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Grazing

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Health Task Force

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Litigin Documents

Louisiana Act 300

Low Emission Vehicles

Maritime Commission

Marshal Service - Employment

McLuToch

Medical Malpractice

Mines - patenting

Patent Office

Patricoff suit

PEB

Puerto Rican questions

Reagan EO's

Religion - FCC provision

Religion - Literacy initiative

Religion - International

Religion - DOD schooling

Savings + Loan case

Securities - Fields Bill

Sevinde v Florida

SEPTA dispute

Wetland - cause of action

Wetland / drug testing

Wisconsin waiver - wetland

Wetland - religion provisions

Wetland - rivers

WELFARE Immunization

Mission statement

Peace Tax

EPA Standards

Home Drug Testing

Priorities EO

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Wisconsin waiver - welfare

Wetzel - religion provisions

Wetzel - press
Wetzel - immunization

Mission statement

Peace Tax

EPA Standards

Home Drug Testing

Proethics EO

THE WHITE HOUSE
WASHINGTON

→ Note to

Kathy

✓

1. Timber in ACBMA

2. Grazing permits/renewals

3. Coast Guard - EIS reqs?
(whales?)

- Lois Schiffer -

mtg set up.

mat'l?

Call Paul

Grazing parties under
How to deal w/ a settlement
of equally overbids -
by the grazing provisions of RA.

Decision -
as much notice as poss
to parties involved that
we think under overbids -
make a sure they have
change to make apps to
the company.
Just like what we did
~~was~~ under timber provisions

Ellen Athas - 305-0451-

Draft of brief on rangeland reform reqs.

II (shop, cattle, farmers) etc.

facial challenge to reqs.

175 pp.

due in 10th.

Dinah Bear asked to see.

I'd like to see copy too.

Gary Randall

lead atty.

305-0444

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DRAFT

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

[brief statement because of page limitation]

II. STATEMENT OF THE CASE

Petitioners assert that the rules adopted by the Department of the Interior governing the Bureau of Land Management's administration of livestock grazing on public lands exceed statutory authority, are arbitrary and capricious, and the EIS and accompanying ROD violate NEPA. Petitioners request the court to declare the final rules unlawful and to enjoin their implementation.

The amendments to the Department's hearings and appeals procedures, cooperative relations, livestock grazing administration rules are within statutory authority delegated to the Secretary. The administrative record supports the factual conclusions on which the rule is based, demonstrates a reasonable basis for the changes, and articulates a rational explanation for the changes.

The Secretary, through the BLM, is charged with managing approximately 170 million acres of public rangelands throughout the western United States. (DEIS 1-2) Management of the public rangelands is guided and constrained by Congressional mandates found primarily in the Taylor Grazing Act of 1934 (TGA) 43 U.S.C. § 315, *et seq.*, the Federal Land Policy and Management Act of 1976 (FLPMA) 43 U.S.C. § 1701, *et seq.*, and the Public Rangelands Improvement Act of 1978 (PRIA) 43 U.S.C. § 1901, *et seq.* (DEIS 1-5)

The TGA authorized the Secretary to withdraw those lands which remained unappropriated for specific public uses, and divide them into grazing districts. *Id.* § 315. The main goals of the Act as set forth in its preamble were to improve the rangeland conditions and to stabilize the western livestock industry. The Secretary was empowered to make rules and regulations to regulate the use of the public rangelands and "to preserve the land and its resources from destruction or unnecessary injury [and] to provide for the orderly use, improvement, and development of the range." § 315a.

FLPMA did not repeal the TGA, but rather added a new management structure within which the Secretary was to operate. FLPMA directed that public lands be inventoried and subjected to a land use planning process which would enable them to be managed by the Secretary of the Interior

in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy use. 43 U.S.C. § 1701(a)(8).

FLPMA also directs the Secretary to manage the public lands under the principles of multiple use and sustained yield. 43 U.S.C. § 1732(a). Section 1702(c) of the Act, defines multiple use as:

a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

43 U.S.C. § 1702(c).

In PRIA, Congress articulated the general findings that the public rangelands were in an unsatisfactory condition, (43 U.S.C. § 1901(a)(1), (2), and (3)), and that these conditions could be addressed by increased management and funding. 43 U.S.C. § 1901(a)(4). Range improvements were to be undertaken so the public rangelands could become as productive as feasible for "all rangeland values." 43 U.S.C. § 1901(b)(2).

The ANPR and DEIS summarize the process that led the Department to propose policy and regulatory changes to the BLM's grazing program. In 1990 BLM initiated the "Range of

Our Vision" program (hereinafter "Vision document") as the first step to address and resolve public rangeland issues.¹ Cites to ANPR and DEIS. As discussed in the Vision document, BLM's goals by the 75th Anniversary of the TGA in the year 2009 is to achieve the highest ecological conditions on 40 percent of the range, about 68 million acres. In addition, BLM indicated it was working to reduce the areas in the lowest condition to 10 percent, about 17 million acres. The Vision document also highlighted the Bureau's commitment riparian areas on the public range and set a goal of achieving late seral to potential natural stage on 75 percent of BLM riparian areas by 1997. Vision document.

In 1991 the BLM Director asked the agency's National Public Lands Advisory Council (NPLAC) to make recommendations that would help guide the BLM's rangeland management program. 58 Fed. Reg. 43208. The NPLAC tasked a small "Blue Ribbon Panel" (Panel) to review the rangeland management program needs and to recommend reform. Id. The Panel produced a report, "Rangeland--Program Initiatives and Strategies" (Panel report) and presented it to the BLM Director and the Secretary of the Interior in March 1992. 58 Fed. Reg. 43208.

The NPLAC provided two objectives as general guidance to the Panel: to develop a comprehensive strategy for the implementation of a "Range of Our Vision" the BLM's program to address and resolve public rangeland issues; and to provide specific recommendations to BLM through the NPLAC for establishing a comprehensive and publicly supported rangeland management program. (Panel report p. 3.)

One concern noted in the Panel report was a need for grazing program goals and objectives that reflect sustainability of natural systems while providing for human needs and desires. (Panel report p. 5.) The Panel recommended the BLM should, among other things, develop rangeland program goals and objectives that assure protection of the basic resources (soil, water and vegetation) and the sustainability of the rangeland systems. (Panel report at 6.)

¹ "State of the Public Rangelands 1990, The Range of our Vision, 2009: Diamond Jubilee of the Taylor Grazing Act," United States Department of the Interior.

The Panel concluded that BLM needed to give foremost consideration to the protection of the basic rangeland components of soil, water and vegetation, explaining that, "without assurances for the future well-being of these basic natural resources, there is precious little to squabble about." ANPR 58 Fed. Reg. 43208.

The panel report also discussed the need to address the problem of rangeland inventory and assessment. The panel report called into question the use of climax or Potential Natural Communities which BLM had utilized for describing the health of the rangelands in its 1990 Vision document.

Using the Panel report and its recommendations for implementing the BLM's "Range of Our Vision" program as a starting point, the BLM initiated a major effort to review its overall mission and responsibilities, and to analyze critically how it conducts resource management across the full spectrum of its activities and programs. 58 Fed. Reg. 43208. BLM studies such as its 1990 "Riparian, Wetlands Initiative," outside scientific studies, General Accounting Office reports, Department of the Interior Office of the Inspector General audits of the public rangeland programs were factored into this internal review. DEIS p. 1-3.

In the fall of 1992, several conservation organizations informed the Secretary of the Interior that they wanted BLM to improve its grazing administration by encouraging stewardship and designing ways to quickly improve the environment. DEIS at 1-4.

In the spring and summer of 1993 the Secretary of the Interior held five Town Hall meetings in the West to discuss rangeland management. 58 Fed. Reg. 43208. As a result of the Panel recommendations, internal review, and input from the Town Hall meetings the Department of the Interior, through the Bureau of Land Management announced the proposed policy and regulatory changes to the BLM's grazing program in August of 1993.

These proposals became commonly known as "Rangeland Reform '94." At this same time BLM also developed a booklet entitled Rangeland Reform '94, describing the Department of the Interior's proposal. Approximately 35,000 copies of the booklet were distributed in late

August and September of 1993 to all BLM grazing permittees and lessees, interested Congressional staff, and other interested parties. ROD p. 1.

The Department received a total of about 12,600 letters from about 8,000 persons on the ANPR, notice of intent to prepare and EIS, and the Rangeland Reform '94 summary booklet. Id. The Department considered these comments in identifying and refining key components of the rangeland improvement effort and in preparing a proposed rule and a draft EIS. Id.

