

The National Agricultural
Law Center



University of Arkansas
System Division of Agriculture

NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

Livestock Grazing in BLM Wilderness and Wilderness Study Areas

by

Harold Shepard

Originally published in JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION
5 J. ENVTL. L. & LITIG. 61 (1990)

www.NationalAgLawCenter.org

COMMENT

Livestock Grazing In BLM Wilderness And Wilderness Study Areas

Wilderness areas recently received much publicity as a result of the celebration of the 25th anniversary of the Wilderness Act¹ in 1989. Most of the attention focused on the Act's accomplishments and failures regarding existing United States Forest Service wilderness areas. This attention, however, largely ignored a significant portion of other federal lands with equal wilderness potential. The vast acreage of lands managed by the United States Bureau of Land Management (BLM) (normally referred to as public lands) contains some of the most pristine and unique sites in the country.² Yet little has been done to permanently protect public lands from degradation.

Hopefully, this will soon change for some BLM lands. The agency is currently reviewing twenty-four million acres of Wilderness Study Areas (WSAs) in the contiguous western states for potential designation as wilderness.³ By 1991, the BLM must complete its review and recommend to the President areas for wilderness status protection.⁴

This wave of pending wilderness designations calls for reconsideration of the current management policy for wilderness areas. Now is the time to determine whether twenty-five years of management have succeeded in mitigating the adverse effects of activities allowed in wilderness areas, but which are generally incompatible with the wilderness concept. The future of management activities in existing and yet to be established wilderness areas mandates such an analysis.

Many people are unaware that livestock grazing and mining are still allowed in wilderness areas and BLM WSAs.⁵ Both the Wilderness Act,

¹ 16 U.S.C. §§ 1131-1136 (1988).

² See Leshy, *Wilderness and Its Discontents - Wilderness Review Comes to the Public Lands*, 1981 ARIZ. ST. L.J. 361, 363 n.10 (1981).

³ U.S. DEP'T OF INTERIOR, BUREAU OF LAND MANAGEMENT, WILDERNESS MANAGEMENT POLICY 35 (1981) [hereinafter WMP].

⁴ *Id.*

⁵ For example, a recent article in the *New York Times* identified wilderness areas as

which governs the management of wilderness areas on federal lands in general, and the Federal Land Policy and Management Act (FLPMA),⁶ which governs the management of BLM WSAs, expressly allow this activity.⁷

Literature about resource exploitation in wilderness and WSAs exists but addresses mining and oil and gas leasing almost exclusively.⁸ Any analysis of the effects of grazing on wilderness and WSAs is noticeably absent from legal literature. Yet the effects of improper livestock grazing on rangelands can be severe.⁹ Moreover, BLM grazing management policies on public lands often de-emphasize protection of natural systems. Budget constraints and political pressure from the ranching community usually place agency concern for resource conservation at the bottom of the priority list. The BLM's failure to consider the serious environmental consequences of grazing activities, coupled with the statutory exception allowing grazing in wilderness areas, presents a significant threat to these areas.

This comment analyzes the legislative and judicial backgrounds of wilderness and WSAs and their relationship to grazing management. It also examines current BLM management practices and policies regarding WSAs and the potential they hold for future BLM wilderness areas.¹⁰

those where "logging, mining, grazing and other intrusions are forbidden." Shabecoff, *A Rising American Impulse to Leave the Land Alone*, N.Y. Times, June 11, 1989, § 4, at 6, col. 1.

⁶ 43 U.S.C. §§ 1701-1784 (1988).

⁷ 16 U.S.C. § 1133(d)(3) & (4) and 43 U.S.C. § 1782(c).

⁸ See, e.g., Harvey, *Exempt From Public Haunt: The Wilderness Study Provisions of the Federal Land Policy and Management Act*, 16 IDAHO L. REV. 481 (1980); Leshy, *supra* note 2; Cwik, *Oil and Gas Leasing on Wilderness Lands: The Federal Land Policy and Management Act, The Wilderness Act, and the United States Department of the Interior, 1981-1983*, 14 ENVTL. L. 585 (1983-84); Ray & Carver, *Section 603 of the Federal Land Policy and Management Act: An Analysis of the BLM's Wilderness Study Process*, 21 ARIZ. L. REV. 373 (1979); Martin, *The Interrelationships of the Mineral Lands Leasing Act, The Wilderness Act, and the Endangered Species Act: A Conflict in Search of Resolution*, 12 ENVTL. L. 363, (1982).

⁹ See STODDART, SMITH & BOX, RANGE MANAGEMENT 160-71 (3d ed. 1975). The major range ecology problem produced by over-grazing is "retrogression" of plants and/or soil. Retrogression is the process by which ecological systems move away from a state of "climax" or stability. *Id.* at 147, 163. What retrogression means for the range environment is gradual ecological deterioration depending on the extent and duration of the grazing problem. The stages of this deterioration may vary from the weakening of plants preferred by cattle and wildlife, allowing the invasion of less desirable plants, to more severe problems such as the loss of vegetation which then results in a loss of soil due to erosion. *Id.* at 163-71. Soil loss may become so severe that the ecology of the site is permanently changed and the reformation of soil, especially in dry areas, may take hundreds or even thousands of years. *Id.* at 163-64.

¹⁰ This Comment does not address the many acres of Forest Service wilderness areas which are also subject to grazing. This omission does not mean grazing in Forest Service

The comment then analyzes BLM policy and management of designated wilderness and concludes by recommending: (1) a reevaluation of the importance of grazing in BLM wilderness and WSAs, and (2) prohibition of grazing in these areas.

I

LEGISLATIVE BACKGROUND

A. *The Wilderness Act*

Any discussion of grazing in BLM wilderness and WSAs must begin with an analysis of the relevant provisions of the Wilderness Act. Initially, the Wilderness Act did not encompass BLM administered wilderness areas but instead focused on lands managed by the Forest Service and the National Park Service, and wildlife refuges.¹¹ The general language of the Act, however, can be interpreted to include public lands managed by the BLM.¹² In addition, once a WSA is designated as wilderness under FLPMA,¹³ the Wilderness Act's administration and use provisions apply.¹⁴ Therefore, unless Congress expresses intent to treat each BLM wilderness area designation differently, the area will be managed in the same manner as a National Forest Wilderness area.¹⁵

The general purpose of the Wilderness Act is to discourage any activity which would impair the natural characteristics of wilderness areas. The Act states:

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.¹⁶

To this end, Congress established the National Wilderness Preservation System containing lands to be managed "in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as

wilderness is not extensive or problematical. Rather, this paper focuses on grazing in BLM wilderness and WSAs, based on important issues raised due to the recently proposed additions to these areas.

¹¹ Harvey, *supra* note 8, at 485.

¹² Leshy, *supra* note 2, at 367.

¹³ See *infra* notes 27-30 and accompanying text.

¹⁴ 43 U.S.C. § 1782(c).

¹⁵ Leshy, *supra* note 2, at 393.

¹⁶ 16 U.S.C. § 1131(a).

to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness"¹⁷

The grazing exception in the Wilderness Act states that "the grazing of livestock, where established prior to September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture."¹⁸ Thus, grazing which existed in wilderness areas when the Wilderness Act was enacted may continue.

The grazing provision is an exception to the general language of the Wilderness Act which directs federal agencies to preserve wilderness characteristics. The Act states:

Except as otherwise provided in this chapter, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character.¹⁹

The "special provision" label²⁰ given to grazing activities illustrates the intent to separate it from this preservation mandate.²¹ Inconsistent use exceptions, such as the grazing language, represent compromises that supporters of the Wilderness Act in Congress made in order to soften opposition from private users and obtain passage of the bill.

Any doubt as to the intent of the grazing exception is resolved by the Act's legislative history, which clearly establishes that grazing and activities related to grazing are allowed to continue if established prior to September 3, 1964.²² Indeed, in 1977 and 1978 in response to reports that the U.S. Forest Service was discouraging grazing in wilderness areas, the House Committee on Interior and Insular Affairs issued two reports clarifying the intent of section 1133(d)(4)(2). The Committee stated:

To clarify any lingering doubts, the committee wishes to stress that this language means that there shall be no curtailment of grazing

¹⁷ *Id.*

¹⁸ 16 U.S.C. § 1133(d)(4)(2).

¹⁹ 16 U.S.C. § 1133(b).

²⁰ 16 U.S.C. § 1133(d).

²¹ See Leshy, *supra* note 2, at 393-94. Professor Leshy reaches the same conclusion about mining and other grandfathered uses falling under the special provisions section. He concludes that they are "understood as an exception to, rather than a compatible part of, the idea of wilderness." *Id.* at 394.

²² For example, the House Report on the Act states, "[i]n those areas designated as 'wilderness' grazing would be permitted where previously established subject to reasonable regulations deemed necessary by the Secretary of Agriculture." H.R. Rep. No. 1538, 88th Cong., 2d. Sess., *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 3615, 3618.

permits or privileges in an area simply because it is designated as wilderness Furthermore, wilderness designation should not prevent the maintenance of existing fences or other livestock management improvements, nor the construction and maintenance of new fences or improvements which are consistent with allotment management plans and/or which are necessary for the protection of the range.²³

In 1979 the committee issued congressional guidelines further emphasizing pre-existing rights under the grazing exception and providing federal agencies guidance in grazing management decisions for wilderness areas.²⁴ Congress adopted these guidelines in designating several

²³ H.R. REP. NO. 620, 95th Cong., 1st Sess. 5 (1973); H.R. REP. NO. 1321, 95th Cong. 2d Sess. 7 (1978).

²⁴ The guidelines reprinted in full are as follows:

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

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

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

wilderness areas.²⁵

B. The Federal Land Policy and Management Act

FLPMA is the first federal legislation to provide a comprehensive mandate for protection and management of public lands.²⁶ The statute governs BLM WSAs which have not yet been designated as wilderness. The management of wilderness review areas under the statute begins with the inventory of all BLM lands, their resources, and other values.²⁷ Section 603(a) of FLPMA provides that as a result of this inventory and

[w]ithin fifteen years after October 21, 1976, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory . . . as having wilderness characteristics described in the Wilderness Act . . . and shall from time to time report to the President his recommendations as to the suitability or unsuitability of each such area or island for preservation as wilderness.²⁸

Thus, the BLM has until 1991 to recommend to the President areas

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

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

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

In summary, subject to the conditions and policies outlined in this report, the general rule of thumb on grazing management in wilderness should be that activities or facilities established prior to the date of an area's designation as wilderness should be allowed to remain in place and may be replaced when necessary for the permittee to properly administer the grazing program. Thus, if livestock grazing activities and facilities were established in an area at the time Congress determined that the area was suitable for wilderness and placed the specific area in the wilderness system, they should be allowed to continue. With respect to areas designated as wilderness prior to the date of this Act, these Guidelines shall not be considered as a direction to reestablish uses where such uses have been discontinued.

H.R. REP. No. 617, 96th Cong., 1st Sess. 11 (1979).

