties had stipulated that regular uses included livestock grazing and watering, general agricultural operations, and maintenance of roads. *Id.*

89. This exception can be summarized as allowing privately-owned land encumbered by an involuntary scenic easement to continue to be used for grazing as it was before the river was designated wild or scenic. *See id.*

A. GRAZING ON PRIVATELY-OWNED LAND IN THE "IMMEDIATE ENVIRONMENT"

The administering federal agency will have to acquire a scenic easement on private land in the river's immediate environment. In the case of a voluntary scenic easement, the owner will have an opportunity to negotiate the terms of the easement knowing that if negotiations fail, an involuntary scenic easement would allow continuation of current uses. Therefore, grazing will be allowed on privately-owned land if it has been agreed to as a result of negotiating a scenic easement, or allowed as an exception following a condemnation proceeding.⁹⁰ The physical characteristics of the privately-owned land will have little or no impact on whether grazing will be allowed.

B. GRAZING ON FEDERAL LAND IN THE "IMMEDIATE ENVIRONMENT"

In the case of federally-owned land within a designated river's immediate environment, the administering agency, at the secretary's discretion, is allowed to lease out the land if such a use is appropriate and subject to restrictive covenants to carry out the purpose of the Scenic Act.⁹¹ The lease could permit grazing since the statutory authority does not prohibit such a use. If this is correct, grazing leases will be allowed but only if the activity can be described as preserving the free-flowing conditions of rivers with outstanding scenic, recreational, geologic, fish and wildlife, historic, cultural or similar values, and to protect those rivers and their immediate environments for the benefit and enjoyment of present and future generations.⁹² The physical characteristics and special attributes of federally-owned land will greatly influence whether it is appropriate to allow grazing.⁹³ Consequently, the status of grazing activities is not clear.

In addition, the statute states that existing rights to federal lands held by private individuals cannot be abrogated by a wild or scenic designation without the individual's consent.⁹⁴ This language suggests that persons holding grazing permits for federal lands, whether within or outside the designated area, cannot have their grazing rights diminished as the result of a wild or scenic designation. This limitation may reflect that an existing

90. However, a federal agency that exercises its power of eminent domain to acquire fee ownership of the land through condemnation will eliminate the opportunity for the private owner to retain grazing privileges.

91. 16 U.S.C. § 1285(a) (1988).

92. *Id.*

93. 16 U.S.C. § 1281(a) (1988). "Management plans for any [designated river] may establish varying degrees of intensity for its protection and development, based on the special attributes of the area." *Id.*

94. *Id.* § 1283(b).

permit is a property interest that cannot be "taken" without just compensation, and that federal grazing permits in existence at the time of the river's designation will be allowed to run their course, usually no more than ten years,⁹⁵ unless the permittee consents.⁹⁶ However, this provision does not guarantee that expired permits will be renewed in the future.⁹⁷ Whether the opportunity to renew a grazing permit is a protected property right is discussed in more detail in the next section.

C. GRAZING ON STATE LAND IN THE "IMMEDIATE ENVIRONMENT"

Management of state-owned land is not addressed in the federal statute, and North Dakota does not have any law on this question because no river in the state is included in the federal preservation system.⁹⁸ But if the state is to retain ownership of land within the immediate environment of a federally designated river, the state must agree to manage it in a manner consistent with federal rules.⁹⁹ The implication is that whatever guidelines are imposed by the federal administering agency will likely be the minimum restrictions imposed by the state agency. Therefore, the physical attributes of the state-owned land and the directives of the state agency will influence whether grazing is allowed.

D. MANAGEMENT PLAN

"[T]he federal agency charged with the administration [of a river segment] . . . shall prepare a comprehensive management plan for such river segment to provide for the protection of the river values."¹⁰⁰ The proponents of the Badlands Proposal admit that uncertainty surrounds the federal law as a result of the secretary's discretion in deciding whether grazing will be allowed.¹⁰¹ Consequently, the decision about future livestock grazing and watering most likely will be made during the development of the river's management plan.¹⁰² As suggested by the proposal's

95. 43 U.S.C. § 1752(a) (1988); *see also* 36 C.F.R. §§ 222.1(b)(7), 222.3(c)(1) (1993).

96. 16 U.S.C. § 1283(b) (1988).

97. *Id.*

98. BADLANDS PROPOSAL, *supra* note 1, at 1.

99. 16 U.S.C. § 1281(e) (1988).

100. *Id.* § 1274(d).

101. *Id.* § 1281(e); *see also* BADLANDS PROPOSAL, *supra* note 1, at 22.

Needless to say . . . how designation may affect local land use will usually be vague and cause confusion. This points to the need for rivers bounded by private land to have to the extent possible, a specific agreed-upon plan prior to designation—a plan that local jurisdictions have developed, deliberated, and adopted. Without such a plan, it will always be difficult to tell an apprehensive landowner what will happen to his or her land after designation.

Id.

102. *Id.*

proponents, interested parties should consider becoming involved in the process of developing a management plan.

An alternative to being involved in the management plan development would be to urge that provisions are included in the designating legislation to address some of the grazing issues. However, any such legislation would likely be a political compromise, not much different than what may be included in the management plan. Furthermore, a legislative resolution similar to the grazing guidelines of the Wilderness Act may not evolve because the Scenic Act does not explicitly except grazing practices. Perhaps only if the secretaries use their discretionary authority contrary to Congressional intent will the legislators respond with grazing guidelines for the Scenic Act.

In summary, a river included in the national wild and scenic rivers system is intended to be preserved and protected for public use and enjoyment. The character of the river at the time of its designation determines the future permitted uses of the river. However, the construction of water resource projects upon a designated river is absolutely prohibited. Existing livestock practices on private lands, even though within the immediate environment of the river, can be continued unless the owner agrees to discontinue the activity or the federal government acquires fee title to the area.

