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**‘Til the Cows Come Home: The Fatal Flaw in  
the Clinton Administration’s Public  
Lands Grazing Policy**

by

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# "TIL THE COWS COME HOME: THE FATAL FLAW IN THE CLINTON ADMINISTRATION'S PUBLIC LANDS GRAZING POLICY

By  
JOSEPH M. FELLER\*

*Since the first days of the Clinton Administration, the Department of Interior, under the leadership of Secretary Bruce Babbitt, has endeavored to develop policies to reform environmentally destructive livestock grazing practices on millions of acres of public lands in the western United States. In the face of bitter opposition from livestock ranchers and their congressional supporters, the Administration issued a succession of regulatory proposals exhibiting varying degrees of commitment to genuine change. None of the Administration's proposals, however, recognize that large portions of the western public lands are poorly suited to livestock grazing because of scant rainfall, low productivity, rugged terrain, and adverse impacts to other, more valuable resources. Perpetuation of grazing on such lands will result in false expectations, wasteful expenditures of public funds, and continued environmental destruction.*

## I. COWS IN THE DESERT

Livestock grazing is the most extensive commercial use of public lands in the United States. The two largest categories of public lands are the national forests, managed by the United States Forest Service, and the public lands managed by the Bureau of Land Management (BLM). Grazing is authorized on approximately 159 million acres, or about 90 percent, of the 177 million acres of BLM lands in the western United States.<sup>1</sup> The 18 million acres of BLM lands that are not used for livestock grazing consist mostly of lands that cannot be grazed because of lack of forage, lack of water, or physical inaccessibility. The amount of BLM lands that have been placed off-limits to cattle and sheep by deliberate decision, as op-

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<sup>1</sup> BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, RANGELAND REFORM '94 DRAFT ENVIRONMENTAL IMPACT STATEMENT at 3-5 (1994) [hereinafter RANGELAND REFORM DRAFT EIS].

posed to physical or economic infeasibility, is very small.<sup>2</sup> Virtually all BLM lands that *can* be grazed, are grazed.

Livestock grazing is also authorized on most of the land included within the nation's national forests. Grazing allotments include about 85 million acres, or 60 percent, of the 144 million acres of national forests in the lower 48 states.<sup>3</sup>

Despite the enormous amount of public lands devoted to livestock grazing, the public lands contribute little to the nation's meat supply. Although most public lands grazing is by beef cattle, the public lands produce only about two percent of the feed consumed by beef cattle in the United States.<sup>4</sup> The other ninety-eight percent comes from feed crops grown on private lands and from private and state-owned pastures and rangelands. For sheep production, the public land percentage is higher (eleven percent), but still small.<sup>5</sup>

Why does so much land produce so little? The answer is simple. Because of their general aridity, the public lands, which are concentrated in the far western United States, are remarkably unproductive of livestock forage. In the humid eastern United States, one acre of land may produce enough feed to support a cow through the year. On BLM lands in the western United States, it takes an average of over one hundred acres of rangeland to feed a cow.<sup>6</sup> On the driest BLM lands, it takes several hundred. The rugged terrain of much of the western public lands, which makes livestock management difficult and expensive, further detracts from their productivity.

Measured in human terms, western public lands are also a small part of the nation's livestock ranching picture. Although the public lands are often portrayed as an essential component of the ranching lifestyle and culture, ninety-seven percent of the nation's ranchers do not use public lands.<sup>7</sup> Even in the far western states where public lands are concentrated, seventy-eight percent of ranchers do not use public lands.<sup>8</sup>

Although they are unproductive of livestock forage, the arid and semi-arid western public lands are rich in other resources. BLM lands alone provide habitat for over three thousand species of wildlife,<sup>9</sup> including over

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<sup>2</sup> Joseph M. Feller, *What is Wrong With the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 570-73 (1994).

<sup>3</sup> RANGELAND REFORM DRAFT EIS, *supra* note 1, at 3-5.

<sup>4</sup> *Id.* at 3-68.