²⁵ Act of Dec. 22 1980, Pub. L. No. 96-560, § 108, 94 Stat. 3271.

²⁶ Harvey, *supra* note 8, at 481.

²⁷ 43 U.S.C. § 1711(a).

²⁸ 43 U.S.C. § 1782(a).

which are suitable for wilderness preservation. The President then has two years to recommend to Congress wilderness designations for each area.²⁹ An area becomes part of the National Wilderness Preservation System only by directive of Congress.³⁰

The definition of wilderness in the Wilderness Act and of WSAs on public lands provides that these areas must be largely unspoiled and human influence should be primarily unnoticeable.³¹ Further, wilderness review under FLPMA is similar to the procedures developed by the Forest Service in reviewing its potential wilderness areas.³²

In order to preserve the wilderness characteristics of the areas identified as WSAs during the period of review, section 603(c) of FLPMA requires that the Secretary manage these areas "in a manner so as not to impair [their] suitability . . . for preservation as wilderness . . ." ³³ FLPMA, however, allows for "the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976," the date of passage of FLPMA.³⁴

²⁹ 43 U.S.C. § 1782(b).

³⁰ *Id.*

³¹ Section 2(c) of the Wilderness Act states:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

³² 16 U.S.C. § 1131(c).

³³ The House Interior Committee report on the FLPMA review process states:

The committee intends that the Bureau of Land Management wilderness review program will be similar to the process developed by the Forest Service. Emphasis should be on multiple natural values of roadless areas as part of an overall multiple use framework for a general area rather than primarily recreational uses. In addition to the public use values, ultimate designation as wilderness should augment multiple use management of adjacent or nearby lands in protecting watershed and water yield, wildlife habitat preservation, preserving natural plant communities and similar natural values.

H.R. REP. No. 1163, 94th Cong., 2d Sess., at 17-18 (1976).

³³ 43 U.S.C. § 1782(c).

³⁴ *Id.*

The intent of the legislature is again clear as to the meaning of these resource use exceptions to the nonimpairment directive. Both the Senate and House reports on what ultimately became FLPMA expressly state that preparation and maintenance of the wilderness lands inventory for BLM lands does not affect or prohibit other existing uses.³⁵

C. *The National Environmental Policy Act*

Section 102 of the National Environmental Policy Act (NEPA)³⁶ also applies to BLM actions in wilderness and WSAs. NEPA insures that federal agencies analyze environmental impacts before taking action on federal lands. Section 102(2)(C) requires that agencies produce an Environmental Impact Statement (EIS) before undertaking "major fed-

³⁵ The Senate version of FLPMA wilderness review did not provide for special management of WSAs. Instead the Senate Interior Committee report provided that wilderness review will not change the general uses of public lands. The Report states that during preparation of inventories "under no circumstances, will the pattern of uses . . . be frozen, or will uses automatically be terminated [on BLM lands]." S. REP. No. 583, 94th Cong., 1st Sess. 44 (1975). See also Harvey, *supra* note 8, at 486-90.

The wilderness management language of section 603(c) is largely adopted from a bill reported by the House Interior Committee which generally concurred with the Senate's desire not to disturb existing uses. In addition, however, this bill provided for special management of wilderness review areas. H.R. REP. No. 1163, 94th Cong., 2d Sess., reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6175-6237. Section 311 of the bill sets out in language similar to that of the current law management guidelines for areas under wilderness study. It provides that "[w]hile tracts are under review they are to be managed in a manner to preserve their wilderness character, subject to continuation of existing grazing and mineral uses and appropriation under the mining laws." *Id.* at § 311.

During subcommittee hearings on the House bill and another bill introduced by the administration, Congressman Dellenback clarified the meaning of the "existing uses" language. He explained that this is intended "to keep the static, [sic] trying to keep the Secretary from changing anything. That is what I had in mind with this particular language." Hearings on H.R. 5441 before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess. 9 at 1324 (1975), reprinted in Interpretation of Section 603 of the Federal Land Policy and Management Act of 1976, Bureau of Land Management (BLM) Wilderness Study, 86 Interior Dec. 89 (1979).

³⁶ 42 U.S.C. § 4332 (1988).

³⁷ 42 U.S.C. § 4332(2)(C). An EIS is a "detailed written statement," 40 C.F.R. § 1508.11 (1988), which must include:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C).

³⁸ An EA is defined as:

concise public document for which a Federal agency is responsible that serves to:

eral actions significantly affecting the quality of the human environment."³⁷

In order to determine whether an EIS is necessary, a federal agency must first prepare an Environmental Assessment (EA)³⁸ unless it has properly supplanted the EA requirement with its own procedures.³⁹ If the agency determines as a result of the EA that an EIS is not necessary, then it must prepare a "finding of no significant impact" (FONSI).⁴⁰

Thus, federal agencies are expected to properly analyze the effects on the environment when grazing is allowed in wilderness and WSAs. The extent of the procedures to be followed, however, will vary from case to case and depend largely on the BLM's interpretations of its own actions.

II

BLM WILDERNESS STUDY POLICY AND GUIDELINES

A. *The Nonimpairment Standard*

To aid implementing the mandate of FLPMA section 603(c), the BLM has adopted an Interim Management Policy (IMP) and guidelines for on-the-ground management of lands under wilderness review.⁴¹ The IMP determines that, as a general policy, the Secretary's suitability recommendations concerning an area's wilderness designation are based on whether the area fits the definition of wilderness described in section 2(c) of the Wilderness Act.⁴² It is the Department of Interior's responsibility under the nonimpairment standard of section 603(c) to insure that each WSA satisfies this definition at the time Congress makes its decision on designation.⁴³ In addition, the Secretary must "ensure that an area's

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the [NEPA] when no [EIS] is necessary.

(3) Facilitate preparation of a statement when one is necessary.

40 C.F.R. § 1508.9 (1989).

³⁹ 40 C.F.R. § 1501.4(a) and (b) (1989).

⁴⁰ 40 C.F.R. § 1501.4(e) (1989). A FONSI is

"a document by a federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an [EIS] therefore will not be prepared. It shall include the [EA] or a summary of it and shall note any other environmental documents related to it"

40 C.F.R. § 1508.13.

⁴¹ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, INTERIM MANAGEMENT POLICY AND GUIDELINES FOR LANDS UNDER WILDERNESS REVIEW, *reprinted in* 44 Fed. Reg. 72,013-34 (1979) [hereinafter IMP].

⁴² *Id.* at 72,015. For the definition of wilderness as cited in the Wilderness Act see *supra* note 31.

⁴³ *Id.* at 72,016.

existing wilderness values are not degraded so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendations with respect to the area's suitability or nonsuitability for preservation as wilderness."⁴⁴ Therefore, inconsistent uses such as mining and grazing which are not pre-existing activities must be restricted if they would impair wilderness suitability under the IMP standard.

Despite the strong protectionist language of the nonimpairment standard in the IMP, there is still opportunity for abuse. The IMP's affirmative directive that the BLM not degrade wilderness values in WSAs is diluted by the agency's discretion and decisionmaking regarding potentially damaging activities in WSAs. In order to ensure that "wilderness values are not degraded" in a particular area, the BLM must first determine what these values are and what can be done to them before they are "significantly" degraded. The BLM's responsibility is further obscured by the broad definition of wilderness under the Wilderness Act. It is difficult for anyone challenging a BLM decision to allow potentially damaging activity, such as grazing, to take place in a WSA when the definition of wilderness contains such vague terminology such as: "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable."⁴⁵ In addition, BLM grazing management under the nonimpairment standard is colored by the agency's general pronouncement that "[i]n some respects, rangeland management activities are less restricted by the [IMP] than other activities."⁴⁶

Because of the authority it retains in interpreting the nonimpairment standard, the BLM allows a number of uses in WSAs, above and beyond those related to existing grazing, which are generally incompatible with the preservation of wilderness values. These uses are allowed as long as their effects on wilderness characteristics are negligible in the eyes of the agency. They include grazing increases,⁴⁷ motor vehicle use to support grazing activities,⁴⁸ and new range improvements "for the purpose of

⁴⁴ *Id.*

⁴⁵ 16 U.S.C. § 1131(c).

⁴⁶ IMP, *supra* note 41, at 72,027.

⁴⁷ Grazing increases may be granted after the agency produces an EA which analyzes the effect of the increase on "(1) degradation of the natural ecological condition of the vegetation, (2) degradation of the aesthetic and visual condition of the lands and waters in the WSA, (3) accelerated erosion, (4) change in the numbers or natural diversity of fish and wildlife, and (5) any other possible identified effects that could effect wilderness suitability." *Id.* at 72,045. "If, BLM concludes, following the EA, that the effects are more than negligible, the increase cannot be authorized." *Id.*

⁴⁸ "Cross-country motorized access may be authorized along routes specified by the

enhancing wilderness values by better protecting rangeland *in a natural condition*.”⁴⁹

While individual grazing increases, motor vehicle use, and range improvements can threaten wilderness values, the cumulative effects of these activities are often even greater. Although the IMP directs the BLM to address cumulative impacts,⁵⁰ the BLM retains sole authority in determining the extent of damage caused by cumulative impacts on wilderness areas under review.⁵¹

B. Pre-existing Uses

The IMP also acknowledges that wilderness values in lands under wilderness review are second to grazing, mining, and mineral leasing uses which existed on the date of FLPMA’s enactment as provided by section 603(c). It states that these “grandfathered” uses may continue “in the same manner and degree as on that date, *even if this impairs wilderness suitability*.”⁵² For example, if a permittee was grazing cattle in

BLM if it satisfies the nonimpairment criteria, including reclamation requirements; no grading or blading will be permitted. Temporary roads may be built if the BLM has determined that they satisfy the nonimpairment criteria.” *Id.* at 72,028. The nonimpairment criteria generally state that a proposal must be temporary, capable of reclamation so that the nonimpairment standard is not violated and so reclaimed by the time the Secretary sends his recommendations to the President. *Id.* at 72,023-25.

⁴⁹ *Id.* at 72,046. Rangeland improvements are allowed only if they:

[w]ould not require motorized access if the area were designated as wilderness[,] . . . are substantially unnoticeable in the wilderness study area (or inventory unit) as a whole [and] [a]fter any needed reclamation is complete, [must not have degraded] the area’s wilderness values . . . so far, compared with the area’s values for other purposes, as to significantly constrain the Secretary’s recommendation with respect to the area’s suitability or nonsuitability for preservation as wilderness.

Id.

The list of improvements allowed includes: salting, supplemental feeding, fences, water developments, vegetative manipulation, and insect and disease control. *Id.* at 72,046-48. In addition, motor vehicle use or the construction of temporary access routes may be allowed in WSAs for construction of range improvements if the BLM determines they satisfy the nonimpairment criteria. *Id.* at 72,046.

⁵⁰ The agency must include a written assessment of the following in an EA or EIS: If the project’s impacts (after reclamation) had existed at the time of intensive inventory, would those impacts have disqualified the area from being identified as a wilderness study area?

