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Rancher Stewardship on Public Ranges: A Recent Court Decision

by

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ABSTRACT

Congress enacted the Experimental Stewardship Program (ESP) in the Public Rangeland Improvement Act (PRIA) to determine whether qualified permittees could be induced to improve public range conditions. The Bureau of Land Management (BLM) implemented the ESP by developing the Cooperative Management Agreement (CMA) program, which made qualified permittees stewards over their grazing allotments. Congress in the PRIA also re-enacted the BLM's duty under the Federal Land Policy and Management Act (FLPMA) to "prescribe" livestock numbers and seasons of use in grazing permits. A Federal District Court struck down the CMA program based on unjustifiably narrow constructions of the ESP and the BLM's duty under FLPMA. The BLM is currently preparing an appeal of the decision. Hence, the objective of this paper is to offer timely support for the CMA program by presenting an alternative view of the economic and legal issues which convinced the Court to strike the program down.

INTRODUCTION

The Public Rangeland Improvement Act[1] (PRIA) of 1978 established the Experimental Stewardship Program[2] (ESP). The ESP authorized the Secretary of the Interior (Secretary) to ". . . explore innovative grazing management policies and systems which might provide incentives to improve range conditions,"[3] and to provide ". . . such other incentives as he may deem appropriate."[4]

The Secretary implemented the ESP by establishing the Cooperative Management Agreement (CMA) program.[5] CMA's are cooperative agreements between public land managers and permittees demonstrating exemplary rangeland management practices.[6] The cooperative agreements

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1. 43 U.S.C. § 1901 (1982).
2. 43 U.S.C. § 1908 (1982).
3. 43 U.S.C. § 1908(a) (1982).
4. 43 U.S.C. § 1908(a)(3) (1982).
5. 43 C.F.R. § 4100 (1984).
6. 43 C.F.R. § 4100.0-5 (1984).

establish mutually determined "performance standards".[7] Cooperative permittees are viewed as the stewards of their grazing allotments, rewarded with increased tenure security, and left relatively free to determine the livestock numbers and seasons of use which achieve the standards in a profit-maximizing way.[8]

A Federal District Court (Court) recently struck down the regulations establishing the CMA program.[9] The Court held that the CMA program was not compatible with either the enabling legislation (namely, the ESP program in PRIA) or past federal grazing law which PRIA re-enacted (that is, the Taylor Grazing Act[10] and the Federal Land Policy and Management Act,[11] FLPMA[12]). The Secretary is currently preparing an appeal of the decision.[13]

The first section of this article presents a short summary of the public grazing laws and regulations which underpin the arguments in later sections. The second section describes the Federal District Court's reasons for striking down the CMA program. The third section argues that the Court's construction of public grazing legislation was unjustifiably narrow since it frustrated Congressional intent in creating the ESP program. This section formulates a wider construction of public grazing legislation and specifies conditions where the CMA program is consistent with the wider construction.

FEDERAL GRAZING LAW AND REGULATIONS

Taylor Grazing Act of 1934

In deference to the poor forage condition of public rangeland, the Taylor Grazing Act authorized the Secretary to withdraw unappropriated public lands and to divide them into grazing districts.[14] The Secretary was also authorized to issue ten-year grazing permits ". . . upon payment of a reasonable fee."[15] Permittees were given no ". . . right, title, interest, or estate in the lands"[16] but were limited to a ". . . preference right . . . to renewal in the discretion of the Secretary."[17] The Secretary was directed

7. *Id.*
8. Bureau of Land Management Manual Handbook H-4120-1, Document No. 182 (1984) [hereinafter Handbook].
9. Natural Resources Defense Council, Inc. v. Hodel, No. Civ. S-84-616 RAR (E.D. Cal. Sep. 3, 1985) [hereinafter *Court*].
10. 43 U.S.C. § 315 (1982).
11. 43 U.S.C. § 1701 (1982).
12. *Court*, *supra* note 9, at 4.
13. Telephone conversation with Allan Brock, Attorney for the Department of the Interior (Dec. 5, 1986).
14. *See supra* note 10.
15. 43 U.S.C. § 315b (1982).
16. *Id.*
17. *Id.*

to ". . . specify from time to time numbers of stock and seasons of use . . ." in grazing permits.[18]