<sup>5</sup> *Id.*

<sup>6</sup> The authorized level of forage use on 159 million acres of BLM lands is approximately 15 million animal unit months (AUMs), or one AUM for every 10 acres. *Id.* at 3-10. One AUM is the amount of forage needed to feed a cow for one month. *Id.* at GL-2. Twelve AUMs are required to feed a cow through the year. At 10 acres per AUM, it takes 120 acres to sustain a cow.

<sup>7</sup> *Id.* at 3-66.

<sup>8</sup> *Id.*

<sup>9</sup> BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 1991, at 37 (1992) [hereinafter PUBLIC LAND STATISTICS]. For a discussion of the types of wildlife found on public land, see RANGELAND REFORM DRAFT EIS, *supra* note 1, at 3-38 to 3-48.

one hundred species that are threatened or endangered.<sup>10</sup> Despite their general aridity, BLM lands contain over 30,000 miles of fishable streams.<sup>11</sup> More than 150,000 archeological sites have been recorded on BLM land, even though the majority of BLM acreage has not yet been inventoried.<sup>12</sup>

Last, but not least, the mountains, deserts, and canyons of the western public lands provide outdoor recreational opportunities for tens of millions of Americans who live in, or visit, the far western states. BLM lands alone support over seventy million visitor-days of recreational use annually.<sup>13</sup> By conventional economic measures, the value of the recreational resources on western public lands far exceeds the value of the livestock forage there.<sup>14</sup>

Because of the high importance of non-commodity resources on the western public lands, the adverse impacts of livestock grazing on those resources should be a matter of great public concern. These impacts are numerous and serious. Livestock grazing has radically altered vegetation over tens of millions of acres, destroyed riparian areas, polluted streams, created massive soil erosion, displaced wildlife, desecrated archeological sites, and spoiled prime recreational areas.<sup>15</sup>

## II. THE LEGAL STANDARD

Given the poor economics of grazing on much of the public lands, and given grazing's serious impacts on other, more valuable resources on the same lands, it is natural to question whether grazing should be continued on all of the public lands where it is currently permitted. A rational approach would be to continue grazing only where its economic benefits exceed its costs by a margin sufficient to justify its environmental impacts. On lands that cannot be profitably grazed without unacceptable degradation of ecosystems, on which the costs of mitigation measures exceed the value of the livestock forage, on which the government's costs of grazing administration exceed the rancher's profits, or on which grazing conflicts with other, more valuable land uses, grazing should be terminated.

Existing law not only allows, but requires, such an approach. Both BLM and the Forest Service have legal authority, and a legal duty, to discontinue grazing on particular areas of land if they determine that grazing on those areas is doing more harm than good. What is lacking is the political will to exercise that authority.

While public lands statutes clearly contemplate that livestock grazing will continue to be a permitted use of substantial areas of BLM and na-

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<sup>10</sup> PUBLIC LAND STATISTICS, *supra* note 9, at 44.

<sup>11</sup> *Id.* at 38.

<sup>12</sup> *Id.* at 49.

<sup>13</sup> *Id.* at 52.

<sup>14</sup> Feller, *supra* note 2, at 559 n.15.

<sup>15</sup> See, e.g., Thomas L. Fleischner, *The Ecological Costs of Livestock Grazing in Western North America*, 8 CONSERVATION BIOLOGY 629 (1994); Feller, *supra* note 2, at 561-63; LYNN JACOBS, WASTE OF THE WEST: PUBLIC LANDS RANCHING 33-151 (1991).

tional forest lands,<sup>16</sup> there is no legal requirement that it continue to be permitted on *all* land managed by these agencies. Both BLM and the Forest Service are required to manage their domains in accordance with the principle of "multiple use."<sup>17</sup> For BLM this principle is defined in the Federal Land Policy and Management Act of 1976 (FLPMA),<sup>18</sup> for the Forest Service it is defined in the Multiple Use-Sustained Yield Act of 1960.<sup>19</sup> The two definitions are virtually identical. BLM's definition is as follows:

