

BY FEDERAL EXPRESS

March 1, 2004

Director (630)
Bureau of Land Management
Eastern States Office
7450 Boston Boulevard
Springfield, Virginia 22153

Re: Grazing Administration, Proposed Rule, 68 Fed. Reg. 68452 (Dec. 8, 2003), and
Draft Environmental Impact Statement, DES 03-62, Proposed Revisions to
Grazing Regulations for the Public Lands (December, 2003)

To the Director:

Enclosed please find comments on the above-named proposed rule and Draft Environmental
Impact Statement. These comments are submitted by the following organizations:

National Wildlife Federation
Natural Resources Defense Council
California Trout
Californians for Western Wilderness
Defenders of Wildlife
Forest Guardians
Grand Canyon Trust
Idaho Conservation League
New Mexico Environmental Law Center
New Mexico Wildlife Federation
Sierra Nevada Forest Protection Campaign
Southern Utah Wilderness Alliance
Wyoming Outdoor Council

Also enclosed please find documents submitted by these organizations for inclusion in the
administrative rulemaking record. These documents, which are listed in Part I of the enclosed
comments, are cited in the enclosed comments and are incorporated therein by reference.

We appreciate your consideration of the enclosed comments and documents. If you have any
questions, please contact me at the address, phone number, or e-mail address provided below.

Sincerely

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Comments
on
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and
Draft Environmental Impact Statement, DES 03-62,
Proposed Revisions to Grazing Regulations for the Public Lands (December, 2003)

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I. List of Documents Cited by These Comments, Incorporated by Reference, and Enclosed for Inclusion in the Administrative Rulemaking Record.

These comments include citations to documents in the following list. All of the listed documents contain information that is germane to the proposed rule. Copies of the listed documents are enclosed. We hereby incorporate all of the listed documents by reference in these comments, and we request that these documents be included in the administrative rulemaking record. For ease of reference, the enclosed documents are marked with the corresponding numbers from the list.

Interior Department Administrative Decisions

1. National Wildlife Federation v. Bureau of Land Management, No. UT-06-91-1 (U.S. Dep't of the Interior, Office of Hearings and Appeals, Hearings Div.) (Dec. 20, 1993).
2. National Wildlife Federation v. BLM, 140 IBLA 85 (1997).
3. High Island Ranch and Frank Robbins v. Bureau of Land Management, IBLA 98-180; 98-404 (Nov. 20, 1998).
4. HD Ranch & Frank Robbins, Jr., IBLA 99-279 (May 20, 1999).

Other Interior Department Documents

5. UNITED STATES BUREAU OF LAND MANAGEMENT, RIPARIAN AREA MANAGEMENT: PROCESS FOR ASSESSING PROPER FUNCTIONING CONDITION, Technical Reference TR 1737-9 (1993).
6. UNITED STATES BUREAU OF LAND MANAGEMENT, A USER GUIDE TO ASSESS PROPER FUNCTIONING CONDITION AND SUPPORT SCIENCE FOR LOTIC AREAS, Technical Reference TR 1737-15 (1998).
7. UNITED STATES BUREAU OF LAND MANAGEMENT, USING AERIAL PHOTOGRAPHS TO ASSESS PROPER FUNCTIONING CONDITION OF RIPARIAN WETLAND AREAS, Technical Reference TR 1737-12 (1996).
8. UNITED STATES BUREAU OF LAND MANAGEMENT, INTERPRETING INDICATORS OF RANGELAND HEALTH, Technical Reference 1734-6 (Version 3, 2000).
9. Ohmart R, Anderson B. 1986. Riparian habitat. In: Cooperrider A, Boyd R, Hansen S. editors. Inventory and Monitoring of Wildlife Habitat. Colorado: USDI Bureau of Land Management. p169-199.

10. U.S. Department of the Interior, Bureau of Land Management, Winnemucca Field Office, CHD/WPP Protest Points Submitted on July 3, 2002 and Additional Protest Points Submitted on July 10, 2003 (Oct. 15, 2003).
11. BLM Manual Chapter H-4400-1, Rangeland Monitoring and Evaluation.
12. United States Department of the Interior, Bureau of Land Management, Bishop, CA Field Office, March 4, 2003 Letter to Dear Bishop Field Office Range Permittee.
13. United States Department of the Interior, Bureau of Land Management, Dillon, MT Resource Area, August 9, 1994 Letter to “Dear Affected Interest”.
14. U. S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, REPORT TO THE CONGRESS – LAND USE PLANNING FOR SUSTAINABLE RESOURCE DECISIONS (2000).
15. U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, ADMINISTRATIVE REVIEW COPY OF DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR REVISIONS TO GRAZING REGULATIONS (NOVEMBER 18, 2003).

Other Government Documents (non-Interior Department)

16. UNITED STATES GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: INTERIOR’S MONITORING HAS FALLEN SHORT OF AGENCY REQUIREMENTS, GAO/RCED-92-51 (1992).
17. UNITED STATES GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: SOME RIPARIAN AREAS RESTORED BUT WIDESPREAD IMPROVEMENT WILL BE SLOW, GAO/RCED-88-105 (1988).
18. UNITED STATES GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: BLM’S HOT DESERT GRAZING PROGRAM MERITS RECONSIDERATION, GAO/RCED-92-12 (1991).
19. UNITED STATES GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: MORE EMPHASIS NEEDED ON DECLINING AND OVERSTOCKED GRAZING ALLOTMENTS, GAO/RCED-88-80 (1988).
20. ED CHANEY, WAYNE ELMORE, AND WILLIAM S. PLATTS, LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS (U.S. Environmental Protection Agency, 1990).
21. ED CHANEY, WAYNE ELMORE, AND WILLIAM S. PLATTS, MANAGING CHANGE: LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS (U.S. Environmental Protection Agency, 1993).
22. UNITED STATES DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, DESERT TORTOISE (MOJAVE POPULATION) RECOVERY PLAN (JUNE 1994) (excerpt from).

Scientific Journal and Law Review Articles

23. Platts, William S. and Fred J. Wagstaff. 1984. Fencing to control livestock grazing on riparian habitats along streams: Is it a viable alternative? *North American Journal of Fisheries Management* 4: 266-272.
24. Warren P. Clary and Bert F. Webster, *Managing Grazing of Riparian Areas in the Intermountain Region* (Intermountain Research Station, Forest Service, U.S. Dep't of Agriculture, General Technical Report INT-263) (1989).
25. Pieper, R.D., and R.K. Heitschmidt. 1988. Is Short-Duration Grazing the Answer? *Journal of Soil and Water Conservation* 43(2): 133-137.
26. Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 *CONSERVATION BIOLOGY* 629 (1994).
27. Holechek, J.L., H. Gomez, F. Molinar, and D. Galt. 1999. Grazing Studies: What We Have Learned. *Rangelands* 21(2): 12-16.
28. Joseph M. Feller, *The Comb Wash Case: The Rule of Law Comes to the Public Rangelands*, 17 *PUBLIC LAND & RESOURCES LAW REVIEW* 25 (1996).
29. Joseph M. Feller, *What is Wrong With the BLM's Management of Livestock Grazing on the Public Lands?*, 30 *IDAHO LAW REVIEW*. 555, 586-95 (1994).
30. Joseph M. Feller, *Grazing Management on the Public Lands: Opening the Process to Public Participation*, 26 *LAND & WATER LAW REVIEW* 571 (1991).
31. Joseph M. Feller and David E. Brown, *From Old-Growth Forests to Old-Growth Grasslands: Managing Rangelands for Structure and Function*, 42 *ARIZONA LAW REVIEW* 319 (2000).
32. Joseph M. Feller, *Back to the Present: The Supreme Court Refuses to Move Public Range Law Backward, but Will the BLM Move Public Range Management Forward?*, 31 *ENVIRONMENTAL LAW REPORTER* 10021 (2001).

Other Non-Government Documents

33. Robert D. Ohmart, *Historical and Present Impacts of Livestock Grazing on Fish & Wildlife Resources in Western Riparian Habitats*, in *RANGELAND WILDLIFE* (Paul R. Krausman, ed.) (Society for Range Management, 1996).
34. E. Lamar Smith, *Use of Inventory and Monitoring Data for Range Management Purposes*, in *NATIONAL RESEARCH COUNCIL/NATIONAL ACADEMY OF SCIENCES*,

DEVELOPING STRATEGIES FOR RANGELAND MANAGEMENT 809 (1984).

35. Letter from Johanna H. Wald, Natural Resources Defense Council, to Bruce Babbitt, Secretary of the Interior (March 8, 1993) (petitioning for abolition of grazing advisory boards and transfer of their functions to multiple use advisory councils)
36. Johanna Wald and David Alberswerth, *Our Ailing Rangelands: Still Ailing. Condition Report -- 1989 (National Wildlife Federation and Natural Resources Defense Council (1989))*.
37. Letter from Beth Wendel, National Wildlife Federation, to Jim Baca, Director, Bureau of Land Management, and John Leshy, Solicitor, Department of the Interior (June 11, 1993) (documenting problems with pre-Range Reform rules for public participation in grazing decisions).
38. The Wilderness Society and Environmental Defense Fund, *The Living Landscape, Vol. 3 – Taxpayers’ Double Burden* (1993) (excerpt from).
39. Cathy Carlson and Johanna Wald, *Rangeland Reform Revisited* (Center for the Wild West and Natural Resources Defense Council (2001)).
40. Johanna H. Wald, NRDC, June 1993, “*Range Betterment” Funding: Where Has All The Money Gone?*
41. Johanna Wald, NWF (undated), “*Range Improvements” – A Panacea That Never Was.*

I. The BLM Has Subverted the NEPA Process by Replacing the Draft EIS Written by Professional Resource Managers With a Substitute Designed to Rationalize the Proposed Rule.

On November 18, 2003, less than three weeks before the publication of the proposed rule, the BLM made available to all its Washington Office officials, and to all of its state offices in the western states, an administrative review copy of the draft environmental impact statement (ARC-DEIS) to accompany the proposed rule. The ARC-DEIS was written by career resource management professionals in the BLM and represented their best professional judgment as to the environmental consequences of the proposed rule and alternatives. A copy of Chapter 3, Affected Environment, and Chapter 4, Environmental Consequences, of the ARC-DEIS is included among the enclosed documents, and the text of these two chapters is reproduced below as the last part of these comments.

The ARC-DEIS reveals that the negative environmental consequences of the proposed rule, if it is finally adopted, will be significant and pervasive. Among the conclusions of the ARC-DEIS are the following:

“The Proposed Action will have a slow, long-term adverse impact on wildlife and

biological diversity in general. Upland and riparian habitats will continue to decline due to increasing an already burdensome grazing appeals process, lack of ability to control illegal activities on public lands, and allowing livestock operators to acquire rights to livestock management facilities and vegetation on public lands. The cumulative effects resulting from all these changes will be significant and adverse for wildlife and biological diversity in the long-term..”

...

“In terms of improving working relationships with permittees and lessees, explicitly stating and emphasizing in the grazing regulations that the economic, social, and cultural elements be considered in when making grazing decisions will tend to give emphasis of these considerations over natural resource considerations, such as wildlife and special status species.”

...

“[B]y establishing ownership of water or range improvements the livestock operator will have the right to graze and greatly diminishes the ability of the BLM to regulate grazing and will create long-term impacts to wildlife resources.”

...

“Authorizing joint title to range improvements will have very long lasting adverse impact to the wildlife of the public lands in the West.”

...

“Deferring to state water law, as in the case of Nevada, where they prohibit the BLM from holding water rights will have a long-term, adverse impact on wildlife, particularly fish.”

...

“Amending when BLM will make changes in grazing management when not meeting land health standards from the present requirement of the next grazing season to 24 months and that any adjustment in active use in excess of 10% must be implemented over a 5-year period could have significant and log-term adverse effects upon wildlife resources and biological biodiversity in general, but could be especially problematic for many of the special status species on public lands, especially plants.”

...

“1. Grazing decisions would require not only a land health assessment, but also monitoring data. BLM, in fact, lacks sufficient funding and staffing to perform

adequate monitoring.

- 2. After a grazing decision record of decision there is a 2 year period allowed prior for making any changes in the grazing operation.
- 3. Proposed changes in active use greater than 10% would require a 5 year phase-in period.

All of these cumulative delaying tactics could result in a protracted 7 year period for full implementation and change and thus would result in a long-term, adverse impact upon wildlife resources and biological diversity, including threatened and endangered and special status species.”

...

“The additional provision that determinations that existing grazing management practices or levels of grazing use are significant factors in failing to achieve standards and conform with guidelines must be based on not only the standards and guidelines assessment, but also include monitoring data will further delay the grazing decision process. Present BLM funding and staffing levels do not provide adequate resources for even minimal monitoring and the additional monitoring requirement will further burden the grazing decision process, thus adversely impacting wildlife resources and biological resources in the long-term.”

...

“Adverse, historic impacts which have been realized on riparian obligates and dependent species, especially fishes and migratory birds, will be exacerbated under the Proposed Action largely due to the inherent inability to make livestock adjustments due to increasing the burdensome grazing appeals process.”

...

“The change in definition of ‘interested public’ will limit the ability of environmental groups to participate in the appeals process in the interest of wildlife. . . . This should result in long-term, adverse impacts to wildlife and special status species on public lands”

...

“The deletion of the requirements to consult, cooperate and coordinate with or seek review and comment from the “interested public” for designating and adjusting allotment boundaries, reducing permitted use, emergency closures or modifications, renewing/issuing grazing permit/leases, modifying a permit/lease and issuing temporary non-renewable grazing permits will further reduce the ability of environmental groups and organizations to participate in weigh in and support wildlife and special status species with regard to public land grazing issues. This should result in long-term adverse impacts to wildlife and special

status species on public lands.”

...

“The requirement for the BLM to cooperate with State, local, or county established grazing boards in reviewing range improvements and allotment management plans on public lands will result in giving permittees and lessees greater access to the decision making process at the expense of conservation groups who are advocates for wildlife resources. First, this requirement will give greater emphasis to local entities who favor extraction of forage and water resources at the expense of wildlife and biological diversity. Secondly, this requirement will give local entities greater influence over decision making than national interests who are excluded from this venue. This would be a long-term adverse impact for wildlife and special status species resources.”

...

“The proposed action will provide additional tools to exacerbate long term impacts on riparian habitats, channel morphology and water quality. Degradation of channel morphology and water quality will continue in watersheds with declining vegetative cover due in-large to the increasing and burdensome administrative procedural requirements for assessment and for acquisition of monitoring data.”

The BLM originally planned to release a draft environmental impact statement simultaneously with the publication of the proposed rule. However, at the last minute, the BLM decided not to release any NEPA document along with the proposed rule, because the admissions in the ARC-DEIS were so adverse to the proposed rule. Instead, the BLM undertook a hurried rewrite of the ARC-DEIS designed to rationalize the proposed rule. The rewritten, sanitized DEIS was released to the public on January 2, 2002, nearly one month after the publication of the proposed rule.

NEPA requires the BLM to “include” an EIS in every recommendation or report on a major federal action significantly affecting the human environment. 42 U.S.C. § 4332(2)(C). The EIS must “accompany the proposal through the existing agency review processes.” *Id.* This requirement “must . . . be read to indicate a congressional intent that environmental factors, as compiled in the ‘detailed statement,’ be considered through agency review processes.” *Calvert Cliffs Coordinating Committee v. AEC*, 449 F.2d 1109, 1117-18 (D.C. Cir. 1971).

The BLM’s discarding of the ARC-DEIS, followed by the creation of a sanitized DEIS *after* the promulgation of the proposed rule, violates NEPA. The BLM considered neither the ARC-DEIS nor the sanitized DEIS in its development of the proposed rule. The ARC-DEIS was first ignored by the drafters of the proposed rule, then squelched when they realized its findings were adverse to the proposed rule. The sanitized DEIS was a post-hoc rationalization of the proposed rule. Clearly, the BLM has not followed NEPA’s requirement that it take a “hard look” at the environmental consequences of the proposed rule.

I. The Proposed Amendments Would Unreasonably Reduce the BLM’s Authority and Duty to Protect Rangeland Resources

A. Monitoring data should not be prerequisite to determinations regarding conformance with the Fundamentals of Rangeland Health (FRH) and the Standards and Guidelines for Grazing Administration (S&Gs) (§ 4180.2).

B. " \ 2

As stated in the preamble to the proposed rule, “BLM’s current policy is to use all available relevant information, including monitoring data when available” to assess whether existing grazing management practices are failing to achieve the standards and conform with the guidelines for grazing administration. 68 Fed. Reg. at 68,466. This policy is rational and reasonable and should be retained. The proposed rule would change this policy by requiring that all determinations of non-achievement and non-conformance be supported by monitoring data. Under the proposed rule, if monitoring data for a particular allotment have not been collected, are inadequate, or are not applicable to a particular standard or guideline, then the BLM may not find non-achievement of that standard or non-conformance with that guideline, and the corrective action requirement of 43 C.F.R. § 4180.2(c) will not be triggered. In effect, the proposed rule would suspend implementation of the standards and guidelines whenever and wherever monitoring data is missing, incomplete, or inadequate.

The Federal Register notice provides no rationale for this requirement. Moreover, this requirement is based on a misrepresentation of some public scoping comments. This requirement is also irrational, because, for many aspects of the standards and guidelines, monitoring data is neither necessary nor helpful in making determinations of conformance. Most important, this requirement will effectively nullify the standards and guidelines on many grazing allotments, either because the monitoring data being collected does not address compliance with the standards and guidelines or because adequate monitoring is not occurring.

1. Comments advocating increased monitoring should not be interpreted as favoring making monitoring data a prerequisite to conformance determinations.

There is widespread agreement that monitoring data is important and that BLM should increase its monitoring of rangeland conditions. Indeed, the organizations submitting these comments support increasing the scope, intensity, and use of BLM’s rangeland monitoring. However, support for increased monitoring is a far cry from support for the proposition that existing grazing practices should continue, and that implementation of the BLM’s standards and guidelines should be suspended, whenever and wherever monitoring data is missing, incomplete, or inadequate.

A continuation of existing, often destructive, grazing practices is as much of a “determination” and a “decision” as is a change in those practices. Therefore, a concern that “determinations” or “decisions” may lack credibility if not supported by monitoring data does not justify a policy that continues existing practices whenever monitoring data is lacking. In fact, given the fragile nature of some rangelands and the irreversibility of some processes of degradation (such as soil loss, or shifts in vegetative species composition in arid lands), prudence

dictates that very conservative grazing practices be employed wherever existing information is inadequate to establish with confidence whether or not grazing is having unacceptable impacts. The proposed rule, which would lock in existing grazing practices in the absence of adequate monitoring data, is the antithesis of prudent range management.

1. **For many aspects of the standards and guidelines, monitoring data is neither necessary nor helpful in making determinations of conformance.**

Despite the proposed rule's reliance on monitoring data for determinations of conformance with the standards and guidelines, neither the proposed rule nor the DEIS contains any description or discussion of what types of data have been, are, or will be collected through monitoring, or how that data will be used in making such determinations. In fact, the only information about monitoring in either document is the definition of monitoring, carried forward from the existing regulations. Monitoring is defined as follows:

"Monitoring" means the periodic observation and orderly collection of data to evaluate:

- (1) Effects of management actions; and
- (2) Effectiveness of actions in meeting management objectives.

43 C.F.R. § 4100.0-5. From this definition, it is apparent that the only difference between "monitoring" and other forms of assessment is that monitoring involves periodic observations. Nowhere, however, does the proposed rule or the DEIS explain why periodic observations are always necessary to determine whether conditions and practices on an allotment are in conformance with the standards and guidelines. In fact, for many of the standards and guidelines, a requirement for periodic observations is unnecessary or even irrational.

a. **Many guidelines are directly applicable to grazing management practices without requiring rangeland health determinations.**

Many guidelines refer to grazing management *methods and practices* rather than to aspects of rangeland health. (Guidelines are defined as "management *approaches, methods, and practices* that are intended to achieve a standard." ARIZONA STANDARDS FOR RANGELAND HEALTH AND GUIDELINES FOR GRAZING ADMINISTRATION at Appendix 1-4. "Guidelines direct the selection of grazing management *practices*." IDAHO STANDARDS FOR RANGELAND HEALTH AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT at 8.) Monitoring data is neither necessary nor helpful in determining whether existing practices are in conformance with guidelines that refer directly to methods and practices. The following are just a few examples of such standards and guidelines:

- Guideline 6 for Oregon requires the BLM to "[p]rovide periodic rest from grazing for rangeland vegetation during critical growth periods to promote plant vigor,

reproduction and productivity.” If continuous grazing, without rest during critical growth periods, is authorized, then this guideline is violated. Monitoring data are not needed to establish the violation.

- Guideline 5 for the Sierra Front/Northwestern Nevada requires that “[t]reated areas will be rested from livestock grazing for two growing seasons or until seedlings are established or the vegetative response has achieved objective levels.” If grazing is permitted in a treated area immediately after a treatment, then this guideline is violated. Monitoring data are not needed to establish the violation.
- Guideline 10 for Central California provides that “[p]eriods of rest from livestock grazing or other avoidable disturbances should be provided during/after episodic events (e.g., flood, fire, drought) and during critical times of plant growth needed to achieve proper functioning conditions, recovery of vegetation, or desired plant community.” If continuous grazing, with no rest periods, is authorized, then this guideline is violated. Monitoring data are not needed to establish the violation.
- Guideline # 2 for the Butte District in Montana requires that “[p]astures and allotments will be periodically inventoried to determine their relative suitability for livestock grazing.” If such inventories are not conducted, then this guideline is violated. Monitoring data are not needed to establish the violation.
- Guideline # 6 for the Butte District in Montana requires the BLM to “[l]ocate facilities (e.g., corrals, water developments) away from riparian areas and wetlands when possible.” Monitoring data is neither necessary nor helpful in determining whether a facility is near a riparian area or whether it is possible to relocate the facility.

Moreover, some standards and guidelines require that certain data be collected *before* certain types of grazing are authorized. For these standards and guidelines, grazing *without* the collection of the required data is itself a violation. Therefore, to provide, as does the proposed rule, that non-conformance can never be found without the collection of monitoring data, is to nullify such standards and guidelines entirely. Examples of such standards and guidelines include:

- Guideline 2 for Central California allows season-long grazing only if “it has been demonstrated that it can be consistent with achieving a healthy, properly functioning ecosystem.” Authorization of season-long grazing *without* data demonstrating consistency with a healthy, properly functioning ecosystem is a violation of this guideline. Monitoring data are not needed to establish the violation.
- Guidelines 2 and 3 for Central California allow grazing on annual rangelands only when criteria for residual dry matter and standing plant material are met. Authorization of annual grazing *without* data demonstrating that these criteria are

met is a violation of this guideline. Monitoring data are not needed to establish the violation.

a.

Many key aspects of rangeland health can be assessed without periodic observations.

The implicit assumption behind the proposed rule's requirement for monitoring data is that no aspect of rangeland health can ever reliably be assessed without repeated, periodic observations. The proposed rule, however, offers no information or analysis to support that assumption. On the other hand, the BLM has developed, and currently uses, methods for assessing key aspects of rangeland health that do not require repeated, periodic observations. The proposed rule, without offering any analysis or explanation, would effectively prohibit the use of those methods for establishing non-conformance with standards and guidelines.

A critical requirement of virtually every state's standards is that riparian and wetland areas be in properly functioning condition. Recognizing the importance of this requirement, the BLM has developed a systematic process for interdisciplinary (ID) teams to assess whether riparian areas are in properly functioning condition. *See* RIPARIAN AREA MANAGEMENT: PROCESS FOR ASSESSING PROPER FUNCTIONING CONDITION, Technical Reference TR 1737-9 (1993) (hereinafter cited as PFC PROCESS); A USER GUIDE TO ASSESSING PROPER FUNCTIONING CONDITION AND THE SUPPORTING SCIENCE FOR LOTIC AREAS, Technical Reference TR 1737-15 (1998) (hereinafter cited as LOTIC USER GUIDE). *See also* USING AERIAL PHOTOGRAPHS TO ASSESS PROPER FUNCTIONING CONDITION OF RIPARIAN- WETLAND AREAS, Technical Reference TR 1737-12 (Revised 1999).

The process is described in detail in the BLM's LOTIC USER GUIDE, which includes a checklist of items for the ID team to evaluate in determining whether a riparian area is functioning properly. LOTIC USER GUIDE at 59 - 64. The checklist includes such items as stream sinuosity and with/depth ratio, the presence and condition of beaver dams, the age-class distribution, diversity, composition and vigor of riparian vegetation, floodplain characteristics, and the presence and condition of point bars. The guide also includes detailed examples of use of the checklist. *Id.* at 65 - 100. *Evaluation of the items in the checklist does not require repeated, periodic observations.*

In the guide, the BLM concludes:

As long as the procedure is followed and the definitions are understood, the PFC assessment will work for most sites because it was founded from rigorous science (ESI) and is performed by an ID team.

LOTIC USER GUIDE at 25. Most of the items on the checklist are qualitative. However, the guide recognizes that "there will be times when items from the checklist need to be quantified," *id.*, and it provides methods for quantifying each item, *id.* at 25 - 56. *The guide does not suggest, however, that the determination of whether a riparian area is functioning properly requires repeated, periodic observations.*

The guide refers to monitoring, *id* at 23, but it lists monitoring as a process to be instituted *after* functionality has been assessed and management actions have been initiated to restore riparian areas that are not functioning properly, *id* at 21 - 23. *Nowhere does the guide suggest that monitoring should be a prerequisite to the initiation of management actions to restore degraded riparian areas.*

Similarly, assessment of conformance with numerous other standards and guidelines does not require repeated, periodic observations. The following are just a few examples of such standards:

- Colorado’s Standard 1 requires that “[e]xpression of rills [and] soil pedestals is minimal,” that “[c]anopy and ground cover are appropriate,” and that “[u]pland swales have vegetation cover or density greater than that of adjacent uplands.” Assessment of conformance with this standard does not require repeated periodic observations.
- Idaho’s Standard 1 requires that “[e]vidence of accelerated erosion in the form of rills and/or gullies, erosional pedestals, flow patterns, physical soil crusts/surface sealing, and compaction layers below the soil surface is minimal for soil type and landform.” Assessment of conformance with this standard does not require repeated periodic observations.
- Central California’s Standard for Species requires that “[a] variety of age classes are present for most perennial plant species.” Assessment of conformance with this standard does not require repeated periodic observations.
- Standard 5 for the Sierra Front/Northwestern Nevada requires that “[h]abitat areas are large enough to support viable populations of special status species.” Assessment of conformance with this standard does not require repeated periodic observations.

a. **Periodic observations are not always necessary, or even helpful, in determining the causes of, or the solutions to, rangeland degradation.**

Monitoring is an important method for tracking the effects of management actions. *See* 43 C.F.R. § 4100.0-5) (defining monitoring as a method for evaluating the effects of management actions). But monitoring is not always necessary, or even helpful, in determining whether action is necessary in the first place. Specifically, where existing rangeland practices have been in place for many years or decades, repeated measurements of the same parameters, without changes in those practices, are unlikely to be helpful in determining whether livestock grazing is the cause of existing unsatisfactory conditions, or whether changes in grazing practices will alleviate such conditions. As indicated in the DEIS, most rangeland trends in the western United States are static. This is not surprising; one would not expect much change to be occurring where the same practices have been in place for many decades. The important question is whether unsatisfactory conditions would be alleviated by changes in those practices.

There are numerous tools for answering that question, but measuring the same things over and over, while continuing the same practices, will not provide the answer.

