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Western Grazing: The Capture of Grass, Ground, and Government

Part 2

by

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regulations imposed by the Carter Administration.³⁶⁵ As described above, Reagan also preserved the grazing fee formula favored by stockmen.³⁶⁶ But his administration's most blatantly pro-rancher measure was promulgation of rules implementing a cooperative management agreement (CMA) policy, under which the BLM entered into range management agreements to "reward" grazing permittees who were considered good land stewards.³⁶⁷ A former BLM director described the agreements as "a give-away of the public lands to private interests."³⁶⁸ A federal district court ruled that the program violated FLPMA by essentially abdicating to livestock operators the BLM's statutory land management responsibilities.³⁶⁹ Unconvinced by the Administration's and the ranchers' "trust us" assurances, the judge struck down the rules, observing: "Permittees must be kept under a sufficiently real threat of cancellation or modification in order to adequately protect the public lands from overgrazing or other forms of mismanagement."³⁷⁰

Reagan's policies fit well within what was by then a long-standing political tradition of protecting public-land ranchers from change, but they were more overtly pro-grazing than those of his predecessors. For the first time, Americans were told that they could and should trust *cowboys* to take care of public lands belonging to all Americans. This has become the mantra of Reagan's philosophical successor, George W. Bush.

The years of the Clinton Administration will be seen by some as an aberration in this picture, if not a serious flaw in my thesis. The ranching community will scoff, but in my view, even the Clinton-Babbitt "range reform" regulations³⁷¹ reflect that administration's inability to escape the livestock industry's loop. The Interior Department's *Rangeland Reform '94 DEIS* documented the degraded range and identified livestock grazing as the principal cause.³⁷² The study concluded that, under the "No Grazing" alternative, "[e]cological conditions would improve the most," "watershed and water quality conditions would improve to their maximum potential," the "diversity and abundance of wildlife" would increase, and recreationists

³⁶⁵ SHORT, *supra* note 361, at 37. The interior secretaries were James Watt, Donald Hodel, and William Clark. *Id.*

³⁶⁶ See *supra* notes 337–40 and accompanying text (discussing Reagan's Executive Order No. 12,548 (Feb. 14, 1986)).

³⁶⁷ See Bernard D. Zaleha, *The Rise and Fall of BLM's "Cooperative Management Agreements": A Livestock Management Tool Succumbs to Judicial Scrutiny*, 17 ENVTL. L. 125, 139–40 (1986) (characterizing the purpose of the CMA program as a reward to livestock operators). See also KLYZA, *supra* note 32, at 125 (noting the necessity of rancher cooperation in implementing BLM's programs).

³⁶⁸ See DONAHUE, *supra* note 4, at 77 (quoting former BLM Director Frank Gregg).

³⁶⁹ *Natural Res. Def. Council v. Hodel*, 618 F. Supp. 848, 853 (E.D. Cal. 1985).

³⁷⁰ *Id.* at 871.

³⁷¹ 43 C.F.R. §§ 1784.0-1–1784.6-2, 4100.0-1 to 4180.2 (2004). Most notable, the rules established fundamentals of rangeland health, which required "appropriate" (i.e., corrective) action "as soon as practicable but not later than the start of the next grazing year" (i.e., within one year of determining that range conditions did not meet standards). 43 C.F.R. § 4180.1. The Bush Administration's revised rules more than double the period within which action must be taken. See *infra* note 463 and accompanying text.

³⁷² See generally RANGELAND REFORM '94, *supra* note 8.

and others would benefit thereby.³⁷³ It further found that grazing on public lands produced marginal economic benefits.³⁷⁴ Nevertheless, the agency did not propose to eliminate grazing. Instead, it justified continued grazing, apparently on the basis of lifestyle and social or cultural concerns.³⁷⁵

The industry did suffer a setback (temporary, as it turned out³⁷⁶) when the U.S. Supreme Court in *Public Lands Council v. Babbitt*³⁷⁷ upheld the BLM's range reform regulations.³⁷⁸ According to the Court, the TGA "make[s] clear that the ranchers' interest in permit stability cannot be absolute; and that the Secretary is free reasonably to determine just how, and the extent to which, 'grazing privileges' shall be safeguarded, in light of the Act's basic purposes."³⁷⁹ Would the Supreme Court have upheld an agency decision to end grazing on all or a large portion of BLM rangelands? The answer to that (highly hypothetical) question is less certain. A divided Tenth Circuit panel stated that, under the TGA, the Secretary of the Interior is "free to consider" the minor contribution of BLM lands to livestock production when "balancing the need for industry stability against the need to protect the land from deterioration."³⁸⁰ Presumably, that balance could tilt toward removal of livestock to protect other resources.³⁸¹ Whether such a policy choice will ever be made depends on the political will of Congress and/or the land management agencies. That in turn will depend on demystifying the cowboy—highly unlikely under the current administration.

In the George W. Bush era, cowboy politics have been rejuvenated.³⁸² It is increasingly fashionable to tout the admirable traits of cowboys and the need to keep ranchers on the land, and to deny or ignore the ecological impacts and economics of public-land grazing.³⁸³ President George W. Bush, a self-proclaimed rancher,³⁸⁴ sets the tone. Forest Service and BLM line

³⁷³ *Id.* at 44–45.

³⁷⁴ *See id.* at 45, 3–56 to 3–70.

³⁷⁵ *Cf. id.* at 5, 46, 3–55 to 3–56, 3–75 to 3–76, 4–122.

³⁷⁶ *See infra* discussion of the Bush grazing rules, notes 436–71 and accompanying text.

³⁷⁷ 529 U.S. 728 (2000).

³⁷⁸ *Id.* at 731.

³⁷⁹ *Id.* at 742.

³⁸⁰ *Public Lands Council v. Babbitt*, 154 F.3d 1160, 1172 n.5 (10th Cir. 1998). The notion of industry stability appears solely in the TGA preamble, as one of three purposes of the legislation. 48 Stat. 1269. It was not codified. *Cf. FOSS, supra* note 103, at 204 (commenting on the Taylor Grazing Act).

³⁸¹ I have argued—based on the law, economics, ecology, and history—that a policy choice to eliminate grazing on a majority of BLM lands *could* be justified. *See DONAHUE, supra* note 4, at 284–90.

³⁸² *Cf. Karen Dodwell, From the Center: The Cowboy Myth, George W. Bush, and the War with Iraq*, http://www.americanpopularculture.com/archive/politics/cowboy_myth.htm (last visited Nov. 20, 2005) (describing how Bush has frequently been described "in terms of a variety of cowboy images," and that "the term 'cowboy' [is] lodged securely in the national and international consciousness as a means of delineating positions").

³⁸³ Consider for instance the Thomas bill, promoting the culture and history of grazing while suggesting compensation for ranchers impacted by environmental regulations. S. Res. 85, 109th Cong. (2005). *See also infra* notes 481, 489–509 (discussing how scientists and range consultants have been co-opted by the myths).

³⁸⁴ *See, e.g.,* Press Release, Office of the Press Secretary, President Gives Tour of Crawford Ranch (Aug. 25, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/08/20010825->

officers “have been told to accommodate for ranchers’ needs.”³⁸⁵ Numerous Bush appointees are westerners (or claim to be) and “play cowboy.”³⁸⁶ Indeed, the Bush Administration is unabashedly reclaiming the BLM moniker, “Bureau of Livestock and Mining.”³⁸⁷

Perhaps the consummate Bush cowboy is former Interior Solicitor William G. Myers III.³⁸⁸ An entire article could be written about his connections with and advocacy for the livestock industry.³⁸⁹ In a speech to

2.html. Bush purchased the former Engelbrecht ranch in 1999 while he was a candidate for the presidency, and a house was built on it the next year. Engelbrecht’s cattle continue to graze on the property. *Id.*, see also Steven R. Weisman, *Meanwhile Back at the Ranch, and Other Vacation Tales*, N.Y. TIMES, Jan. 2, 2002, at A14, available at 2002 WLNR 4019505 (comparing the ranching activities of past presidents with those of President Bush).

³⁸⁵ Paul Koberstein, *The Big Dry: Cows Plus Drought Equals Misery for Rivers in the West*, CASCADIA TIMES, Summer 2002 (quoting “government sources,” and noting further that “[t]here is extra pressure now under Bush for managers to look out for the ranching community”) (copy, received by e-mail, Jan. 19, 2005, on file with author). Ranchers attending a public meeting in the Malad, Idaho, BLM field office in early 2001 informed BLM personnel that “now that the Bush administration is in power [the permittees] will not agree to any cuts in [livestock] numbers and will not need to!” E-mail from attendee at meeting to author (Feb. 16, 2001) (on file with author).

³⁸⁶ For instance, Mike Leavitt, Utahan, insurance executive, and former Utah governor, now Secretary of Health and Human Services, enjoyed donning cowboy attire and riding a horse in parades while he was governor. Tom Sansonetti, former Assistant Attorney General for Environment and Natural Resources, came to Wyoming in 1978 after growing up in the East and being educated in Virginia, and now refers to Campbell County, Wyoming, as “my home neck of the woods.” He once remarked that his division at the Department of Justice needed more people from the West because current employees “don’t understand the importance of our ranching industry” and “don’t understand why coyotes are bad for sheep.” Tom Sansonetti, Address at University of Wyoming College of Law (Mar. 5, 2004) (notes of speech on file with author). Kathleen Clarke, BLM director and a Utah native, in an address to the Society for Range Management (SRM) said that “for too long, there’s been an attitude that the only way to address range that is challenged is to remove the cattle.” Michelle Nijhuis, *Change Comes Slowly to Escalante Country*, HIGH COUNTRY NEWS, Apr. 14, 2003. See also *Telling Truth Behind the Curtains*, Sept./Oct. 2003 (on file with author) (describing Clarke’s reference to her agency as the “Bureau of Livestock and Mining”). Jim Magagna, vice-president of the Wyoming Stockgrowers Association and a “third-generation sheep rancher,” was identified by *Outside* magazine as one of twenty “power brokers driving the [Bush] counter-enviro juggernaut.” See *Earth Shakers: The Counter-Enviro Power List*, *supra* note 5, at 112, 118. Magagna, whose goals include “reform[ing] policies so that ranchers have more say over federal land decisions,” is “the man to watch in the fight to roll back wolf recovery.” *Id.* See also *infra* notes 388–92, 397–99 and accompanying text (discussing former Interior Solicitor William Myers).

³⁸⁷ The term reportedly was coined by Interior Secretary Cecil Andrus not long after enactment of FLPMA. See KLYZA, *supra* note 32, at 124–25. BLM Director Clarke ingratiated an SRM audience by suggesting that “her mission” was to transform the current “Bureau of Landscapes and Monuments” into the “Bureau of Livestock and Mining” of the good old days. See *Telling Truth Behind the Curtain*, *supra* note 386 (noting that Clarke’s motivation for coming to BLM was to promote a pro-grazing agenda).

³⁸⁸ Myers served as Interior Solicitor from 2001–03. He resigned while under investigation for possible ethics violations and after being nominated by President Bush to a seat on the Ninth Circuit Court of Appeals. *Telling Truth Behind the Curtain*, *supra* note 386.

³⁸⁹ From 1997 to 2001, Myers was of counsel with Holland & Hart, LLP (a firm to which he returned following his resignation as solicitor). During that period, he served as president of the Public Lands Council and represented it in litigation against the Department of Interior, challenging the 1995 Clinton range reform regulations. The litigation was unsuccessful. See *Public Lands Council v. Babbitt*, 929 F. Supp. 1436 (D. Wyo. 1996); *rev’d in part & aff’d in part*,

cattlemen, Solicitor Myers asserted: "The biggest disaster now facing ranchers is not nature, but a flood of federal regulations designed to turn the West into little more than a theme park."³⁹⁰ He assured his audience that Interior intended "to make it easier to exempt from environmental reviews any activities that it sees as having insignificant effects on public lands," and to "reverse some of the changes in livestock-grazing regulations adopted under" the Clinton Administration.³⁹¹ Myers also was implicated in an unparalleled settlement with BLM permittee Frank Robbins.³⁹² Robbins holds BLM grazing permits in connection with two ranches in Wyoming. Shortly after Robbins purchased the ranches in 1994 and 1998,³⁹³ BLM had charged him with numerous violations, including: trespassing on private and BLM lands; grazing too early, too late, and too many cattle; blocking a neighbor's use of a cattle driveway; refusing to obtain permits for his dude ranch trail drives over BLM lands; and ignoring BLM directives to modify his grazing practices to accommodate drought conditions.³⁹⁴ The BLM proposed to resolve its dispute with Robbins in a lopsided settlement agreement that included "forgiveness for . . . 16 grazing violations," a "new grazing allotment with extensive management control," "rights of way across federal lands without reciprocal easements for the BLM" across Robbins's private lands, a "special recreation permit to run his dude ranch," and a "[u]nique status whereby only the director of the BLM could cite Robbins for future violations."³⁹⁵ The agreement also allowed Robbins to pursue his ongoing RICO suit against BLM employees.³⁹⁶

154 F.3d 1160 (10th Cir. 1998); *amended on reh'g*, 167 F.3d 1287 (1999), *aff'd*, 529 U.S. 728 (2000). The livestock industry, however, ultimately prevailed in undoing the reform regulations by means of the recently completed BLM rulemaking proposal, initiated while Myers was solicitor. Notice of Availability of the Final Environmental Impact Statement for Regulatory Amendments of Grazing Regulation for the Public Lands. 70 Fed. Reg. 35,299 (June 17, 2005). In late 2002, Solicitor Myers opined that "the BLM could not completely exclude cattle from an allotment within a federal grazing district," despite statutory provisions plainly providing otherwise. Nijhuis, *supra* note 386, at 11; Taylor Grazing Act, 43 U.S.C. §§ 315b, 315f (2000); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1712(e), 1752 (2000).

³⁹⁰ *Telling Truth Behind the Curtains*, *supra* note 386.

³⁹¹ Valentine D. Sworts & Alan C. Schroeder, *Pegasus, Workhorse, or Trojan Horse? A Case Study of the Use of the NEPA Process in Grazing Use Decisions on Bureau of Land Management Lands in Wyoming*, 3 WYO. L. REV. 3, 102 (2003) (quoting Scott Sonner, *Interior's Top Lawyer Wants to Put Brakes on Environmental Reviews*, SALT LAKE TRIB., Nov. 18, 2002).

³⁹² See *infra* text at notes 397-99. Even if Myers did not know the full details of the settlement offer, his failures to know and to take responsibility for his deputies' actions reflect either gross mismanagement or an indirect means of promoting Robbins's interests at the expense of the BLM and the public land.

³⁹³ See Mike Stark, *Thermopolis Rancher Seeks Probe of BLM Office*, BILLINGS GAZETTE, Sept. 13, 2003, available at <http://www.billingsgazette.com/index.php?id=1&display=rednews/2003/09/13/build/wyoming/40-blmprobe.inc>. Robbins is from Alabama. Brodie Farquhar, *Interior Report Slams Grazing Deal*, CASPER STAR TRIB., Feb. 17, 2005, available at <http://www.casperstartribune.net/articles/2005/02/17/news/wyoming/24aac8d667d0a5b387256faa00714fb0.txt>.

³⁹⁴ Farquhar, *supra* note 393. According to Stark: "Between February 1996 and March 2003, the [BLM] issued 29 'adverse grazing decisions' [i.e., "alleged grazing violations"] against Robbins." Stark, *supra* note 393.

³⁹⁵ Farquhar, *supra* note 393.

³⁹⁶ Robbins had sued BLM employees for harassment under the Racketeer Influenced and

An investigation by the Department of Interior Inspector General (IG) resulted in a report harshly critical of the settlement and events leading to it. Among other findings, the IG reported that “normal processes [were] circumvented,” negotiations were conducted by the Interior Solicitor’s Office (SOL), without involving BLM, concerns of the Department of Justice and the BLM field office were ignored by SOL and not conveyed to the BLM decision-maker, and the interests of BLM were not adequately protected by the settlement.³⁹⁷ But the IG concluded that Solicitor Myers was a victim of his own staff; that is, he “was given a distorted explanation” of the deal.³⁹⁸ Frank Robbins’s attorney Karen Budd-Falen disagreed: “Myers had ‘full knowledge of the [Robbins] settlement agreement and all of its terms’ before the deal was finalized,” she claims.³⁹⁹ Ultimately, the BLM reneged on the deal after Robbins committed trespass yet again.⁴⁰⁰

B. Cowboys in the Agencies

The livestock industry’s elevated status in the Bush Administration is evident in other ways: Agency officials who go against livestock interests have been dismissed or transferred. BLM Idaho State Director Martha Hahn is a prominent example. Hahn’s grazing cuts in Owyhee County, implemented under the 1995 grazing regulations, reportedly riled stockmen as well as Senator Larry Craig, and resulted in her forced transfer, which led

Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2004). See Farquhar, *supra* note 393.