The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination *that will best meet the present and future needs of the American people*; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; *the use of some land for less than all of the resources*; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment *with consideration being given to the relative values of the resources* and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.<sup>20</sup>

Clearly the principle of multiple use does not mandate that all possible uses take place on all areas of the public lands. Instead, it specifically contemplates "the use of some land for less than all of the resources."<sup>21</sup> In other words, not all forested lands should be used for timber production, not all oil-bearing lands should be used for petroleum extraction, and not all forage-producing lands should be used for livestock grazing. A particular use should be allowed on a particular area of land only if it makes a net positive contribution to "meet[ing] the present and future needs of the American people,"<sup>22</sup> that is, if it does more economic and environmental good than harm.

A key consideration in determining whether a particular use in a particular area is in the public interest is "the relative values of the re-

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<sup>16</sup> See, e.g., Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315o-1 (1988); National Forest Grazing Act of 1950, 16 U.S.C. §§ 580c-580l (1988); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1988 & Supp. V 1993); Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (1988).

<sup>17</sup> For a discussion of the meaning of "multiple use," see George C. Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. COLO. L. REV. 229, 279 (1981) (concluding that while hard for the courts to interpret, the multiple use laws give directives which public land managers must follow, including formulating consistent and predictable land use plans).

<sup>18</sup> 43 U.S.C. § 1702(c) (1988).

<sup>19</sup> 16 U.S.C. § 531(a) (1988).

<sup>20</sup> 43 U.S.C. § 1702(c) (1988) (emphasis added).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

sources"<sup>23</sup> in that area. A desert area that produces little livestock forage but is rich in wildlife habitat, natural scenery, recreational opportunities, or archeological sites is a poor candidate for livestock grazing if the grazing detrimentally affects the more valuable resources.<sup>24</sup>

Forest Service planning regulations recognize the necessity of discriminating between lands on which grazing is appropriate and lands on which it is not by requiring the Forest Service to identify which national forest lands are "suitable" for grazing.<sup>25</sup> Suitability is defined as "[t]he appropriateness of applying certain resource management practices to a particular area of land, as determined by an analysis of the economic and environmental consequences and the alternative uses foregone."<sup>26</sup>

Although BLM has no corresponding regulation regarding the suitability of lands for grazing, a similar mandate is found in a recent administrative interpretation of FLPMA's principle of "multiple use."<sup>27</sup> An administrative law judge in the Department of Interior, reviewing a BLM decision to allow cattle grazing in five scenic and ecologically sensitive canyons in southeastern Utah, found that BLM had violated FLPMA by authorizing grazing in the canyons without making a "reasoned and informed decision that the benefits of grazing the canyons outweigh[ed] the costs."<sup>28</sup> The "costs" the judge required BLM to consider included damage to vegetation, riparian areas, archeological sites, and scenic and recreational values.<sup>29</sup>

### III. THE REALITY

Both BLM and the Forest Service are required by statute to engage in systematic and comprehensive land use planning.<sup>30</sup> The land use planning processes of both agencies provide procedural mechanisms for applying the principle of "multiple use" to determine which public lands are appropriate for livestock grazing and which are not.<sup>31</sup> Unfortunately, neither agency has used its planning process for this purpose. As a rule, BLM and the Forest Service land use plans and their accompanying environmental impact statements (EISs) do not contain the economic and environmental information necessary to determine the harms and benefits of grazing in

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<sup>23</sup> *Id.*

<sup>24</sup> For an example of livestock grazing on public land that does serious damage to other, more valuable resources, see Feller, *supra* note 2, at 586-91 (discussing the impacts of cattle grazing on the Comb Wash allotment in southeastern Utah).

<sup>25</sup> Forest Service National Forest System Land and Resource Management Planning, 36 C.F.R. § 219.20 (1994).

<sup>26</sup> *Id.* § 219.3.