Unlike the Wilderness Act, the Scenic Act provides a much narrower exception for the continuation of current activities and does not provide an explicit exception for grazing. Consequently, the Badlands Proposal to designate rivers and their immediate environments wild or scenic is likely to have a greater adverse impact on private ownership and commercial activities than would the wilderness designation. Furthermore, the wild or scenic designation will probably involve more privately-held land than the wilderness designation of federally-owned land in which current grazing activities would be allowed to continue. As a result, the development of the management plan is an important opportunity for interested parties to discuss and resolve their differences.

IV. CREATION OF THE NATIONAL GRASSLANDS UNDER THE BANKHEAD-JONES FARM TENANT ACT

All the land in the Badlands Proposal was once in the public domain, that is, owned in fee simple by the United States without any reservations for private use.¹⁰³ In 1862, Congress passed the Homestead Act granting individuals ownership of 160 acres—a sufficient size to support a family in

103. See PHILLIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* 3 (1960).

the east, but not in the arid west.¹⁰⁴ Typically in areas like western North Dakota, settlers would homestead by a creek or water hole and run cattle on the adjacent public domain.¹⁰⁵ Use of the public domain was first come, first serve, which led to overgrazing and erosion.¹⁰⁶ The Homestead laws were nullified by the Taylor Grazing Act of 1934, which placed the remaining public domain range lands into federal grazing areas.¹⁰⁷ Today these federal range lands are managed by the Bureau of Land Management [hereinafter BLM] under the Taylor law.¹⁰⁸ The Taylor grazing laws and associated BLM regulations are beyond the scope of this article because the Badlands Proposal targets only forty acres of BLM land for wilderness and approximately one thousand acres of "immediate environment"¹⁰⁹ for wild and scenic river designations.

By the turn of the century, the federal government recognized that much of the public domain, particularly forest area, was being too rapidly depleted, and in 1905, Congress created the Forest Service as the first federal organization to manage public resources in a scientific, prudent, and efficient manner.¹¹⁰ In 1933, Congress started a land acquisition and utilization program [hereinafter LU program] to acquire lands that were ill-suited for crop production.¹¹¹ Through the LU program, the federal government reacquired submarginal private land and withdrew it from cultivation for better-suited uses, such as grazing.¹¹² For example, the National Grasslands were primarily assembled from lands acquired through the LU program.¹¹³ Many of these lands were best-suited for livestock grazing and therefore, were leased to farmers, ranchers, and grazing associations.¹¹⁴ However in 1936, the Department of Agriculture's Forest Service reported that portions of the country's range land, as a result of long-term overgrazing, drought, and the invasion of poor forage

104. WESTERN PUBLIC LANDS: THE MANAGEMENT OF NATURAL RESOURCES IN A TIME OF DECLINING FEDERALISM 15 (John G. Francis & Richard Ganzel eds., 1984) [hereinafter FRANCIS & GANZEL].

105. FOSS, *supra* note 103, at 3.

106. *Id.* at 3-4.

107. *Id.* at 27; FRANCIS & GANZEL, *supra* note 104, at 18; Taylor Grazing Act, 43 U.S.C. §§ 315-16 (1988).

108. 43 C.F.R. pt. 4100 (1993).

109. Federal grazing land in North Dakota is overwhelmingly Forest Service land. Of 1,220,053 acres of federal land, 1,105,046 acres are Forest Service, 67,030 acres are BLM, and 30,173 acres are Fish and Wildlife Service. DEAN A. BANGSUND & F. LARRY LEISTRITZ, CONTRIBUTION OF PUBLIC LAND GRAZING TO THE NORTH DAKOTA ECONOMY, DEPT. OF AGRIC. ECONOMICS, AGRIC. EXPERIMENTAL STATION, NDSU, AGRICULTURAL ECONOMICS REP. No. 283, tbl. 1 at 6 (March 1992); see also FOREST VISITORS MAP, *supra* note 6.

110. FRANCIS & GANZEL, *supra* note 104, at 16.

111. Obermiller Speech, *supra* note 8, at 3-5.

112. *Id.* at 8-9. "Submarginal lands generally were defined as lands low in productivity or otherwise ill-suited for cultivated farm crop production. Because of their low productivity, . . . [these] lands fell below the margin of profitable crop production." *Id.* at 9 n.4.

113. *Id.* at 20. The federal government acquired lands for the LU program through "foreclosure, . . . condemnation, voluntary sale, gift, or exchange." *Id.* at 6.

114. *Id.* at 10 n.7.

such as cheatgrass, could only support about half the livestock it once did.¹¹⁵ The problem of depletion of resources had not been solved.

Subsequently, administration of the LU program was formalized with the passage of the Bankhead-Jones Act in 1937¹¹⁶ which provided a more permanent status to the program.¹¹⁷ It authorized the Secretary of Agriculture to retire submarginal land and to develop a program of land conservation and land utilization.¹¹⁸ This authority was consistent with the LU program's purposes of withdrawing private land from cultivation.¹¹⁹ The National Grasslands are still administered by the Forest Service under Bankhead-Jones.¹²⁰

To effectuate the program of land conservation and land utilization, Bankhead-Jones granted the secretary certain powers for administering land under the program.¹²¹ Adapting the land to its most beneficial use and making recommendations consistent with the purposes of land conservation and utilization are the secretary's guiding policies with respect to such administration.¹²²

The secretary's administrative powers include selling, leasing, exchanging, or otherwise disposing of Bankhead-Jones land.¹²³ The land can be sold or exchanged "only to public authorities and agencies and only on condition that the [land] is used for public purposes . . ." ¹²⁴ Similarly, the secretary can exchange land with private owners if the transaction will not conflict with the purposes of Bankhead-Jones.¹²⁵

Bankhead-Jones, like both the Wilderness and the Scenic Acts, provides authority for the federal government to further a policy of conserving public lands. Bankhead-Jones differs in that it explicitly envisions

115. *E.g.*, Foss, *supra* note 103, at 3, 33. The USDA's 1936 report on overgrazing of federal land was part of the fight between the Interior Department and the USDA over which department would manage the federal rangelands. GARY D. LIBECAP, *LOCKING UP THE RANGE: FEDERAL LAND CONTROLS AND GRAZING* 13, 39-42 (1981).

