

The National Agricultural
Law Center



University of Arkansas

NatAgLaw@uark.edu · (479) 575-7646

An Agricultural Law Research Article

**The Use of *Qui Tam* Actions to Enforce Federal
Grazing Permits**

by

Edmund C. Baird, III

Originally published in WASHINGTON UNIVERSITY LAW QUARTERLY
72 WASH. U. L. Q. 1407 (1994)

www.NationalAgLawCenter.org

NOTE

THE USE OF *QUI TAM* ACTIONS TO ENFORCE FEDERAL GRAZING PERMITS

I. INTRODUCTION

The single greatest ecological threat to federally owned rangelands is overgrazing by sheep and cattle.¹ This is due, in large part, to the inability of federal agencies to effectively administer the lands and prevent these abuses.² This Note proposes the use of *qui tam* actions under the False Claims Act³ against ranchers who graze in violation of federally granted permits. *Qui tam* provisions allow citizens to bring suit to prosecute frauds against the government.⁴ In certain circumstances, ranchers who graze sheep and cattle in violation of federal permits are defrauding the government.⁵ Permitting False Claims Act *qui tam* actions against grazing permit violators would allow environmentally concerned citizens and organizations to enforce grazing permits in circumstances where the federal government is either unwilling or unable to enforce them itself.⁶

While most of the deterioration of public rangelands occurred before the federal government regulated the use of such lands,⁷ their condition has improved only slightly since Congress first provided for rangeland regulation in 1934.⁸ Overgrazing by privately owned cattle, both in accordance with and in violation of federal law, appears to be principally

1. George C. Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 539 & n.21 (1982) [hereinafter Coggins I].

2. See discussion *infra* Part II.B.

3. 31 U.S.C. §§ 3729-3733 (1988).

4. 31 U.S.C. § 3730(b) (1988).

5. See discussion *infra* Part IV.A.

6. Several environmental groups, particularly the Natural Resources Defense Council (NRDC), have shown interest in litigating issues in this area. See, e.g., *NRDC v. Hodel*, 618 F. Supp. 848 (E.D. Cal. 1985); *NRDC v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976). See also Joseph M. Feller, *Grazing Management on the Public Lands: Opening the Process to Public Participation*, 26 LAND & WATER L. REV. 571, 573 (1991).

7. Coggins I, *supra* note 1, at 547 n.75 (referring to the use of western lands for grazing in the nineteenth century as an example of Hardin's "tragedy of the commons"). See also *infra* notes 79-80, 86.

8. See *infra* notes 79-85 and accompanying text.

responsible for this limited recovery.⁹

The Bureau of Land Management (BLM)¹⁰ is the primary federal agency charged with overseeing the lands available for public grazing. The BLM currently manages nearly 170 million acres of public rangeland.¹¹ However, critics have denounced the BLM for its failure to prevent overgrazing on these lands.¹²

Several factors contribute to the overgrazing problem: the influence of ranchers on government rangeland decisionmaking;¹³ the lack of funding of agencies which administer the lands;¹⁴ the limited information on which BLM decisions are based;¹⁵ and the lack of public participation in rangeland management decisionmaking.¹⁶ In some areas, steps are being taken to confront these problems. For example, the Clinton administration has proposed regulations to increase grazing fees and to add biologists and environmentalists to local advisory boards, which were previously dominated by ranchers.¹⁷ Environmental groups succeeded in an early suit to require National Environmental Protection Act impact statements for government regulation of public lands.¹⁸ More recently, these groups won an administrative determination that grazing permit or lease approvals and renewals are "actions" for the purposes of BLM regulations implementing the Federal Lands Protection and Management Act (FLPMA).¹⁹ Consequently, whenever a grazing permit or a lease is approved or renewed, public rangeland administrators must notify affected parties, provide a

9. See *infra* notes 86-87 and accompanying text.

10. This Note is limited in scope to a discussion of problems associated with the BLM's management of public rangeland. However, the Forest Service also manages a substantial amount of rangeland under a similar statutory schema. See CELIA CAMPBELL-MOHN ET AL., ENVIRONMENTAL LAW FROM RESOURCES TO RECOVERY 346 (1993). Generally, comments in this Note should also be applicable to the Forest Service, although its rangeland management programs have not been criticized as extensively as have the BLM's. GEORGE C. COGGINS, PUBLIC NATURAL RESOURCES LAW § 19.01, at 19-2 (1991) [hereinafter PNRL]. But see U.S. GENERAL ACCOUNTING OFFICE, FOREST SERVICE NOT PERFORMING NEEDED MONITORING OF GRAZING ALLOTMENTS (1991).

11. See *infra* note 27 and accompanying text.

12. See *infra* notes 88-99 and accompanying text.

13. See *infra* notes 88-91 and accompanying text.

14. See *infra* notes 95-96 and accompanying text.

15. See *infra* notes 93-94 and accompanying text.

16. See *infra* note 92 and accompanying text.

17. 58 Fed. Reg. 43,230 (proposed Aug. 13, 1993) (to be codified at 43 C.F.R. § 1784.6-4). See generally 58 Fed. Reg. 43,208-231 (1993).

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

19. Feller, *supra* note 6, at 573 n.11 (citing Joseph M. Feller, No. UT-06-89-02 (U.S. Dep't of the Interior, Aug. 13, 1990)).

statement of reasons for their action, and allow an opportunity for administrative protest and appeal.²⁰ These changes will help resolve the problems associated with rancher influence, lack of information, and lack of public participation discussed above.

The problem of agency underfunding, and corresponding understaffing, seems more resistant to solution, however. Given current budget realities,²¹ it seems unlikely that the administrative agencies charged with monitoring ranchers who use federal rangelands can expect adequate resources to enforce federal permits. Empowering private citizens to bring actions against violators on behalf of the federal government represents a potential solution to the problem of underenforcement of federal grazing permits. Actions brought in this manner are known as *qui tam* actions.²² By using this private prosecution power, environmentally concerned individuals or groups can take a role in the prevention of range overgrazing.

The False Claims Act empowers both the Justice Department and private citizens to bring actions against persons who assert fraudulent claims against the government.²³ It provides for the recovery of civil penalties of up to \$10,000 per violation and treble damages arising from such claims.²⁴ Private citizens who bring these *qui tam* actions can collect ten to thirty percent of the damages recovered from the violator, as well as attorney fees.²⁵ Therefore, if the False Claims Act were applicable in the federal rangeland context, it would provide incentive for citizens to aid the government in the prevention of illegal overgrazing by privately enforcing grazing limits in rangeland permits and leases.

This Note argues that ranchers assert fraudulent claims against the government, and thus violate the False Claims Act, whenever: (1) they renew their permits or leases while in violation of their current permit restrictions; or (2) they receive or renew leases or permits for federal rangeland with the intent to violate the lease restrictions. Part II of this Note provides an overview of the administration of federal rangeland and summarizes the problems of overgrazing. Part III discusses the requirements of *qui tam* actions under the False Claims Act. Part IV applies the False Claims Act to the problem of unlawful overgrazing.

20. *Id.*

21. *See infra* note 101.

22. *See infra* notes 102-05 and accompanying text.

23. *See infra* notes 107-08 and accompanying text.

24. 31 U.S.C. § 3729(a) (1988).

25. *See* 31 U.S.C. § 3730(d) (1988).

II. BUREAU OF LAND MANAGEMENT ADMINISTRATION OF PUBLIC RANGELANDS

In order to understand how the False Claims Act may be used against range permit violators, it is necessary to provide a brief overview of the statutory scheme under which rangeland grazing is regulated, to examine the interests that ranchers hold in their grazing permits, and to characterize the benefit that ranchers receive from a grazing permit. Part II.A. covers these areas. It is also necessary to explain why current approaches to rangeland enforcement are not adequate. Part II.B. describes the ecologically detrimental effects of overgrazing, and shows why BLM is unable to deal effectively with the problem.

A. *The Statutory and Regulatory Framework*

The framework under which the BLM administers the federal rangelands grants ranchers specific property rights in the lands they use. Because federal grazing rights are worth more than ranchers pay the government, these grazing permits also constitute a ranching subsidy. The presence of these characteristics in the federal grazing program creates the potential for application of the False Claims Act.

Federal rangelands are administered under a panoply of statutes.²⁶ The most important statute for grazing regulation is the Taylor Grazing Act of 1934 (Taylor Act).²⁷ Under the Taylor Act, the BLM administers almost 160 million acres of public rangeland, most of which is located in eleven western states.²⁸ The rangelands, which are left over from various federal

26. The Bureau of Land Management is governed by, *inter alia*, the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315r (1988); the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1988); and the Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (1988). The Forest Service's rangeland program is governed by, in addition to the above statutes, the 1897 Organic Act, 16 U.S.C. §§ 473-483, 551 (1988); the National Forest Grazing Act, 16 U.S.C. §§ 580c-580l (1988); and the Multiple-Use, Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531 (1988). In addition, limited livestock grazing is authorized in some parts of the national parks, 16 U.S.C. § 410mm-1(e) (1988), wildlife refuges, 16 U.S.C. § 668dd(1)(A) (1988), and wilderness systems, 16 U.S.C. § 1133(d)(4) (1988).

27. 43 U.S.C. §§ 315-315r (1988) (originally enacted as Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269).

28. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 1990, at 26 (1991) [hereinafter PUBLIC LAND STATISTICS]. Under the authority of other statutes, the BLM administers another 5.7 million acres. *Id.* at 27.