Riparian areas in unsatisfactory condition provide an instructive example. If, after being grazed for over a century, a riparian area is found to be not functioning properly in 2004, then continuing the same grazing practices and finding, again, that it is not functioning properly in 2005, 2010, or 2020, will not tell one what has caused it to be non-functioning, or whether it would have improved had management been changed. There are, however, methods for predicting whether a change in management would bring about improvement:

- One could observe whether other riparian areas that are geographically, edaphically, and climatically similar, but are not grazed by livestock, or where livestock are managed differently, are in better condition. *See, e.g., National Wildlife Federation v. Bureau of Land Management*, No. UT-06-91-1, at 12 - 15 (U.S. Dep't of the Interior, Office of Hearings and Appeals, Hearings Div.) (Dec. 20, 1993) (comparing riparian areas in grazed and ungrazed canyons in southeast Utah).
- One could observe whether exclusion of livestock or a change in grazing management has brought about improvement in riparian conditions in other riparian areas that are geographically, edaphically, and climatically similar. *See, e.g., UNITED STATES GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: SOME RIPARIAN AREAS RESTORED BUT WIDESPREAD IMPROVEMENT WILL BE SLOW*, GAO/RCED-88-105 (1988) (providing examples of riparian improvement after exclusion or limitation of grazing) ; ED CHANEY, WAYNE ELMORE, AND WILLIAM S. PLATTS, *LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS* (U.S. Environmental Protection Agency, 1990) ((providing examples of riparian improvement after exclusion or limitation of grazing); William S. Platts and Fred J. Wagstaff, *Fencing to control livestock grazing on riparian habitats along streams: Is it a viable alternative?* 4 NORTH AMERICAN JOURNAL OF FISHERIES MANAGEMENT 266-272 (1984) (showing that, in the overwhelming majority of documented cases, exclusion of livestock has led to significant improvement in degraded riparian areas).
- One could exclude or limit livestock grazing management in all or part of the riparian area and monitor the effects of this management change (an option precluded by the proposed rule, which would require monitoring *before* changing management).

BLM personnel are well aware of these scientifically rational methods for choosing management options based on research and experience. That is why the DEIS is able to state, at page 3-27: “When disturbance factors are managed, most stream-riparian systems begin a relatively rapid recovery.”

However, by making the collection of monitoring data a prerequisite to management changes, the proposed rule precludes use of the vast base of available knowledge and experience

and relegates the BLM to an endless cycle of data-collecting that will not answer the questions, nor resolve the conflicts, that the agency faces.

1. **Most aspects of the standards and guidelines are not addressed by the monitoring data that the BLM collects.**

Regardless of the theoretical utility of monitoring data, the simple fact is that *the vast majority of the rangeland parameters addressed by the standards and guidelines are not monitored by the BLM.* Therefore, *requiring monitoring data as a prerequisite to determinations of non-conformance with the standards and guidelines is tantamount to an indefinite suspension of implementation of the standards and guidelines.*

Besides counting livestock numbers and measuring precipitation, BLM monitoring usually consists of measuring (1) forage utilization, and (2) trend in vegetative species composition. See BLM MANUAL, ch. H-4400-1; E. Lamar Smith, *Use of Inventory and Monitoring Data for Range Management Purposes*, in NATIONAL RESEARCH COUNCIL/NATIONAL ACADEMY OF SCIENCES, DEVELOPING STRATEGIES FOR RANGELAND MANAGEMENT 809 (1984); Joseph M. Feller, *What is Wrong With the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO LAW REVIEW 555, 578 (1994); Joseph M. Feller and David E. Brown, *From Old-Growth Forests to Old-Growth Grasslands: Managing Rangelands for Structure and Function*, 42 ARIZONA LAW REVIEW 319, 329 (2000). Sometimes monitoring also includes measurements of ground cover. But measurements of this very small set of parameters do not even begin to capture the much larger range of variables involved in rangeland health. See Feller, 30 IDAHO LAW REVIEW at 579; Feller and Brown, 42 ARIZONA LAW REVIEW at 329 - 335. The following is just a sampling of the enormous number of variables that are affected by livestock grazing, and that are integral to the standards and guidelines, but that are not monitored by the BLM.

Variables related to riparian conditions:

- stream sinuosity
- stream width
- stream bank stability
- stream bank trampling
- stream shading
- water temperature
- age-class distributions of riparian vegetation
- presence of large woody material

Variables related to soils and watersheds:

- soil compaction
- soil permeability
- rates of soil erosion
- abundance of rills and gullies
- abundance of water flow patterns, pedestals, and terraces
- numbers and types of soil microorganisms

All of these variables, and more, have been identified by the BLM as important indicators of rangeland health. *See* INTERPRETING INDICATORS OF RANGELAND HEALTH, Technical Reference 1734-6 (Version 3, 2000); A USER GUIDE TO ASSESSING PROPER FUNCTIONING CONDITION AND THE SUPPORTING SCIENCE FOR LOTIC AREAS, Technical Reference TR 1737-15 (1998). But *none* of them are included in the BLM's monitoring data. Therefore, by requiring that determinations of non-conformance with the standards and guidelines be based on monitoring data, the BLM is rendering most aspects of the standards and guidelines unenforceable.

The Interior Department's Office of Hearings and Appeals has determined that the BLM violates the multiple-use mandate of FLPMA when it artificially restricts its management options by requiring that management decisions be based on monitoring data. In *National Wildlife Federation v. Bureau of Land Management*, No. UT-06-91-1 (U.S. Dep't of the Interior, Office of Hearings and Appeals, Hearings Div.) (Dec. 20, 1993), Chief District Administrative Law Judge John Rampton wrote:

BLM's failure to adequately consider many factors other than range utilization and trend data when setting stocking rates violates FLPMA's mandate to protect the full spectrum of environmental, ecological, cultural, and recreational values.

The proposed rule would reinstate a requirement that Judge Rampton found unlawful over a decade ago.

1. **On most grazing allotments, the BLM does not collect adequate monitoring data, nor is it likely to do so in the foreseeable future.**

Another reason that the proposed rule's monitoring requirement constitutes a *de facto* suspension of the standards and guidelines is that the BLM does not have adequate resources to perform the requisite monitoring. The BLM's experience with monitoring requirements demonstrates that the BLM is not able to collect even the utilization and trend data required by its current policies, let alone perform the vastly expanded monitoring that the proposed rule would require.

At least as early as 1983, BLM employees began expressing and documenting concerns about the agency's inability to perform monitoring. That year, during a review of its range program, the Idaho BLM noted that "[c]oncern was expressed that, given a decreasing budget strategy, BLM may not have the capability to follow up with necessary monitoring responsibilities." Idaho State BLM Office, "Evaluation Report – Range Program," p. 2 (May 1983). The report went on to state:

There is inadequate personnel to meet monitoring commitments made in grazing decisions, cooperative agreements, and planning documents.

. . .

A common feeling among the districts was that monitoring is being used as an excuse for delaying decisions and establishing carrying capacities.

Id., Worksheet 1-8.

The following year, the BLM State office in Utah conducted a special evaluation of its monitoring program and reached similar conclusions:

Funding and personnel simply are not available to do intensive monitoring on all allotments.

Utah State BLM Office, "Special Evaluation Report - Utah Statewide Rangeland Monitoring Evaluation," Worksheet II-1 (Dec. 14, 1984) (hereinafter "Utah Statewide Evaluation").

The four basic studies (trend, utilization, actual use and climate) are not being accomplished on all allotments with serious resource conflicts (high priority allotments). As a result there will not be enough data upon which to base management decisions.

Id., Worksheet IV-1, p.1. *See also id.*, Worksheet II-1 ("The current monitoring level does not provide data . . . which will be needed to support management decisions for changes in grazing use.")

Moreover, the Utah report noted that few monitoring plans have "integrated range, wildlife, and watershed monitoring objectives." *Id.*, Worksheet III-1. As a result, "monitoring studies that are being done will only answer part of the questions needed to resolve management problems or issues." *Id.*, Worksheet III-5.

A 1986 analysis of the Idaho BLM's range program explicitly and comprehensively criticized the program's implementation:

Monitoring has not always received the priority necessary to support grazing adjustment decisions and in turn assuring time schedules for adjustments are met.

. . . Districts question whether the monitoring data gathered can really be used to support grazing adjustments.

Even though there is clear understanding of the basic five-year adjustment implementation requirements, grazing decisions to consummate those adjustments are written in a manner that accommodates indefinite delays.

Grazing use adjustments are not occurring timely in the areas reviewed. They have occurred on only about 5 percent of the allotments. Of those, most were upward adjustments where little or no conflict could be expected.

Idaho State BLM, "Special Evaluation Report -- Range Management Program Summary Review," p. 2 (July 22, 1986).

Similar concerns were expressed at the national level. From February through August, 1986, the Bureau's Washington Office conducted a Bureauwide review of the monitoring program in order to "provide management with information about the effectiveness of renewable

resource monitoring.” BLM, Draft Program Evaluation Report, “Bureauwide Renewable Resources Monitoring,” p. 1 (August 1986) (hereinafter “Monitoring Evaluation Report”). The topics addressed in the review were identified by means of a comprehensive questionnaire. *Id.* at 4. According to Appendix II of the Monitoring Evaluation Report, entitled “Summary of the Renewable Resources Monitoring Evaluation Questionnaire”:

The principal finding is that the majority of the managers and renewable resource program specialists in the field do not believe that the overall WO [Washington Office] monitoring policy is achievable or that the quality control process is effective.

Indeed, “only 26% of the respondents [to the questionnaire] felt the WO policy for renewable resources monitoring was achievable.” Monitoring Evaluation Report, p. 4. The “main reason was due to reductions of funds and staff.” *Id.* Specifically, 70% of the respondents to the questionnaire stated that staffing was inadequate to achieve the policy while 80% said that funding was inadequate. *Id.*, Appendix II, p. 3. Numerous other inadequacies of the monitoring program were also identified. For example, “some field personnel expressed concern that monitoring data was [sic] inadequate to issue decisions within a five year time frame.” *Id.*, p. 7. Employees also felt quality control was not adequate. *Id.* Moreover, “in some Resource Areas monitoring is not being accomplished in all allotments where decisions or actions need to be made in the allotted (5 year) time frame.” *Id.*, Worksheet No. 2.

According to a 1992 report by the United States General Accounting Office, no monitoring had been conducted on half of all BLM grazing allotments where monitoring was required by land use plans. RANGELAND MANAGEMENT: INTERIOR’S MONITORING HAS FALLEN SHORT OF AGENCY REQUIREMENTS, GAO/RCED-92-51, at 4 (1992). On another 20 percent of allotments, only utilization or only trend data had been collected. *Id.* at 40. On only about 30 percent of allotments had both utilization and trend data been collected. *Id.* Further, on the majority of allotments where monitoring had been performed, the data had never been analyzed to determine if it indicated a need for changes in livestock numbers or other aspects of grazing management. *Id.* at 4.

On the majority of allotments where monitoring was not performed or where monitoring data was collected but never analyzed, BLM range managers cited lack of staff, and staff commitment to higher-priority work, as major reasons for the lack of monitoring and analysis. *Id.* at 19-20, 25. Over 40 percent of BLM range managers described their staffs and budgets as “very inadequate” to perform range monitoring and another 40 percent described them as “somewhat inadequate.” *Id.* at 39. Less than 10 percent considered their resources adequate. *Id.*

The situation has not improved since the GAO report was published in 1992. In fact, given recent budget deficits, personnel cutbacks, and increasing demands on the BLM, there is every reason to believe that the BLM is falling even farther behind on monitoring.

A recent decision from the BLM’s Winnemucca, Nevada, Field Office (WFO) confirms that the BLM lacks the resources to perform the expanded monitoring that the proposed rule would require. In response to a protest alleging that the BLM had failed to conduct necessary

baseline studies and inventories for special status plant and animal species and important native wildlife, the BLM responded:

BLM staff and budget at the WFO is limited, and workloads and priorities change with issues and management decisions. Changes in personnel also impact the work accomplished and the continuity of planning, objectives, inventories, monitoring, fieldwork, and their final products.

At the WFO we depend on assistance and coordination with the U.S. Fish and Wildlife Service and other Federal agencies, the Nevada Department of Wildlife and other state agencies, the Nevada Natural Heritage Program, colleges and universities, and private individuals to document studies, inventories, and monitoring on special status plant and animal species and important native wildlife

Bureau of Land Management, Winnemucca Field Office, CHD/WPP Protest Points Submitted on July 3, 2002 and Additional Protest Points Submitted on July 10, 2003, at 6 (October 15, 2003). In response to a protest that the BLM had failed to perform current and adequate PFC assessments for streams on a grazing allotment, the BLM responded:

The BLM does not have adequate staffing or funding to conduct annual comprehensive PFC assessments, and nothing in the applicable law requires BLM to do so. The WFO administers 102 grazing allotments that contain approximately 894 miles of lotic streams and 15,000 acres of lentic habitats. The initial PFC assessments were conducted in 1998 for the PMA [Paiute Meadows Allotment, which contains existing and potential habitat for Lahontan cutthroat trout, a threatened species]. The WFO attempts to reassess functionality prior to allot evaluations/re-evaluations but this is not always possible. Reassessments are conducted each year on approximately 10 percent of the streams. At this rate, each stream should be reassessed once every 10 years.

Id. at 4. With PFC reassessments occurring only once per decade, it would take 20 years to perform even a pair of the “periodic observations” required by the proposed rule as a prerequisite to determinations of non-conformance with the standards and guidelines.

Given the flat budgets, as well as the increasing competing demands on BLM resources, projected by the DEIS (page 4-5), there is virtually no chance that the BLM will even come close to performing the vastly expanded monitoring that would be required to implement the standards and guidelines under the proposed rule in the foreseeable future. Therefore, the proposed rule is tantamount to an indefinite suspension of the standards and guidelines.

1. **The DEIS does not adequately assess the impacts of making monitoring data a prerequisite to determinations regarding rangeland health.**

The proposed rule will prevent corrective action from being taken with respect to any

aspect of the standards and guidelines for which the BLM lacks adequate monitoring data. In order to assess the impact of the proposed rule, therefore, the following information is required *for each parameter implicated in the standards and guidelines*:

- i. On how many, and which, grazing allotments is monitoring data currently unavailable with respect to each parameter?
- ii. Where monitoring data is unavailable for a parameter, what resources would be required to collect such data?
- iii. What is the likelihood that such resources will become available?
- iv. When, if ever, will such data be collected and how long will it take?
- v. On which allotments, for how long, and with respect to which parameters, will standards and guidelines go unimplemented because of a lack of monitoring data?
- vi. What will be the extent of resource degradation and loss resulting from failures to implement standards and guidelines because of a lack of monitoring data?.

As discussed above, it is likely that the answer to the first question is that monitoring data is currently unavailable on almost all allotments for *every* parameter except forage utilization, trend in vegetative composition, and possibly ground cover, because these are the only parameters that BLM monitors. It is also likely, given limited budgets and personnel, that the answer to the third question is “slim to none” and the answer to the fourth question is “never” on most allotments.

But in its accounting of the environmental consequences of the proposed action, the DEIS provides no information at all on these questions. There is no accounting of what variables currently are being monitored, what additional variables would require monitoring in order to implement the proposed rule, the likelihood that such vastly expanded monitoring will ever occur, or how long it will take. The DEIS acknowledges, in a single sentence, that the monitoring requirement would impose “additional workload and costs” on the BLM (page 4-18), but it provides no assessment of the magnitude of the burden, the likelihood that the burden will actually be met, or the consequences if it is not. The DEIS states that “BLM would need to find alternative means of collecting monitoring data, and would reprioritize other tasks” (page 4-18), but it gives no hint as to what those “alternative means” might be, what “other tasks” will be “reprioritized,” or what the environmental consequences of such reprioritization will be. Elsewhere, the DEIS indicates that increased monitoring of “low priority areas” will result in “less management emphasis on high-priority areas” (page 4-23), but it fails to give any accounting of the nature, extent, or environmental consequences of the reduction in management emphasis on high priority areas.

In its analysis of the environmental consequences of Alternative Three, the DEIS gives a backhanded acknowledgment that the proposed rule will be harmful to riparian areas and to wildlife. The DEIS admits that Alternative Three, which does not impose the requirement for

monitoring data “would be beneficial to riparian soil resources” because it would allow “[a]n accelerated implementation of management changes [that] would result in more rapid improvement in resource condition” (page 4-41). It also admits that omitting the monitoring requirement would benefit special status species and other wildlife because it “would enhance BLM’s ability to take corrective action at the earliest date within existing funding and staffing capability” (pages 4-42, 4-43). But the DEIS refuses to acknowledge the converse, namely, that the proposed action would be harmful to riparian areas and to wildlife because it would delay or prevent the needed management changes. In fact, the sections on the environmental consequences of the proposed action on wildlife (4.3.7) and special status species (4.3.8) make no mention at all of the effects of the monitoring requirement.

A. Delaying remedial action as proposed is unjustifiable.

B. " \ 2

C. Congress, the courts and BLM itself have long recognized that many areas of the public lands are in unacceptable condition, suffering from past and, in many cases, ongoing grazing abuse. *See, e.g.*, FLPMA, 43 U.S.C. § 1751 (b); PRIA, *id.*, § 1901(a)(1); *NRDC v. Hodel*, 618 F.Supp. at 855-858; Range Reform ’94 DEIS at 3-18, 3-20, 3-33; Rangeland Reform ’94 Final Environmental Impact Statement at 26. In adopting the current rules, the Interior Department and BLM were motivated by the overarching need to protect the public’s lands and their resources. *See* 60 Fed. Reg. at 9906-9908. Accordingly, they explicitly sought to ensure that actions necessary to protect resources from grazing damage or to restore degraded conditions were identified and implemented in a timely manner.

D.

E. The imperative that motivated the Department and the BLM 10 years ago is no less pressing today. It has now been almost 30 years since Congress, in FLPMA, recognized the need to improve range conditions, and more than 25 years since it acknowledged in PRIA the breadth of the damage grazing had done. *See, e.g.*, 43 U.S.C. § § 1751 (b), 1701(c). However, rather than seeking to ensure that remedial actions are promptly identified and promptly taken, the proposed rules seek to shield permittees from the consequences of the damage caused by their livestock at the expense of the environment.

F.

1. The proposed 5-year phase in period is unjustifiable (§ 4110.3-3).

The BLM has proposed to require that reductions in grazing use be phased in over five years. This requirement was previously included in the grazing rules pursuant to a rulemaking carried out by then-Interior Secretary James Watt. For more than two decades, this requirement tied the hands of BLM officials with respect to livestock numbers – “the major factor affecting degradation” of the public’s range resources. R.D. Pieper and R.K. Heitschmidt, *Is Short-Duration Grazing the Answer?* 43 JOURNAL OF SOIL AND WATER CONSERVATION 133-137 (1988) (emphasis added). As the BLM has previously acknowledged, during the years when this requirement was in effect it was a major obstacle to improved resource conditions:

Although that provision may, in the short term, mitigate some of the adverse

effects on permittees and lessees, it has inhibited responsive actions in situations where reductions in use are most needed.

59 Fed. Reg. at 14,324 (emphasis added). The BLM cannot simply ignore this conclusion, based as it was on extensive agency experience with the rule now being proposed. The Draft EIS' claim (at page 4-23) that this phase in period will not have “substantially different effects” than a shorter time period is unsupported by any analysis, contrary to the agency’s past experience, and is, in any case, unsupportable: indeed, elsewhere the possibility that adoption of this proposal will have significant adverse impacts is hinted at – although no real analysis is provided. *See* Draft EIS at 2-28 (“potential to negatively affect plants and wildlife”), 4-29 (“potential to adversely affect numerous at-risk species”); 4-32 (may “delay needed long-term improvements in rangeland conditions”). In lieu of conducting any real analysis, the draft summarily asserts that a) there are few instances in which reductions exceed ten percent and b) where changes are needed immediately, they can be accomplished through cooperation or emergency closure. The former assertion simply ignores the central role that livestock numbers play in range degradation and, accordingly, the potential impacts that imposing a new and significant barrier in the way of reductions of ten percent and more may have. The latter assertion, as discussed below, is plainly false.

The BLM has simply ignored the possibility that, on many allotments, significant resource damage could result from adopting this and other proposed changes. Consider the following scenario: the BLM has scheduled the first range health evaluation for allotment X in 2005. The evaluation is postponed for four years to obtain monitoring data per proposed § 4180.2(c) and prior practice. Assuming two years for the evaluation, a decision that the standards are not being met on the allotment as the result of current grazing practices, including excessive numbers, is made in 2012 and, 24 months later, *id.*, in 2014, an 11 % reduction is imposed. The permittee appeals and, two years later, the Interior Board of Land Appeals issues a decision upholding the BLM’s decision. In 2016, the phase in begins and, in 2020, the number of livestock grazing the allotment finally reaches the level that can be sustained over time without resource damage – for a total of 15 years under this new approach. Ecosystems like the Great Basin, *see, e.g.,* BLM, *Out of Ashes* (1999) and *Healing the Land* (2000), and the deserts of the Southwest, *see* U.S. General Accounting Office, *Rangeland Management: BLM’s Hot Desert Grazing Program Merits Reconsideration* (GAO/RCED-92-12 (1991), as well as species like the Gunnison and greater sage grouse, Draft EIS at 3-34, are already imperiled and would suffer greatly under this scenario. This result cannot be squared with the asserted need “to make timely and effective grazing decisions” with respect to such species. *Id.*¹

Moreover, neither of the reasons offered by the Bureau for proposing this change can

¹ The Draft EIS’s complaints about the complexity of management attributable to endangered and threatened species and the dramatic increase in numbers of such species on public lands overlooks the role of grazing in species imperilment. *See, e.g., The Wilderness Society and Environmental Defense Fund, Taxpayers’ Double Burden – Federal Resource Subsidies and Endangered Species* (1993), p. 10 (grazing contributes to endangerment of 19 to 22% of listed species).

withstand scrutiny. First, the BLM alleges, the phase-in is needed to allow ranchers time for gradual operational adjustments. 68 Fed. Reg. at 78,460. This claim ignores the fact that typically such decisions are preceded by years of review and consultation – as the scenario set out above illustrates. Second, the claim is made that the phase-in period “allows for ongoing monitoring in order to determine whether the initial decision needs to be adjusted.” *Id.* However, as discussed elsewhere in these comments, the BLM does not have funding or staff to do “ongoing monitoring.” Accordingly, this assertion simply confirms the BLM’s reluctance to impose reductions and the arbitrary commitment of its current leaders to maintaining the status quo for livestock.

Furthermore, in proposing the mandatory 5-year phase-in, the BLM has ignored the fact that, on many allotments, actual use is perpetually and substantially less than permitted use (or “active preference” as the BLM now proposes to call it.). *See* Draft EIS at Tables 3.16.1, 3.16.2. Therefore, in many instances, a decrease in permitted use will result in a much smaller decrease – or no decrease at all – in actual use. In these instances, under the proposed rule only “paper cows” will be removed during some or all of the 5-year phase-in period, with no reduction in actual use and no alleviation of grazing impacts. If the BLM insists on requiring a phase-in period, it should be required only when permitted use is decreased below levels of *actual use* in recent years. Reductions in “paper cows” should not require a phase-in period.

1. **The provision for emergency closures does not cure the problems created by the 5-year phase-in period (§ 4110.3-3).**

The BLM cannot accurately claim that the provision authorizing emergency closures cures any problems that would otherwise result from the required phase-in period. *See, e.g.*, Draft EIS at 4-28. Proposed § 4110.3-3(b) would allow BLM to require an immediate reduction greater than ten percent (after consultation with permittees and the state, but not the public) only under two strictly limited conditions. The first deals with an emergency caused by other than livestock, such as drought or fire. As such, it provides BLM with no authority to halt harmful grazing.² The second involves a situation in which “[c]ontinued grazing poses an imminent likelihood of significant resource damage.” This kind of emergency is very different than a situation involving ongoing grazing mis-management, especially where it is longstanding.

Where abusive grazing is ongoing and of extended duration, significant resource damage to many resources will already have occurred and, although range health standards are being violated, in many if not most cases, it will be very difficult to prove such violations constitute “an imminent likelihood of significant resource damage.” In reality, BLM rarely exercises its emergency authority (cases of fire being the exception) and we have been unable to document any instance in which it has done so in response to a grazing-caused violation of range health standards. None is provided in the draft EIS, which provides no empirical or other information in support of this claim and no genuine analysis of likely impacts. No matter how large the

² If an allotment is not meeting applicable standards and guidelines (or the fundamentals of rangeland health) because of livestock grazing practices, then, by definition, the problem was *not* caused by drought, fire, flood, or insect infestation.

reduction needed, if there is no emergency, the BLM will be required to delay addressing the major causal factor responsible for the range degradation. And, as discussed immediately below, the five-year phase in is not the only delay the BLM proposes to provide.

1. **Delaying remedial action when standards are being violated is unjustifiable (§ 4180.2).**

2. " \ 3

3. The current grazing regulations direct that, once the BLM has determined that existing grazing practices are preventing or impeding compliance with applicable standards (whether fundamentals of rangeland health or the state/regional standards and guidelines), it must take “appropriate action” before the next grazing year. 43 C.F.R. §§ 4180.1, 4180.2(c). “Appropriate action” is broadly defined to give the BLM a range of management options, *see id.* § 4180.2(c), but inaction is not an option. The fundamentals of rangeland health and the range health standards were the centerpiece of Range Reform ’94 and the requirement for prompt action was the key to their overall goal – to “preserve currently healthy rangelands and restore healthy conditions to those areas that currently are not functioning properly....” 60 Fed. Reg. at 9898. In its press materials announcing the publication of these proposed rules, the BLM alleged that it was not altering that part of the current rules. *See* BLM, News, “QUESTIONS AND ANSWERS re: the Proposed Grazing Rule of the Bureau of Land Management,” p. 3. In truth, this rulemaking would severely undermine Rangeland Health Standards in two separate ways: 1) by extending the deadline for taking remedial action, discussed below and 2) by imposing a monitoring requirement in connection with evaluations of range health stands discussed elsewhere in these comments.

4.

5. The BLM asserts that the proposed delay is needed because the existing one year “timeframe has proven to be too short in many instances, especially given that NEPA and other environmental laws ... must be satisfied before a decision is made...,” Draft EIS at 1-13, along with consultation, cooperation and coordination requirements, *id.* This purported explanation ignores the obvious: BLM is in control of its own scheduling and time lines. The BLM for example can always call a halt to consultation. Even more importantly, there clearly are other alternatives to granting a blanket extension of the existing deadline – although the Bureau appears not to have considered any other option but the one proposed. For example, the BLM could include in the rules a provision for an extension of the existing deadline, upon the State Director’s determination that the manager requesting one had done all s/he reasonably could have been expected to do to comply (*i.e.*, that there was no effort to delay the decision). Additionally, the BLM could explore streamlining the existing process in order to comply with the existing deadline. Rather than continue to conduct and complete the evaluation, make a determination and then initiate the NEPA process seriatim as is

now done, the BLM could examine whether some or all of these steps could be combined to save time and permit the existing deadline to be met.

6.

7.

Not only did the BLM fail to consider any alternatives to the proposed delay, its evaluation of the impacts of this change was, to be blunt, shoddy and lacking in documentation of the alleged problems referred to above. Rather than try to predict the impacts of excusing prompt action on the thousands of allotments for which the BLM has yet to determine whether the range health standards have been met, the draft EIS simply presents unsupported conclusions and allegations. For example, readers are told that allowing 24 months for a decision to be made “would have little or no adverse short term effect on upland soil resources and could have a positive long-term effect if it allows more time for developing a comprehensive plan...” Draft EIS at 4-26. The possibility of negative long-term effects is simply ignored. Similarly, readers are not provided with documentation of the alleged need for extending the deadline or with any information about the BLM’s progress in carrying out range health evaluations. No information has been provided regarding how BLM prioritized the allotments that have been evaluated and that required management changes. Readers are not told the number of cases in which the deadline was met or the number in which it was not met. Was there any substantive difference between the decisions made within the specified time period and those that took longer? What was the average length of additional time needed? The shortest and longest periods? What happened in the cases of delay? *E.g.*, was the delay challenged and, if so, by whom? And, with regard to allotments that have yet to be evaluated, how many are there? How have they been prioritized? When will their evaluations be completed?

8.

9.