The Federal Land Policy and Management Act of 1976 (FLPMA)

FLPMA emphasized the continued deterioration of federal rangeland under the Taylor Grazing Act[19] and instituted comprehensive long-run federal management of rangeland for sustained yield and multiple use.[20] FLPMA authorized the Secretary to ". . . cancel, suspend or modify . . ." permits as punishment for rule violations;[21] to offer short-term licenses rather than ten-year permits when they are in the ". . . interest of sound land management";[22] and to limit the guarantee of renewal to an offer of "first priority" so long as expiring permit holders are willing to accept any new conditions of the Secretary.[23]

FLPMA required the Secretary to conform grazing permits to one of two prescribed methods of issuance: (1) permits incorporating "Allotment Management Plans" (AMP permits);[24] and (2) "permits without Allotment Management Plans" (non-AMP permits).[25] Allotment Management Plans are tailored to the specific range condition of a given allotment (allotments are the pasture areas assigned to permittees). Prescription of the stocking practices necessary to meet the multiple use and sustained yield goals of FLPMA must be done ". . . in careful and considered consultation, cooperation and coordination with the lessees, permittees, and landowners involved . . ."[26] The Secretary may revise or terminate the AMP after consultation with the parties involved. In a permit not incorporating an AMP, the Secretary alone must ". . . specify the numbers of animals to be grazed and the seasons of use."[27]

Public Rangeland Improvement Act of 1978 (PRIA)

PRIA reenacted the Taylor Grazing Act and FLPMA.[28] It reemphasized the deterioration of public rangeland[29] and supplemented FLPMA's comprehensive land management program by authorizing additional funds for federal rangeland management programs.[30] PRIA directed the Secretary

18. *Id.*
19. 43 U.S.C. § 1751(b)(1) (1982).
20. 43 U.S.C. § 1732(a) (1982).
21. 43 U.S.C. § 1752(a) (1982).
22. 43 U.S.C. § 1752(b) (1982).
23. 43 U.S.C. § 1752(c) (1982).
24. 43 U.S.C. § 1752(d) (1982).
25. 43 U.S.C. § 1752(e) (1982).
26. *See supra* note 24.
27. *See supra* note 25.
28. 43 U.S.C. § 1903(b) (1982).
29. 43 U.S.C. §§ 1901(a)(1)-(3) (1982).
30. 43 U.S.C. § 1901(a)(4) (1982).

to institute the Experimental Stewardship Program which ". . . provides incentives to, or rewards for, the holders of grazing permits and leases whose stewardship results in an improvement of the range condition of lands under permit or lease."[31] PRIA further states that the ESP:

> . . . shall explore innovative grazing management practices and systems which might provide incentives to improve range condition. These may include, but need not be limited to—(1) cooperative range management projects designed to foster a greater degree of cooperation and coordination between Federal and State agencies charged with the management of the rangelands and with local private range users . . . (2) such other incentives as he may deem appropriate.[32]

The Secretary was directed to report to the Congress "the results of such experimental program" by December of 1985.[33]

The Cooperative Management Agreement (CMA) Program

Bureau of Land Mangement regulations define a CMA as ". . . a mutually agreed to plan of action embodied in an agreement between the BLM and a qualified applicant or operator that identifies the responsibility of the cooperative partner and performance standards applicable to the grazing operation."[34] A qualified applicant is defined as ". . . any permittee or lessee who has demonstrated exemplary rangeland management practices."[35] A CMA is issued for a ten-year term and constitutes a five-year "rolling" plan. CMA's are jointly reviewed after five years have been implemented of the ten-year term. If objectives are being met, another ten year plan is implemented. If objectives are not being met, the cooperative permittee ". . . is allowed a reasonable time to make the necessary adjustments to comply with the objectives before the agreement terminates."[36] The procedure is repeated every five years.