<sup>27</sup> National Wildlife Fed'n v. BLM, No. UT-06-91-01 (U.S. Dep't of the Interior, Office of Hearings & Appeals, Hearings Div., Dec. 20, 1993), *petition for stay denied*, 128 IBLA 231 (Mar. 1, 1994), *petitioner's motion to dismiss intervenors' appeal for lack of standing granted in part, denied in part*, 129 IBLA 124 (Apr. 13, 1994).

<sup>28</sup> *Id.* at 23.

<sup>29</sup> *Id.* at 23-24.

<sup>30</sup> Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1712 (1988 & Supp. V 1993); National Forest Management Act of 1976, 16 U.S.C. § 1604 (1988 & Supp. V 1993).

<sup>31</sup> 36 C.F.R. § 219.20(a) (1994).

particular areas.<sup>32</sup> And neither agency has shown any interest in terminating economically inefficient or environmentally destructive grazing in large areas.<sup>33</sup>

Concerned citizens and environmental organizations who urge BLM and the Forest Service to assess the appropriateness of grazing on particular parcels of public lands find themselves engaged in a bureaucratic shell game in which the agencies avoid the issue by sliding it back and forth between their land use planning processes and their decisionmaking processes for individual grazing allotments. When citizens request that a land use plan include a review of the appropriateness of grazing on particular sites or allotments within a planning area, they are typically informed that the land use planning process is not designed to address such site-specific issues, and that they should raise the issue later when allotment management plans (AMPs) are developed for the allotments in question. However, when the issue is raised during the development of an AMP or the issuance of a permit for an allotment, the agency responds that it is a land use planning issue that should have been raised during the development of the applicable land use plan. In fact, the issue is never addressed, and grazing continues without ever being seriously questioned.<sup>34</sup>

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<sup>32</sup> Feller, *supra* note 2, at 572; BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, IN COOPERATION WITH FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, RANGELAND REFORM '94 FINAL ENVIRONMENTAL IMPACT STATEMENT 66 (1995) [hereinafter RANGELAND REFORM FINAL EIS] ("The forest planning process is programmatic and does not typically analyze site-specific effects of grazing on a specific area of land."); see also GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 13.04[4][b] (1990) (describing a typical BLM land use plan as "a nugatory, meaningless exercise" and "a confused melange of do-nothing motherhood statements which offered neither managers nor users much useful guidance on future management").

<sup>33</sup> Feller, *supra* note 2, at 572; Doug Heiken, Determining Grazing Suitability Based on Desired Ecosystem Outcomes for the Interior Columbia River Basin 5-8 (Jan. 26, 1995) (unpublished manuscript, on file with author) (examining the Forest Service's failure to adequately examine whether grazing would be suitable for the lands involved in seven forest plans). Forest Service plans classify rangelands as "suitable" or "unsuitable" for livestock grazing. According to Forest Service regulations, the classification should involve the weighing of economic and environmental consequences. 36 C.F.R. § 219.3 (1994). Instead, contrary to its regulations, the Forest Service classifies as "suitable" all "[l]and that is accessible or that can become accessible to livestock, that produces forage or has inherent forage-producing capabilities, and that can be grazed on a sustained-yield basis under reasonable management goals." U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FOREST SERVICE MANUAL § 2210.5 (1991) (definition of "Suitable Range-Livestock").

<sup>34</sup> The schizophrenic position of the Forest Service with respect to how and when it determines the suitability of lands for grazing is painfully apparent in its response to comments on a recent EIS. In one sentence, the Forest Service states: "Forest Plans determine the suitability of land for grazing and establish minimum standards that must be met." RANGELAND REFORM FINAL EIS, *supra* note 32, at 66. The next sentence, however, states: "The forest planning process is programmatic and does not typically analyze site-specific effects of grazing on a specific area of land." *Id.* Since the Forest Service's regulations require that a determination of suitability be based on "an analysis of the economic and environmental consequences" of grazing on "a particular area of land," see *supra* note 26 and accompanying text, these two statements cannot be reconciled with each other or with the regulations.