³⁹⁷ Memorandum from Earl E. Devaney, Inspector General, to Sue Ellen Wooldridge, Solicitor (Oct. 13, 2004), available at <http://www.oig.doi.gov/upload/BLM-Robbins%20Report%20REDACTED1.pdf> (redacted report). Devaney wrote that the “conduct chronicled in this report cries out for administrative action.” *Id.* The Deputy Solicitor upon whom the bulk of the blame was placed referred to the BLM and DOJ officials who were concerned about the settlement as “part of the posse . . . against Mr. Robbins.” *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Rancher’s Attorney Challenges Report*, CASPER STAR-TRIB., Apr. 14, 2005, available at <http://www.casperstartribune.net/articles/2005/04/14/news/wyoming/e947098d18ea362a87256fe30001ffffb.txt>.

⁴⁰⁰ See Farquhar, *supra* note 393.

her to resign.⁴⁰¹ Other reported cases involved agency personnel in California⁴⁰² and Utah.⁴⁰³

Many land management decisions are blatantly pro-ranching—or inexplicable, apart from a livestock bias.⁴⁰⁴ For example, the U.S. Forest Service has reneged on drought provisions in livestock management plans designed to protect the land,⁴⁰⁵ and has undertaken expensive monitoring

⁴⁰¹ See, e.g., Tom Kenworthy, *Land Agency Accused of Personnel "Purge,"* USA TODAY, Mar. 11, 2002, available at <http://www.usatoday.com/news/washington/2002/03/11/usat-blm.htm>; Koberstein, *supra* note 385 (noting that Craig called the Owyhee grazing decision "an affront"); Press Release, Public Employees for Environmental Responsibility, BLM Idaho Director Forced to Resign (Mar. 6, 2002), available at http://www.peer.org/news/news_id.php?row_id=133; *NOW with Bill Moyers: Environmental Dissenters—Three Career Public Officials Resign* (PBS television broadcast, Aug. 23, 2002) [hereinafter *Moyers Interview*] (noting that it may have been only one or a few disgruntled grazing permittees whose contacts with members of the Idaho congressional delegation led to Hahn's forced resignation), available at http://www.pbs.org/now/transcript/transcript131_full.html. Hahn, a career BLM employee with 21 years of service, was given a choice: transfer to the New York Harbor office of the National Park Service or resign. See *id.* Hahn was replaced by a retired BLM employee and former Idaho rancher, K. Lynn Bennett. Bennett allegedly was one of two BLM state directors who, at the last minute, called for the administrative review copy (ARC) of the Draft Environmental Impact Statement on the proposed grazing rules to be revised because of certain statements therein about the ecological impacts of livestock grazing. E-mail from Larry Walker, retired BLM conservationist, to author (Jan. 3, 2004) (on file with author). See *infra* note 466 and accompanying text. A curious thing about Bennett: in news releases about his selection he was credited, variously, with 21, 32, and 40 years of prior service with BLM. See Press Release, Sen. Larry Craig, Delegation Applauds Choice for BLM State Director (Oct. 29, 2002) (claiming 21 years), available at <http://craig.senate.gov/releases/pr102902.htm> (last visited Nov. 19, 2005); David Wilkins, *Cattlemen Welcome New BLM Director*, Capital Press Agriculture Weekly, Nov. 25, 2002 (claiming 32 years), available at <http://www.capitalpress.info/main.asp?FromHome=1&TypeID=1&ArticleID=464&SectionID=46&SubSectionID=438>; Patricia R. McCoy, *BLM Chief Plans for Cooperation—Wants Staff Out on the Land Instead of in Their Offices, Talking to People*, Capital Press Agriculture Weekly, Jan. 7, 2003, available at http://www.citizenreviewonline.org/jan_2003/blm_chief.htm (reporting "40 years of agency experience"). In 1997, Senator Craig had attempted to interfere with a hiring decision by Hahn. He was officially reprimanded by then Interior Solicitor John Leshy, citing the "Hatch Act, which prohibits members of Congress from making recommendations about career personnel decisions." *Cop Off the Beat; Another Craig Victim*, GREEN EARTH J., Apr. 8, 2002, http://www.greenjournal.com/articles.asp?article_key=405 (last visited Nov. 19, 2005).

⁴⁰² BLM employee Tim Salt was transferred after limits he imposed on grazing and roads in the California Desert upset grazing, mining, and outdoor recreational vehicle interests. See Nijhuis, *supra* note 386, at 10; Kenworthy, *supra* note 401.

⁴⁰³ Director Kate Cannon made repeated attempts to protect Grand Staircase-Escalante National Monument from grazing and trespassing cattle during the third year of drought. See Nijhuis, *supra* note 386; Kenworthy, *supra* note 401. She was subsequently directed to take a job in BLM's Washington office or as deputy superintendent at Grand Canyon National Park. See Kenworthy, *supra* note 401.

⁴⁰⁴ The websites of environmental organizations give an idea of the extent of decisions that those groups believe improperly favor livestock interests. See, e.g., Western Watersheds Project, <http://www.westernwatersheds.org/default.htm> (last visited Nov. 19, 2005); Forest Guardians, <http://www.fguardians.org/> (last visited Nov. 19, 2005); Center for Biodiversity, <http://www.sw-center.org/swcbd/> (last visited Nov. 19, 2005); Natural Resources Defense Council, <http://www.nrdc.org/> (last visited Nov. 19, 2005).

⁴⁰⁵ Cattle were removed from the Tonto National Forest in 2002 because of an "extended and severe drought." The Forest's own management "guidance advises waiting one full growing season after the resumption of normal precipitation before restocking cattle," or "up to two

efforts rather than remove domestic sheep from ranges where they pose a serious threat to endangered bighorn.⁴⁰⁶ The Service's top officials teamed up with stockgrowers to convince Congress to exempt national forest grazing permit reauthorizations from NEPA compliance during fiscal years 2005-07.⁴⁰⁷ A more obscure, but revealing, example involves a technical report published by the Forest Service's Rocky Mountain Research Station. Co-authored by an agency scientist, the report examined studies allegedly supporting several "axioms" of range management, used to justify a fifty-year-long "war against big sagebrush."⁴⁰⁸ Contrary to the axioms, the authors concluded that "most, if not all, of the sins attributed to big sagebrush by the range management community are the *result of livestock grazing*."⁴⁰⁹ Four months later the Research Station director rescinded the report and re-published it with the disclaimer: "This would normally not have passed peer

years of rest" after "severe or extended drought," but cattle were allowed to return in June 2005 after less than three months of "normal" precipitation. Press Release, Center for Biological Diversity, Tonto National Forest Managers Jeopardize Desert by Resuming Ranching Without Thoroughly Evaluating Drought Impacts (June 15, 2005), available at <http://www.biologicaldiversity.org/swcbd/press/grazing6-15-05.html>.

⁴⁰⁶ The Inyo National Forest in California allows sheep grazing on 175,000 acres despite concerns that domestic sheep will transmit fatal diseases to endangered Sierra Nevada bighorn sheep. See Tim Reiterman, *Plan to Kill Endangered Is Protested*, L.A. TIMES, June 8, 2005, at B3, available at 2005 WLNR 9094642. According to the federal recovery plan for the sheep, disease from domestic sheep "probably played a major role in the decline of the bighorn population." *Id.* Instead of simply removing the domestic sheep, the Forest Service is proposing to equip both domestic and wild sheep with radio collars and then hire seasonal employees to track the sheep. "If the two populations make contact, . . . the state Department of Fish and Game will be called in." *Id.* The California Fish and Game Department is proposing to kill infected endangered bighorn to prevent transmission to the rest of the herd. *Id.* Cf. Greg Stahl, *Sheep Grazing Plan for Sawtooths Challenged*, IDAHO MTN. EXPRESS, May 18, 2005 (stating that a Forest Service EIS's "beginning baseline" was that "[g]razing remains a legitimate use of the Sawtooth National Forest and the SNRA [Sawtooth National Recreation Area]," even though the area had suffered severe damage from grazing in the past and "desired vegetative conditions have not been maintained through the current level of grazing"), available at http://www.mtexpress.com/story_printer.php?ID=2005103114.

⁴⁰⁷ FY 2005 Consolidated Appropriations Act, Pub. L. No. 108-447 § 339 (2004). See *Senators Would Exempt Grazing Permits from NEPA Review*, PUBLIC LANDS NEWS, Oct. 1, 2004, at 7 (reporting that the Senate Appropriations Committee approved a rider that would exempt 900 Forest grazing allotments from environmental review). See also Koberstein, *supra* note 385 (reporting that "the largest allotment in the Southwest—a 110,000-acre area in the Gila River headwaters" was exempted from NEPA review, "even though the agency admits that the area is one of the most severely overgrazed places in New Mexico and Arizona").

⁴⁰⁸ BRUCE L. WELCH & CRAIG CRIDDLE, COUNTERING MISINFORMATION CONCERNING BIG SAGEBRUSH 1 (2003). Welch is a plant physiologist with the Forest Service.

⁴⁰⁹ *Id.* (emphasis added).

and policy review"⁴¹⁰ The notice, however, identified no flaws in the report's scientific analysis.

Even the National Park Service (NPS) and the U.S. Fish & Wildlife Service (FWS) are not immune from the livestock industry's influence. For instance, a joint federal/state (NPS/Montana) plan for management of the Yellowstone National Park (YNP) bison herd—the only naturally occurring, (ostensibly) free-ranging bison herd in the United States⁴¹¹—seems designed primarily to assuage cattle producers outside the park.⁴¹² This is so despite congressional mandates to “conserve . . . wildlife” in the parks⁴¹³ and “provide against . . . their capture or destruction.”⁴¹⁴ Bison that cross YNP's northern border are treated like livestock, not wild animals: they are trapped, impounded, and tested for brucellosis. Those that test positive are shipped to slaughter. Those testing negative are ear-tagged, calves and non-pregnant yearlings are vaccinated against brucellosis, and all bison are held until spring for release—provided room in the holding pens remains available.⁴¹⁵ In 2004, 182 bison had been shipped to slaughter by mid-March.⁴¹⁶ No case of transmission of brucellosis “from bison to cattle in the wild has ever been documented. Still, avoiding the disease is important to ranchers.”⁴¹⁷

The FWS is charged with conserving threatened and endangered species, many of which are at risk because of livestock grazing practices.⁴¹⁸ In written responses to a recent survey conducted by the Union of

⁴¹⁰ Marcia Patton-Mallory, *Untitled Opening Statement*, in BRUCE L. WELCH & CRAIG CRIDDLE, COUNTERING MISINFORMATION CONCERNING BIG SAGEBRUSH 1 (2003), available at http://www.fs.fed.us/rm/pubs/rmrs_rp040.pdf. The statement could be described as an apology or a disclaimer. This is the first USFS technical report ever rescinded, then reissued, with such a disclaimer. Personal communication between author and Bruce Welch (who further stated that the report had gone through all normal review processes prior to publication). Since then, Dr. Welch has published a book-length treatise on the natural history of big sagebrush (also published by USFS), portions of which cite the same studies and reach the same conclusions as the earlier, controversial report. See WELCH, *supra* note 16. Welch concluded, *inter alia*, that the axiom which holds that overgrazing has induced increases in big sagebrush density or canopy cover is invalid. *Id.* at 13.

⁴¹¹ The free-ranging bison in the Henry Mountains of Utah were introduced there. See Utah Official State Tourism Site, Utah! Travel and Adventure, http://www.utah.com/playgrounds/henry_mtns.htm (last visited Nov. 19, 2005) (describing the origins of the free-ranging bison).

⁴¹² See, e.g., Scott McMillion, *Bison Capture Facility Filling Up*, BOZEMAN CHRONICLE, Mar. 17, 2004, available at <http://bozemandailychronicle.com/articles/2004/03/17/news/01bisonbzbig.txt>.

⁴¹³ National Park Service Organic Act, 16 U.S.C. § 1 (2000).

⁴¹⁴ Yellowstone Park Act of 1872 § 2, 17 Stat. 32.

⁴¹⁵ See McMillion, *supra* note 412.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ Approximately ninety species of animals are listed as threatened or endangered due, at least in part, to livestock grazing; 19% to 22% of all listed species are harmed by grazing. Natural Resources Defense Council, *Grazing Facts*, <http://www.nrdc.org/land/use/fgrazef.asp> (last visited Nov. 19, 2005); see HORNING, *supra* note 8, at 1 (stating that, as of 1994, livestock grazing was a “significant factor in the decline of 76 listed and candidate species” and “likely to be a factor in the decline of another 270 candidate and listed” species). Horning also reported that livestock graze on 45 million acres of listed species' habitat, including designated critical habitat of the Lahontan and Paiute cutthroat trouts. *Id.*

Concerned Scientists (UCS) and Public Employees for Environmental Responsibility (PEER),⁴¹⁹ some FWS “scientists complained that agency chiefs are overly friendly with ranchers who are hostile to science and whose cattle graze on public lands.”⁴²⁰ Two hundred agency scientists responding to this survey reported that they had been directed to “alter official findings to lessen protections for plants and animals.”⁴²¹ The Bush Administration’s record under the Endangered Species Act (ESA)⁴²² is widely considered abysmal,⁴²³ and several of its decisions have been strongly endorsed by ranchers. For example, the FWS removed from the list of ESA candidate species the black-tailed prairie dog⁴²⁴ and has proposed to delist

⁴¹⁹ Dan Vergano, *Survey: Science, Politics at Odds*, USA TODAY, Feb. 9, 2005, at 9D, available at http://www.usatoday.com/tech/science/2005-02-09-fish-game_x.htm (also reporting that 71% of USFWS scientists responding to the survey said that “the agency cannot be trusted to save endangered species”). Of the 1410 scientists who received the survey questionnaire, 414, or 30%, responded. See *id.* “[N]early nine out of ten scientist managers (89%) knew of cases where U.S. Department of Interior political appointees have injected themselves into Ecological Services determinations.” UCS & PEER, U.S. FISH & WILDLIFE SERVICE SURVEY SUMMARY, Feb. 2005 at http://www.ucsusa.org/scientific_integrity/interference/us-fish-wildlife-service-survey.html. See also Press Release, PEER, Politics Trumps Science (Feb. 9, 2005), available at http://www.peer.org/news/news_id.php?row_id=474.

⁴²⁰ Vergano, *supra* note 419. The uncomfortable relationship some ranchers have with science was suggested by a livestock industry representative’s comment about my book, *The Western Range Revisited*. “Olin Sims said that if Donahue’s book presents a strong argument supported by scientific data, people unfamiliar with ranching could read her book and assume that she is correct.” Nate Green, LARAMIE DAILY BOOMERANG, May 5, 2000, at 1.

⁴²¹ Julie Cart, *U.S. Scientists Say They Are Told to Alter Findings*, L.A. TIMES, Feb. 10, 2005, at A13.

⁴²² Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

⁴²³ Not only environmentalists are critical. More than 100 economists from western states signed a letter to George Bush, dated December 3, 2003, in which they addressed the economic importance of the West’s natural environment and offered policy criticisms and recommendations. Among other things, the letter charged that “federal agencies have dragged their feet when called upon to conserve threatened and endangered species. These actions jeopardize the economic outlook for western communities by increasing the risks to species with high economic value, *protecting inefficient and often subsidized activities harmful to both the species and the economy*, and raising the ultimate costs of conserving the species.” Letter from Bonnie G. Colby, Univ. of Ariz., et al, to George W. Bush (Dec. 3, 2003) (emphasis added) (on file with author). The authors identified public land grazing as one of several subsidized, “resource-intensive activities,” whose “full costs” are being hidden from consumers. *Id.*

⁴²⁴ Endangered and Threatened Wildlife and Plants; Finding for the Resubmitted Petition to List the Black-Tailed Prairie Dog as Threatened, 69 Fed. Reg. 51,217 (Aug. 18, 2004). The FWS had determined in 2000 that a “threatened” listing was “warranted” for the species, whose range had declined by 99% since historical times, but that listing was financially “precluded” by higher priority concerns. Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition to List the Black-Tailed Prairie Dog as Threatened, 65 Fed. Reg. 5,476, 5,487 (Feb. 4, 2000). The primary opponents of listing were ranchers—who claim that prairie dogs compete with their livestock for feed and that their burrows are nuisances—and land developers. Immediately after removal from the candidate list in 2004 and at the behest of ranchers, South Dakota began allowing the poisoning of prairie dogs on private land and the Forest Service began poisoning prairie dogs in the Buffalo Gap National Grassland in South Dakota. Buffalo Gap is the location of the only successfully reintroduced population of the highly endangered black-footed ferret, over ninety percent of whose diet consists of prairie dogs. See Chet Brokaw, *S.D. Senate Panel Rejects Plan to Declare Prairie Dogs as Pests*, CASPER STAR TRIB., Jan. 18, 2005, available at <http://www.casperstartribune.net/articles/2005/01/18/news/regional/bde599a09fbb36187256f8d0073e142.txt>; see also Biodiversity Conservation Alliance, *Your*

the Preble's meadow jumping mouse.⁴²⁵ And the agency declined to list as threatened either the Rio Grande cutthroat trout⁴²⁶ or the sage grouse,⁴²⁷ both of which occur on public lands and are impacted by grazing. The case of the sage grouse reflects the political power of ranchers and the oil-and-gas industry, both of whom actively opposed listing the bird.⁴²⁸ It was widely

Voice Needed to Protect Imperiled Prairie Dog, Endangered Black-footed Ferret, available at <http://www.voiceforthewild.org/wildspecies/alerts/a31aug04.html>. Ranchers "say herds of prairie dogs have ruined federal grasslands where they lease pastures for their cattle." Steve Miller, *USFS Works on Prairie Dog Plan*, RAPID CITY J., Mar. 5, 2005, available at <http://www.rapidcityjournal.com/articles/2005/03/05/news/local/news02.prt>. A South Dakota legislator attempted unsuccessfully to designate the species a "state pest." Brokaw, *supra*.