BLM regulations also clearly explain that a CMA supplements, not repeals, provisions of existing land use plans and grazing authorizations: "A cooperative management agreement shall be consistent with and incorporate by reference, all applicable provisions of any existing land use plan as well as the terms of authorizations[s] issued to the cooperative party to graze livestock on the allotment[s]."[37]

The BLM Handbook indicates that the CMA program should be ad-

31. *See supra* note 3.
32. *Id.*
33. 43 U.S.C. § 1908(b) (1982).
34. *See supra* note 6.
35. 43 C.F.R. § 4120.1(a) (1984).
36. Handbook, *supra* note 8, at 2.
37. 43 C.F.R. § 4120.1(a)(2) (1984).

ministered to promote secure rancher tenure and permittee self-management (the CMA program ". . . recognizes the co-operator as the steward of the allotment.").[38]

FEDERAL DISTRICT COURT OPINION

Plaintiffs (five environmental and wildlife organizations and an individual) challenged BLM regulations establishing the CMA program. The Court concluded with plaintiffs that the CMA program: (1) created a permanent permit issuance system which did not meet the description of projects the ESP program was intended by Congress to encourage;[39] and (2) was also unjustified by past public grazing law.[40]

In support of conclusion 1, the Court argued that the CMA program established a permanent (as opposed to an experimental) system since the cooperative agreements ". . . fail to retain necessary governmental authority to enforce overgrazing prohibitions by cancelling, suspending, or modifying permits on abused public allotment."[41] The Court further argued that the BLM had already conducted and reported on three official "Experimental Stewardship Groups":

> Given the manner in which the BLM carefully identified the three regions subject to ESP experiments in the past, it would be strange indeed for it to establish a fourth experiment without so much as brief mention of section 1908 [the ESP] in any of the documents pertaining to the new program. The apparent truth is that the CMA program was never intended as a stewardship experiment.[42]

The Court finally argued that the CMA program could not be ready for Congressional review by December of 1985 when the Secretary was directed to report the results of the ESP.[43]

In support of conclusion 2 (that is, CMA program is unjustified by past grazing law), the Court contended that:

> The cooperative agreements unlawfully abdicate the Secretary's statutory duty to prescribe for ranchers the appropriate number of livestock which may be grazed on each public land allotment or the permissible grazing seasons . . . The regulation and program, consequently, violate the spirit and letter of federal laws which are intended to preserve and improve the ravaged commons through intensive management and ongoing governmental rights of re-entry.[44]

38. *See supra* note 36.
39. *Court*, *supra* note 9, at 47.
40. *Id.* at 49.
41. *Id.* at 4.
42. *Id.* at 45.
43. *Id.* at 47.
44. *Id.* at 4.

The next section argues that the Court's construction of public grazing legislation was unjustifiably narrow since it frustrated Congressional intent in fashioning the ESP. The CMA program can be consistent with both the ESP and past grazing legislation if the statutes are given a wider reading.

AN ALTERNATIVE VIEW

This section: (1) formulates wider constructions of "experimental stewardship" under PRIA[45] and the Secretary's duty to "prescribe" livestock numbers and seasons of use under FLPMA;[46] and (2) specifies conditions where the CMA program is consistent with both.

Consistency of the CMA Program with the ESP

The "plain meaning" principle of statutory construction holds that plain and unambiguous statutory language must be given effect.[47] Applying the principle to "Experimental Stewardship" sheds light on Congressional intent regarding the nature of the ESP.

Webster's Dictionary defines experimental as being "founded on or derived from experiment. . . ."[48] Experiment is defined as "a tentative tentative procedure or policy . . . an operation carried out under controlled conditions in order to discover an unknown effect or law."[49] Tentative is the characteristic of "not [being] fully worked out or developed".[50] Stewardship is the "obligation of a steward" who is "one who actively directs affairs: MANAGER".[51] Hence, the plain meaning of the Experimental Stewardship Program is *an incompletely developed policy meant to discover, under controlled conditions, whether allowing qualified permittees to actively direct decisionmaking results in improved range conditions.*