The systematic refusal to consider terminating grazing in areas in which it makes no economic or environmental sense frequently leads to absurd results. In order to manage livestock and mitigate the impacts of grazing on other resources, BLM and the Forest Service commonly propose to construct "range improvements"—usually fences and water developments—whose costs far exceed the economic benefits of the grazing they are associated with.<sup>35</sup> The expenditures are often rationalized by cost-benefit analyses that compare the costs and benefits of grazing with and without the improvements but ignore the option of simply not grazing the area at all.

#### IV. THE EBB AND FLOW OF RANGELAND REFORM

With the election of the Clinton Administration in 1992 and the appointment of Bruce Babbitt as Secretary of the Interior in 1993, citizens and environmental organizations concerned over livestock grazing on public lands held high hopes for significant change. Since its first days, the Administration has devoted enormous amounts of time, money, and resources to the comprehensive reform of federal public range management. The direction of the reform effort, however, has wavered considerably over the last two years, and its ultimate outcome is still uncertain. The reform effort to date has unfolded in three major phases.

##### A. Phase One: *The 1993 Advance Notice of Proposed Rulemaking*

The major product of the first phase of the Clinton Administration's range reform effort was an Advance Notice of Proposed Rulemaking (1993 ANPR).<sup>36</sup> The 1993 ANPR caused an uproar in the public lands livestock industry and among the industry's supporters in Congress. The features most offensive to the industry were a proposed increase in the federal grazing fee from about two dollars per cow per month to about four,<sup>37</sup> term-length reductions of grazing permits for ranchers who violate permit conditions or fail to meet resource condition objectives,<sup>38</sup> disqualification of ranchers who violate regulations or permit conditions,<sup>39</sup> assertion of federal title to newly developed sources of livestock water on BLM

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<sup>35</sup> Feller, *supra* note 2, at 584-86.

<sup>36</sup> Forest Service Grazing and Livestock Use and Grazing Fees Proposed Rules, 58 Fed. Reg. 43,202 (Aug. 13, 1993); BLM Grazing Administration Proposed Rules, 58 Fed. Reg. 43,208 (Aug. 13, 1993).

<sup>37</sup> 58 Fed. Reg. at 43,205 (Forest Service); 58 Fed. Reg. at 43,210 (BLM). Both the existing fee and the proposed fee are not fixed, but consist of a "base" value multiplied by a fluctuating market-based index. The existing fee is based on a "base" value of \$1.23 per cow per month. 36 C.F.R. § 272.51 (1994). The Administration's proposal would reset the base value to \$3.96 and revise and reinitialize the market-based index. 58 Fed. Reg. at 43,205 (Forest Service); 58 Fed. Reg. at 43,210 (BLM).

<sup>38</sup> 58 Fed. Reg. at 43,211 (BLM).

<sup>39</sup> *Id.* at 43,210 (BLM).



lands,<sup>40</sup> and a set of national standards and guidelines for rangeland management and ecological conditions.<sup>41</sup>

Although the 1993 ANPR incurred the wrath of many ranchers, it actually was quite deficient in addressing several critical environmental issues. First and foremost, it contained no provision for classifying any BLM or Forest Service lands as unsuitable or inappropriate for livestock grazing. In this respect, it would have perpetuated the de facto policy of the Reagan and Bush Administrations of grazing virtually all public lands, no matter how great the environmental costs or how meager the economic benefits. Worse, the proposed regulations in the 1993 ANPR would have substantially reduced the opportunities for citizens other than ranchers to have input into rangeland decisionmaking, and would have placed new limitations on the ability of BLM to reduce livestock numbers in order to prevent damage to environmental resources.<sup>42</sup> In these latter respects, the regulations in the 1993 ANPR would actually have been a step backwards from the existing regulations left by the Reagan and Bush Administrations.