During a three-month period beginning November 17, 1993, Secretary of the Interior Bruce Babbitt met on 20 occasions around the West with groups that included western governors, State and local officials, ranchers, environmentalists and other public land users.

On March 25, 1994, the BLM published proposed rules in the Federal Register (59 Fed. Reg. 14314), with a 120-day comment period to July 28, 1994. Subsequently, at the request of several commenters, the comment period was extended through September 9, 1994. Fed. Reg. CITE. On May 13, 1994, BLM published a notice of availability of the draft EIS. 59 Fed. Reg. 25118. The comment period was extended and ended on September 9, 1994. The BLM and FS held 48 hearings throughout the West on the draft EIS and the proposed rulemaking; one hearing was also held that same day at BLM's Eastern States Office in Virginia. May 16, 1994 Fed. Reg. cite needed. Hearings were preceded by open houses staffed by Federal personnel to answer individual questions about the proposed rule. ROD p. 2. More than 1,900 people testified at the hearings. Id. A transcript was made of each hearing and are a part of the administrative record. Id.

The notice of final EIS availability appeared on December 30, 1994 59 Fed. Reg. 67717 and the final rules were published February 22, 1995 with an effective date of August 21, 1995. 60 Fed. Reg. 9894. The ROD for the FEIS was signed by Secretary Babbitt on _____.

Public participation opportunities for Rangeland Reform '94 included: five grazing town hall public meetings, 60-day comment period on the BLM ANPR, 70-day scoping period for the draft EIS, formal hearings conducted throughout the West during the public comment period

on the proposed rule and draft EIS, 167-day comment period on the BLM proposed rule, 119-day comment period on the draft EIS. The Department received and considered more than 20,000 letters from over 11,000 persons on the notice of proposed rulemaking and the draft EIS. These letters included over 38,000 individual comments. ROD p. 2.

The purpose and intent of the regulatory changes were to: make the Forest Service's and BLM's rangeland management programs more consistent with each other, and more compatible with ecosystem management; accelerate restoration and improvement of public rangelands to proper functioning condition; obtain for the public a fair return for grazing livestock on public lands; streamline administrative functions; and consider the needs of local communities for open space and their dependence on livestock grazing.

III. SUMMARY OF LEGAL ARGUMENT

[needs to be very brief because of page limitation]

IV. APA CLAIMS: THE REGULATIONS ARE SUPPORTED BY STATUTORY AUTHORITY, REASONED BASES, AND ADEQUATE RESPONSE TO COMMENTS

[Sections IV, V and VII in Petitioners' Brief]

Petitioners launch three distinct attacks on the rules under the Administrative Procedure Act ("APA") and the applicable grazing statutes reviewed under the APA, the Taylor Grazing Act ("TGA"), Federal Land Policy Management Act ("FLPMA") and Public Rangelands Improvement Act ("PRIA"). Petitioners claim that the rules lack statutory support (Section IV of their brief), a reasoned basis (Section V), and adequate response to comments (Section VII). Respondents will address each of these arguments in this unified section on petitioners' APA claims.

A. Standard of Review for Statutory Authority, Reasoned Basis, and Response to Comments

1. Petitioners-Bear a Heavy Burden in Mounting a Facial Challenge to the Regulations' Statutory Authority

Petitioners in this case are not challenging any actual applications of the grazing regulations to them, but rather are challenging the facial validity of those regulations. Petitioners thus assume a "heavy burden." Rust v. Sullivan, 500 U.S. 173, 183 (1991) (quoting U.S. v. Salerno, 481 U.S. 739, 745 (1987)). The Supreme Court has repeatedly stated:

A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [regulation] would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.

Rust, 500 U.S. at 183 (quoting Salerno, 481 U.S. at 745). While this quote describes a constitutional challenge, the same standard applies to facial challenges to a regulation's statutory authority. "The fact that a regulation may be invalid as applied in [some] cases, however, does not mean that the regulation is facially invalid because it is without statutory authority." Immigration and Naturalization Service v. National Center for Immigrants' Rights, 502 U.S. 183, 188 (1991); see also Rust, 500 U.S. at 183; Babbitt v. Sweet Home Chapter of Communities, 115 S. Ct. 2407, 2414 (1995).

Petitioners' burden on a facial challenge is made heavier by the deference due to the implementing agencies' construction of the relevant statutes. The TGA and FLPMA each grants the Secretary broad rule-making authority; he is to "make such rules and regulations . . . and do any and all things necessary to accomplish the purposes of this subchapter." 43 U.S.C. § 315a; see also 43 U.S.C. §§ 1701(a)(5), 1740. For rules such as these, "[a] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984). Instead, the Court should accord considerable weight to an executive department's construction of a statutory scheme it is entrusted to administer. Id. The principle of deference applies whenever Congress has implicitly or explicitly left the resolution of

conflicting policies to the executive. It also applies to complex circumstances such as range management when a full understanding of the force of the statutory policy in the given situation depends upon more than ordinary knowledge respecting the matters involved. See id.

2. The APA applies the same reasoned basis standard to all rules, including those that reverse long-standing regulatory interpretations

It is well-settled that agency rulemaking is subjected to the same reasonableness standard, whether an agency is first issuing a rule, revoking it, or radically departing from a long-held interpretation. In all cases "the agency must examine the relevant data and articulate a satisfactory explanation for its action."² State Farm, 463 U.S. at 43; Olenhouse, 42 F.3d at 1574 (citing State Farm). The Supreme Court recently stated:

This Court has rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations" of the statute in question. Chevron, 467 U.S. at 862. In Chevron, we held that a revised interpretation deserves deference because "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." Id. at 863-64.

Rust v. Sullivan, 500 U.S. 173, 186 (1991). The Tenth Circuit also grants deference to agency rules even where they reverse long-standing practices. Home Mortgage Bank v. Ryan, 986 F.2d 372, 376 (10th Cir. 1993); Federal Election Comm. v. Colorado Republican Federal Campaign Comm., 59 F.3d 1015, 1022 n.7 (10th Cir. 1995). With its complex and subtly

² Petitioners mistakenly appear to believe that the State Farm court called for heightened scrutiny when it required an agency to provide "reasoned analysis." (Pet. Br. at 31; State Farm, 463 U.S. at 42.) This is simply wrong: regular arbitrary and capricious review also requires the agency to provide a "reasoned basis" for its decision. State Farm, 463 U.S. at 43. The State Farm Court actually gave greater attention to the possibility that rulemaking rescissions deserved less rigorous scrutiny than ordinary rulemaking, but instead should be judged against the relaxed standards for an initial refusal to act. Id. at 41-42. Ultimately, the Court rejected this possibility as well: in numerous places, State Farm indicates that ordinary arbitrary and capricious review applies. Id. at 41-42, 44, 46.

changing factors, federal range policy requires the Department of Interior to carefully heed the Supreme Court's instruction that "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron, 467 U.S. at 863-64; Rust, 500 U.S. at 186. No less than ordinary judicial deference is appropriate for the Department's ongoing adaptive efforts.

Even petitioners cite to two cases that indicate that the same standard of review applies whether or not an agency departs from a previous position. "The Supreme Court has made clear that 'the same test' applies to the rescission or modification of a rule as to its initial promulgation--the 'arbitrary and capricious' standard of 5 U.S.C. § 706(2)(A) (1982)--and that there is "no difference in the scope of judicial review depending on the nature of the agency's action." Center for Auto Safety v. Peck, 751 F.2d 1336, 1343 (D.C. Cir. 1985) (cited by petitioners at page 31 of their brief) (quoting Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 41 (1983) (cited by petitioners at p. 31)).

Petitioners ignore the controlling authorities of Chevron, State Farm, and Rust, the multiple Supreme Court cases directly applicable to the notice-and-comment ruling at issue here. Instead, petitioners have carefully clipped passages from inapposite cases that often involve entirely different types of administrative actions. After acknowledging State Farm, petitioners baldly declare that courts should provide heightened scrutiny to an agency's revision of its long-standing policy. (Pet. Br. at 31.) Yet the only support cited, Securities Indus. Assn. v. Board of Governors, 468 U.S. 137, 143 (1984), makes no such statement and in fact does not even address an agency's revision of its prior rules.³ Petitioners cannot provide any support for their statement that heightened scrutiny is applicable.

³ The Supreme Court did not indicate that heightened scrutiny should be applied to rule-making revisions; no such holding was possible because the case did not even involve notice-and-comment rulemaking. The High Court only applied less deference because the Federal Reserve Board had abruptly reversed course in mid-stream, advancing radically different arguments in court than it had in its own administrative proceeding. Id. at 143-44.