The CMA program is consistent with this construction of Congressional intent regarding the ESP. First, the CMA program views cooperative permittees as the active managers of their grazing allotments. The program assures that their stewardship is not illusory by increasing the tenure security of their grazing allotments. Public land managers would be the true stewards if they could immediately cancel, suspend, or modify the permits of permittees who made decisions not conforming to the managers' desires. Cooperative permittees would not have the necessary autonomy to make their own decisions. Hence, the experimental design of

45. *See supra* note 3.
46. *See supra* note 24.
47. S. MERMIN, LAW AND THE LEGAL SYSTEM, at 263 (2d ed. 1982).
48. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1964) [hereinafter WEBSTER'S].
49. *Id.*
50. WEBSTER'S NEW COLLEGIATE DICTIONARY (1973).
51. WEBSTER'S, *supra* note 48.

the ESP would be frustrated since it is meant to determine what permittees with decisionmaking responsibility will do—not public range managers.

Second, the CMA program is administered under controlled conditions. Agreements are entered into only with qualified permittees. The agreements are cooperatively drafted and reviewed every five years. The "rolling" nature of the CMA program is consistent with those suggested in similar contexts to controlling stocking rates on public ranges, for example by Dixit in studying the problem of controlling consumption rates in optimal savings models.[52] The Court's charge that the five-year review period makes a CMA permanent, notwithstanding the cooperative permittee's performance, is grossly exaggerated. BLM rules would not have allowed CMA renewals at the five-year review if objectives were not being met.[53]

Third, as an incompletely developed policy, the ESP left the door open to the CMA program. The Court's narrow construction of the ESP would limit its implementation to cooperative range projects similar to the three the BLM had already completed. However, the fact that the BLM conducted and reported on three official "Experimental Stewardship Groups" did not limit its authority under PRIA to conduct other experiments. PRIA explained that ". . . these [experiments] may include, but *need not be limited to*—(1) cooperative range management projects . . ."[54] (emphasis added). Furthermore, the legislative history of the ESP shows that Congress suggested only two types of experimental programs ("management projects" which had occurred in areas of mixed jurisdiction; and programs allowing grazing permittees to pay up to fifty percent of grazing fees for range improvements) and left the door open to ". . . *many other incentive programs* that the Secretar[y] may develop to improve range conditions"[55] (emphasis added). Hence, the CMA program did not have to be identical to the three completed experiments.

Finally, the plain-meaning construction of the ESP puts no necessary time limit on the CMA program. The Court's narrow construction would place a time limit on ESP projects equal to the December 1985 deadline Congress gave the Secretary to "report the results of such experimental program."[56] The reporting requirement is ambiguous at best. On one hand, an experiment does not have to be over for the results to be reported. A result is a conclusion which can be defined as "the necessary consequence of two or more related propositions taken as premises."[57] Hence,

52. DIXIT, THE THEORY OF EQUILIBRIUM GROWTH, at 109 (Oxford Univ. Press 1976).
53. *See supra* note 36.
54. *See supra* note 3.
55. *See* 78 U.S. Code Cong. & Ad. News, 4076-78, Senate Report No. 95-1237.
56. *See supra* note 33.
57. WEBSTER'S, *supra* note 48.

an experiment's results can be reported at any stage generating premises, not necessarily the final stage. Furthermore, the statute does not require the Secretary to report "final" results.

On the other hand, "conclusion" can be viewed as "the last part of something: CLOSE, TERMINATION, END . . ."[58] However, this understanding of "result" is not supported by Congressional intent as reflected in the legislative history of PRIA. There are two principal purposes of PRIA set out: "(1) *to establish a long-term program* to improve the condition of the public rangeland, and (2) *to specify until 1985* a method for determining the fee charged for grazing domestic livestock on those rangelands"[59] (emphasis added). Terminating the ESP with an ambiguous reporting deadline would be inconsistent with the long-term focus of purpose (1) and the explicit manner in which Congress stated an ending date for the grazing fee program in purpose (2). Hence, the Court's argument that the CMA program is unauthorized because it can not be ready for Congressional review by the reporting deadline is unsupported by the available evidence.