⁴²⁵ Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Delist the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*) and Proposed Delisting of the Preble's Meadow Jumping Mouse, 70 Fed. Reg. 5404 (Feb. 2, 2005) (announcing that "review of all available data . . . indicate that Preble's is not a discrete taxonomic entity, does not meet the definition of a subspecies, and was listed in error"). Agricultural interests, including ranchers, had opposed the listing in 1998, because the species' preference for willow habitats meant that its listing would impede ranchers' ditch maintenance and haying activities. See NATIONAL RESEARCH COUNCIL COMMITTEE ON RIPARIAN AREA FUNCTIONS AND STRATEGIES FOR MANAGEMENT, RIPARIAN AREAS: FUNCTIONS AND STRATEGIES FOR MANAGEMENT 232 (2002) [hereinafter NRC, RIPARIAN AREAS].

⁴²⁶ The agency cited "improved habitat conditions" and "cattle grazing practices [which] now provide better habitat protection." See Koberstein, *supra* note 385. Later the same month (June 2002), however, on a field tour of the Santa Fe National Forest, the regional director for range management for the Forest Service in Albuquerque discovered that "prolonged drought and overgrazing had severely damaged habitat" of the cutthroat, and "improvements had *not* been made." *Id.* (emphasis added).

⁴²⁷ Listing of sage grouse was opposed by oil and gas companies as well as public land ranchers, as listing would significantly affect the operations of both in several states. Although still widespread, sage grouse have been reduced in numbers by up to 80%. See NRC, RIPARIAN AREAS, *supra* note 425, at 116 (reporting that distribution of the species has decreased by about half and abundance by 45 to 80% (citing Clait E. Braun, *Sage Grouse Declines in Western North America: What Are the Problems?*, 78 PROC. WESTERN ASS'N FISH & WILDLIFE AGENCIES 139 (1998))). According to the BLM, "the West's sage grouse population has fallen 90% over the past century, including 35% since 1985." *Grouching About Sage Grouse*, GREENLINES #2077, Mar. 31, 2004 (on file with author). Evidence is mounting that sagebrush steppe landscapes have been widely altered and degraded. See, e.g., DAVID S. DOBKIN & JOEL D. SAUDER, SHRUBSTEPPE LANDSCAPES IN JEOPARDY: DISTRIBUTIONS, ABUNDANCES, AND THE UNCERTAIN FUTURE OF BIRDS AND SMALL MAMMALS IN THE INTERMOUNTAIN WEST 28 (2004) (citing a report by High Desert Ecological Research Institute finding "no basis for optimism about the future prospects" of any of 61 bird species examined), available at http://www.onda.org/library/papers/Shrubsteppe_Sections.pdf; NOSS, LAROE & SCOTT, *supra* note 14, at 62 (reporting that ungrazed Intermountain sagebrush steppe is among the most "critically endangered ecosystems"); Cole, Henderson & Shafer, *supra* note 15, at 315 (attributing the most severe vegetation changes of the last 5400 years on the Colorado Plateau to grazing occurring in the last 200 years); HEALING THE LAND, *supra* note 24, at 1 (asserting that a "large part of the Great Basin [sagebrush being the most widespread community] lies on the brink of ecological collapse"). Livestock grazing is one of the major causes of the degradation of sagebrush habitats and the decline of sage grouse populations. See, e.g., Jeffrey L. Beck & Dean L. Mitchell, *Influences of Livestock Grazing on Sage Grouse Habitat*, 28 WILDLIFE SOC'Y BULL. 993 (2000); WELCH & CRIDDLE, *supra* note 408, at 1; Thomas L. Thurrow et al., *The Role of Drought in Range Management*, 52 J. RANGE MGMT. 413, 415-16 (1999) (noting that drought exacerbates erosion and loss of vegetative cover, resulting in greater competition between sage grouse and livestock for forage and cover).

⁴²⁸ See, e.g., Felicity Barringer, *Plan May Keep Bird Off Endangered List: Designation Might Be Bad for Business*, N.Y. TIMES, Nov. 10, 2004, at A21, available at 2004 WLNR 6729524 (noting that sage grouse "range overlaps with oil and gas deposits and grazing lands"); *Grouching About*

reported that the scientific findings of FWS biologists concerning sage grouse and sagebrush habitat were criticized and heavily edited by a Deputy Assistant Secretary of the Interior, a political appointee with “no background in wildlife biology,” a “strong property rights background,” and “deference to industry views.”⁴²⁹

Of all federal agencies, however, the BLM best epitomizes rancher capture. Its bias is frequently apparent in management decisions that disregard available science and policy guidance. For instance, a BLM study of the ecological condition of the Great Basin revealed that 25 million acres are “dominated by exotic annual grasses,” particularly cheatgrass, and concluded that restoration is urgently needed.⁴³⁰ The agency established a “guiding principle” that the “Great Basin must be managed for *no net loss* of sagebrush habitat.”⁴³¹ Just a few years later, however, the BLM proposed to apply herbicide to *kill* sagebrush to increase cattle forage on a huge grazing allotment in Elko County, Nevada.⁴³² More recently, the BLM’s Pinedale field office proposed to “treat” up to 23,000 acres of “mature and decedent [sic]

Sage Grouse, *supra* note 427 (citing Associated Press, Mar. 26, 2004, report that Kathleen Clarke, BLM director, found receptive audiences among livestock and oil and gas operators when she toured “several western states to muster opposition to [ESA] listing for sage grouse”).

⁴²⁹ See, e.g., Felicity Barringer, *Interior Aide and Biologists Clashed Over Protecting Bird*, N.Y. TIMES, Dec. 5, 2004, at 138, available at 2004 WLNR 13102691 (reporting that the official, Julie MacDonald—an engineer—suggested, for instance, that sage grouse “will eat other stuff if it is available,” despite biologists’ unanimous agreement that the bird is seasonally dependent—up to 100 percent—on sagebrush). MacDonald’s edits were forwarded to a panel of FWS biologists and managers, who later recommended against listing. *Id.*

⁴³⁰ See HEALING THE LAND, *supra* note 24, at 1–2, 11 (explaining the ecological problems of the Great Basin). The BLM concluded: “Several factors are behind the changes. Certainly, changes in wildland fire are one cause. Another element is *grazing* . . . [and] the two are related.” *Id.* at 12 (emphasis added). But on the next page it backtracked: “[A]ctivities, “such as grazing, which is widespread, also need to be assessed to determine *if* they detract from conditions that sustain healthy rangelands. *If* livestock is shown to contribute to loss of perennial vegetation, then regulations provide a process to modify grazing practices.” *Id.* at 13 (emphasis added). This is typical agency waffling—despite the evidence, the agency does not concede a livestock grazing causal connection. Instead, the agency pushes for further study. Ironically, the “regulations” to which the quotation ostensibly refers have since been revised by the Bush Administration in ways that weaken the BLM’s ability to take action when grazing damage is identified. See generally *infra* text accompanying notes 436–64.

⁴³¹ HEALING THE LAND, *supra* note 24, at 19 (emphasis added). This management prescription seems well advised in view of scientific assessments of the extent and condition of sagebrush in the Intermountain Region. See *supra* note 427.

⁴³² See Adella Harding, *BLM Loses Grazing Appeals*, ELKO DAILY FREE PRESS, Sept. 26, 2004 (further noting that the proposed project allegedly involved “more than 100 miles of new fencing, mostly at taxpayer expense”), available at <http://www.elkodaily.com/articles/2004/09/26/news/local/news2.prt>; Press Release, Western Watershed Project, Judge Halts Massive Elko BLM Fencing and Spraying Scheme Designed to Benefit Barrick Gold Mine Cattle Grazing, (Sept. 16, 2004) (describing an Office of Hearings and Appeals decision that stayed implementation of the project, which would affect habitat of sage grouse and pygmy rabbits, both proposed for listing as threatened species) (on file with author). The Barrick-Goldstrike Mines ranch covers 300,000 acres, 200,000 of which are public land. Harding, *supra*. Cf. WELCH & CRIDDLE, *supra* note 408, at 8–11 (concluding that sites “with big sagebrush are . . . more productive,” and “[d]ifferences in perennial grass production in big sagebrush stands [have] less to do with shrub cover than . . . with soils, moisture (wet or dry years), and especially grazing history”).

sagebrush, using herbicides, prescribed fire, mowing, and other mechanical means.”⁴³³ Although the project purported to “enhance” sagebrush age-class diversity, it was likely to reduce sagebrush cover at the expense of species that depend on it.⁴³⁴ It seemed plain that the project was designed to enhance livestock forage.⁴³⁵

The prime example of this Administration’s obeisance to public-land ranchers is evident in recently finalized revisions to the BLM’s grazing regulations.⁴³⁶ (The rules also exemplify the agency’s reliance on specious western myths in its public-land policy making.) In proposing the rules,⁴³⁷

⁴³³ BLM Pinedale Field Office, Mesa Sagebrush Enhancement 1, Environmental Assessment WY-100-EA05-253 (n.d.) (copy on file with the author) [hereinafter BLM Pinedale].

⁴³⁴ See WELCH & CRIDDLE, *supra* note 408, at 11 (explaining the ecological importance of sagebrush). The EA cited one study to support the finding that herbaceous understory is reduced by increasing sagebrush cover. BLM Pinedale, *supra* note 433, at 2. Welch and Criddle refuted this notion, which they discussed under axioms 2 and 3. See WELCH & CRIDDLE, *supra* note 408, at 4–8 (finding “no significant relationship between big sagebrush cover and [increased] bare ground”).

⁴³⁵ The EA predicted that all proposed treatments “should enhance livestock grazing by . . . reducing competition with sagebrush.” See BLM Pinedale, *supra* note 433, at 15; see also *id.* at 20 (“Improved forage for livestock will not occur under the No Action Alternative.”). Yet the EA did not list livestock forage enhancement among project objectives, see *id.* at 1, nor did it consider removing livestock to achieve vegetative and wildlife habitat objectives. In its response to public comments on this issue, the Pinedale BLM office denied a livestock-related purpose, stating repeatedly: “There is no change in grazing numbers or season of use associated with this project. . . . [A]ny increase in forage would be available for wildlife since the AUM’s allotted for cattle are being under utilized.” BLM, Pinedale Office, Comments and Responses to the Mesa Sagebrush Enhancement EA, EA Number: WY-100-EA05-253, Case Number: TC55 (n.d.) (copy received by e-mail from Curtis R. Yanish, Pinedale BLM, Aug. 22, 2005; on file with author). In any event, the office later scaled back the proposed action to a much more modest “study.” BLM, Pinedale Field Office, Record of Decision, Mesa Sagebrush Enhancement 1 (n.d.) (“Specifically, this decision will result in approximately 300 acres (ten 30 acre plots) to be established as study sights [sic]. . . . Results from the study sites will be used to determine the most effective treatment type to be used in the future.”) (copy received by e-mail from Curtis R. Yanish, Pinedale BLM, Aug. 22, 2005; on file with author). Cf. BLM Pinedale, *supra* note 433, at 1 (describing the proposed action as treating “[u]p to 23,000 acres of sagebrush . . . over 20 years”).

⁴³⁶ The Final EIS was released on June 17, 2005, more than nine months after the BLM’s scheduled date. See Notice of Availability of the Final Environmental Impact Statement for Regulation Amendments of Grazing Regulations for the Public Lands, 70 Fed. Reg. 35,299 (June 17, 2005) (providing final EIS to support amendments to the regulations governing grazing administration); Press Release, BLM, BLM Publishes Final Environmental Impact Study on Changes to Grazing Regulations (June 16, 2005) available at http://www.blm.gov/nhp/news/releases/pages/2005/pr050616_grazing.htm. While the timing of the FES and final rules’ issuance (when this article was in editing) prevented a careful review of those documents, a quick look suggested that the agency made few, and perhaps, no substantive changes as a result of the 18,000 public comments it received. See *BLM to Issue Grazing EIS that Anticipates Big Policy Changes*, 30 PUBLIC LANDS NEWS 1, 7 (2005) (reporting that the “upcoming final regulation . . . will closely track proposed regulations”).

⁴³⁷ The proposed rule changes were announced in late 2003. See 68 Fed. Reg. 68,452 (Dec. 8, 2003) (to be codified at 43 C.F.R. Part 4100). See also DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., PROPOSED REVISIONS TO GRAZING REGULATIONS FOR THE PUBLIC LANDS, DRAFT ENVIRONMENTAL IMPACT STATEMENT, DES 03-62 (2003) [hereinafter GRAZING REGULATIONS DES]. At that time the BLM predicted that the final EIS and grazing rules would be issued in September 2004. See RangeNet.org, RangeNet: Insider Trading, <http://www.rangenet.org/trader/grazingdeis/100703timeline.pdf> (last visited Nov. 19, 2005) (providing a link to BLM’s proposed

the BLM claimed that they would “improve working relationships with permittees and lessees, protect the health of the rangelands, and increase administrative effectiveness and efficiency.”⁴³⁸ Interior Secretary Gale Norton also said that the rules would “help public lands ranchers stay on the land.”⁴³⁹ Even a cursory review of the rule changes confirms that, in fact, they will “serv[e] the most special interest”—ranchers⁴⁴⁰—but at great expense to the interests of the public and the land’s health.

The regulations reverse three rules issued by the Clinton Administration and approved by the Supreme Court. Permittees will be allowed to own water rights and to share title to permanent structural range improvements on public lands,⁴⁴¹ and “grazing preference” is redefined to mean the total

timeline, Revision #2, dated Oct. 3, 2003). But the Final EIS was not released until June 17, 2005, with expected publication of the rules in July 2005. See Press Release, BLM, *supra* note 436. According to the agency, the FES was printed in October 2004, but “[d]ue to delay in final clearance, the EIS was not cleared for release until June, 2005.” BLM, REVISIONS AND ERRATA (2005) (twelve-page document accompanying GRAZING REGULATIONS FES). Apparently, the BLM had “been unable to clear the final regs with the Office of Management and Budget (OMB) and, perhaps, the Council on Environmental Quality.” *BLM Still Working on Grazing Regs; Ranchers Fault ESA*, PUBLIC LANDS NEWS, Apr. 22, 2005, at 8 (citing “sources close to the situation” and noting that the rules “offer lots of targets”).

⁴³⁸ See GRAZING REGULATIONS DES, *supra* note 437 (cover letter by Kathleen Clarke). The agency also asserted that the proposed rule changes were intended to “clarify” existing regulations. For instance, an agency spokesman at a public hearing in Cheyenne, Wyoming, on Feb. 2, 2004 (which the author attended), said that the proposed rules were “a routine update and adjustment of the ‘95 regulations.” Notes on file with the author. Similarly, upon the release of the Final EIS, the BLM Washington office rangeland resources manager stated: “We don’t look at this as a significant change from the current regulations . . . This is fine-tuning and making adjustment in existing rules.” Julie Cart, *Land Study on Grazing Denounced: Two Retired Specialists Say Interior Excised Their Warnings on the Effects on Wildlife and Water*, L.A. TIMES, June 18, 2005 at A1 (quoting Bud Cribley). Such statements are belied by the actual changes, summarized *infra* in the text, and by the agency’s expenditure of considerable resources in preparing an EIS.

⁴³⁹ N.S. Nokkentved, *Ranching Proposal Faces Criticism*, THE DAILY HERALD, Dec. 15, 2003. “[R]anchers and the Bush administration say changes are needed . . . to keep ranchers in business.” Faith Bremner, *Conservationists, Ranchers Disagree Over Grazing in the West*, GANNETT NEWS SERVICE, Mar. 11, 2004, available at <http://www.rgj.com/news/stories/html/2004/03/11/65904.php>.