The history of range management since 1934 and the conditions of our public lands attest to the urgent need for a clear, short deadline for taking action to alter grazing practices that have been determined to be detrimental to rangeland health. In the absence of a required deadline, it was the rare BLM manager who acted expeditiously to decide that alterations in management practices are necessary. *See, e.g.*, Joseph M. Feller, *Back to the Present: The Supreme Court Refuses to Move Public Range Law Backward, but Will the BLM Move Public Range Management Forward?*, 31 ENV. L. REP. 10021 (2001) (hereinafter “Feller, *Back to the Present*”); UNITED STATES GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: SOME RIPARIAN AREAS RESTORED BUT WIDESPREAD IMPROVEMENT WILL BE SLOW, GAO/RCED-88-105 (1988). Under the Taylor Grazing Act and FLPMA, grazing on public lands is allowed only to the extent, and only in the manner, that it is explicitly authorized by the BLM. The BLM is therefore responsible for ensuring that any authorized grazing is compatible with maintenance of rangeland health, but the agency has yet to evaluate thousands of allotments have yet to be

evaluated for compliance with applicable standards and guidelines. For the BLM to sanction the continuation of grazing practices that it has determined are incompatible with rangeland health, without documentation of the alleged need for delay, consideration of any alternatives, or serious analysis of impacts, is irresponsible and unlawful.

10.

B.

The Fundamentals of Rangeland Health Should Not Be Suspended Where Standards and Guidelines Have Been Established (§ 4180.1).

Current regulations require that BLM take corrective action whenever it determines that existing grazing practices are causing violations of *either* the fundamentals of rangeland health (FRH) *or* the standards and guidelines for grazing administration (S&Gs). 43 C.F.R. §§ 4180.1, 4180.2(c). The proposed rule would substantially weaken this requirement by rendering the FRH unenforceable wherever S&Gs are in place. This weakening of the regulations is unjustified and would nullify critical requirements of the FRH. Moreover, the draft environmental impact statement completely fails to assess the environmental consequences of this weakening of the regulations.

1.

The fundamentals of rangeland health are a key component of Rangeland Reform, not merely a temporary stand-in for standards and guidelines.

As their name suggests, and as stated in the proposed rule, the FRH “were identified as the basic components of rangeland health and were intended to serve as overarching principles to be *supplemented* by the standards and guidelines.” 68 Fed. Reg. 68,466 (emphasis added). It was never intended that the FRH would be *replaced* by the S&Gs. The S&Gs were all promulgated with the knowledge and understanding that the FRH would remain in place, remain enforceable, and fill any gaps in resource protection not covered by the S&Gs. Since the S&Gs were not designed to replace the FRH, the drafters of the S&Gs were under no obligation to ensure that the S&Gs provided all of the resource protections included in the FRH. The proposed rule, by rendering the FRH unenforceable wherever S&Gs are in place, would remove the foundation block of the existing regulations, undermining the understanding under which the S&Gs were drafted.

The proposed rule confuses the FRH with the “fallback” standards set out in 43 C.F.R. § 4180.2(f)(1). The fallback standards *were* designed as a temporary stand-ins for S&Gs, which is why the regulations provide that they are enforceable only where S&Gs are not in place. But the FRH are much different than the fallback standards. The FRH are more detailed, more stringent, and cover a broader range of resources than the fallback standards. *Compare* 43 C.F.R. §§ 4180.1(a)-(d) *with* 43 C.F.R. §§ 4180.2(f)(1)(i)-(iv). Rendering the FRH unenforceable wherever S&Gs are in place would constitute a substantial rollback of resource protection.

1.

The fundamentals of rangeland health include critical requirements that are not included in all standards and guidelines.

Rendering the FRH unenforceable would create substantial gaps in resource protection that are not filled by the S&Gs. For example, the FRH provide that watersheds, including their upland, riparian-wetland, and aquatic components must be in, or making significant progress toward, properly functioning physical condition. 43 C.F.R. § 4180.1(a). The regulations, however, do not mandate that the S&Gs include this requirement; the S&Gs need only “address” watershed function. *Id.* § 4180.2(d)(1). The standards currently in place for Arizona, California, Colorado, Oregon, and Utah require that riparian-wetland areas be in properly functioning condition, but contain no parallel requirement for either upland or aquatic areas. The standards for Wyoming and for the Mojave/Southern Great Basin Area in Nevada do not require that either upland, riparian, or aquatic components of watersheds be in properly functioning condition.

3. The DEIS does not assess the impacts of making the fundamentals of rangeland health unenforceable wherever standards and guidelines have been established.

The preceding paragraph gives just one example of how the proposed rule’s effective repeal of the FRH would substantially weaken the BLM’s regulations’ protection of rangeland resources. It is the responsibility of the BLM, in the EIS accompanying the regulations, to perform a comprehensive analysis of the environmental impacts of rendering the FRH unenforceable wherever S&Gs are in place. The BLM must carefully compare each state or region’s S&Gs with the FRH to establish a complete list of all instances in which the S&Gs are weaker, or provide less coverage, than the FRH. The BLM must then analyze the environmental consequences of each weakening or reduction in resource protection.

The DEIS contains no such analysis of the effects of proposed rule regarding the FRH. In fact, the DEIS contains *no information or analysis at all* related to the environmental consequences of effectively repealing the FRH. The DEIS is therefore grossly inadequate and must be revised.

A. The BLM Should Not Eliminate Permit Terms Disclosing the Requirement for Reasonable Administrative Access Across Private Land (43 C.F.R. § 4130.3-2(h)).

The proposed regulations would remove from 43 C.F. R. § 4130.3-2 the provision in subsection (h) that a permit or lease may include “[a] statement disclosing the requirement that the permittee or lessee shall provide reasonable administrative access across private and leased lands to the Bureau of Land Management for the orderly management and protection of the public lands.” BLM’s justification for removing this provision is that “[t]here is no need to disclose on the permit or lease the requirement that the permittee or lessee provide administrative access to BLM.” 68 Fed. Reg. 68452, 68,461 (Dec. 8, 2003). BLM argues that this provision is unnecessary because in 1999 the Interior Board of Land Appeals (“IBLA”) held that administrative access is “an implied condition of a grazing permit whenever administrative access is necessary in order for BLM to carry out its statutory responsibilities on the public lands.” 68 Fed. Reg. at 68,461. The BLM cites an unreported IBLA decision, *High Island Ranch and Frank Robbins v. Bureau of Land Management*, IBLA 98-180; 98-404 (Nov. 20, 1998).

We object to removing section 4130.3-2(h). Despite the BLM’s assurance, the IBLA’s order in *High Island Ranch* may not be sufficiently clear to put all permittees on notice of the BLM’s right of administrative access. In *High Island Ranch*, the IBLA explained, based on a “careful review of the procedural background of this case,” that “BLM is authorized reasonable administrative access across Appellant’s private and lease lands necessary for the orderly management and protection of the public lands.” *High Island Ranch*, IBLA 98-180 at 1. The Board did not further explain its reasoning, or make clear that its holding was applicable to all BLM grazing permits and leases.

In an order six months later in a related case, *HD Ranch & Frank Robbins, Jr.*, IBLA 99-279 (May 20, 1999), the Board referred back to *High Island Ranch*. In *HD Ranch*, the Board concluded the appellants were “properly required to accede to reasonable provisions to allow the Government to monitor” the exercise of the privilege of grazing on the public lands. *HD Ranch*, IBLA 99-279 at 4. The Board specifically cited § 4130.3-2(h) – which BLM now proposes to eliminate – as evidence of the requirement to allow access. The Board held that administrative access could be required, and that the provision in the permit authorized by § 4130.3-2(h) was appropriate. Eliminating § 4130.3-2(h) could be seen as undermining the Board’s reasoning in *HD Ranch* and could create confusion regarding the BLM’s right of access across private land.

Assuming, as the BLM does, that an access requirement is an implied condition of all permits, there is no sound reason for deleting section 4130.3-2(h). That section serves to put permittees on notice as to the access requirement and eliminate any doubt as to its existence. Deleting it will only lead to confusion and conflict as permittees deny, or claim that they are unaware of, the requirement. In fact, the best course of action would be for BLM to amend the regulations to make disclosure of the access requirement a *mandatory* term of *all* grazing permits and leases.

Clouding the waters by deleting section 4130.3-2(h) could impede the BLM’s ability to monitor and manage the public lands for which it is responsible and could thereby have significant impacts on the resources of those lands. Yet the Draft Environmental Impact Statement (“DEIS”) fails to analyze or disclose any of the impacts that could result if BLM’s administrative access is impeded or precluded. If BLM deletes section 4130.3-2(h), it must analyze and consider these impacts. The BLM should also analyze and consider the alternative of making disclosure of the access requirement a mandatory condition of all grazing permits and leases.

I. The Proposed Limits on Public Participation Are Unlawful.

In contravention of FLPMA’s broad and unlimited mandate for public participation, the BLM has proposed to impose limits on such participation by:

- 1) revising the definition of “interested public” to impose new hurdles, *see, e.g.*, 68 Fed. Reg. at 68,459;

2) explicitly excluding members of the public from participating in the majority of management decisions, including important decisions with potentially significant impacts; and

3) encouraging permittees to help it avoid making certain “decisions” so that there will be nothing for the public to participate in.

In proposing these changes, BLM has ignored FLPMA’s plain language and contradicted the BLM’s own statement of the “intent” of these rules. What is more, the BLM has affirmatively misled the public with regard to the opportunities for participation that allegedly would be allowed them under the proposed rules. Last but not least, the BLM has failed to justify the alleged need for these changes as well as to accurately and fully analyze their impacts.

FLPMA’s mandate for public participation is unprecedented and broader than any other comparable statute. In particular, it requires public involvement in the management of the public lands as well as decisionmaking. Section 309(e) directs that:

... the Secretary, by regulation, shall establish procedures, ..., to give ... the public adequate notice and an opportunity to ... participate in, the preparation and execution of plans and programs for, and the management of, the public lands.

43 U.S.C. § 1739(e)¹ (emphasis added). *See also id.*, §§ 1702(d), 1712(f). “[T]here are strong indications that Congress intended some form of public input for all decisions that may have significant impact on federal lands. *National Wildlife Fed. v. Burford*, 835 F.2d 305, 322 (D.C. Cir. 1987) *rev’d on other grounds*, 110 S.Ct. 3177 (1990) (citing H.R. Rep. No. 1163, 94th Cong., 2d Sess. 7 (1976), 1976 U.S. Code Cong. & Admin. News 6181).

In the Preamble, BLM explicitly concedes that it is amending the current grazing rules in order to limit public involvement in decision-making and management of grazing on the public’s lands. *See, e.g.*, 68 Fed. Reg. at 68,454 (“modifying the public participation requirements relating to some day-to-day grazing management matters”). In addition to conflicting with FLPMA’s plain statutory language, this purpose also conflicts with BLM’s announced intent of these rules: “The intent of the regulations has always been for the agency to consult and cooperate with the ranchers, private landowners, *and other users of the public lands.*”. *Id.* at 68,452 (emphasis added). *See also* Draft EIS at 4-22 (proposed action expected to “[i]mprove cooperation with all interested persons”). Indeed, ensuring cooperation with all interested persons may have been the intent in the past. However, the proposed rules themselves reveal the intent going forward is to ensure that the BLM consults and cooperates only with permittees and those who represent their interests, like state, county and local grazing boards.

At no point does the Preamble acknowledge the findings made with respect to the role of the public when the current rules were adopted and specifically, the Interior Department’s

¹ This mandate far exceeds “involve[ment] in the development of land use plans,” Draft EIS at 1-7.

recognition that “increased public participation is essential to achieving lasting improvements in the management of our public lands.” 60 Fed. Reg. at 9895 (emphasis added). Other benefits of public involvement previously identified by the Department and the BLM are similarly ignored. For example, the BLM previously acknowledged:

While at some stages, involvement of the interested public may slow the process, their involvement also will result in fewer drawn-out protests and appeals and more rapid implementation on the ground.

35 Fed. Reg. at 9933. Others too have described these benefits and the importance of public participation to achieving healthy rangelands and improvement in resource conditions. *See, e.g.,* Feller, Joseph M., *Grazing Management on the Public Lands: Opening the Process to Public Participation*, 26 LAND & WATER LAW REVIEW 571, 593-594 (1991) (hereinafter “Feller, *Opening the Process*”). Improving public land conditions for the benefit of all values and uses – and not just livestock – is the BLM’s overarching mission. *See, e.g.,* Natural Resources Defense Council, Inc., et al. v. Hodel, 618 F.Supp. 848, 858 (referring to FLPMA’s “implicit denunciation” of BLM’s past management of grazing), 861 (referring to the “essential Congressional message” of range *improvement*” (italics in the original)) (D.C.Cal. 1985). That mission has been all but forgotten in this rulemaking and certainly will not be achieved if the proposed changes in public involvement (as well as other proposed changes) are adopted.

The BLM’s justification for disenfranchising members of the general public is that involving the public takes too much time and/or too many of the agency’s “scarce” resources. 68 Fed. Reg. at 68,454. *See also* Draft EIS at 1-15 (public participation requirements of regulations “considered by some to be excessive, inefficient or non-productive”). But the Bureau has provided no information to support these allegations. The Draft EIS, for example, presents no information regarding how long consultation actually takes and where, when, how often and to what extent, consultation with members of the public has actually interfered with timely decision-making. Nor does it present any comparative information regarding consultation with others, including livestock permittees and range consultants representing them, and the extent to which such consultation has delayed timely decisions. Nor is there any evidence that the BLM has considered other, less draconian, ways of lessening the “burdens” of managing public involvement, short of complete elimination, such as expedited procedures for public consultation, as discussed below. Moreover, it is worth noting that no concern for the BLM’s resources or efficiency is expressed in connection with the proposed changes that are aimed at *increasing* input from livestock interests, including in particular the proposal to require consultation with state, local and county grazing boards, or the proposal to require monitoring – both of which will have serious negative impacts on timely decisions, efficiency and the BLM’s resources as discussed in detail in other sections of these comments.

Under these proposed rules, years could go by before the BLM engaged in the kind of decision that concerned members of the public would be allowed to participate in – while in the interim livestock operators, the BLM and grazing boards would be “cooperating” together to make all the other kinds of decisions without any public input whatsoever. The BLM’s efforts to prevent the public from having a meaningful role in its decisionmaking process are not only blatant, they are completely unjustifiable and, as demonstrated below, “impermissibly prevent

public participation in livestock grazing management decisionmaking ...” in violation of the law. NRDC v. Hodel, 618 F.Supp. at 881.

A. The new definition of “interested public” will disenfranchise concerned citizens (§ 4100.0-5).

In recognition of the “essential” role concerned members of the public play in improving range management and halting abusive practices, the existing rules incorporate a liberal definition of interested public and one which is self-executing – *i.e.*, anyone who writes the authorized officer requesting an opportunity to participate may do so. The rules guarantee the public the right to participate in the making of virtually all decisions in recognition of FLPMA’s mandate and the environmental significance of these decisions. This approach was adopted following documentation of actions taken under the prior rule by a number of BLM state offices to limit or discourage interested members of the public from participating in grazing decisions.² The BLM now proposes to alter the current definition to burden members of the public and make it harder for them to participate even in the limited class of decisions that the proposed rules would allow.

Under the proposed rule, concerned citizens would have to submit a written request to “BLM” (not “the authorized officer,” which phrase would be deleted) to be given the opportunity to participate in decision-making regarding grazing on the public lands. In addition, that request would have to be “follow[ed] up” by the requester in one of two ways: he or she would have to either actually participate in decision-making if “there has been an opportunity” or submit comments in a process that led to a decision on grazing management in a specific allotment. 68 Fed. Reg. at 68,459. These new barriers are certain to result in routinely preventing members of the public from participating in grazing management decisions.

First, under this proposal, it is entirely unclear to whom the letter of request should be addressed. Use of the word “BLM” and the elimination of the words “specific allotment[s]” and “authorized officer” suggest that such requests might have to be addressed to BLM headquarters in Washington DC, but whether that is true and to whom such requests would have to be addressed is totally unclear. Then, there is the disconnect between the first letter and the required follow-up. Since one must first be denominated an “interested public” to receive “proposed decisions,” proposed § 4160.1, no one who was not already so designated would be given “an opportunity” to participate. *See* Draft EIS at 4-20. With regard to the second option, which

² Under the pre-Range Reform rule, to be able to participate in decisions, a member of the public had to “express[] in writing to the authorized officer concern for the management of livestock grazing on specific grazing allotments” and “be determined” to be an “affected interest.” *See, e.g.*, 43 CFR § 4100.0-5(1993). Under this rule, members of the public desiring to participate experienced inconsistent treatment and other problems as documented in writing in a June 11, 1993 letter to the then-BLM Director and the then-Interior Department Solicitor from Beth Wendel, National Wildlife Federation, on behalf of NRDC, Sierra Club, six other organizations and two individuals (hereinafter “Wendel letter.” *See also Oregon Natural Resources Council v. BLM*, 129 IBLA 269 (1994); Feller, *Opening the Process*, pp. 581-586.

presumably would occur when someone who was not an “interested public” somehow learned of a decision being made, it seems virtually certain that, under the proposed language, citizens could submit comments in a decision-making process only to find out that they were not “interested publics”³ or they could submit comments only to find out no decision resulted. In either case, they would end up not qualifying as “interested public[s]” and, consequently, required to start all over again. Indeed, according to the Draft EIS at page 4-20, if a person does not participate when an opportunity was presented, he or she *would* have to start all over – regardless of the reason for non-participation, the kind of decision involved, the nature, extent and benefits of the individual’s participation in the past and/or their experience or their expertise. The basic conviction on the part of the authors of this rulemaking that members of the public have nothing to offer the Bureau could not be more clear – or incorrect.

Additionally, although the preamble states that members of the public will be given the opportunity to comment on NEPA documents – presumably the “comments” referenced in the proposed definition – in the case of individuals who are not on the list of interested publics, it is totally unclear what mechanism the BLM would be relying on to provide notice of such documents to them. Is the BLM going to keep two separate lists – one of which would be only for “interested publics” and the other, larger list for NEPA documents? Does the BLM even intend to inform individuals that they either have failed to qualify or have been disqualified? Moreover, in many cases, the BLM’s NEPA process does not guarantee public involvement. Thus, the BLM has conceded that, in most cases, it prepares environmental assessments, rather than environmental impact statements on proposed decisions. In others it relies on so-called “DNAs” or “determinations of NEPA adequacy.” In neither instance is public participation guaranteed.

As indicated above, the draft EIS wholly fails to justify this proposed new rule or to analyze its impacts. In addition to failing to document the bald assertions regarding the problems caused by public participation under the existing rule, the BLM has made no attempt to quantify the degree to which public involvement will be reduced or to assess the impact of such reductions on the quality of BLM decisions, and specifically the extent to which they may be less environmentally responsible decisions. *Cf. Feller, Opening the Process*, pp. 593-594. Take for example, the draft EIS’s discussion of the proposed change and vegetation: according to the draft, the change “should allow BLM to make more timely decisions. Thus, it would have a beneficial effect on vegetation resources.” Draft EIS at 4-23. This is the entirety of its treatment of this issue – a treatment that ignores decades of BLM history, *see, e.g., NRDC v. Hodel*, 618 F.Supp. at 856-861, and accordingly is wholly inadequate. Similarly, the document contains no real attempt to assess what excluding the public will mean for BLM’s management of the public lands. *See* Draft EIS at 4-33. No where is there any effort to determine whether the proposed exclusion will have any costs, such as increased protests, appeals and litigation, that might balance the alleged, but unsupported, benefits.

A. Under the proposed rule, opportunities for public participation will

³ This is exactly what occurred on numerous occasions under the pre-Range Reform rules. *See* Wendell letter.

be few, far between, and largely meaningless.

B. " \ 2

C. The proposed rule would eliminate the vast majority of existing opportunities for public participation in BLM range management, leaving only a very limited number of decisions in which the public would have input. Public participation would be required when: “apportioning additional forage on BLM-managed lands”; during “development or modification of grazing activity plans and other BLM land use plans”; “planning of the range development or improvement program”; and “reviewing and commenting on grazing management evaluation reports.” 68 Fed. Reg. at 68,454. The Preamble alleges that participation in these opportunities would “be of the greatest value,” *id.* – although to whom is unclear. Certainly not to members of the concerned public who want to be involved in the making of environmentally significant decisions about grazing. On the contrary, the decisions in which the public could participate under the proposed rules are the decisions of *least* practical value and significance, as demonstrated below. Or, put another way, under the proposed rule, the public would be excluded from the decisions that will have real, on-the-ground impacts on publicly-owned resources – the very decisions that FLPMA sought to guarantee their participation in.

D.

E. First, several of the opportunities in which the public would be allegedly permitted to participate rarely exist now while still others will rarely exist in the future if changes that have been proposed are adopted. How often does the BLM actually apportion *additional* forage? In our combined experience – which totals many decades – not very often. Moreover, contrary to the misleading text in the Preamble, under the actual regulatory language that has been proposed, members of the public could participate in the allocation of such forage only when “all suspensions” have been “end[ed].” Proposed § 4110.3-1(b)(2). Given the over-allocation of forage that is a principal cause of these “suspensions,” *see, e.g.,* Coggins & Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and The Taylor Act*, 13 *Envtl. L.* 1, 56-59, and the loss in productivity that the public lands have suffered, *see, e.g.,* 43 U.S.C. § 1901(a)(1), the practical effect of this limitation will be that the allocation decisions that the public allegedly will get to participate in will never be made.

F.

G. Similarly, as the BLM well knows, over at least the last two decades “grazing activity plans” (also known as “allotment management plans” or AMPs, *see* 43 U.S.C. § 1752 (c)), have rarely been developed due to limitations on staff and resources. *See, e.g.,* U.S. General Accounting Office, Rangeland Management: More Emphasis Needed on Declining and Overstocked Grazing Allotments (GAO/RCED-88-80) (1988), at pp. 40-41 (hereinafter “GAO, More Emphasis Needed on Declining and Overstocked Grazing Allotments”). Accordingly, the opportunity to participate in “determining vegetation management objectives” in AMPs that allegedly will be available, Draft EIS at 4-20, will not exist and, accordingly, is no opportunity at all.

H.

- I. Land use plans, too, are rarely revised, *see* U.S. Department of the Interior, Bureau of Land Management, Report to the Congress – Land Use Planning for sustainable Resource Decisions (February 2000), p. 13 (“only 13%” of 162 plans are “current”), and even when they are, details such as the specific terms and conditions under which grazing will be managed in particular allotments are virtually never addressed. Feller, *Opening the Process*, pp. 585, 591-92. Moreover, even if opportunities to participate in AMP and land use plan development existed, because the proposed rule eliminates the requirement for public participation in issuance and renewal of grazing permits, the BLM could issue grazing authorizations that do not conform to updated AMPs or land use plans, and members of the public who participated in the development of those plans would never know, and would have no opportunity to object.
- J. Lastly, but equally importantly, if monitoring data are required for range health evaluations and determinations regarding compliance with applicable standards and guidelines, there unquestionably will be many fewer instances in the future when those evaluations are conducted than there are even now, given BLM’s past history of failure to keep up with monitoring mandates.
- K.
- L. In short, although the proposed rule purports to require participation by members of the public in some BLM decisions, in fact the BLM is trying to hoodwink the public. Because the agency will rarely if ever engage in the specified kinds of decisions, the requirement is, as a practical matter, essentially meaningless.
- M.
- N. **The proposed rule would exclude the interested public from all decisions that determine actual grazing practices (§§ 4110.2-4, 4110.3-1, 4110.3-3, 4130.2, 4130.3-3, and 4130.6-2).**

According to BLM, to save “scarce staff resources and time,” the proposed rule would limit public participation in “some day-to-day grazing management matters....” 68 Fed. Reg. at 68,454. In fact, the proposed rule would eliminate input from the interested public in all decisions that determine actual, on-the-ground grazing practices. By the BLM’s own account, the decisions from which the interested public would be excluded include:

- designation and adjustment of allotment boundaries, and
- reductions in permitted use,
- emergency closures and modifications of grazing use.
- issuance and renewal of grazing permits and leases,
- modifications of grazing permits and leases,
- issuance of temporary, non-renewable grazing permits,

DEIS at ES-11. The actual list is even longer and includes matters such as reductions and increases in grazing levels when the BLM and a permittee reach “agreement” and thus changes are *not* made “by decision,” proposed § 4110.3-3 (a)(1),⁴ as well as other “voluntary” actions that permittees would take.⁵

Together, the decisions from which the public will be excluded determine *everything* about grazing on the public lands. They determine whether, where, when, how many, what type, for how long, and under what conditions livestock are permitted to graze. All other decisions – land use plans, allotment management plans, setting management objectives – are important to rangeland management only insofar as they shape and influence these actual management decisions. As noted above, if the public is excluded from actual management decisions, then concerned citizens will not even have an opportunity to object when actual management fails to follow the plans and programs in whose development they have participated. In other words, if the public is excluded from actual management decisions, then opportunities for participation in plans and programs become meaningless diversions. *See Feller, Opening the Process*, p. 586.

At least in the absence of an AMP, a grazing permit or lease – as the Preamble emphasizes – is the sole authorization for grazing on public lands. 68 Fed. Reg. at 68,461. *See also NRDC v. Hodel*, 618 F.Supp. at 859. The terms of this document and the annual adjustments made pursuant to it determine the actual, on-the-ground grazing practices and hence the impacts of livestock grazing on the public’s lands and resources. *See Feller, Opening the Process*, p. 585. In particular, the permit or lease establishes the maximum level of livestock use – the stocking rate – that will be permitted on an allotment.

The stocking rate is the most important factor in range management. Holechek, J.L., H. Gomez, F. Molinar, and D. Galt. 1999. *Grazing Studies: What We Have Learned*. *Rangelands* 21(2): 12-16. Stocking rate “is and always will be the major factor affecting the degradation of rangeland resources. No grazing system can counteract the negative impacts of overstocking on a longterm basis.” Pieper, R.D., and R.K. Heitschmidt. 1988 *Is Short-Duration Grazing the Answer*: *Journal of Soil and Water Conservation* 43(2): 133-137. *See also* Clary, W.P. and B. F. Webster, *Managing Grazing of Riparian Areas in the Intermountain Region* (Intermountain Research Station, Forest Service, U.S. Dep’t of Agriculture, General Technical Report INT-263) (1989), p. 6. The elimination of public involvement in the making of this critically important decision is plainly inconsistent with and not permitted under FLPMA’s public participation mandate. *National Wildlife Federation v. Burford*, 835 F.2d 305, 322 (D.C. Cir. 1987) *rev’d on*

⁴ In these latter cases, grazing management becomes a matter of private negotiation. *See, e.g., Feller, J., What is Wrong With the BLM’s Management of Livestock Grazing on the Public Lands?*, 30 Idaho L. R. 555, 575 (1944). Even if the public were permitted to comment on evaluations and NEPA documents, the BLM and permittees could agree on the changes, if any, without any public involvement and, under the proposed rules, even interested publics would receive no notice of the agreements.

⁵ This list also includes decisions about the kinds of monitoring that will be required and who will be authorized to carry this task out.

other grounds, 110 S.Ct. 3177 (1990). What is more, the explanation proffered to justify this change is affirmatively misleading.

In the Preamble, the BLM claims that it can eliminate the requirement for public input prior to issuing or renewing a grazing permit because the public is already consulted as part of the NEPA process. Specifically, the BLM alleges that “consultation” with the public

[p]rior to the issuance or renewal of grazing permits and leases ... is redundant to consultation that already would have occurred as part of the process of completing NEPA analysis and other documentation that is pre-requisite to permit or lease issuance or renewal.

68 Fed. Reg. at 68,461.

In fact, as BLM well knows, the agency currently has a large backlog in conducting such environmental reviews due to lack of staff and budget. Even Congress has recognized this backlog, which began in about 1998;⁶ each year since FY99, Congress has given the Bureau via an annual appropriations rider the authority to renew expiring grazing permits and leases on the same terms **without conducting environmental reviews pursuant to NEPA**, regardless of the environmental damage that has been resulting and/or will result in the future. Moreover, although these riders provide that BLM may change the terms and conditions of renewed permits and leases once NEPA is complied with, they impose no deadline for such compliance and/or provide no other incentive for compliance.