116. *Id.* at 20.

117. Obermiller Speech, *supra* note 8, at 11.

118. Bankhead-Jones Farm Tenant Act, Pub. L. No. 75-210, 50 Stat. 522, 525 (1937) (codified at 7 U.S.C. §§ 1001-1040 (1988 & Supp. 1993)) (7 U.S.C. §§ 1001-1006 *repealed by* Pub. L. No. 87-128, tit. III, § 341(a), Aug. 8, 1961, 75 Stat. 318).

119. Obermiller Speech, *supra* note 8, at 8-9.

120. *Id.* at 20; 36 C.F.R. § 213.1(b) (1993) (indicating that the National Grasslands are part of the National Forest System and are administered under the Bankhead-Jones Farm Tenant Act).

121. 7 U.S.C. § 1011 (1988 & Supp. 1993). Although Bankhead-Jones mandates a program of land conservation and land utilization, the terms "conservation" and "utilization" are not mutually exclusive. One can be accomplished in conjunction with the other so long as the overriding policy of Bankhead-Jones, adapting the land to its most beneficial use, is accomplished.

122. *Id.*

123. *Id.* § 1011(c) (1988).

124. *Id.*

125. *Id.* Originally, Bankhead-Jones also granted the secretary power "to acquire land by purchase, gift, or devise." Pub. L. No. 75-210, 50 Stat. 526 (1937) *repealed by* Food and Agriculture Act, Pub. L. No. 87-703, 1962 U.S.C.A.N. (76 Stat. 605) 711, 713.

commercial uses such as grazing while the Wilderness Act allows grazing as an exception and the Scenic Act does not specifically address grazing.

V. BANKHEAD-JONES LAND AS WILDERNESS OR WILD AND SCENIC AREAS

Much of the land proposed to be designated as wilderness and some of the immediate environment of the Little Missouri River is federally-owned National Grasslands administered under the Bankhead-Jones Act. A question to be answered is whether the Bankhead-Jones Act and the history of the National Grasslands disqualify the areas from being designated as wilderness or wild and scenic. Some of the specific concerns are whether

- the purposes of the programs are compatible,
- the laws impose conflicting land management practices,
- the land is not eligible because it is no longer “untrammelled by man,” and
- a wilderness or wild and scenic designation is an unlawful taking of private property.

Each of these issues and some related questions are addressed in this section. Differences between a wilderness designation and a wild or scenic designation of Bankhead-Jones land also are considered.

A. INCOMPATIBLE PROGRAM PURPOSES

Administering the National Grasslands to fulfill both the Bankhead-Jones Act and the Wilderness Act is not a problem, but the answer is not as clear for the Scenic Act. Bankhead-Jones requires that the land be managed for conservation and utilization¹²⁶ whereas the primary goals of the other two acts are preservation and conservation.¹²⁷ However, Congress' intent to allow current grazing activities to continue even after a wilderness designation indicates that the Bankhead-Jones and Wilderness Acts are to be administered without conflict.¹²⁸ This intent to allow graz-

126. 7 U.S.C. § 1010 (Supp. 1992). “The secretary [of agriculture] is authorized and directed to develop a program of land conservation and land utilization” *Id.*

127. The purpose of the Wilderness Act is “to secure for the American people of present and future generations the benefits of an enduring resource of wilderness” and to “administer[] [the land] for the use and enjoyment of the American people in a manner as will leave [the lands] unimpaired for the future use and enjoyment as wilderness, and . . . to provide for the protection of these areas, the preservation of their wilderness character” 16 U.S.C. § 1131 (1988).

The purpose of the Scenic Act is to “preserve in free-flowing condition,” “rivers that possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural and similar values” and “their immediate environment.” *Id.* § 1271.

128. See 16 U.S.C. § 1133(d)(4)(2) (1988); see also Grazing Guidelines discussion *supra* notes 41, 43; *infra* Appendix I.

ing also is relied on to answer several of the issues subsequently addressed in this section.

Congress, over the years, has modified the Bankhead-Jones Act by increasing its conservation purpose, yet still preserving grazing uses.¹²⁹ The Multiple Use Sustained Yield Act,¹³⁰ the Forest and Rangeland Renewable Resources Planning Act,¹³¹ and the National Environmental Policy Act,¹³² all guide the Forest Service in managing national grasslands and designated wilderness lands. The effect of these laws has been synthesized in Forest Service regulations which require the Service to "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefits in an environmentally sound manner."¹³³ This purpose is reflected in the national forest principles which recognize both economic efficiency and the need to respond "to changing social . . . demands of the American people."¹³⁴ Congress, accordingly, expects the lands to be managed to accomplish both purposes.

The compatibility between the Scenic Act and the Bankhead-Jones Act is less clear because the Scenic Act's impact on grazing activities is not explicit. The Scenic Act does provide the narrow "regular use" exception for involuntary scenic easements, and the secretary's discretionary authority to lease. But the goal of preservation is dominant once a river and its immediate environment are designated wild or scenic.¹³⁵ Likewise, a river is not rendered ineligible for a wild or scenic designation just

129. Food and Agricultural Act of 1962, Pub. L. No. 87-703, title I, § 102(a), 76 Stat. 607 (1962) (deleting the goal of retiring submarginal land, but adding the goal of assisting in protection of fish and wildlife, and prohibiting industrial parks, and private industrial and commercial enterprises); Nov. 8, 1966, Pub. L. No. 89-796, § 1(a), 80 Stat. 1478 (adding a goal of developing and protecting recreational facilities); Dec. 22, 1981, Pub. L. No. 97-98, tit. XV, § 1513, 95 Stat. 1333 (adding a goal of developing energy resources).