⁴⁴⁰ See Joseph M. Feller, *The BLM’s Proposed New Grazing Regulations: Serving the Most Special Interest*, 24 J. LAND RESOURCES & ENVTL L. 241 (2004) (arguing the proposed regulations will return ranchers to an exclusive role in public lands); see also Joseph M. Feller, *Ride ‘em Cowboy: A Critical Look at BLM’s Proposed New Grazing Regulations*, 34 ENVTL. L. 1123 (2004) (describing the proposed rules changes as “a virtual wish list for ranchers seeking liberation from environmental restraints and restoration of their historic position as dominant users of the western public lands”). Agency comments in the press concerning the new rules also reveal the BLM’s bias. See, e.g., Julie Cart, *Federal Officials Echoed Grazing-Rule Warnings*, L.A. TIMES, July 16, 2005 at A14 (reporting that BLM “officials . . . said the new grazing rules . . . more fairly balanced the needs of plants, wildlife, water and other resources with the rights of ranchers to use public land”) (emphasis added). See *supra* note 86 and accompanying text (explaining that ranchers have no legal “right” to use public lands).

⁴⁴¹ See GRAZING REGULATIONS FEIS, *supra* note 19, app. A at A-22 (proposed final revision to 43 C.F.R. § 4120.3-9, deleting the former provision that water rights would be acquired in the United States’ name), A-20 (proposed final revision to 43 C.F.R. § 4120.3-2(b), providing that the U.S. will share title to range improvements with “cooperators”).

number of AUMs attached to base property.⁴⁴² These provisions undermine statutory authority denying holders of grazing permits any private right or interest in the public lands.⁴⁴³ In so doing, they jeopardize the agency's ability to avoid property-rights-based challenges and to manage use of rangelands in the public interest. For our purposes, these rules changes also illustrate nicely the capture metaphor: By this instance of *agency capture*, stockmen can be seen as compensating for their failure to employ the *rule of capture* to secure a property interest in grazing permits.

The new rules also require ill-defined "monitoring"⁴⁴⁴ before the BLM can take action to correct grazing practices that are causing range conditions to run afoul of rangeland health Standards and Guidelines (S&G).⁴⁴⁵ The BLM and permittees, with no public input, would decide what to monitor, how, and how often, and how to interpret the findings. This requirement, on its face, would delay corrective action that would protect the lands. Delays would be exacerbated by BLM shortages of money and personnel for monitoring. In fact, the agency lacks monitoring data for about half of all allotments.⁴⁴⁶

⁴⁴² See GRAZING REGULATIONS FEIS, *supra* note 19, app. A at A-9 (proposed final revision to 43 C.F.R. § 4100.0-5 definition of "grazing preference"). The 1995 rule, which the Supreme Court approved, defined preference consistently with the TGA's use of the term. See Taylor Grazing Act, 43 U.S.C. § 315b (2000).

⁴⁴³ 43 U.S.C. §§ 315b, 1752(h) (2000).

⁴⁴⁴ See GRAZING REGULATIONS FEIS, *supra* note 19, app. A (proposed final revisions to 43 C.F.R. 4100.0-5); *id.* at A-46 (proposed final revision to 43 C.F.R. § 4180.2). Reliance on "monitoring" is a familiar ploy of rancher-friendly administrations. Under President Ronald Reagan and Interior Secretary James Watt, the BLM "revamp[ed] its methodology for setting grazing levels," resorting to "continued monitoring over longer periods of time." See Natural Resources Defense Council v. Hodel, 624 F. Supp. 1045, 1061 (D. Nev. 1985). See also SHORT, *supra* note 361, at 37 (noting "Watt's efforts to minimize enforcement of grazing regulations imposed by the Carter administration"). Monitoring is simply unnecessary to justify many management actions. Where it is appropriate, it should be used, not to track the status quo, but to measure ecological responses to grazing management *changes* implemented to improve land health.

⁴⁴⁵ See 43 C.F.R. § 4180.2.

⁴⁴⁶ Inadequate resources have plagued BLM since the agency's inception. Today, BLM "has 480 range conservationists looking out for nearly 160 million acres of public rangelands. Ten years ago, it had 590 . . ." Bremner, *supra* note 439 (citing Dick Mayberry, a BLM range management specialist). See also GAO, HOT DESERTS, *supra* note 25, at 55-56 (documenting inadequate resources for monitoring in most BLM offices in Southwest in 1991, including a declining number of range conservationists). The GAO in 1991 found that, despite then-existing requirements that monitoring data be collected and evaluated "to determine whether management objectives are being met and whether changes are needed," many BLM allotments either had no data or had not completed evaluations. *Id.* at 54. In one specific case, GAO:

found that preliminary monitoring data collected for an allotment in Arizona indicated in 1983 that the number of livestock grazing exceeded the level that available forage could support. BLM decided to monitor the allotment for 3 years and issue a final decision on the basis of data collected. Monitoring data continued to be collected, but no evaluation of the data was completed until 1991, despite the belief of the range staff and the wildlife biologist that the allotment was being damaged.

Id. at 55. See also GEN. ACCOUNTING OFFICE, RANGELAND MANAGEMENT: INTERIOR'S MONITORING HAS FALLEN SHORT OF AGENCY REQUIREMENTS, GAO/RCED-92-51, at 3 (February 1992) (reporting that BLM had "performed the required monitoring . . . for only about 20 percent of the 14,500

The new rules delete prior regulatory requirements to involve the public in all on-the-ground grazing decisions, while retaining requirements to involve permittees and states.⁴⁴⁷ The public effectively would no longer have input to decisions to issue, renew, or modify grazing permits; changes to allotment boundaries; issuance of temporary nonrenewable use permits; reductions in permitted use; or emergency closures. These changes arguably violate FLPMA,⁴⁴⁸ and they are plainly inconsistent with the *national, public* nature of rangeland resources. The BLM claims that NEPA processes will afford public comment opportunities.⁴⁴⁹ But most grazing decisions do not require preparation of an EIS,⁴⁵⁰ and since 1999 Congress has authorized BLM grazing permits to be renewed without NEPA compliance.⁴⁵¹

At the same time, the rules require a *new layer* of consultation—with local, county, state, and tribal “grazing boards”—for the very decisions from which the public would be excluded.⁴⁵² This requirement arguably violates

allotments covered by [DEISs] issued more than 5 years ago. It has not monitored about 7,200 allotments at all.”).

⁴⁴⁷ See GRAZING REGULATIONS FEIS, *supra* note 19, app. A at A-25, A-28 to A-29, A-31 (proposed final revisions to 43 C.F.R. §§ 4130.2(b), 4130.3-3, and 4130.6-2); *id.* at A-14, A-16, A-25, A-28 to A-29, A-31 (retaining 43 C.F.R. §§ 4110.2-4, 4110.3-3, 4130.2(b), 4130.3-3, 4130.6-2).

⁴⁴⁸ See Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1712(f) (requiring regulations to “establish procedures . . . to give . . . the public[] adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands”).

⁴⁴⁹ See Bureau of Land Management, Grazing Administration—Exclusive of Alaska, Proposed Rule, 68 Fed. Reg. 68,452, 68,461 (Dec. 8, 2003).

⁴⁵⁰ BLM itself acknowledges that “[a]n environmental assessment [EA, not an EIS] is prepared for most grazing decisions.” GRAZING REGULATIONS DES, *supra* note 437, § 2.1.1; see also Sworts & Schroeder, *supra* note 391, at 103 (reporting that BLM in Wyoming “relied exclusively on EAs” in “processing over 900 grazing decisions” between 1999 and 2001). But only an EIS triggers NEPA’s public participation requirement. Agencies are not required to involve the public when they prepare EAs. See 40 C.F.R. § 1501.4(e)(2) (requiring public review of an EA only when the action “is, or is closely similar to” one normally requiring an EIS or is one “without precedent”); see also Feller, *Ride ‘em Cowboy*, *supra* note 440, at 1131 n.49 (explaining that public involvement is generally not required, and often not allowed, in the preparation of an EA).

⁴⁵¹ This has been accomplished by riders to annual Interior appropriation bills, see, e.g., Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, § 116, 114 Stat. 943 (2000), even though the first such legislation used open-ended language stating that the exemption would continue “until such time as the Secretary of the Interior completes processing” of permit renewals “in compliance with all applicable laws and regulations.” Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 123, 113 Stat. 1501, 1501A-159-160 (1999). Moreover, House Republicans have initiated a broad review of NEPA and its implementation, apparently motivated by concerns that NEPA hinders economic development and national security. See House Resource Committee, Task Force on Improving the National Environmental Policy Act Created, <http://resourcescommittee.house.gov/nepataskforce/press/0406taskforce.htm> (last visited Nov. 19, 2005) (announcing the establishment of a taskforce to review implementation of NEPA).

⁴⁵² See GRAZING REGULATIONS FEIS, *supra* note 19, app. A (proposing final revisions to 43 C.F.R. § 4120.5-2(c)). The agency admitted that grazing boards do not currently exist in all locales, but it stated that the “specific requirement to coordinate with grazing boards should stimulate the development of additional grazing boards throughout the west [sic].” See GRAZING REGULATIONS DES, *supra* note 437, § 4.3.14. A spokesman for the Public Lands Council and the National Cattlemen’s Beef Association called the “creation and use of these boards” a “very innovative and useful approach to implementing Secretary Norton’s four C’s concept to

FLPMA and the Federal Advisory Committee Act.⁴⁵³ It also seriously undermines BLM's claim that the new rules will "enhance administrative efficiency."⁴⁵⁴

The rules further require BLM offices to consider the economic, social, and cultural impacts of grazing decisions.⁴⁵⁵ Indeed, concerns about these impacts seemed to be a chief motivation for revising the rules.⁴⁵⁶ The BLM suggests that NEPA requires this analysis.⁴⁵⁷ In fact, however, the Council on Environmental Quality (CEQ) regulations specify that economic, social, and cultural impacts are to be considered *only if* anticipated impacts to the physical/natural environment are significant—and thus only when an EIS will be prepared. They are not meant to be the *reason* for doing an EIS.⁴⁵⁸

resource management." Bureau of Land Mgmt., Public Hearing to Receive Comments on the Draft Environmental Impact Statement on the Proposed Grazing Rule, Feb. 5, 2004, Washington, D.C. (statement of Stacey Katseanes) (emphasis added), *available at* http://www.blm.gov/grazing/transcripts/DC_Public_Meeting_020504.txt.

⁴⁵³ See *supra* discussion at notes 279–86.

⁴⁵⁴ See *supra* text at note 438.

⁴⁵⁵ GRAZING REGULATIONS FEIS, *supra* note 19, app. A (proposing final revisions to 43 C.F.R. § 4110.3).

⁴⁵⁶ The prominence of this concern, and its role in motivating the rules changes, has been widely evident. For instance, in announcing the availability of the DES on the proposed rules changes, BLM's website stated: "The proposed rule, announced by Interior Secretary Gale Norton in a speech in New Mexico, recognizes the economic and social benefits of public lands ranching, as well as its preservation of open space in the rapidly growing West." U.S. Bureau of Land Mgmt., Grazing Information, <http://www.blm.gov/grazing> (last visited Nov. 19, 2005). See also GRAZING REGULATIONS FEIS, *supra* note 19, at ES-2 (listing "Improving Working Relations with Grazing Permittees" as the first of three "categories" of proposed revisions, and the NEPA documentation of social, economic, and cultural effects on permittees first among those proposed revisions), 2–5 (listing "Social, Economic, and Cultural Considerations" as the first of several "key issues"), 2–19 (noting that the proposed amendment to 43 C.F.R. § 4110.3 "would require the BLM to analyze and, if appropriate document, the relevant social, economic, and cultural effects of . . . chang[ing] grazing preference"). See also Press Release, BLM, Fact Sheet, (Dec. 5, 2003), *available at* http://www.blm.gov/nhp/news/releases/pages/2003/pr031205_grazing.htm#factsheet (listing "Improving Working Relationships with Grazing Permittees and Lessees" as the first category of proposed rules changes, and stating: "[i]n this category, the proposed rule would: ensure that BLM managers consider and document the social, cultural, and economic consequences of decisions affecting grazing, consistent with the requirements of the National Environmental Policy Act (NEPA) of 1969."); Transcript of DEIS public meeting in Washington, D.C., Feb. 5, 2004, http://www.blm.gov/grazing/transcripts/DC_Public_Meeting_020504.txt (last visited Nov. 19, 2005) (statements of Bud Cribley and Ken Visser).

⁴⁵⁷ See, e.g., Department of the Interior, Bureau of Land Management, Grazing Administration—Exclusive of Alaska, 68 Fed. Reg. 68,452, 68,459 (proposed Dec. 8, 2003) (to be codified at 43 C.F.R. pt. 4100) ("BLM is proposing the change [to § 4110.3] to ensure that our managers document their consideration of relevant social, economic, and cultural factors when they comply with NEPA."); GRAZING REGULATIONS FEIS, *supra* note 19, at 5–49 ("BLM is obligated under 40 C.F.R. § 1508.8(b) to assess the consequences of BLM actions . . . on . . . historic, cultural, and economic, [and] social . . . aspects of the human environment."). The agency's responses to comments (in Chapter 5 of the FEIS) failed to address the specific issue raised in the text, which this author raised in her comments on the proposed rules.

⁴⁵⁸ See 40 C.F.R. § 1508.14 (providing "economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an [EIS] is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment"); see also *Metropolitan Edison Co. v. People Against Nuclear Energy*, 40 U.S. 766,

The BLM itself says that most grazing decisions do not require an EIS.⁴⁵⁹ Moreover, nothing in FLPMA allows, much less requires, the BLM to make grazing decisions on the basis of economic, social, or cultural impacts of grazing decisions, at the local level or otherwise.⁴⁶⁰ The BLM seems to believe that by using NEPA to shoehorn social and cultural concerns into grazing decisions it can avoid complying with (or at least dilute) environmental protection mandates in its governing laws and regulations. But NEPA rejects this view, as well.⁴⁶¹

The BLM claims that the rules do not change the Fundamentals of Rangeland Health (FRH) rules,⁴⁶² promulgated by the Clinton Administration, but in fact they weaken those rules—by requiring monitoring before BLM may take action to correct rangeland conditions, by doubling the time within which corrective action must be started,⁴⁶³ and by making the FRH unenforceable once the S&G are implemented.⁴⁶⁴

As disturbing as the *substance* of the new rules was, the *procedures* leading to their promulgation were worse. The timing of the Draft Environmental Statement's (DES) release (after the proposed rules were published), and recent disclosures by two BLM scientists,⁴⁶⁵ strongly suggest that the DES was a *post hoc* rationalization of a rulemaking choice already made—and thus a violation of the spirit if not the letter of NEPA.⁴⁶⁶ The

772 (1983) (finding that NEPA requires assessment only of the impact on the physical environment).

⁴⁵⁹ See *supra* note 450.

⁴⁶⁰ See, e.g., *supra* note 300 and accompanying text (noting that FLPMA policies refer to "national," not local, interests in the public land). Cf. DONAHUE, *supra* note 4, at 203–13 (arguing that a decision to remove livestock from public lands could readily be justified in terms of FLPMA's provisions).

⁴⁶¹ See National Environmental Policy Act of 1969, 42 U.S.C. § 4334 ("Nothing in section 4332 [requiring an EIS] . . . shall in any way affect the specific statutory obligations of any Federal agency . . . to comply with criteria or standards of environmental quality . . .").

⁴⁶² 43 C.F.R. § 4180.1.

⁴⁶³ In fact, the new rules could delay corrective on-the-ground action by up to ten years; i.e., at least two to three years for monitoring, sufficient time to complete all required consultation, two years to decide on management action (before action could begin the *following* year), and time for protests and appeals. See GRAZING REGULATIONS FEIS, *supra* note 19, app. A (proposing changes to § 4180.2(f)).

⁴⁶⁴ See *id.* Cf. Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513, 607 (1997) (explaining that "[d]epending on how rigorously—and for how long—the [1995] standards and guidelines are implemented, they could lead to dramatic changes in livestock grazing over a vast portion of the West. . . . They should . . . improve the ecological health of BLM rangelands.").

⁴⁶⁵ Cart, *supra* note 438, at A1. See also Tony Davis, *New Grazing Rules Ride on Doctored Science: Veteran Scientists Leave the BLM in Frustration*, HIGH COUNTRY NEWS, July 25, 2005 (discussing assertions of two BLM scientists that their work was rewritten).