Petitioners also argue that special weight should be given to agency rules implicitly approved by Congress. (Pet Br. at 31.) The Supreme Court has expressly rejected, however, any diminution of the deference given an agency's later effort to alter such a rule.

While an agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation . . . even an unequivocal ratification . . . would not connote approval or disapproval of an agency's later decision to rescind the regulation. That decision remains subject to the arbitrary and capricious standard.

State Farm, 463 U.S. at 29. Once again, Supreme Court authority contradicts petitioners' argument that anything less than ordinary deference should be given the DOI here.

Finally, petitioners restate the same argument by suggesting that agencies deserve less deference when their new rules represent a break with the past. (Pet. Br. at 31.) Neither of the Supreme Court cases cited, however, involved notice-and-comment rulemaking under the APA.⁴ There was good reason for the Court to provide less deference to agency reversals of

⁴ See I.N.S. v. Cardoza Fonseca, 480 U.S. 421, 446 n.30 (1987) (where the Board of Immigration Appeals had reversed an earlier position without any public notice or comment in an adjudicative proceeding); Watt v. Alaska, 451 U.S. 259, 262-63, 271 (1981) (where the Department of the Interior changed positions based on an internal opinion by the Solicitor's office, again without any public notice or comment). Respondents also note that the reduced deference accorded by the Cardoza-Fonseca court has been called into doubt by later Supreme Court opinions. See Noland v. Sullivan, 785 F. Supp. 179, 182 n.1 (D.D.C. 1992) (discussing Supreme Court caselaw).

The two Tenth Circuit cases petitioners cite are similarly distinguishable. Exxon Corporation v. Lujan, 970 F.2d 757, 762 (10th Cir. 1992) involved another agency change of position without public comment or review. Nevertheless, the Tenth Circuit cited to State Farm and indicated that it would uphold a national reversal of agency policy as long as it was based on reasoned analysis. Id. at 762 n.4. Jones v. Runyon, 32 F.3d 1454, 1457 (10th Cir. 1994) also did not involve a direct challenge to an agency rulemaking. Furthermore, this case involved an agency's comparison of multiple statutes to identify the applicable statute of limitations, a matter much less within the agency's expertise and much more a traditional judicial function than the adaptation of range policy to changing circumstances.

position which had not been vetted by the public involvement central to the APA rulemaking process. Here, where there has been an APA rulemaking effort, the established principles of Chevron and State Farm apply. The challenged rules must be upheld as long as the Department of Interior has offered a reasonable explanation of the relevant data.

3. The Agency Must Respond to All Significant Comments

Petitioners also claim in section VII of their brief that the DOI failed to comply with prescribed procedures by inadequately responding to public comments under 5 U.S.C. § 553(c). The applicable standard is that "an agency need not respond to every comment so long as it responds in a reasoned manner to significant comments received." U.S. Satellite Broadcasting Co., Inc. v. Federal Communications Comm., 740 F.2d 1177 (D.C. Cir. 1984); *see also* State of S.C. ex. rel. Tindal v. Block, 717 F.2d 874, 885 (4th Cir. 1983); Wyoming v. Alexander, 971 F.2d 531, 538 (10th Cir. 1992).

B. The Tenth Circuit Has Repeatedly Recognized the Secretary's Broad Rulemaking Authority Under the Applicable Statutes

TGA, FLPMA, and controlling judicial authorities all grant the Secretary broad discretion in managing grazing lands. *See* 43 U.S.C. §§ 315a, 1701(a)(5), 1740. The TGA expansively delegates authority through a provision selectively quoted by petitioners. 43 U.S.C. § 315a; Pet. Br. at 25. Petitioners acknowledge that the Secretary is empowered to "preserve the land and its resources from destruction or unnecessary injury [and] to provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a. They overlook, however, that the Secretary "shall make such rules and regulations . . . and do any and all things necessary to accomplish" these goals. *Id.* (emphasis added). The Tenth Circuit and other courts have emphasized the Secretary's broad authority under this provision. Diamond Ring Ranch v. Morton, 531 F.2d 1397, 1401 (10th Cir. 1976) (relying on the Secretary's "broad power to administer the public lands included within the "'grazing districts'"); Barton v. United States, 609 F.2d 977, 979 (10th Cir. 1979) (finding broad discretionary grant in §

315a's direction to "the Secretary of Interior to adopt such rules and regulations as were deemed necessary"); Wilkinson v. United States, 180 F. Supp. 413, 414 (D. Or. 1960) (§ 315a of the TGA gives the Secretary broad power to make rules and regulations).

The enactment of FLPMA in 1976 not only reinforced the Secretary's authority under the TGA, but gave him broad discretion to balance the competing concerns of multiple uses in managing the public lands. The Tenth Circuit has held:

FLPMA . . . vests the Secretary of Interior with broad authority to manage the federal government's vast landholdings. The statute departs from the federal government's earlier policy of giving away the public lands, in favor of a philosophy of retention and management to maximize the multitudinous interests in the lands.

Sierra Club v. Hodel, 848 F.2d 1068, 1078 (10th Cir. 1988); see United States v. Lawrence, 620 F. Supp. 1414, 1417 (D. Wyo. 1985) (observing that through FLPMA "Congress set out new goals for the public lands"); 43 U.S.C. § 1732(a) ("[t]he Secretary shall manage the public lands under principles of multiple use and sustained yield"). Courts have recognized the need for deference where an administrator must balance complex and competing concerns. See NRDC v. Hodel, 624 F. Supp. 1045, 1063 (D. Nev. 1986), aff'd, 819 F.2d 927 (9th Cir. 1987) (court declines invitation to become a "rangemaster" deciding how to balance between multiple uses). The Tenth Circuit and other courts have repeatedly recognized the Secretary's broad discretion to balance competing uses under FLPMA. Topaz Beryllium Co. v. United States, 649 F.2d 775, 777 (10th Cir. 1981) (FLPMA granted "the Secretary broad authority to promulgate rules and regulations to aid him in his administration of the public lands"); see Hodel, 848 F.2d at 1078; see also 43 U.S.C. §§ 1701(a)(5), 1740.

Finally, the Supreme Court has described the Secretary's authority to manage the public lands as "plenary." Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963). In Best, the High Court was construing 43 U.S.C. § 1201, "the general congressional grant of authority

to the Interior Secretary to manage the public lands.⁵ Ryan Outdoor Advertising v. United States, 559 F.2d 554, 556 (9th Cir. 1977). Subsequent cases have reaffirmed the unusually broad discretion granted the Secretary under § 1201. Ryan, 559 F.2d at 556 (stating that "the Department of Interior has been given almost plenary authority over the administration of the public lands"); Boeschle v. Udall, 373 U.S. 472, 476-77 (year) (citing the Secretary's "general managerial powers" over a variety of interests in the public lands); U.S. v. Zweifel, 508 F.2d 1150, 1154 (10th Cir. 1974) (referring in passing to "statutes giving the Secretary plenary authority over the administration of public lands").

The Secretary has properly employed this broad discretion in adopting the challenged rules. The 1995 rules are faithful to the governing statutes in two critical respects. The rules are both consistent with any statutory terms that are relevant, and they reflect the statutes' overarching mandate to implement whatever regulations are necessary to provide for the orderly use of grazing districts and other grazing lands and to preserve and enhance their resources.

C. The 1995 Rules Preserve the Concept of Grazing Preference Embodied in the Taylor Grazing Act and Safeguard Grazing Privileges

Petitioners mistakenly claim that the 1995 rules eliminate the grazing preference specified in the Taylor Grazing Act. They argue unconvincingly that changes in terminology in the 1995 rules regarding the concepts of "preference" and "use" contradict the TGA's mandate for a preference in the issuance of grazing permits and violate the TGA's requirement that recognized and acknowledged grazing privileges be adequately safeguarded so far as consistent with the purposes and provisions of the Act. (Pet. Br. at 11, 17.) In fact, although the 1995 rules redefine the term "grazing preference," add the new term "permitted use," and

⁵ 43 U.S.C. § 1201 states:

The Secretary of Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

amend the definition of grazing permit and lease, they fully adhere to the concept of a preference right in the issuance of permits and leases that is mandated by the TGA. Furthermore, the rules safeguard recognized and acknowledged grazing privileges consistent with the purposes and provisions of the TGA.