The vast majority of BLM lands are located in the following eleven western states: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

land distributions during the nineteenth century,²⁹ generally are found in intermountain and desert areas and are unsuitable for farming.³⁰ The lands are used for grazing because they contain nourishing forage for cattle and are suitable for the "Spanish-style" ranching that has historically dominated the West.³¹ Rangelands controlled by the BLM also serve other public purposes, including recreation, mining, and research.³²

The rangelands are divided into individual grazing allotments.³³ The BLM authorizes use of these allotments by issuing a permit for a period of up to ten years.³⁴ In addition, other more isolated tracts of land may be "leased" for grazing.³⁵ At a minimum,³⁶ grazing permits and leases must

George C. Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 5 (1982) [hereinafter Coggins II].

29. A variety of nineteenth century statutes granted federal land to various parties including states, railroads, miners, and homesteaders. See Coggins II, *supra* note 28, at 4-22.

30. Coggins I, *supra* note 1, at 536.

31. Coggins II, *supra* note 28, at 22. "Spanish-style" ranchers allow their cattle herds to roam unherded for months. Early western ranchers adopted the method because it was relatively inexpensive—there was no need to build fences or pay herders—and the low population density of the early West reduced or eliminated the need to tightly control herds. *Id.*

32. PUBLIC LAND STATISTICS, *supra* note 28, at 50-52, 56-58, 62-90. Under FLPMA, the Secretary of the Interior must manage federal lands "under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a) (1988). Multiple use is defined as:

[T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; . . . a combination of balanced and diverse resource uses that takes into account the long term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values

43 U.S.C. § 1702(c) (1988). Sustained yield means "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." 43 U.S.C. § 1702(h) (1988).

33. Feller, *supra* note 6, at 573.

34. 43 U.S.C. § 315b (1988); 43 C.F.R. § 4130.2(c) (1991).

35. 43 U.S.C. § 315m (1988). Despite this limited leasing authority, the grazing permit is the far more important device for distributing grazing rights. In 1990, 12,153 operators held grazing permits for 142 million acres of public land representing 12 million animal unit months of grazing. PUBLIC LAND STATISTICS, *supra* note 28, at 26. By contrast, 7,101 operators held grazing leases for 16 million acres of public land constituting 1.5 million animal unit months of grazing. *Id.*

For a discussion of the differences between permits and leases, see *infra* notes 47-57 and accompanying text.

36. Following an attempt by the Reagan administration to delegate essentially all of the BLM's oversight authority to local ranchers, the Eastern District of California mandated certain minimal functions which the BLM, under the federal grazing statutes, must serve. NRDC v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985). See generally PNRL, *supra* note 10, § 19.03, at 19-13 to 19-14.

These minimum requirements include the specification of grazing limits in the permit, either by incorporation of the allotment management plan or by specification of exact grazing levels in the permit. Hodel, 618 F. Supp. at 869. The BLM must also reserve permit revision and cancellation authority.

specify the allotments to be used, the kind and number of livestock authorized to graze, and the times of the year during which the land may be used.³⁷ A permit or lease must also specify the intensity with which the land may be grazed, measured in animal unit months.³⁸ Permits and leases may contain additional terms necessary for the management of the allotment,³⁹ or such terms may be incorporated into the permit or lease in the form of an Allotment Management Plan.⁴⁰

The Taylor Act requires the BLM to give preference for grazing permits or leases to persons engaged in the livestock business who own or control land near the desired allotment or rights to water necessary for watering livestock on the allotment.⁴¹ Ranchers may transfer these preferences with the consent of the BLM.⁴² While the BLM has the authority to modify the terms and amount of grazing permits, or to cancel them altogether,⁴³

Id. at 870-71.

37. 43 C.F.R. § 4130.6-1(a) (1992).

38. *Id.* According to BLM regulations, an "animal unit month" is "the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month." 43 C.F.R. § 4100.0-5 (1992).

Professor Feller reports that, in practice, permissible grazing levels may actually be determined on an annual basis. Feller, *supra* note 6, at 575. These levels may or may not be in accordance with the allotment management plan. *Id.* at 576. See *infra* note 40 and accompanying text.

39. 43 C.F.R. § 4130.6-2 (1992). Such conditions may include: authorization to use, and directions for placement of, additional feed and salt; reporting requirements; provisions to temporarily discontinue grazing to allow the introduction of plants; or the recovery of indigenous plants or other administrative or "range management" goals. *Id.*

40. 43 C.F.R. § 4120.2(a) (1992). Allotment management plans, which are land use plans for a group of allotments, must be developed by the BLM in consultation with permittees, local landowners, state governments, and local grazing advisory boards. *Id.* They are developed pursuant to FLPMA. 43 U.S.C. § 1752(d) (1988).

41. 43 U.S.C. §§ 315b, 315m (1988). The BLM further defines this property, called "base property," in relevant part as follows:

- (1) [Base property] serves as a base for a livestock operation which utilizes public lands within a grazing district; or
- (2) [Base property] is contiguous land, or non-contiguous land when no applicant owns or controls contiguous land, used in conjunction with a livestock operation which utilizes public lands outside a grazing district.

43 C.F.R. § 4110.2-1 (1992).

42. 43 C.F.R. § 4110.2-3 (1992).

43. 43 U.S.C. §§ 315b, 1752(a) (1988); 43 C.F.R. § 4130.6-3 (1992); *United States v. Fuller*, 409 U.S. 488, 489 (1973) (stating that Taylor Act permits are revocable); *Swim v. Bergland*, 696 F.2d 712, 715 (9th Cir. 1983) (holding that permits may be modified or cancelled to implement tribal grazing rights); *Mollohan v. Gray*, 413 F.2d 349, 353 (9th Cir. 1969) (stating that permits confer a mere privilege, withdrawable without compensation); *LaRue v. Udall*, 324 F.2d 428, 431 (D.C. Cir. 1963) (allowing permit revocation), *cert. denied*, 376 U.S. 907 (1964); *United States v. Cox*, 190 F.2d 293, 294 (10th Cir.) (stating that permits confer a privilege withdrawable at anytime without compensation), *cert. denied*, 342 U.S. 867 (1951); *Oman v. United States*, 179 F.2d 738, 742 (10th Cir. 1949) (same); *Osborne v. United States*, 145 F.2d 892, 896 (9th Cir. 1944) (same); *Bowman v. Udall*, 243 F. Supp.

it must respect the preference rights of persons who qualify for allotments of lands on which grazing is permitted.⁴⁴ In addition, the Taylor Act requires the BLM to renew permits of permittees who have pledged their "grazing units" as security for a loan, as long as they are in compliance with BLM regulations.⁴⁵ Indeed, the D.C. Circuit noted that those who qualify for a preference are "entitled as of right" to a permit as against others.⁴⁶

For the majority of the rangelands it manages, the BLM is required to control grazing through the issuance of grazing permits.⁴⁷ However, for certain isolated lands, the BLM is authorized to issue grazing leases. The main difference between the two devices is the quality of the property interest they provide to the holder. Holders of grazing leases possess actual property rights as against the government, and regulations that deprive a leaseholder of grazing rights bestowed by the lease may constitute a Fifth Amendment taking for which compensation is due.⁴⁸ In fact, the Oregon

672, 678 (D.D.C. 1965) (same), *aff'd sub nom.*, *Hinton v. Udall*, 364 F.2d 676 (D.C. Cir.), *cert. denied* 385 U.S. 878 (1966); *Sellas v. Kirk*, 101 F. Supp. 237, 239 (D. Nev. 1951) (same), *aff'd*, 200 F.2d 217 (9th Cir. 1952), *cert. denied*, 345 U.S. 940 (1953).

But see Hinsdale Livestock v. United States, 501 F. Supp. 773 (D. Mont. 1980) (holding that a drought was not a satisfactory reason for cancelling a permit, and enjoining such cancellation). Professor Coggins notes that Judge Battin, who wrote the opinion in *Hinsdale*, has evidently reversed himself on this point. PNRL, *supra* note 10, § 19.02, at 19-9 n.17 (citing *Schwenke v. Secretary of the Interior*, 21 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,542, 20,547 (D. Mont. 1990)).

44. 43 U.S.C. § 1752(c) (1988); 43 C.F.R. § 4130.2(d) (1992); *McNeil v. Seaton*, 281 F.2d 931, 935 (D.C. Cir. 1960) (holding that a plaintiff cannot be deprived of preference by the Secretary of Interior's adoption of a special rule); *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938).

45. 43 U.S.C. § 315b (1988).

46. *Red Canyon Sheep*, 98 F.2d at 314.

47. *See supra* notes 33-35 and accompanying text.

48. *United States v. Certain Parcels of Land in San Bernardino County*, 296 F. Supp. 774 (C.D. Cal. 1969). *See also* Michael J. Kaplan, Annotation, *Construction and Application of Taylor Grazing Act*, 42 A.L.R. FED. 353, 394-95 (1979). *But see* *Bowman v. Udall*, 243 F. Supp. 672 (D.D.C. 1965) (stating, as dicta, that a lease granted under 43 U.S.C. § 315m is a privilege which may be withdrawn from the holder without compensation), *aff'd sub nom.*, *Hinton v. Udall* 364 F.2d 676 (D.C. Cir.), *cert. denied*, 385 U.S. 878 (1966); PNRL, *supra* note 10, § 19.03[3][b], at 19-18 n.52 (stating that *Parcels* was almost certainly overruled by *United States v. Fuller*, 409 U.S. 488 (1973)).

The court in *Parcels* noted that 43 U.S.C. § 315b, which regulates the grant of permits, expressly states that permits create no right in the holder. 296 F. Supp. at 775. However, it observed that 43 U.S.C. § 315m, which allows the grants of leases, contains no such language. *Id.* The court reasoned that Congress would have placed a similar reservation in § 315m if it desired leaseholders to have no rights against the government. *Id.* Thus, the court held that grazing leases were property, and, therefore, compensable in a condemnation proceeding. *Id.* at 776.