130. Pub. L. No. 86-517, 74 Stat. 215 (1960).

131. Pub. L. No. 93-378, 88 Stat. 476 (1974).

132. Pub. L. No. 91-190, 83 Stat. 852 (1969).

133. 36 C.F.R. § 219.1(a) (1993). "Multiple use" is defined as managing the national forests' surface resources "so that they are utilized in the combination that will best meet the needs of the American people; . . . with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output." 16 U.S.C. § 531(a) (1988). "Sustained yield" is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land." *Id.* § 531(b); *see also Butz*, 541 F.2d at 1310 (reporting the legislative history that "[i]t is a multiple-purpose wilderness program" and that "[n]o area now devoted to any economic purpose, or to any other development program, is withdrawn from its use by this legislation."); 36 C.F.R. § 213.1(c). "The National Grasslands shall be administered under sound and progressive principles of land conservation and multiple use, and to promote development of grassland agriculture and sustained-yield management of the forage, fish and wildlife, timber, water and recreational resources in the areas of which the National Grasslands are a part." *Id.*

134. 36 C.F.R. § 219.1(b)(14). *E.g., id.* § 219.1(b)(13) (requiring economically efficient management); § 219.1(b)(14) (requiring responsiveness to changing conditions of the land, social demands, and economic demands).

135. *See* 16 U.S.C. § 1281(a) (1988) (requiring that conflicting uses cease once an area is designated as wild or scenic).

because a current use in the area conflicts with the goal of preservation.¹³⁶ There is no reason to conclude that the utilization purpose of Bankhead-Jones will block a designation, especially since Bankhead-Jones also has a conservation purpose.

B. LAND MANAGEMENT PRACTICES

A second major concern may be that the responsibilities imposed by the Acts on the administering agency are so different that the agency cannot possibly fulfill them without internal conflicts. Opponents of designation argue that if conflicts would arise, the land should not be designated wilderness or wild and scenic. Such conflicts should not arise between Bankhead-Jones and Wilderness Acts because Congress intended that the wilderness areas can continue to be grazed. If a conflict would arise, the administering agency (the Forest Service in the case of National Grasslands) apparently is expected to resolve it internally, rather than conclude that the area cannot be used to fulfill the goals of both laws.

As stated previously, the relationship between the Bankhead-Jones Act and the Scenic Act is not as clear. For example, the Scenic Act requires that federally-owned land, once designated wild or scenic, cannot be disposed of,¹³⁷ whereas the Bankhead-Jones Act empowers the administrator to transfer the land.¹³⁸ Another example of a possible conflict is that the Scenic Act requires the area to be administered "to protect and enhance the values" which led to the designation, with primary emphasis "given to protecting esthetic, historic, archeologic, and scientific features;"¹³⁹ whereas Bankhead-Jones empowers the administrator "[t]o protect, improve, develop, and administer" the land and to construct structures to adapt it to its most beneficial use.¹⁴⁰

The Scenic Act provides more focus and less discretion to the administering agency than does Bankhead-Jones. However, it is not likely that the conflict between the responsibility of preserving the land and the authority to construct structures will render Bankhead-Jones land ineligible for a wild or scenic designation. Instead, the likely interpretation will be that the preservation goal will dominate. Congress' grant of broad authority to the Department of Agriculture does not mean it cannot subsequently narrow this authority when public policy changes. No legal

136. For a river to be designated as wild, it must be free of impoundments, be inaccessible except by trail, have primitive and unpolluted waters, and include "vestiges of primitive America." *Id.* § 1273(b)(1). A scenic river, however, needs only to be free of impoundments, largely primitive, largely undeveloped, but accessible in places by roads. *Id.* § 1273(b)(2). If these requirements are met, the river and immediate environment are eligible for designation regardless of other uses.

137. *Id.* § 1279(a).

138. 7 U.S.C. § 1011(c) (1992).

139. 16 U.S.C. § 1281(a) (1988).

140. 7 U.C.S. § 1011(b) (1988).

authority has been found to support the argument that Bankhead-Jones land cannot be designated wild or scenic because the designation narrows the activities that can occur on the federal land.

C. ELIGIBLE AS WILDERNESS OR WILD AND SCENIC

A third concern is whether past or present activities on the National Grasslands would render the area ineligible for a wilderness or wild and scenic designation. The issue focuses on whether man's activities have eliminated the primitive features of the area.

For example, an area is eligible for a wilderness designation if it is

- land "untrammelled by man,"
- an area where "man himself is a visitor who does not remain,"
- "undeveloped federal land retaining its primeval character and influences without permanent improvements or human habitation," and
- an area that "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable"¹⁴¹

The concern is that once land, like the National Grasslands, has been privately-owned and cultivated for crop production or has permanent improvements (such as fences and man-made stock ponds), it cannot meet the criteria of a wilderness designation.

The criteria for a wilderness area emphasizes present appearances,¹⁴² rather than past activities. An area that looks as it did in nature and that no longer bears the scars of man's activities is not ineligible for a wilderness designation. Likewise, a river restored to its free-flowing condition can be considered for inclusion as a wild, scenic, or recreational river.¹⁴³ Therefore, National Grasslands that were formerly cropland or an impounded river that is now free-flowing are not ineligible for designation because of past uses.

Man's present uses may render an area ineligible under the Wilderness Act. For example, land currently being used for crop production most likely will not be considered "untrammelled," nor will it be considered an area where "man's work is substantially unnoticeable." Current crop production, however, may not significantly impact the National

141. 16 U.S.C. § 1131(c) (1988); *see also supra* note 21.

142. *Id.* § 1131(c).

143. *Id.* § 1273(b).