1. Grazing Preference As Now Defined Is Consistent With TGA

The grazing rules in effect before the current changes used the term "grazing preference" to mean "the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee." 43 CFR § 4100.0-5 (1994). That term included "active use" and "suspended use." 43 CFR § 4110.2-2(a) (1994). Under those rules, "grazing preference" (meaning a designated amount of forage expressed in AUMs) was specified in all grazing permits or leases (Id.); was attached to base property (Id. at 4110.2-2(c)); and was transferable with the base property, in whole or part, upon application and approval (Id. at 4110.2-3).

In the 1995 rules BLM added the term "permitted use," defined as meaning "the forage [expressed in animal unit months] allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease. . . ." 43 CFR § 4100.0-5 (1995). "Permitted use" encompasses all authorized use including active use (livestock use and conservation use) and suspended use.⁶ 43 CFR § 4110.2-2(a) (1995). As with "grazing preference" in the previous rules, "permitted use" (meaning a designated amount of forage expressed in AUMs) is specified in permits (Id.); is attached to base property (Id. at 4110.2-

⁶As BLM states clearly in the final environmental impact statement,

The concept of suspended nonuse has been retained. . . . The present suspended use would continue to be recognized and have a priority for additional grazing use within the allotment. Suspended use provides an important accounting of past grazing use for the ranching community and is an insignificant administrative workload to the agency. . . .

Final Environmental Impact Statement at 144.

2(c)); and is transferable with the base property, in whole or part, upon application and approval (Id. at 4110.2-3). Thus, AUMs are protected and not eliminated under the new rules.

In the new rules BLM not only added "permitted use," but also dropped the previous definition of "grazing preference," grounded as it was on amount of forage. The agency returned to the original concept of preference contained in the TGA by defining "grazing preference or preference" to mean

a superior or priority position against others for the purpose of receiving a grazing permit or lease. This priority is attached to base property owned or controlled by the permittee or lessee.

43 CFR § 4100.0-5 (1995). This redefinition is more logical and clear, as it conforms to the common sense meaning of the word. Moreover, this redefinition of "grazing preference" returns to the original concept of preference in the TGA. This is clear upon examination of the statute. Section 3 of the TGA provides that

Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them. . . .

* * *

Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use.

43 U.S.C. § 315b. As used in the TGA, "preference" plainly means precedence or priority in the issuance of grazing permits among potential users of these privileges, such that certain applicants for grazing permits (including permittees seeking renewal) are favored over others.⁷ As one court stated in construing the meaning of the word "preference" in the TGA,

⁷The word "preference" appears many times in the TGA, as amended, and in each instance means precedence or priority of one class in relation to another. See 43 U.S.C. §§ 315b, 315f, 315m.

[t]he word in the context used is to be taken in its ordinary sense. Its meaning is plain. It is a term with which Congress is fully familiar as in legislation dealing with immigration, preference in employment, Indian land allotments and many other fields. So here.

McNeil v. Seaton, 281 F.2d 931, 301-302 (D.C.Cir. 1960) (footnotes omitted). A judicial decision soon after enactment of the TGA portrays the TGA preference as one where "those who . . . bring themselves within a preferred class set up by the statute and regulations, are entitled as of right to permits as against others who do not possess the same facilities for economic and beneficial use of the range." Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 314 (D.C.Cir. 1938)(emphasis added). See also, Garcia v. Andrus, 692 F.2d 89, 91 (9th Cir. 1982)(construing TGA preference in context of grazing lease).

Thus, as used by Congress in the TGA, "preference" does not connote the number of AUMs or extent of grazing privileges to be permitted, but rather establishes a class of applicants to be accorded favoritism in the issuance of grazing privileges.⁸ Likewise, in the Range Code of March 16, 1938, it is the sense of precedence or priority that is reflected in the concept of "preference".

It was not until the grazing rules of 1977, following enactment of FLPMA, that BLM added the term "grazing preference" to the Range Code and defined it in terms of a designated quantity of forage expressed in AUMs. It is worth noting that at the same time BLM added "grazing preference" to the rules in 1977, it dropped the term "base property qualifications," which, itself having been added to the Range Code only in 1956, was defined as meaning "the

⁸Indeed, it is clear that Congress intended the Secretary to retain the power and authority to specify from time to time numbers of stock and seasons of use. 43 U.S.C. 315b. "[T]he dominant message and command of [the Secretary's] Congressional mandate is that [the Secretary] shall prescribe the extent to which livestock grazing shall be conducted on the public lands." Natural Resources Defense Council v. Hodel, 618 F.Supp. 848, 869 (C.D. Cal. 1985).

maximum amount of grazing privileges on Federal range properly allowable to base properties in Class I or Class II."⁹ 43 C.F.R. § 1612(i) (1978).

Thus, in the 1995 rules BLM returns to the plain meaning of "preference" as used in the TGA and now describes the extent of the grazing privilege, as expressed in animal unit months, under a permit or lease by the term "permitted use." The element of preference that petitioners argue has been eliminated, namely, animal unit months or extent of grazing privilege permitted on public lands, is one that was not part of the "preference" established by the TGA in the first place. Terminology related to various grazing concepts has undergone several changes over the years. The preference accorded certain applicants for permits or leases has not changed and specifically remains attached to the base property. 43 CFR § 4110.2-2(b) (1995). So too with the permitted use expressed in animal unit months. *Id.* at 4110.2-2(c). Under the 1995 rules "grazing preference or preference" and "permitted use," together, embody the essential characteristics of the previous term "grazing preference" in the Range Code as well as the original word "preference" in the TGA and leave them unaffected. Thus, the rules are completely consistent with the TGA.

Because the new terminology is totally consistent with the TGA and preserves the attributes of preference, the new rules continue to safeguard grazing privileges consistent with the purposes and provisions of the TGA.

2. A Rational Basis Exists for Changing the Terminology

Petitioners argue that the 1995 rules reverse contemporaneous administrative and judicial interpretations of the TGA and lack a reasoned explanation to support "a radical departure from well-established governmental policy and practice". (Pet. Br. at 32.) Apart from the conspicuous exaggeration in petitioners' characterization of the change in terminology involving

⁹In the Range Code as revised in 1956, "animal-unit month" meant the **grazing privileges** represented by the grazing of one cow or its equivalent for a period of one month. 43 CFR § 161.2(m) (1956).

the concept of preference, their argument is unconvincing. They challenge BLM's explanation that the change returns to the original concept of preference, does not impair stability, and clears up confusion in terminology.¹⁰

As already explained, the TGA clearly uses "preference" to mean precedence or priority in receiving a grazing permit or lease. In the statute the term is used in its ordinary sense. McNeil v. Seaton, 281 F.2d at 301-302. The statutory language does not connote quantity of AUMs or extent of grazing privilege. However, "[t]hrough time, common usage of the term evolved to mean the number of AUMs attached to particular base properties. But this usage dilutes the original statutory intent of the term as an indication of relative standing." 60 FR 9922. BLM explains that the new "term 'permitted use' captures the concept of total AUMs attached to particular base properties, and . . . does not cancel preference. The change is merely a clarification of terminology." Id. It "eliminates the shorthand jargon of 'preference AUMs' that has developed" over time (FR 9928) and adds the more appropriate term "permitted use," which more clearly encompasses the concept of specified quantity of forage. Grazing permits and leases will specify all authorized use including livestock grazing, suspended use, and conservation use. 43 CFR § 4100.0-5 (1995).

Contrary to petitioners' suggestion that the clarification of terminology reverses the agency's contemporaneous interpretation and 60 years of precedent, "the term 'preference' was

¹⁰While Petitioners contend that BLM justifies the change in terminology by claiming it is "necessary to make BLM's grazing administration similar to that of the Forest Service" and argue that is not a reasoned explanation (Pet. Br. at 34.), they are really just setting up a straw man. DOI's only reference to the Forest Service in the preamble to the final regulations in this context simply states that "[l]ike the Forest Service, BLM will identify the amount of grazing use (AUMs), consistent with land use plans, in grazing use authorizations to be issued under a lease or permit." FR 9921 Nothing in that statement even remotely suggests that BLM considers it "necessary" to follow the Forest Service in this regard. In fact, the sentence does not even suggest that DOI intended it as an explanation or justification of its change in terminology.

used during the process of adjudication of available forage following the passage of TGA to establish an applicant's relative standing for the award of a grazing privilege." *Id.* A review of previous versions of the Range Code reveals that the term "grazing preference" was, itself, not added to the Code until 1977, replacing another term used to denote the total number of AUMs attached to particular base properties.