The BLM has indisputably and repeatedly exercised the authority to renew permits without complying with NEPA since it was first granted. *See, e.g.*, March 4, 2003 letter from U.S. Department of the Interior, Bureau of Land Management, Bishop, CA Field office to “Dear Bishop Field Office Range Permittee” renewing a 10-year grazing permit without NEPA. Moreover, it will undoubtedly continue to do so in the future since the current rider would extend such authority to 2008. However, the Draft EIS not only inexplicably and impermissibly fails to acknowledge what these riders authorize, *see* Draft EIS at 3-9, it also fails to provide critical information about the nature, extent and duration of the backlog at the present time as well as going forward.

For example, it is unclear how many permits have been renewed without NEPA in total, *see* Draft EIS at 3-9, as well as how many were renewed in each of the years since 1999 without NEPA and what percent of the total they constituted. No information is provided regarding the number of NEPA reviews on those permits that have subsequently been completed or when the remaining reviews will be completed. In addition, the draft does not quantify the total number of permits that will expire over the next five years, provide an estimate of the number that will be

⁶ The backlog was the result of an extremely large number of permit expirations over a discrete period of years and may well re-occur again in the future, since at least one other backlog occurred previously since *NRDC v. Morton*, 388 F.Supp. 289 (D.D.C. 1974), was handed down and FLPMA enacted.

renewed without NEPA, or set out the BLM's current schedule for compliance. *Cf. id.* In short, in the case of this proposed change too, the BLM is attempting to fool the public: the opportunity they purport to offer for involvement may not exist for years – while authorized grazing practices continue to damage the public's lands and resources.

Moreover, even when the BLM does comply with NEPA in the issuance or renewal of a grazing permit, the BLM's NEPA process does not guarantee public involvement. In most cases the BLM prepares an environmental assessment (EA) rather than an environmental impact statement. In some cases it relies on a so-called "determination of NEPA adequacy" (DNA) and does not even prepare an EA. But there is no specific regulatory requirement for public input in the process for preparing either an EA or a DNA.

Other decisions from which the public would be excluded are also important – and for many of them there will not be even the fig leaf of environmental review. Included among these are "temporary changes within the terms and conditions of the permit or lease" – i.e., using up to the entirety of 'active use' and acceleration of on and off dates. 68 Fed. Reg. at 68,462. *See* proposed § 4130.4.⁷ *See also* Draft EIS at ES-3. Under this proposed rule, in any one year as well as in multiple years, the BLM and a permittee could agree to a significant increase in grazing levels and/or periods of use on an allotment, resulting in significant impacts to the resources without any public notice or environmental review – just as occurred before FLPMA and NEPA. *See, e.g., NRDC v. Hodel.*

The draft EIS's treatment of this issue is completely devoid of analysis. It is indisputable that livestock grazing can have serious impacts on the resources of the public's lands, including riparian areas, *see, e.g.,* U.S. Department of the Interior, Bureau of Land Management, Rangeland Reform '94 Draft Environmental Impact Statement, at 3-30, 3-32, 3-43 (hereinafter "Range Reform '94 DEIS"); U.S. General Accounting Office, Rangeland Management: Some Riparian Areas Restored But Widespread Improvement Will Be Slow, GAO/RCED-88-105 (1988) (hereinafter "GAO, Some Riparian Areas Restored"); Chaney, E., W. Elmore and W.S. Platts, Livestock Grazing on Western Riparian Areas (U.S. Environmental Protection Agency, 1990), soils and vegetation, *see, e.g.,* National Research Council, Rangeland Health: New Methods to Classify, Inventory, and Monitor Rangelands (1994) at 25 (summarizing kinds of "rangeland degradation" revealed by BLM EISs), and terrestrial wildlife species and their habitats, *see, e.g.,* U.S. Fish and Wildlife Service, Desert Tortoise (Mojave population) Recovery Plan (1994). Nonetheless, the draft only acknowledges that this proposal might affect vegetation and ignores all other resources. *See* Draft EIS at 4-24 – 4-31. Moreover, its treatment of this issue consists only of conclusions without analysis regarding the potential effects of this change on vegetation. *See id.* at 4-24 ("Grazing will be more consistent with fluctuations in forage production and range readiness, and should have a beneficial effect on vegetation resources"). As indicated, other resources that grazing affects did not even receive this woefully inadequate treatment.

The treatment of the proposal involving temporary non-renewable use (TNR) is similarly

⁷ Temporary non-renewable use, which the BLM has proposed to also deal with under this section, is also a matter of concern and is discussed separately below.

deficient. The proposed rule would eliminate the requirement that BLM consult with the interested public before issuing TNR permits – allegedly because a ‘rapid response’ is needed to take advantage of forage that is available on a temporary basis. 68 Fed. Reg. at 68,463. This reason ignores the fact that elimination of the public is hardly the only option available to minimize delay (see below) as well as that the agency has the authority to terminate consultation at any time it wishes. It also ignores the fact that, at least in some areas of the West, the BLM has abused its authority to issue TNR permits at the expense of the public’s resources. In Idaho’s Jarbidge Resource Area, for example, the BLM repeatedly issued very large amounts of TNR over a period totaling nearly ten years, purporting to rely on a faulty and out-of-date environmental assessment. It took a lawsuit to stop this practice. Committee for the High Desert v. Guerrero, Civ. 02-0521-MHW (D. Idaho).

Not only can authorization of TNR constitute an environmentally significant decision by, for example, preventing rehabilitation of degraded resources, it can also trump decisions that the public is entitled to participate in, thereby making a mockery of such participation. Take the case in which livestock numbers and times have been established in an AMP that was prepared with public participation and NEPA documentation. Under the proposed rule, those critical terms and conditions could be over-ridden by TNR use and members of the public who participated in the AMP’s development would not even be notified of this use, let alone allowed to comment on it – even though both could be accomplished through an email or a phone call.⁸

The Draft EIS makes no real attempt to analyze any potential environmental impacts of changes relating to grazing use within terms and conditions of permits. See Draft EIS at 2-24 (set out above). In addition, as indicated, the BLM has made no attempt to consider any alternatives to the elimination of public involvement in these (and other) decisions. Even assuming that the BLM could document significant problems associated with involving the public in its grazing decision-making processes, elimination of involvement is not necessarily the only solution. Both FLPMA and NEPA obligate BLM to consider reasonable alternatives to elimination of the public, including expedited procedures for public consultation, such as use of telephone, email or fax; or adding an exigent circumstances exception to public involvement that which would authorize decisions to be made in specified emergency or similar circumstances, or providing some forms of informal public involvement short of “consultation, cooperation, and coordination.” See, e.g., Feller, *Opening the Process*, p. 592. None of these – or any other – alternatives to the proposed elimination of public involvement in the majority of grazing decisions have been considered, however, in clear violation of applicable law.

A. The proposed rule further circumvents public oversight by substituting “voluntary” non-use for BLM decisions about stocking levels.

The final way the BLM has sought in this rulemaking to lock out of the public is, as indicated above, by not making decisions that it might have to notify the public about and/or

⁸ As indicated above, terms and conditions of AMPs as well as land use plans could be over-ridden by grazing permits too and, under the proposed rules, the public would receive no notice or opportunity to comment.

involve them in. Specifically, in the Preamble, the agency “encourages” ranchers to take voluntary actions – and in particular voluntary non-use – so that there will be no need for issuance of a decision. 68 Fed. Reg. at 68,462. If no decision is issued, there would be no public participation. Thus, the Preamble notes that “[i]n some cases, approval of an application for temporary nonuse precludes the need for BLM to issue a decision...” *id.*, and, accordingly no need to involve or even inform the public. Agreements of this sort between permittees and BLM have, in the past, frequently been used to prevent the public from participating in and/or reviewing decisions reached behind closed doors, *see, e.g.*, August 9, 1994 letter to “Affected Interest” from Dillon, Montana Resource Area – a practice that these new rules would undoubtedly exacerbate. Moreover, these rules would exacerbate the serious problems associated with non-use on our public rangelands.

Non-use is extremely problematic: it epitomizes the fact that, on many BLM allotments, permitted use – now proposed to be called authorized use – substantially exceeds actual use *and* grazing capacity.⁹ Indeed, the levels of use stated in permits is based on determinations made decades ago essentially by permittees themselves,¹⁰ and, as such, do not reflect current range conditions, contemporary scientific knowledge or modern legal mandates. Nonetheless, the BLM has always been extremely reluctant to conform permit numbers to grazing capacity and ranchers of course do not want them to, for a multiplicity of reasons. *See, e.g.*, Joseph M. Feller, *Back to the Present: The Supreme Court Refuses to Move Public Range Law Backward, but Will the BLM Move Public Range Management Forward?*, 31 ENV. L. REP. 10021 (2001) (hereinafter “Feller, *Back to the Present*”). As a result, as documented in this EIS, in a great many areas across the West, permittees have taken and are taking voluntary non-use year after year after year. *See* Draft EIS, Tables 3.16.1, 3.16.2. Their actions have undoubtedly lessened the impacts of grazing on the allotments in question. In addition, however, their actions have also masked the fact that those allotments cannot support permitted numbers, contributed to unreliable allotment evaluations and helped avoid reductions or suspensions in permitted use, thereby ensuring that permits are renewed without change, among other problems.¹¹ The BLM’s Draft EIS ignores all of these costs, preferring instead to focus only on the environmental benefits. Encouraging voluntary non-use will exacerbate these results as well as maximize the exclusion of the public from decision-making by turning what would otherwise be a public process into a private negotiation. By encouraging permittees to engage in this practice, BLM is further ensuring that the public cannot participate in setting the number of livestock that can graze an allotment or even learn about such decisions.

⁹ The assertion that active use incorporates the “known grazing capacity” of an allotment, 68 Fed. Reg. at 68457, constitutes wishful thinking at best. *See, e.g.*, GAO, [More Emphasis Needed on Declining and Overstocked Allotments](#), at 26-28.

¹⁰ *See, e.g.*, BLM, [50 Years of Public Land Management](#) (1984); [NRDC v. Hodel](#), 618 F.Supp at 856-857; George C. Coggins & Margaret Lindeberg-Johnson; *The Law of Public Rangeland Management II: The Commons & The Taylor Act*, 13 ENVTL. L. 1 (1982).

¹¹ *See also* Response of NRDC et al. to the BLM’s Advance Notice of Proposed Rulemaking at pages 15-16. By this reference, this document is incorporated herein.

Another example of the BLM's determination to avoid making decisions that the public would get to participate in involves monitoring. According to the Preamble, the agency has decided not to "includ[e] new regulatory language regarding monitoring," but rather to "handl[e]" "establishing monitoring methodologies and working with permittees and lessees in collecting and interpreting data and developing monitoring reports ... through BLM's own policy guidance in Manuals and Handbooks." 68 Fed. Reg. at 68,456. Typically, such guidance is not developed with public involvement through notice and comment procedures. Even under the existing rules, monitoring is an important management function, but this rulemaking proposes to significantly increase its importance as discussed elsewhere in these comments. If BLM proceeds to adopt a rule requiring monitoring data be in hand for purposes of determining whether allotments comply with applicable standards and guides as well as what remedial actions should be taken, monitoring – and specifically how BLM monitors the public lands, what it monitors and who does the monitoring – will become central to the agency's range program. Under such circumstances, for the BLM to go behind closed doors with members of the livestock industry and decide these issues is inconsistent with FLPMA's public participation mandate.

A. The BLM's bias against the public is impermissible.

Individually and collectively the changes that BLM has proposed to the current grazing rules reveal an unjustified and illegal bias against participation by the public. At the same time that the agency is overtly and covertly attempting to severely limit the ability of concerned members of the public to participate in decisions about the management of grazing on their lands in violation of an explicit and unqualified congressional directive, it is preserving current regulatory obligations for consultation with others in connection with the making of these decisions. Only the public is being shut out. More specifically, in all cases when the BLM is making "decisions," the new rules would require it to continue to consult not just with permittees, but also with "the State." *See, e.g.*, proposed §§ 4110.2-4 (boundary changes), 4110.3-3(a)(1) (changes in active use), 4110.3-3(b) (emergency closures). What is more, notwithstanding its limited resources the BLM is even proposing a new mandatory consultation requirement – *i.e.* with state, county and local grazing boards.

The organizations submitting these comments support broad-based participation by all interests in BLM decision-making. Thus, while we oppose requiring consultation with permittee-only boards on the grounds that they are illegal as well as a waste of time and resources as discussed below, we do not question participation by either permittees or the state in agency decisions. However, we submit that, when the BLM is willing to consult with some of those who have legitimate concerns about grazing – and to do so even in the case of emergencies, where time is arguably of the essence –, it has no justification for excluding others. That is to say, when the agency is consulting with some interests or individuals, it cannot refuse to consult with others who want to participate, especially not when those others have been granted an unambiguous and unqualified statutory right to participate by Congress.

I. The Proposal to Require Consultation with State and Local Grazing Boards is Unlawful (§ 4120.5-2).

At the same time as it seeks to eliminate participation of concerned members of the public, the BLM is trying to increase the involvement – and influence – of permittees in its decision-making processes. When it comes to permittees, apparently, no considerations of timeliness, efficiency, or staff resources apply. Thus, to increase permittee involvement, the new rules propose to require consultation with state and local grazing boards regarding the expenditure of so-called range betterment funds and in connection with AMPs. *See, e.g.*, 68 Fed. Reg. at 68,461. At best, this proposal is a back-door attempt to evade federal law. At worst, it is a violation of the Federal Advisory Committee Act (FACA). In either case, the bald assertion that these boards could provide “useful service,” *id.*, is demonstrably untrue. During the almost ten years in which exactly the same kind of boards were supposed to provide the BLM with advice on exactly the same topics, the boards served only to enhance the industry’s influence on the agency while wasting agency time and taxpayer dollars.

As the Preamble notes, grazing boards composed solely of representatives of the public land livestock industry predated the passage of FLPMA and were not extended by Congress after 1985, consistent with its imposition of the BLM’s new multiple use mandate and its direction for the establishment of multiple use councils that would reflect that mandate. *See* 43 U.S.C. § 1753. The Preamble fails to note, however, that, in 1986, at the urging of the public land livestock industry, the then-Secretary of the Interior issued an order re-establishing grazing boards, with one for each BLM district in the West. The history of those boards was documented in 1993 and was presented to the BLM and Interior Department prior to the 1994 rulemaking. *See* March 8, 1993 letter from Johanna H. Wald of NRDC, to then-Secretary of the Interior Bruce Babbitt. It bears repeating here.

As indicated, the Secretarial order specified that the boards were to provide advice on only two topics, both of which were then – and remain – matters of significant interest to the general public – especially the expenditure of so-called range betterment funds. FLPMA requires that such funds be spent to benefit more than just livestock; specifically they are to be spent for on-the-ground “range rehabilitation, protection and improvements” to “arrest” continuing degradation and benefit wildlife and watershed protection as well as livestock. 43 U.S.C. § 1751 (b). The fact that livestock permittees were the only persons on the boards, however, undoubtedly contributed to the fact that more than 96% of the funds in question that the BLM spent between 1980 and 1990 chiefly benefitted livestock, rather than multiple public land values. *See* Wald, J.H. “‘Range Betterment’ Funding: Where Has All the Money Gone” (June 1993).¹²

Moreover, the BLM’s own agendas for these meetings – published regularly in the Federal Register – revealed that the boards routinely and blatantly ignored the limitations imposed by the Secretarial order in every district: rather than limit their advice to the two

¹² This document was previously submitted to the BLM as Attachment 7 to Comments of the Natural Resources Defense Council, Sierra Club, The Wilderness Society and California Trout on the proposed rule governing management of livestock grazing – Bureau of Land Management, September 9, 1994, prepared by Johanna H. Wald, NRDC, and Rose Strickland, Sierra Club.

specified topics, in every state they addressed the full range of public land management issues. March 8, 1993 Wald letter. The actions of these grazing advisory boards and the ways in which they were operating violated FACA and the Secretarial order. In addition, their actions were unnecessary and a waste of BLM time and resources, as well as taxpayer monies. Accordingly, they were abolished as part of Range Reform '94.

The BLM is now proposing to reinstate the requirement that its employees to consult with livestock permittee-only boards established at the state, local and county levels. It is doing so even though it admits the Resource Advisory Committees have absorbed those boards' functions. *See, e.g.*, Draft EIS at 2-26. It does not admit, however, that the state/local boards that it would have its employees consult with are the same boards that served as the BLM's grazing boards, *see, e.g.*, 43 U.S.C. § 1753 (c), and some became notorious for spending public funds to challenge BLM grazing decisions.¹³ And, it would require this consultation despite the BLM's limited budget and staff resources and because it could not legally re-establish permittee-only boards. As with other proposed changes, the Draft EIS ignores the potential costs of this proposal, including the likelihood that these boards will skew investments in range improvements as they did in the past. *See* Draft EIS at 4-19. Instead, it merely asserts that there will be benefits without bothering to provide any analysis or documentation of these benefits, let alone any analysis of environmental impacts that might result.

The BLM's attempt to rely on the boards of others is clearly an attempt to evade the requirements of FACA. In fact, however, courts have held that federal agency utilization of boards established by others is illegal. *See, e.g., Animal Legal Defense Fund, Inc. v. Shalala*, 104 F.3rd 424 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 949. Moreover, the plain purpose of the proposed requirement – to institutionalize the influence of livestock permittees and elevate grazing over other public land uses and values – is inconsistent with the Bureau's multiple use mandate and responsibilities as well as with its claimed reasons for eliminating public involvement. The BLM should abandon this proposal.

I. The Proposed Definition of “Preference” Requires Clarification (§ 4100.0-5).

II.

III.

The definition of “preference” adopted by Range Reform exactly tracked its original meaning in the Taylor Grazing Act, conformed BLM practice to that of the U.S. Forest Service, and was upheld by a unanimous U.S. Supreme Court. *See, e.g., Joseph M. Feller, Back to the Present: The Supreme Court Refuses to Move Public Range Law Backward, but Will the BLM Move Public Range Management Forward?*, 31 ENV. L. REP. 10021, 10027 (2001). Nonetheless, this rulemaking proposes a new definition of the term, which, allegedly, is “similar” to the pre-Range Reform definition. 68 Fed. Reg. at 68,458. If the new definition only returned to the pre-existing one, this change might not have any on-the-ground impacts, although it would certainly have great symbolic

¹³ For example, records of the expenditures of so-called 12.5% funds in Nevada from 1989 to 1994 show payments of thousands of dollars for legal actions against the federal government as well as for payments to consultants in connection with appeals. In Colorado, similar expenditures were made.

importance. That symbolic importance – specifically creating and contributing to expectations on the part of both ranchers and BLM that the agency was obligated to a) minimize reductions and ensure they were temporary and b) “restore” historical numbers – has been a major obstacle to management of the public lands as Congress intended, with grazing as one of multiple uses, but not the dominant use. Feller, *Back to the Present* at 10026-10027. As such, returning to the pre-Range Reform definition is cause for concern as well as objectionable on the grounds that it serves no legitimate purpose, has no legal effect, and will surely cause confusion among permittees and the public alike. As is the case with other proposed changes, the Draft EIS fails to acknowledge the potential costs of this change on any public land resources save vegetation and rather than analysis, presents only an unsupported conclusion. *See* Draft EIS at 4-23.

IV.

V.

Before determining to proceed with this change the BLM must provide an honest evaluation of its likely impact and specifically the degree to which the new definition will deter managers from making needed changes and deter permittees from cooperating in implementing such changes. In the alternative, the BLM could ensure that adoption of the proposed definition would have *no* environmental impacts but stating unambiguously that the concept of “preference” is purely and only symbolic. Prior to final adoption of this new definition it must do one or the other, unless the existing approach is retained.

VI.

VII.

VIII. **The Proposed Language Regarding Increases in Grazing Use Requires Clarification (§ 4110.3-1(b)(2)).**

As drafted, proposed § 4110.3-1(b)(2) suggests an entitlement to a fixed number of livestock, by providing that additional forage will be used to “end[] all suspensions” before allocations to others can be made. Such an entitlement would represent a lien on the public lands and would unlawfully prevent the Secretary and the BLM from achieving Congress’ mandates for improved productivity and improved management of these lands. The BLM must clarify that the proposed language refers only who gets livestock forage and does not in any way preclude allocation of forage to wildlife, watershed restoration or other purposes. Absent such clarification, the regulation would be unlawful and the proposed language should be abandoned.

I. **The Proposed Amendments Concerning Stays Pending Appeal Are Irrational and Unreasonably Biased in Favor of Grazing and Against Resource Protection (§ 4160.4).**

Most of the proposed amendments to 43 C.F.R. § 4160.4 concern the effect of the issuance of a stay by the Office of Hearings and Appeals (OHA). The effects of a stay are critical, because appeals often take years and a stay, if issued, will determine what will happen on the ground during the pendency of an appeal. In fact, for some critical decisions, such as decisions to issue temporary non-renewable (TNR) permits on ephemeral or annual rangelands, or to allocate additional forage temporarily available, the effect of the decision is usually over before an appeal of the decision is resolved. For these decisions, a stay is the only effective administrative relief available.

The proposed rule claims that “the BLM is attempting to find a balance between the exhaustion of administrative remedies under the APA and its responsibilities under FLPMA and TGA to: Manage lands for multiple use and sustained yield; Regulate the occupancy and use of the rangelands; Safeguard grazing privileges; Preserve the public rangelands from destruction or unnecessary injury; and; Provide for the orderly use, improvement, and development of the range.” *This claim is false. The proposed amendments to section 4160.4 are grotesquely biased in favor of livestock grazing permittees and against all other interests and users of the public lands.* The proposed rule is so skewed that it makes it *impossible* for adversely affected parties to obtain effective stays of a broad class of decisions to initiate livestock grazing in currently-ungrazed areas or to increase grazing in areas that are already being grazed. The proposed rule would also make it impossible for adversely affected parties to obtain effective stays of decisions that perpetuate existing grazing practices, regardless of how much harm those practices are causing.

A. **Section 4160.4(c)**

Section 4160.4(c) of the proposed rule provides that the following categories of grazing decisions would go into effect *even if stayed by OHA*:

- decisions authorizing grazing on ephemeral or annual rangelands (proposed section 4160.4(c)(2));
- decisions authorizing grazing of additional forage temporarily available (proposed section 4160.4(c)(3)); and
- all decisions granting applications for permits or leases that are not made in conjunction with a preference transfer application (proposed section 4160.4(c)(4)). This last category is incredibly broad, including not only applications for renewals of existing permits, but also applications for permits to graze areas that are not currently being grazed, areas that have not been grazed for many years, and even areas (there are a few) that have never been grazed by domestic livestock.

Under the proposed rule, for example, a decision to authorize an enormous number of cattle to temporarily graze in a fragile riparian area or a high-use recreational area, or a decision to start up grazing in a protected wildlife area that has been ungrazed for decades¹⁴, or a decision to renew unchanged a grazing permit authorizing practices that are proven to be destructive to wildlife habitat or fisheries, would go into effect even if it were appealed by an adversely affected party (such as an organization representing hunters, anglers, or recreationists) and even if it were stayed by OHA. That is, the grazing would go forward *even if the appellant proves, and an administrative law judge determines*, pursuant to 43 C.F.R. § 4.21(b)(1) that (i) the harm

¹⁴ This could happen even if the applicable land use plan prohibits grazing in the area, because the impossibility of obtaining an effective stay would leave the BLM free to violate the land use plan.

to the environment caused by the grazing would be much greater than the harm to the permittee caused by disallowing the grazing, (ii) the appellant is highly likely to succeed on the merits in proving that the decision is unlawful, (iii) the harm caused by the grazing would be immediate and irreparable, and (iv) the public interest favors disallowing the grazing.

The proposed rule is concerned only with the interests of permittees, to the exclusion of all others. It claims that “[t]o do otherwise would potentially eliminate grazing and deny a user the ability to graze the lands for years awaiting an administrative decision.” 68 Fed. Reg. at 68,465. But the proposed rule gives no consideration at all to the possibility that allowing a decision to go into effect might cause or perpetuate damage to other interests for years awaiting an administrative decision. It would allow decisions authorizing grazing to go into effect even when OHA has determined that the grazing would cause immediate and irreparable harm to other interests and even when OHA determines that that harm outweighs any harm to the permittee of denying grazing. Moreover, the proposed rule’s reference to “eliminating grazing” is inaccurate, since the proposed sections 4160.4(c)(2), (3), and (4) cover many decisions authorizing new or renewed grazing in areas where grazing is not currently occurring.

There is no excuse for insulating potentially-destructive decisions from the effects of stays. The “balance” that the proposed rule claims to seek is already built into the conditions for granting a stay set out in 43 C.F.R. § 4.21(b)(1), which requires OHA to consider the relative harm to the parties, the likelihood of immediate and irreparable harm, and the public interest, in deciding whether to issue a stay. If OHA, after considering these factors, decides to issue a stay, then the stayed decision should not go into effect. By allowing such decisions to go into effect, the proposed rule abandons any semblance of balance.

A. **Section 4160.4(b)** .

The proposed rule’s section 4160.4(b), while not as facially outrageous as section 4160.4(c), is also biased against all potential appellants other than ranchers, and denies such appellants the ability to obtain effective stays in many instances. Under proposed section 4160.4(b), a stay can never result in an authorized grazing level lower than the current authorized active use, even when the current authorized active use substantially exceeds current and historic actual use.

A simple hypothetical illustrates the problem:

Consider an allotment with an authorized active use level of 10,000 AUMs, but on which actual use for many years has been only 4,000 AUMs. (This scenario is not at all unusual, especially in the southwest, as shown by the data on levels of nonuse in the DEIS.) Say the BLM issues a decision to renew the permit, but with an authorized active use level of 7,000 AUMs. An organization of hunters appeals and applies for a stay, presenting evidence that the current actual use level of 4,000 AUMs is causing serious damage to wildlife habitat, and that a use level of 7,000 AUMs would cause even greater damage. OHA issues a stay based on a determination that (i) grazing of 7,000 AUMs would cause great harm to wildlife habitat, but limiting grazing to 4,000 AUMs (the current actual use level) would

not cause hardship to the permittee; (ii) the appellants are likely to succeed on the merits; (iii) the harm caused by grazing 7,000 AUMs would be immediate and irreparable, and (iv) the public interest favors limiting grazing to 4,000 AUMs.

Under the proposed section 4160.4(b), the issuance of the stay would cause the authorized active use level to revert to 10,000 AUMs, despite OHA's determination that grazing 7,000 AUMs, let alone 10,000, would cause immediate and irreparable harm. This result is clearly unreasonable, and would deny appellants the benefit of any meaningful stay.

This anomaly in the proposed rule cannot be cured by any simple, technical fix. The variety of possible factual circumstances precludes any simple rule regarding stays that will ensure balance and fairness in all cases. The only reasonable approach is a flexible rule that will allow the effect of the stay to be tailored to the reasons for granting the stay. We suggest two possibilities:

(a) authorize OHA to specify the level of grazing, if any, that will be permitted while the stay is in effect, or

(b) provide that the BLM, subject to review by the same ALJ who issued the stay, shall determine a level of authorized grazing during the pendency of the stay that is consistent with the findings that the ALJ made when issuing the stay.

I. The BLM Should Not Eliminate the Requirement That New Rangeland Water Rights on Public Lands Be in the Name of the United States (§ 4120.3-9).

The proposed regulations would remove the existing requirement in 43 C.F. R. § 4120.3-9 that livestock water rights be acquired, perfected, maintained and administered in the name of the United States to the extent allowed by the laws of the states where the rights would be acquired. Under the proposed amendment, BLM would only have the option, and not the obligation, of acquiring the water right, as long as BLM's acquisition was in compliance with state water law. 68 Fed. Reg. 68,452, 68,460-461 (Dec. 8, 2003).

We oppose elimination of the requirement that BLM acquire new water rights on BLM lands wherever permitted under state laws. Where BLM does not own and control the water on its lands, there can be serious management and environmental problems, which neither the proposed rule nor the DEIS discusses.