Grasslands included in the Badlands Proposal since they are generally described as noncrop areas.¹⁴⁴

The grazing activities in the National Grasslands, including associated permanent improvements such as fences, corrals, stock ponds, dams, and other livestock facilities, will not be unnoticeable. But again, the Congressional intent that grazing be allowed to continue as an exception to a wilderness designation leads to the conclusion that existing permanent improvements resulting from grazing practices will not prohibit the National Grasslands from being designated as wilderness.

In addition, land that has been re-acquired by the federal government from private ownership is not ineligible for a wilderness designation, as a matter of law. Otherwise, the authority to condemn, exchange, or purchase private land within a wilderness area would be meaningless.¹⁴⁵ Similarly, National Grasslands that were privately-owned earlier this century are not ineligible for a wilderness designation just because the public ownership has not been continuous.

Present activities, such as cropping, grazing, or permanent improvements do not prevent a river and its immediate environment from being designated wild or scenic. Instead, the primary requirement is that the river be free-flowing at this time and that it have the appropriate level of shoreline accessibility and development for its classification.¹⁴⁶

In summary, an area which had been used by man but has now returned to its natural appearance or conditions is not ineligible for a wilderness or wild and scenic designation as a result of the earlier use. Similarly, permanent livestock facilities will not prevent National Grasslands from being designated as wilderness. Present activities will not prevent a wild or scenic designation of a river as long as it is free-flowing and undeveloped.

D. TAKING OF PRIVATE PROPERTY

Since the National Grasslands are federally-owned, the only individuals using the area for grazing are holders of grazing permits [hereinafter permittees].¹⁴⁷ The following discussion considers the legal recourse permittees have if a wilderness or wild and scenic designation reduces graz-

144. See generally BADLANDS PROPOSAL, *supra* note 1 (describing the proposed wilderness areas as used for grazing).

145. See 16 U.S.C. § 1134(a), (c) (1988).

146. 16 U.S.C. § 1273(b) (1988).

147. 36 C.F.R. § 222.3(a) (1993).

ing or restricts their associated activities. Is a reduction in permitted activities a regulatory taking that mandates just compensation?¹⁴⁸

An initial step in the analysis is defining the permittees' property right.¹⁴⁹ Grazing permits are Congressional creations described in federal statutes and regulations,¹⁵⁰ and although these laws provide indications as to the rights held by permittees, they may not be conclusive. Consequently, grazing permits have been defined in different ways. Some of the suggested definitions for a grazing permit are:

1. a revocable license that the administering federal agency can modify or cancel at any time and without compensating the permittee;
2. a lease for a term requiring the lessor to compensate the lessee should the permit be altered during the term; and the lease is renewable with priority given to the holder of the expiring permit, but there is no guarantee that it will be renewed with terms identical to those of the prior permit; or
3. a property interest of infinite duration entitling the lessee to have the permit renewed at the end of each term with no more than limited reductions in rights, and any substantial changes in the terms of the permit, whether during its term or at renewal, entitle the permittee to just compensation.¹⁵¹

A review of federal law may help resolve the question.

Grazing permits are issued for a term of ten years, unless there is a reason for a shorter term.¹⁵² The permittee holding an expiring permit is given first priority for receipt of a new permit if:

- the land remains available,
- the permittee is in compliance with the agency's rules, and
- the permittee accepts the terms of the new permit.¹⁵³

148. U.S. CONST. amend V; *see Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *see also Dolan v. City of Tygard*, 62 U.S.L.W. 4576 (1994) (adopting a new standard of review for regulatory exactions pursuant to private development proposals).

149. "[T]he logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interest were [or were] not part of his title to begin with." *Lucas*, 112 S. Ct. at 2889.

150. *See* 43 U.S.C. § 1752 (1988); 36 C.F.R. pt. 222 (1993).

151. *See, e.g., John S. Harbison, Hohfeld and Herefords: The Concept of Property and the Law of the Range*, 22 N.M. L. REV. 459 (1992) (focusing on BLM lands); Rozanna C. Larson, *Grazing on the National Grasslands* (unpublished writing requirement, University of North Dakota School of Law) (1992) (concentrating on Forest Service Grasslands).

152. 43 U.S.C. § 1752(a), (b) (1988). Reasons for shorter terms include: "(1) the land is pending disposal; or (2) the land will be devoted to a public purpose prior to the end of ten years; or (3) it will be in the best interest of sound land management to specify a shorter term." *Id.*

153. 43 U.S.C. § 1752(c) (1980).

However, grazing permits do not convey a right, title, or interest in any lands or resources held by the United States.¹⁵⁴ Likewise, a permit does not limit or restrict “any right, title, or interest of the United States in any [federally-owned] land or resource;”¹⁵⁵ nor does it negate Congressional constitutional “power to . . . make all needful rules and regulations respecting the . . . property belonging to the United States.”¹⁵⁶

The Forest Service is authorized to cancel, modify, or suspend grazing permits, in whole or in part.¹⁵⁷ More specifically, by regulation the Forest Service is allowed to

- (1) [c]ancel permits where lands grazed under the permit are to be devoted to another public purpose including disposal . . . [or]
- (7) [m]odify the terms and conditions of a permit to conform to current situations brought about by changes in law, regulation, executive order, development or revision of an allotment management plan, or other management needs.¹⁵⁸

Furthermore, in order to update permits, the permits “may be canceled at the end of the calendar year of the midyear of the decade . . . , provided they are reissued to the existing permit holder for a new term of 10 years.”¹⁵⁹

None of these laws explicitly impose an obligation on the Forest Service to compensate the permittee for changes in the grazing permit, but they do grant the permittee some legal protection. For example, if a permit is canceled in whole or in part in order to devote land to another public purpose, the permittee shall receive reasonable compensation for the adjusted value of authorized permanent improvements (such as corals, fences, stock watering facilities),¹⁶⁰ and except in case of an emer-