Notwithstanding petitioners' charge that the change in terminology regarding preference and use will result in instability, the agency believes otherwise. "Permitted use," reflecting the total number of AUMs allocated under a permit is derived from the land use planning process required by FLPMA. The land use plan provides guidance for allocation of land or forage on a regional scale. (FR 9922). That process includes detailed analysis of data collected by monitoring and other studies. *Id.* "Permitted use" will not be subject to yearly change (FR 9928) and, in the absence of a major change in the overall situation on the ground, BLM-initiated changes are unlikely where land use plan objectives are being met (FR 9923). As a consequence, there will be "a high level of security, stability and predictability from year to year." *Id.* Moreover, since the priority for receiving a permit or lease is clearly retained in the definition of "grazing preference or preference," there is no reason to "anticipate there will be a decrease of financial stability for grazing operations." (FR 9928). Indeed, BLM concludes that the establishment of permitted use through the land use planning process "will increase not decrease, the stability of grazing operations." *Id.*

D. The Secretary May Ensure the Orderly and Lawful Use Of the Public Lands By Holding Permittees Accountable for Their Affiliates

In evaluating permit applications, the 1995 rules consider the stewardship records of both applicants and their affiliates. 43 C.F.R. § 4110.1(b). Petitioners dispute the statutory authority for the affiliate provisions, although they do not contest that the provisions have a reasoned basis. *See* Pet. Br., sections IV, V. "The concept of affiliate is intended to take into account those persons who actually have the ability to control the manner by which a grazing

operation is conducted." 60 Fed. Reg. 9927 (emphasis added). Thus, an affiliate either "controls, is controlled by, or is under common control with, an applicant, permittee, or lessee." 43 C.F.R. § 4100.0-5 (1995)). "In determining whether affiliation exists, the authorized officer shall take into account all appropriate factors, including, but not limited to, common ownership, common management, identity of interests among family members, and contractual relationships." *Id.* § 4110.1(c) (emphasis added). "[T]he Department does not intend the term 'affiliate' to be applied in an over broad or burdensome manner but rather in a manner that recognizes ordinary business relationships."¹¹ 60 Fed. Reg. 9923.

The rules establish a much narrower scope of affiliate accountability for the renewal of an existing permit or lease, 43 C.F.R. § 4110.1(b)(i), in contrast to the application for a new permit or lease, 43 C.F.R. § 4110.1(b)(ii). An applicant for a new permit¹² will be held accountable for an affiliate's actions if they resulted in the either the cancellation of a federal or state grazing permit within the past 36 months, judicial debarment from holding a federal grazing permit. 43 U.S.C. § 4110.1(b)(2) (1995), 60 Fed. Reg. 9962. For existing grazing privileges sought to be renewed, permittees are only accountable for affiliates' actions if they cause a violation of the terms and conditions of the "permit or lease for which renewal is sought." 43 C.F.R. § 4110.1(b)(i) (emphasis added); 60 Fed. Reg. 9962. Thus, for existing grazing privileges, a permittee is only accountable for the management of affiliates in his own business. The rules reserve broader examination of affiliate actions on other properties for where it does not threaten grazers' existing permits.

Furthermore, DOI carefully designed the affiliate accountability regulations so they would not be unfairly burdensome. The authorized officer is directed to consider any

¹¹ The reach of affiliate accountability is not likely to extend to financial institutions or most buyer-seller relationships. 60 Fed. Reg. 9923, 9927.

¹² For brevity's sake, respondents will use the term "permit" to refer to both "permit" and "lease, and the term "permittee" to refer to both "permittee" and "lessee."

circumstances beyond the control of the applicant and affiliates. Concerning applications for new permits, DOI will not disqualify grazers if their affiliates' record of violations has resulted only in permit suspensions. 43 C.F.R. § 4110.1(b) (1995); 60 Fed. Reg. 9927, 9962. "Basing qualifications on whether past permits and leases have been cancelled for violation is intended to focus attention on those types of actions that justified decisive and substantial corrective action." 60 Fed. Reg. 9926. Moreover, after an affiliate has accumulated sufficiently serious violations of the grazing laws to have a permit cancelled, the associated permittee is only ineligible for a new permit for the next 36 months. Id. at 9927. Despite commenters' suggestions to the contrary, DOI left any more serious penalties to the judicial system. Id. at 9925, 9926.

1. There is ample authority for holding permittees accountable for their affiliates' seriously illegal or damaging actions

The affiliate provisions "are intended to reflect the requirements of TGA and FLPMA that public lands be managed in a way that protects them from destruction or unnecessary injury and provides for orderly use, improvement, and development of resources." 60 Fed. Reg. 9926; see 43 U.S.C. §§ 315a, 1701(a)(8), 1732(a), 1752(a),(c). The TGA empowers the Secretary "to do any and all things necessary" to achieve these ends. 43 U.S.C. § 315a; see section IV.B. supra. In order to implement this provision, the TGA grants the Secretary broad authority to determine which individuals "under his rules and regulations are entitled to participate in the use of the range." 43 U.S.C. § 315b. FLPMA broadly authorizes the Secretary to regulate "a grazing permit or lease for any violation of a grazing regulation or any term or condition of such grazing permit or lease." 43 U.S.C. § 1752(a). Furthermore, in order to retain any priority of renewal, FLPMA requires that "the permittee or lessee is in compliance with the rules and regulations issued and the terms and conditions in the permit or lease specified by the Secretary concerned." 43 U.S.C. § 1752(c); see 60 Fed. Reg. 9926, 9927. It would be illogical to consider the permittee in compliance with the terms and

conditions in the permit where employees or agents carrying out his business have violated the very same terms and conditions. See 60 Fed. Reg. 9926. Furthermore, pre-existing rules already held the permittee "responsible for the management of the livestock which graze the public land under a grazing permit or lease." 43 C.F.R. § 4130.5(a) (1994).

The Secretary has rationally implemented his broad rule-making power through the affiliate rules. See discussion of Secretary's broad authority at section IV.B. supra. The preamble to the final rule states:

FLPMA [43 U.S.C. 1740] authorizes the Secretary to promulgate rules and regulations necessary to implement the requirements of the Act. . . . The Department believes that the provisions of this section of the rule are critical to BLM's ability to ensure that permittees and lessees are good stewards of the land.

60 Fed. Reg. 9926. In deciding whether to renew grazing permits, the Secretary may consider whether their use has violated the grazing code or the conditions placed on their benefit from the public lands. Similarly, in allocating new permits to use scarce and vulnerable range resources, the Secretary may rationally prefer applicants whose affiliates have not accumulated such serious grazing violations on other public lands that their permits have been administratively cancelled or judicially debarred.

2. Petitioners demonstrate a fundamental misunderstanding of the affiliate provisions

Petitioners' challenge to affiliate accountability under the 1995 rules is founded on four significant misconceptions. First, petitioners fail to recognize the important distinction between new permit applications and permit renewals. (See Pet. Br. at 19.) Second, petitioners speculate that there will be the "imposition of liability based solely on a family relationship." (Pet. Br. at 21.) To the contrary, "[in] determining whether affiliation exists, the authorized officer shall consider all appropriate factors," including not just "identity of interests among family members," but also "common ownership, common management, . . . and contractual relationships." 43 C.F.R. § 4110.1(c) (emphasis added).

Third, petitioners demonstrate a misunderstanding of the basic nature of the affiliate provisions when they analogize to tax, corporations, and family law limitations on monetary liability for the acts of others. (See Pet. Br. at 19-21.) Nothing in the 1995 rules would impose monetary liability on permittees or otherwise threaten their property based on the acts of affiliates. See United States v. Fuller, 409 U.S. 488, pincite (1973) (grazing permit is not a compensable property interest). The regulatory preamble speaks not of affiliate "liability," but affiliate "accountability." 60 Fed. Reg. 9923. Accordingly, the 1995 rules are more properly compared to other regulations that governing the award of business opportunities involving federal property. Other federal agencies besides the Department of Interior have sought to protect the public interest in these circumstances by holding applicants "accountable" for their affiliates who have seriously violated federal law or their agreements with the agency.

For example, the Forest Service may suspend or disbar contractors from purchasing timber on public lands based on the acts of their affiliates. See 36 C.F.R. §§ 223.133, 223.140(a)(2); 223.145. The Forest Service did not have explicit statutory authority to extend suspension or debarment of timber contractors to affiliates. Instead, the Forest Service based its regulation on the Federal Acquisition Regulation (FAR), government-wide regulations for suspension or debarment of procurement contractors. 52 Fed. Reg. 43324, 43324 (Nov. 12, 1987); see FAR provisions on suspension and debarment of affiliates at 48 C.F.R. Subpart 9.4, §§ 9.403, 9.406-1(b), 9.407-1(c). The FAR and other federal regulations holding contractors accountable for affiliates have been judicially upheld.¹³ Furthermore, the FAR, the Forest

¹³ See Federal Media Inc. v. GSA, 1994 WL 559084 *3 (N.D. Ill. 1994) (finding no likelihood of success on the merits in motion for a temporary restraining order where plaintiffs were affiliates of debarred contractors under FAR); Stanko Packing Co. v. Bergland, 489 F. Supp. 947 (D.D.C. 1980) (upholding suspension of affiliate of beef supplier under the U.S. Department of Agriculture's procurement regulations, which were similar to FAR); Robinson v. Cheney, 876 F.2d 152, 154 (D.C. Cir. 1989) (indicating that under FAR "[a]n agency may also extend a debarment order to any affiliate of a debarred contractor").