⁴⁶⁶ These disclosures seemed to confirm earlier allegations that agency scientists' conclusions had been removed from the preliminary DEIS, known as the administrative review copy (ARC). The BLM's Assistant Director for Renewable Resources and Planning distributed the ARC for comment on November 17, 2003, to all Washington office officials and western state directors. Instruction Memorandum No. 2004-044 from United States Department of the Interior, Bureau of Land Management, Request for Comments on Administrative Review Copy of Revisions to Grazing Regulations Draft Environmental Impact Statement (DEIS) (2003) (on file with author). The memorandum gave recipients nine days—until November 26—to submit

scientists, who participated in drafting the DEIS and have since retired, reported that their conclusions concerning adverse impacts on water quality and wildlife, including endangered species, “were excised and replaced with language justifying less stringent regulations favored by cattle ranchers.”⁴⁶⁷ Remarkably, their prediction of a “significant adverse impact’ on wildlife” was removed, and the rewritten DEIS concluded that the proposed rules would be “beneficial to animals.”⁴⁶⁸ The scientists charged the BLM Washington office with rewriting the DEIS so that it would support rules that had already been written.⁴⁶⁹ The Washington office rangeland resources manager acknowledged: “There were definitely changes made in the area of impact analysis.” His only explanation: “When [the DEIS] was finished in November 2003, the agency believed it ‘needed a lot of work . . . We adjusted it.’”⁴⁷⁰ The agency’s “adjustment” was used to support regulations that will further entrench the private interests of perhaps 18,000 public-land ranchers, while jeopardizing the ecological health of 160 million acres of public lands belonging to all Americans. As one of the overruled BLM scientists put it, “[The] bottom line is that there’s no way we will ever effect changes in livestock grazing . . . The cowboys will not allow it.”⁴⁷¹

“detailed review comments.” *Id.* The memo’s author “apologize[d] for the quick turnaround,” but explained, “we are under a very tight deadline for issuing this DEIS in a timely manner following the release of the Proposed Rule.” *Id.* It was reported that two BLM state directors (including the new Idaho director, former rancher K. Lynn Bennett) at the last minute called for the ARC to be revised because of certain statements therein about the ecological impacts of livestock grazing. (Personal communication on file with author). See also *supra* note 401 (describing replacement of Martha Hahn with Bennett as Idaho state director). In general, a draft EIS is expected to be submitted at the same time as a proposed rule, since the analysis is intended to inform the agency’s proposed action. See 42 U.S.C. § 4332(2)(C) (directing agencies to “include in [their] recommendation or report on proposals for . . . major Federal actions” an EIS); 40 C.F.R. § 1502.5 (forbidding an agency from using an EIS to justify a decision already made). These facts strongly suggest that the agency had decided on a proposed course of action, notwithstanding the potential impacts of implementing that decision, and that the published DES was fabricated in part to support that course of action. See, e.g., Joe Feller, *In Bush Grazing Decision, Politics, Secrecy Win Again*, http://www.publiclandsranching.org/htmlres/press_americanprogress_feller.htm (last visited Nov. 19, 2005). But according to the BLM, the “analysis of environmental effects was completed prior to the publication of the proposed rule,” and it is “not aware of any absolute requirement to publish the DEIS and proposed rule simultaneously.” See GRAZING REGULATIONS FEIS, *supra* note 19, at 5–17 to –18. (The FEIS was not released until June 2005.)

⁴⁶⁷ Cart, *supra* note 438, at A1; see also *Science Fiction: The Altering of Reports to Fit Policies is Dismaying*, LOS ANGELES TIMES, July 5, 2005, at B10 (asserting that “recast[ing] [scientific reports] for the sake of political expediency . . . has been happening regularly throughout President Bush’s tenure”). The scientists, Erick Campbell and Bill Brookes, who had thirty and twenty-five years, respectively, with the agency, resigned out of frustration not only with the BLM but with the Bush Administration’s overall handling of environmental issues. See Davis, *supra* note 465 (citing Campbell and Brookes).

⁴⁶⁸ Cart, *supra* note 438, at A1 (quoting DES). These allegations are corroborated by comparison of a leaked copy of the ARC (on file with author) to the published DES. Numerous examples of diluted or qualified language can be found in the DES. See Feller, *supra* note 466.

⁴⁶⁹ See Cart, *supra* note 438, at A1. In fact, the proposed rules were released nearly a month before the DES was available. See *supra* notes 465–66. See also Feller, *supra* note 466.

⁴⁷⁰ Cart, *supra* note 438, at A1 (quoting Bud Cribley).

⁴⁷¹ Davis, *supra* note 465.

C. Cowboy Myths—and the Realities

The foregoing discussion should leave little doubt that public-land ranchers' capture of politicians and land management agencies continues at a gallop. This section takes a brief look at the influence of cowboys in other areas of American life,⁴⁷² followed by an examination of the role of myths in the capture metaphor.⁴⁷³

Subscribers to cowboy mythology include a wide range of persons trying to preserve the West as they imagine it to be.⁴⁷⁴ The myths are perpetuated for profit or to support other interests by magazines, filmmakers, "poets," artists, manufacturers of consumer goods ranging from clothing to furniture, and the media (to name a few).⁴⁷⁵ Public-land ranchers enjoy preferential treatment by Congress,⁴⁷⁶ by state legislatures, governors, and boards;⁴⁷⁷ and by local officials.⁴⁷⁸ Chambers of commerce, tourism

⁴⁷² This review is necessarily anecdotal.

⁴⁷³ See *infra* notes 510–44 and accompanying text.

⁴⁷⁴ Cf. *supra* notes 349–56 and accompanying text.

⁴⁷⁵ If these myth-mongers are not familiar to readers, a few minutes of web browsing will yield hundreds of examples. See *infra* note 480. A prime example of media capture is the bi-weekly regional newspaper *High Country News* (HCN). Regular readers of this paper (including the author) believe that in recent years it has come to dispense an uncritical and unrealistically positive image of ranchers and ranching. (Readers might get a sense of this perspective by reviewing past HCN articles. See HCN, <http://www.hcn.org/archives.jsp>.) Ten years after describing land-grant-university agriculture colleges and the range science discipline as "the obedient handmaidens of traditional ranching," see *infra* note 481, HCN publisher Ed Marston introduced a May 2000 conference with the proclamation: "The first thing we do is declare ourselves for ranching. Then we invite all those we think can help ranching and disinvite all those who we think could hurt ranching." See Ed Marston, *Why This Book Matters*, in *RANCHING WEST OF THE 100TH MERIDIAN*, *supra* note 91, at 237.

⁴⁷⁶ In addition to the numerous examples in the text heretofore, grazing, along with the rest of agriculture, enjoys relative immunity from Clean Water Act regulation. See generally J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGY L.Q.* 263 (2000) (stating that farms are generally unregulated by environmental law but are a major source of pollution). Even though FLPMA and the Clean Water Act require that federal activities comply with applicable state water quality requirements (notably water quality standards), those requirements are difficult to police and are rarely enforced against ranchers or their stock. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1712(c)(8) (2000); Federal Water Pollution Control Act, 33 U.S.C. § 1323 (2000).

⁴⁷⁷ Consider, for example, the Wyoming and Idaho statutes ensuring that preference in issuing state land leases be given to ranchers, despite financial losses to the trust beneficiaries, state schools. See, e.g., Erik Ryberg, *Comedy of Errors or Confederacy of Dunces? The Idaho Constitution, State Politics, and the Idaho Watershed Projects Litigation*, 40 *IDAHO L. REV.* 187, 188 (2003) (describing the Idaho "political establishment" as "unabashedly rancher friendly," and further describing Idaho State Land Board of Commissioners' and Idaho Legislature's repeated attempts to keep state land leases in the hands of ranchers, despite dramatically lower revenues to the state schools); Delissa Hayano, Note: *State School Lands—Disinterest in the Public Interest: The Wyoming Supreme Court's Failure to Define "The Great Public Interest" in State School Lands in Riedel v. Anderson*, 70 *P.3d* 223 (Wyo. 2003), 5 *WYO. L. REV.* 59, 62 (2005) (discussing Wyoming's statutory right-to-renew preference for grazing leases, and concluding that it "conflicts with the great public interest").

Wyoming—the Cowboy State—provides many other examples. In 2000 the state senate president drafted legislation to close the University of Wyoming College of Law, the state's only law school, in order to "send a message" to the author (me) of a book that recommended ending grazing on arid public lands. See Dierdre Stoelzle, *Twiford Drops UW Law School Threat*,

bureaus⁴⁷⁹ and real estate agents,⁴⁸⁰ as well as range scientists⁴⁸¹ and university administrators,⁴⁸² tout the virtues of ranching. Other groups and

CASPER STAR-TRIB., Feb. 16, 2000, at A1, A10. Wyoming maintains twenty-three feed grounds for elk to assuage cattle ranchers who object to elk eating hay or other winter forage used by their herds, even though the concentrations of animals at feed grounds increase the likelihood for transmission of brucellosis (and possibly other diseases, such as chronic wasting disease) among elk and possibly to cattle. See generally Associated Press, *Wasting Disease Plan Insufficient, Federal Official Says*, CASPER STAR TRIB., Mar. 23, 2005, available at <http://www.casperstartribune.net/articles/2005/03/24/news/wyoming/c9430cfdc7b6dbf987256fcb004c4657.txt> (discussing chronic wasting disease considerations for the management of elk feeding grounds). No one ever points out that brucellosis was not native to native Wyoming ungulates; rather, elk and bison were initially infected by cattle. When one cow in northwest Wyoming (near a Game & Fish-managed elk feedground) tested positive for brucellosis in 2003, the decision was made to test the entire herd—at the federal government's expense. Cat Urbigkit, *Wyoming Herd Infected with Brucellosis*, CASPER STAR TRIB., Dec. 5, 2003 (received by e-mail, and on file with the author).

⁴⁷⁸ Ranchers and farmers have typically dominated county commissions and been over-represented on western state legislatures. See, e.g., *supra*, text at note 267; DONAHUE, *supra* note 4, at 81–82, 303 n.37 (“Ample anecdotal and experimental evidence support a coincidence of interest between western county commissioners and livestock business.”). Ranchers and livestock associations, notably the National Cattlemen's Association, were founding members of the county supremacy movement. See Reed, *supra* note 347, at 525–30 (detailing the county supremacy movement). The movement seeks to maintain continued commodity uses of federal public lands, in part by asserting a greater county role in planning and management activities. See generally *id.* Attorneys Karen Budd-Falen and Frank Falen, who hail from public land ranching families in Wyoming and Nevada, respectively, marketed to counties around the West a standard-form ordinance, to be used as a basis for individual county efforts. *Id.* at 548–51. Reed described the “custom and culture” mantra, on which the county movement is based, as “claptrap.” *Id.* at 530, 548. See also Julie Cart, *Grazing Rights Trigger Showdown Between Ranchers*, BLM, ENVTL. NEWS (Mar. 1, 2001) (reporting that a local sheriff “defied federal orders and allowed [BLM-impounded] cattle to be taken” by ranchers), available at <http://www.heartland.org/Article.cfm?artId=9375> (last visited July 7, 2005); Nijhuis, *supra* note 386.

⁴⁷⁹ See, e.g., DONAHUE, *supra* note 4, at 96–97 (evaluating tourists' attraction to the western cowboy myth). Pick up any travel magazine for further examples.

⁴⁸⁰ We have all seen the billboards and real estate signs. A quick search of the internet produced several hits, including “Cowboys.com,” a website with links to real estate as well as (among others) “western malls,” “western wear, gifts, and collectibles,” books and magazines, décor, software, museums, historical attractions, and even “Native Americans.” See *Cowboys.com*, at <http://www.cowboys.com> (last visited Nov. 19, 2005) (advertising guest ranches, “dream ranches,” “luxury mountain ranches,” etc., in “cowboy country”). See also Betsy Schiffman, *The Most Expensive Ranches*, http://www.forbes.com.lifestyle/realestate/2004/03/05/cx_bs_0305home.html (last visited Nov. 19, 2005) (noting that “ranches are becoming increasingly popular with many high net worth individuals”; that many wealthy people, including Michael Jackson, receive sizeable property tax credits by leasing part of their land for cattle grazing and not developing the rest; and that “for an individual looking for a little privacy, beautiful views, and a way to offset capital gains, ranch life may be ideal”).

⁴⁸¹ See, e.g., DONAHUE, *supra* note 4, at 81–83, 258, 277, 304 n.46; Box, *supra* note 23. *High Country News* publisher Ed Marston aptly “captured” this relationship, describing land-grant-university agriculture colleges and the range science discipline as “the obedient handmaidens of traditional ranching.” Ann Vileisis & Ed Marston, *What Did the Land Look Like? What Should the Land Look Like?*, HIGH COUNTRY NEWS, Mar. 23, 1992, at 14. See also Davis, *supra* note 191, at 85 (noting that industry supporters include certain natural resource economists at western state universities); *supra* note 423 (citing letter signed by over 100 economists from western states to George W. Bush criticizing federal grazing policies).

⁴⁸² For instance, after my book *The Western Range Revisited* attracted criticism and concern

industries, such as mineral developers and motorized recreationists, frequently join forces with public-land ranchers or espouse their cause.⁴⁸³ Writers and academics wax eloquent about the ranching culture and lifestyle,⁴⁸⁴ while a growing number of environmental groups clamber aboard the “sustainable ranching” bandwagon.⁴⁸⁵ Indeed, increasing numbers of

by livestock producers, former University of Wyoming president Phillip Dubois faxed a letter to the editor of a livestock trade publication, in which he wrote: “Readers of the Wyoming Livestock Roundup should know that the official position of the University of Wyoming is, has been, and will continue to be, support for those industries including production agriculture – that have brought this state from its status as a territory in 1886 to its promise in the new millennium.” Phillip Dubois, Letter to the Editor, *UW Supports Ag*, WYO. LIVESTOCK ROUNDUP, Jan. 24, 2000, at 2. Pointing to my book, certain University trustees and university staff (particularly those associated with the booster group, “The Cowboy Joe Club”) also questioned my continued employment. A president of New Mexico State University may have been fired “as punishment for offending the state’s traditional ranching interests.” Peter Chilson, *Did Ranchers Fire a University President?*, HIGH COUNTRY NEWS, June 23, 1997, at 5 (noting that the member of the Board of Regents who complained about the offending remark was a rancher).

⁴⁸³ These groups, which generally favor public-land access, development of public lands, and protection of private rights, often join forces or espouse similar positions on public-land issues. See, e.g., Idaho State Snowmobile Ass’n, *2002 Update*, Dec. 2002 (on file with author) (declaring that the appointment of former rancher K. Lynn Bennett as BLM state director was “well worth the wait”). The author noted approvingly that Bennett had left the agency in 1993, which “shows he has good judgment,” and that ranching “was his life-long goal.” *Id.* Ranchers and motorized recreationists share an affinity for off-road, or all-terrain, vehicles (ORVs and ATVs). See, e.g., National Cattlemen’s Beef Association (NCBA) website, http://www.beefusa.org/newsmember_eupdate-may19200521919.aspx (last visited Nov. 19, 2005) (reporting that the NCBA has chosen as its “official utility vehicle” the Gator, a six-wheeled ATV); WELFARE RANCHING: THE SUBSIDIZED DESTRUCTION OF THE AMERICAN WEST (George Wuerthner & Mollie Matteson eds., 2002) (showing an ORV-mounted “cowboy” herding cattle on the jacket of the book); Press Release, White House, <http://www.whitehouse.gov/news/releases/2001/08/20010825-2.html> (reporting that President Bush uses a Gator to help clear trails through “jungly” vegetation at his ranch near Crawford, Texas).

⁴⁸⁴ See, e.g., RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91, at xiii–iv (presenting poems and essays on ranching and promoting dialogue about ranching culture); PAUL F. STARRS, LET THE COWBOY RIDE: CATTLE RANCHING IN THE AMERICAN WEST 31–34 (1998).

⁴⁸⁵ Examples include The Nature Conservancy, Quivira Coalition, Malpai Borderlands, and even local Sierra Club groups. See, e.g., P. Lynn Scarlett, *A New Approach to Conservation: The Case for the Four C’s*, 17 NAT. RESOURCES & ENV’T 73, 74–75 (Fall 2002) (describing conservation strategies of the Malpai Borderlands Group); Bob Budd, *Colors and Words*, in RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91, at 44 (offering perspective of manager of ranch owned by Nature Conservancy); Kelly Cash, *Malpai Borderlands: The Searchers for Common Ground*, in ACROSS THE GREAT DIVIDE: EXPLORATIONS IN COLLABORATIVE CONSERVATION AND THE AMERICAN WEST 112–21 (Philip Brick et al. eds., 2001) (recounting the story of the Malpai Borderlands Group). In Idaho local environmental groups joined forces with ranching interests (with the blessing of a Senator Mike Crapo (R-ID)) to secure wilderness designation for the Owyhee Canyon in southwest Idaho and part of the Boulder-White Cloud Roadless Area in central Idaho. In the process, they made significant compromises regarding grazing, thus drawing criticism from other conservation interests. See, e.g., JANINE BLAELOCH & KATIE FITE, QUID PRO QUO WILDERNESS—A NEW THREAT TO PUBLIC LANDS (2005), http://www.westernwater_sheds.org/reports/quidpro/quid-pro-quo.pdf (also reviewing other compromises). The final agreement, known as the Owyhee Initiative, was released in November 2004 and is available at <http://www.owyheeinitiative.org>.