A. Private stockwater rights on public land create unreasonable pressure on BLM managers.

Where the permittee or lessee owns the water rights on BLM lands, BLM's decisions to reduce grazing on those lands may be opposed by the permittee on the grounds that reducing grazing will deprive the owner of his right to use his private stockwater rights. Disputes between the land-owning agency and water-owning permittees will make it more difficult for the BLM to modify grazing use, even if reductions are necessary to protect resources other than livestock

grazing. Where BLM does not control the water on its lands, its ability to control their management becomes more tenuous.

The DEIS fails to discuss the environmental consequences which will arise from BLM's difficulties in trying to manage federal lands containing mixed land and water rights.

A. **Private stockwater rights on public land create costly and time-consuming litigation.**

Even if BLM is not swayed by a permittee's insistence that utilization of his stockwater rights requires grazing use in excess of what BLM believes is environmentally appropriate, BLM risks legal water rights challenges where it does not control the water rights on its lands.

Several courts have held that stockwater rights do not include an appurtenant right to forage in the vicinity of the water. *See, e.g., Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967) ("He [the plaintiff] urges that the adjoining lands provide the means to use the water beneficially and must therefore be deemed appurtenant to it. He claims too much."). Nonetheless, legal challenges to the BLM's and Forest Service's ability to manage federal lands continue to plague both agencies and hinder their management of federal rangelands where stockwater rights are in private hands.

For example, in a case currently pending in the United States Court of Federal Claims (*Hage v United States*, No. 91-1470L), the plaintiff rancher alleges the United States illegally took his water rights by cancelling his grazing permit and by its management of wildlife on federal rangelands adjacent to his private water rights. Plaintiff Wayne Hage claims:

The actions of the United States Forest Service and the BLM have prevented plaintiffs from grazing livestock on the allotments appurtenant to the Pine Creek Ranch, and have resulted in further adverse impacts on plaintiffs' property rights. The number of mountain sheep planted by the United States Forest Service and the Nevada Department of Wildlife on the Meadow Canyon allotment have proliferated, consuming water and forage there. The number of antelope on the Ralston and Monitor allotments have proliferated in the absence of plaintiffs' livestock there. These antelope have consumed water and forage located there.

Hage v. United States, Plaintiffs' Motion To Amend Complaint Under RCFC 15(a), p. 3 ¶5, August 9, 2001 [Docket No. 166] (emphasis added). Plaintiff Hage also claims that elk management on federal lands took his water. He asserts:

Department of Wildlife of the State of Nevada [] release[d] non-indigenous elk on plaintiffs' allotment," that those elk reduced "the forage available for plaintiffs," [and] "use[d] the water owned by plaintiffs.

Hage v. United States, ¶26(A) of the Second Amended Complaint [Docket No. 206] (emphasis added).

Although Hage's claims lack legal merit, his case and other similar cases have cost the government thousands and thousands of hours of employee time and millions of dollars in litigation costs. Given the threat of such costly and time-consuming litigation, reasonable BLM managers may well hesitate to curtail livestock grazing, or to take actions that promote and sustain healthy wildlife populations, where potentially-litigious permittees control water rights. Yet the DEIS neither discloses the problem created by the Hage case and similar cases nor analyzes its possible impacts.

A. Private stockwater rights on public land limit BLM's management options.

Even if there is no disagreement or legal challenge between a permittee who owns water rights in the midst of BLM rangelands and the Bureau as to how those lands should be grazed, if the BLM does not own the water rights on its lands, it loses the ability to manage the water for the benefit of resources other than livestock.

For example, when a permittee removes livestock from a pasture, he might shut off water to wells, troughs, ditches, tanks, and ponds within the pasture. Drying up these water sources may deprive wildlife, vegetation, and humans from using that water on federal land. Similarly, when a permittee moves livestock onto a pasture, he might divert flows out of a stream to water his livestock, to the detriment of fish, wildlife, vegetation, soils, and humans who had depended on the former streamflow. BLM can control neither of these impacts unless it owns the water on these federal lands.

Moreover, as the Hage case demonstrates, private stockwater rights can create enormous management headaches when a permittee who owns stockwater rights loses his permit because of violations of permit terms and conditions or other legal infractions. With the water rights still in the hands of the ex-permittee, any new permittee maybe practically precluded from grazing the allotment

The existing regulation, which requires BLM to hold new water rights, gives the agency substantial control over the water which it can then use to benefit uses on BLM lands other than grazing. On the other hand, allowing permittees to exclusively control water, as BLM now proposes, will reduce BLM's ability to control water on federal rangelands for the benefit and protection of wildlife, vegetation, soils, and people. However, none of these consequences is discussed in the DEIS.

I. Private Parties Should Not Be Given Title to Structural Range Improvements on Federal Public Lands (§ 4120.3-2(b))

We oppose BLM's proposal to revise § 4120.3-2(b) so that permittees and the United States would share title to permanent structural range improvements constructed under cooperative range improvement agreements on public lands. This revision would reinstate the pre-1995 rule on ownership of such range improvements, and would again allow permittees to hold private property rights in structural improvements such as wells, pipelines, and fences constructed on federal lands managed by the BLM.

To begin with, the BLM's justification for this change is called into question by its own analysis. According to the DEIS, permittees claim that having range improvements jointly owned by the Federal government and the operator provides "an incentive for operators to construct improvements." DEIS at 1-11. However, there is no persuasive evidence that the 1995 change in this regulation, which precluded permittees from partially owning structural range improvements, has had an adverse effect on the willingness of permittees and the BLM to build structural range improvements.

The yearly average number of range improvements constructed between 1982 to 1994 was 1,945 improvements per year. From 1995 to 2002, when the existing regulations precluded joint ownership of structural improvements, the BLM authorized an average of 1,210 improvements each year. However, BLM explains that "[t]he decrease in the number of range improvements constructed each year is attributable to a number of factors, including decreasing availability of public funds and shifting BLM work priorities." DEIS at 3-10. There is no evidence that the decrease brought on by the 1995 rule change. In fact, the DEIS discounts the "disincentive" justification:

In some States, there was a noticeable decrease in range improvements from 1995 to 1996, but following 1996 the trends are more erratic. Also, there was an overall declining trend in the numbers of range improvements since 1982 for all States combined. Thus, the data on numbers of range improvements before 1995 and after 1995 do not reveal whether permittees became permanently more reluctant to participate in range improvements, or what the effect may have been on the value of their operations.

DEIS at 4-32.

According to the DEIS, another justification for allowing permittees to hold partial title to structural range improvements is the permittees' claim that joint ownership allows them "to more easily obtain loans for their operations" and "claim the value of their contribution as part of their ranching operation." DEIS at 1-11. However, the DEIS undercuts this justification by pointing out that under the existing regulations:

Shared title of range improvements could potentially improve permittees'

financial condition to the extent that title may increase the value of their operations or increase their ability to obtain financing. However, permittees presently do have shared financial interest in range improvements and are compensated for the contribution they made under a cooperative agreement in the event the permit changes ownership, so it is not clear what the net effect of this provision might be.

DEIS at 4-32.

Aside from the agency's unpersuasive justifications for allowing permittees to own property rights in permanent structural range improvements, joint ownership will impede BLM's management of its rangelands and create two types of environmental impacts, neither of which is considered in the DEIS.

First, when both BLM and the permittee have title to a structural improvements, such as a well, pipeline, or fence, BLM's ability to manage rangelands will be impeded. If BLM concludes that livestock grazing on a pasture should be eliminated or reduced in order to protect other rangeland values, a permittee who owns portions of wells, fences, and/or pipelines on that pasture may object to reducing grazing because his investment in the structural improvements won't be utilized. The permittee's disgruntlement with BLM's disinclination to use his property will pressure BLM to accommodate the permittee's grazing interests at the potential expense of other rangeland resources, which might benefit from less, or no grazing. The DEIS considers none of the environmental impacts of this likely quandary.

Second, where BLM is not the sole owner of structural improvements, it forfeits its ability to use and alter those improvements for the benefit of other resources, such as wildlife. For example, if BLM is the sole owner of a fence on federal rangelands and discovers the fence is a substantial impediment to wildlife migration, BLM is free to modify or remove the fence in order to benefit wildlife. Likewise, if BLM owns a water development that is drowning wildlife, it is free to modify or remove the water development.

However, if the fence or water development is jointly owned by the BLM and the permittee, BLM is not as free to modify the improvement to benefit resources other than grazing. If the permittee owns 50% of the fence that BLM wants to modify or remove to accommodate wildlife, then BLM must persuade the permittee that his ownership in the fence should no longer be used to support his grazing operation.

In addition, if BLM decides to eliminate or alter a range improvement for the benefit of resources other than grazing, and the improvement is partially owned by the permittee, BLM may face a legal threat from the permittee that the removal of the range improvement and reduction in grazing is a partial cancellation of his grazing permit intended to devote the lands to another purpose. This could require compensating the permittee for his ownership in the improvements under 43 U.S.C. § 1752(g). This has

happened in a case now before the United States Court of Federal Claims (*Hage v United States*, No. 91-1470L). The rancher claims, among other things, that the BLM and Forest Service decided to devote the federal lands to non-grazing purposes, and must compensate him for his ownership of range improvements.

Despite these problems, the DEIS considers none of the environmental impacts that will result from these restraints and pressures on BLM's ability to modify, eliminate, or discontinue using jointly owned range improvements for the benefit of uses other than livestock grazing. Furthermore, the DEIS fails to analyze the obvious reasonable alternative of giving the authorized BLM officer discretion to determine, on a case-by-case basis, whether title to a particular proposed range improvement will be shared or will be solely in the name of the United States. Such an alternative would allow the BLM to hold sole ownership of those range improvements whose management and control are determined to be most essential to the BLM's multiple-use mission. The DEIS, however, considers only the no-action alternative and the extreme option of sharing title to *all* permanent range improvements, which is incorporated in both the Proposed Action and Alternative 3.

I. The BLM Should Not Restrict Its Authority to Penalize Permittees Who Violate the Law (§ 4140.1(c)).

We oppose BLM's proposal to amend 43 C.F.R. § 4140.1(c) to limit its authority to subject permittees to civil penalties under § 4170.1-1. The proposed rule would amend this regulation so that if a permittee violates any of the prohibited acts listed under § 4140.1(c), the violation may only trigger an action against his grazing permit or lease if the violation of the prohibited act occurred on the BLM-managed allotment where the operator is authorized to graze. Under the existing regulations, a violation of these prohibited acts authorizes BLM to take action against the operator's permit no matter where the violation occurred.

The prohibited acts include: placement of poisonous bait or hazardous devices designed for the destruction of wildlife; pollution of water resources; illegal removal or destruction of archeological or cultural resources; violations of the Bald Eagle Protection Act, the Endangered Species Act, or regulations concerning wild horses and burros; and violations of state livestock laws or regulations concerning branding and other livestock-related issues.

At the outset, BLM is incorrect when it suggests that since "both the Endangered Species Act (ESA) and the Bald Eagle Protection Act (BEPA) provide for grazing sanctions" against the violator's permit (68 Fed. Reg. at 68,464), there is no need to retain authority under § 4140.1(c) to take action against the grazing permit for violations of ESA and BEPA which take place off of a permittee's allotment.

To the contrary, both the ESA (16 U.S.C. § 1504(b)(2)) and the BEPA (16 U.S.C.

§ 668(c)) provide that the head of any Federal agency which has issued a lease or permit authorizing the use of federal lands for grazing, may cancel the grazing permit of anyone convicted of violating these statutes. Because both the ESA and BEPA provide that canceling a grazing permit for violations of the statute is discretionary, BLM's current proposal to modify § 4140.1(c) to preclude action against a permit where violations of these acts occur off the permittee's allotment may be construed as BLM's decision not to invoke the discretion granted in §§ 1504(b)(2) and 668(c). And the DEIS fails to consider this possible loss of authority under ESA and BEPA.

More fundamentally, BLM's ability to suspend or deny grazing permits of individuals who violate state or federal laws by placing poisonous bait or hazardous devices to kill wildlife; applying or storing pesticides, herbicides, or other hazardous material on public lands; altering or destroying natural stream courses without authorization; polluting water sources; and illegally taking, destroying, or harassing fish and wildlife, has had a positive impact on wildlife resources by discouraging grazing permittees from committing these prohibited acts both on and off their allotments.

There is no reason why there should be diminished accountability and responsibility for violations of state and federal resource protection laws merely because the violations occurred on lands different from where the violator was authorized to graze. Limiting the violator's accountability is inconsistent with the BLM's intent to develop strong partnerships with good stewards of the land to attain a shared purpose of sustaining open space, habitat, and watershed values.

Moreover, BLM should not retreat on the efforts taken over the last thirty years to strictly scrutinize convicted environmental criminals before allowing them to benefit from federal resources, such as the right to use a federal grazing permit. The National Wildlife Federation began this effort in 1972, contesting the right of Herman Werner to obtain a grazing permit for the Bolten Ranch in Wyoming, after his conviction for killing an estimated 570 eagles.

BLM should retain its authority to cancel or suspend grazing permits when a permittee violates resource protection statutes, regardless of the location of the violation, as an additional disincentive for permittees to violate those laws.

I. Requiring Documentation of Social, Economic and Cultural Effects in Decisions is Unjustifiable and Smacks of Intimidation (§ 4110.3(c)).

The new rules would require BLM managers to **document** their consideration of social, economic and cultural effects when proposing to change grazing preferences. *See* proposed § 4110.3(c). *See also* 68 Fed. Reg. at 68,459. This requirement would be imposed even though the BLM concedes its field managers "routinely" assess these effects when they prepare environmental documents. Id. Individually as well as in combination with the other proposed changes, this new requirement reflects an attempt to

elevate grazing over all other rangeland uses, notwithstanding the mandates of applicable law as well as the realities of the public lands today.¹ Changing preference is undoubtedly the most difficult decision that a manager could make, *see, e.g.*, Feller, *Back to the Present*, and the imposition of this new requirement is certain to discourage such decisions.

NEPA is an environmental statute. Congress' goal in enacting it was to enable public officials to make decisions based on understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment. 40 C.F.R. § 1500.1(c). Contrary to the belief BLM expressed in its ANPR, NEPA does not require consideration of the social, cultural and economic effects of its decisions save in connection with the preparation of environmental impact statements. Even more to the point, however, the still-unsatisfactory conditions of vast areas of our public lands stand as mute, but incontrovertible evidence of the consideration BLM field managers routinely give such effects now – in the absence of an explicit requirement. Requiring managers to document their consideration of these impacts will only make it harder than it already is for them to decide to make necessary changes in management practices, including, in particular, reductions in livestock numbers.

NEPA was not enacted to ensure that the BLM would consider social, economic and cultural effects in its decisionmaking and it does not authorize the BLM to elevate such effects over the applicable environmental mandates of FLPMA and PRIA. On the contrary, NEPA was enacted to ensure that previously overlooked environmental considerations were incorporated into federal agency decisions.² The BLM and its range program present the paradigmatic case of a federal agency that failed to consider environmental impacts of its actions, but consistently gave in to the special pleadings of its principal constituency. *See NRDC v. Hodel*, 618 F.Supp. *supra*.

Neither NEPA, nor FLPMA, nor PRIA authorize BLM to adopt rules that aim to protect the “custom and culture” of the western cowboy, or to insulate the public land livestock industry from economic impacts. Nor does NEPA grant BLM any authority or excuse to ignore the resource protection mandates of FLPMA and PRIA. On the contrary, rather than directing BLM to support the livestock industry,³ federal law directs

¹ As the BLM noted in promulgating the existing grazing rules: “[t]he American rangelands can be – and are – used for far more than grazing.” 60 Fed. Reg. at 9895.

² *See, e.g.*, S. REP. NO. 91-296 at 4 (1969) (our Nation’s present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces”).

³ As the 10th Circuit noted in *Public Lands Council v. Babbitt*, 167 F. 3d 1286, 1298 n. 5, even the Taylor Grazing Act “treats stabilizing the livestock industry as a secondary goal.” *See also NRDC v. Morton*, 388 F.Supp. 829, 833 (D.D.C. 1974), *aff’d*,

that the public lands be managed for multiple uses of which grazing is only one, establishes the overarching goal of improving conditions degraded by past grazing so they become as productive as feasible for all rangeland values, and mandates that range abuse and overgrazing be halted. Rather than attempt to use NEPA to discourage managers from complying with these laws, the BLM should abandon this proposal.

I. BLM Has Missed An Opportunity to Facilitate Buyouts.

We regret that the BLM has failed to take advantage of this rulemaking to welcome and encourage permittees and others to use the market to resolve conflicts over rangeland use. Transactions between willing buyers and willing sellers are entirely consistent with the free-market philosophy of the current administration, and have the potential to provide “win-win” solutions that benefit both ranchers and the environment. In particular, the purchase of ranches, and the retirement or non-use of associated grazing permits, by conservation organizations is sometimes the fastest, simplest, most effective, and most amicable method of resolving disputes over livestock grazing in environmentally-sensitive areas. Such transactions not only protect and enhance rangeland resources while providing financial benefits to ranchers who voluntarily participate; they also substantially reduce the BLM’s expenditures of time, money, and manpower on administration, mitigation, enforcement, and litigation.

We recognize that the courts have struck down regulatory provisions for “conservation use” and do not oppose BLM’s proposal to amend the regulations to reflect this fact. However, it is still within the BLM’s authority to structure its regulations so as to facilitate buyouts. And there is a need for national level guidance regarding permit relinquishment when permit holders so desire. Regrettably, the BLM has not addressed this issue directly in the context of this rulemaking.

The rulemaking does include several proposals that will help permit holders who wish to protect or enhance range resources on “their” allotments, including the proposal to not make AUMs placed in non-use for conservation purposes available to others. However, we urge the BLM to be more forthright about conservation in these rules. In particular, we urge the regulations be amended to provide that, when permit holders request non-use or a reduction or suspension in what is now denominated permitted use, that such requests will be granted. We also believe that the rules should direct that, at the request of the permittee, the BLM will promptly initiate a planning process to determine whether the applicable land-use plan should be amended to provide that all or a portion of an allotment will be made unavailable for grazing as authorized by both FLPMA, 43 U.S.C. § 1752(b)(1), and PRIA, *id.* at § 1903(b).

Failure to take these and other actions to facilitate third-party buyouts is

inconsistent with the interests and desires of many permittees, *see, e.g.*, Arizona Voluntary Grazing Permit Buyout Act (H.R. 3337), as well as the larger interests of the Bureau and the public.

I. The Affected Environment and Environmental Consequences of the Proposed Rule as Described by the BLM's Professional Resource Managers in the ARC-DEIS.

The remainder of these comments presents the affected environment and the environmental consequences of the proposed rule, as described by BLM's professional resource managers in the administrative review copy of the draft environmental impact statement (ARC-DEIS) made available to BLM Washington Office officials and BLM state office on November 18, 2003. (See Part I of these comments.) We respectfully request that the BLM fully consider this information in the development of a final rule.

CHAPTER 3

AFFECTED ENVIRONMENT

WILDLIFE

Terrestrial

The Bureau of Land Management administers over 260,000,000 acres of terrestrial wildlife habitat on the public lands in the western states. These public lands sustain a nationally significant, rich heritage with an abundance and diversity of fish and wildlife. The federal lands provide seasonal or permanent habitat for more than 3,000 species of mammals, birds, reptiles, amphibians, and fish. Increasing human populations in the west are placing ever increasing demands for consumptive as well as non-consumptive uses. All these species and their genetic differences are significant for their aesthetic, recreational, and scientific values.

Livestock grazing has been a widespread and significant influence on all of the wildlife habitats and species on the public lands since the introduction of livestock in the late 1700s. Livestock grazing is the most widespread economic use of public lands in the West. The grazing of domestic livestock has been highly contentious due the competing social, economic, natural, and economical values. Grazing has been particularly destructive in ecosystems where native grazing animals were scarce or absent (Mack and Thompson 1982, Milchunas et al. 1988, Schlesinger et al. 1990).

Jones (2000) systematic review of the scientific literature principal objective was to quantitatively synthesize the effects of cattle grazing on arid western rangelands. Eleven of 16 analyses (i.e., 69%) revealed significant detrimental effects of livestock grazing on

arid rangelands. Grazed areas had reduced cryptogammic crust cover, reduced infiltration rates, significantly greater soil loss to erosion, significantly reduced litter biomass, cover, seedling survival, total vegetation biomass and grass and shrub cover compared to ungrazed areas.

Temperate Desert

The temperate desert generally occurs within the Columbia Plateau/Great Basin and is a large and complex region that is relatively arid due to its position in the rain shadow of the adjacent western mountain ranges (Cascade Mts. and Sierra Nevada Mts.). The vegetation complexes are dominated by sagebrush, pinyon/juniper woodlands, mountain shrub, ponderosa pine, lodgepole pine/subalpine fir forests, grasslands, and some very significant wetlands.

Shrub-steppe ecosystems in this region did not evolve with large herbivores, such as livestock. Subsequently, the grasses of this region were evolutionarily unprepared for introduced large herbivores (Mack and Thompson 1982). The result was the loss of native grasses and forbs, reduction in grass and forb cover, increased shrub cover, and increased non-native forbs and grasses.

Mammals typical of this region include pygmy rabbit (*Brachylagus idahoensis*), mule deer (*Odocoileus hemionus*), Rocky Mt. elk (*Cervus canadensis*), pronghorn (*Antilocapra americana*), bighorn sheep (*Ovis canadensis*) mountain lion (*Felis concolor*), bobcat (*Lynx rufus*), coyote (*Canis latrans*), kit fox (*Vulpes velox*), and numerous species of squirrels and voles. Reptiles and amphibians typical of the region include sagebrush lizard (*Sceloporus graciosus*) and western rattlesnake (*Crotalus viridis*),

Temperate Steppe

The temperate steppe generally occurs within the Colorado Plateau/Wyoming Basin and is a complex of mountain ranges dominated by a variety of coniferous forest types, interspersed with aspen communities, pinyon/juniper woodlands, separated by the tablelands of the Colorado Plateau. The Colorado Plateau/Wyoming Basin are also occupied by mule deer, Rocky Mt. elk, and pronghorn.

Tropical/Subtropical Steppe

The tropical/subtropical steppe and is characterized by shortgrass prairie in an arid region in the rainshadow of the Rocky Mts. that has greatly reduced vegetation stature and diversity, as well as the significant playa lakes shorebird/waterfowl wintering areas. Precipitation increases from west to east and temperature increases from north to south. These climatic gradients have created the lush tallgrass prairie east of the 100th meridian, midgrass prairie in the northwestern plains, and shortgrass prairie in the west-central plains (Bailey 1978). Livestock grazing has reduced fire frequency and intensity through consumption of fine fuels and thereby encouraging woody plant invasions (Bock et al. 1993). Historically, American bison (*Bos bison*) played a significant role in the ecosystem that favored short grass preferring species such as mountain plover

(*Charadrius montanus*) and burrowing owl (*Athene cunicularia*). The shortgrass prairie was also home to the wolf (*Canis lupus*), as well as elk.

Tropical/Subtropical Deserts (Mojave, Sonoran and Chihuahuan)

The tropical/subtropical deserts include the Mojave, Sonoran and Chihuahuan deserts that are comprised of arid scrublands and grasslands at the lower elevations, oak-juniper woodlands and coniferous forests in the higher elevations. Historic livestock grazing degraded many grasslands in permanent desert scrub (Schlesinger et al. 1990).

Historically, pronghorn occurred in all of the major valleys; wild turkey (*Meleagris gallopavo*) and grizzly bears (*Ursus arctos*) occurred in all major riparian areas; and wild turkey and black bear (*Ursus americanus*) in all mountain ranges. Reptiles include the desert tortoise (*Gopherus agassizii*).

Grazing by native ungulates historically was widely scattered and of low intensity. However, excessive grazing pressure has been responsible for the loss of many of these ecosystems

Migratory Birds

Executive Order 13186 (Responsibilities of Federal Agencies To Protect Migratory Birds) recognized that migratory birds are of great ecological and economic value to America and to other countries. They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries. The United States has recognized the critical importance of this shared resource by ratifying international, bilateral conventions for the conservation of migratory birds. Such conventions include the Convention for the Protection of Migratory Birds with Great Britain on behalf of Canada 1916, the Convention for the Protection of Migratory Birds and Game Mammals-Mexico 1936, the Convention for the Protection of Birds and Their Environment-Japan 1972, and the Convention for the Conservation of Migratory Birds and Their Environment-Union of Soviet Socialist Republics 1978.

These migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the Migratory Bird Treaty Act (Act), the United States has implemented these migratory bird conventions with respect to the United States. This Executive Order directs Executive departments and agencies to take certain actions to further implement the Act.

Birds are particularly responsive to changes in their physical environment, that is, the structures of habitats in they nest and forage (Cody 1985). Livestock grazing that results in dramatic physical changes in the environment, such as conversion of grassland habitats to shrublands, have had the greatest adverse impact on native birds.

Table 1 is the “Watch List” from Partners in Flight, a voluntary, non-advocacy,

international coalition whose vision is the restoration and maintenance of populations of native landbird species well distributed throughout their historical geographic ranges. Partners currently include federal, state, provincial and territorial government agencies, nongovernmental organizations, numerous universities, and private industry. This list represents the best science available on species of concern for BLM administered lands in the West.

Table 1
Partners-in-Flight Watch List

Species	Population Trend	US + Canada Population
Highest Continental Concern *		
California Condor	Experimental Pop'n in Wild	< 100
Gunnison Sage-Grouse	> 50% decline	2,000
Lesser Prairie-Chicken	> 50% decline	< 20,000
Thick-billed Parrot	> 50% decline	
Black-capped Vireo	> 50% decline	4,800
Golden-cheeked Warbler	> 50% decline	24,000
Tricolored Blackbird	> 50% decline	250,000
High Continental Concern *		
Greater Sage-Grouse	> 50% decline	150,000
Spotted Owl	Moderate decline	11,000
Swainson's Hawk	Uncertain	120,000
Blue Grouse	> 50% decline	2,500,000
Greater Prairie-Chicken	> 50% decline	620,000
Scaled Quail	Moderate decline	590,000
Band-tailed Pigeon	> 50% decline	960,000
Short-eared Owl	> 50% decline	670,000
White-throated Swift	> 50% decline	330,000
Rufous Hummingbird	> 50% decline	6,300,000
Elegant Trogon	Moderate decline	370
Red-headed Woodpecker	> 50% decline	2,500,000
Olive-sided Flycatcher	> 50% decline	1,200,000
Willow Flycatcher	Moderate decline	3,300,000
Bell's Vireo	> 50% decline	1,100,000
Pinyon Jay	> 50% decline	3,000,000
Oak Titmouse	Moderate decline	910,000
Sprague's Pipit	> 50% decline	920,000
Grace's Warbler	Moderate decline	900,000
Prairie Warbler	Moderate decline	1,400,000
Brewer's Sparrow	> 50% decline	14,000,000
Baird's Sparrow	> 50% decline	1,100,000
Harris's Sparrow	> 50% decline	3,500,000
Varied Bunting	Moderate decline	31,000
Painted Bunting	> 50% decline	3,700,000
Dickcissel	Moderate decline	20,000,000

Rusty Blackbird	> 50% decline	2,500,000
Biome-restricted High Responsibility Species **		
Bendire's Thrasher	> 50% decline	96,000
Montezuma Quail	Moderate decline	6,000
Black Swift	Moderate decline	85,000
Lewis's Woodpecker	Uncertain	140,000
Nuttall's Woodpecker	Uncertain	290,000
Wrentit	Moderate decline	1,400,000
California Thrasher	Moderate decline	200,000
Lucy's Warbler	Uncertain	940,000
Hermit Warbler	Uncertain	2,500,000
Five-striped Sparrow	Moderate decline	
Black-chinned Sparrow	Moderate decline	310,000
Audubon's Oriole	Uncertain	8,700
Mountain Quail	Uncertain	160,000
Flammulated Owl	Uncertain	40,000
Elf Owl	Uncertain	46,000
Costa's Hummingbird	Uncertain	2,100,000
Calliope Hummingbird	Uncertain	1,000,000
Allen's Hummingbird	Uncertain	560,000
Arizona Woodpecker	Uncertain	4,600
White-headed Woodpecker	Stable	83,000
Thick-billed Kingbird	Uncertain	2,500
Gray Vireo	Stable	340,000
Yellow-billed Magpie	Uncertain	180,000
California Gnatcatcher	Stable	1,200
Black-capped Gnatcatcher	Uncertain	
Le Conte's Thrasher	Uncertain	180,000
Virginia's Warbler	Uncertain	440,000
Red-faced Warbler	Uncertain	96,000
Abert's Towhee	Uncertain	220,000
Rufous-winged Sparrow	Uncertain	9,600
Nelson's Sharp-tailed Sparrow	Stable	510,000
McKay's Bunting	Uncertain	6,000
Black Rosy-Finch	Uncertain	170
Brown-capped Rosy-Finch	Uncertain	45,000
Lawrence's Goldfinch	Uncertain	140,000

(Rich et al. 2003)

* Widespread species with fairly large populations, but are declining and/or threatened throughout their range.