The Court's narrow construction of the ESP program is not surprising since it disposed of the need for "stewardship experiments" by presuming the outcome: permittees will overgraze if left free to do so. The Court reasoned that a private incentive to conserve public range forage can not be imputed from the overgrazing which occurred in the absence of federal regulation.[60] The Court viewed national grazing policy as maturing over the century ". . . from a policy of near *laissez faire,* in the years prior to the Great Depression, to the current national posture of watchful conservation and affirmative action to improve rangeland conditions."[61] The absence of federal grazing law resulted in a ". . . tragedy of our commonly owned lands . . ." as ranchers were left free to overgraze their livestock.[62] Hence, federal law was necessarily enacted ". . . to preserve and improve the ravaged commons through intensive management and ongoing government rights of re-entry."[63] In sum, the Court concluded that the wisest policy was for "permittees [to] 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," as opposed to the CMA policy of making permittees the stewards of their allotments over ten-year periods and offering renewal security if objectives are being met.[64]

58. *Id.*
59. *See supra* note 55, at 4069.
60. *Id.* at 11.
61. *Court, supra* note 9, at 10.
62. *Id.* at 61.
63. *Id.* at 4.
64. *Id.* at 56.

The Court based its pessimistic appraisal of private forage utilization on a false analogy between incentives generated by early-century common property public ranges and those envisioned by the CMA program. Early-century ranchers had no individual motivation to conserve public range forage because each lacked the legal right to exclude other ranchers from stocking cattle to consume it.[65] The federal government for equity reasons unwittingly promoted common-property disincentives and resultant overgrazing by frustrating early rancher attempts to fence off areas of exclusive use on the public range. The Unlawful Enclosures Act of 1885 made private enclosures of public land illegal;[66] and the Supreme Court ruled in 1890 that there was an implied license of free access to grazing lands.[67]

Low forage productivity on public ranges has persisted under federal regulation because of the continued low level of investment in range improvement practices.[68] The level of investment has been restricted by budget allocations for such work in the agencies themselves and by earmarked allocations of part of the grazing fee collected from ranchers. Ranchers have been reluctant to invest heavily from their own funds because of tenure uncertainty. In fact, from time to time the agencies have explicitly prohibited private investment because of fears that such investment would imply a property right to the benefits of such investment which would weaken the exclusive agency control over the multiple use allocations of resources.[69] As evidenced by the Federal District Court case critiqued in this section, environmental organizations have been especially sensitive about rancher domination of the BLM and thus have opposed any policy that would improve the security of rancher tenure.

In sum, a private incentive to conserve the range can not be summarily dismissed by referring to the history of range use under completely open access conditions. These conditions were produced by the *lack of tenure* security that gave incentives for overgrazing prior to the enactment of the Taylor Act and FLPMA. Likewise, an incentive to conserve can not be summarily dismissed by permittee behavior under the attenuated grazing rights associated with public grazing permits defined by the Taylor Act and FLPMA. These Acts provided no economic incentive for permittees to invest in range improvement or conservative management practices because of tenure uncertainty. On the other hand, the creation of

65. LIBECAP, LOCKING UP THE RANGE: FEDERAL LAND CONTROLS AND GRAZING, at 9 (Pacific Institute for Public Policy Research (1981)).

66. 23 Stat. 321 (1885).

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

68. *See supra* note 29.

69. Gardner, *"The Role of Economic Analysis in Public Range Management"*, in DEVELOPING STRATEGIES FOR RANGELAND MANAGEMENT, at 1456-59 (National Research Council/National Academy of Sciences (Westview Press 1984)).

exclusive rancher grazing allotments and the concomitant freedom to manage the allotment as provided under the CMA agreements would create incentives of precisely the opposite kind: careful stewardship of the allotment so as to maximize the livestock product that could be taken from the range resource in perpetuity.