154. *See id.* § 1752(h); 36 C.F.R. § 222.3(b) (1993); *see also* *Osborne v. United States*, 145 F.2d 892, 895 (9th Cir. 1944) (stating that although the Forest Service regulations specify that “[a] term permit shall have the full force and effect of a contract between the United States and the permittee[,]” [n]o authorization for such provision can be found in any Congressional Act, and its literal meaning cannot be valid. We are of the opinion that by such provision the government means that it will regard the terms of its permit as binding between it and other permit seekers.”). Thus, permittees are protected from the federal government’s issuance of permits which would encroach on their use of federal land but are not given any interest in federal land. *See also* 43 U.S.C. § 315(b) (1980); *United States ex rel. Bergen v. Lawrence*, 620 F. Supp. 1414, 1419 (D. Wyo. 1985) (discussing the Taylor Grazing Act). “The issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.” *Id.* (citing 43 U.S.C. § 315(b) (1980)).

155. Pub. L. No. 103-278.

156. U.S. CONST. art. IV, § 3.

157. 43 U.S.C. § 1752(a) (1988).

158. 36 C.F.R. § 222.4(a) (1993) (specifying changes in grazing permits).

159. 36 C.F.R. § 222.3(c)(1)(iii) (1993) (specifying criteria under which grazing and livestock use permits may be issued).

160. 43 U.S.C. § 1752(g) (1980); 36 C.F.R. § 222.6 (1993).

agency, a grazing permit can be canceled in whole or in part only after a two-year notification.¹⁶¹ Likewise, the requirement of having to reissue a new permit to replace one canceled at midpoint to update its terms and conditions also offers some legal protection,¹⁶² but it does not prevent unilateral changes in the terms of the permit.

Although possessing many of the terms of a lease, a permit appears to be a revocable license for which no compensation is owed to the permittee if it is canceled,¹⁶³ unless the permit is canceled without the two-year notice in a nonemergency situation. The courts have repeatedly reinforced this definition.¹⁶⁴

The ten-year term should be interpreted as the period of time during which the government and permittee will exclude other livestock producers from the leased land.¹⁶⁵ The permit does not obligate the government to allow the permittee to remain on the land that entire time, nor does it guarantee renewal of the permit upon its expiration. The law states that the government can have the permittee off the land in two years or less if the land is to be devoted to another public purpose. A permittee does not have the same legal rights against the federal government as the permittee does against another livestock producer. Likewise, the right of first refusal for a renewed lease defines the permittee's legal position relative to other producers; it does not obligate the government to renew the permit.

Congress recognized that some areas likely to be designated as wilderness or wild and scenic will be federal grazing areas and in the interest of preserving these activities, indicated that these areas should not be subject to outright grazing prohibitions. For example, the Grazing Guidelines specify that there should be "no curtailments" or phasing out of grazing as a consequence of a wilderness designation.¹⁶⁶ Similarly, the Scenic Act forbids any abrogation of "any existing rights, privileges, or contracts affecting Federal lands held by any private party without the consent of said party."¹⁶⁷

161. 43 U.S.C. § 1752(g) (1980); *see also* *Hinsdale Livestock Co. v. United States*, 501 F. Supp. 773, 776 (D. Mont. 1980) (finding that drought conditions were not sufficient to create an emergency situation which would allow the eviction of permittees' cattle from grazing land before their permits expired).

162. *See supra* note 159.

163. *See Osborne*, 145 F.2d at 896 (stating that the Forest Service may not enter into an arrangement "to make any agreement regarding [permits] subject to the payment of compensation for . . . revocation").

164. *See supra* note 161 (discussing the necessity for an emergency situation to exist before evicting ranchers prior to the expiration of their permits).

165. *See supra* note 154 (discussing the relationship between the United States and its permittees).

166. *See infra* Appendix I.

167. 16 U.S.C. § 1283(b) (1988).

The Congressional restriction on the administering agency as specified in the Grazing Guidelines suggests that a wilderness designation no longer qualifies as "another public purpose" to justify a two-year notice to cancel a grazing permit. Prior to the Grazing Guidelines, any other public purpose, including a wilderness designation, would have been justification for a two-year notice. Since the Guidelines, a wilderness designation can no longer be used as the reason for canceling or curtailing grazing. This also suggests that a wilderness designation is not a valid reason for not renewing an expired grazing permit.

If that is the case, the resulting question is whether the Wilderness Act and its Grazing Guidelines have expanded the legal protection for grazing activities, rather than contracting them, as often has been suggested over the last three decades.

The implication of the Scenic Act is not as clear. An argument could be made that a wild or scenic designation is not a public purpose with which to justify canceling the permit; that is, using the designation to cancel the permit abrogates an existing right. Conversely, allowing a wild or scenic designation to serve as the basis for a two-year cancellation notice does not "abrogate any existing rights" because the authority to cancel a grazing permit for scenic or wild areas after a two-year notice is no different than the rights and limitations the permittee faced prior to the designation.

If a wilderness designation and the Grazing Guidelines expand the permittee's rights, how would they be enforced against an agency? One suggestion is that an injunction prohibiting curtailed grazing, and not compensation, would be the appropriate remedy.

E. OTHER RIGHTS

Grazing activities are not the only interests affected by wilderness and wild or scenic designations. The permittee's base operation and water rights may also be impacted.

Permittees are required to have privately-owned land for the base of their grazing business to which the grazing permit attaches.¹⁶⁸ The sale or transfer of the base property among individuals, in most cases, also transfers the attached grazing permit.¹⁶⁹ Often the value of the permit is bid into the price of the base, and a reduction in permitted grazing activities leads to a diminution in the value of the privately-owned base.

168. 36 C.F.R. §§ 222.1(b)(3), 222.3(c)(1)(i) (1993) (specifying criteria under which grazing and livestock use permits may be issued).

169. 36 C.F.R. § 222.3(c)(1)(iv) (1993).