** Species with restricted distributions and small global populations.

Temperate Steppe and Temperate Desert

Birds typical of this region include greater sage-grouse (*Centrocercus urophasianus*), Gunnison sage-grouse (*Centrocercus minimus*), sage thrasher (*Oreoscoptes montanus*), sage sparrow (*Amphispiza belli*), loggerhead shrike, Brewer's sparrow (*Spizella breweri*) in the terrestrial environment and American white pelican (*Pelecanus erythrorhynchos*), cinnamon teal (*Anas cyanoptera*), gray vireo (*Vireo vicinior*), northern pintail (*Anas acuta*), tundra swan (*Cygnus columbianus*), American avocet (*Recurvirostra americana*), black-necked stilt (*Himantopus mexicanus*), willet (*Catoptrophorus semipalmatus*), Wilson's phalarope, eared grebe (*Podiceps nigricollis*), mountain plover, snowy plover (*Charadrius alexandrinus*), white-faced ibis (*Plegadis chihi*), and California gull (*Larus californicus*) in the wetlands.

Species responding positively to grazing include the golden eagle (*Aquila chrysaetos*), brown-headed cowbird (*Molothrus ater*), and sage sparrow. Species responding negatively to grazing include long-billed curlew (*Numenius americanus*), Brewer's sparrow, vesper sparrow (*Pooecetes gramineus*), ferruginous hawk (*Buteo regalis*), burrowing owl, short-eared owl (*Asio flammeus*), western (*Sturnella neglecta*) and eastern (*S. magna*) meadowlarks, northern harrier (*Circus cyaneus*), Swainson's hawk (*Buteo swainsoni*), red-tailed hawk (*Buteo jamaicensis*), savannah sparrow (*Passerculus sandwichensis*), grasshopper sparrow (*Ammodramus savannarum*), and white-crowned sparrow (*Zonotrichia leucophrys*) (Bock et al. 1993).

Tropical/Subtropical Steppe

Birds typical of this region include mountain plover, McCown's longspur (*Calcarius mccownii*), long-billed curlew, ferruginous hawk, burrowing owl, and lesser prairie-chicken (*Tympanuchus pallidicinctus*). Playa lakes in this region are significant for a myriad of wintering ducks, sandhill cranes, and shorebirds, as well as breeding habitat for snowy plover (*Charadrius alexandrinus*).

Livestock grazing has resulted in various responses by neotropical migratory birds who breed and winter in this region. Species usually responding positively included killdeer (*Charadrius vociferans*), mountain plover, burrowing owl, common nighthawk (*Chordeiles minor*), horned lark (*Eremophila alpestris*), northern mockingbird (*Mimus polyglottos*), lark sparrow (*Chondestes grammacus*), black-throated sparrow (*Amphispiza bilineata*), and McCown's longspur. Species usually responding negatively to grazing included northern harrier, short-eared owl, common yellowthroat (*Geothlypis trichas*), Botteri's sparrow (*Aimophila botterii*), Cassin's sparrow (*Aimophila cassinii*), savannah sparrow, Baird's sparrow (*Ammodramus bairdii*), and Henslow's sparrow (*Ammodramus henslowii*). Species responding negatively at heavier grazing included upland sandpiper (*Bartramia longicauda*), Sprague's pipit (*Anthus spragueii*), dickcissel (*Spiza americana*), lark bunting (*Calamospiza malanocorys*), grasshopper sparrow, chestnut-collared longspur (*Calcarius ornatus*), bobolink (*Dolichonix oryzivorus*), red-winged blackbird (*Agelaius phoeniceus*), and eastern and western meadowlarks (Bock et al.

1993).

Tropical/Subtropical Deserts (Mojave, Sonoran, and Chihuahuan)

Birds typical of this region include Gambel's quail (*Callipepla gambelii*), scaled quail (*Callipepla squamata*), Montezuma quail (*Cyrtonyx montezumae*), Swainson's and ferruginous hawks, lesser nighthawk (*Chordeiles acutipennis*), Chihuahuan raven (*Corvus cryptoleucus*), verdin (*Auriparus flaviceps*), cactus wren (*Campylorhynchus brunneicapillus*), pyrrhuloxia (*Cardinalis sinuatus*), and crissal (*Toxostoma crissale*), Le Conte's (*Toxostoma lecontei*), and curve-billed (*Toxostoma curvirostre*) thrashers.

Riparian/Wetlands Birds

Executive Order 11988 (Floodplain Management) and Executive Order 11990 (Protection of Wetlands) directs the BLM to avoid to the extent possible the long and short-term adverse impacts associated with the destruction or modification of wetlands and riparian areas.

Agricultural and urban development have been responsible for a significant decline of >80% of the riparian/wetland ecosystems in the West. Riparian/wetland ecosystems have always been a relatively minor component of the landscape in the west. Native plant and animal communities are the most diverse of any vegetation association with a broad mixture of shrub, grass, forb, and sedge species. Conservation of riparian/wetlands is of greatest concern due to their very high wildlife value and vulnerability to disturbance and fragmentation by livestock grazing and fragmentation associated with livestock grazing (Thomas et al. 1979, Knopf et al. 1988). Chaney et al. (1990) report that riparian habitats are the most modified land type in the West. Conservation of neotropical migratory birds in the West depends very much on the protection and eventual restoration of riparian ecosystems.

Southwestern riparian habitats host the highest breeding densities in all of North America (Carothers and Johnson 1975, Ohmart and Anderson 1982, Rice et al. 1983). In Idaho, 60% of all breeding neotropical migratory birds are found in riparian habitats (Saab and Groves 1992). Eighty-two (82 %) of all nesting species in Colorado use riparian areas and 78% (93 of 119) of landbirds are neotropical migrants (Knopf 1985).

Species usually responding positively to grazing include killdeer, Lewis' woodpecker (*Melanerpes lewis*), house wren (*Troglodytes aedon*), mountain bluebird (*Sialia currucoides*), American robin (*Turdus migratorius*), Brewer's blackbird (*Euphagus cyanocephalus*), pine siskin (*Carduelis pinus*), and brown-headed cowbird. Species responding negatively include American kestrel (*Falco sparverius*), Calliope hummingbird (*Stellula calliope*), willow flycatcher (*Empidonax traillii*), cedar waxwing (*Bombycilla cedrorum*), yellow-rumped warbler (*Dendroica coronata*), MacGillivray's warbler (*Oporornis tolmiei*), Wilson's warbler (*Wilsonia pusilla*), common yellowthroat (*Geothlypis trichas*), savannah sparrow, chipping sparrow (*Spizella passerine*), dark-eyed

junco (*Junco hyemalis*), white-crowned sparrow, Lincoln's sparrow (*Melospiza lincolnii*), red-winged blackbird, Bullock's oriole (*Icterus bullockii*), American goldfinch (*Carduelis tristis*), and Cassin's sparrow (Bock et al. 1993).

Few studies on the direct impact of livestock or livestock removal exist. Krueper et al. (2003) recently completed a multi-year study on the impacts of livestock removal on birds in the San Pedro Riparian National Conservation Area, Arizona (Table 2). Removal of livestock resulted in an increase for 42 species, 26 significantly, and decreased for 19 species, 8 significantly.

Table 2. Species with increasing and decreasing trends during the breeding season on the San Pedro Riparian National Conservation Area, Arizona, before and after removal of cattle late 1987, sorted by significance level of the trend.

<i>Trend and species</i>	<i>Detections/kilometer</i>					<i>Annual change^a</i>
	<i>1986</i>	<i>1987</i>	<i>1988</i>	<i>1989</i>	<i>1990</i>	
INCREASING SPECIES						
Cassin's Sparrow (<i>Aimophila cassinii</i>)	0.06	0.92	5.19	5.15	2.15	2.42
Dusky-capped Flycatcher (<i>Myiarchus tuberculifer</i>)	0.03	0.07	0.09	0.32	0.31	1.93
N. Beardless-Tyrannulet (<i>Camptostoma imberbe</i>)	0.06	0.04	0.17	0.25	0.46	1.82
Yellow Warbler (<i>Dendroica petechia</i>)	3.21	6.05	8.77	17.68	16.71	1.55
Western Wood-Pewee (<i>Contopus sordidulus</i>)	1.51	1.62	2.18	3.23	4.17	1.31
Summer Tanager (<i>Piranga rubra</i>)	3.73	5.91	5.81	10.61	10.13	1.29
Abert's Towhee (<i>Pipilo aberti</i>)	6.14	7.28	8.63	13.11	15.43	1.28
Great Blue Heron (<i>Ardea herodias</i>)	0.24	0.65	0.42	0.43	0.97	1.27
Mallard (<i>Anas platyrhynchos</i>)	0.80	0.61	1.07	0.92	1.81	1.23
Blue Grosbeak (<i>Guiraca caerulea</i>)	2.92	5.20	4.46	6.19	7.22	1.22
Ash-throated Flycatcher (<i>Myiarchus cinerascens</i>)	1.81	2.36	2.41	3.66	3.74	1.21
Cassin's Kingbird (<i>Tyrannus vociferans</i>)	3.46	3.93	3.06	6.07	5.54	1.15
Common Yellowthroat (<i>Geothlypis trichas</i>)	1.27	3.24	5.36	12.95	14.71	1.87
Brown-headed Cowbird (<i>Molothrus ater</i>)	3.47	5.03	5.58	6.21	8.11	1.21
Vermilion Flycatcher (<i>Pyrocephalus rubinus</i>)	2.35	3.22	3.40	5.40	7.30	1.32
White-winged Dove (<i>Zenaida asiatica</i>)	1.93	2.69	3.37	7.54	10.78	1.56
Bewick's Wren (<i>Thryomanes bewickii</i>)	10.87	10.85	9.82	14.34	14.97	1.10
Yellow-breasted Chat (<i>Icteria virens</i>)	5.35	6.60	7.94	17.17	20.58	1.44
Lesser Goldfinch (<i>Carduelis psaltria</i>)	5.08	5.17	3.73	7.00	6.13	1.07
Gray Hawk (<i>Asturina nitida</i>)	0.57	0.92	0.54	0.84	1.15	1.14
Hooded Oriole (<i>Icterus cucullatus</i>)	0.00	0.17	0.21	0.20	0.41	1.86

Brown-crested Flycatcher (<i>Myiarchus tyrannulus</i>)	2.07	2.32	2.43	3.34	3.54	1.16
Mourning Dove (<i>Zenaida macroura</i>)	1.05	1.41	1.80	5.30	4.09	1.50
Common Raven (<i>Corvus corax</i>)	0.02	0.01	0.17	0.13	0.24	2.18
House Finch (<i>Carpodacus mexicanus</i>)	2.17	1.39	1.71	2.80	3.12	1.15
N. Rough-winged Swallow (<i>Stelgidopteryx serripennis</i>)	0.08	0.38	0.35	0.64	0.53	1.55
Black Phoebe (<i>Sayornis nigricans</i>)	0.27	0.15	0.10	0.51	0.92	1.44
Black-chinned Hummingbird (<i>Archilochus alexandri</i>)	0.57	0.57	0.50	0.71	1.63	1.26
Indigo Bunting (<i>Passerina cyanea</i>)	0.02	0.02	0.27	0.54	0.58	2.73
Lucy's Warbler (<i>Vermivora luciae</i>)	13.80	14.68	13.76	16.03	20.81	1.10
Bell's Vireo (<i>Vireo bellii</i>)	0.91	1.50	1.22	1.89	2.69	1.27
Phainopepla (<i>Phainopepla nitens</i>)	0.11	0.10	0.78	0.16	0.64	1.47
Yellow-billed Cuckoo (<i>Coccyzus americanus</i>)	0.43	0.63	0.78	0.96	1.19	1.28
Common Ground-Dove (<i>Columbina passerina</i>)	0.08	0.18	0.07	0.54	0.41	1.57
Red-winged Blackbird (<i>Agelaius phoeniceus</i>)	0.08	0.01	0.16	0.12	0.31	1.71
Song Sparrow (<i>Melospiza melodia</i>)	1.09	0.80	1.39	3.00	4.18	1.49
Turkey Vulture (<i>Cathartes aura</i>)	0.51	0.00	3.68	1.37	0.85	1.40
Ladder-backed Woodpecker (<i>Picoides scalaris</i>)	1.52	1.67	1.62	1.59	2.10	1.06
Gila Woodpecker (<i>Melanerpes uropygialis</i>)	2.63	2.41	2.47	3.07	2.79	1.04
Bullock's Oriole (<i>Icterus bullockii</i>)	1.55	1.67	1.56	2.21	1.69	1.05
Botteri's Sparrow (<i>Aimophila botterii</i>)	1.83	2.61	1.47	4.21	2.40	1.11
White-breasted Nuthatch (<i>Sitta carolinensis</i>)	1.24	1.72	1.30	1.66	1.50	1.03
DECREASING SPECIES						
Great Horned Owl (<i>Bubo virginianus</i>)	0.43	0.42	0.21	0.47	0.33	0.96
Northern Cardinal (<i>Cardinalis cardinalis</i>)	0.46	0.20	0.25	0.43	0.25	0.95
Killdeer (<i>Charadrius vociferus</i>)	1.43	0.67	0.57	0.56	0.50	0.80
European Starling (<i>Sturnus vulgaris</i>)	0.64	0.72	0.70	0.55	0.21	0.78
House Sparrow (<i>Passer domesticus</i>)	0.34	0.49	0.38	0.09	0.00	0.51
Greater Roadrunner (<i>Geococcyx californianus</i>)	0.72	0.43	0.33	0.21	0.26	0.76
Eastern Meadowlark (<i>Sturnella magna</i>)	1.43	1.52	1.00	1.71	0.80	0.90
Black-throated Sparrow (<i>Amphispiza bilineata</i>)	1.86	0.91	0.89	0.64	0.76	0.81
Verdin (<i>Auriparus flaviceps</i>)	0.69	0.79	0.33	0.10	0.34	0.71
Red-tailed Hawk (<i>Buteo jamaicensis</i>)	0.22	0.17	0.16	0.20	0.09	0.84
Cactus Wren (<i>Campylorhynchus brunneicapillus</i>)	0.53	0.55	0.40	0.39	0.18	0.78
Crissal Thrasher (<i>Toxostoma crissale</i>)	0.93	0.44	0.60	0.68	0.44	0.90

Cooper's Hawk (<i>Accipiter cooperii</i>)	0.26	0.10	0.07	0.16	0.14	0.92
Bushtit (<i>Psaltriparus minimus</i>)	2.16	1.23	1.85	1.89	1.31	0.94
Gambel's Quail (<i>Callipepla gambelii</i>)	3.12	2.52	1.28	2.64	1.79	0.90
Northern Mockingbird (<i>Mimus polyglottos</i>)	1.72	1.34	1.28	1.17	1.05	0.89
Western Kingbird (<i>Tyrannus verticalis</i>)	2.08	1.52	1.56	1.61	1.70	0.97
Northern Flicker (<i>Colaptes auratus</i>)	1.83	1.85	1.45	1.77	1.66	0.98
Canyon Towhee (<i>Pipilo fuscus</i>)	0.52	0.39	0.37	0.51	0.36	0.96

(Krueper et al. 2003)

SPECIAL STATUS SPECIES

Species that are considered special status species included herein are those that are officially listed under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) as threatened or endangered, those that are proposed for listing, or are candidates for listing as threatened or endangered under the provisions of the Endangered Species Act (ESA); those listed by a State in a category such as threatened or endangered implying potential endangerment or extinction; and those designated by each BLM State Director as sensitive. The protection provided by the policy for candidate species shall be used as the minimum level of protection for BLM sensitive species. The sensitive species designation is normally used for species that occur on Bureau administered lands for which BLM has the capability to significantly affect the conservation status of the species through management.

The BLM Special Status Species Management (6840) policy requires that BLM ensure that actions requiring authorization or approval are consistent with the conservation needs of special status species and do not contribute to the need to list any special status species, either under provisions of the ESA or other provisions of this policy.

Appendix I is the complete list of special status species by state at this time.

While BLM would prefer to manage native plant and animal communities or ecosystems, the ESA requires the agency to manage threatened and endangered species by species.

The effects of livestock grazing on native plant and animal communities depends on the affected plant or animal, grazing intensity, season of use, and long-term weather patterns

(Milchunas et al. 1988). Long-term studies on the impacts of livestock grazing are wanting due to the enormous cost and complexity that such studies would require. Historic bison grazing in the shortgrass prairie was characterized by bison migrating great distances and would graze an area only once or twice each year for relatively short periods. Livestock on the other hand graze an area continuously for longer periods during the growing season. The remainder of the West lacked continual large herbivore grazing. Many species and their habitats have been affected by livestock grazing, which in some cases has contributed to or caused the extirpation or endangerment of species. The General Accounting Office (GAO 1991) cited several studies that recorded the deleterious effects of livestock grazing have had on a number of wildlife species and their habitats. GAO concluded that current grazing practices degrade wildlife habitat, including the tendency for livestock to transmit diseases to wildlife and change the composition of vegetation communities beyond what is practical for wildlife adaptation to such radical changes. The GAO report went on to document the adverse impacts livestock grazing have had upon Mojave desert tortoise, bighorn sheep, and Montezuma quail.

Grazing directly and indirectly impacts special status species. Direct grazing impacts include livestock consumption of palatable special status plants and direct trampling of special status species, such as desert tortoise. Allied livestock management actions, such as vehicular traffic, water development have caused direct take. The exact extent of such is not well known since monitoring is always deficient.

Livestock grazing also causes indirect take of special status species. Indirect take has taken the form of removing palatable forage for species such as desert tortoise and sage-grouse and removing screening for nest concealment for sage-grouse. Livestock grazing operations have also been responsible for the introduction and transport of invasive species such as cheatgrass, which most cases forever changes the dynamics of the ecology of the native plant community. Overgrazing has caused a decline in diversity and abundance of native plant communities. Ecological decline from overgrazing is a gradual, long-term process.

Johnson (1989) reported that in Arizona and New Mexico there are more than 100 special status species dependent on riparian ecosystems and they are all sensitive largely due to livestock grazing. This can be generalized to most special status species on rangelands.

Animals

BLM management of the public lands will become increasingly complex due to the listing of additional species as threatened or endangered under the ESA in the West.

There are a number of species which have been receiving increased attention from environmental groups. The mountain plover will in all likelihood be listed as threatened or endangered under the ESA in fall of 2003. This listing will affect Montana, Wyoming, Nevada, Colorado, Utah, Arizona, New Mexico, and California primarily.

Petitions have been filed with the U.S. Fish and Wildlife Service (FWS) for the mountain quail (*Oreortyx pictus*), but the FWS found the petition insufficient to list.

The FWS received a petition on April 21, 2003 to list the pygmy rabbit rangewide as threatened

or endangered. This listing would affect the states of Oregon, Idaho, California, Nevada, Wyoming, Utah and Montana. The FWS recently published in the Federal Register the final rule (March 5, 2003) listing the pygmy rabbit, Columbia Basin distinct population segment in Washington, as endangered under the ESA.

Table 3 details the 7 petitions that have been received by FWS to list both the Gunnison and greater sage-grouse as threatened or endangered. Listing of this species may not be imminent, but the 50% habitat loss (Map 1) and continuing population declines of >60% are reminiscent of the eventual listings of the desert tortoise and northern spotted owl (*Strix occidentalis*). The listing of the sage-grouse would create significant workload demands on all BLM resource specialists, but the greatest impact would be upon the grazing program.

Table 3
Summary of Sage Grouse Petitions Submitted to the U.S. Fish and Wildlife Service (USFWS)¹

(as of April 16, 2003)

Petition Date: May 14, 1999 (74 pages)	Petition Date: January 25, 2000 (254 pages)	Petition Date: December 28, 2001 (493 pages)
Species: Washington population of the Western Sage Grouse <i>Centrocercus urophasianus phaios</i>	Species: Gunnison Sage Grouse <i>Centrocercus minimus</i>	Species: Mono Basin population of the Greater Sage Grouse <i>Centrocercus urophasianus phaios</i>
Petition Request: List as threatened or endangered	Petition Request: List as endangered or threatened, emergency listing, and designation of critical habitat	Petition Request: Emergency list as endangered
Petitioners: Northwest Ecosystem Alliance and Biodiversity Legal Foundation	Petitioners: Mark Salvo, American Lands Alliance, Dr. Randy Webb, Net Work Associates, Andy Kerr, The Larch Company, Jasper Carlton, Biodiversity Legal Foundation, Susan Ash, Wild Utah Forest Campaign, Rob Edwards, Sinapu	Petitioners: Donald Randy Webb, Institute for Wildlife Protection
Legal Action: No NOI** to date	Legal Action: Court complaint dated September 29, 2000 from the American Lands Alliance et al. On January 31, 2003 District Court rules that the USFWS must prepare a 12-month finding. USFWS has filed a	Legal Action: A court complaint dated July 3, 2002 was received from Dr. Steven Herman and the Institute for Wildlife Protection. New NOI dated January 9, 2003 on the USFWS 90-day finding

	motion with the court to reconsider this decision.	from Dr. Steven Herman and the Institute for Wildlife Protection.
USFWS Determination: Both a 90-day finding (August 24, 2000) and a 12-month finding (May 7, 2001) published in the <u>Federal Register</u> . Outcome was that the petition presents substantial information and listing is warranted but precluded for the Columbia Basin Distinct Population Segment (occurs in WA and n. OR); became a candidate by default under USFWS policy.	USFWS Determination: The species as a candidate by USFWS prior to petition. It has a listing priority number	USFWS Determination: Initial review indicated that the situation does not warrant an emergency listing. A 90-day finding was initiated August 1, 2002. The 90-day finding was published in the <u>Federal Register</u> December 26, 2002 with an outcome that the information presented in the petition is not substantial.
Lead USFWS Office: Upper Columbia Fish and Wildlife Office, Spokane, Washington (509) 891-6839	Lead USFWS Office: Western Colorado Field Office, Grand Junction, Colorado (970) 243-2778	Lead USFWS Office: Nevada Fish and Wildlife Office, Reno, Nevada (775) 861-6300
USFWS Contact: Chris Warren	USFWS Contact: Terry Ireland	USFWS Contact: Kevin Kritz

Petition Date: January 24, 2002 (468 pages)	Petition Date: June 18, 2002 (7 pages)	Petition Date: July 3, 2002 (524 pages)
Species: Western subspecies of the Greater Sage Grouse <i>Centrocercus urophasianus phaios</i>	Species: Greater Sage Grouse <i>Centrocercus urophasianus</i>	Species: Eastern subspecies of the Greater Sage Grouse <i>Centrocercus urophasianus urophasianus</i>
Petition Request: List the subspecies	Petition Request: List as endangered	Petition Request: List as endangered
Petitioners: Donald Randy Webb, Institute for Wildlife Protection	Petitioners: Craig Dremann	Petitioners: Donald Randy Webb, Institute for Wildlife Protection
Legal Action: Court complaint dated October 3, 2002 from the Institute for	Legal Action: No NOI** to date	Legal Action: Court complaint dated January 10, 2003 filed in the Western District Court

Wildlife Protection. New NOI dated February 7, 2003 from the Institute for Wildlife Protection challenging the merits of the 90-day finding.		of Washington by the Institute for Wildlife Protection for failure to do a 90-day finding. USFWS responded to the complaint but no date established yet for a finding.
USFWS Determination: A 90-day finding was initiated October 30, 2002. The 90-day finding was published in the <u>Federal Register</u> on February 7, 2003 with an outcome that the information presented in the petition is not substantial.	USFWS Determination: Insufficient funds to initiate a 90-day finding	USFWS Determination: Insufficient funds to initiate a 90-day finding
Lead USFWS Office: Oregon Fish and Wildlife Office, Portland, Oregon (503) 231-6179	Lead USFWS Office: Wyoming Ecological Services Field Office, Cheyenne, Wyoming (307) 772-2374	Lead USFWS Office: Wyoming Ecological Services Field Office, Cheyenne, Wyoming (307) 772-2374
USFWS Contact: Jeff Dillon	USFWS Contact: Pat Deibert	USFWS Contact: Pat Deibert

Petition Date: March 19, 2003 (992 pages; combination of previous petitions for Western and Eastern subspecies)
Species: Greater Sage Grouse <i>Centrocercus urophasianus</i>
Petition Request: List as endangered
Petitioners: Donald Randy Webb, Institute for

Wildlife Protection
Legal Action: No legal action to date
USFWS Determination: No determination yet.
Lead USFWS Office: Wyoming Ecological Services Field Office, Cheyenne, Wyoming (307) 772-2374
USFWS Contact: Pat Deibert

¹ Table compiled by Kevin Kritz, U.S. Fish and Wildlife Service, Nevada Fish and Wildlife Office, 1340 Financial Blvd. Suite #234 , Reno, NV 89502-7147
(775) 861-6300

**** 60-day Notice of Intent to Sue (NOI)**

Vegetation

Riparian

Riparian areas are a highly productive and unique wetland environment that is found adjacent to rivers and streams. Riparian communities are often referred to as “ribbons of green” in the arid Western U.S., since in many landscapes, the riparian areas along watercourses provide the only visible green vegetation. Though estimates vary, it is generally agreed that riparian ecosystems comprise less than 1% of the surface area in the 11 western United States (Cooperrider et al. 1986; Ohmart 1996). Riparian communities in the Western U.S. are the most productive habitats in North America (Johnson et al. 1977), and provide irreplaceable wildlife habitat for breeding, wintering, and migration. An estimated 75% of the vertebrate species in Arizona and New Mexico depend on riparian habitat for some portion of their life history (Johnson et al. 1977). Numerous classification systems have been developed for riparian communities, but the system proposed by Dick-Peddie and Hubbard (1977) was used for BLM’s Range Reform 1994 EIS, and remains appropriate for this effort. **[Include Dick-Peddie and Hubbard’s description of riparian communities here? Or leave as reference and let them look at the 1994 EIS for details?]. [Why not Cowardin classification?]**

Table 3-1

Comparison of Condition of Lotic Riparian Habitat on BLM Lands 1998 vs. 2001

Condition of Riparian Area	1998		2001		% Change
	Total Miles in Lower 48 States	%	Total Miles in Lower 48 States	%	
Proper Functioning Condition	13,230	36%	14,314	42%	+6%
Functioning-At-Risk	12,900	35%	14,657	43%	+8%
Non-Functional	3,251	9%	3,688	11%	+2%
Unknown	7,310	20%	1,478	4%	-16%

Table 3-2

Comparison of Lentic Riparian-Wetland Habitat on BLM Lands 1998 vs. 2001

Condition of Riparian Area	1998		2001		% Change
	Total Acres in Lower 48 States	%	Total Acres in Lower 48 States	%	
Proper Functioning Condition	147,923	41%	166,796	51%	+10%
Functioning-At-Risk	45,135	13%	48,320	15%	+2%
Non-Functional	7,557	2%	6,409	2%	0%
Unknown	166,819	44%	107,135	32%	-12%