Will the addition of this proposal produce an aggregate effect upon the area’s wilderness characteristics and values that would constrain the Secretary’s recommendation with respect to the area’s suitability or nonsuitability for preservation as wilderness, considering the area in its expected condition at the time the Secretary sends his recommendation to the President?

For wilderness study areas that are pristine in character, will the addition of this proposal significantly reduce the overall wilderness quality of the WSA?
Id. at 72,027.

⁵¹ *Id.*

⁵² *Id.* at 72,015 (emphasis added).

a WSA when FLPMA was enacted, the grazing may continue regardless if this use is incompatible with wilderness characteristics for that area. This is true even if the grazing activities would destroy those characteristics and consequently any opportunity for wilderness designation.⁵³

Moreover, "grandfathered" uses may be passed on to new owners⁵⁴ and the same "manner and degree" of a grazing use does not necessarily mean the same numbers of cattle or the same range improvements which were already present. Instead, this language refers to the physical and aesthetic impacts caused by grazing on the date of FLPMA's enactment.⁵⁵ Therefore, according to the BLM, it may allow increases in the number of cattle grazing under grandfathered rights in a WSA.⁵⁶ The agency also interprets the "manner and degree" language to allow for installation of new range improvements. If a permittee was entitled under permit to install range improvements prior to passage of FLPMA and did not complete the installation, the permittee may do so even if it impairs the area's wilderness values.⁵⁷

Thus, the grazing exception of FLPMA section 603(c), like the Wilderness Act, in some cases requires federal agencies to disregard the general mandate to preserve wilderness values of protected areas. In such cases the BLM *must* allow the destruction of wilderness values in WSAs.⁵⁸ The effect of this exception is limited only by the directive that the Secretary shall "take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection."⁵⁹ Thus, when grandfathered grazing uses are involved, the BLM may reduce the number of cattle in a WSA as soon as their presence begins to have an excessive negative effect on environmental quality.⁶⁰

⁵³ See Leshy, *supra* note 2, at 407.

⁵⁴ IMP, *supra* note 41, at 72,016.

⁵⁵ *Id.* at 72,017.

⁵⁶ *Id.* at 72,044.

⁵⁷ *Id.* at 72,017 and 72,046.

⁵⁸ The nonimpairment standard is also limited by other sections in the general provisions of FLPMA. Section 701(h) states that all actions of the Secretary "under this Act shall be subject to valid existing rights." 43 U.S.C. § 1701 (1988). Thus, valid existing rights which are related to grazing, such as right of ways, are protected by this provision as well. IMP, *supra* note 41, at 72,004.

⁵⁹ 43 U.S.C. § 1782(c) (1988). "This applies to . . . grandfathered uses and to all other activities." IMP, *supra* note 41, at 72,003. This language is similar to another provision in section 302(b) of FLPMA concerning all public lands, which states that the Secretary shall "prevent unnecessary or undue degradation of the lands." FLPMA § 302(b), 43 U.S.C. § 1732(b) (1982). The practical effect of the language in section 603(c) is simply that the section will be covered by the general mandate of FLPMA that public lands will not be subject to such environmental degradation. IMP, *supra* note 41, at 72,003.

⁶⁰ IMP, *supra* note 41, at 72,045.

III CASE LAW

Federal case law affecting grazing in BLM wilderness and WSAs primarily addresses the application of FLPMA and NEPA. Although cases on livestock grazing in WSAs and wilderness areas are virtually non-existent, a significant amount of case law on other inconsistent uses in WSAs can be found. The courts also address NEPA obligations concerning WSAs and wilderness areas, and grazing on public lands.

A. FLPMA

Federal case law generally supports the BLM's interpretation of interim management of WSAs. In *Utah v. Andrus*,⁶¹ the federal government filed suit to prevent the lessee of state school trust lands, surrounded by a federal WSA, from engaging in any construction or other activity which would threaten the area's wilderness characteristics. The court ultimately determined the lessee's rights were not an "existing use" when FLPMA was passed and as such were subject to regulation under the nonimpairment standard. In reaching this conclusion, however, the court found that FLPMA provides the BLM with the authority to prevent impairment of WSAs "unless those lands are subject to an existing use" and thus the "BLM may regulate so as to prevent unnecessary or undue degradation of the environment" in the latter situation.⁶² The inconsistent nature of section 603(c), which requires resource protection and allows for its deterioration at the same time, did not go unnoticed by the court.⁶³

Utah v. Andrus limited the degree of grandfathered uses by construing the "manner and degree" language to mean activity which was actually taking place on the date of FLPMA's enactment.⁶⁴ According to the court,

⁶¹ 486 F. Supp. 995 (D. Utah 1979).

⁶² *Id.* at 1005.

⁶³ *Id.* at 1002. The court stated that "to some extent [FLPMA] appears to be internally inconsistent, reflecting different concerns of environmentalists, miners, and ranchers." The court found this conflict could be resolved once the statute is regarded "in a dynamic rather than static context, and is viewed as applying to *all* public lands." *Id.* at 1002-03 (emphasis in original). According to the court the competing demands of FLPMA must be applied with respect to the overall use of the public lands and not to one particular piece of land. The court determined the latter interpretation would make it impossible for the BLM to carry out the mandate of the Act since a parcel of land cannot be both preserved in its natural character and exploited. *Id.* This conclusion sends conflicting messages when applied to section 603(c), however. Because section 603(c) allows for preservation on the one hand and resource exploitation on the other, according to the reasoning of the *Andrus* court it should have broad application over public lands as a whole. Section 603(c) however, specifically applies to management of particular parcels of land, i.e. WSAs.

⁶⁴ *Id.* at 1006.

the "same manner and degree" refers to "actual uses, not merely a statutory right to use."⁶⁵ Application of this case to grazing activities leads to the conclusion that permittees must have been actively exercising grazing privileges⁶⁶ by October, 1976, to continue those privileges. The mere existence of a grazing privilege on public lands is not sufficient without actual use.

*Rocky Mountain Oil and Gas Ass'n v. Watt*⁶⁷ addressed mineral leasing activities in WSAs. The Tenth Circuit Court of Appeals in *Rocky Mountain* upheld an opinion of the Solicitor of the Department of the Interior⁶⁸ which held that section 603(c) treated mineral leasing activities the same as mining and grazing and that only pre-existing mineral leasing was exempt from the nonimpairment standard.⁶⁹ In so doing, the court expressly stated that construction of section 603(c) calls for deference to the Department of the Interior's interpretation of its language.⁷⁰ The agency's opinion need only be reasonable to be accepted.⁷¹ The court concurred with the Interior Department that Congress intended "only existing mining and grazing uses and existing mineral leasing activities to be exempted by the [grandfather] clause" and that these activities "are exempt to 'the manner and degree in which [they were] being conducted on October 21, 1976.'" ⁷²

The *Rocky Mountain* court also agreed with the BLM and the court in *Utah v. Andrus* regarding the "manner and degree" language of section 603(c).⁷³ The trial court⁷⁴ summarily dismissed the Solicitor's Opinion, the BLM Wilderness Area Handbook, and the IMP nonimpairment standard as being too restrictive to oil and gas interests.⁷⁵ It interpreted grandfathered uses to include leases issued after the date of FLPMA's enactment.⁷⁶ The Tenth Circuit Court of Appeals reversed, stating: "[w]e agree with [the Andrus] court's interpretation; we believe that Congress

⁶⁵ *Id.* (emphasis in original).

⁶⁶ Technically, there is no statutory right to graze public lands. Rather, grazing is a privilege granted by permit. See The Taylor Grazing Act of 1934, 43 U.S.C. § 315 (1982).

⁶⁷ 696 F.2d 734 (10th Cir. 1982).

⁶⁸ Interpretation of Section 603 of the Federal Land Policy and Management Act of 1976 - Bureau of Land Management (BLM) Wilderness Study, 86 Interior Dec. 89 (1979).

⁶⁹ *Id.* at 750.

⁷⁰ 696 F.2d at 745. The court alluded that section 603(c) was ambiguous on its face and thus, it must "afford deference to the interpretation given the statute by the agency charged with its administration." *Id.*

⁷¹ *Id.*

⁷² *Id.* at 747 (emphasis in original) (citing 43 U.S.C. § 1782(c)(1982)).

⁷³ *Id.* at 749.

⁷⁴ *Rocky Mountain Oil & Gas Ass'n v. Andrus*, 500 F. Supp. 1338 (D. Wyo. 1980), *rev'd sub nom. Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734 (10th Cir. 1982).

⁷⁵ 500 F. Supp. at 1346.

⁷⁶ *Id.* at 1346-47.

intended to limit existing mining and grazing activities to the level of physical activity being undertaken on the FLPMA's date of enactment"⁷⁷

The same court in *Sierra Club v. Hodel*⁷⁸ deferred to the BLM's interpretation that "valid existing rights"⁷⁹ are exempt from the nonimpairment standard. The Sierra Club had contested the BLM's decision not to regulate proposed county improvements to a road passing between two WSAs.⁸⁰ The court determined that the failure to regulate the improvements did not violate section 603(c).⁸¹ According to the court, the statute is ambiguous in providing for both nonimpairment of WSAs and protection of valid existing rights and in such a case it is necessary to defer to the BLM's interpretation. Therefore, based on the agency's determination that valid existing rights are analogous to the grandfathered uses of section 603(c), the court held that these rights are exempt from nonimpairment even if this results in degradation of the WSAs.⁸²

Although federal courts support the BLM's conclusion that nongrandfathered uses are managed under the nonimpairment standard, attempts to oversee BLM management practices under this standard are limited. There is little judicial definition of the type of activity the agency may prohibit under nonimpairment. In addition, courts are not strict about which activities the BLM may allow under the standard.

One court which does address the BLM's ability to protect WSAs describes the agency's responsibility as limited to the prevention of "permanent impairment of potential wilderness values."⁸³ The Court, however, stated only that "some human activity" can take place in WSAs and did not address the types of activities which the BLM may limit.⁸⁴

⁷⁷ 696 F.2d. at 749. See also *Utah v. Andrus*, 486 F. Supp. 995, 1006 (1979).

⁷⁸ 848 F.2d 1068 (10th Cir. 1988).

⁷⁹ See *supra* note 59.

⁸⁰ 848 F.2d at 1073-74.

⁸¹ *Id.* at 1087.

⁸² *Id.* at 1087-88.

⁸³ *Utah v. Andrus*, 486 F. Supp. at 1007.