Despite these critical shortcomings, the media depicted and the public perceived the 1993 ANPR as a bold environmental initiative.<sup>43</sup> Ranchers and numerous western senators and representatives took it as a declaration of war, condemning it in public meetings across the West. It triggered a bill in the House of Representatives to block its implementation. A counterproposal in the Senate would have placed several of the 1993 ANPR's provisions into statutory form. Since neither bill could pass both houses of Congress, the ball remained in the Clinton Administration's court.

### *B. Phase Two: The 1994 Notice of Proposed Rulemaking*

The Clinton Administration's next move was to issue a Notice of Proposed Rulemaking in March 1994 (1994 NPR), with a substantially revised set of proposed regulations<sup>44</sup> and accompanied by a Draft EIS.<sup>45</sup> The Administration's spin on its latest proposal was that it reflected a more cooperative stance toward ranchers than the 1993 ANPR, and the press portrayed it as a retreat by the Administration in the face of bitter opposition from ranchers and their allies.<sup>46</sup>

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<sup>40</sup> *Id.* at 43,211-12. This provision of the proposal has received more attention than it deserves, as it would affect only new water rights and not existing water rights. Moreover, the provision would merely return BLM policy regarding water rights on public rangelands to what it was prior to the Reagan Administration and make BLM's policy the same as the Forest Service's.

<sup>41</sup> *Id.* at 43,212 (BLM).

<sup>42</sup> See Joseph M. Feller, Comments on Advance Notice of Proposed Rulemaking, 3-7 (Sept. 12, 1993) (on file with author).

<sup>43</sup> See, e.g., Tom Kenworthy, *U.S. to Tighten Grazing Rules, Increase Fees on Public Lands*, WASH. POST, Aug. 10, 1993, at A1.

<sup>44</sup> BLM Grazing Administrative Proposed Rules, 59 Fed. Reg. 14,314 (Mar. 25, 1994).

<sup>45</sup> RANGELAND REFORM DRAFT EIS, *supra* note 1.

<sup>46</sup> See, e.g., Tom Kenworthy, *Revised Grazing Proposal Makes Concessions to Livestock Interests*, WASH. POST, Mar. 4, 1994, at A3.

The grazing fee proposed in the 1994 NPR was similar to the fee proposed in the 1993 ANPR. The changes from the 1993 ANPR that received the most public attention related to ecological standards and advisory committees. The 1994 NPR dropped the idea of national ecological standards and guidelines for public rangelands. Instead, it proposed to instruct BLM offices in each western state to develop their own standards and guidelines.<sup>47</sup> Under the new proposal, the state-level standards and guidelines would be required to meet national "requirements," but these "requirements" were much less specific than the national standards and guidelines proposed in the 1993 ANPR. The 1994 NPR also contained a set of "fall-back" standards and guidelines that would take effect in any state that failed to develop its own standards and guidelines within eighteen months.

The 1994 NPR's proposals for advisory committees grew out of Secretary Babbitt's fascination with a "working group" of environmentalists and ranchers in Colorado that had proposed a "grass roots model" of rangeland management.<sup>48</sup> Based on the group's recommendations, the 1994 NPR proposed a system of "Resource Advisory Councils," "Rangeland Resource Teams," and "Technical Review Teams" to advise BLM and to attempt to achieve consensus on rangeland issues between ranchers, environmentalists, and other interest groups.<sup>49</sup>

Despite the public perception that the 1994 NPR represented a retreat from environmentally assertive proposals contained in the 1993 ANPR, and despite the NPR's excessive and unrealistic reliance on the magical powers of advisory committees, the details of the proposed regulations in the 1994 NPR were environmentally superior to those in the 1993 ANPR in some important respects. In place of the 1993 ANPR's restrictions on participation by non-ranchers in range management decisions, the 1994 NPR contained broad, inclusive provisions for public participation.<sup>50</sup> The 1994 NPR's provisions concerning BLM's authority to reduce livestock numbers were more liberal than those of the 1993 ANPR (though not more liberal than the existing regulations).<sup>51</sup> Perhaps most important, the 1994 NPR contained an action-forcing provision that would require corrective action within one year on grazing allotments in which standards and guidelines are not being met.<sup>52</sup>

Thus, the undercurrent of the details in the Administration's grazing reform proposals ran counter to the prevailing public perception of a strong environmental initiative followed by a retreat. A better description

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<sup>47</sup> 59 Fed. Reg. at 14,326.