Figure 3-1

Condition of Lotic Riparian Areas on BLM Lands (Lower 48 States), 2001

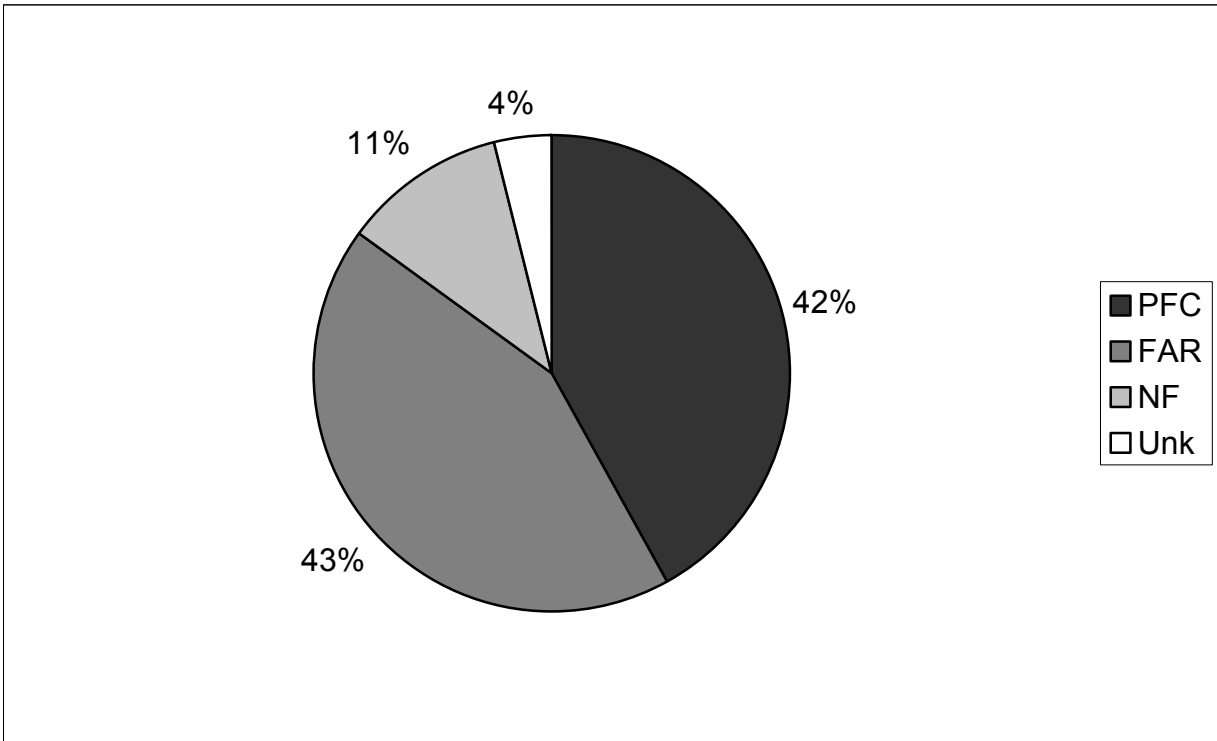
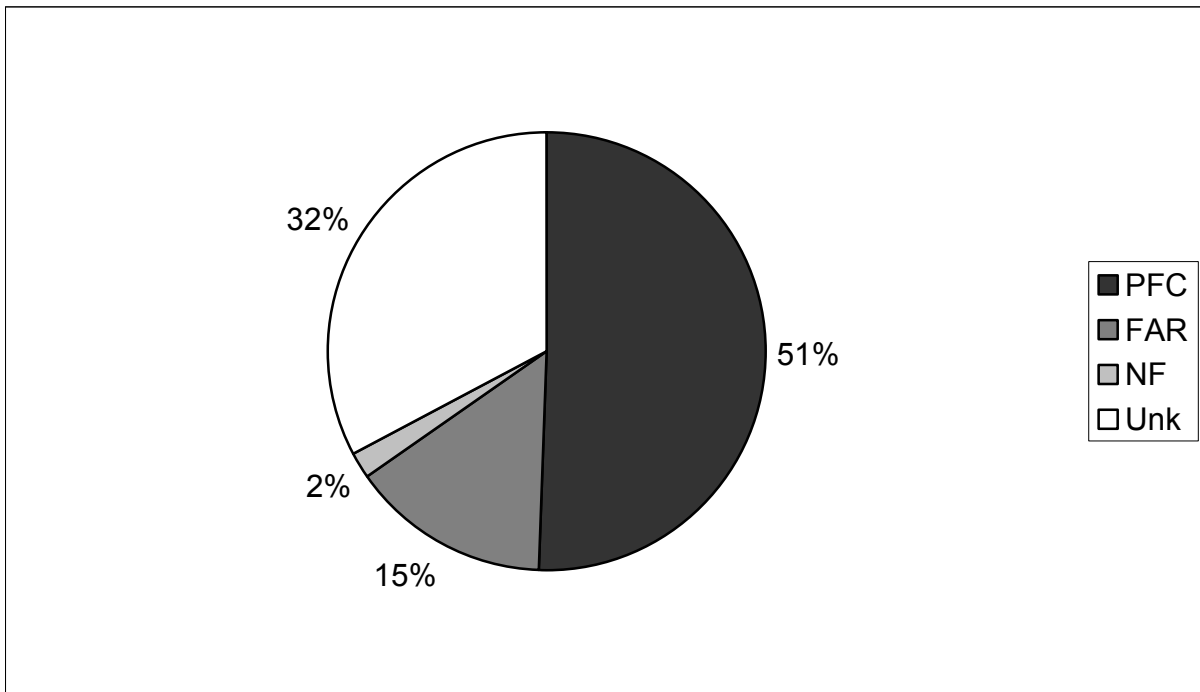


Figure 3-2

**Condition of Lentic Riparian-Wetland Areas on BLM Lands
(Lower 48 States), 2001**



Riparian, Wetlands, and Aquatic Communities

Riparian areas were greatly altered by early grazing practices prior to 1934, when the Taylor Grazing Act established some control over livestock grazing practices on the public domain (Leopold 1946). Nonetheless, numerous recent studies clearly document that livestock grazing continues to degrade riparian habitats (Elmore and Kaufman 1994, Ohmart 1996, Belsky et al. 1999). Although many riparian systems respond quickly to improved management or livestock exclusion, Clary et al. (1996) found that past grazing practices at their study site in eastern Oregon had likely altered habitat conditions so drastically that a wide range of grazing treatments (including no grazing) for a period of 7 years resulted in few differential responses by plants or animals. Natural recovery of native riparian vegetation may be very slow, even with reduction or elimination of cattle grazing due to deterioration of stream condition (downcutting, widening), dominance of non-native annuals within the riparian area, and loss of native seed sources (Clary et al. 1996). The continuing decline in the condition of many western U.S. riparian areas is partially attributable to the more than doubling of the number of cattle grazing western

rangelands between 1940 and 1990 (Trimble and Mendel 1995).

Riparian areas combine the presence of water, increased vegetation, shade, and a favorable microclimate to create the most biologically diverse habitat found on BLM lands. Riparian areas are highly prized for their recreation, fish and wildlife, water supply, cultural, and historic values, as well as for their economic values related to livestock production, timber harvest, and mineral extraction (BLM 1998). In the semi-arid west, healthy functioning riparian areas perform several critical functions:

- Improve water quality via filtering and sediment removal
- Stabilize streambanks
- Soil retention
- Dissipate stream energy during high flow events (reduced flood damage)
- Provide water, forage, and shade for wildlife and livestock
- Act as migration corridors for wildlife and birds
- Create opportunities for recreation (fishing, camping, picnicking, hiking)
- Maintain in-stream flows and restore perennial flow
- Maintain aquatic habitat for healthy fish populations
- Raise and maintain the water table
- Increase habitat diversity for wildlife and plants
- Enhance aesthetics

Livestock grazing causes numerous changes in plant communities. Removal of streamside vegetation can lead to channel downcutting or incision, which lowers the water table near the stream. As the water table drops, riparian plant species and their associated wildlife species are replaced by upland species (sagebrush and juniper), which can tolerate drier soils (Belsky et al. 1999). Removal of vegetation leads to increases in noxious weeds which invade the bare ground. Once established, these weed species crowd out native riparian species and lead to a decline in riparian functioning. Belsky et al. (1999) concluded that many riparian and their associated aquatic habitats have been converted into communities that are now dominated by habitat generalists and weedy species such as cheatgrass (*Bromus tectorum*), cowbirds (*Molothrus spp.*), smallmouth bass (*Micropterus dolomieu*), and by upland or common species such as sagebrush, juniper, and speckled dace (*Rhinichthys osculus*).

Livestock are adapted to mesic habitats, and spend a disproportionate amount of their time in riparian areas. Since riparian areas are among the biologically richest communities in the arid Western U.S., many of the adverse impacts associated with grazing are magnified in riparian habitats (Fleischner 1994). Several studies have shown that damage to riparian habitat as a result of livestock grazing can be reduced by improving grazing methods, herding or fencing cattle away from streams, reducing livestock numbers, or increasing the period of rest from grazing (Armour et al. 1994, Elmore and Kauffman 1994). Studies have shown that improved livestock management allows damaged and denuded streambanks to revegetate and for erosion rates to decline (Elmore and Kauffman 1994). However, Elmore and Kauffman (1994) concluded that the most dramatic and rapid rates of ecosystem recovery are obtained by livestock exclusion. The results of recent studies and literature reviews (Armour et al 1994; Elmore and Kauffman

1994; Ohmart 1996; Belsky et al. 1999) only serve to validate Platts (1982) conclusion that livestock grazing is the major cause of impaired stream and riparian environments and reduced fish populations throughout the arid western U.S.

Riparian Conditions and Trends

In 1993, BLM adopted the Process for Assessing Proper Functioning Condition (BLM 1993) as its standard methodology for determining the condition on riparian resources on public lands. BLM has aggressively undertaken the task of conducting PFC assessments on its lands, resulting in a decrease of sites classified as Unknown from 55% in 1993 to only 4% in 2001. As a result of its commitment to the standardized PFC assessment technique, BLM has compiled several years of information on the status and trends of riparian conditions on lands under its management.

Riparian habitat on BLM lands in the lower 48 states include 34,137 miles adjacent to flowing water (lotic systems) and 328,660 acres of riparian habitat associated with standing water (lentic systems). As of October 2001, the condition of approximately 96% of lotic riparian areas on BLM lands in the lower 48 states had been assessed using the Proper Functioning Condition (PFC) assessment technique (BLM, 2002). Overall, 42% were classified as being in Proper Functioning Condition, 43% as Functioning-At-Risk (FAR), 11% as Non-Functional, and 4% as Unknown (see Figure 3-1)(BLM 2002). Of the miles in the FAR category, 36% were in an upward trend, indicating that the condition is improving and no changes in management are immediately needed. In September 1990, BLM published its Riparian-Wetland Initiative for the 1990's (BLM 1990). The Initiative set the goal of restoring or maintaining riparian-wetland areas so that 75% or more would be in PFC by 1997. The fact that only 42% of BLM's lotic riparian areas were classified as PFC in 2001, shows that BLM still has a long way to go before this goal is met.

As of October 2001, the condition of approximately 67% of lentic riparian areas on BLM lands in the lower 48 states had been assessed using the PFC assessment technique (BLM 2002). Overall, 51% were found to be in PFC, 15% in FAR, 2% in Non-Functional, and 32% were Unknown (BLM 2002)(see Figure 3-2).

Over the past 15-20 years, BLM has focused a great deal of its restoration efforts on riparian areas. Riparian areas typically respond quickly to management changes, and in some instances recovery has been dramatic. Many of the restoration efforts have been in highly visible areas, where the public has taken the lead in changing land management practices. Despite several highly publicized and visible successes, trends indicate that the overall improvement in the condition of riparian habitat on BLM lands is minimal. A comparison of lotic riparian conditions on BLM lands in the lower 48 states from 1998 to 2001 shows little improvement in overall condition of riparian areas (see Table 1). While the percentage of miles in PFC has increased over the four year period, the percentage of miles classified as Non-Functional has also increased. The largest change from 1998 to 2001 is in the Unknown category, which dropped from 20% to 4%, demonstrating BLM's commitment to actively evaluate the condition of its

riparian resources.

Riparian, Wetland, and Aquatic Communities

Riparian ecosystems are extremely productive and offer a unique combination of habitat niches for fish and wildlife. Riparian communities provide abundant food, shelter, and water, and are used extensively by wildlife at all stages of their life history. Riparian ecosystems are important for a wide range of physical and biological features, including:

- Dense vegetation cover for shelter, shade, nesting, and resting
- Presence of surface water and abundant soil moisture
- Diverse vegetation structure provides a range of habitat types
- Linear nature provides protected pathways for wildlife migration

Numerous studies have documented the effects of livestock grazing and trampling on aquatic and riparian species in the western United States. Belsky et al. (1999) summarized these effects and their impacts on various species groups. Their findings are summarized as follows:

- Fish species diversity, abundance, and productivity decline due to higher water temperatures, increased turbidity, lower summer flows, decreased dissolved oxygen, damaged spawning beds, loss of plant cover, fewer insects, and decreased hiding cover. These habitat changes lead to loss of salmonids and other cold-water species, loss of avian and mammalian predators, and replacement of cold-water aquatic species with warm-water species.
- Aquatic invertebrate abundance, diversity, and species composition is altered by higher water temperatures, increased fine sediments, lower dissolved oxygen levels, and lower late season flows. Alteration of the aquatic invertebrate community results in loss of species that require clean, cold water and coarse substrate, increase in algae feeders, fewer palatable species, and less food for higher trophic levels.
- Amphibian and reptile abundance and species composition declines as a result of loss of prey base, loss of thermal cover and protection from predators, increased aridity, and decreased vegetation structure. Declines in amphibian and reptile numbers leads to loss of biodiversity and prey for higher trophic levels and loss of native species.
- Bird diversity, abundance, and species composition is altered due to reduction in food, water quality and quantity, loss of perches, nesting sites, and protective plant cover. The alteration of bird species composition results in a reduction in biodiversity, replacement of riparian specialists by upland species and generalists, and loss of some neotropical migrants.
- Mammal diversity, abundance, and species composition is often altered due to loss of food sources, change to a warmer, drier, more exposed environment, and behavioral modifications such as avoidance of livestock. Changes in the mammal population lead to changes in predator-prey relations, lessened beaver activity and loss of wetlands they create, and replacement of riparian species with upland species and generalists.
- The abundance of threatened and endangered species is reduced due to loss of habitat, disturbance, livestock herbivory, competition with livestock, and habitat fragmentation.

The reduction in the abundance of threatened and endangered species could lead to possible extinction.

Due to their importance to a wide range of both terrestrial and aquatic species, riparian ecosystems serve as repositories for biodiversity throughout the West (Belsky et al. 1999). Several studies have shown that livestock grazing has led to a decline in neotropical migratory birds that utilize riparian habitat (Saab et al. 1995). The declines are particularly apparent for ground-nesting species and species that forage in riparian areas with heavy shrub or ground cover (Saab et al. 1995). Riparian areas attract a disproportionate number of migrating birds and provide primary habitat for waterfowl and shorebirds (BLM 1994). Wet meadow areas and riparian zones serve as critical feeding and watering sources for sage grouse (Hockett 2002). Larger vertebrate species also depend on riparian areas. Mule deer and elk use riparian areas for food and cover and for travel and migration corridors (Thomas et al. 1979). Pronghorn antelope use riparian areas extensively in summer (Cooperrider et al. 1986). Flather et al. (1994) reported that livestock grazing was the fourth leading cause of species endangerment in the U.S. and the second leading cause of plant endangerment. The same report also found that within the Arizona Basin and the Colorado/Green River Plateau, livestock grazing is the primary cause of species being federally listed as threatened or endangered. Livestock grazing often indirectly affects wildlife associated with spring and seep ecosystems. Throughout the west, seeps and springs have been altered, and in many cases completely dewatered, in order to provide water for livestock. Springs are developed and their water is piped to a trough or pond, resulting in loss of riparian vegetation and the animals that are dependant on the natural spring ecosystem. Springsnails are aquatic mollusks that occur primarily as relict populations of formerly widespread species (BLM 2001). There are several species of springsnails on the federal endangered species list and numerous others are found on BLM sensitive species lists. Livestock grazing directly impacts springsnail populations through trampling, spring channel alteration, and degradation of water quality (Frest 2002).

Cold Water Fisheries

Fish populations are directly affected by changes in riparian habitat. Numerous studies document reduced trout populations as a result of habitat loss and degradation caused by livestock grazing (Platts 1991; Behnke 1992). Ungrazed streams on the Tonto and Santa Fe National Forests had twice as many trout and twice the trout biomass as did grazed streams (Rinne and Lafayette 1991). The native cutthroat trout population in Huff Creek, Wyoming, increased from 36 fish per mile to 444 fish per mile in response to livestock exclusion followed by improved livestock management (Chaney et al. 1990). Measurements showed that Huff Creek's channel narrowed by about one-third, doubled in depth, and water temperatures declined in response to changes in livestock management (Chaney et al. 1990). BLM's efforts to protect and expand populations of native cutthroat trout have been hampered by livestock grazing in some areas. Changes in riparian and aquatic habitat due to livestock grazing often give nonnative trout a competitive advantage over native trout (Griffith 1988). Increased sediment loads and higher summer water temperatures due to riparian degradation favor exotic introduced trout species over native cutthroat trout (Stefferd 1988).

Streamside grazing removes vegetation, leading to warmer water temperatures due to loss of shade, and higher levels of sediment in the stream as a result of increased soil erosion. Increased sediment can smother fish eggs in spawning areas and lead to reduced abundance of young fish. Livestock remove vegetative cover and compact soils, which slows the rate of water percolation and infiltration, resulting in unnaturally high and frequent runoff events. The increased erosion and subsequent frequent flood events alter cold water fish habitat by filling pools and substrate with silt, uprooting riparian vegetation, widening stream channels, and lowering water tables (Bock et al. 1992). Wider and shallower stream channels provide less hiding cover for fish and leave them more susceptible to predation. There is a clear and documented connection between the health of upland vegetation and the health of riparian communities and aquatic habitat. Chaney et al. (1993) noted that accelerated runoff from uplands triggers downcutting of soft substrate streams. The downcutting lowers both the streambed and water table, desiccates the riparian area, destabilizes streambanks, and increases erosion and further accelerates runoff. The cumulative effect of declining riparian condition is that coldwater species such as trout and salmon decline, and are replaced by less valuable and more tolerant species (Belsky et al. 1999).

Livestock grazing has major effects on stream channel morphology. As the protective riparian vegetation is removed, livestock shear off streambanks and the banks begin to erode (Bowers et al. 1979). After the streambanks become broken down and eroded, the stream channel becomes wider and shallower. Wide shallow streams have much greater surface area exposed to solar radiation and evaporation. Eroding streambanks contribute excessive sand and silt accumulation over the stream substrate, leading to loss of aquatic invertebrates and smothering of fish eggs (Armour 1978).

Figure 3-1 shows the sequential degrading of a stream channel and its associated riparian community (BLM 1993) [**Note: Figure 3-1 is identical to Figure 3-2 in the 1994 EIS**]. A healthy riparian community protects streambanks from erosion and maintains a high water table and productive habitat for fish and aquatic invertebrates (State A in Figure 3-1). As the stream channel erodes, the wet meadow areas become disconnected from the water table and dry out (State B in Figure 3-1). Sagebrush and rabbitbrush encroach on the site resulting in a reduction in the amount and quality of forage. In the absence of protective riparian vegetation, the stream channel is likely to become incised and form a new base level (State C in Figure 3-1). Once the channel becomes incised, it is classified as non-functional. Over time, the incised channel widens and a new floodplain begins to develop at the new base level (State D in Figure 3-1). Figure 3-2 shows the stages in the recovery of a stream-associated riparian area [**Note: Figure 3-2 is identical to Figure 3-3 in the 1994 EIS**].

CH 4 – ENVIRONMENTAL CONSEQUENCES

NO ACTION - MANAGEMENT ALTERNATIVE 1

WILDLIFE

Terrestrial (including Migratory Birds)

The environmental impact changes analysis herein focuses on proposed policy changes and existing regulations for livestock grazing as they affect wildlife populations and their habitats on the 162 million acres grazed by domestic livestock in the western United States. Implicit in these environmental consequences is the analysis of the policy changes and existing regulations as stated, as well as the *practical* and *legal* implications of any changes.

The No Action alternative includes all of the previous regulations, as well as new proposed policy changes.

Impacts on wildlife resources are most beneficial under the No Action alternative.

Satisfactory performance for a grazing permit/lease requires that unsatisfactory performance results in having a federal/state permit/lease cancelled. This allows BLM to reward those permittees who are performing well and disciplining those that do not. This results in positive long-term impacts for wildlife resources and the ecosystems upon which they depend.

The BLM can currently take action against a grazing permit or lease when a permittee or lessee has been convicted by a court of law or otherwise found to be in violation of several different Federal or State laws or regulations (i.e., placing poisonous bait or hazardous devices to kill wildlife, applying or storing pesticides, herbicides, or other hazardous material on public lands, altering or destroying natural stream courses without authorization, polluting water sources, aiding and abetting or directly illegally taking, destroying, or harassing fish and wildlife), where the violation is related to the grazing use authorized by BLM. This provision has had a positive impact on wildlife resources by discouraging grazing permittees from these prohibited acts. Historic, adverse impacts have been realized upon Lahontan cutthroat trout, black-tailed prairie dogs and therefore black-footed ferrets, gray and Mexican wolves, jaguar, grizzly bears, southwestern willow flycatchers, and many others.

The existing administrative remedies require that any person whose interest is adversely affected by a final decision may appeal and file a petition for stay. This has had positive impacts for wildlife resources as it allows environment organizations to appeal grazing decisions on behalf of wildlife resources. As a result, a stay must be granted by the Office of Hearings and Appeals to suspend implementation of a final decision. This has been positive for wildlife resources.

Broad public participation in the grazing decision process has increased overall support for achieving ecologically sound resource objectives and resulted in decisions benefiting multiple uses and more diverse ecosystems.

BLM ownership of range improvements have allowed projects to be more easily built and modified for safe wildlife use.

SPECIAL STATUS SPECIES

Terrestrial (including Migratory Birds)

The BLM Special Status Species Management Policy (Manual 6840) ensures that actions authorized or approved by BLM are consistent with the conservation needs of special status species and do not contribute to the need to list any special status species. Conservation of special status species means the use of all methods and procedures which are necessary to improve the condition of special status species and their habitats to a point where their special status recognition is no longer warranted.

Special status species are defined as those proposed for listing under the Endangered Species Act (ESA), officially listed as threatened or endangered under the ESA, those listed by a State in a category such as threatened or endangered implying potential endangerment or extinction, or those designated by each BLM State Director as sensitive.

It is BLM policy to conserve listed species and the ecosystem upon which they depend. BLM shall manage species proposed for listing under the ESA as threatened or endangered and proposed critical habitat with the same level of protection provided for listed species. For candidate species, BLM shall implement management plans that conserve the species and habitats and ensure that actions authorized, funded, or carried out by BLM do not contribute to the need to list the species. The protection provided by the 6840 policy for candidate species shall be used as the minimum level for protection for BLM sensitive species. State listed species shall be managed consistent with state laws protecting these species to the extent that they are consistent with FLPMA and other federal laws.

Timely implementation of grazing decisions for correcting environmental damage has resulted in reducing resource damage, benefiting more diverse, healthier ecosystems. Implementing decisions before an appeal is resolved has resulted in short to long-term increases in herbaceous cover and forage for wildlife. Historic, adverse impacts have been realized upon Lahontan cutthroat trout, southwestern willow flycatchers, yellow-billed cuckoo, Bell's vireo, northern beardless tyrannulets, and countless threatened, endangered, proposed, and candidate plant species.

The present grazing regulations favor emphasizing potential natural vegetation communities that favor most special status species. Any increase in the already burdensome grazing appeals process would have an adverse on terrestrial and aquatic wildlife species. Timely implementation of grazing decisions for correcting environmental problems has reduced resource damage, benefiting riparian areas most importantly for aquatic and migratory birds. Of special concern in the future will be the ability to make timely and effective grazing decisions with respect to pygmy rabbits, mountain plover, mountain quail, and Gunnison and greater sage-grouse, all of whom are being considered for listing in the near future. An inability to make effective grazing decisions for these species will result in long-term, adverse impacts to these species. Managing rangelands to restore and maintain natural ecosystems has resulted in increased biological diversity, allowing more wildlife and plant species to meet basic life requirements.

RIPARIAN, WETLAND, AND AQUATIC COMMUNITIES

Trends in riparian condition are discussed in Section 3.5.3.2. Riparian habitat conditions on BLM lands in the lower 48 states showed only minimal improvement from 1998 to 2001. Under continuation of existing management and regulations, overall riparian conditions Bureauwide (excluding Alaska) would remain static or improve only slightly from current conditions. Some regions would show noticeable improvements in riparian conditions, while other regions would show declines or no change. The trend from 1998 to 2001 showed an increase in the percentage of streams classified as “properly functioning” from 36% to 42% (a rate of 1.5% per year). We can assume that the rate of improvement will decrease as the percentage of sites in the “unknown” category falls to zero. The resulting rate of increase in the percentage of properly functioning streams would be only 1% per year. At this rate, it would take BLM until 2036 (nearly 40 years later than the original BLM target of 1997) to reach its goal of having 75% of its lotic riparian areas in proper functioning condition. The continuation of Current Management will not allow BLM to reach its riparian goals in a timely fashion.

At the local scale, some improvements in riparian and aquatic habitat would result from the continuing implementation of rangeland standards and guides as mandated under Current Management. The rangeland standards and guides process identifies where livestock grazing is a significant factor contributing to riparian sites not meeting standards. Once these sites are identified, livestock management practices should be modified to allow these sites to recover so that they will meet riparian standards. Improvements in riparian health depend on the willingness of local BLM managers to enforce changes in grazing management where livestock grazing is a significant factor in failing to achieve or make significant progress toward meeting the riparian standard. Once riparian degradation has been documented and livestock grazing is identified as a significant factor, changes in grazing management should lead to improved riparian conditions.

Regulations under Current Management provide only limited protection for riparian and aquatic habitat. Even with local improvements due to the proper implementation of rangeland standards and guides, in many areas riparian and aquatic conditions will remain static or decline under Current Management. Livestock are adapted to mesic habitats and spend a disproportionate amount of their time in riparian areas. Even with fewer livestock on the range and improved upland conditions in the long-term, livestock will continue to congregate in riparian areas. Livestock grazing and trampling in riparian areas results in reduced abundance and diversity of fish, aquatic invertebrates, amphibians, birds, and threatened and endangered species. The removal of streamside vegetation by livestock leads to increased sedimentation, increased water temperatures due to loss of shading, and wider and shallower stream channels, all of which combine to degrade aquatic habitat.

PROPOSED ACTION – MANAGEMENT ALTERNATIVE 2

WILDLIFE

Terrestrial (including Migratory Birds)

The environmental impact changes analysis herein focuses on policy and regulation changes for livestock grazing as they affect wildlife populations and their habitats on the 162 million acres grazed by domestic livestock in the western United States. Implicit in the environmental consequences is the analysis of the policy and regulation changes as stated, as well as the *practical* and *legal* implications of these changes.

The Proposed Action will have a slow, long-term adverse impact on wildlife and biological diversity in general. Upland and riparian habitats will continue to decline due to increasing an already burdensome grazing appeals process, lack of ability to control illegal activities on public lands, and allowing livestock operators to acquire rights to livestock management facilities and vegetation on public lands. The cumulative effects resulting from all these changes will be significant and adverse for wildlife and biological diversity in the long-term. The numbers of special status species will continue to increase in the future under this alternative.

Significant losses of native habitats have been caused by agricultural conversion, rangeland conversion, livestock management, post-fire rehabilitation, wildfire, prescribed fire, structures, conifer expansion, exotic invasive plants, and wild horses and burros.