Service affiliate provisions, and the challenged rule all define "affiliate" in substantially the same way. Compare 43 C.F.R. §§ 4100.0-5, 4110.1(c) (DOI rule) with 36 C.F.R. § 223.133 (Forest Service) and 48 C.F.R. § 9.403 (FAR). Finally, like the Forest Service regulations, the FAR also lacked explicit statutory authority for its affiliate provisions.¹⁴ Thus, there is ample precedent for DOI to hold businesses accountable for their affiliates in order to protect the public interest when awarding business opportunities involving federal property.

Fourth, permittees will receive notice before any final determination of their responsibility for the acts of affiliates. (See Pet. Br. at 22.) In the context of permit renewals, grazers will receive notice as "an affected permittee or lessee" of any proposed agency decision that the affiliate has violated the terms and conditions of their permit or lease. See 43 C.F.R. § 4160.1(a). Concerning applications for new permits, grazers will receive notice as "an affected applicant" of any proposed denial based on an affiliate's actions. Id. A grazer could dispute his responsibility for the affiliate in this setting before any decision became final. Finally, even though DOI has given notice, there is no applicable statutory or constitutional requirement of advance notice before any authorized officer's final ruling on the grazing privileges at issue.¹⁵

Petitioners also contend that the DOI failed adequately to respond to public comments on the affiliate rules. (Pet. Br. at 52.) Petitioners neglected to identify, however, any specific comments which allegedly received no response. (See Pet. Br. at 19-22, 52.) The DOI extensively responded to comments on the affiliate provisions. 60 FR 9923, 9925-27; FEIS at 145.

¹⁴ The FAR provisions on contractor qualifications are authorized by 40 U.S.C. § 486(c), 10 U.S.C. Chapter 187, and 42 U.S.C. § 2473(c). See 48 C.F.R. Part 9.

¹⁵ The TGA provides for local hearings on appeals (43 U.S.C. § 315h), which are safeguarded by the 1995 regulations. 43 C.F.R. § 4160.4 (1995).

Finally, petitioners cannot prevail on their facial challenge if any applications of the regulation will be valid. See section IV.A.1. supra. The Secretary intends to restrict the rule to instances where the affiliate relationship involves the actual ability to control, 43 C.F.R. §§ 4100.0-5, 4110.1(c); 60 Fed. Reg. 9927, and such application is fully consistent with the governing statutes. Petitioners' speculations that the Secretary may act arbitrarily and capriciously in specific instances must await subsequent applied challenges.¹⁶

E. The Regulations Permissibly Clarify Which Range Improvements Are Owned by the United States

The 1995 rules clarify the ownership of range improvements based on "common law concepts regarding retention of permanent improvements in the name of the party that holds title to the land." 60 Fed. Reg. 9897. The United States prospectively asserts title to permanent range improvements, such as fences, wells, and pipelines, and non-structural improvements such as seeding and chaining. 43 C.F.R. § 4120.3-2(b),(c); see Pet. Br. at 23 (conceding that the United States has always owned non-structural improvements). "The permittee or lessee may hold title to authorized removable range improvements used as livestock handling facilities such as corrals, creep feeders, and loading shutes, and temporary structural improvements such as troughs for hauled water." 43 U.S.C. § 4120.3-3(b). In the case of either existing or future range improvements, the permittee will still receive compensation for his investment in the improvements if he ceases to use the allotment. 43 C.F.R. §§ 4120.3-5, 4120.3-6(c). Finally, the new rules apply only to improvements constructed after August 1995, and fully protect existing rights. 43 C.F.R. § 4120.3-2(b).

The 1995 rules make only clarifying changes to the immediately prior rules and are highly consistent with the past rules and BLM policy on the same subject over the past twenty

¹⁶ See, for example, Caiola v. Carroll, 851 F.2d 395, 400 (D.C. Cir. 1988) (in as-applied challenge, overturning as unreasonable Department of Defense's debarment of specific contractors as affiliates of other disbarred corporation).

years. Ever since the mid-1970's, the United States has asserted ownership over certain types of range improvements to orderly administer the public lands and flexibly manage them for multiple use purposes. As an outgrowth of these efforts, the revised rules have three rational purposes, any one of which would be sufficient to uphold them. First, the 1995 rules clarify potential ambiguities in the prior rules to "provide[] consistent practice within the BLM." 60 Fed. Reg. 9897; see also 9935. Second, the revised rules conform to the common law understanding, as discussed above. 60 Fed. Reg. 9894, 9897. Finally, the provisions simplify numerous permittees' compliance efforts by conforming BLM practice to Forest Service regulations. 60 Fed. Reg. 9897.

Petitioners mistakenly assert that the 1995 rules grant the United States ownership of all range improvements. (Pet. Br. at 23). According to petitioners, these new rules lack any reasoned basis and reverse the past 60 years of DOI interpretation. (Pet. Br. at 22-23, 37.) Finally, petitioners contend that the rules are inconsistent with the statutory authority of FLPMA and the TGA.

1. The Regulations Reasonably Interpret the Combined Authority of FLPMA and TGA

The governing statutes give the DOI broad authority to manage the public lands to ensure their orderly use and the conservation of their grazing resources. See Section IV.B. supra. The DOI has logically interpreted the combined authority of relevant FLPMA and TGA provisions as providing sufficient discretion to allow the challenged rule. Petitioners read the TGA as granting to permittees ownership of all range improvements on the public lands. (Pet. Br. at 23.) The TGA is ambiguous on the subject of which improvements permittees own, however, and the enactment of section 402(g) of FLPMA seriously undermines petitioners' argument that the TGA granted permittees title to all range improvements.

a. FLPMA undermines petitioners' argument

Three aspects of section 402(g) of FLPMA defeat petitioners' argument. This provision states:

Whenever a permit or lease for grazing domestic livestock is cancelled in whole or in part, in order to devote the lands covered by the permit or lease to another public purpose, including disposal, the permittee or lessee shall receive from the United States a reasonable compensation for the adjusted value . . . of his interest in authorized permanent improvements placed or constructed by the permittee on lands covered by such permit or lease.

42 U.S.C. § 1752(g). The first problem with petitioners' argument is that the legislative history shows that Congress did not believe that permittees already owned range improvements. To the contrary, Congress considered that permittees were without rights in their improvements, and needed the encouragement of statutory compensation to undertake worthwhile improvement projects. For example, Congressman Steiger stated that "this language is intended to encourage permittee developments that he might otherwise not make for fear of losing the value in it. So that is our purpose, to encourage those developments which the permittee has to bear the cost of." Transcript of May 6, 1975 subcommittee meeting on H.R. 5224 at 59.¹⁷

Second, Congress's very enactment of § 1752(g) shows that it did not believe permittees already owned the range improvements. If they owned the improvements, permittees would automatically be entitled to compensation under the takings clause of the U.S. Constitution if the United States asserted physical control over their property. See Loretto v. Teleprompter

¹⁷ H.R. 5224 contained compensation language substantively identical to that ultimately adopted in FLPMA. See H.R. 5224, section 211(e). While Congress ultimately created FLPMA by adopting a Senate bill, S. 507, the FLPMA provisions concerning grazing, including the compensation language, come from House bills. Subcommittee Chairman Melcher echoed Congressman Steiger, stating in relation to fences on public lands that "there is so much needed on public lands that it is a shame to have [the fences] torn out simply because you can't recognize and pay the permittee that lost his lease or permit for what ought to remain there." Serial No. 94-9 at 58-59. For the court's reference, section 211(e) of H.R. 5224, which is substantially similar to the final language adopted by FLPMA, is attached as Ex. ____.