Another critic of these collaborative efforts is ecologist George Wuerthner. He reports that The Nature Conservancy (TNC) is advising ranchers to include a clause in conservation easements that “automatically gives back to the rancher development rights if public lands grazing allotments are canceled or there are reductions in livestock use that ‘destroys the

environmentalists opposed to public-land ranching are lobbying for generous payments to ranchers who are willing to permanently retire their grazing permits⁴⁸⁶—an outcome that Congress or the agencies could achieve legally without providing any compensation at all.⁴⁸⁷ Even some courts have rendered judgments that are inexplicable unless one accepts that they, too, are vulnerable to the cowboy myth and ranchers' political clout.⁴⁸⁸

economic viability' of the ranch. This would permit ranchers to subdivide their property . . ." E-mail from George Wuerthner, freelance writer and ecologist, to author (Feb. 12, 2000) (on file with author) (citing *Owyhee Cattlemen Discuss Conservation Easements*, CAP. PRESS, Feb. 11, 2000, at 29). Wuerthner continues: "TNC is apparently explicit in explaining to the ranchers that such a clause can be used as a 'hammer' . . . over 'state and federal agencies' heads." *Id.*

⁴⁸⁶ See, e.g., National Public Lands Grazing Campaign, Voluntary Grazing Permit Buyout Endorsements, <http://www.publiclandsranching.org> (last visited Nov. 19, 2005) (describing voluntary buyout efforts and endorsements, including Congressman Grijalva's bill, Multiple-Use Conflict Resolution Act, H.R. 3166). See also Tania Soussan, *Buyout Plan Targets Ranchers, Grazing Permits Would Be Retired*, ALBUQUERQUE J., Jan. 23, 2005, at B1, available at 2005 WLNR 1049109 (describing state and federal proposals for grazing-buyout programs). Private buyout programs include that of the Grand Canyon Trust, which for several years has been buying private land in the Southwest and then attempting to retire the attached federal grazing privileges. The Trust has been sued by persons opposed to the program, and Interior Department officials claim that grazing cannot be stopped on federal lands that have been determined to be "chiefly valuable for grazing," simply by buying out the current permittees. See, e.g., John Tierney, *The Sagebrush Solution*, N.Y. TIMES, July 26, 2005, available at 2005 WLNR 11680935 (describing a ranch buyout near Escalante, Utah). As noted earlier, however, federal lands in fact have never been determined chiefly valuable for grazing. See *supra* note 29 and accompanying text.

⁴⁸⁷ See *supra* text accompanying notes 148, 295 (describing the TGA and FLPMA provisions, which dictate that a grazing permit is not a property interest).

⁴⁸⁸ See, e.g., *Public Lands Council v. U.S. Dep't of Interior Sec'y*, 929 F. Supp. 1436, 1450-51 (D. Wyo. 1996), *aff'd in part and rev'd in part sub nom. Public Lands Council v. Babbitt*, 154 F.3d 1160, 1182 (10th Cir. 1998), *amended on reh'g*, 167 F.3d 1287, 1309 (1999), *aff'd*, 529 U.S. 728, 750 (2000). Federal District Court Judge Clarence Brimmer repeatedly referred (erroneously) to ranchers' "rights" in his opinion striking down several challenged provisions of the 1995 Clinton-Babbitt grazing regulations. *Id.* at 1441. See also Jim Stanford, *Wyo. Judge Has Green Heart*, CASPER STAR TRIB., Mar. 8, 2004, at A3 (reporting that Brimmer "believes Western courts are the proper venue for deciding Western issues" and quoting him as saying, "I don't think an Eastern judge is really in a position to assess fairly the interests that are involved" in some public-land issues); *id.* (also quoting Brimmer as saying: "I'm a Westerner, born and bred' [and] . . . I favor Western interests"). As reported by the Idaho Watersheds Project (now Western Watersheds Project), on May 31, 2000, Federal District Court Judge Edward Lodge "issued a Temporary Restraining Order stopping the implementation of a [BLM] decision to cut grazing [in an Idaho] Allotment by 53%." E-mail from Idaho Watersheds Project to author (June 1, 2000) (on file with author). Lodge, who has been on the bench since 1989 and was "until recently, a [BLM] grazing permittee himself . . . acted without any court hearing . . . and . . . solely on the basis of information provided by three public land ranching permittees provided three days before the Order." *Id.* See also DONAHUE, *supra* note 4, at 83-87, 305 n.54 (describing other specific examples of judicial "deference" to ranching interests). A recent study by the Environmental Law Institute revealed that judges' party affiliation was a decisive factor in the outcomes of NEPA cases. See ENVTL. LAW INST., *JUDGING NEPA: A HARD LOOK AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 13*, available at <http://www.endangeredlaws.org/downloads/JudgingNEPA.pdf>. But see Spence & Cross, *supra* note 160, at 122-23 (debunking agency capture as a valid descriptive theory of bureaucratic behavior). Cf. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1310-11 (1976) ("The premise of 'capture' does not apply in anything like the same degree, however, in the contemporary judicial setting," and various factors "operate to insulate the judge from the

Among the most influential—and thus potentially damaging—proponents of cowboy mythology are range and wildlife scientists. Former Society for Range Management president Thad Box acknowledges that the range science profession has “lost credibility because we have been too close to the livestock industry.”⁴⁸⁹ Box posed some tough questions to his colleagues: “Are we really captive of cattlemen? Are we letting the myth of the cowboy limit our effectiveness? . . . Do our gods get in the way of our science?”⁴⁹⁰ I am not alone in suggesting that the answer to these questions is “yes.”⁴⁹¹ Some of these scientists are associated with universities, serve as government consultants, contribute to environmental assessments and other studies, and participate in “collaborative” public-land planning and management efforts. In these contexts, their casual, misleading, and/or unsupported statements can significantly retard the development of sound public-land grazing policy and a better understanding of range ecology.

Wayne Burkhardt, associate professor emeritus, University of Nevada-Reno, and frequent range consultant, serves as an example. A 1991 article by Burkhardt in *Range* magazine is rife with platitudes and inaccuracies about grazing ecology, history, and the law.⁴⁹² Three years later Burkhardt

cruder forms of ‘capture’”).

⁴⁸⁹ Box, *supra* note 23, at 30. Box conceded the truth of my charge that the results of range science studies “may be portrayed carelessly or even misrepresented, intentionally or otherwise, by the investigators or others.” *See id.* at 28 (referring to DONAHUE, *supra* note 4, at 61).

⁴⁹⁰ Box, *supra* note 23, at 28, 29.

⁴⁹¹ *See* WELCH & CRIDDLE, *supra* note 408, at 1 (characterizing the “range or vegetative management axioms” about destroying sagebrush as “rationalizations”). Welch and Criddle explain that their report “analyze[s] whether [each axiom] is based on science or [is] a reflection of Box’s . . . question to the range management community: ‘Do our gods get in the way of our science?’”; and they conclude that “[i]n short, most, if not all, of the sins attributed to big sagebrush by the range management community are the result of livestock grazing.” *Id.*; *see also* DONAHUE, *supra* note 4, at 61.

⁴⁹² *See* J. Wayne Burkhardt, *Renewal on the Western Range: Mother Nature’s Balance Is Not Always Harmonious*, RANGE, Spring 1991, available at <http://www.rangemagazine.com/archives/stories/spring00/renewal.htm> (presenting grazing as a natural process and asserting improving health of public rangelands). Among other assertions, Burkhardt states: “Grazing is extensive, low fossil energy consumptive, a natural process Natural grazing damages little and is based on a renewable resource that can be harvested in no other way.” *Id.* Some rebuttal: Cattle grazing in the American West is not “natural.” *See supra* notes 8–20 and accompanying text (describing the environmental effects of grazing and citing numerous scientific sources). Cattle are not native to this continent. Nor is their diet or foraging behavior similar to that of any historically abundant large native ungulate. *Id.* All cattle raised on public rangelands are “finished” elsewhere, usually on feedlots. *See* DONAHUE *supra* note 4, at 251 (noting that few animals spent an entire year on federal land). Grazing causes significant ecological damage, including to soil, water, and native species. *See supra* note 8 and accompanying text. In his article, Burkhardt also cites the beneficial role of livestock in releasing “nutrients that need to go back into the soil [but which] are tied up in litter,” and he queries: “Doesn’t a lawn look better when it is mowed?” Burkhardt, *supra* note 492. Grazing does reduce litter, but the effects on arid rangelands are *not* beneficial. Reduced litter and vegetative cover alter fire regimes, result in greater erosion and more runoff, and negatively affect soil temperatures, soil texture, and microorganisms. *See* RANGELAND REFORM ‘94, *supra* note 8, at 3-35 (“Natural litter is an important element of cover,” which “intercepts precipitation, reducing raindrop impact, restricting overland flow, and allowing more infiltration and less runoff and erosion.” Litter “improve[s] soil structure, thus improving the ability of the soil to absorb water . . . [and]

contributed to two grazing-related reports contracted by the federal inter-agency Interior Columbia Basin Ecosystem Management Project (ICBEMP).⁴⁹³ Apparently, these reports were similarly unscientific. An agency-solicited peer review of these reports⁴⁹⁴ was highly critical, finding a “number of serious flaws,” including:

faulty conceptualization of processes of natural selection and evolution, reliance on unsubstantiated or weakly substantiated assumptions, arguments built on scientifically unsupported premises, a failure to present all alternatives concerning controversial issues, a propensity to present a single alternative as

supplies nutrients to the soil.”); *id.* at 4-113 (predicting, *inter alia*, that if all livestock were removed, plant and litter cover would “considerably increase,” thereby “improv[ing] physical soil properties” over the long term). Moreover, scientists have recently discovered that “a long-term decrease in litter cover [such as results from extended grazing] is the most evident sign when an area begins to change to desert.” Press Release, EurekaAlert!, Desertification Alters Regional Ecosystem Climate Interaction (Jan. 18, 2005), *available at* http://www.eurekaalert.org/pub_releases/2005-01/bpl-dar011805.php. One scientist has noted that greater mulch (litter) accumulation in *moist* climates might be related to decreased infiltration and increased sediment yield. Farrel A. Branson, *Evaluation of “Impacts of Grazing Intensity and Specialized Grazing Systems on Watershed Characteristics and Responses,”* in DEVELOPING STRATEGIES, *supra* note 219, at 985–1000. Burkhardt’s comparison to lawns is highly inapt: Lawns are monocultures of non-native grasses; public rangelands should neither be monocultures nor comprise significant numbers of non-native species. See RANGELAND REFORM ‘94, *supra* note 8, at 27 (attributing declines in native animal and plant species to degraded vegetative communities and disrupted natural processes). Burkhardt further asserts, citing no supporting data: “Near barren landscapes and gutted stream courses of the early 1900s are today [1991] proven and productive stable rangelands.” Burkhardt, *supra*. *But cf.* RANGELAND REFORM ‘94, *supra* note 8, at 24–25 (reporting that in 1994 riparian areas were in their worst condition in history, that “[p]lant communities palatable to livestock or maintained by fire . . . have diminished,” and that uplands in areas receiving less than 12 inches annual precipitation have not improved under BLM management).

⁴⁹³ E-mail from Dr. Elizabeth Painter to author (Dec. 14, 2003, and Apr. 21, 2004) (on file with author). See also STEPHEN G. LEONARD & MICHAEL G. KARL, REVIEW DRAFT—HERBIVORY IN THE INTERIOR COLUMBIA RIVER BASIN: IMPLICATIONS OF DEVELOPMENTAL HISTORY FOR PRESENT AND FUTURE MANAGEMENT (1995) (summarizing the “divergent views” in the Burkhardt reports and Painter’s peer-review evaluation), *available at* www.icbemp.gov/science/leonard1.pdf. The ICBEMP, which was initiated in the early 1990s, was described this way by U.S. Forest Service Chief Michael Dombeck:

As directed by the President, the Forest Service, and BLM are developing a scientifically sound and ecosystem-based strategy for the management of the “East Side forests.” We are responding to several broad scale issues, including forest and rangeland ecosystem health . . . and potential listings under the Endangered Species Act, economies of rural communities[,] and treaty and trust responsibilities to Native American Tribes in the Project.

Hearings on the Interior Columbia Basin Ecosystem Management Project: Hearings Before the Subcomm. on Forest and Forest Health of the H. Comm. on Resources, 105th Cong., 2d Sess., 4 (1998) (statement of Michael Dombeck, Chief, U.S. Forest Service).

⁴⁹⁴ Elizabeth L. Painter, *Review: Herbivory in the Intermountain West* (1995) [hereinafter Painter, *Review*] (review of J. WAYNE BURKHARDT, HERBIVORY IN THE INTERMOUNTAIN WEST: AN OVERVIEW OF EVOLUTIONARY HISTORY, HISTORIC CULTURAL IMPACTS, AND LESSONS FROM THE PAST (1994), contract report on file with ICBEMP, 112 E. Poplar, Walla Walla, WA 99362, 208-885-6673) (on file with author). E-mail from Dr. Elizabeth Painter to author (Dec. 14, 2003, Apr. 21, 2004, and July 27, 2005) (on file with author). See also LEONARD & KARL, *supra* note 493 (outlining the “divergent views” in the Burkhardt and Painter reports).

if it were the only point of view found in scientific literature, presentation of scientifically unsubstantiated opinions as if they were scientifically tested and accepted, and inconcise or unconventional uses of scientific terminology.⁴⁹⁵

The reviewer concluded: "Current versions of the reports are scientifically invalid, and should not be considered for use as a framework on which to base management decisions without almost complete revision."⁴⁹⁶ She rejected Burkhardt's assertions that "most rangelands remain productive and stable after more than a century of livestock grazing," that "bison were abundant and widespread" and thus important selection forces in the Intermountain Region, and that domestic livestock serve as "replacements" for "extinct Pleistocene megafauna"⁴⁹⁷—all of which are commonly heard pronouncements of grazing apologists.⁴⁹⁸

More recently, *Range* magazine published a remarkable piece of drivel by another range consultant, Steven H. Rich, president of the Rangeland Restoration Academy.⁴⁹⁹ In this article, Rich (who apparently is *not* a scientist, but who nevertheless advertises himself as a "successful Natural Resource Management Consultant"⁵⁰⁰), wrote: "Buffalo chips and cow pies are indispensable, integral parts of the West."⁵⁰¹ This piece reflects two spurious views, widely held among ranchers and range managers: (1) that livestock benefit rangelands by cycling nutrients,⁵⁰² and (2) that cattle

⁴⁹⁵ Painter, *Review*, *supra* note 494, at 1.

⁴⁹⁶ *Id.*

⁴⁹⁷ See, e.g., Painter, *Review*, *supra* note 494, at 1 (quoting Burkhardt, *supra* note 494).

⁴⁹⁸ See *infra* notes 501–505 and accompanying text.

⁴⁹⁹ Steven H. Rich, *The Humble But Important Cow Pie: The Tao and Ecology of Poo and the Key Role of Endangered Feces*, RANGE, Winter 2005, available at <http://www.rangemagazine.com/features/winter-05/cowpie.shtml> (last visited Nov. 19, 2005).

⁵⁰⁰ Rangeland Restoration Academy website, <http://www.rangelandrestoration.org/rangelandacademy/Steven%20Resume.htm> (last visited Nov. 19, 2005) (further stating that Rich is a "successful businessman," primarily in the hospitality and food service industries). Elsewhere, the organization's website reports: "Everything we [the Rangeland Restoration Academy] do is based on real, peer reviewed, solid, published science." Rangeland Restoration Academy, Welcome to Rangeland Restoration Academy!, <http://www.rangelandrestoration.org/rangelandacademy> (last visited Nov. 19, 2005).

⁵⁰¹ Rich, *supra* note 499. "Cow pies are part of . . . the 'grazing lawn' phenomenon. An enriched soil grows extra nutritious plants with increased grazing tolerance and a much longer green, active period. Wildlife needs these grazing lawn communities. Livestock form and maintain them." *Id.* (citing "Dr. Samuel McNaughten of Syracuse University"). This is typical pro-livestock propaganda, which fails to account for evolutionary history or cite differences in climate, soils, precipitation regime, or other relevant factors. Aridity, combined with a dearth of coprophagous (dung) beetles in the West (compared to east of the Continental Divide where bison and dung beetles had been plentiful), result in cattle dung persisting for years. See J.R. Anderson, R.W. Merritt & E.C. Loomis, *The Insect-Free Cattle Dropping and Its Relationship to Increased Dung Fouling of Rangeland Pastures*, 77 J. ECON. ENTOMOLOGY 133, 133 (1984) (explaining that insecticides given to cattle prevent micro-organisms from breaking down cattle dung). See also *infra* note 505 and accompanying text.