⁸⁴ *Id.* The court reached this conclusion based largely on its interpretation of *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971), *cert. denied sub nom. Kaibob Indus. v. Parker*, 405 U.S. 989 (1972) and the Wilderness Act. The Parker court interpreted the Wilderness Act and determined that the Department of Agriculture was prohibited from taking any action which would foreclose Congressional consideration of an area's wilderness designation potential. On the other hand, according to the *Anderson* court, the definition of "wilderness" in the Act left room for limited human activity as long as the area "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable . . ." 486 F. Supp at 1007 (citing 16 U.S.C. § 1131 (1974)) (emphasis added by the *Anderson* court). The court was also encouraged by the statement of the BLM's Interim Management Policy. The draft IMP recognized that if the negative impact of temporary activities could be reversed by reclamation operations, then such activities would not impair the wilderness qualities of WSAs. *Id.*

*Sierra Club v. Clark*⁸⁵ illustrates the extent of judicial deference to the BLM's interpretation of the nondegradation mandate when allowing potentially damaging activities in WSAs. In that case, the Sierra Club challenged the BLM's issuance of a permit for the "Barstow to Vegas" cross country motorcycle race, an event which attracted thousands in the past.⁸⁶ The Sierra Club argued the path of the race course would violate the nonimpairment standard for a WSA.⁸⁷ As one of its nonimpairment criteria, the IMP provides that the impacts of any activity in a WSA must "be capable of being reclaimed to a condition of being substantially unnoticeable in the wilderness study area (or inventory unit) as a whole"⁸⁸ The BLM determined this provision applied to the WSA as a whole and "not on a parcel-by-parcel basis."⁸⁹ The Ninth Circuit Court of Appeals found that agency interpretation of its own regulations (the IMP) "is entitled to a high degree of deference,"⁹⁰ and therefore the BLM interpretation of the IMP was reasonable.⁹¹

B. *The National Environmental Policy Act*

Case law under NEPA affects grazing management in both wilderness areas and WSAs. Although courts have consistently interpreted NEPA to be primarily a procedural statute,⁹² it is largely ineffective in directing the BLM to take affirmative steps in protecting wilderness areas.

NEPA ensures that federal agencies "will have available and will carefully consider detailed information concerning [the] significant environmental impacts"⁹³ of their proposed actions. In addition, NEPA ensures the availability of information to the public so that it too may participate in the decisionmaking process.⁹⁴ Moreover, as long as the agency follows the proper procedural requirements of NEPA, it may take whatever steps it wishes regardless of the environmental consequences.⁹⁵

⁸⁵ 774 F.2d 1406 (9th Cir. 1985).

⁸⁶ *Id.* at 1407-08.

⁸⁷ *Id.* at 1408-09.

⁸⁸ IMP, *supra* note 41, at 72,023-24.

⁸⁹ 774 F.2d. at 1409.

⁹⁰ *Id.* at 1408.

⁹¹ *Id.* at 1409.

⁹² The Supreme Court stated: "Congress in enacting NEPA, . . . did not require agencies to elevate environmental concerns over other appropriate considerations Rather, it required only that the agency take a 'hard look' at the environmental consequences before taking a major action." *See Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976). Courts are simply to ensure the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious. *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97-98 (1983).

⁹³ *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1845 (1989).

⁹⁴ *Id.*

⁹⁵ *Id.* at 1846.

Thus, although it is likely the issuance of BLM grazing permits in wilderness and WSAs requires NEPA analysis in most cases, the statute does not direct the agency to take affirmative steps to protect wilderness from degradation due to resource exploitation. At most, NEPA simply requires an EIS to evaluate the environmental effects of those uses.

An EIS which addresses grazing permits issued in BLM wilderness and WSAs is likely to be required if the permits are part of a larger grazing program. In *Natural Resources Defense Council, Inc. v. Morton*,⁹⁶ the United States District Court for the District of Columbia found that the BLM must produce an EIS which addresses the environmental impact of issuing grazing permits as part of such a program on public lands. In response to a claim that grazing was not a major federal action, the *Morton* court stated:

[T]he grazing permit program produces significant impacts on individual locales. And when the cumulative impact of the entire program is considered it is difficult to understand how defendants-intervenors can claim either that the impact of the program is not significant or that the federal action involved is not major.⁹⁷

The court emphasized that the EISs must address site-specific impacts of grazing.⁹⁸ It directed the BLM to prepare EISs “on an appropriate district or geographic level to assess the actual impact of the issuance of federal grazing permits on local environments.”⁹⁹ Since local environments include wilderness areas and WSAs, *Morton* applies when the issuance of grazing permits in these areas is part of a district or larger grazing plan.

The content requirement of EISs for grazing programs will also affect wilderness and WSAs. This requirement governs the extent to which federal agencies must analyze negative impacts on wilderness areas and discuss alternatives which mitigate those impacts.

The Ninth Circuit Court of Appeals in *California v. Block*¹⁰⁰ considered the range of alternatives a federal agency must include in an EIS. The case analyzed the Forest Service’s RARE II project which inventoried all roadless areas in the National Forest System and placed these into three categories: “Wilderness;” “Further Planning;” and “Nonwilderness.”¹⁰¹ The State of California challenged the adequacy of the EIS prepared by

⁹⁶ 388 F. Supp. 829 (D.D.C. 1974), *aff’d per curiam*, 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied*, 427 U.S. 913 (1976).

⁹⁷ *Id.* at 834.

⁹⁸ *Id.* at 838-41.

⁹⁹ *Id.* at 833. The “grazing district” is the BLM’s basic management unit. *Id.* at 832.

¹⁰⁰ 690 F.2d 753 (9th Cir. 1982).

¹⁰¹ *Id.* at 758.

the Forest Service in delineating these lands, including its range of alternatives.¹⁰² The court first determined that

NEPA requires a 'detailed statement . . . on . . . alternatives to the proposed action . . .'. Agencies are also under a mandate to '[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.'¹⁰³ Judicial review of the range of alternatives considered by an agency is governed by a 'rule of reason' that requires an agency to set forth only those alternatives necessary to permit a 'reasoned choice.'¹⁰⁴

The court concluded the Forest Service acted unreasonably when it failed to consider the allocation of more acreage to wilderness designation,¹⁰⁵ basing its conclusion on the arbitrary system used by the Forest Service in deciding not to study such an alternative.¹⁰⁶

By analogy *Block* applies to grazing decisions on BLM lands. Since the decision requires federal agencies to consider preservation alternatives as well as resource exploitation alternatives, it is likely that EISs analyzing grazing effects on public lands should contain a no-grazing alternative or at least alternatives which propose significant reductions in livestock use.

With the exception of areas containing pre-existing uses, this conclusion may especially apply in WSAs and wilderness areas where a no-grazing alternative to protect wilderness values is considered at least reasonable. Indeed, a "no action" alternative to proposed resource exploitation *must* be studied if the agency decision would affect the wilderness suitability of a WSA.¹⁰⁷

At least one federal court, however, rejects the assertion that the BLM

¹⁰² *Id.* at 765-69.

¹⁰³ *Id.* at 766-67 (citations omitted)(quoting 42 U.S.C. § 4332(2)(C)(iii) & (E)(1976)).

¹⁰⁴ *Id.* at 767 (citations omitted) (quoting *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981)); *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974)).

¹⁰⁵ 690 F.2d at 767-69.

¹⁰⁶ *Id.*

¹⁰⁷ *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-30 (9th Cir. 1988) *cert. denied sub nom. Kohlman v. Bob Marshall Alliance*, 109 S. Ct. 1340 (1989). The BLM may even be required to study no-grazing alternatives in WSAs in which pre-existing grazing permits are held, in light of potential wilderness designation. This conclusion is based on Congress' authority to restrict or even prohibit grazing uses in established wilderness. Although the Wilderness Act allows grazing to continue in wilderness, when Congress establishes a wilderness area it retains the authority to dictate which uses will be allowed, in spite of existing law. See *infra* note 197 and accompanying text. Since it is entirely feasible that Congress could prohibit grazing in future wilderness, such an alternative is likely to be considered reasonable in WSA NEPA analysis.

must include a broader range of alternatives in grazing EISs. The United States District Court in *Natural Resource Defense Council, Inc. v. Hodel*¹⁰⁸ read NEPA more narrowly than the *Morton* and *Block* courts, significantly lessening both the specificity and the range of alternative requirements of the EIS. In *Hodel*,¹⁰⁹ the BLM produced an EIS to address grazing in the Reno, Nevada area. NRDC claimed that the EIS was inadequate for several reasons.¹¹⁰ The court, however, consistently deferred to agency discretion regarding the content of the EIS and rejected the NRDC complaints.

The court first decided that the EIS need not describe specific, on-the-ground actions to be taken regarding each grazing allotment. The scope of the EIS is defined by the scope of the proposed action and "it is unreasonable to expect the EIS to analyze possible actions in greater detail than is possible given the tentative nature" of the proposed action.¹¹¹ The plaintiffs claimed that *Morton* required specificity because it directed the agency to create localized EISs.¹¹² The court determined that plaintiffs really sought an EIS for each allotment and implied that this was neither practical nor what *Morton* required.¹¹³

The plaintiffs next challenged the range of alternatives in the EIS, citing *Block*.¹¹⁴ The court found the BLM did not violate NEPA although there was a difference of only about thirty percent in forage consumption allocated to livestock among all the alternatives and three out of the four alternatives called for the same level of short run use.¹¹⁵ Stating that "the scope of alternatives required to be analyzed is determined by the scale of the proposed action," the court found that *Block* dealt with an enormous quantity of land whereas the affected land base in this case was relatively minute.¹¹⁶ Thus, the court did not find the range of alternatives discussed to be "fatal under a 'rule of reason' standard."¹¹⁷ In addition, it found the BLM was not required to study any alternatives which would significantly reduce forage allocations to livestock since this would result in adverse economic impacts to the ranching community and ultimately to the BLM's range improvement funds.¹¹⁸ Further, the court felt that

¹⁰⁸ 624 F. Supp. 1045 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987).

¹⁰⁹ *Id.*

¹¹⁰ 624 F. Supp. at 1049-56.

¹¹¹ *Id.* at 1051.

¹¹² *Id.*

¹¹³ *Id.* at 1051-52.

¹¹⁴ *Id.* at 1052.

¹¹⁵ *Id.*

¹¹⁶ 624 F. Supp. at 1052.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1053.

plaintiffs' contention that the EIS must include alternatives which would address the poor range condition of the area was impractical since "[t]he 'poor' label refers only to . . . a hypothetical and theoretical condition for most of the public land."¹¹⁹

The court similarly rejected the claim that the BLM must consider a no-grazing alternative, determining that this argument must be considered in conjunction with the historical and economic background of the area in question.¹²⁰ The court stated that "production of forage for livestock use is at least an important priority in the overall resource picture of [the Reno] area."¹²¹ Moreover, the Public Rangeland Improvements Act (PRIA)¹²² envisions that "livestock use was to continue as an important use of public lands."¹²³ Having reached these conclusions, the court found that a no-grazing alternative was unreasonable because it was too "speculative, contrary to law [and] economically catastrophic as to be beyond the realm of feasibility."¹²⁴

Finally, the Nevada court dismissed the plaintiff's contention that the EIS lacked site specific estimates of carrying capacity. The court found that "[the] specificity of the EIS is governed by the proposed action," thus the EIS need not be as specific as future management framework plans.¹²⁵ In addition, "[b]ecause existing regulations assure that authorized grazing will not exceed carrying capacity, none of the alternatives analyzed will result in the 'vegetative destruction and overall resource deterioration' that plaintiffs fear" if carrying capacity is not sufficiently analyzed in the EIS.¹²⁶

The courts have also applied NEPA directly to WSAs. The court in *Hodel*¹²⁷ found an affirmative duty to apply NEPA to nonconforming uses

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1054.