Manhattan CATV Corp., 458 U.S. 419 (1982) (finding "per se" takings where government physically occupies property.) Yet in this event 43 U.S.C. § 1752(g), whose entire purpose was to compensate permittees for range improvements, would be entirely superfluous. The Supreme Court "generally presume[s] that Congress is knowledgeable about existing law pertinent to the legislation it enacts." Goodyear Atomic Energy Corp. v. Miller, 484 U.S. 174, 185 (1988). Furthermore, "[i]t is an elemental rule of statutory construction that effect must be given, if possible, to every word, clause, and sentence of a statute." Knutzen v. Eben Ezer Lutheran Housing Ctr., 815 F.2d 1343, 1348 (10th Cir. 1987). Petitioners' argument would impermissibly render superfluous an entire subsection of FLPMA, § 1752(g).

Third, Congress was careful to limit permittees' rights and expectations under § 1752(g) to compensation and not ownership. Congress carefully avoided property law terminology in drafting the subsection. The permittee's investment in range improvements is described by a term without any legal force, his "interest." Presumably, if Congress wanted prospectively to grant the permittee ownership of range improvements as well as compensation, it could easily have done so.

The legislative history shows instead that Congress intended not to grant permittees any property rights. See House hearings on the substantively identical provision from H.R. 5224, a FLPMA predecessor. In response to Forest Service concerns, Congressman Melcher, Chairman of the House Subcommittee on Public Lands, stated that he did not believe that compensation for range improvements created "any inherent right or property right." Serial No. 94-9 at 32. Congressman Santini then asked the Forest Service Chief "if it were determined by your legal advisors that this was merely a contractual right rather than an enhancement of a proprietary right in the property, a position that precedent would strongly endorse, would that then eliminate your objection to this particular clause...." Id. Forest Service Chief John McGuire subsequently submitted a legal opinion from the General Counsel of the Department of Agriculture finding that the compensation clause under consideration "would be a statutory

right created independently of traditional property or contract law, although it is more closely akin to the latter." *Id.* at 33. Thus, in response to the Forest Service's concerns, Congress expressed its intent that the compensation provision would be a limited statutory right without any property law ramifications such as the conveyance of ownership.

b. Petitioners misread the TGA

Petitioners largely overlook FLPMA, and instead base their claim on the TGA. The relevant provision of the TGA states:

No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior.

43 U.S.C. § 315c (emphasis added). This provision states that if improvements are both constructed and owned by the prior occupant, then the subsequent occupant must compensate him for their value. The provision does not indicate when improvements are owned by the prior occupant, however. Thus, the statute does not focus on the critical question before this Court. There is one limited exception: the statute clearly envisions that in some circumstances improvements would be both owned and constructed by the applicant; otherwise the provision would be meaningless. The 1995 rules comply with this requirement, because removable range improvements will generally be both owned and constructed by applicants.

As the implementing agency, DOI has rationally read the TGA as not otherwise addressing the ownership of range improvements. Indeed it would be curious if outright ownership of property on the public lands were determined by a clause that only purports to address a relationship between private parties. It is FLPMA that addresses the permittee's rights as against the owner of the public lands, the United States. However, FLPMA does not grant the permittee any ownership rights to range improvements.

Furthermore, the Court must interpret 43 U.S.C. § 315c consistently with the later enacted 43 U.S.C. § 1752(g). Any interpretation of the TGA provision as granting ownership

of improvements to permittees would contradict both more recent indications of Congressional intent and several rules of statutory construction, as discussed above.

Petitioners' references to the legislative history do not assist their challenge. First, petitioners argue that because Congress favored range improvements, it must have intended to grant ownership to permittees. However, the cited statements by Congressmen show to the contrary that Congress sought to encourage range improvements by means other than ceding ownership of them.¹⁸ Petitioners also seek to extrapolate Congress's intent concerning range improvement ownership from a single Senator's views on the amortization compensation approach of 1934 Forest Service regulations. (Pet. Br. at 24.) The desirability of the Forest's Service's compensation scheme is fundamentally distinguishable from the statutory consistency of the 1995 ownership rules before the Court.¹⁹

Finally, even if the Court reads the statutes differently from DOI, petitioners cannot prevail on a facial challenge. An across-the-board challenge to a rule cannot succeed where

¹⁸ Congressman Pierce emphasized that "[t]hose who have expended money in improvements will have preference rights giving those persons prior allotments." 78 Cong. Rec. at 6359. The other representative petitioners cite, Congressman Robinson, favored a "10-year program" of compensation for range improvements, but never mentioned ownership. *Id.* at 6358.

¹⁹ The 1934 Forest Service approach was different from the current regulations in two critical respects. Senator Adams rejected the Forest Service approach as "confiscation" both because it lacked a guarantee of compensation, and because the Forest Service charged the permittee increased fees for improvements the permittee himself had built. Senate Hearings at 80. In direct contrast, there is nothing confiscatory about the 1995 regulations. They both compensate the permittee, and charge no increased fees for the permittee's labor. Furthermore, the comments of one Senator who was not the bill's sponsor are not especially probative amidst the avalanche of available legislative history. **John: cite; see also Rust v. Sullivan**, 500 U.S. 173, 189-190 (1991) ("[i]t is well established that legislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations"). Thus, the cited legislative history is neither on point nor particularly indicative of the entire legislature's intent.

some of its applications are permissible. See section IV.A.1. supra. Petitioners' complaint is addressed to the range improvements that the United States owns under the 1995 rules, those that are permanent and constructed after the effective date of the regulations. 43 C.F.R. § 4120.3-2. However, federal money is made available for permanent improvements under cooperative agreements between permittees and the BLM, so the United States shoulders at least a portion of the costs of these improvements. BLM Manual H 4120-1 (p.8). Yet nothing in the TGA's 43 U.S.C. § 315c addresses ownership of range improvements constructed in part by the United States. At the very least the DOI has rationally read the statute as not addressing ownership of these types of permanent improvements authorized under cooperative agreements.

Furthermore, it is yet to be seen how the 1995 rules concerning title will cause permittees any concrete harm. If the grazing preference is transferred to a subsequent permittee, permittees will receive compensation for the value of authorized range improvements. 43 C.F.R. § 4120.3-5. If a grazing permit is cancelled in order to devote the public lands to another public purpose, a permittee will still receive reasonable compensation for the adjusted value of improvements. Id. at § 4120.3-6. Permittees may elect to salvage materials rather than receive compensation for improvements authorized under range improvements. Id. While the land remains in grazing, meanwhile, permittees have full use of the improvements. Thus, petitioners' across-the-board statutory challenge is premature, does not reach all applications of the rule, and cannot prevail.

2. DOI Provided a Reasoned Basis for the Regulations

- a. The 1995 regulations are consistent with the only prior regulations to incorporate FLPMA's multiple-use mandate as well as the TGA**

Petitioners assert that the challenged rules on ownership of range improvements reverse prior policy. (Pet. Br. at 36.) To the contrary, the applicable rules have

long stated that the title of nonremovable improvements shall be in the name of the United States and the title of removable improvements shall be in the name

of the permittee or lessee. The final rule clarifies further these provisions regarding temporary and permanent improvements.

60 Fed. Reg. 9935. In particular, the clarifications "provide consistent direction within the BLM." *Id.* at 9897. The basic form of the current rules dates back to 1978. Following FLPMA's mandate of multiple use planning for the public lands, DOI overhauled the grazing rules that year in order to "recognize the multiple use values of the land and the need for management flexibility." Preamble to Proposed Rules, 42 Fed. Reg. 35334, 35334 (July 8, 1977). As part of this effort, DOI asserted title over the same types of range improvements that it claims ownership of today.

The 1995 rules make no substantive change to the past 20 years' regulations concerning ownership for improvements authorized under range improvement permits.²⁰ Throughout this time, the permittee has owned all "removable range improvements" authorized under these permits.²¹ These provisions reflect the same common law principles as those behind the current rules. While the permittee owns removable improvements such as livestock handling facilities, he does not hold title "to permanent range improvements that become part of the land itself." 45 Fed. Reg. 68506, 68507 (Oct. 15, 1980).

Furthermore, the 1995 rules are fully consistent with the most persuasive reading of the immediately prior rules concerning ownership of range improvements authorized under cooperative agreements. The 1984 rules indicated that under cooperative agreements, the

²⁰ There are separate regulations for range improvements, depending on whether they are authorized under range improvement permits or cooperative agreements. *See* 43 C.F.R. §§ 4120.3-1, 4120.3-2 (1995). Ranchers seek range improvement permits when they alone construct the improvements, while they use cooperative agreements when they seek financing or other assistance from the United States. *See* BLM Manual §§ 4120.32, 4120.33.