However, the reduced market value of the base property resulting from government action is not likely to be a compensable taking. In canceling a permit, the government is taking no more than two years of grazing profit, even though the private sector may have speculated and bid many years of future profit from federal grazing into the base land. From the government's perspective, all that the permittee holds is a two-year guaranteed permit,¹⁷⁰ and that is the limit for which the permittee may receive compensation. No permittee is assured of any more than two years of grazing under the terms of the permit and federal law.¹⁷¹ The private sector's action of raising the price of the base to reflect the value of future grazing permits that individuals speculate will arise does not alter the legal relationship between the government and the permittee.¹⁷² This is different from privately-owned land in which the market has bid up the value based on speculation about the future. In the case of privately-owned land, it is a private right about which the market is speculating; whereas in the case of a grazing permit, it is a well-defined government-granted privilege that is the target of the speculation.¹⁷³

Furthermore, these two years of profit should be figured into the value of the permit and not the base. Even though private parties bid the expected value of the permit into the base, perhaps because it is the easiest means for private parties to transfer the value of the permit, that does not alter the legal relationship between the permit-granting agency and the permittee.

Private water rights and their usage also may be affected by a wilderness or wild and scenic designation. The law is clear that water rights are property interests,¹⁷⁴ and that they are protected by the United States Constitution from government action which interferes with their use or enjoyment.¹⁷⁵ Likewise, "regulations that prohibit all economically bene-

170. See 43 U.S.C. § 1752(g) (1980) (providing that a two-year notice to cancel a grazing permit is required in a nonemergency situation).

171. Although the permittee may be issued a permit with a ten-year limit, there are certain circumstances under which this may be revoked. There must be a two-year notice of revocation unless there is an emergency. 36 C.F.R. § 222.4(a)(1) (1993). Thus, barring an emergency, it appears that any permit is terminable in two years.

172. *United States v. Fuller*, 409 U.S. 488 (1973).

173. See generally *In re Cornin's Estate*, 237 N.W.2d 171 (S.D. 1975) (discussing valuation and grazing rights). However, after *Lucas*, this speculation may be protected if the owner has merely a "reasonable expectation" or a "reasonable investment-backed expectation" of compensation for a taking. *Lucas* 112 S. Ct. at 2894 n.7.

174. WELLS A. HUTCHINS, NATURAL RESOURCE ECONOMICS DIVISION, ECONOMIC RESEARCH SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, MISCELLANEOUS PUBLICATION NO. 1206, Vol. 1, at 151 (1977).

175. *Id.* at 390-91; 16 U.S.C. § 1284(b) (1988) ("[A]ny taking by the United States of a water right which is vested under either State or Federal law at the time such river is included . . . shall entitle the owner thereof to just compensation.").

ficial use"¹⁷⁶ are as much a taking as a physical invasion of the owner's land. Federal action, such as a wilderness or wild and scenic designation, which leaves the permittee's water rights unusable because the livestock can no longer enter the river's riparian area, may be a compensable taking of those water rights.

A wilderness designation is not likely to diminish grazing activities due to the grazing guidelines. A wild or scenic designation, as discussed previously, is not as clear and is likely to impact grazing in the river's immediate environment. The designation may impact the livestock producers' chances to fully utilize their right to water their livestock at the river. This, in turn, leaves the water unusable to the producer. In such a case, the water right will likely be considered taken, entitling the permittee to be compensated. Congress recognized that this may occur and mandated, in the Scenic Act, that taken water rights be compensated.¹⁷⁷ In states in which water rights can be transferred much like any other private property right, grazing permittees may be expected to mitigate their damages by selling the water right to another party. This scenario is beyond the scope of this article.

The legal consequences of secondary impacts of a designation differ. Reduced market value of the privately-owned base is not a compensable taking, unless the notification requirement has been violated, whereas interference with the use of water rights entitles the owner to just compensation.

VI. IMPACT OF WILDERNESS OR WILD AND SCENIC RIVER DESIGNATION ON SCHOOL LANDS

Even though National Grasslands comprise most of the land encompassed in the Badlands Proposal, landowners other than grazing permit holders also are affected by the proposal. Several other types of land could be affected by wild and scenic designation. The area between the Little Missouri National Grasslands and the Fort Berthold Indian Reservation contains several tracts of BLM land that could be affected. Portions of the Fort Berthold reservation near the Little Missouri River might be affected, too.

Some land parcels included in the Badlands Proposal are school trust lands.¹⁷⁸ These parcels were granted to North Dakota by the federal government at the time of statehood in return for the state's promise to use

176. *Lucas*, 112 S. Ct. at 2900. The *Lucas* majority suggested in dicta that less than total loss of economic use, such a loss of 90% use, may constitute a compensable taking. 112 S. Ct. at 2894-95 n.7-8.

177. 16 U.S.C. § 1284(b) (1988).

178. See FOREST VISITORS MAP, *supra* note 6.

the lands only to support schools and to relinquish any claim on federal land within the state.¹⁷⁹ The promise to use the lands only to support schools was incorporated into the state constitution.¹⁸⁰

Under the federal mandate to use the lands to support schools, states with school lands must obtain "full fair market value" for any sale or exchange of the lands.¹⁸¹ Generally, the Wilderness and Scenic Acts allow land to be donated to the federal government, but do not authorize agencies to purchase state-owned land.¹⁸² Since school lands can be sold but not donated, one of the few alternatives for school lands targeted for a wilderness or wild and scenic designation is to exchange them for other federal land of equal value. Another alternative may be for the state to retain ownership of the land after it has been designated as a wilderness area or wild and scenic river and continue using the land as it had done in the past. Perhaps this could include leasing the land to ranchers.

VII. CONCLUSION

When a wilderness or wild and scenic designation is proposed for areas currently used for grazing, questions arise such as: whether National Grasslands, acquired and managed according to Bankhead-Jones, are eligible for such designations, and if so, what impact would such designations have on grazing practices.