¹²¹ *Id.*

¹²² 43 U.S.C. §§ 1901-1908 (1982). The PRIA was enacted in 1978 to address the "unsatisfactory condition" of public rangelands in producing "wildlife habitat, recreation, forage, and water and soil conservation benefits" as a result of livestock grazing. *Id.* at § 1901(a). The Act directs federal agencies to: "(1) inventory and identify current public rangelands conditions and trends . . . ; (2) manage, maintain and improve the condition of the public rangelands so that they become as productive as feasible for all rangeland values in accordance with management objectives and the land use planning process . . . ; (3) charge a fee for public grazing use . . . ; and (4) protect wild and free-roaming horses and burros while at the same time facilitating the removal of those animals which pose a threat to the range resource." *Id.* at § 1901(b).

¹²³ 624 F. Supp. at 1054.

¹²⁴ *Id.* (citing *Kilroy v. Ruckelshaus*, 738 F.2d 1448, 1454 (9th Cir. 1985); *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982)).

¹²⁵ *Id.* at 1055.

¹²⁶ *Id.*

¹²⁷ 848 F.2d 1068 (10th Cir. 1988).

in WSAs through the nondegradation language of section 603(c). The court determined the “BLM’s duty under FLPMA § 603(c) and its regulations, to prevent unnecessary degradation of the WSAs requires the agency analyze potentially degrading activity under NEPA.¹²⁸ Even if the action consists of a pre-existing use exception, if it is a major federal action under NEPA, an EIS is needed to study the effects of the action so that such degradation can be detected and prevented.¹²⁹ Specifically, the agency must “determine whether there are less degrading alternatives, and it has the responsibility to impose an alternative it deems less degrading”¹³⁰

C. WSA Grazing Case Law

The few cases discussing grazing in BLM WSAs and wilderness areas have arisen thus far only in Administrative Law Judges (ALJs) courts and the Interior Board of Land Appeals (IBLA) of the Interior Department. A recent example is *Grenke v. Bureau of Land Management*¹³¹ where the ALJ rejected the BLM’s interpretation of the IMP and granted a grazing increase to a permittee, affecting a number of WSAs.¹³²

The BLM argued that it could not allow the grazing increase because it had not completed monitoring the effects of such an increase and it lacked sufficient resources to do so.¹³³ The IMP requires that before the BLM may allow a proposed action such as a grazing increase in a WSA, sufficient monitoring of the impacts of the increase must take place.¹³⁴ In addition, if the BLM concludes from this monitoring that the effects of the

¹²⁸ *Id.* at 1090.

¹²⁹ *Id.* at 1090-92.

¹³⁰ *Id.* at 1090-91.

¹³¹ No. 030-87-01 (Dept. of Interior, Oregon Dist., April 1989). This case was appealed to the IBLA in July 1989 and a decision is pending.

¹³² *Id.* at 8.

¹³³ The BLM based its argument on the fact that the EA, which had addressed the effect of the grazing increase, was still in the draft phase and did not sufficiently monitor the areas in question. *Grenke*, ALJ transcript at 228 and 295-300.

¹³⁴ The required monitoring occurs in the form of either an EIS or an EA and must address the nonimpairment standard of section 603(c). IMP, *supra* note 41, at 72,025. The EA or EIS will also include: “[a] description of the proposal and its alternatives . . . [a] description of the affected environment, considering both the specific site and the [WSA] (or inventory unit) in its entirety . . . analysis of [the] reclamation . . . [and a] [w]ritten assessment of cumulative impacts. . . .” *Id.* at 72,026-27. Proper monitoring is supported further by the Oregon State Director of the BLM where *Grenke* took place. The Director determines that before the agency can act on a proposed increase in grazing in a WSA, it must prepare a formal allotment evaluation. In addition, the EA or EIS produced must address the effects of the proposal, the development of a monitoring plan, and the availability of resources sufficient to complete the monitoring. Instruction Memorandum from BLM State Director, No. OR-86-533, July 8, 1986 (discussing WSA monitoring).

proposed increase would be "more than negligible, the increase cannot be authorized."¹³⁵ Nevertheless, the ALJ overturned the agency's decision and directed that the increase be allowed.¹³⁶ The Judge based his decision on the fact that monitoring could be accomplished through available resources and that more resources could be obtained through budget submittals or otherwise.¹³⁷ The ALJ additionally determined that any adverse effects of the proposed increase would be offset by the fact that the permittee making the request offered to fence off any affected WSAs.¹³⁸

IV

THE WILDERNESS DESIGNATION PROCESS UNDER THE DEPARTMENT OF INTERIOR

In order to implement the wilderness review mandate of FLPMA, the BLM developed a wilderness review process with three phases: inventory, study, and reporting to Congress.¹³⁹ The inventory stage was completed by western states on November 14, 1980, resulting in identification of approximately 24 million acres as WSAs.¹⁴⁰

The BLM is studying each area to determine whether it will be recommended for wilderness designation. The Secretary must then report which areas are suitable for designation to the President by October 21, 1991.¹⁴¹ The President must make recommendations to Congress by October 21, 1993.¹⁴²

Since the BLM places so much emphasis on nondegradation in WSA suitability determinations, an important factor in preserving suitability is the prevention of such degradation. Public rangelands require careful management because of grazing's destructive impact. Therefore, because of BLM discretion in preventing WSA impairment due to post

¹³⁵ IMP, *supra* note 41 at 72,045.

¹³⁶ Grenke, No. 030-87-01 at 16.

¹³⁷ *Id.* at 8. The ALJ did not address the possibility that the increase should not have been allowed until monitoring could be completed. Since the IMP requires that no increase take place if it would have more than a negligible effect on the WSA involved, it follows that increases are not allowed until the proper monitoring can be conducted to determine if this impact will occur.

¹³⁸ *Id.* at 8-9. The ALJ did not address the fact that keep fence construction is a discretionary matter for the BLM. Thus, if the agency determines not to require the construction of the fence, the WSAs would be left unprotected and the required monitoring could not be conducted.

¹³⁹ WMP, *supra* note 3, at 35.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

FLPMA grazing uses, the adequacy of the agency's management policies and practices are of major importance in preventing this impairment.

The BLM grazing program in general is often intensely criticized. Until the passage of the Taylor Grazing Act in 1934,¹⁴³ there was little federal control of grazing on public lands.¹⁴⁴ But some critics believe the BLM has failed even after that date to regain control of its rangelands.¹⁴⁵ Such criticism illuminates that most BLM lands continue to exist in a seriously degraded condition because of overgrazing. Currently, more than four-fifths of BLM rangelands produce less than one-half of their estimated historic capacity.¹⁴⁶ Overgrazing on BLM rangelands has caused severe erosion, has permitted invasion by unpalatable plants, and has rendered them of little value for many other uses.¹⁴⁷

¹⁴³ 43 U.S.C. §§ 315-315(r) (1982).

¹⁴⁴ Coggins & Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 22-32 (1982) (hereinafter *Public Rangeland Law II*); Coggins, *The Law of Public Rangeland Management V: Prescriptions for Reform*, 14 ENVTL. L. 497, 501 (1984) (hereinafter *Public Rangeland Law V*).

¹⁴⁵ Coggins, *Public Rangeland Law V*, *supra* note 144, at 501. Johanna Wald, an attorney with the Natural Resources Defense Council in San Francisco, said in reference to public rangelands: "I wonder what people have been doing for the last 40 years? They haven't yet come to grips with the misuse." Zaslowsky, *A Public Beef: Are Grazing Cattle Turning the American West into a New Desert?*, 19 HARROWSMITH 39 Jan./Feb. 1989, at 45.

¹⁴⁶ Coggins, *Public Rangeland Law V*, *supra* note 144, at 501. According to Professor Coggins, all known methods to estimate range condition (which is roughly equivalent to production) are vague and judgmental at best. One fact is clear, however: "[b]y every measure and every standard and every estimation technique used so far, the overall finding is that more than four out of five public rangeland acres are producing at less than half their historical capacity for growth of useful vegetation." *Id.* at 501 n.20.

¹⁴⁷ *Id.* at 501-02. See also NRDC v. Morton, 388 F. Supp. 829, 840 (1974):

[t]he plaintiffs note that the BLM Budget Justification estimated that only 16 percent of the BLM managed grazing land was in good or excellent condition while 84 percent was in fair, poor or bad condition. In addition, plaintiffs present evidence from both private and governmental sources demonstrating that serious deterioration of BLM lands is taking or has taken place. In its first annual report, the Council on Environmental Quality reported that overgrazing had dramatically affected the public lands.

"Much of this land, particularly the vast public domain, remains in desperate condition, as wind, rain, and drought have swept over them and eroded their exposed soils. Although the effects of overgrazing in rich pastures or prairie [sic] farmland can be quickly corrected, the process is often irreversible on the limited soils and arid climate of much of the public lands."

CEQ, *Environmental Quality* 182 (1970).

Unfortunately, this situation has not been rectified since that date. A recent Bureau of Land Management report entitled *Effects of Livestock Grazing on Wildlife, Watershed, Recreation and Other Resource Values in Nevada* (April 1974) documents the serious damage being wrought on the environment. The report, compiled by a team of BLM resource managers, states flatly that wildlife habitat is being destroyed. "Uncontrolled,

According to BLM critics, the major reason for failure of its grazing management program is the agency itself.¹⁴⁸ Many factors typical of government agency operation contribute to the problems, but some stand out more than others. First, the BLM is poorly funded at best, and subject to periodic budget cuts,¹⁴⁹ often making even the most ambitious management plans an impossibility. Second, many of the upper level managers are political appointees with conflicts of interest and limited knowledge of resource management.¹⁵⁰ Finally, the BLM has been unable to separate itself from the influence of cattle ranchers.¹⁵¹ This influence has existed ever since the time of the early settlers of the American West, when cattle ranchers and other livestock grazers dictated grazing management of public lands. Ranchers have established a political base which meets with little present day resistance.¹⁵² This emphasizes the interests of ranchers and red meat production at the

unregulated or unplanned livestock use is occurring in approximately 85 percent of the State and damage to wildlife habitat can be expressed only as extreme destruction." *Id.* at 13. Overgrazing by livestock has caused invasion of sagebrush and rabbitbrush on meadows and has decreased the amount of meadow habitat available for wildlife survival by at least 50 percent. The reduced meadow area has caused a decline in both game and non-game population. *Id.* at 26. In addition, there are 883 miles of streams with deteriorating and declining wildlife habitat, thus making it apparent, according to the report, that grazing systems do not protect and enhance wildlife values. *Id.* at 14, 29.