Professor Coggins' interpretation of *Fuller* as overruling *Parcels*, PNRL, *supra* note 10, § 19.03[3][b], at 19-18 n.52, is suspect. First, *Fuller* deals with Taylor Act permits, not leases. 409 U.S.

Supreme Court has held BLM grazing leases to be taxable possessory interests.⁴⁹

In contrast, grazing permits do not grant property rights as against the government, and subsequent modifications by the BLM of permit terms do not constitute takings under the Fifth Amendment.⁵⁰ However, it is clear that the holder of a permit does have property rights as against other private individuals.⁵¹ Other characteristics of BLM permits also suggest that they should be considered property interests. A Taylor Act permittee may sublease public lands for which he holds a grazing permit as long as the leased lands include the base property to which the permit is attached.⁵² Under its regulations, the BLM must approve the transfer of grazing privileges,⁵³ but at least one court has enforced a contract that illegally transferred such preferences between private parties.⁵⁴ In addition, the market value of a ranch to which a permit is attached reflects

at 489. Second, the Court's holding in *Fuller*—that the value of property derived from the holding of grazing permits is not compensable in a condemnation proceeding for land held in fee simple—is not pertinent to the issue in *Parcels*. Finally, the *Fuller* Court did not even address the statutory arguments that support the *Parcels* holding.

49. *Sproul v. Gilbert*, 359 P.2d 543 (Or. 1961).

50. See *supra* note 43 and accompanying text.

51. See *Garcia v. Andrus*, 692 F.2d 89, 94 (9th Cir. 1982) (enforcing the right of an owner of one-third of a base property to receive a preference for that property over the owner of the other two-thirds); *McNeil v. Seaton*, 281 F.2d 931 (D.C. Cir. 1960) (upholding preference holder's right to property over others despite Department of Interior special regulations); *Oman v. United States*, 179 F.2d 738, 742 (10th Cir. 1949) (holding that Taylor Act grazing permittees had a cause of action under the Federal Tort Claims Act against federal employees who allegedly aided others in using plaintiff's permitted lands). See also John S. Harbison, *Hohfeld and Herefords: The Concept of Property and the Law of the Range*, 22 N.M. L. REV. 459, 463 (1992) ("[P]ermittees and lessees acquire rights [under the Taylor Grazing Act] of the kind that do constitute property.").

52. See RESOURCES, COMMUNITY AND ECON. DEV. DIVISION, U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: GRAZING LEASE ARRANGEMENTS OF BUREAU OF LAND MANAGEMENT PERMITTEES (1986) [hereinafter GAO, GRAZING LEASE ARRANGEMENTS]; C. Kerry Gee & Albert G. Madsen, *The Cost of Subleasing Federal Grazing Privileges* (August 1986), reprinted in *Bureau of Land Management Reauthorization: Hearing Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, 102d Cong., 2d Sess. 148-58 (1992) [hereinafter 1992 *Reauthorization Hearing*].

The BLM does not allow subleasing of grazing-permitted lands unless the base property is also leased. 43 C.F.R. §§ 4140.1(a)(6), 4100.0-5 (1992). In addition, the BLM prohibits grazing of livestock not owned or controlled by the permittee or lessee. *Id.*

53. 43 C.F.R. § 4120.3-6 (1992).

54. *United States v. Redland*, 695 P.2d 1031 (Wyo. 1985) (upholding an otherwise illegal transfer of grazing rights, where the BLM was aware of, and later condoned, the transaction based on the BLM's responsibility to enforce its own regulations).

the property interest bestowed by the permit.⁵⁵ Such interests are taxable as a part of a decedent's estate under the federal estate tax rules,⁵⁶ and California even considers grazing permits a sufficient possessory interest to be taxed under its property tax.⁵⁷

In recent years, one of the most controversial aspects of the federal grazing program has been the level of fees that the BLM charges grazing permittees and lessees.⁵⁸ Critics complain that the fixed fee is below "market value" for comparable grazing on private rangelands.⁵⁹ On the other hand, the cattle industry argues that, at current BLM rates, it actually costs more to use public land than private lands.⁶⁰ The General Accounting Office has determined that the formula the BLM uses to calculate

55. PNRL, *supra* note 10, § 19.01, at 19-4. *See also* Estate of Cronin v. Cronin, 237 N.W.2d 171 (S.D. 1975) (holding that estate appraisers erred in not considering grazing permits in determining value of deceased's lands).

56. Rev. Rul. 86-99, 1986-2 C.B. 159.

57. Board of Supervisors v. Archer, 96 Cal. Rptr. 379 (Ct. App. 1971).

58. *See, e.g.*, Catalina Camia, *With Grazing Fee Hike Certain, Question Becomes How Much*, 51 CONG. Q. WKLY. REP. 2150 (1993); John A. Baden, *New Range Wars and the Grazing-Fee Dilemma*, THE SEATTLE TIMES, Dec. 22, 1992, at A11; Rudy Abramson, *Lawmakers Block Increase in Grazing Fees*, L.A. TIMES, Sept. 24, 1992, at A3; Anna Maria Gillis, *Should Cows Chew Cheatgrass on Commonlands?*, BIOSCIENCE, Nov. 1991, at 668, 674; Phillip A. Davis, *East Meets West in Latest Fight Over Grazing Fee Increase*, 49 CONG. Q. WKLY. REP. 1656 (1991). *See generally* 1992 Reauthorization Hearing; *Grazing Management and Grazing Fee Issues, Hearing Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, 102d Cong., 2d Sess. (1992) [hereinafter 1992 *Grazing Fee Hearing*]; *BLM Reauthorization and Grazing Fees: Hearing Before the Subcomm. on National Parks and Public Lands of the House Comm. on Interior and Insular Affairs*, 102d Cong., 1st Sess. (1991) [hereinafter 1991 *Reauthorization Hearing*]; *Reauthorization of the BLM: Hearing Before the Subcomm. on National Parks and Public Lands of the House Comm. on Interior and Insular Affairs*, 101st Cong., 1st Sess. (1989) [hereinafter 1989 *Reauthorization Hearing*].

59. *See, e.g.*, 1991 *Reauthorization Hearing, supra* note 58, at 25 (statement of Representative Synar) (arguing that current grazing fees do not reflect market rates.)

60. *See, e.g.*, 1992 *Grazing Fee Hearing, supra* note 58, at 186-88; 1991 *Reauthorization Hearing, supra* note 58, at 70-80. Other livestock industry representatives argue that the costs to use public and private lands are the same. *See, e.g.*, 1991 *Reauthorization Hearing, supra* note 58, at 213. However, livestock industry comparisons do not make explicit the times that certain costs are incurred, which impacts the net present value of the costs involved. *See* Neil R. Rimbey, *Federal Grazing Fees: The Never-Ending Story*, reprinted in 1992 *Grazing Fee Hearing, supra* note 58, at 86, 90. Additionally, such estimates probably do not take into account the opportunity cost to the public land rancher to move his herd to private lands. *See also* RAY F. BROKKEN & BRUCE A. MCCARL, ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, AGRICULTURAL ECONOMIC REPORT NO. 570, A THEORETICAL EVALUATION OF FEE SYSTEMS FOR PRIVATE GRAZING ON FEDERAL LANDS (1987).

There is also a school of thought, fueled largely by the Sagebrush Rebellion of the late 1970s, that the western rangelands should be privatized. *See generally* WAYNE HAGE, STORM OVER RANGELANDS: PRIVATE RIGHTS IN THE FEDERAL LANDS (1989); GARY D. LIBECAP, LOCKING UP THE RANGE: FEDERAL LAND CONTROLS AND GRAZING (1981).

grazing fee levels inherently produces low fees.⁶¹ Over the last several years, many alternative proposals have been introduced in Congress that would either codify the existing grazing fee formula⁶² or require the BLM to charge higher fees.⁶³ In August 1993, the Clinton administration proposed rules that would raise grazing fees threefold.⁶⁴

While critics of the BLM's grazing fees may be misguided in their contention that the fees do not reflect market prices,⁶⁵ their more basic claim that the fees reflect a subsidy to ranchers appears correct.⁶⁶ The fee charged does not cover the cost of administering the rangeland grazing program.⁶⁷ Thus, permittees and lessees get a bargain.⁶⁸ Furthermore,

61. RESOURCES, COMMUNITY AND ECON. DEV. DIVISION, U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: CURRENT FORMULA KEEPS GRAZING FEES LOW 2 (1991) [hereinafter GAO, CURRENT FORMULA]. The formula for determining grazing fees is designed to take into account the ability of ranchers to pay based on their profitability levels. This is supposed to produce cheaper grazing rates when ranching is less profitable, and vice versa. However, the formula actually double counts the profitability factor by including one factor that is based on the market rate for private forage, and another that accounts for ranching profitability. *Id.* at 16-17. Because the cost of forage is directly related to the profitability of the ranching industry, both of these factors measure the same thing—ability to pay. *Id.*

62. See, e.g., H.R. 1292, 102d Cong., 1st Sess. (1991); H.R. 1670, 101st Cong., 1st Sess. (1989).

63. See, e.g., H.R. 643, 103d Cong., 1st Sess. (1993); H.R. 944, 102d Cong., 1st Sess. (1991).

64. 58 Fed. Reg. 43,227 (proposed Aug. 13, 1993) (to be codified at 43 C.F.R. § 4130.7-1). See also Catalina Camia, *Administration Aims to Increase Grazing Fees, Tighten Rules*, 51 CONG. Q. WKLY. REP. 2223 (1993).