The land utilization requirement of Bankhead-Jones will not hinder a wilderness designation; Bankhead-Jones lands are to be managed for multiple uses, including land conservation. Furthermore, the Wilderness Act includes an explicit exception for current grazing practices and indicates that permanent improvements needed for current grazing activities do not render the area ineligible for a wilderness designation.

Past cultivation does not prevent a wilderness designation because present appearance is the eligibility criterion, not past uses. Although the designated area needs to be federally-owned, the Wilderness Act allows acquisition by the federal government as part of the designation process. Thus, past private ownership will not render an area ineligible. Consequently, for purposes of this discussion, eligibility conflicts between the Bankhead-Jones and Wilderness Acts are virtually nonexistent.

179. *E.g.*, Sally K. Fairfax et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797 (1992) (describing the school trust grant program and problems that states have in managing the lands); FRANCIS & GANZEL, *supra* note 104, at 15.

180. N.D. CONST. art. IX, § 3.

181. Fairfax, *supra* note 179, at 799.

182. This is based on a narrow interpretation that Congress' authorization of agencies to purchase "privately-owned land" from a willing seller or to obtain "privately-owned land" by condemnation do not authorize purchasing targeted land from a state even if the state is willing to sell. *See* 16 U.S.C. §§ 1134(a), (c); 1135(a)-(b) (1988).

A wild or scenic designation is based on whether the river is currently free-flowing and whether the river's immediate environment has the appropriate level of development and access. Grazing in the immediate environment may not render the river ineligible for designation.

Although grazing may conflict with preservation goals, it may not be the presence of cattle but the presence of man and man-made items used or left in the grazing area that cause the problem. Recognizing that grazing activities likely conflict with the broad prohibitions of the Wilderness Act, Congress excepted current grazing activities. A wilderness designation locks in current grazing practices. The wilderness designation will not allow these activities to be expanded unless such expansion does not interfere with the goal of the wilderness designation, but the guidelines prohibit an involuntary reduction in grazing activities solely for the purpose of wilderness preservation.

The Scenic Act does not have a broad exception for grazing in the river's immediate environment. Instead, the protection takes the form of more limited and indirect protection. For example, a wild or scenic designation cannot diminish private contractual rights to federal lands. This protection assures two years of grazing, but it is not clear for how long beyond that period.

In addition, grazing can continue into the future if such activity fits the purpose of the Scenic Act, as determined in the management plan. Therefore, a partial solution to the uncertainty surrounding grazing and a wild or scenic designation may be a political compromise that is reached either during development of a management plan or incorporated into the designating legislation. One has to wonder whether Congress would develop grazing guidelines for areas designated as wild or scenic? Furthermore, existing grazing practices on private land within the immediate environment of a designated river will continue uninterrupted if the federal agency has acquired the land through a scenic easement.

Another issue is whether a designation, to the extent that it reduces grazing, is a compensable taking. Generally, it will not be a taking; relative to the federal government, the permittees' grazing interest is no more than a two-year lease. The Grazing Guidelines arguably expand the permittee's rights by eliminating wilderness designation as a public purpose with which to justify canceling a permit. In all other cases, a two-year notice to cancel a grazing permit so the land can be devoted to another public purpose, or a decision to not renew a grazing permit because the land is no longer available, is not a taking of property that would require a payment of just compensation.

Finally, a wild or scenic river designation will more adversely impact current grazing practices than would a wilderness designation for

National Grasslands. This conclusion primarily relies on two points. First, the immediate environment of the proposed wild or scenic river is not all federally-owned land, and private ownership in the river's immediate environment will be affected. Fee ownership or a scenic easement will be acquired for all private land within the river's immediate environment, whether voluntarily or by condemnation. By comparison, nearly all the area proposed to be designated wilderness is federally-owned, so the Badlands Proposal would not directly affect as much privately-owned land. But the fee title private lands affected by such a wilderness designation would have to be acquired by the federal government. Second, the Wilderness Act includes an explicit exception for current grazing practices; the Wild and Scenic Act does not have such an explicit or encompassing exception (except to continue regular uses if a scenic easement is acquired through condemnation). Without such an explicit exception, the administering agency has more discretion. This means permittees and private landowners in the river's immediate environment are subjected to a more uncertain future.

Proponents of the Badlands Proposal recognize the uncertainty that follows from designating a river wild or scenic and suggest that local interests and concerns be addressed during the development of the management plan before the area is ever designated. Interested parties need to be involved in the political process and should not expect to rely on the current law to protect their grazing activities.

APPENDIX I
GRAZING GUIDELINES¹⁸³

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

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

2. The maintenance of supporting facilities, existing in an area prior to its classification as wilderness (including fences, line cabins, water wells and lines stock tanks, etc.), is permissible in wilderness. Where practical alternatives do not exist, maintenance or other activities may be accomplished through the occasional use of motorized equipment. This may include, for example, the use of backhoes to maintain stock ponds, pickup trucks for major fence repairs, or specialized equipment to repair stock based watering facilities. Such occasional use of motorized equipment should be expressly authorized in the grazing permits for the area involved. The use of motorized equipment should be based on a rule of practical necessity and reasonableness. For example, motorized equipment need not be allowed for the placement of small quantities of salt or other activities where such activities can reasonably and practically be accomplished on horseback or foot. On the other hand, it may be appropriate to permit the occasional use of motorized equipment to haul large quantities of salt to distribution points. Moreover, under the rule of reasonableness, occasional use of motorized equipment should be permitted where practical alternatives are not available and such use would not have a significant adverse impact on the natural environment. Such motorized equipment uses will normally only be permitted in those portions of a

183. H.R. 617, *supra* note 41, at 11-12.

wilderness area where they had occurred prior to the area's designation as wilderness or are established by prior agreement.

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

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

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