¹⁴⁸ Coggins, *Public Rangeland Management V*, *supra* note 144, at 507. See also *Morton*, 388 F. Supp. at 836 ("Over the past four years the BLM has shown relatively slow progress in implementing a thorough management planning system which would assist in protecting the environment . . . Thus, in a substantial and practical sense there is a serious threat of injury to the public lands . . .").

¹⁴⁹ Coggins, *Public Rangeland Management V*, *supra* note 144, at 507.

¹⁵⁰ *Id.*

¹⁵¹ A Government Accounting Office (GAO) report produced in 1988 states that interviews with BLM staff members indicated a general reluctance on the part of BLM employees to take steps towards resource protection for fear of reprisal against the "politically powerful permittees." United States General Accounting Office, Report To Congressional Requesters, *Public Rangelands: Some Riparian Areas Restored but Widespread Improvement Will Be Slow*, 46 (June, 1988). "In one district, the staff told us that the district essentially is directed by headquarters and the state office to make no decisions opposed by permittees. Further, BLM is not managing the permittees; rather, permittees are managing BLM." *Id.* at 46-47.

¹⁵² In the mid-nineteenth century, ranchers and other settlers used a variety of means, ranging from buying to stealing, in order to acquire use of the public lands. Coggins, *Public Rangeland Law II*, *supra* note 144 at 23-27; Coggins, *Public Rangeland Law V*, *supra* note 144 at 501, 527. Rather than take steps to control large numbers of people staking claims, Congress and courts attempted to make the public lands more accessible. Coggins, *Public Rangeland Law II*, *supra* note 144, at 29-31; See also Coggins, *Public Rangeland Law V*, *supra* note 144 at 501, 527. This policy sparked a rush to use rapidly diminishing range resources, quickly resulting in over use and destruction of range and associated ecosystems. Coggins, *Public Rangeland Law II*, *supra* note 144, at 31-32. Unfortunately, this early attitude towards rangeland management and policy set the stage

expense of other BLM land uses,¹⁵³ including wilderness.¹⁵⁴

BLM reports submitted with recommendations for wilderness designations also help analyze the agency's compliance with the nonimpairment standard. For example, the Oregon office of the BLM recently released

for future management, surviving the enactment of the Taylor Grazing Act and the even more recent enactment of FLPMA. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 5-71 (1983) [hereinafter *Public Rangeland Law IV*]; Coggins, *Public Rangeland Law II*, *supra* note 144, at 94-100; Coggins, *Public Rangeland Law V*, *supra* note 144.

Preferences given to ranchers in rangeland legislation and weak regulations also contribute to the domination of grazing interests on BLM land. Ranchers are often politically successful and use legal loopholes to their advantage. For example, the Taylor Grazing Act provides permittees with base ranches adjacent to BLM grazing allotments have grazing privileges or preferences over those allotments. 43 U.S.C. § 315(b). Ranchers, in conjunction with bureaucrats and bankers, have transformed this privilege into a form of property right by loaning money on interest and buying ranches for prices which include the value of the grazing permit. Coggins, *Public Rangeland Law V*, *supra* note 144, at 527-34. The ranching community's control over the BLM is largely attributable to such manipulations as this self-proclaimed right to the resource. *Id.*

¹⁵³ The major problem with the BLM's emphasis on cattle grazing is that an over allocation of forage and other range resources results in a violation of the principles of multiple use mandated by FLPMA and the Multiple Use Sustained Yield Act (MUSY), 16 U.S.C. §§ 528-31 (1976), which the BLM has systematically ignored. Coggins, *Public Rangeland Law IV*, *supra* note 152, at 48-65. The multiple use mandate, in short, provides that the BLM must manage public lands not just for cattle grazing, but for other values such as wildlife, recreation, watershed, scenic attributes, and environmental quality. *Id.* at 15-16, 37-58. In addition, multiple use requires the agency to avoid impairment of range productivity, manage for sustained yield of resources, and combine resource uses harmoniously and compatibly. *Id.* at 58-65.

Another factor in the BLM's favorable bias of cattle interests is that range scientists, comprising a large part of BLM staff, "tend to be ideologically bound to the status quo" and are for the most part entrenched in the cattle production philosophy. Coggins, *Public Rangeland Law V*, *supra* note 144, at 516. The BLM is primarily interested in increasing meat production and range scientists often reflect this view in their work. *Id.* For example, Professor Coggins uses papers submitted to a committee on Developing Strategies for Public Rangeland Management commissioned by the National Academy of Sciences which conducted six symposia from 1980-81. *Id.* at 497, n. *. He points out that many papers submitted to the symposia contained detailed analyses of the scientific evidence regarding the effects of grazing on rangeland ecosystems but consistently ignored any conclusions as to negative effects if the data pointed to such findings. *Id.* at 517.

In addition, range economists and the BLM often prefer economic models which favor ranchers' interests. Coggins, *Public Rangeland Law II*, *supra* note 144, at 48-65; Coggins, *Public Rangeland Law V*, *supra* note 144, at 516-36. Subsidies such as below market value grazing fees, preference grazing rights, and other financial preferences to ranchers contribute to the agency's economic troubles and inhibit its ability to better manage other uses of public lands. Coggins, *Public Rangeland Law V*, *supra* note 144, at 516-36.

¹⁵⁴ BLM commitment to wilderness preservation has often been questioned. Coggins, *Public Rangeland Law II*, *supra* note 144, at 97-98. Professor Coggins quotes a letter from a BLM District Recreation Specialist, Lakeview District, Oregon as an example:

In the nine years that I have worked on BLM districts, at no time have primitive or

the final EIS on its review of 85 WSAs totaling 2,652,234 acres, all located in the eastern portion of the state.¹⁵⁵ The Oregon office found 1,529,547 acres of the total were unsuitable for wilderness designation.¹⁵⁶

The criteria for determining wilderness suitability according to the Oregon EIS include recommendations of district managers, potential contribution of WSAs to wilderness diversity, public comment, and mineral and energy potential in WSAs.¹⁵⁷ Impairment of wilderness characteristics as a result of inconsistent resource uses such as livestock grazing is not mentioned as a factor in the EIS.¹⁵⁸ If the agency's critics are correct, however, it is likely grazing in WSAs is not treated much differently than on the rest of the public lands. Therefore, much of the unsuitable WSA acreage could be the result of continued grazing activities in violation of the nonimpairment standard.

A good indication of BLM abuse of discretionary authority in Oregon WSAs is the continued environmental degradation which occurs in these areas as a result of livestock grazing.¹⁵⁹ Despite this degradation, significant livestock use continues in the WSAs. The BLM states:

wilderness values been given adequate consideration in the management of natural resource lands. It's not that primitive or wilderness values are not included in the BLM planning system, but, rather that, most BLM managers feel that wilderness is unimportant or are personally biased against wilderness values

Every district that I worked on had areas that met the criteria for wilderness, however, the areas were never identified as such or included within the BLM planning system. The excuses were: there was not enough public interest, establishing wilderness areas caused too many conflicts with other resources, the local people were opposed to any wilderness areas, wilderness values "locked up" the land to multiple use

Id. at 98 n.634, (citing Foster, *Bureau of Land Management Primitive Areas — Are They Counterfeit Wilderness?*, 16 NAT. RESOURCES J. 621, 643 (1976) (quoting a letter from Dennis Hill, BLM District Recreation Specialist, Lakeview District, Oregon)).

¹⁵⁵ 1 U. S. Dep't of the Interior, Bureau Of Land Management, Oregon Wilderness, Final Environmental Impact Statement-Statewide, 2 (Dec. 1989) [hereinafter *Oregon Wilderness FEIS*].

¹⁵⁶ *Id.* at 12.

¹⁵⁷ *Id.* at 5-7.

¹⁵⁸ *Id.*

¹⁵⁹ The BLM states: "Sagebrush is the dominant plant in many study areas, and there are indications that the plant is more common now than it was 100 years ago because of past overgrazing by livestock and the suppression of wildfire." 1 *Oregon Wilderness FEIS*, *supra* note 155, at 41. In addition, the Oregon Department of Environmental quality found instream water quality to be a problem in the summer in the state's WSAs "primarily due to cattle grazing and solar heating on diminishing flows and unshaded streams." *Id.* at 53-56.

Although the BLM avoids any meaningful discussion of current grazing practices and degradation in WSAs in the Oregon EIS, it is clear ecological damage from livestock in these areas continues. The agency's analysis of individual study areas illustrates livestock are causing significant damage to those sites accessible to them. Lower elevation and flatter areas of Oregon WSAs typically consist of vegetation described by the agency as

"[a]lmost all of the study areas are grazed by livestock, and most of the evidence of human activity is associated with management of livestock."¹⁶⁰ In addition, most of the areas contain livestock improvements which include a total of 555 reservoirs and water holes, 125 developed springs, 17 wells, 11 miles of pipeline, 3,220 miles of fence, 3 wild horse traps, 23 corrals, 9,200 acres of seeding, 2,680 acres of brush control, and 3,160 acres of juniper cutting.¹⁶¹ Moreover, livestock operators are often allowed to use existing roadways to check livestock, distribute salt, inspect or maintain range improvements, and haul water for livestock.¹⁶²

Although the EIS does not delineate which improvements existed before establishment of particular WSAs or which are needed to support pre-FLPMA grazing activities,¹⁶³ the BLM often resorts to "improvements" in an attempt to preserve wilderness or resource values, rather than reducing livestock.¹⁶⁴ In fact, during the short period from 1985 to 1989, the BLM in Oregon added 56 reservoirs and waterholes, 9 developed springs, 4 wells, 2 miles of pipeline, and 38 miles of fence to the state's WSAs¹⁶⁵ despite the fact livestock related developments and roadways "are obvious reminders of human influence" and therefore caused the agency to conclude that "some roadless areas did not have wilderness characteristics."¹⁶⁶

While ecological degradation from grazing and extensive range improvements may affect BLM suitability recommendations, a more im-

in "early to mid seral stages." *Id.* at Vols. II-IV (under the heading "Vegetation" of section 3. "Affected Environment" for each WSA). This language is simply another way of stating that these areas are in fair to poor ecological condition, UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, STATE OF THE PUBLIC RANGELANDS 1990, 3 (1990).

That livestock grazing is the cause of this condition in WSAs is illustrated by the fact that areas which are in better condition are usually found only on steep slopes, higher elevations, or other places which are generally inaccessible to livestock. Oregon Wilderness FEIS, *supra* note 155, vols II-IV (under the heading "Vegetation" of section 3. "Affected Environment" for each WSA).

Some of the more severely grazed WSAs exhibit characteristics such as destruction of riparian vegetation; invasion of undesirable plants; downward trend in ecological condition and forage production; "heavy or severe livestock use"; headcuts developing along streams resulting in drying up of meadows and subsequent invasion of sagebrush; and high fecal coliform counts in streams. *Id.* vol. III at 279-80, 374, 401 and vol. IV at 496, 548.

¹⁶⁰ Oregon Wilderness FEIS, *supra* note 155, at 41.

¹⁶¹ *Id.* at 59.

¹⁶² *Id.* at 59-60.

¹⁶³ *Id.* at 76-77, 100.