65. The package of services that a rancher receives from the government is different from that which she would normally receive in a private rangeland lease. Rimbey, *supra* note 60, at 86. See also *supra* notes 42-46.

In addition, because there is no real market for the grazing of these lands, it cannot be said that there is a market value for such a use. See Coggins II, *supra* note 28, at 75. The fee the government charges for the grazing of these lands should be determined by the goal it wants to achieve. See GAO, CURRENT FORMULA, *supra* note 61, at 31 ("If the primary objective is to track changes in forage prices paid on private lands or to recover the government's costs of administering the livestock grazing program . . . substantial revisions [in the fee structure] would be needed.").

66. See PNRL, *supra* note 10, § 19.02, at 19-10 to 19-12.

67. In 1991, the BLM grazing fee was \$1.97 per animal unit month. 1991 *Reauthorization Hearing*, *supra* note 58, at 217. In that year, the BLM permitted grazing for 13.3 million animal unit months. RESOURCES, COMMUNITY AND ECON. DEV. DIVISION, U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: PROFILE OF THE BUREAU OF LAND MANAGEMENT'S GRAZING ALLOTMENTS AND PERMITS 14 (1992). Thus, the BLM's receipts should have been \$26.2 million. GAO estimated that the BLM allocated \$28.9 million for its rangeland management in 1991. RESOURCES, COMMUNITY AND ECON. DEV. DIVISION, U.S. GENERAL ACCOUNTING OFFICE, BLM RESOURCE ALLOCATION 13 (1992).

Other estimates recognize this disparity. See, e.g., GAO, CURRENT FORMULA, *supra* note 61, at 23 (estimating that in 1990, BLM's livestock-related costs were \$21 million and its receipts from grazing fees were \$19 million, but suggesting BLM understated its costs). A House of Representatives committee report estimated that BLM administration costs in 1983 were \$2.65 for every \$1.35 received.

there is substantial evidence that holders of federally granted grazing rights can sometimes sublease those rights, legally or illegally, for a substantially higher fee than that charged by the government.⁶⁹ Typically, ranches with attached grazing permits are worth more than those without such rights.⁷⁰ In fact, banks often make loans secured by grazing permits as collateral.⁷¹ The existence of these circumstances, critics argue, shows that grazing permits must represent a subsidy. If these permits conferred no benefit beyond the price the government charges, the above phenomena should not be observed.⁷² After reviewing the BLM policies, the House Committee on Government Operations characterized the BLM's administration of the public rangelands as a direct drain on the federal treasury.⁷³

Permits may be canceled, suspended, or modified for violation of their terms.⁷⁴ In addition, permits may be modified if allotment monitoring data show that "present grazing use is not meeting the land use plan or

HOUSE COMM. ON GOV'T OPERATIONS, FEDERAL GRAZING PROGRAM: ALL IS NOT WELL ON THE RANGE, H.R. REP. 593, 99th Cong., 2d Sess. 10 (1986) [hereinafter HOUSE GRAZING REPORT]. In addition, the report notes that only approximately one-third of the permit revenues are actually returned to the U.S. Treasury. *Id.* The other funds are used for various purposes, including distributions to state governments. *Id.*

68. The BLM spends substantial amounts on range improvements. See HOUSE GRAZING REPORT, *supra* note 67, at 28. In fact, 50% of grazing fees, or \$10 million, whichever is greater, must be spent directly on range improvements each year. 43 U.S.C. § 1751(b)(1) (1988). The BLM also spends considerable amounts of money on predator control programs that may not be included in its rangeland management budget. George C. Coggins, *Livestock Grazing on the Public Lands: Lessons from the Failure of Official Conservation*, 20 GONZ. L. REV. 748, 757 (1984-85) [hereinafter Coggins Speech]. For example, the Department of the Interior spends millions of dollars to kill coyotes and other livestock predators. *Id.* In addition, the government may spend money to eliminate insects, such as grasshoppers, that would otherwise affect the quality of the rangeland for forage. *Id.*

69. See HOUSE GRAZING REPORT, *supra* note 67, at 12-19; Gee & Madsen, *supra* note 52; GAO, GRAZING LEASE ARRANGEMENTS, *supra* note 52, at 2.

70. Coggins II, *supra* note 28, at 74.

71. *Id.*

72. *Id.* See also HOUSE GRAZING REPORT, *supra* note 67, at 20 (citing FOREST SERVICE, DEPARTMENT OF AGRICULTURE & BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, GRAZING FEE REVIEW AND EVALUATION: A REPORT FROM THE SECRETARY OF AGRICULTURE AND THE SECRETARY OF THE INTERIOR 49-50 (1986)) (stating that if the courts allowed permittees to claim compensation for taking of permits, a "permittee [would] retain the capitalized value of a resource that belongs to the public"). *But see* 1989 *Reauthorization Hearing*, *supra* note 58, at 182 (offering other explanations for these phenomena); BROKKEN & MCCARL, *supra* note 60, at 2-4 (same).

73. HOUSE GRAZING REPORT, *supra* note 67, at 5-36. The Committee characterized the rangeland program this way because the fee does not cover administrative costs, *id.* at 10, and permittees gain profits at the expense of the public treasury through subleasing and enhanced value of base property, *id.* at 12-20, ineffective permit enforcement, *id.* at 21-23, and damage to the land, *id.* at 26.

74. 43 C.F.R. § 4130.6-1(b) (1992); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1401-02 (10th Cir. 1976).

management objectives.”⁷⁵ Ranchers grazing on federal land without a permit, or grazing more livestock than allowed in their permit, are guilty of “trespass”⁷⁶ and are liable for damages to the property arising from the trespass.⁷⁷ Persons who willfully trespass, violate permit terms, or damage public lands are liable for a fine of up to \$1,000 and imprisonment of up to one year.⁷⁸

B. *The Condition of Public Rangeland: Problems and Causes*

Overgrazing poses a significant threat to the ecological viability of public rangelands. However, due to political and budgetary constraints, the BLM has been unable to effectively limit the practice. These circumstances make citizen enforcement of grazing limits through *qui tam* actions an attractive approach to combatting the overgrazing problem.

While the deterioration of the public rangelands has abated somewhat since the enactment of the Taylor Act in 1934,⁷⁹ the rangelands have not recovered fully from the large-scale ecological catastrophes caused by overgrazing in the late nineteenth century.⁸⁰ Today, the condition of the

75. 43 C.F.R. § 4130.6-3 (1992). Land use plans are regional plans developed to further “recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.” 43 U.S.C. §§ 1712, 1702(c) (1988). See 43 C.F.R. § 1601.0-5(k) (1992). See generally George C. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1 (1983).

76. PNRL, *supra* note 10, § 19.03, at 19-23 (citing Kent Gregerson, 101 I.B.L.A. 269 (1988)).

77. 43 C.F.R. § 4150.1 (1992). BLM regulations assess liability based on whether the trespass was “nonwillful,” “willful,” or “repeated willful.” For nonwillful violations, the violator must pay damages in the amount of the value of the forage consumed by trespassing livestock at the market rate on private lands. *Id.* at § 4150.3(a). Willful violators must pay twice the market value of the forage consumed, *id.* at § 4150.3(b), and repeated willful violators must pay three times its value, *id.* at § 4150.3(c).

In 1991, the General Accounting Office reported that the BLM charged \$9.19 per animal unit month in these cases. GAO, CURRENT FORMULA, *supra* note 61, at 27 (1991). See also Kent Gregersen, 101 I.B.L.A. 269, 270 (1988) (upholding trespass assessment in 1984 at a rate of \$8.85 per animal unit month).

78. 43 C.F.R. § 4170.2-2 (1992); 43 U.S.C § 1733(a) (1988). A separate fine of \$500 is assessable under the authority of the Taylor Act. 43 C.F.R. § 4170.2-1 (1992).

79. See Coggins I, *supra* note 1, at 551-52; 1991 *Reauthorization Hearing*, *supra* note 58, at 86. In fact, the Dust Bowl of the 1930s, caused in part by overgrazing, may have been an important factor in the passage of the Act. Coggins II, *supra* note 28, at 46-47.

80. Coggins Speech, *supra* note 68, at 754-55.

In the “Great Debacle” of 1889-90, overgrazing, coupled with a summer drought and severe winters, resulted in reduced rangeland productivity. The ensuing forage shortage caused the death of millions of livestock. Coggins II, *supra* note 28, at 22. Professor Coggins noted: “One [ranch] in Nevada and Idaho that had branded 38,000 calves in 1885 found only 68 calves on the same area in 1890.” *Id.* (citing Young et al., *Successional Patterns and Productivity Potentials of the Sagebrush and Salt Desert*

rangelands remains less than adequate.

The BLM categorizes two-thirds of the lands under its control as in "fair" or "poor" shape.⁸¹ These labels indicate that the lands produce less than one-half of the forage that they are capable of producing.⁸² Reduced levels of ground cover increase erosion problems and degradation of native plant and animal species.⁸³ Moreover, overgrazing has destroyed riparian areas within the public rangelands.⁸⁴ Congress, in enacting the Public Rangelands Improvement Act,⁸⁵ found that "vast segments of the public rangelands are producing less than their potential . . . and for that reason are in unsatisfactory condition."⁸⁶

These problems are largely a result of abusive grazing practices. The historical practice of overgrazing has continued despite prohibitive statutes and regulations. Even today, the BLM continues to issue permits that authorize excessive grazing, and ranchers continue to violate permit limits and trespass on federal lands.⁸⁷

Ecosystems, in NAS SYMPOSIUM IV 27 (1981)).