<sup>48</sup> *Id.* at 14,317.

<sup>49</sup> *Id.* at 14,317-21.

<sup>50</sup> *Id.* at 14,317; see also Joseph M. Feller, Comments on Rangeland Reform '94, Proposed Rule, 3-4 (Sept. 7, 1994) (on file with author).

<sup>51</sup> The 1993 regulations required "other studies" on ecological damage before livestock numbers were reduced. Feller, *supra* note 50, at 2-3. The 1994 regulations liberalized the evidentiary standard to "monitoring, field observations, ecological site inventory or other [acceptable] data." 59 Fed. Reg. at 14,346.

<sup>52</sup> 59 Fed. Reg. at 14,327.

of the trend would be a poor beginning followed by modest, but significant, improvements.

### C. Phase Three: The 1995 Final Regulations

The third phase in the Administration's rangeland reform saga came in December of 1994 and February of 1995. In December, the Administration issued a Final EIS.<sup>53</sup> In February, final regulations appeared in the Federal Register.<sup>54</sup> The final regulations are generally similar to those proposed in the 1994 NPR with one glaring exception: The Administration completely abandoned the idea of increasing the grazing fee. While current market rates exceed eight dollars per cow per month, federal forage will continue to be virtually given away at less than two dollars per cow per month.

### D. Phase Four?

The last act may be performed by Congress. Although the regulations published in February 1995 are the Administration's final product, they will not be implemented immediately. Instead, in a concluding demonstration of ambivalence, the Administration gave the new regulations an effective date six months after their publication,<sup>55</sup> with the stated purpose of giving the new, Republican-dominated Congress an opportunity to pass legislation to override or modify them before they go into effect.

## V. THE FATAL FLAW

While the three phases of the Administration's rangeland reform program have demonstrated varying degrees of strength and weakness, the program at all times has suffered from a fatal flaw: the failure to admit that substantial portions of the public lands are poorly suited to livestock production and therefore should be retired from grazing in favor of other resources and uses. As long as the Clinton Administration refuses to come to grips with this reality, the public rangelands will continue to be the subject of false expectations, intense conflict, environmental degradation, and wasted tax dollars.

Neither the 1993 ANPR, nor the 1994 NPR, nor the 1995 final regulations contain any provision for reviewing the public lands to identify those areas that are ecologically unsuitable for livestock grazing or those areas where the costs and environmental impacts of grazing are disproportionate to its economic benefits. The Final EIS concedes that "[s]uitability criteria per se would not be developed."<sup>56</sup> In responding to comments calling for a suitability review, however, the Administration argues that the application of ecological standards and guidelines will lead to a de facto assessment of the suitability of lands for grazing:

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<sup>53</sup> RANGELAND REFORM FINAL EIS, *supra* note 32.

<sup>54</sup> BLM Grazing Administration Rules and Regulations, 60 Fed. Reg. 9894 (Feb. 22, 1995).

<sup>55</sup> *Id.*

<sup>56</sup> RANGELAND REFORM FINAL EIS, *supra* note 32, at 65.

The BLM national requirements, guiding principles for developing state or regional standards and guidelines, and the fallback standards and guidelines all focus on attaining and maintaining healthy rangeland ecosystems. . . . If livestock grazing conflicts with attaining or maintaining properly functioning ecosystems due to the sensitive, fragile nature of the site or other resources, the area is not suitable for grazing. Sensitive areas not suited for grazing are expected to be identified by applying regional or state standards and guidelines or forest plan standards and guidelines through site-specific analyses.<sup>57</sup>