⁵⁰² See, e.g., Knight, *supra* note 91, at 128 (asserting that "grass and shrubs need . . . the dung and urine incorporated by hoof action facilitating more efficient nutrient cycling"). Most ecologists have rejected these "hoof action" theories, whose chief promoter is Zimbabwean scientist Alan Savory). See DONAHUE, *supra* note 4, at 141–42 (describing scant empirical evidence that hoof action enhances seed establishment); see also *id.* at 167–68 (citing other examples of the nutrient-cycling view, as well as evidence of the deleterious impacts of cattle

“substitute” (are ecological replacements) for bison.⁵⁰³ As noted above, however, the long-term result of cattle “cycling nutrients” (by consuming vegetation and reducing litter cover) can be desertification.⁵⁰⁴ This is so in part because native plant species in the arid and semi-arid West did not evolve in association with large ungulate grazers. Neither these plants nor western soils are adapted to coexisting with cattle. Bison—contrary to the second view—were sparse or absent over most lands that are now public grazing lands (west of the Continental Divide), and no other native ungulates are similar to cattle in size, diet, foraging behavior, or ecological impacts.⁵⁰⁵

Many examples of the misuse or subversion of science are more subtle. Consider, for example, an article entitled “Influences of livestock grazing on sage grouse habitat.”⁵⁰⁶ Its authors concluded that “rest-rotation cattle grazing” had a “direct *positive* impact” on sage grouse because grouse food forbs increased *during the rest period* (i.e., the period of no grazing).⁵⁰⁷ Ranchers and grazing apologists commonly claim credit for “improvements” in the land which, in fact, occur as the result of *discontinuing* some damaging grazing practice, such as removing cattle from riparian areas.⁵⁰⁸

To borrow a phrase from Dr. Box, as long as range professionals allow their “gods [to] get in the way of [their] science,”⁵⁰⁹ the public and politicians can hardly be expected to see the truth. There seem to be two principal reasons for the seriousness with which these “gods” or myths are embraced

dung); *supra* note 501 (concerning the persistence of cattle dung in the West). Cattle actually retard nutrient cycling by damaging biological soil crusts. DONAHUE, *supra* note 4, at 124–25.

⁵⁰³ DONAHUE, *supra* note 4, at 133–39.

⁵⁰⁴ See *supra* note 492 (explaining that reducing litter cover can alter fire regimes and erosion, signaling a change to a desert environment).

⁵⁰⁵ See generally George Wuerthner, *Just a Domestic Bison?: Cows Are No Substitute for Buffalo*, in WELFARE RANCHING, *supra* note 483, at 295–97; DONAHUE, *supra* note 4, at 133–38; Painter, *Review*, *supra* note 494, at 1–2 (explaining that, by definition, there “were” no ‘vacant’ or ‘empty’ niches for livestock to fill, and “[b]est available science provides evidence that alien domestic livestock are not and cannot be ‘replacements’ for extinct Pleistocene ‘mega-fauna’ or contemporary native large herbivores”).

⁵⁰⁶ Beck & Mitchell, *supra* note 427, at 993.

⁵⁰⁷ *Id.* at 994, 997 (emphasis added).

⁵⁰⁸ See, e.g., Scott E. Cotton & Ann C. Cotton. *Wyoming CRM: Enhancing Our Environment* (n.d.) (discussed in DONAHUE, *supra* note 4, at 281); cf. W. William Weeks, *Cloudy Sky over the Range: Whose Home and Why It Matters*, in RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91, at 219, 224 (claiming that “ranchers have always fought invasive species” and asserting that, without “this kind of active management, much of our western range will follow a course of succession that cannot be called natural”). Such statements ignore that livestock grazing bears perhaps primary responsibility for invasion by weeds. See *supra* note 8 and accompanying text; *supra* note 16 (noting that the loss of sixty-five percent of the shrublands on the Snake River plain in southwest Idaho and conversion to cheatgrass is due in part to livestock grazing); and *supra* note 79. Most “improvements” are manipulations undertaken for the benefit of livestock with little or no consideration of the effects on the environment or on native species. See, e.g., FERGUSON & FERGUSON, *supra* note 132, at 147–56; DONAHUE, *supra* note 4, at 127–32, 216, 220, 276–80.

⁵⁰⁹ Box, *supra* note 23, at 29. Dr. Box also suggested that the fact that most range professionals “have [their] roots in the ranching culture” often leads them to “defend[] a use that is dear to [their] hearts rather than land [they] have pledged to preserve.” See *id.* at 28. “Pledged” refers to the Society for Range Management objectives, subscribed to by all SRM members. See *id.* at 27.

today: First, the longer ranching persists as a land use, the more plausibly (and sympathetically) ranchers can argue that theirs is a culture worth preserving. This is so even though public-land ranching holds on largely because of government subsidies and ranchers' attachment to their chosen lifestyle. Second, a growing number of persons attracted to the West for its wide open spaces, but concerned at the rate they are dwindling, grasp at solutions that link preservation of those open spaces to keeping ranchers on the land.

Webster's defines myth as "a belief given uncritical acceptance by the members of a group especially in support of existing or traditional practices and institutions; a belief or concept that embodies a visionary ideal."⁵¹⁰ Mythical means "fabricated, invented, or imagined in a consciously arbitrary way . . . or ignorantly and willfully without facts or in defiance of facts."⁵¹¹ Even a cursory look at some of the most prominent rationalizations of current public-land grazing policies⁵¹² shows that each indeed "embodies a visionary ideal" and is "ignorantly and willfully without facts or in defiance of facts":

- Ranchers are "cowboys."⁵¹³
- Cowboys are romantic figures.⁵¹⁴

The notion that ranchers and cowboys live lives of freedom and adventure in the open air on the open range is a mere fiction.⁵¹⁵ Ranchers are

⁵¹⁰ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1497 (1986).

⁵¹¹ *Id.*

⁵¹² See DONAHUE, *supra* note 4, at 268–82 (reviewing and rebutting the asserted justifications for public-land grazing).

⁵¹³ A corollary myth is that cowboys are *men*. This facet of the myth has been addressed elsewhere. See DONAHUE, *supra* note 4, at 88–90 (and sources cited therein). Despite the longstanding existence of cowgirls and women ranchers (such as Mary Bulloch, *infra* note 514), the myth persists, cropping up in odd places, like National Public Radio stories. *E.g.*, "Male-Female Wage Gap in Cowboy Country," <http://www.npr.org/templates/story/story.php?storyId=4486560> (last visited Nov. 19, 2005). Senator Thomas's "National Day of the Cowboy" resolution begins by noting that "pioneering men *and women*, recognized as *cowboys*, helped establish the American West." S. Res. 85, 109th Cong. (2005) (emphasis added).

⁵¹⁴ See S. Res. 85, 109th Cong. (2005) (touting the admirable qualities of cowboys); see also *supra* notes 353–54 and accompanying text. Consider also the second definition of cowboy offered by an on-line dictionary: "An adventurous hero." Dictionary.com, cowboy, <http://dictionary.reference.com/search?q=cowboy>. See also WEBB, *supra* note 92, at 245–47; DONAHUE, *supra* note 4, at 88–91. See Nijhuis *supra* note 386, at 10 and accompanying text (reporting rancher Mary Bulloch's comment: "Yep, there's nothing like being a cowboy in the middle of society, is there?"). An aside: according to an elder member of the W.R. Cross family, who operated a western wear store in Ogden, Utah, for 127 years, *non-cowboys* are called "civilians." *Profile: Cross Western Wear, Established in 1878 in Utah, Prepares to Close After 127 Years of Continuous Operation by Cross Family*, (National Public Radio broadcast Mar. 18, 2005).

⁵¹⁵ See, *e.g.*, RANGELAND REFORM '94, *supra* note 8, at 3-76 ("Some of the personal traits and lifestyle patterns of cowboys/ranchers have been romanticized and may tend to exist less in reality than in the minds of ranchers and other Americans.").

(sometimes absentee) land owners and businesspersons. Cowboys are hired hands.⁵¹⁶ Indeed, cowboys are among the lowest paid workers in the West.⁵¹⁷

- Cowboys (hence, according to the myth, ranchers) are independent, self-reliant, honest, hard-working, respectful, etc. They “have integrity and courage in the face of danger.”⁵¹⁸

Any stereotype has its limits and flaws, but these notions seem especially unfounded. Of the alternative definitions of cowboy offered by *Webster's*, “outlaw or gangster in the early days of the western U.S.” precedes “one who tends and drives herds of cattle.”⁵¹⁹ Early cowboys were not generally liked or admired.⁵²⁰ They were often disorderly, prone to violence and drinking, and considered “uncivilized.”⁵²¹ Most were illiterate.⁵²² Ranchers (or ranch managers) work hard, but so do people in many other occupations and professions. Ranchers may be “rugged individualists” and *philosophically* independent,⁵²³ but public-land ranching has long been heavily dependent on government subsidies and is still referred to as a “pocket of socialism” in our capitalist economy.⁵²⁴

- Public land ranching is crucial to local rural western economies.⁵²⁵

⁵¹⁶ As Ed Abbey put it: “A cowboy is a hired hand on the middle of a horse contemplating the hind end of a cow.” Edward Abbey, *Free Speech: The Cowboy and His Cow*, in WELFARE RANCHING, *supra* note 483, at 57, 60.

⁵¹⁷ See, e.g., POWER, *supra* note 33, at 190 (documenting cowboys' meager wages). Even so, the expense of those wages may deter a rancher from hiring a range rider (cowboy) to ensure that cattle remain within designated pastures or out of sensitive riparian areas. See Brodie Farquhar, *Forest Throws Out Grazing Plan*, CASPER STAR-TRIB., July 15, 2005 (citing Wyoming Stockgrowers official Jim Magagna on the cost of retaining cowboys to watch herds), available at <http://www.casperstartribune.net/articles/2005/07/17/news/wyoming/1812262862f679f98725703e008261d1.txt> (last visited Nov. 19, 2005). Magagna is considered one of the “power brokers” in the Bush Administration's counter-environmental revolution. See *Earth Shakers*, *supra* note 5.

⁵¹⁸ See, e.g., Press Release, Office of Senator Craig Thomas, Thomas Sponsors “National Day of the Cowboy” Legislation (proclaiming that “the cowboy embodies honesty, courage, integrity, compassion, respect, a strong work ethic, and patriotism”), available at http://thomas.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=386&Month=3&Year=2005 (last visited Nov. 19, 2005); Marston, *supra* note 475, at 237, 240 (calling ranchers “proud, self-reliant, inward people”).

⁵¹⁹ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 526 (1986).

⁵²⁰ WEBB, *supra* note 92, at 244–251; BARNES, *supra* note 96, at 38 (listing cowboys among the “ills” and “evils” to which settlers were subjected).

⁵²¹ WEBB, *supra* note 92, at 244–251; BARNES, *supra* note 96, at 38.

⁵²² See, e.g., LARSON, *supra* note 118, at 121–22; WEBB, *supra* note 92, at 498; BARNES, *supra* note 96, at 38. “Wyoming newspaperman Bill Nye quipped that one cowboy in twenty was brave when armed.” DONAHUE, *supra* note 4, at 91.

⁵²³ See *supra* notes 118–20, 360, and accompanying text (suggesting the individuality and moral independence of cowboys, at least in stories).

⁵²⁴ See Nelson, *supra* note 30, at 287 (referring to government intervention in forage production as “a virtual pocket of socialism”); see also generally POWER, *supra* note 33, at 171–200; DONAHUE, *supra* note 4, at 94–96.

⁵²⁵ See, e.g., Ben Alexander & Luther Propst, *Saving the Family Ranch*, in RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91, at 203–04 (characterizing the agricultural economy as the

This myth was addressed briefly in the introduction.⁵²⁶ According to a study by agricultural economists thirty years ago, ranchers depend more on the availability of jobs in the local community than communities depend on ranching.⁵²⁷ The General Accounting Office later failed to find any supporting documentation for this claim in the Southwest.⁵²⁸ In the early 1990s the Department of Interior and a University of Montana economist both concluded that *eliminating all* public-land grazing would have minor economic effects.⁵²⁹

- Public-land ranching is crucial to maintaining a valuable culture and way of life.⁵³⁰

In truth, there is no single ranching “way of life.” “Ranching” and ranchers vary widely, historically and presently.⁵³¹ Ranchers have included sheep and cattle producers, landed and itinerant operators, cattle “barons,”

lifeblood of many rural communities in the West); Press Release, National Cattlemen's Beef Association (NCBA), NCBA Remains Firm in Opposition to Grazing Permit Buyouts (Feb. 17, 2005) (asserting that “rural communities benefit from public land grazing” and grazing “sustains [their] economies”), *available at* <http://hill.beef.org/newview.asp?DocumentID=14424> (last visited Nov. 20, 2005); S. Res. 85, 109th Cong. (2005) (asserting that “the cowboy continues to play a significant role in America’s culture and economy” and ranchers “are contributing to the economic well being of nearly every county”); H.R. Res. 411, 109th Cong. (2005) (“Ranching is an important part of the culture and economies of many rural communities throughout the American West, and the rural West depends on a healthy and thriving ranching industry.”); RANGELAND REFORM ‘94, *supra* note 8, at 3–77 (“Ranchers believe that livestock grazing on federal land is vital to the economic stability of rural communities.”). Data to support such claims, however, are few or nonexistent.

⁵²⁶ See *supra* notes 40–43 and accompanying text.

⁵²⁷ Smith & Martin, *supra* note 41, at 224.

⁵²⁸ GAO, HOT DESERTS, *supra* note 25, at 48 (reporting that, while livestock operators in the Southwest “believe that livestock grazing provides a large portion of the tax base to many local communities,” those “operators and cattlemen’s associations did not supply any quantitative data to GAO to support this view”); see also *id.* at 46–47 (reporting that twelve EISs reviewed by the GAO showed that “sales of livestock products and sales from ranching contribute little to the local economies”). Some politicians and industry proponents even claim regional or national economic significance for public land ranching, but such claims are even more plainly belied by the facts.

⁵²⁹ See RANGELAND REFORM ‘94, *supra* note 8, at 4-118 to 4-121 (describing the impact of ranching on western economies as minor); POWER, *supra* note 33, at 181–86 (analyzing the economic benefit of public land grazing).

⁵³⁰ See *generally* RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91 (presenting a collection of essays and poems glorifying the ranching way of life); S. 1459, 104th Cong. § 101(a)(9) (1996) (Domenici bill) (characterizing the importance of grazing on federal land in terms of “preserving the social, economic, and cultural base of rural communities in the Western States”), *quoted in* DONAHUE, *supra* note 4, at 71. See also Davis, *supra* note 191, at 90 (citing testimony offered by range program supporters during hearings on range reform bills); RANGELAND REFORM ‘94, *supra* note 8, at 3-55–3-56 (referring to ranchers’ traditional way life); Reed, *supra* note 347, at 528 n.11 (noting that Wyoming Senator Alan Simpson “characterized [a] filibuster [by Western senators against a grazing fee increase] as ‘defending a Western life style’”).

⁵³¹ See RANGELAND REFORM ‘94, *supra* note 8, at 3-75 (noting the variety of ranching characteristics based on “location, type of livestock, management, distance from nearest community, and financial structure”); DONAHUE, *supra* note 4, at 88, 90, 93, 268–73 (contrasting the idealized cowboy with facts).

Eastern and foreign capitalists, family operations, hobby ranchers, "rustlers," absentee owners, etc. Even so, very few livestock producers, even in the West (fewer than 23,000, or six percent), use federal public lands; thus, ranching would continue absent federal grazing privileges. The chief objection to this myth, however, is that nothing in the law authorizes, much less mandates, federal land management agencies to take lifestyles or self-described "culture" into account in making grazing decisions.⁵³²

- Keeping public-land ranchers in business maintains open spaces,⁵³³ a.k.a., the "cows versus condos" issue.⁵³⁴

As with the community-dependence myth, proponents of this argument have failed to marshal supporting evidence. The reality is otherwise.⁵³⁵ First, sprawl development occurs on private (not on public) lands, where there is a *demand* for the development. No development pressure exists in many public-land areas. Second, nothing in existing federal law prevents public land ranchers from subdividing or selling their private lands to developers. The real estate market and individual economic choices, not federal grazing rights, dictate which lands will be developed.⁵³⁶ Third, most ranchers are in

⁵³² See, e.g., *supra* notes 300–06 and accompanying text (discussing relevant provisions of FLPMA).