In addition, the "Spanish-style" ranching techniques traditionally employed in the West encouraged overgrazing. Because use of the range was free, there were no cost restraints on the amount to which it could be grazed, leading inevitably to overgrazing. Coggins I, *supra* note 1, at 547-49. See also Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

81. 1991 Reauthorization Hearing, *supra* note 58, at 86.

82. Coggins Speech, *supra* note 68, at 753 (citing NRDC v. Morton, 388 F. Supp. 829 (D.D.C. 1974)).

Indeed, the intensity at which lands are grazed today has a direct bearing on the level of forage production tomorrow. See RESOURCES, COMMUNITY AND ECON. DEV. DIVISION, U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: MORE EMPHASIS NEEDED ON DECLINING AND OVERSTOCKED GRAZING ALLOTMENTS 26-27 (1988) [hereinafter GAO, OVERSTOCKED GRAZING ALLOTMENTS]; Gillis, *supra* note 58, at 674.

83. HOUSE GRAZING REPORT, *supra* note 67, at 66; Coggins Speech, *supra* note 68, at 753-54.

For a thorough explanation of the way overgrazing affects rangeland resources, and of the ecological impact of overgrazing, see DENZEL FERGUSON & NANCY FERGUSON, SACRED COWS AT THE PUBLIC TROUGH 60-130 (1983).

84. RESOURCES, COMMUNITY, AND ECON. DEV. DIVISION, U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: ASSESSMENT OF NEVADA CONSULTING FIRM'S CRITIQUE OF THREE GAO REPORTS 18-19 (1992) (quoting COUNCIL ON ENVTL. QUALITY, DESERTIFICATION OF THE UNITED STATES (1981)); U.S. ENVIRONMENTAL PROTECTION AGENCY, LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS (1990); U.S. GENERAL ACCOUNTING OFFICE, SOME RIPARIAN AREAS RESTORED BUT WIDESPREAD IMPROVEMENT WILL BE SLOW (1988); HOUSE GRAZING REPORT, *supra* note 67, at 26; Richard H. Braun, *Emerging Limits on Federal Land Management Discretion: Livestock, Riparian Ecosystems, and Clean Water Law*, 17 ENVTL. L. 43, 44-45 (1986); Coggins Speech, *supra* note 68, at 754.

85. 43 U.S.C. §§ 1901-1908 (1988) (originally enacted as Act of Oct. 25, 1978, 92 Stat. 1803).

86. 43 U.S.C. § 1901(a)(1) (1988).

87. See *infra* notes 88-99 and accompanying text.

Many authorities agree that the history of the BLM is marked by subservience to cattle interests.⁸⁸ Local ranchers have long played a prominent role in determining the amount of grazing allotments available for lease.⁸⁹ The shape of allotments today is directly related to decisions made sixty years ago by advisory boards comprised of local ranchers during the initial implementation of the Taylor Act.⁹⁰ Even when new scientific information indicating that the actual cattle carrying capacity of allotments was less than had been permitted became available, the advisory boards were often able to block proposals to decrease grazing allowances.⁹¹ Thus, in the summer of 1993, the Clinton administration moved to include biologists and environmentalists on the advisory boards.⁹²

The BLM has been constrained further in its attempts to properly manage the public lands by the lack of information on the conditions of the rangelands under its authority. Although the BLM is required to develop rangeland management plans and determine the environmental impact of its actions,⁹³ such requirements are ineffective if the agency does not have

88. Coggins II, *supra* note 28, at 90; Braun, *supra* note 84, at 57-58. See generally Coggins II, *supra* note 28, at 61-75.

89. BLM regulations contemplate consultation with advisory boards, comprised mainly of local ranchers, for guidance in administration of the allotments. See 43 C.F.R. §§ 4110.2(a) (1992). These boards have been created over the years under a variety of statutory authorities. See 43 U.S.C. § 3150-1 (1988) (Taylor Act authorization held expired in *Carpenter v. Morton*, 424 F. Supp. 603 (D. Nev. 1976)); 43 U.S.C. § 1753 (1988) (FLPMA authorization expired in 1985); Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-14 (1988).

90. Coggins II, *supra* note 28, at 56-58. When the Department of the Interior first took control of the public rangelands after the enactment of the Taylor Act, the Department had no infrastructure through which to administer the lands. *Id.* at 56-57. The only people with the detailed knowledge of the lands necessary for the administration of the lands at that time were the ranchers themselves; therefore, the Department relied on the ranchers. *Id.* The Department established grazing boards comprised of ranchers who not only served a consultative function, but also served as the "local governing agency as to all matters of a range regulatory nature." *Id.* at 57 (citing U.S. DEP'T OF INTERIOR, 1938 ANN. REP. SEC. 15-16, *quoted in* P. FOSS, POLITICS AND GRASS 81-82 (1960)). These boards also made the initial determination of allotment carrying capacity. Coggins II, *supra* note 28, at 58.

91. Coggins I, *supra* note 1, at 552; Coggins II, *supra* note 28, at 90.

92. 58 Fed. Reg. 43,230 (proposed Aug. 13, 1993) (to be codified at 43 C.F.R. § 1784.6-4). See generally 58 Fed. Reg. 43,208-231 (1993); Camia, *supra* note 64.

93. FLPMA, 43 U.S.C. § 1752(d) (1988), requires the BLM to develop allotment management plans. FLPMA also requires the BLM to create land use plans for all public lands that the BLM administers. *Id.* at § 1712(a). These plans must incorporate "the principles of multiple use and sustained yield." *Id.* at § 1712(c). See *supra* note 32.

Further, under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1988), the BLM must develop environmental impact statements for the grazing districts it administers. *NRDC v. Morton*, 388 F. Supp. 829, 841 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1975), *cert. denied*, 427

access to reliable data on lands within its jurisdiction. Budget constraints and poorly conceived information collection strategies often prevent the BLM from obtaining such data.⁹⁴

Authorities generally agree that the BLM does not have the resources to adequately enforce the grazing permits it issues.⁹⁵ Thus, ranchers have little incentive to comply with permit limitations. In 1990, the Government Accounting Office reported that many rangeland allotments are either rarely visited or not visited at all.⁹⁶ The BLM has no systematic approach for detecting grazing trespass.⁹⁷ In addition, although the BLM has substantial authority to penalize violators,⁹⁸ it has been rather lenient in assessing penalties against those it does find guilty of trespass.⁹⁹

Public involvement in the BLM decisionmaking process represents a promising mechanism for halting the practice of issuing grazing permits

U.S. 913 (1976).

94. According to the General Accounting Office, the condition of much of the public rangeland is unknown because the BLM's data are either old or unreliable, and the agency lacks sufficient resources to maintain an adequate information base. GAO, *OVERSTOCKED GRAZING ALLOTMENTS*, *supra* note 82, at 20. For example, the GAO found that much of the data on the rangelands is over five years old. *Id.* at 21. The GAO also found that BLM rangeland managers, from whom rangeland data is primarily derived, did not "know current conditions and trends for much of their range." *Id.* at 20. See also Gillis, *supra* note 58, at 669-71; Giles T. Rafsnider et al., *Range Survey Cost Sharing and the Efficiency of Rangeland Use*, 63 *LAND ECON.* 92 (1987) (evaluating a proposal that range managers and private beneficiaries share in the costs of range surveys).

95. For example, Representative Vento, chairman of the House Subcommittee on National Parks and Public Lands, stated:

[The] BLM's roughly 400-member range staff are currently attempting to manage the grazing activity of over four million head of domestic livestock spread over 165 million acres and administered through 22,000 grazing allotments. On the average, each range staff member is responsible for 47 grazing permits, and 392,000 acres. At least 26 of the staff members have a responsibility for more than one million acres each.

1991 *Reauthorization Hearing*, *supra* note 58, at 103. See also *RESOURCES, COMMUNITY AND ECON. DEV. DIVISION, U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: BLM EFFORTS TO PREVENT UNAUTHORIZED LIVESTOCK GRAZING NEED STRENGTHENING 3* (1990) [hereinafter *GAO, BLM EFFORTS*]; GAO, *OVERSTOCKED GRAZING ALLOTMENTS*, *supra* note 82, at 39; Coggins II, *supra* note 28, at 90 (citing W. CALEF, *PRIVATE GRAZING AND PUBLIC LANDS* 70-72, 143 (1960)).

96. GAO, *BLM EFFORTS*, *supra* note 95, at 3.

97. *Id.* at 4.

98. See *supra* notes 76-78 and accompanying text. See also Coggins II, *supra* note 28, at 91.

99. GAO, *BLM EFFORTS*, *supra* note 95, at 5-8 (reporting that the BLM handles 84-88% of grazing permit violations informally, and rarely assesses penalties); *HOUSE GRAZING REPORT*, *supra* note 67, at 21-24 (finding that the record of BLM trespass cases closed shows that grazing trespass enforcement is a low priority at most BLM field offices); Coggins II, *supra* note 28, at 91 (noting that the BLM asserts control over third-party trespassers, but seems hesitant to control its own permittees' noncompliance).

that authorize overgrazing.¹⁰⁰ However, enforcement of grazing permits by the BLM seems unlikely to improve given current budget realities.¹⁰¹ A potential solution to this underenforcement problem may be available in *qui tam* suits brought by citizens, on behalf of the government, against ranchers who operate in violation of their grazing permits. Part III provides an overview of *qui tam* actions as authorized under the False Claims Act, and Part IV argues that the False Claims Act would allow, in some circumstances, *qui tam* suits against ranchers responsible for overgrazing.