¹⁶⁴ Coggins, *Public Rangeland Law V*, *supra* note 144, at 540.

¹⁶⁵ *Id.* at 59; 1 United States Department of the Interior, Bureau of Land Management, Oregon Wilderness, Draft Environmental Impact Statement-Statewide, 53 (1985).

¹⁶⁶ 1 Oregon Wilderness FEIS, *supra* note 155, at 41.

portant question is, What effect will this degradation have on Congress' decision as to suitability? Congress, not the BLM, ultimately determines whether a particular activity makes a WSA unsuitable.¹⁶⁷ Therefore, even fewer areas may receive wilderness designation than those recommended by the Oregon BLM office, if Congress's suitability determinations are more restrictive than those of the agency.

Although proper grazing management in WSAs is important, any analysis with an eye to resource protection may already be too late for most areas. With the deadline for suitability recommendations fast approaching, it is realistically unlikely to reverse livestock damage in time to affect suitability determinations. Nevertheless, analysis of WSAs grazing is necessary because it can build a framework for addressing management for future wilderness areas.

V

BLM WILDERNESS MANAGEMENT

Although WSAs which become wilderness areas will be managed under the Wilderness Act, standard provisions in most wilderness legislation for areas managed by the BLM clearly indicate that the agency will continue to manage designated areas.¹⁶⁸

The BLM's grazing management regulations are generally considered adequate to allow the agency to minimize the impact of grazing in wilderness areas.¹⁶⁹ These regulations provide that grandfathered grazing in wilderness under BLM jurisdiction be allowed "to continue under the regulations on the grazing of livestock on public lands in Part 4100 [of the C.F.R. regulations] and in accordance with any special provisions covering grazing use in wilderness areas that the Director may prescribe."¹⁷⁰ In addition, "[g]razing activities may include the construction, use and maintenance of livestock management improvements and facilities associated with grazing that are in compliance with wilderness area management plans provided for in the Wilderness Management Policy"¹⁷¹

In spite of the confidence in these provisions, the BLM's reputation for carrying out its regulations and policies may require a whole new strategy

¹⁶⁷ Leshy, *supra* note 2, at 395.

¹⁶⁸ WMP, *supra* note 3, at 7.

¹⁶⁹ Edwards, *Keeping Wilderness Areas Wild: Legal Tools for Management*, 6 VA. J. NAT. RESOURCE L. 101, 106 n.26 (1986-87).

¹⁷⁰ 43 C.F.R. § 8560.4-1(a) (1989). The regulations governing livestock grazing on public land are found at 43 C.F.R. § 4100 (1989).

¹⁷¹ 43 C.F.R. § 8560.4-1(b) (1989).

in analyzing its ability to minimize negative effects in wilderness areas. The real question may not be whether the BLM is capable of mitigating grazing impacts on wilderness, but whether it will do so.

How effectively the BLM carries out its duty to protect wilderness characteristics begins with BLM policy. According to BLM wilderness policy, there are a number of important provisions in the Wilderness Act in addition to those allowing grandfathered grazing rights to continue.¹⁷²

One of the more important of these provisions is the section 4(b),¹⁷³ which directs managing agencies to preserve the wilderness character of designated areas.¹⁷⁴

In order to preserve the wilderness character of BLM wilderness areas, the agency determines each area under its administration shall be managed under a "principle of nondegradation."¹⁷⁵ This principle requires it "to prevent degradation of natural conditions, opportunities for solitude or primitive recreation and special features."¹⁷⁶ BLM's policy is to preserve their wilderness character, and to manage them for the use and enjoyment of the American people in a manner that will leave them unimpaired for future use and enjoyment as wilderness. The wilderness areas will be devoted to the public purpose of recreational, scenic, scientific, educational, conservation, and historical use.¹⁷⁷

At the same time, the BLM recognizes the continuation of nonconforming uses such as grazing, as provided in the Wilderness Act.¹⁷⁸ The agency allows nonconforming uses to permanently destroy wilderness values "[i]n portions of a wilderness area where nonconforming activities such as mining and grazing are permitted, there may be instances when the public purposes listed in section 4(b) may be displaced either temporarily or permanently."¹⁷⁹

BLM policy regarding grazing in wilderness areas stems largely from the 1978 and 1979 House Interior and Insular Affairs Committee guidelines regarding grazing in national forest wilderness areas.¹⁸⁰ The agency adopted the general directive of the guidelines which reaffirm that grazing will not be de-emphasized in wilderness areas. To implement the House policy and guidelines and to protect wilderness values, the BLM

¹⁷² WMP, *supra* note 3, at 6-7.

¹⁷³ WMP, *supra* note 3, at 6.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 8.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 9.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 8.

¹⁸⁰ *Id.* at 11, 21-23. The guidelines are reprinted *supra* at note 24.

dictates specific grazing management practices to be followed in wilderness areas. These practices include constructing allotment management plans,¹⁸¹ issuing grazing permits,¹⁸² and conducting range analysis.¹⁸³

Not surprisingly, the guidelines provide the BLM with significant authority in insuring that they are properly implemented. They delegate to the agency the discretion to determine the results of range analysis and the content of allotment management plans, and consequently when and which activities occur in wilderness.¹⁸⁴

¹⁸¹ WMP, *supra* note 3, at 23. Planning for grazing in BLM wilderness areas is implemented through the normal BLM resource management planning process. *Id.* BLM policy regarding management plans states:

(1) Resource management plans establish:

(a) Objectives and prescriptions for management of wilderness. These are based on resource inventory data which includes, but is not limited to, ecosystem identification, rangeland conditions, existing uses, and areas of existing or potential conflict.

(b) Use levels of the rangeland resource and its relationship with other uses.

(2) Allotment management plans, within the direction established by the resource management plan, prescribe:

(a) The manner and extent to which livestock grazing will be conducted to meet wilderness objectives, rangeland resource needs, desired condition of ecosystems, and other resource values.

(b) Direction and scheduling for accomplishing goals and objectives on individual allotments, including the development of rangeland improvement schedules and grazing system to be followed.

Id.

¹⁸² Grazing within wilderness areas is authorized by permits. *Id.* Further, permits "will be issued only in areas where grazing was established at the time the wilderness was designated." *Id.*

¹⁸³ BLM rangeland analysis policy states:

(1) Rangeland analysis in wilderness areas will follow the normal BLM standards.

(2) The development of the allotment management plan will determine the need for and standards of rangeland improvements and will prescribe the grazing system to be followed.

Where an approved allotment management plan exists at the time an area is designated as wilderness, it will be reviewed in context with the congressional guidelines and policy. Necessary modification will be integrated into the resource management plan and the allotment management plan.

Allotment management plans for allotments partially or entirely within designated wilderness will specifically identify the following:

(a) The use of motor vehicles, motorized equipment or other forms of mechanical equipment including: specific equipment, where it is to be used, when it is to be used, and what it is to be used for.

(b) Rangeland improvement structures and installations to be maintained, constructed, or reconstructed in achieving rangeland management objectives, including maintenance standards.

(c) The means to handle emergencies. In bonafide emergencies or urgent situations, decisions will be based on consideration of all relevant factors and use of good judgement.

Id.

¹⁸⁴ See *infra* notes 174-76.

In addition, the BLM implements guidelines to govern range improvements in wilderness areas.¹⁸⁵ Range improvements represent the hidden cost of the wilderness grazing exception. Improvements may be even more destructive to resource values than the livestock grazing itself. Improvements may include: motor vehicle use; motorized equipment, or other forms of mechanical transport; the maintenance or replacement of existing structural improvements or the construction of new improvements such as fences, windmills, water pipelines, and stock ponds; irrigation; fertilization; and even the use of chemicals to control noxious weeds.¹⁸⁶

The potentially degrading types of grazing related activities which may occur in wilderness and the extensive discretion that the BLM retains in the management of those activities highlights the potential for wilderness abuse. Indeed, the agency's own reports illustrate that the agency may be opening doors to increased grazing and range improvements, with potentially damaging effects in wilderness areas. In the Oregon EIS, for example, the BLM proposed that structural range improvements and vegetation manipulation projects be implemented in eighteen WSAs, some of which the agency may be recommending for wilderness designation.¹⁸⁷ These improvements would be implemented so that the agency can increase grazing in the study areas by 15,707 animal-unit-months

¹⁸⁵ The first category of improvements addressed by WMP include the use of motor vehicles, motorized equipment or mechanical transport in constructing, maintaining, or applying rangeland improvements and practices. WMP, *supra* note 3, at 23. Twelve criteria are followed in minimizing the impacts of these activities. *Id.* at 23-24.

The second type of range improvements addressed by BLM wilderness policy are "structural improvements." *Id.* at 24. Thus, guidelines exist for structural maintenance, new improvements, and types of materials to be used. *Id.*

The third type of rangeland improvements regulated by the WMP are "non-structural" rangeland improvements. *Id.* at 25. This category includes seeding, plant control, irrigation, fertilization, and prescribed burning. *Id.*

¹⁸⁶ *Id.* at 24.

¹⁸⁷ Oregon Wilderness FEIS, *supra* note 155, at 100. The BLM EIS does not specify which of the areas affected by the increase in grazing activities are being recommended for suitability and which are recommended for non-suitability. *Id.*

The Oregon BLM State Director ordered that all range improvements in Oregon WSAs be prohibited by September 30, 1990 with the exception of: "Activities which clearly protect or enhance wilderness values . . . ; [a]ctivities which are considered grandfathered or have valid existing rights under the IMP . . . ; [r]eclamation activities designed to minimize impacts to wilderness values . . . ; [a]ctivities which would clearly be permitted in a designated wilderness area and would assist in management of the wilderness resource"; and emergencies such as fire repression activities. Bureau of Land Management, Oregon State Office, Instruction Memorandum No. OR-89-497, June 19, 1989. Whether this order significantly limited the number of range improvements proposed in the EIS for Oregon WSAs is questionable, however. Since the improvement cut off date is approximately 8 months after the release of the Oregon EIS, the BLM has had ample time to construct many of the grazing related improvements listed in the EIS.