The current trend for upland habitats is unknown, but as the West is in the fifth year of a drought, it can be assumed that upland habitats are in poor and declining condition. The poor and declining trend in many western uplands is due not only to the drought conditions, but also the inherent inability to make livestock adjustments due to the existing burdensome grazing appeals process. This has had significant, long-term adverse impacts upon wildlife resources, including threatened and endangered and special status species.

In terms of improving working relationships with permittees and lessees, explicitly stating and emphasizing in the grazing regulations that the economic, social, and cultural elements be considered in when making grazing decisions will tend to give emphasis of these considerations over natural resource considerations, such as wildlife and special status species. The BLM is required by the National Environmental Policy Act of 1969 (Public Law 91-90; 42 U.S.C. 4321 et seq.) to use a systematic interdisciplinary approach, which ensures the integrated use of natural and social sciences and the design arts in planning and decision-making affecting the human environment. The grazing regulations do not contain language specifically addressing the need for compliance with the NEPA.

Range improvement ownership has significant meaning with respect to a livestock operator's right to be there. That is, ownership of water or range improvements gives the livestock operator the right to be at any given point in time and any change in that right results in a "take". "Take" results in the permittee either being allowed to be grazing regardless of range condition and thus adversely impact wildlife resources or the permittee must be compensated. In the cases of *Hage v. United States*, 35 Fed. Cl. 147, 180 (1996) and *Hage v. United States*, 42 Fed. Cl. 249 (1998), the court held that the operator had indeed ownership of water rights and therefore the right to graze in order to utilize that water. Therefore, by establishing ownership of water or range improvements the livestock operator will have the right to graze and greatly diminishes the ability of the BLM to regulate grazing and will create long-term impacts to wildlife resources.

Authorizing joint title to range improvements will have very long lasting adverse impact to the wildlife of the public lands in the West. The proposed action would require that title to all new permanent, structural grazing-related range improvements constructed on public lands, or made to the vegetation resource on the public lands, except temporary or removable improvements, be held jointly between the cooperators and the United States in proportion to their initial contribution to on-the-ground project development and construction costs. Allowing permittees joint ownership of the vegetation of the public lands would give them ownership and therefore a right to “take” that vegetation regardless of adverse impacts to wildlife resources.

The BLM would continue work cooperatively with other cooperators in the development and construction of water-related range improvement projects including application for its proportional right to acquire, perfect, maintain and administer water rights, as allowed by State law. Some states, such as Nevada, are passing laws prohibiting the federal government from owning water rights, which adversely affects wildlife resources. Under these laws the BLM would not be able to hold water rights for the wildlife resources on public lands, thus there will be a long-term adverse to wildlife and special status species as BLM will be unable to require that water be made available for wildlife during time periods when livestock are not grazing. Present ability of BLM to hold water rights to benefit wildlife, particularly fish has been significant. Deferring to state water law, as in the case of Nevada, where they prohibit the BLM from holding water rights will have a long-term, adverse impact on wildlife, particularly fish. Where BLM does not have some control over the water, livestock facilities are often shut off when livestock are absent, but wildlife could use the facilities. Exclusive control of water will reduce wildlife habitat quality by promoting wildlife-livestock conflicts.

Under current regulations, the determination that livestock grazing practices are a significant factor in failing to achieve the rangeland health standards or making significant progress toward the fundamentals of rangeland health, BLM is required to formulate, propose, and analyze appropriate actions to address the failure to meet the rangeland health standards by the next grazing season after the determination. Amending when BLM will make changes in grazing management when not meeting land health standards from the present requirement of the next grazing season to 24 months and that any adjustment in active use in excess of 10% must be implemented over a 5-year period could have significant and long-term adverse effects upon wildlife resources and biological biodiversity in general, but could be especially problematic for many of the special status species on public lands, especially plants.

The proposed changes for protecting the health of the rangelands:

1. Grazing decisions would require not only a land health assessment, but also monitoring data. BLM, in fact, lacks sufficient funding and staffing to perform adequate monitoring.
2. After a grazing decision record of decision there is a 2 year period allowed prior for making any changes in the grazing operation.
3. Proposed changes in active use greater than 10% would require a 5 year phase-in period.

All of these cumulative delaying tactics could result in a protracted 7 year period for full implementation and change and thus would result in a long-term, adverse impact upon wildlife resources and biological diversity, including threatened and endangered and special status species.

The additional provision that determinations that existing grazing management practices or levels of grazing use are significant factors in failing to achieve standards and conform with guidelines must be based on not only the standards and guidelines assessment, but also include monitoring data will further delay the grazing decision process. Present BLM funding and staffing levels do not provide adequate resources for even minimal monitoring and the additional monitoring requirement will further burden the grazing decision process, thus adversely impacting wildlife resources and biological resources in the long-term.

Of the riparian habitats on public lands in the lower 48 states in 2001, only 42 % are in proper functioning condition, that is to say, they are meeting the physical characteristics necessary for proper functions, but are not indicative of proper biological function. The remaining 48 % are functioning at risk, non-functional, or unknown status (BLM 2002). The downward trend in riparian habitats is due to the difficulty in preventing livestock from congregating in riparian/wetland habitats and the current amount of year-long and continuous season-long grazing. Adverse, historic impacts which have been realized on riparian obligates and dependent species, especially fishes and migratory birds, will be exacerbated under the Proposed Action largely due to the inherent inability to make livestock adjustments due to increasing the burdensome grazing appeals process.

Of the wetlands habitats on public lands in the lower 48 states in 2001, only 51 % are in proper functioning condition. Once again, they are meeting the physical characteristics necessary for proper functions, but are not indicative of proper biological function. The remaining 49 % are functioning at risk, non-functional, or unknown status (BLM 2002). Adverse, historic impacts which have been realized on wetland species will be exacerbated under the Proposed Action largely due to the inherent inability to make livestock adjustments due to the burdensome grazing appeals process which will increase.

The change in definition of “interested public” will limit the ability of environmental groups to participate in the appeals process in the interest of wildlife. Including all interested parties in the appeals process has had a long-term positive impact for wildlife and special status species. Redefining “interested public” as an individual, group or organization that has: (1) submitted a written request to BLM to be provided an opportunity to be involved in the process leading to a decision for management of livestock grazing and followed up on that request by commenting on or otherwise participating in the decision-making process on management of a specific allotment; or (2) submitted written comments to the BLM regarding management of livestock grazing on a specific allotment, as part of the process leading to a BLM decision on the management of livestock grazing on the allotment will lessen the ability of environmental groups and organizations to participate in weigh in and support wildlife and special status species with regard to public land grazing issues.

This should result in long-term, adverse impacts to wildlife and special status species on public lands.

The deletion of the requirements to consult, cooperate and coordinate with or seek review and comment from the “interested public” for designating and adjusting allotment boundaries, reducing permitted use, emergency closures or modifications, renewing/issuing grazing permit/leases, modifying a permit/lease and issuing temporary non-renewable grazing permits will further reduce the ability of environmental groups and organizations to participate in weigh in and support wildlife and special status species with regard to public land grazing issues. This should result in long-term adverse impacts to wildlife and special status species on public lands.

The requirement for the BLM to cooperate with State, local, or county established grazing boards in reviewing range improvements and allotment management plans on public lands will result in giving permittees and lessees greater access to the decision making process at the expense of conservation groups who are advocates for wildlife resources. First, this requirement will give greater emphasis to local entities who favor extraction of forage and water resources at the expense of wildlife and biological diversity. Secondly, this requirement will give local entities greater influence over decision making than national interests who are excluded from this venue. This would be a long-term adverse impact for wildlife and special status species resources.

Providing permittees and lessees, the state having lands or responsibility for managing resources within the area, and the interested public the opportunity to review and comment on biological assessments prepared under the Endangered Species Act should have no impact on wildlife resources, other than delaying the process, but it is nonetheless a good cooperative business practice. Any required concurrence by the livestock permittee or lessee or other entity would negate the intent of the Endangered Species Act.

In terms of rangeland health, the requirement that the BLM could approve non-use for no longer than one year at a time for resource reasons as well as for business/personal needs of the permittee/lessee will create an administrative workload for BLM, but should have little impact upon wildlife resources.

Current regulations allow livestock operators to be cited for certain prohibited acts. Elimination of these prohibited acts (i.e., Placing poisonous bait or hazardous devices to kill wildlife, applying or storing pesticides, herbicides, or other hazardous material, altering or destroying natural stream courses without authorization, polluting water sources, aiding and abetting or directly illegally taking, destroying, or harassing fish and wildlife, and illegally removing or destroying archeological or cultural resources) will have a significant, long-term adverse impact on wildlife and special status species. Even though there may be other regulatory mechanisms for enforcement none of these regulatory mechanisms are presently effective. Examples include poisoning prairie dogs and ground squirrels, killing gray and Mexican wolves, grizzly bear jaguars and mt. lions, diverting water sources from historic Lahontan cutthroat habitat, etc. All of these illegal activities are conducted in support of their livestock operations and are thus directly related to livestock grazing activities. While none of the these prohibited acts have been utilized to penalize a permittee, there is no way to ascertain how many permittees were influenced not to perform a prohibited act. We do know that a livestock operator in Montana, not connected to a BLM permit, did poison prairie dogs on public lands with no opportunity for enforcement due to state law permitting prairie dog poisoning.

Inclusion of prohibited acts as “terms and conditions” in grazing permits has been used rather sparingly and has not historically constituted an effective prohibition.

The exclusion of certain grazing permit or lease renewals or other proposed actions from EIS or EA analysis will have a negative impact on wildlife resources. Even though they do not individually or cumulatively have a significant effect on the human environment, it will limit wildlife input into allotments needing change to benefit wildlife species. This will also further restrict BLMs ability to assess cumulative impacts of livestock grazing on wildlife and special status species.

Allowing BLM managers to lock gates on public lands at the request of livestock operators will further restrict wildlife recreational users from using the public lands whether for hunting, fishing, or wildlife viewing.

Timely implementation of grazing decisions for correcting environmental damage has resulted in reducing resource damage, benefiting more diverse, healthier ecosystems. Staying decisions prior to resolving an appeal will have significant adverse impacts upon such listed species as Lahontan cutthroat trout, desert tortoise, southwestern willow flycatchers, yellow-billed cuckoo, Bell’s vireo, northern beardless tyrannulets, and countless threatened, endangered, proposed, and candidate plant species. It is doubtful that conservation partnerships, RCAs, voluntary restructuring of allotments, or conservation easements would have any beneficial impact to wildlife, especially listed species, unless there is a change within the livestock grazing industry. Traditionally, livestock operators have shown a desire to appeal proposed grazing decisions, regardless of the impacts upon listed species.

SPECIAL STATUS SPECIES

Terrestrial (including Migratory Birds)

Please refer to the impacts section under the previous Wildlife section , as those impacts will also apply to special status species and in many cases be exacerbated for special status species who are either threatened or endangered or sensitive due to low population levels, degraded habitats, or endemism.

The BLM Special Status Species Management Policy (Manual 6840) ensures that actions authorized or approved by BLM are consistent with the conservation needs of special status species and do not contribute to the need to list any special status species. Conservation of special status species means the use of all methods and procedures which are necessary to improve the condition of special status species and their habitats to a point where their special status recognition is no longer warranted.

Special status species are defined as those proposed for listing under the Endangered Species Act (ESA), officially listed as threatened or endangered under the ESA, those listed by a State in a category such as threatened or endangered implying potential endangerment or extinction, or

those designated by each BLM State Director as sensitive.

It is BLM policy to conserve listed species and the ecosystem upon which they depend. BLM shall manage species proposed for listing under the ESA as threatened or endangered and proposed critical habitat with the same level of protection provided for listed species. For candidate species, BLM shall implement management plans that conserve the species and habitats and ensure that actions authorized, funded, or carried out by BLM do not contribute to the need to list the species. The protection provided by the 6840 policy for candidate species shall be used as the minimum level for protection for BLM sensitive species. State listed species shall be managed consistent with state laws protecting these species to the extent that they are consistent with FLPMA and other federal laws.

The proposed changes for protecting the health of the rangelands:

4. Grazing decisions would require not only a land health assessment, but also monitoring data. BLM, in fact, lacks sufficient funding and staffing to perform adequate monitoring.
5. After a grazing decision record of decision there is a 2 year period allowed prior for making any changes in the grazing operation.
6. Proposed changes in active use greater than 10% would require a 5 year phase-in period.

All of these cumulative delaying tactics could result in a protracted 7 year period to effect change and thus would result in a long-term, adverse impact upon wildlife resources and biological diversity, including special status species. Changes in active use in excess of 10% would be implemented over a 5-year period unless the changes must be made before 5 years to comply with applicable law (e.g., Endangered Species Act). The excepted provision for the Endangered Species Act will result in BLM being able to make necessary adjustments within a reasonable timeframe, thus reducing adverse impacts to listed threatened or endangered species.

All of these cumulative delaying tactics would result in a long-term, adverse impact upon special status species and biological diversity, especially special status species such as Gunnison and greater sage-grouse, mountain plover, pygmy rabbit, mountain quail, etc. Wisdom et al. (2003) identified 363 species of conservation concern in the sagebrush ecosystem in the western United States alone, of which 70% are plants. These 363 species are considered to be at risk of regional extirpation owing to habitat or population declines or rarity (Wisdom et al. 2003).

RIPARIAN, WETLAND, AND AQUATIC COMMUNITIES

Under the Proposed Action, riparian, wetland, and aquatic resources will improve with the implementation of some actions under consideration and decline with the implementation of others. The Proposed Action will change several elements of BLM's current management policies, regulations, and management practices. Each of the key elements that will be changed is discussed below, including an analysis of the effect of that change on riparian, wetland, and aquatic resources.

Authorizing Joint Title for Range Improvement Projects: Allowing title to range improvements to be held jointly would not affect riparian or aquatic resources in the short-term. The long-term effect of this action would be positive, since range improvements tied to improving distribution of livestock (upland water developments, riparian pasture fences, exclosure fences, etc.) would likely be maintained more regularly as a result of joint title.

Water Rights: Eliminating the current regulation on water rights for livestock grazing would have a negative effect on riparian and aquatic conditions if BLM loses its ability to file for instream flow water rights. Negative impacts to riparian habitat would result if water rights on existing or newly discovered springs were exercised such that the natural spring source and outflow are altered or dewatered.

Prohibited Acts: Elimination of several acts prohibited by current regulations would have both short and long term negative effects for riparian and aquatic resources. If BLM loses its enforcement authority to punish violators by not issuing, suspending, or canceling their grazing permits, then these prohibited acts become more likely to occur on public lands. The elimination of five prohibited acts under the Proposed Action would directly and negatively affect riparian and/or aquatic resources. The effects of eliminating these prohibited acts are as follows:

- Placement of poisonous bait or hazardous devices designed for the destruction of wildlife: Placing poisonous bait or hazardous devices to kill wildlife often involves the use of cyanide, which is lethal to fish and aquatic invertebrates.
- Application or storage of pesticides, herbicides, or other hazardous materials: Improper application of pesticides or herbicides can kill fish and aquatic invertebrates. In addition, riparian vegetation is sometimes targeted for removal with herbicides due to the mistaken perception that willows (*Salix spp.*) and other riparian species dewater streams and ditches. These species are vital to properly functioning riparian systems and, by storing water in stream banks, actually increase late season stream flows by releasing the stored water slowly over time as flows decline.
- Alteration or destruction of natural stream courses without authorization: Unauthorized alteration of stream courses would lead to loss of aquatic habitat diversity and destruction of riparian vegetation if a stream is straightened or channelized. Streams are often straightened or altered in an effort to bring more agricultural land into production or to facilitate water removal from a stream into an irrigation ditch. Channelization of streams leads to increased erosion and downcutting of the stream channel due to increased stream gradient.
- Pollution of water sources: Polluting water sources directly and negatively affects fish and aquatic invertebrate populations.
- Illegal take, destruction or harassment, or aiding and abetting in the illegal take, destruction or harassment of fish and wildlife resources: Aiding and abetting in, or directly illegally taking, destroying, or harassing wildlife or fish directly and negatively affects fish populations.

The provision to allow placement of locking devices on fence gates under the Proposed Action

would have positive effects on riparian and aquatic resources if locks were placed for protection of natural resources. Closing roads due to wet conditions would decrease erosion and sedimentation and indirectly benefit aquatic resources.

Prohibiting the introduction of invasive species under the Proposed Action would also have a positive effect on riparian and aquatic conditions. The spread of aggressive invasive species such as tamarisk (*Tamarix spp.*), purple loosestrife (*Lythrum salicaria*), and Russian olive (*Elaeagnus angustifolia*) are negatively impacting riparian communities on public lands. These aggressive invasive species crowd out native riparian species and do not provide the deep roots of willows, sedges (*Carex spp.*), or cottonwoods (*Populus spp.*) that hold the streambank in place during high flow events. Introduction of non-native invasive fish species also has had a negative effect on fish communities on public lands by displacing native fish species and compromising their genetic purity (i.e., native cutthroat trout (*Oncorhynchus spp.*)). Making the introduction of invasive species a prohibited act will decrease the likelihood that they will be knowingly introduced.

Administrative Remedies: Narrowing the definition of who is considered a “party” to a case will negatively affect riparian and aquatic resources. Current regulations allow any “interested public” to appeal a grazing decision. In most instances, the “interested public” who appeals grazing decisions is a conservation organization whose appeal is based on documentation of negative impacts from livestock grazing to riparian, fisheries, wildlife, or threatened and endangered species habitat. Conservation organizations help BLM by identifying and documenting detrimental livestock grazing impacts on public lands, which enables BLM to more effectively protect riparian and aquatic habitat.

Temporary Nonuse: Extending the period for temporary nonuse from a maximum of three years to five years would positively benefit riparian and aquatic resources. Although riparian areas typically respond quickly to the removal of livestock grazing, complete recovery is a slower process. A five year period of rest from livestock grazing would allow ecological processes disrupted by livestock grazing (recruitment of young woody species, recovery of vegetation which protects stream banks and attenuates high flows, channel narrowing and stream bank stabilization as riparian vegetation traps sediment, etc.) to recover and function properly. Extending the maximum amount of time for temporary nonuse indefinitely would provide greater benefits in situations where five years of recovery is not adequate to restore ecological function.

Excluding Certain Lease Renewals from NEPA Compliance: The Proposed Action would exclude certain renewals of grazing permits or leases from NEPA analysis. The implementation of this action would have a negative effect on riparian and aquatic resources. Bypassing NEPA analysis would eliminate BLM’s obligation to assess and document existing riparian and aquatic conditions on a site specific basis. Without NEPA analysis, BLM would be unable to add stipulations designed to maintain or enhance riparian and aquatic conditions to grazing permits.

Permitted Use: Under this section of the Proposed Action, BLM would gain authority to create RCA’s. Creation of RCA’s would have a mixed effect on riparian and aquatic resources. The positive effect will be that RCA’s will provide a place for permittees to graze their livestock while the land attached to their base property undergoes restoration. The negative effects of

RCA's are twofold: First, RCA's would be located on public lands that would otherwise be ungrazed. Since the ungrazed condition is optimal for riparian and aquatic resources, any grazing will lead to a decline in riparian and aquatic condition on RCA lands. Secondly, in some cases, RCA's would serve as a "safety net" for permittees who have mismanaged land assigned to their base property by giving permittees an option to continue grazing while their home range undergoes restoration and recovery. The availability of RCA's may, in some instances, serve to remove the incentive for permittees to graze their public land allotment responsibly.

Standard and Guideline Appropriate Action Implementation: If livestock grazing is determined to be a significant factor contributing to a riparian area not meeting land health standards, delaying any changes in the grazing permit for up to 18 months, as planned in the Proposed Action, will allow for additional degradation of riparian and aquatic habitat. In the case of a riparian area that is functioning-at-risk with a downward trend, one additional grazing season combined with a high flow event could cause the system to become non-functional.

Removing the Provision for Conservation Use Permits: Removal of this provision as recommended in the Proposed Action would negatively affect riparian and aquatic resources. Conservation use permits would be issued to groups or individuals who do not plan to graze livestock on their allotment. Under this provision, groups or individuals would actively seek allotments that contain valuable riparian or threatened and endangered species habitat. The removal of livestock from allotments that are most vulnerable to degradation from livestock grazing via the issuance of a conservation use permit would have both short and long-term benefits for riparian and aquatic resources.

Water Resources

The proposed action will provide additional tools to exacerbate long term impacts on riparian habitats, channel morphology and water quality. Degradation of channel morphology and water quality will continue in watersheds with declining vegetative cover due in-large to the increasing and burdensome administrative procedural requirements for assessment and for acquisition of monitoring data.

Many rangeland watersheds throughout the western United States are currently stressed as a result of on-going drought conditions. The proposed extension(s) of time:

Grazing decisions requirement land health assessment monitoring data	2 – 3 years
Following a grazing decision record of decision up to a 2 year planning period plus by application of decision to allotment but not later than start of next grazing year, an additional year.	2 – 3 years
Proposed changes in active use greater than 10% would require up to a 5 year	5 years

phase-in period.	
The West experiences below average rainfall every 6 out of 10 years actual on the ground improvements would require	?
Protracted 10 year decision process plus the favorable climatic conditions to effect vegetation improvement	10 + years
Litigation- appeals	?

abrogate our responsibility for management of water quality as codified in Section 313 of the Water Quality Act of 1987 (P.L. 100-4); and further, committed to by designation by most as a “Designated Management Agency”. Delaying modification of grazing prescriptions when an where warranted and/or mitigation of damages created by failure to implement a Best Management Practices(BMPs) iterative process will continue to stress western watersheds.

The requirement for the BLM to cooperate with State, Local, and county established grazing boards in reviewing range improvements and allotment management plans could further delay mitigation and would give permittees greater access to the decision making process, at the expense of environmental groups and other public land users.

Reliance upon regulatory agencies to enforce environmental law and the potential for delaying implementation of appropriate on-the-ground resource management decisions could further prolong decisive actions to restore or maintain channel integrity and function and water quality.

The proposed changes water right direction will lead the “wait and see” States to enact legislation, like Nevada’s, to exclude federal ownership of water rights for livestock grazing. This potentially could lead to further takings litigation when and where ranchers are stripped of their grazing permits for non-payment of grazing fees or chronic trespass. With the ownership of certificated water rights comes a sense of ownership or control of an allotment and strips land managers of their ability to make science based resource management decisions.

MANAGEMENT ALTERNATIVE 3

WILDLIFE

Terrestrial (including Migratory Birds)

The impacts upon wildlife species in Alternative 3 are identical to those identified for Alternative 2, with the following exceptions:

The requirement that any change in active use in excess of 10% would be discretionary rather

than mandatory would result in BLM being able to make changes on the ground in less than mandated 5 year period. This would greatly reduce the adverse impacts to wildlife resources.

The ability of BLM to base rangeland health determinations on a rangeland health assessment and/or monitoring data would greatly enhance BLM's ability to take corrective action at the earliest date within existing funding and staffing. This would be a significant improvement over Alternative 2 where monitoring data would be required.

SPECIAL STATUS SPECIES

Terrestrial (including Migratory Birds)

The BLM Special Status Species Management Policy (Manual 6840) ensures that actions authorized or approved by BLM are consistent with the conservation needs of special status species and do not contribute to the need to list any special status species. Conservation of special status species means the use of all methods and procedures which are necessary to improve the condition of special status species and their habitats to a point where their special status recognition is no longer warranted.

Special status species are defined as those proposed for listing under the Endangered Species Act (ESA), officially listed as threatened or endangered under the ESA, those listed by a State in a category such as threatened or endangered implying potential endangerment or extinction, or those designated by each BLM State Director as sensitive.

It is BLM policy to conserve listed species and the ecosystem upon which they depend. BLM shall manage species proposed for listing under the ESA as threatened or endangered and proposed critical habitat with the same level of protection provided for listed species. For candidate species, BLM shall implement management plans that conserve the species and habitats and ensure that actions authorized, funded, or carried out by BLM do not contribute to the need to list the species. The protection provided by the 6840 policy for candidate species shall be used as the minimum level for protection for BLM sensitive species. State listed species shall be managed consistent with state laws protecting these species to the extent that they are consistent with FLPMA and other federal laws.

Changes in active use in excess of 10% would be implemented over a 5-year period unless the changes must be made before 5 years to comply with applicable law (e.g., Endangered Species Act). The excepted provision for the Endangered Species Act will result in BLM being able to make necessary adjustments within a reasonable timeframe, thus reducing adverse impacts to listed species.

RIPARIAN, WETLAND, AND AQUATIC COMMUNITIES

Temporary Nonuse: Extending the period for temporary nonuse from a maximum of three years to five years would positively benefit riparian and aquatic resources. Although riparian areas typically respond quickly to the removal of livestock grazing, complete recovery is a slower

process. A five year period of rest from livestock grazing would allow ecological processes disrupted by livestock grazing (recruitment of young woody species, recovery of vegetation which protects stream banks and attenuates high flows, channel narrowing and stream bank stabilization as riparian vegetation traps sediment, etc.) to recover and function properly. Extending the maximum amount of time for temporary nonuse indefinitely would provide greater benefits in situations where five years of recovery is not adequate to restore ecological function.

Permitted Use: Under this section of the Proposed Action, BLM would gain authority to create RCA's. Creation of RCA's would have a mixed effect on riparian and aquatic resources. The positive effect will be that RCA's will provide a place for permittees to graze their livestock while the land attached to their base property undergoes restoration. The negative effects of RCA's are twofold: First, RCA's would be located on public lands that would otherwise be ungrazed. Since the ungrazed condition is optimal for riparian and aquatic resources, any grazing will lead to a decline in riparian and aquatic condition on RCA lands. Secondly, in some cases, RCA's would serve as a "safety net" for permittees who have mismanaged land assigned to their base property by giving permittees an option to continue grazing while their home range undergoes restoration and recovery. The availability of RCA's may, in some instances, serve to remove the incentive for permittees to graze their public land allotment responsibly.

Consultation

At no time during the preparation of this draft EIS did BLM formally consult with the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) on listed species or informally conference on species proposed for listing under section 7 of the Endangered Species Act.

Before implementing actions that might affect listed or proposed species at the regional or site specific level, BLM would consult or confer with the FWS or NMFS.

Cumulative Impact Analysis

Cumulative impacts to wildlife and special status species resources are directly related to the incremental habitat loss, fragmentation, wildfire, invasive species, drought, urbanization, etc that have occurred since the mid 1800s.

Cumulative impacts resulting from the incremental impacts of delaying implementation of grazing decisions would result in long-term adverse impacts upon wildlife, special status species in particular, and biological diversity in general.

Incremental habitat loss and habitat fragmentation due to wildfires, drought, invasive species, and excessive livestock grazing will continue to adversely affect biological diversity, wildlife, and special status species. The sage-grouse, pygmy rabbit, and mt. plover, in particular, would be cumulatively affected by the past, present, and reasonably foreseeable loss of habitat.

Irreversible and Irretrievable Commitment of Resources.

The proposed action would result in a long-term, adverse effect upon special status species and biological diversity, resulting in an irreversible and irretrievable commitment of resources. Habitat loss and degradation is often irretrievable and irreversible even in the long-term due to soil loss and other changes in habitat features. The most significant of these would be the loss of habitat for special status species such as Gunnison and greater sage-grouse, mountain plover, pygmy rabbit, mountain quail, and others.

Quantifying the actual loss of additional wildlife habitat, special status species, and biological diversity in the west is impossible, but it could be very significant..

Short-term vs. Long-term

Short-term is defined as 10 years; long-term is defined as the future beyond 10 years.

Historical loss of wildlife habitat in the west due to livestock grazing, drought, wildfires, and invasive species has been considerable. Additional habitat degradation and fragmentation due to livestock grazing and wildfires will result in further loss of biological diversity.

Impacts in the short and long-term associated with the delay in implementation of grazing decisions would adversely impact wildlife and special status species habitats, as well as biological diversity in general. Impacts to long-term productivity will depend upon BLM's ability to make land use decisions in a timely manner.

The short-term and long-term impacts are least under the No Action Alternative, greater for the Proposed Action, and to a small degree less under Alternative 3.