III. QUI TAM AND THE FALSE CLAIMS ACT

A. History and Description of the False Claims Act

The *qui tam*¹⁰² action is brought by a citizen on behalf of the federal government. It has a long tradition in Anglo-American jurisprudence,¹⁰³ but has fallen largely into disuse in the current day.¹⁰⁴ The False Claims

100. Land use plans must comply with the National Environmental Policy Act (NEPA), see NRDC v. Morton, 388 F. Supp. 829 (D.D.C. 1974), which requires public participation in the development of Environmental Impact Statements for any major federal action that might significantly affect the environment. 40 C.F.R. 1503.1(a)(4) (1993). See generally DANIEL R. MANDELKER, NEPA: LAW AND LITIGATION § 7.12 (1984).

It appears that persons who use grazing areas for any purpose identified under FLPMA, 43 U.S.C. § 1702(c) (1988), are interested parties for the purposes of actions under 43 C.F.R. § 4160 (1992). See Donald K. Majors, 123 I.B.L.A. 142 (1992) (holding that a person who used an allotment for recreational purposes had an "affected interest" pursuant to 43 C.F.R. § 4100.0-5). Under another recent administrative ruling, grazing permit renewals are considered actions for the purposes of FLPMA. Therefore, renewals are subject to notice requirements, written explanations of decision, and appeal. Feller, *supra* note 6, at 573 (citing Joseph M. Feller, No. UT-06-89-02 (U.S. Dep't of the Interior, Aug. 13, 1990)). See *id.* at 586-90.

101. See GAO, BLM EFFORTS, *supra* note 95, at 4.

102. *Qui tam* is an abbreviation for the Latin phrase "*qui tam pro domino rege quam pro si ipso in hac parte sequitur*," which means "who sues on behalf of the King as well as himself." BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

103. *Qui tam* actions have their roots in thirteenth century common law, when they were used as a means of gaining access to the royal courts. Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 85 [hereinafter Note]. As the royal courts gained dominance, this device fell into disuse, but it regained vitality when Parliament, through statute, authorized *qui tam* actions to prosecute crimes and civil wrongs against the crown. *Id.* at 86-91. Likewise, from the colonial days until the late nineteenth century, legislatures in this country made provisions for informer actions. *Id.* at 97-100. The device was effective for prosecuting crimes in an era when police resources were limited. *Id.* at 86, 101. See also Dan D. Pitzer, Comment, *The Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 TEX. INT'L L.J. 415, 417-18 (1972).

104. As public agencies became more effective at enforcing the laws, the need for such actions decreased, and many of the enabling statutes were repealed. See Note, *supra* note 103, at 99-101.

Indeed, modern courts have grown hostile to such actions. The Refuse Act of 1899, 33 U.S.C. §§

Act is the most important statute remaining that allows such actions.¹⁰⁵

The False Claims Act was originally enacted to combat contractor fraud.¹⁰⁶ The statute allows actions by either the Attorney General or a private citizen against persons who: assert "false or fraudulent claims" against the government; use, or allow to be used, false information to get a false claim paid by the government; or conspire to make such a claim against the government.¹⁰⁷ The statute authorizes civil penalties of \$5,000 to \$10,000 as well as treble damages arising from the claim.¹⁰⁸

Faced with evidence of widespread fraud occurring throughout govern-

407-13 (1988), contains a provision that allowed for the reward of informers. However, courts have rejected attempts to interpret this as an authorization for *qui tam* suits, see *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979), *rev'd*, 451 U.S. 287 (1981), despite precedent to the contrary. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943). See also Pitzer, *supra* note 103, at 438-40; STAFF OF CONSERVATION & NATURAL RESOURCES SUBCOMM. OF THE HOUSE COMM. ON GOV'T OPERATIONS, 91ST CONG., 2D SESS., QUI TAM ACTIONS AND THE 1899 REFUSE ACT: CITIZEN SUITS AGAINST POLLUTION OF THE NATION'S WATERWAYS (Comm. Print 1970).

105. Other statutes that allow informer actions include the following: Act of July 8, 1870, ch. 230, § 39, 16 Stat. 198, 203 (codified at 35 U.S.C. § 292(b) (1988)) (regarding the false marking of articles as patented); and Act of June 30, 1834, ch. 161, § 27, 4 Stat. 729, 733-34 (codified as amended at 25 U.S.C. § 201 (1988)) (regarding Indian trade).

106. John C. Kunich, *Qui Tam: White Knight or Trojan Horse*, 33 A.F. L. REV. 31, 31-32 (1990).

107. 31 U.S.C. § 3729(a)(1)-(2) (1988). The statute provides in pertinent part:

(a) Liability for certain acts.—Any person who —

- (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
- (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
- (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

...
is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person

(b) Knowing and Knowingly defined.—For the purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information —

- (1) has actual knowledge of the information;
- (2) acts in deliberate ignorance of the truth or falsity of the information; or
- (3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money which is requested or demanded.

31 U.S.C. § 3729(a)-(c) (1988).

108. 31 U.S.C. § 3729(a) (1988).

ment programs,¹⁰⁹ Congress amended the False Claims Act in 1986. Before this time, judicial interpretations of certain provisions of the False Claims Act, including those relating to its *qui tam* jurisdiction, had restricted the Act's ability to combat fraud effectively.¹¹⁰ Thus, among other changes, Congress extended the Act's reach from only those claims that involved "immediate financial detriment"¹¹¹ to all "fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services."¹¹² The amendments were intended "to make the False Claims Act a more effective weapon against Government fraud."¹¹³

B. Eligibility Requirements for Qui Tam Relators¹¹⁴

To proceed under the False Claims Act, a *qui tam* plaintiff, called a "relator," must first file a complaint. Then the complaint, along with all material evidence and information the relator possesses, is served on the Justice Department.¹¹⁵ The Justice Department then has sixty days from its receipt of the complaint to either proceed with the suit itself, or inform

109. S. REP. NO. 345, 99th Cong., 2d Sess. 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5269 (stating that "fraud permeates generally all Government programs ranging from welfare and food stamps benefits, to multibillion dollar defense procurements, to crop subsidies and disaster relief programs").

110. S. REP. NO. 345, *supra* note 109, at 4, reprinted in 1986 U.S.C.C.A.N. at 5269. The Committee on the Judiciary summarized its findings and intentions as follows:

Since the act was last amended in 1943, several restrictive court interpretations of the act have emerged which tend to thwart the effectiveness of the statute. The Committee's amendments contained in S.1562 are aimed at correcting restrictive interpretations of the act's liability standard, burden of proof, *qui tam* jurisdiction and other provisions in order to make the False Claims Act a more effective weapon against government fraud.

Id.

111. See *United States v. McNinch*, 356 U.S. 595, 599 (1958).

112. S. REP. NO. 345, *supra* note 109, at 9, reprinted in 1986 U.S.C.C.A.N. at 5274.

113. *Id.* at 4, reprinted in 1986 U.S.C.C.A.N. at 5269.

114. In light of the recent developments in Article III standing doctrine, see, e.g., *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), the constitutionality of *qui tam* actions has been questioned. However, the courts have uniformly rejected such attacks. See *United States ex rel. Milam v. University of Texas*, 961 F.2d 46, 49 (4th Cir. 1992) (requiring that the government, rather than the relator, show an injury in fact); *United States ex rel. Givler v. Smith*, 775 F. Supp. 172, 180 (E.D. Pa. 1991) (holding that relators bringing *qui tam* action met Article III standing requirements); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 613-15 (N.D. Cal. 1989) (same); *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1096-99 (C.D. Cal. 1989) (holding relators had standing because they were essentially assignees of the United States). See also Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543 (1990).

For analysis of other constitutional issues involved with *qui tam* actions, see Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341 (1989).

115. 31 U.S.C. § 3730(b)(1)-(2) (1988).

the court that it does not intend to prosecute the action.¹¹⁶ During this time, the complaint remains under seal.¹¹⁷ If the Justice Department does not intervene, the relator may proceed with the action individually.¹¹⁸ Informers are entitled to ten to thirty percent of the proceeds of their claim depending on whether the source of the information regarding the fraud is public, and whether the government decides to prosecute the action itself.¹¹⁹ Relators who prosecute the claim themselves are also entitled to reasonable attorney fees and expenses.¹²⁰

Congress placed jurisdictional limits on *qui tam* actions based on the source from which the relator obtains the information.¹²¹ The limits were instituted in order to combat problems with "parasitic" actions, that is, ones in which citizens bring suit on the basis of information that is readily available to the government.¹²² Specifically, the Act denies courts the jurisdiction to hear actions based on "public disclosure of allegations or transactions" in government hearings or investigations or from the news media, unless the relator is the "original source of the information."¹²³ This original source exception requires the relator to have "direct and independent knowledge of the information" which forms the basis of the allegations and to disclose the information to the government before filing suit.¹²⁴

Courts have interpreted these restrictions broadly. The Second Circuit held that for the "original source" exception to apply, the person filing the *qui tam* action must be the source of the information that was publicly disclosed.¹²⁵ The phrase "public disclosure" has also been defined

116. 31 U.S.C. § 3730(b)(3)-(4) (1988).

117. 31 U.S.C. § 3730(b)(2) (1988).

118. 31 U.S.C. § 3730(c)(3) (1988).

119. 31 U.S.C. § 3730(d) (1988).

120. 31 U.S.C. § 3730(d)(4) (1988).

121. See 31 U.S.C. § 3730(e) (1988).

122. Robert L. Vogel, *Eligibility Requirements for Relators Under Qui Tam Provisions of the False Claims Act*, 21 PUB. CONT. L.J. 593, 593-94 (1992). The action is labeled "parasitic" because it "merely siphon[s] off funds that the government would have recovered [on its own] in the absence of a qui tam suit." *Id.* at 594.