(AUMs).¹⁸⁸ In addition, the BLM claimed that livestock grazing in eleven WSAs can be increased by 19,966 AUMs without improvements.¹⁸⁹

Although the BLM stated that mitigation measures and monitoring will avoid or minimize impacts to wilderness values,¹⁹⁰ even the EIS identifies environmental problems which the agency's proposed management will cause in Oregon WSAs, including those it may be recommending for wilderness designation. Problems include: vegetation alteration, partly for livestock grazing management; vegetation removal, partially because of construction of livestock facilities; decline in riparian vegetation along twelve miles of streams; livestock increases which are expected to produce higher utilization and less residual ground cover in twenty-four WSAs; actions in eight WSAs which could potentially threaten plant species of special interest; wildlife habitat alteration due partly to livestock developments; and management actions in nine WSAs which will occur in the vicinity of known or suspected populations of federally designated threatened or endangered wildlife species.¹⁹¹

VI

RECOMMENDATIONS

As resource protection is concerned, the law and policy regarding grazing in wilderness and WSAs is seriously flawed. The BLM retains too much discretion in implementing vague and contradictory federal statutes, resulting in environmental degradation from continued grazing in WSAs and many BLM wilderness areas. Strategies dealing with the BLM's general grazing policies include a complete overhaul of the agency itself, or transferring BLM jurisdiction and functions to the Forest Service.¹⁹²

Although these changes would result in better management of BLM wilderness and WSAs, they are likely to solve only part of the problem. Since the Wilderness Act and FLPMA allow pre-existing grazing to continue at the cost of wilderness values, wilderness and WSAs will suffer from grazing whether or not the BLM is in control.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 99-100

¹⁹² Coggins, *Public Rangeland Law V.*, *supra* note 144, at 509-26. Professor Coggins lists a number of positive attributes which the Forest Service has over the BLM in managing public rangelands. These include: longer familiarity and better success with grazing regulations; more experience with the theory and practice of multiple use; a closer relationship with agricultural users and resources; higher public esteem; better scientific research capabilities; greater managerial professionalism and independence; and less susceptibility to political pressures. *Id.* at 512.

If the statutes are amended to require greater restriction on grazing, the problem will be less severe, but not completely solved. Although management of livestock grazing can occur with little or no damage to the environment, grazing will always be incompatible with the general purpose of the Wilderness Act. For instance, livestock tend to congregate in certain areas for extended periods of time, especially riparian areas (areas surrounding streams, bogs, lakes, springs or ponds).¹⁹³ Thus, even in small numbers, livestock have significant effects in particular areas.¹⁹⁴ Most people would not consider stumbling on a section of stream where a small number of cattle had congregated for several days a wilderness experience while hiking. Therefore, the solution is to leave some public lands completely untouched for aesthetic and recreational enjoyment. Because of the important role wilderness areas play in recreational, aesthetic, psychological, and even spiritual values,¹⁹⁵ the protection of these areas in their natural state is not only reasonable but practical, benefiting society as a whole by eliminating activities which damage wilderness values.

The most effective means of ridding wilderness of grazing activity is either to repeal the relevant provisions of the Wilderness Act and the FLPMA, or to prohibit grazing in individual existing and future wilderness areas. The latter solution is more feasible since it can be accomplished by considering each piece of wilderness legislation separately. This would allow Congress to limit grazing in those wilderness areas where the political clout of wilderness advocates is sufficient, and according to desires and needs of individual states in which the wilderness is located.

Further, the ultimate decision as to which activities may take place in individual wilderness areas lies with Congress. Thus, despite the language in the Wilderness Act, FLPMA, and past wilderness designations which adopt the guidelines of the House Interior and Insular Affairs Committee, Congress may prohibit grazing in individual wilderness areas if it so desires.¹⁹⁶ Indeed, Congress has already prohibited other nonconforming uses in a limited number of wilderness areas.¹⁹⁷

Whichever method is used, proper legislative language is important for

¹⁹³ STODDART, SMITH & BOX, *supra* note 9, at 257-58; 1988 GAO Report, *supra* note 151, at 8-10.

¹⁹⁴ The 1988 GAO report states that during the animals' extended stays in riparian areas "they eat virtually all the grassy and young vegetation, and trample the streambanks." 1988 GAO Report, *supra* note 150, at 10.

¹⁹⁵ See Manning, *The Nature of America: Vision and Revision of Wilderness*, 29 N.M.L. Rev. 25 (1989).

¹⁹⁶ See Leshy, *supra* note 2, at 386-87. See also WMP, *supra* note 3, at 7.

¹⁹⁷ Edwards, *supra* note 169, at 109.

effective grazing prohibitions. The statutory language most often used to restrict or prohibit particular uses of federal lands is referred to as a "withdrawal." These statutes, executive orders, or administrative orders change "the designation of a described parcel from 'available' to 'unavailable' for . . . resource exploitation."¹⁹⁸ Withdrawals "prohibit[s] some uses of specified land without affirmatively prescribing future use," and are thus often followed by a "reservation" which is typically a "dedication of the withdrawn land to a specified purpose more or less permanently."¹⁹⁹ Withdrawals and reservations may close a particular parcel to mining, mineral leasing, logging, grazing, hunting and fishing, or intensive recreation.²⁰⁰

Three types of withdrawals or reservations are relevant to restrictions on uses in wilderness. The first and most common type is the executive withdrawal or reservation, a delegation to the President by Congress of the authority to withdraw and reserve lands for certain purposes. The Antiquities Act is probably the best example of such authority. The Act states:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.²⁰¹

Although this language may sound narrow, it was used to establish areas such as the Grand Canyon (271,145 acres), Death Valley (1,601,800 acres), Glacier Bay in Alaska (1,164,800 acres), and the Katami National Monument in Alaska (1,088,000 acres).²⁰²

The major weakness of executive withdrawals is they leave the withdrawal decision entirely up to the discretion of the executive branch. In fact, FLPMA itself contains provisions which provide for executive withdrawals²⁰³ which have obviously not been used very effectively, at least with respect to grazing. The FLPMA withdrawal provisions,

¹⁹⁸ COGGINS & WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 239 (2d. ed. 1987).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 240.

²⁰¹ 16 U.S.C. § 431 (1988).

²⁰² COGGINS & WILKINSON, *supra* note 198, at 256.

²⁰³ *See* 43 U.S.C. § 1714 (1988).

however, purport to limit executive withdrawal authority more restrictively than other statutes, which may account for the lack of enthusiasm in invoking them. Even if legislation were to give the executive branch total authority to prohibit grazing, its occurrence would depend largely on the political bias of the administration in office at the time.

The second type of withdrawal is a congressional withdrawal. This type may be unaccompanied by a reservation and thus not be permanent. The Mineral Leasing Act²⁰⁴ is an example of this type of withdrawal. The Act removes oil, gas, coal, and like minerals on all public lands from operation of the mining laws.²⁰⁵ Disposition of these resources after withdrawal is carried out by lease only.

The third type of withdrawal is called the general congressional withdrawal.²⁰⁶ Often used in legislation governing wilderness areas to prohibit certain activities, it therefore would most likely be effective in prohibiting grazing in wilderness and WSAs. An example of general congressional withdrawal language is the Alaska Native Claims Act which removes much of Alaska from availability for resource use, and states: “[t]he following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act”²⁰⁷

Another example is the Taylor Grazing Act,²⁰⁸ which established “grazing districts or additions thereto and/or [modification of] the boundaries thereof” on public lands.²⁰⁹ The Act had “the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement.”²¹⁰ Although land orders issued by the executive branch were needed to carry out its intent, the Taylor Grazing Act ultimately resulted in the withdrawal of 140 million acres of public land from the homesteading laws.²¹¹

Examples of withdrawal provisions used in wilderness legislation usually apply to mining activities. With some exceptions, mining is expressly forbidden in the Hells Canyon (Oregon-Idaho) and Sawtooth (Idaho) wilderness areas. The Hells Canyon withdrawal provision states:

Notwithstanding the provisions of section 1133(d)(2) of this title and

²⁰⁴ 30 U.S.C. §§ 181-287 (1988).

²⁰⁵ WILKINSON & COGGINS, *supra* note 198, at 241.

²⁰⁶ *Id.*

²⁰⁷ 43 U.S.C. § 1610(a)(1) (1988).

²⁰⁸ *See supra* note 143.

²⁰⁹ 43 U.S.C. § 315 (1988).

²¹⁰ *Id.*

²¹¹ COGGINS & WILKINSON, *supra* note 198, at 241.

subject to valid existing rights, all Federal lands located in the recreation area are hereby withdrawn from all forms of location, entry, and patent under the mining laws of the United States, and from disposition under all laws pertaining to mineral leasing and all amendments thereto.²¹²

Some statutes prohibit resource exploitation without expressly using withdrawal language. The Wilderness Act itself effectively withdraws wilderness areas from certain activities in this manner. Section 1133(c) of the Act states:

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to minimum requirements for the administration of the area for the purpose of this chapter . . . there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.²¹³

While grazing prohibitions or restrictions in wilderness and WSAs will cause some hardship to permittees who use those areas, the effects will not be widespread since the land base of wilderness areas will inevitably be minor compared to the rest of public rangelands. In addition, it is important to remember that the key word in public lands is "public." These lands are for the benefit of everyone and presumably many non-ranchers feel that at least some lands should be free from livestock grazing.

Finally, action can be taken to mitigate impacts on permittees from loss of wilderness area permits. Grazing can be phased out over a period of time, allowing ranchers to work out alternatives by themselves or in conjunction with the BLM. Any phase out should be completed within a time period agreeable to both parties, and the BLM must be required to adhere to the schedule. Another method of mitigation is compensation to ranchers for their loss. This method should be cautiously considered, however, since a grazing permit is not a statutory right²¹⁴ and action by federal agencies treating it as such should be avoided as it will reinforce ranchers' arguments that grazing permits are more of a right than a privilege. Thus, compensation should be used in limited circumstances only.

²¹² 16 U.S.C. § 460gg-8 (1988). The withdrawal provision for the Sawtooth area is basically the same. See § 10, 16 U.S.C. § 460aa-9 (1988).

²¹³ 16 U.S.C. § 1133(c) (1988).

²¹⁴ See *supra* note 66.

VII
CONCLUSION

Public lands contain many exceptional natural areas which until recently were largely overlooked. After a long wait, some BLM lands are finally going to receive federal designation as wilderness. Notwithstanding this lofty goal, the process is not without flaws. The initial inventory of public lands allocated a modest amount of land for wilderness review at best. In addition, federal statutes which regulate BLM management of wilderness and WSAs require protection of wilderness values on the one hand and allow for abuse of those values on the other. These statutes, together with the federal courts and agency policies granting broad discretion to the BLM exacerbate the problem. Abuse of WSAs likely will result in the unsuitability of many areas for wilderness designation because of these factors. Further, this abuse will probably continue in areas ultimately designated as wilderness unless management policies are reformed.

With the final deadline for the Department of Interior recommendations for wilderness suitability fast approaching, the public land wilderness review stage will soon come to an end and the wilderness stage will begin. It is necessary to reflect on WSA management to better understand how future wilderness areas will be managed under the BLM grazing program. Ineffective laws and policies regarding grazing in WSAs should be a warning that major changes are needed in order to properly protect future wilderness areas.

The difficulty in finding effective solutions to the problem of grazing in BLM wilderness signifies that the role of grazing in wilderness and WSAs should be reconsidered. Since grazing is inherently contrary to the concept of wilderness, the most logical conclusion is that it should not be allowed to continue in these special areas.

The public lands belong to everyone. Nothing supports this principle better than the provisions of the Wilderness Act. This Act, however, contains contradictions which detract from the concept of public wilderness lands. Thus, the Act is essentially meaningless until Congress sets aside federal lands which are truly wilderness for the sole benefit and enjoyment of the public.

*Harold Shepard**

* 1990 Graduate, University of Oregon School of Law