It is unlikely, however, that application of the standards and guidelines to be developed under the final regulations will lead to meaningful and effective consideration of the suitability of lands for grazing. Given the general and qualitative nature of the standards and guidelines and the enormous uncertainty inherent in ecological science, it will rarely be possible to conclude with certainty that a particular area *cannot* be grazed at some level, and at some cost, while maintaining minimum ecological standards. Much more commonly, the effort and expense required to maintain those standards, while extracting a small amount of forage from an unproductive area, cannot be justified by the small economic benefit derived from that forage. However, the regulations make no provision for such economic considerations. They misdirect attention to the question of whether an area *can* be grazed in an ecologically sound manner, rather than asking the more important question of whether grazing in that area makes economic or environmental sense. The regulations are likely to lead to more proposals for extravagant expenditures on rangeland water developments and other measures to mitigate the impacts of grazing in marginal areas.<sup>58</sup>

Moreover, the new standards and guidelines focus exclusively on maintaining "healthy rangeland ecosystems."<sup>59</sup> While important, this focus fails to account for the full spectrum of adverse impacts of grazing on lands that are often more valuable for other purposes. Grazing that is sound in a purely ecological sense may nonetheless be unwise, because it conflicts with recreational uses that are more important to local economies, destroys priceless archeological sites, or otherwise interferes with competing resources and uses.<sup>60</sup> What is needed is a weighing and balancing of the advantages and disadvantages of grazing in each area to determine whether it is in the public interest. Unfortunately, the new regulations provide for no such analysis.

The only feature in the new regulations that explicitly provides for cessation of grazing on any portion of the public lands is the provision for "conservation use."<sup>61</sup> "Conservation use" is a new euphemism for the practice formerly known as "voluntary non-use," in which a rancher chooses to forego some or all of the grazing allowed by his or her permit. Total or partial non-use of federal grazing permits has long been a com-

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<sup>57</sup> *Id.* at 67-68.

<sup>58</sup> See *supra* note 32 and accompanying text.

<sup>59</sup> 49 Fed. Reg. at 14,325.

<sup>60</sup> See Feller, *supra* note 2, at 561-63.

<sup>61</sup> 60 Fed. Reg. at 9898.

mon practice.<sup>62</sup> The new provision for "conservation use" allows non-use to be authorized for up to ten years at a time, in contrast to the previous practice of requiring non-use to be authorized annually.<sup>63</sup>

The new provision for authorization of non-use in ten-year increments will facilitate arrangements, some of which already exist, between BLM and private organizations, such as the Nature Conservancy, that obtain federal grazing permits with the intention of reducing or eliminating livestock grazing. Such an organization can obtain a grazing permit by purchasing the private "base property" associated with a public land grazing allotment.<sup>64</sup>

While "buy-outs" by the Nature Conservancy or other well-funded organizations perform an extremely valuable function and protect some particularly sensitive and biologically important areas from the ravages of livestock grazing, such private arrangements are not an adequate substitute for public decisionmaking concerning the management of public lands. Many ranchers are not interested in selling their grazing rights, and private funding is unlikely to retire more than a small fraction of the millions of acres of public lands that are currently being grazed where grazing makes no economic or environmental sense.

Moreover, reliance on private "buy-outs" perpetuates the presumption and the perception that the public lands are a private domain, control of which can and should be bought and sold by the holders of grazing permits. Private control of public land management led to the current deplorable state of the public rangelands in the first place.<sup>65</sup> True rangeland reform requires reassertion of public control over lands the public owns.

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<sup>62</sup> See Feller, *supra* note 2, at 574-75.

<sup>63</sup> Ranchers who simply fail to use some or all of their permitted grazing, without having the non-use authorized by BLM, risk cancellation of their grazing privileges. See BLM Grazing Administration, 43 C.F.R. §§ 4140.1(a)(2), 4170.1-2 (1993).

<sup>64</sup> See *id.* §§ 4110.2-1, 4110.2-3 (1993).

<sup>65</sup> See generally PHILIP FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* (1960) (a history of control and regulation of grazing on public lands).