123. 31 U.S.C. § 3730(e)(4)(A) (1988).

124. 31 U.S.C. § 3730(e)(4)(B) (1988).

125. *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990). In *Dick*, two employees of a nuclear power station filed suit against their employer, Long Island Lighting Co. (LILCO), alleging that LILCO had lied to the New York Public Service Commission about construction costs. 912 F.2d at 14. LILCO had thus fraudulently obtained approval for higher rates, and defrauded the United States Government, a major electric consumer. *Id.*

The relators learned about the fraud from news media accounts of similar allegations made against

broadly. The Third Circuit held that information obtained in discovery in a suit unrelated to the fraudulent claim was publicly disclosed, thus barring *qui tam* jurisdiction.¹²⁶ Similarly, the Second Circuit held that information disclosed by government investigators in the course of an investigation constituted public information for the purposes of the jurisdictional bar.¹²⁷

Together, these cases imply that, in order to state a claim that the courts will hear, a *qui tam* relator must have independently obtained information, either by being in the right place at the right time, or by conducting an investigation into facts that are not publicly available.

IV. *QUI TAM* ACTIONS AGAINST GRAZING PERMIT VIOLATORS

A. *Statutory Elements*

In order to state a claim, a person bringing suit under the False Claims Act must show (1) that the defendant has presented a claim against the government, and (2) that the claim is fraudulent.¹²⁸

LILCO by Suffolk County in an earlier suit. *Id.* at 14-15. The relators did not provide any additional information in their complaint. *Id.* The Second Circuit did not dispute the fact that the relators had direct and independent information on which the suit was based or that they voluntarily provided the information to the government. However, the court added an additional requirement, that the relators be a source to the entity that publicly disclosed the information. *Id.* at 16.

The Second Circuit's reasoning in *Dick* was followed by the Ninth Circuit in *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992). However, the Fourth Circuit recently reached the opposite conclusion in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), *vacating and remanding* 813 F. Supp. 410, 413 (D. Md. 1993).

126. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991). In *Stinson*, the relator was a law firm representing a party against Prudential Insurance Company. *Id.* at 1151. In the course of its representation, the relator obtained documents indicating that Prudential had defrauded the government. *Id.* Prudential moved to dismiss, alleging that the relator was not the original source of the information because it came upon the information in a public hearing. *Id.* at 1152. The Third Circuit held that information produced in a discovery proceeding is a public disclosure for purposes of the False Claims Act. *Id.* at 1159-60. The court reasoned that the information obtained in discovery during a civil proceeding was available to the public if they had chosen to look for it. *Id.* at 1159.

The Second Circuit has followed the Third Circuit's interpretation. See *United States ex rel. Kreindler & Kreindler v. United Technology Corp.*, 985 F.2d 1148, 1159 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993).

127. *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). In *Doe*, the relator was an attorney representing an employee in a criminal fraud investigation. *Id.* at 320. After negotiating immunity for his client, the attorney filed a *qui tam* action against his client's employer. *Id.* Prior to the filing of the suit, the government had conducted criminal and administrative investigations of the fraud. *Id.* at 319-20. Government investigators, during the course of the investigations, informed other employees of the fraud. *Id.* at 322. The Second Circuit held that the information had been publicly disclosed because the other employees were under no obligation to keep the information confidential. *Id.* at 323.

128. 31 U.S.C. § 3729(a) (1988). For the relevant text of this provision, see *supra* note 107.

1. Claim

The False Claims Act states that a claim “includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded”¹²⁹ This definition was incorporated to clarify that claims asserted against organizations that receive federal funding or property are included under the False Claims Act.¹³⁰ While not inclusive,¹³¹ this definition gives guidance concerning the type of acts that Congress considered to be a “claim”—requests or demands for money or property. It seems clear that an application for a grazing lease or permit qualifies as a “request or demand” for those grazing rights.¹³² Indeed, the grazing lease can be seen as a contract with the government—the applicant receives the exclusive right to graze some portion of federal rangeland in consideration of the payment of grazing fees. Thus, it only remains to be determined whether grazing rights are “money or property” for the purposes of the False Claims Act.

Federal grazing rights satisfy this requirement. Ranchers who lease public rangelands hold property rights that require the government to pay just compensation if those rights are removed.¹³³ Thus, ranchers who apply for leases are making a claim for money or property under the False Claims Act.

Holders of permits, however, do not have absolute property rights against the government.¹³⁴ Therefore, it is less clear whether an applicant for a grazing permit makes a claim for money or property. Nonetheless, the False Claims Act should also be applicable to grazing permittees. When applying for a grazing permit, a rancher does make a claim for a type of

129. 31 U.S.C. § 3729(c) (1988).

130. S. REP. NO. 345, *supra* note 109, at 21-22, *reprinted in* 1986 U.S.C.C.A.N. at 5286-87.

131. It would be anomalous to interpret § 3729(c) as including claims asserted against, for example, a government contractor, but not including similar claims asserted directly against the government.

132. *See, e.g.,* United States v. Neifert-White Co., 390 U.S. 228, 233 (1968) (upholding a claim against a bank that had supplied false information in an application for a loan); United States v. Alperstein, 183 F. Supp. 548, 552 (S.D. Fla. 1960) (upholding a claim against a veteran for fraudulently applying for benefits for which he was ineligible), *aff'd*, 291 F.2d 455 (5th Cir. 1961); United States v. Johnston, 138 F. Supp. 525, 528 (W.D. Okla. 1956) (upholding a claim against an Air Force dentist who had misrepresented his qualifications in an employment application).

133. *See supra* note 48 and accompanying text.

134. *See supra* note 43.

property against the government, because the permit represents a valuable interest to the permittee. The permittee may sublease his grazing rights,¹³⁵ and his grazing preference is reflected in the market value of his ranch.¹³⁶ Banks loan against the value of a grazing permit.¹³⁷ Contracts transferring grazing rights, even agreements made in contravention of BLM regulations, are enforceable.¹³⁸ Finally, the benefit is sufficiently concrete that both the federal government and California recognize the permittee's "possessory interest" for tax purposes.¹³⁹ These factors show that a rancher who applies for a federal grazing permit does assert a claim against the BLM for money or property.

Grazing leases and permits also constitute property under the False Claims Act because they represent a claim for a service or subsidy. Congress, in enacting the 1986 amendments to the False Claims Act, intended to broaden the Act's scope to include fraudulent claims for services.¹⁴⁰ In accordance with this principle, courts have held that applications for veteran's benefits,¹⁴¹ reduced postal rates,¹⁴² Medicare reimbursement,¹⁴³ and government loans¹⁴⁴ are all claims within the meaning of the Act. Likewise, a rancher applying for a grazing lease or permit is applying for a government service. It is well documented that the BLM expends more to administer its federal rangeland program than it receives in grazing fees.¹⁴⁵ In fact, the federal treasury receives only slightly more than one-third of the fees remitted by public lands ranchers.¹⁴⁶ The grazing permit functions as a subsidy for cattle ranchers.¹⁴⁷ Just as a Medicare recipient or an eligible veteran receives subsidized health care from the government, or a user of the second class mails receives subsidized postage, a grazing permit holder receives subsidized forage for his cattle. Therefore, when ranchers apply for a grazing permit,

135. See *supra* note 52 and accompanying text.

136. See *supra* note 55 and accompanying text.

137. See *supra* note 71 and accompanying text.

138. See *supra* note 54 and accompanying text.

139. See *supra* note 57 and accompanying text.

140. See *supra* notes 109-13 and accompanying text.

141. *United States v. Alperstein*, 183 F. Supp. 548 (S.D. Fla. 1960), *aff'd*, 291 F.2d 455 (5th Cir. 1961).

142. *United States ex rel. Rodriguez v. Weekly Publications*, 68 F. Supp. 767 (S.D.N.Y. 1946).

143. *United States v. Lorenzo*, 768 F. Supp. 1127 (E.D. Pa. 1991).

144. *United States v. Neifert-White Co.*, 390 U.S. 228 (1968).

145. See *supra* notes 67-68 and accompanying text.

146. See *supra* note 67.

147. See *supra* notes 65-73 and accompanying text.

they are making a claim for a service or subsidy from the government.

In determining whether a claim falls under the False Claims Act, it is also necessary to determine whether the claim is asserted as a matter of right. This is important because the legislative history for the 1986 amendments to the False Claims Act specifically endorses the reasoning in *United States ex rel. Rodriguez v. Weekly Publications*.¹⁴⁸ In *Rodriguez*, the court held that a magazine publisher utilizing second class mail in violation of postal regulations was making a claim against the government.¹⁴⁹ In addition to emphasizing that the reduced rate was equivalent to a subsidy,¹⁵⁰ the court stressed that the publisher, by presenting magazines for second class mailing, was, in effect, demanding "as a matter of right that the government carry the publications through the mails at a rate less than it was entitled to charge."¹⁵¹ According to the court, this implied demand elevated the postal submission to a claim within the meaning of the False Claims Act.¹⁵²

Similarly, applicants for renewal of grazing permits make demands as a matter of right. In FLPMA, Congress declared that, subject to certain conditions, a "holder of [an] expiring permit or lease shall be given first priority for receipt of the new permit or lease."¹⁵³ The Taylor Act requires the BLM to renew the permit of a permittee who otherwise complies with the BLM's regulations and who has secured a loan with the permit.¹⁵⁴ Moreover, the D.C. Circuit, in *Red Canyon Sheep Co. v. Ickes*,¹⁵⁵ stated that those who qualify for a preference are entitled "as a matter of right" to the permit as against others.¹⁵⁶ Thus, in accordance with *Rodriguez*, a rancher who seeks to have his grazing permit renewed makes a demand "as a matter of right" and, therefore, makes a claim under the False Claims Act.