Consistency of the CMA Program With Past Grazing Law

The Court opined that the Secretary's ". . . statutory duty *to prescribe* for ranchers the appropriate number of livestock . . . or the permissible grazing seasons . . . *requires specification* of numbers and seasons, not generalized standards or responsibilities (that is, CMA performance standards)"[70] (emphasis added). The Court's definition (prescribe means specify) is inconsistent with the trend in public grazing law toward permittee consultation and management discretion. The trend began with the cooperative management called for by FLPMA in AMP permits and culminated with the stewardship experiment mandated by PRIA. The Court's definition frustrates the trend simply because specification by public range managers of livestock numbers and seasons of use requires no consultation. Giving permittees incentives to improve range conditions makes sense only if they contribute to decisionmaking.

The Court's narrow use of "prescribe" follows from its implicit reliance on the stability properties of purely ecological models[71] to determine that: (1) overgrazed public ranges can only be stabilized by the traditional policy of dictating livestock numbers and seasons of use in grazing permits; and thus (2) severe range degradation must result from allowing permittees to actively direct range management in response to economic decision variables such as livestock prices, operating costs, interest rates, and opportunity costs to range production. The problem is that neither determination should be made without understanding the stability properties of a combined ecological-economic grazing model.

A recent study analyzes the stability properties and implied stabilization schemes of an ecological-economic grazing model.[72] Specifically, economic grazing is cast as a continuous-time optimal control problem. The rancher's assumed objective is to formulate a cattle stocking plan which

70. *Court, supra* note 9, at 52.

71. An ecological grazing system is characterized by equilibrium forage stocks where forage growth is exactly balanced by livestock forage consumption (hence, forage stocks remain constant over time). An ecological grazing system is stable (unstable) at an equilibrium forage stock if small movements away from it develop ecological forces which cause the system to return to (depart from) the original position. Policies which stabilize the grazing system prevent or retard unwanted alterations of forage stocks (e.g., divergence over time away from equilibrium stocks toward forage extinction).

72. Huffaker, Wilen & Gardner, *Stability of Bioeconomic Grazing Systems* (unpublished working paper 1987).

maximizes discounted net returns from livestock production on a fixed area of rangeland in accordance with ecological constraints on forage availability. Stability properties of this model imply that profit-maximizing plans of forage utilization for livestock production can theoretically stabilize overgrazed ranges.

In cases where planned profit-maximizing stabilization drives the range to a lower than socially desired forage density, the public range manager can plan to stabilize the system toward a higher forage density by imposing it as a terminal forage target (that is, a performance standard) in grazing permits. The rancher must then plan to choose cattle stocking densities over time which maximize profits subject to meeting the socially desired forage target by the end of some given period. Contrary to the Court's opinion, the specification of performance standards to keep forage stocks within limits can satisfy the Secretary's duty under FLPMA to "prescribe" livestock practices. Prescribe also means "to keep within limits or bounds: CONFINE, RESTRAIN."[73]

CONCLUSION

Congress enacted PRIA's Experimental Stewardship Program to determine whether qualified permittees could be induced to improve public range conditions. The BLM implemented the ESP by developing the Cooperative Management Agreement program, which made qualified permittees stewards over their grazing allotments. Congress in PRIA also re-enacted the Secretary's duty under FLPMA to "prescribe" livestock numbers and seasons of use in grazing permits. A Federal District Court struck down the CMA program based on unjustifiably narrow constructions of the ESP and the Secretary's duty under FLPMA.

The Court's narrow constructions were based on two fallacies. The first is that a private incentive to conserve range forage can be summarily dismissed by the lessons of range policy history. The paper discussed the reasons why private ranchers have not had the incentive to invest in public range improvements.

The second is that severe range degradation must result from allowing permittees to actively direct range management on their grazing allotments in response to economic decision variables. The paper cited a recent study theoretically demonstrating that economic utilization of range forage for livestock production can stabilize an overgrazed range. The study justifies permittee stewardship programs on public lands so long as two conditions are met at the beginning of the planning period. First, participants are qualified by their ability to demonstrate to public range managers that

73. WEBSTER'S, *supra* note 48.

they can select a cattle stocking plan which maximizes profits subject to socially desired forage targets. Second, stewardship programs are sufficiently flexible for managers and permittees to cooperatively adjust stocking practices when performance standards are not met due to poorly selected participants or changed circumstances affecting initial plans. The CMA program is well formulated to satisfy these two conditions.