⁵³³ This myth is the newest and most broadly subscribed to. See, e.g., BLM, Proposed Grazing Rule Announced, at <http://www.blm.gov/grazing> (last visited Nov. 20, 2005) ("The proposed rule, announced by Interior Secretary Gale Norton in a speech in New Mexico, recognizes the economic and social benefits of public lands ranching, as well as its preservation of open space in the rapidly growing West."); GRAZING REGULATIONS FEIS, *supra* note 19, at 5-18 ("The rule is designed to enable succeeding generations of ranchers to stay on their land, a crucial element of rural landscapes . . ."). See also RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91, *passim*; S. 1459, 104th Cong. § 101(a)(9) (1996) (Domenici bill), quoted in DONAHUE, *supra* note 4, at 71, 274; David Wilkins, *Cattlemen Welcome New Director*, CAPITAL PRESS AGRIC. WEEKLY (Salem, OR), Dec. 2, 2002, available at http://www.citizenreviewonline.org/nov_2002/cattlemen.htm, (last visited Nov. 20, 2005) (quoting former rancher and new Idaho state director for BLM as saying that the way to "maintain open spaces . . . is to keep producers on the ground"); NCBA, *supra* note 525 (asserting that grazing "helps to preserve open space"); Nokkentved, *supra* note 439 (quoting Kathleen Clarke as calling public ranch lands "crucial for open space and wildlife habitat"). See also Davis, *supra* note 191, at 90.

⁵³⁴ George Wuerthner may have coined the expression "cows or condos." See George Wuerthner, *Cows or Condos: A False Choice between Public Lands Ranching and Sprawl*, in WELFARE RANCHING, *supra* note 483, at 299–302.

⁵³⁵ *Id.*; DONAHUE, *supra* note 4, at 273–76.

⁵³⁶ Star Valley on the Wyoming-Idaho border south of Jackson Hole is a classic example. See Victoria Simpson, *Boom Time in Star Valley: Time is Running Out for Small-town Lifestyle of Yore*, PLANET JACKSON HOLE, July 20, 2005, at 11–12 (describing how the "once quaint, sleepy, scenic ranching community has exploded into a developer's paradise"), available at http://www.planetjh.com/stories/story_2005_07_20_cover.html. Simpson reports that the number of full-time dairies in the valley has declined from 300 to 400 in the 1960s to 20, "and more dairies are closing each year," according to the local U.S. Department of Agriculture office. *Id.* at 11. The population has increased from 4500 in 1960 to 11,600 today, "with more people moving in each day." *Id.* "In 2004, 105 homes were built in Star Valley . . . ; as of June 30, 2005, there have been 105 homes built, and additional homes are ready to get underway." *Id.* at 12. While many ranchers have sold out and left the valley or changed professions (e.g., to selling real estate), some say they "will simply move to where [they] can have a more conducive ranching lifestyle." *Id.* The story has nothing to say about federal grazing policies, which are

the business for the lifestyle, not the money, and recent surveys reveal that at least half of public-land ranchers would continue to operate if they lost federal grazing privileges.⁵³⁷

- Ranchers are “good stewards of the land and all its creatures.”⁵³⁸
- Grazing improves the land.⁵³⁹
- Ranching provides clean air and water, wildlife habitat, etc.⁵⁴⁰

undoubtedly unrelated to the boom. (*Planet Jackson Hole* is a free weekly paper in Jackson, WY.)

⁵³⁷ See DONAHUE, *supra* note 4, at 263–67 (citing results of several surveys and studies from 1972–93).

⁵³⁸ See, e.g., Press Release, Office of Senator Craig Thomas, Thomas Sponsors “National Day of the Cowboy” Legislation (Mar. 18, 2005) (proclaiming that the cowboy is an excellent steward of the environment), available at http://thomas.senate.gov/index.cfm?FuseAction=PressRelease.Detail&PressRelease_id=386&Month=3&Year=2005 (last visited Nov. 19, 2005); GRAZING FEES HEARING, *supra* note 259, at 426 (containing repeated assertions as to ranchers’ stewardship); *Norton Calls for Incentive-Based Species Programs*, ENDANGERED SPECIES & WETLANDS REP., Mar. 2001, at 3 (quoting Interior Secretary Gale Norton as stating that “farmers and ranchers are often the best stewards of the land”); Michael Doyle, *Grazing Rules Put Ranchers in the Saddle*, SACRAMENTO BEE, Dec. 12, 2003, at D3 (quoting Steve McDonald, treasurer of the California Rangeland Trust, as saying: “we think the cattlemen themselves are the best stewards of the land”). See also, NCBA, *supra* note 525 (“Cattlemen are the original stewards of the land, having worked . . . the land for the past century . . .”). The NCBA, like livestock producers in general, seems oblivious of the irony in statements like this, which ignore the original stewards of the land, Native Americans, whom ranchers and other settlers and profit-seekers forced off lands the tribes had occupied for *centuries*. Ranching was the chief impediment to reintroduction of wolves in the Greater Yellowstone Ecosystem and other parts of the West, and remains the biggest threat to their future viability. Most predator and pest control is conducted at the behest of stockgrowers. Nevertheless, a bumper sticker is occasionally seen in the West, which proclaims: “On the eighth day, God created ranchers to care for all his other creatures.”

⁵³⁹ This assertion can refer to so-called range improvements, undertaken almost exclusively for the benefit of livestock, see *supra* notes 314–18 and accompanying text, or to the notion that grazing animals actually enhance the environment, e.g., by fertilizing or aerating the soil, by increasing infiltration, by stimulating plant growth, etc. See, e.g., *supra* notes 492, 501–02 and text accompanying notes 502, 504. There is no ecological evidence for arid lands for any of the latter claims, as I have discussed elsewhere. See DONAHUE, *supra* note 4, at 139–42 (discussing aridity and grazing optimization). See also generally WELFARE RANCHING, *supra* note 483, at 162–253, 286–306 (discussing ecological impacts of livestock production in the arid West and presenting counterarguments to these and other claims); E-mail from Dr. Elizabeth Painter to author (Apr. 21, 2004) (on file with the author) (informing on grazing related issues and listing numerous sources).

⁵⁴⁰ See, e.g., Paul F. Starrs, *Ranching: An Old Way of Life in the New West*, in RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91, at 20 (“Ranches are open lands, biodiversity niches, watersheds, archeological reserves, archives of settlement history, endangered species habitat, diverse ecosystem pools, biodiversity banks, and, just incidentally, vessels for livestock feed.”); Budd, *supra* note 485, at 41 (referring to the “pride” ranchers should feel at “the habitat they provide”); *Invasive Species and the National Cattlemen’s Beef Association—What a Difference Four Years Make* (testimony of Myra Bradford Hyde, National Cattlemen’s Beef Ass’n, Apr. 29, 2003, before the Joint Subcomm. on Fisheries Conservation, Wildlife, and Oceans and National, Parks, Recreation, and Public Lands), available at http://www.propertyrightsresearch.org/articles/invasive_species_and_the_nationa.htm (arguing that non-native species are not

A massive literature contradicts these assertions, some examples of which have been cited in this article. The productivity of western lands, private and public, has declined under ranching practices.⁵⁴¹ Cowboys and ranchers historically have been oblivious or careless of, if not actually cruel to, their own livestock.⁵⁴² Many are intentionally destructive of predators and “pests” and intolerant of many other native species.⁵⁴³ Perhaps the most compelling rebuttal to this myth, however, is the condition of the public lands today.⁵⁴⁴

VI. CONCLUSION

The more things change . . . The western range livestock industry was born of opportunity and lawless entrepreneurialism. By the early 1900s, the free-spirited cowboy had captured Americans’ imagination, if not Congress’s solicitude. For most of the next century, the larger operators continued to get, or take, pretty much what they wanted—the use of hundreds of millions of acres of land, tax free and for minimal rent, with predator control, fencing, and various other services provided; the respect (or fear) and envy of their neighbors; the fascination of an ill-informed public; the ready patronage of politicians; and an infinitesimal regulatory burden. Still, ranges were depleted and conflicts simmered. From my vantage point, the status quo in 2005 looks a lot like 1934.

The capture metaphor provides a means of understanding, or at least dissecting, an otherwise nearly inexplicable phenomenon—that ranchers have maintained their hold on the public range. It would seem that no industry could sustain itself indefinitely in the face of *any*, much less *all*, of

necessarily harmful, and native species are not necessarily good).

⁵⁴¹ See, e.g., USDA-FOREST SERVICE, *THE WESTERN RANGE: A REPORT ON THE WESTERN RANGE—A GREAT BUT NEGLECTED RESOURCE*. S. Doc. No. 199, 74th Cong., 2d Sess., 1936 (reprinted by Arno Press, 1979) (documenting and commenting on range and watershed conditions on private and public rangelands); RANGELAND REFORM ‘94, *supra* note 8, at 24–25 (summarizing the depleted conditions of uplands and riparian areas and the prominent causal role of livestock grazing).

⁵⁴² See, e.g., KAREN R. MERRILL, *PRIVATE SPACES ON PUBLIC LANDS; CONSTRUCTING STATE SOVEREIGNTY ON THE WESTERN RANGE*, Ph.D. Dissertation, Univ. of Michigan 31–32 (1994); WEBB, *supra* note 92, at 239–40 (discussing treatment of longhorns).

⁵⁴³ See, e.g., WILLIAM D. ROWLEY, *U.S. FOREST SERVICE GRAZING AND RANGELANDS: A HISTORY* 3 (1985) (discussing lethal control of predators); STEPHEN R. KELLERT, *ACTIVITIES OF THE AMERICAN PUBLIC RELATING TO ANIMALS, PHASE II* 20–21 (1980) (describing cattle and sheep producers’ “lack of objection to human exploitation of animals” and their higher “utilitarian” and lower “moralistic” attitudinal scores toward animals than any other group); GAO, *ANIMAL DAMAGE CONTROL PROGRAM*, *supra* note 8, at 13 (reporting that from 1991–94 the federal government killed nearly a half-million “livestock predators” nationwide). The federal agency charged with “controlling” animals considered destructive to farm and livestock operations is euphemistically named “Wildlife Services.” See Animal & Plant Health Inspection Service website, <http://www.aphis.usda.gov/ws/introreportsindex.html> (last visited Nov. 20, 2005) (providing links to reports about predator control).

⁵⁴⁴ See, e.g., RANGELAND REFORM ‘94, *supra* note 8, at 24–25 (reporting that in 1994 riparian areas were in their worst condition in history, that “[p]lant communities palatable to livestock or maintained by fire . . . have diminished,” and that uplands in areas receiving less than twelve inches annual precipitation have not improved under BLM management).

the following factors: a paucity of persons engaged in the business, the devastating ecological consequences of the enterprise, low profitability and a miniscule collective economic contribution, significant unrecovered administrative costs, increasing competition, and serious legal challenges. But as the capture metaphor illustrates, this industry has the cowboy as its icon. Therein lies the difference.

Ranchers no doubt believe that things have changed considerably in the New West. Their way of life is in jeopardy. They are beset by urbanites, recreationists, and developers, beleaguered by environmental laws (especially the Endangered Species Act) and "reform regulations," and generally unrecognized for their historical and cultural contributions. They are captives of global markets and the meatpacking industry. Clearly, one difference between the Old West and the New West is that nearly all who ranch today say they do it for the lifestyle, not the money. In that sense, perhaps they *are* more like the cowboys than the ranchers of days gone by. However, today's ranch managers and hired hands spend more time in a pickup or four-wheeler than on a horse, and more time using a cell-phone or computer than riding the open range. They supplement their income by driving a school bus, selling insurance, or guiding dudes. Still, these pesky facts seem to matter not: our infatuation persists.

A few years ago, *High Country News* reported yet another clash between the environmental values of the New West and the entrenched dogmas of the Old West. The tale had all the elements of classic western drama: good guys and bad guys, cowboys and the law, man versus nature, and counties' and states' rights versus those of the federal government. It was the "summer of 2000 [and] the third summer of severe drought in Escalante Country":

[In Grand Staircase-Escalante National Monument], even the sagebrush was dying. [Manager] Kate Cannon . . . took the advice of her range staff and warned all the ranchers on the monument that they might have to pull their cows off early. By mid-August, 80 to 90 percent of the forage was gone, and most ranchers had taken their cows off the land. Cannon ordered the remaining three ranchers to remove their cows by Sept. 1.

Ranchers Gene Griffin, Quinn Griffin, and Mary Bulloch refused to budge. In October, Cannon sent agency wranglers and a helicopter to find and impound the mostly wild cattle, and the ranchers became immediate heroes of the wise-use movement. Followed by a crew of supporters, the trio traveled to Salina, Utah, where the BLM had taken the cattle for sale. It's not clear what happened next, but by the end of the day the local county [officials] had allowed . . . Bulloch to open the sale-lot gate, load the animals into trucks, and take off down the freeway for Arizona.

Mary Bulloch . . . remembers the showdown fondly. "It was real Western around here for a while," she says with a smile. "I got calls from all over the

place, telling me congratulations, and I said, “Yep, there’s nothing like being a cowboy in the middle of society, is there?”⁵⁴⁵

Patricia Nelson Limerick might have had such a scene in mind when she wrote:

Western history has been an ongoing competition for legitimacy—for the right to claim for oneself and sometimes for one’s group the status of legitimate beneficiary of Western resources. . . . The contest for property and profit has been accompanied by a contest for cultural dominance. Conquest also involved a struggle over languages, cultures, and religions; the pursuit of legitimacy in property overlapped with the pursuit of legitimacy in a way of life and point of view.⁵⁴⁶

Ranchers’ claim to legitimacy rests largely on their “landedness.”⁵⁴⁷ When environmentalists or urbanites protest the subsidized destruction of public lands wrought by grazing, ranchers are both insulted and mystified. They, and their advocates in government, cleave to two bedrock notions. First, ranchers know and understand the land best because they live on it, love it, and have held it longest.⁵⁴⁸ Second, because ranchers depend on the land for their survival, they will be good stewards. But ranchers seem not content with mere legitimacy. Economist Sam Western coined the term “agriculturalism” to refer to the “‘way-of life’ mindset” possessed by so many Western ranchers and farmers. He describes it as “an intrinsic sense of superiority to all other professions and an entrenched sense of entitlement, specifically expecting financial and political protection.”⁵⁴⁹

I have argued that prevailing notions of ranching as a sustainable land use and ranchers as good stewards are mythical and anachronistic. Biologist E. Fraser Darling recognized fifty years ago that “[p]astoralism for commercial ends . . . cannot continue without progressive deterioration of the habitat.”⁵⁵⁰ Range ecologists have known for at least fifteen years that

⁵⁴⁵ Nijhuis, *supra* note 386.

⁵⁴⁶ PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 27 (1987).

⁵⁴⁷ See *generally supra* notes 146, 202–03, 215–16, 219, 222, 227 and accompanying text. Ironically, two of the three hold-outs in the clash over grazing in Grand Staircase-Escalante National Monument, described in the text accompanying note 545 *supra*, owned no private base property to which they could remove their livestock. See Nijhuis, *supra* note 386. This circumstance seems plainly inconsistent with the Taylor Grazing Act’s provision that permits be awarded preferentially to “those within or near a [grazing] district who are landowners.” See Taylor Grazing Act, 43 U.S.C. § 315b.

⁵⁴⁸ See, e.g., *Norton Calls for Incentive-Based Species Program*, *supra* note 538, at 3 (quoting Interior Secretary Gale Norton as stating: “We can achieve more by working with [farmers and ranchers]—and capitalizing on their intimate knowledge of the land they depend on—and the land they love.”) As we have seen, the earlier, longer tenure of Native Americans does not “count,” as they did not possess and use the land profitably. See *supra* text accompanying note 145. See also *supra* note 538 (reporting NCBA’s claim that “[c]attlemen are the original stewards of the land”).

⁵⁴⁹ WESTERN, *supra* note 42, at 15.

⁵⁵⁰ See CRONON, *supra* note 79, at 141 (quoting E. Fraser Darling, *Man’s Ecological Dominance through Domesticated Animals on Wild Lands*, in *MAN’S ROLE IN CHANGING THE FACE*

livestock grazing in arid environments can lead and has led to irreversible ecological changes. Yet the agencies continue to omit that science from their environmental analyses, and ranchers deny that grazing in the arid West is problematic, even though their own experience should tell them that something is not working. We can no longer afford to indulge these myths and self-delusion. In fact, we have delayed too long to return some landscapes to ecologically healthy, pre-livestock conditions.

Nearly a century ago, President Theodore Roosevelt admonished Western governors: "In the past we have admitted the right of the individual to injure the future of the Republic for his own present profit. The time has come for a change."⁵⁵¹ The public domain has withered as a result of 135 years of captivity in the hands of a tiny fraction of the livestock industry. The capture metaphor helps us understand why and how this happened. But understanding is only the first step toward changing the state of things on the ground—a change that is long overdue on the Western range.

OF THE EARTH 781 (William L. Thomas ed., 1956)).

⁵⁵¹ Theodore R. Roosevelt, Address at Governors' Conference on the Conservation of Natural Resources (May 13 1908) (quoted in Paul Smyth, *Conservation and Preservation of Federal Public Resources: A History*, 17 NAT. RESOURCES & ENV'T 77, 77 (Fall 2002)).