148. *United States ex rel. Rodriguez v. Weekly Publications*, 68 F. Supp. 767 (S.D.N.Y. 1946). See S. REP. NO. 345, *supra* note 109, at 9 (1986 U.S.C.C.A.N. at 5274).

149. *Rodriguez*, 68 F. Supp. at 770.

150. *Id.*

151. *Id.* The court cited *Payne v. United States ex rel. National Ry. Pub. Co.*, 20 App. D.C. 581, 598 (1902), *cert. dismissed*, 192 U.S. 857 (1904), for the proposition that a person who qualified for use of second class mails was entitled to the rate as a matter of "positive legal right." *Rodriguez*, 68 F. Supp. at 770.

152. *Id.*

153. 43 U.S.C. § 1752(c) (1988). *Accord* 43 C.F.R. § 4130.2(d) (1992).

154. 43 U.S.C. § 315b (1988).

155. 98 F.2d 308 (D.C. Cir. 1938).

156. *Id.* at 314.

2. *Fraudulent Claims*

After establishing that applications for grazing permits or leases are claims under the False Claims Act, it still must be determined when and if such claims may be deemed fraudulent.

The False Claims Act gives no definition of "fraudulent" or "false," and no comprehensive definition appears in the cases. However, the cases generally appear to follow the common law tort rule that a fraudulent statement must misstate the truth about a previous occurrence or a present condition.¹⁵⁷ At common law, statements about the future were generally not actionable.¹⁵⁸ However, the *Restatement (Second) of Torts* provides: "A representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention."¹⁵⁹ The accompanying comment states that this rule is applicable when a party misrepresents his intention to fulfill an agreement, whether the intent is actually expressed or merely implied from the agreement.¹⁶⁰

Although the courts have not yet encountered a claim under the False Claims Act made on the basis of some future event, there is no logical reason to exclude claims arising from such events from the Act's coverage. It would be consistent with the entire purpose of the Act to hold that claims are fraudulent when they are made on the basis of some future act that the claimant does not intend to perform.¹⁶¹

157. See, e.g., *United States v. Neifert-White Co.*, 390 U.S. 228 (1968) (finding that false statements on an application for a government loan satisfy the False Claims Act); *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.) (finding violation of False Claim Act where defendant had filed Medicare claims falsely certifying that services had been performed by qualified providers), *cert. denied sub nom.*, *Peterson v. Matthews*, 423 U.S. 830 (1975); *United States v. Sytch*, 257 F.2d 475 (2d Cir. 1958) (finding violation where school had filed false statement of costs with government agency).

The *Restatement* defines fraudulent misrepresentation as a statement made by the maker when he "knows or believes that the matter is not as he represents it to be." RESTATEMENT (SECOND) OF TORTS § 526(a) (1977).

158. See 37 C.J.S. *Fraud* § 6 (1943); 37 AM. JUR. 2D *Fraud & Deceit* § 60 (1968).

159. RESTATEMENT (SECOND) OF TORTS § 530(1) (1977). See also 37 C.J.S. *Fraud* § 11 (1943); 37 AM. JUR. 2D *Fraud & Deceit* §§ 64, 68-69 (1968).

160. RESTATEMENT (SECOND) OF TORTS § 530 cmt. c.

161. Several courts have found statements about the future to be fraudulent under other statutes in accordance with the *Restatement* rule. See *Durland v. United States*, 161 U.S. 306, 313 (1896) (finding mail fraud where defendant made knowingly false statements about future intentions through the mail); *United States v. Hartness*, 845 F.2d 158, 161 (8th Cir.) (finding violation of 18 U.S.C.A. 1001 (1982) when applicant for government loan deliberately overestimated projected annual income), *cert. denied*, 488 U.S. 925 (1988); *Cashco Oil Co. v. Moses*, 605 F. Supp. 70, 71 (N.D. Ill. 1985) (finding that knowingly false statements about future intentions must be proved for RICO action).

There are two situations in which ranchers may be said to submit fraudulent claims under the False Claims Act. The first situation may occur when a rancher applies for renewal of an existing lease or permit. Ranchers who apply for renewals are entitled to first priority if the rancher "is in compliance with the [BLM] rules and regulations and the terms and conditions in the permit or lease."¹⁶² Thus, if a rancher applies for renewal of her lease and she is not in compliance with her existing lease, e.g., she has more cattle on an allotment than is permissible under her lease, she is making a fraudulent claim against the United States under the False Claims Act.¹⁶³ Similarly, if a rancher knowingly makes false statements to the BLM about her compliance with the terms of an existing permit, she makes a false statement to get a "false or fraudulent claim" approved by the government in violation of the False Claims Act.¹⁶⁴

The second situation may occur when ranchers initially apply for grazing permits. Any permit issued by the BLM must contain grazing restrictions on the number of livestock, the periods of use, and the amount of use permissible.¹⁶⁵ By accepting the permit, the rancher agrees to abide by its conditions.¹⁶⁶ If the rancher intended to violate these conditions at the time the permit was issued, the rancher made a fraudulent statement to the BLM,¹⁶⁷ and thus, made a false claim against the United States.¹⁶⁸

B. Jurisdictional Bar

It is clear that a person bringing a *qui tam* suit against a rancher must, at least in part, have information that is not available to the public.¹⁶⁹ The information must necessarily be acquired from another source, such as

162. 43 C.F.R. 4130.2(d)(2) (1992). See also BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, *Grazing Application, Grazing Schedule* (Form 4130-1, 1992) (stating in the "terms and conditions" that all grazing done on lands specified in the permit or lease must be in accordance with BLM regulations).

163. See *United States ex rel. Rodriguez v. Weekly Publications*, 68 F. Supp. 767 (S.D.N.Y. 1946). In *Rodriguez*, the defendant submitted materials to be mailed at the second class rate. *Id.* at 768. The court held that this act constituted a claim that the material was eligible for that rate. *Id.* at 770. Because the materials were not eligible for the second class rate, the court held that the submission was a fraudulent claim against the United States. *Id.*

164. 31 U.S.C. § 3729(a)(2) (1988).

165. 43 C.F.R. § 4130.6-1(a) (1992).

166. See 43 C.F.R. §§ 4130.2(a), 4130.6 (1992).

167. See *supra* notes 159-61 and accompanying text.

168. See cases cited *supra* note 157.

169. See *supra* notes 121-27 and accompanying text.

a disgruntled employee, or an independent investigation.¹⁷⁰ However, this jurisdictional requirement may not be a substantial obstacle in the context of grazing permit enforcement. Because the BLM's enforcement officers are severely overextended, they lack information concerning possible permit violations. Accordingly, little public information regarding specific violations is likely to be published. In fact, concerned citizens, especially those in the local area, can more easily acquire such information on their own. Thus, their claims are not likely to be barred by this requirement.

C. Fines and Damages

These suits are not likely to be enormously profitable in sheer dollar amounts. However, nonprofit environmental groups, who regularly file citizen suits under other statutes, should find adequate incentive in the opportunity to penalize overgrazers. In addition, there is some money to be recovered from permit violators. The False Claims Act allows for a fine of \$5,000 to \$10,000 plus treble damages arising from the fraudulent claim.¹⁷¹ In 1991, the BLM charged damages for trespass of \$9.19 per animal unit month of forage consumed.¹⁷² From the reported cases, it appears that the BLM typically imposes trespass damages of between \$500 and \$1500.¹⁷³ However, there is no reason that damages must be limited to these levels. In *Holland Livestock Ranch v. United States*,¹⁷⁴ the Ninth Circuit required only that damages not be based on speculation or guesswork; the court did not require a precise estimate.¹⁷⁵ In addition, if the federal government does not intervene, a *qui tam* plaintiff is entitled to recoup reasonable costs and attorney fees.¹⁷⁶ While these damages are not an enormous incentive for ordinary citizens, they do compensate interested individuals for their efforts to penalize overgrazers.

170. Because public rangelands are accessible to all, a concerned individual might have the opportunity to count the number of livestock allowed to graze on a specific portion of land. See 43 U.S.C. § 1063 (1988) (making it unlawful to prevent any person from peaceably entering on any public land); 43 U.S.C. § 315e (1988) (stating that nothing in the Taylor Act shall be construed as restricting "ingress or egress over the public lands in [grazing] districts for all proper and lawful purposes").

171. 31 U.S.C. § 3729(a) (1988).

172. See *supra* note 77.

173. See, e.g., Luther Wallace Klump, 125 I.B.L.A. 170 (1993); Kent Gregerson, 101 I.B.L.A. 269 (1988).

174. 655 F.2d 1002 (9th Cir. 1981).

175. *Id.* at 1006.

176. 31 U.S.C. § 3730(d)(4) (1988).

IV. CONCLUSION

Overgrazing remains the primary threat to western public rangelands. Although a variety of causes contribute to this problem, the willful violation of grazing permits is particularly damaging. The BLM has inadequate resources to enforce limitations on the grazing leases and permits it issues. *Qui tam* actions were developed to allow private citizens to help the government in the enforcement of the law. Thus, these actions are uniquely adapted to help combat the overgrazing problem.

The False Claims Act allows for *qui tam* actions against persons who make fraudulent claims against the government. When a rancher who is not in compliance with his permit or lease conditions applies for a renewal, or when a rancher initially applies for a permit or a lease intending to violate its terms, he makes a false claim against the government. In such circumstances, overgrazing violations may be enforced through *qui tam* suits by private individuals.

Edmund C. Baird, III