United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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Memorandum

To: Secretary

From: Solicitor

Subject: Authority for the Bureau of Land Management to Consider Requests for Retiring Grazing Permits and Leases on Public Lands

Question Presented and Summary Conclusion

I have reviewed a memorandum from my predecessor to the Director of Bureau of Land Management (BLM) dated January 19, 2001, regarding BLM's authority to terminate or "retire" grazing on particular public lands at the request of a rancher who holds a permit or lease (hereafter, "permit") to graze livestock on those lands. I conclude that BLM has such authority but only after compliance with statutory requirements and BLM decides the public lands associated with the permit should be used for purposes other than grazing. A decision by BLM to retire livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions.

Introduction

This opinion examines the specific situation in which a grazing permittee volunteers to relinquish all or part of a permit to graze livestock upon the condition that BLM will permanently retire grazing on the public lands subject to the permit. This situation arises in the context of resource or land use conflicts and may involve an arrangement between a third party, such as a conservation organization, and a permittee. In such a situation, a third party generally offers to purchase the base property on the condition that the associated grazing permit is permanently retired.[1] This arrangement meets the goals of the two private parties only where BLM, after a public land use planning process, makes an independent decision

[1] This general description is not meant to characterize the only way private parties can reach agreement. A variety of financial arrangements and sale contracts can be used by private parties to acquire private ranches and transfer associated grazing permits. BLM is not a party to these private agreements. While BLM may acknowledge an agreement in the planning process, BLM does its own analysis and makes its own independent decision about devoting public rangelands to a use other than livestock grazing.

regarding the use of the public lands and decides to accept relinquishment of the grazing permit and terminate or "retire" the authorized grazing. However, this "retirement" cannot be considered permanent in nature absent congressional action.[2]

Solicitor Leshy addressed grazing retirement in his January 19, 2001 memorandum. He concluded that BLM could accept relinquished grazing permits through its land use planning process regardless of whether the relinquishment was voluntary or involuntary, although he suggested that voluntary relinquishments should have priority over involuntary relinquishments. He made no distinction between lands within grazing districts and those outside of grazing districts established under the Taylor Grazing Act (TGA). One additional and very important factor concerning grazing relinquishment, whether voluntary or involuntary, must be considered. This factor is that lands within grazing districts have been found to be "chiefly valuable for grazing and the raising of forage crops." There must be a proper finding that lands are no longer chiefly valuable for grazing in order to cease livestock grazing within grazing districts. Moreover, cessation of grazing may implicate congressional reporting requirements and grazing relinquishment decisions are not permanent.

Statutory Framework

Congressional direction regarding livestock grazing on the public lands is found in the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315o-1; the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782, and the Public Rangelands Improvement Act of 1978 (PRIA), 43 U.S.C. §§ 1901-1908.

In the TGA, Congress authorized the Secretary to identify lands as "chiefly valuable for grazing and raising forage crops," to place these lands in grazing districts, and to issue permits to qualified applicants. 43 U.S.C. § 315. Lands outside of grazing districts may be leased for livestock grazing 43 U.S.C § 315m. The TGA also gives the Secretary the authority to make adjustments to grazing use based on range conditions and to regulate the occupancy and use of the public rangelands in order to preserve the land and its resources from destruction or unnecessary injury and to provide for the orderly use, improvement, and development of the range. 43 U.S.C. § 315a. Under FLPMA, Congress authorized the Secretary to manage public lands on a multiple use and sustained yield basis through land use plans developed with public involvement. 43 U.S.C. § 1712. FLPMA also defines domestic livestock grazing as a "principal or major use." 43 U.S.C. § 1702(*l*). Lastly, in PRIA Congress recognized the need to manage public rangelands to be as productive as feasible for all rangeland values. 43 U.S.C §§ 1901(b)(2), 1903(b).

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[2] To avoid confusion, the voluntary relinquishment of a grazing permit is best referred to as just that -- "relinquishment," not "retirement."

Discussion and Analysis

When considering a proposal to cease livestock grazing on public rangelands, BLM must address a number of important land use planning factors. Some of these factors are set forth in the Leshy memorandum and apply whether the lands are within a grazing district or not. When the lands are within a grazing district, as the vast majority of grazing lands are, BLM must also analyze whether the lands are still "chiefly valuable for grazing and raising other forage crops." 43 U.S.C. § 315. If BLM concludes that the lands still remain chiefly valuable for these purposes, the lands must remain in the grazing district. As such, they would remain subject to applications from other permittees for the forage on the allotment that is relinquished to BLM.

In *Public Lands Council v. Babbitt*, 67 F.3d 1287 (10th Cir. 1999), *aff'd on other grounds*, 529 U.S. 728 (2000), the Tenth Circuit struck down a BLM regulation authorizing conservation use permits. These permits authorized permittees not to graze during the entire term of a ten-year grazing permit. The court found a presumption of grazing use within grazing districts and struck down the regulation because it reversed this presumption:

> The TGA authorizes the Secretary to establish grazing districts comprised of public lands 'which in his opinion are chiefly valuable for grazing and raising forage crops.' 43 U.S.C. § 315. When range conditions are such that reductions in grazing are necessary, temporary non-use is appropriate . . . . The presumption is, however, that if and when range conditions improve and more forage becomes available, permissible grazing levels will rise . . . . The Secretary's new conservation use rule reverses that presumption. Rather than annually evaluating range conditions to determine whether grazing levels should increase or decrease, as is done with temporary non-use, the Secretary's conservation use rule authorizes placement of land in non-use for the entire duration of a permit. This is an impermissible exercise of the Secretary's authority under section three of the TGA because land that he has designated as 'chiefly valuable for grazing livestock' will be completely excluded from grazing even though range conditions could be good enough to support grazing. Congress intended that once the Secretary established a grazing district under the TGA, the primary use of that land should be grazing.

Id. at 1308. The foregoing language clearly applies in the grazing retirement context. If the Secretary cannot foreclose grazing within a grazing district for a ten year period, the Secretary certainly cannot indefinitely retire grazing within a district.

If BLM determines that lands are no longer chiefly valuable for grazing, BLM must express this determination and support it by proper findings in the record of decision that concludes the land use planning process. For lands outside of grazing districts, this analysis is not necessary because BLM has not made a chiefly valuable determination for these lands.

Another factor is that Congress has recognized livestock grazing as one of the principal or major uses of the public lands. The land use planning process should consider whether discontinuing livestock grazing would implicate congressional reporting requirements. *See* 43 U.S.C. § 1712(e)(2).

Finally, land use planning is a dynamic process. In the future, BLM, through the land use planning process, may designate lands where livestock grazing has ceased as once again available for grazing, as circumstances warrant. A decision to foreclose livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions. Only Congress may permanently exclude lands from grazing use.

Conclusion

A permittee cannot force BLM to permanently retire a grazing allotment from grazing use. BLM has the authority to consider, through the land use planning process, a permittee's proposal to relinquish a grazing permit in order to end grazing on the permitted lands and to assign them for another multiple use. If the lands are within an established grazing district, BLM must analyze whether the lands are no longer "chiefly valuable for grazing and raising forage crops" and express its rationale in a record of decision. BLM must also consider whether the elimination of livestock grazing as a principal or major use of the public lands triggers congressional reporting requirements. A decision to cease livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions. This memorandum supercedes contrary Solicitor's Office memoranda or opinions.

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