²¹ Compare 43 CFR § 4120.3-3(b) (1995) with the 43 CFR § 4120.3-3(b) (1984) (authorized by the Reagan administration at 49 Fed. Reg. 6440, 6452 (Feb. 21, 1984), corrected by 49 Fed. Reg. 12704 (Mar. 30, 1984)); and 43 CFR 4120.6-3 (1981) (authorized by the Carter administration at 46 Fed. Reg. 5784, 5790 (Jan. 19, 1981)).

United States held title to non-removable improvements, 43 C.F.R. § 4120.3-2 (1994) (citing to 49 Fed. Reg. 6452 (Feb. 21, 1984)), which were further defined as permanent improvements. BLM Manual H-4120-1.36.C. ("[p]ermanent range improvements are those which cannot be removed from the land.") Thus, the United States claimed ownership to permanent or non-removable range improvements in 1984, just as it does after 1995.

The only difficulty with the 1984 rules was that they contained potentially contradictory provisions on title to range improvements authorized under cooperative agreements. The rules stated that "[t]itle to structural or removable improvements" was to be shared between the United States and the permittee in proportion to their financial contributions. 43 C.F.R. § 4120.3-2 (1994) (citing to 49 Fed. Reg. 6452 (Feb. 21, 1984)). Thus, under an alternative interpretation, title to structural improvements was to be shared, presumably even if they were permanent. Accordingly, the 1984 rules were potentially confusing on this subject, and there was a need to "provide consistent direction within the BLM." 60 Fed. Reg. 9897.

The 1995 rules clarify that the United States owns permanent range improvements under cooperative agreements, fully consistent with both the most persuasive reading of the 1984-1995 rules and the only reading of the rules from 1976 and 1984.²² 43 CFR § 4120.6-1 (1978); proposed at 41 Fed. Reg. 31504, 31507 (July 28, 1976); adopted at 43 Fed. Reg. 29058, 29071 (July 5, 1978). In addition, as discussed above, the 1995 rules make no change to the title provisions under range improvement permits. Thus, contrary to petitioners' assertions, the 1995 rules on ownership of range improvements are highly faithful to their predecessors over the past 20 years.

b. DOI provided three rational reasons for the revised regulations

The 1995 rules have three rational purposes: clarification of ambiguities in the prior regulations, conformance with the common law, and consistency with Forest Service practice.

²² In fact, the United States claimed title to all range improvements authorized under cooperative agreements during this period. Id.

First, as just discussed, the 1995 rules eliminate potential confusion in the prior rules by clarifying that the United States holds title to permanent range improvements built after August 1995, those affixed to the land. 43 C.F.R. § 4120.3-2(b); see 60 Fed. Reg. 9897 ("[t]his provides consistent direction within BLM").

Second, the revised rules conform to the sensible common law understanding that the lessee takes with him any removable property, while fixtures that are attached to the land naturally belong to its owner. 60 Fed. Reg. 9897. Petitioners claim that it is irrational for the BLM to seek consistency with the common law because the TGA "preempts" the common law. (Pet. Br. at 37.) However, petitioners cite to controlling authority which recognizes a "near presumption against preemption of traditional state law" such as property law. Integrity Management International, Inc. v. Tombs and Sons, Inc., 836 F.2d 485, 491 (10th Cir. 1987) (petitioners cite the dissenting opinion at 495). Furthermore, petitioners support their claim of preemption under the TGA with cases involving state fence out laws and specific applications of sheep grazing. However, petitioners have made no showing that the TGA generally preempts all state law. Accordingly, petitioners would need to demonstrate that the TGA preempts the specific provision of the common law at issue here. **John:** cite Petitioners have not made such a showing. (See Pet. Br. at 37.) Thus, the TGA did not preempt common law principles of fixtures. The DOI was entirely rational when it grounded its rule in the judicially developed authority and widely shared understanding of the common law.

The rules also serve a third rational purpose of achieving consistency with Forest Service standards. Harmonizing the agencies' approaches will simplify regulatory compliance for the fully 23% of federal operators who hold both Forest Service and BLM permits.²³ Petitioners miss the point when they argue that the Forest Service and the BLM operate under different

²³ Fowler, Rush, Hawkes, & Darden, *Economic Characteristics of the Western Livestock Industry* (Jan. 1994) at 3, Table 5. The percentage is derived from a total of 5308 out of 22901 federal operators who have both Forest Service and BLM permits. Id.

organic statutes. It is entirely sensible for respondents to implement measures where feasible to simplify the effort of compliance for the numerous ranchers who operate under the authority of both agencies.²⁴

c. The data show that the 1995 regulations will continue to encourage investment

Finally, petitioners argue that the revised rules will discourage new investment in range improvements. (Pet. Br. at 37-39.) Respondents have countered that the 1995 rules serve more to clarify the prior provisions than to create major substantive changes. 60 Fed. Reg. at 9935. Furthermore, respondents contend that to the extent there is a change, investment in range improvements will remain in permittees' interest to increase the productivity of the range. *Id.* Financial institutions reviewing loan applications will also recognize the increased productivity resulting from the improvements. *Id.*

The available data in the record supports respondents and flatly contradicts petitioners' argument. Pet. App. ___, Department of the Interior, Bureau of Land Management, *Total Funds Spent by Rancher for Improvements Through Section 4 (RI) Permits 1978-1993* (July 11, 1994) ("Range Improvements Table") (cited by petitioners). Petitioners claim that the 1995 rules will discourage the investment permitted under the previous regulations. Petitioners' theory can be tested, because the 1995 rules on ownership of range improvements are almost

²⁴ The ANPR noted that the FS was a major participant in developing the concepts of Rangeland Reform for the BLM-administered lands. 58 Fed. Reg. 43209a. "Rangeland Reform '94 emphasizes greater similarity and compatibility of the regulations and policies of the BLM with those of the FS and each agency is attempting to move closer together in terms of rangeland management policy." *Id.* "There would be differences only when the basic laws governing resource management activities of the respective agencies are different, or where there are significant on-the-ground differences." *Id.* The preamble goes on to note that "[t]here are sound reasons for this level of consistency. Both agencies administer immense tracts of Federal rangeland, often within the same ecosystems and watersheds. Both agencies commonly serve the same grazing permittees and lessees and other groups and organizations which have a keen interest in Federal rangeland policies." *Id.*

identical to the rules in place from 1981 through 1983.²⁵ If petitioners are correct that such rules discourage investment, the 1981-1983 period should show less investment in range improvements than the subsequent period from 1984-1993, when the rules were more to petitioners' liking.

There is no such trend in data. In fact, there was an annual average of \$ 11.6 million in range improvements from 1981-1983, and only \$ 9.7 million from 1984 to 1993. Range Improvements Table. Thus, the data simply do not support petitioners' theory that ownership provisions such as those in the 1995 rules will discourage investment in range improvements.²⁶ Furthermore, the Forest Service's long experience in retaining title to permanent improvements refutes the petitioners' fear that range improvements, as well as range values and conditions, will suffer under the new rules. In comparison to the BLM's concrete data and the Forest Service's experience, none of the comments cited by petitioners provide more than conclusory

²⁵ Regulations were adopted in January 1981 which remained in effect throughout the end of 1983 (new regulations were adopted in February 1984). See 46 Fed. Reg. 5784, 5790 (Jan. 19, 1981); 49 Fed. Reg. 6440, 6452 (Feb. 21, 1984), corrected by 49 Fed. Reg. 12704 (Mar. 30, 1984). Like the 1995 regulations, these regulations granted the permittee ownership of removable range improvements authorized under range improvement permits. *Id.* For improvements authorized under cooperative agreements, the 1981-1983 regulations were actually more restrictive than the 1995 provisions. The 1981-1983 regulations granted title for all such improvements to the United States; the 1995 regulations grant the United States ownership of only permanent improvements authorized in this manner. Compare 46 Fed. Reg. at 5790 with 60 Fed. Reg. at 9964. If petitioners were correct, this difference would only cause a greater decrease in the amount of investment in range improvements between 1981 and 1983. Thus, the 1981-1983 period can serve as a viable indicator of whether a decrease in investment should be expected because of the content of the challenged regulations.

²⁶ The decrease in expenditures between the early 1980's and the late 1980's and early 1990's cannot be explained by economic factors. To the contrary, the years from 1981 through 1986 were difficult ones for the ranch industry, while conditions from 1987 to 1993 were highly favorable. Fowler, Rush, Hawkes, & Darden, *Economic Characteristics of the Western Livestock Industry* (Jan. 1994) at 6.

speculations to the contrary. See Pet. App. ____, WRCC-40 Report at 5,17; Burkhardt Comments at 4-5; E. L. Smith Comments at 8-9; and Laycock Comments at 4.²⁷

F. DOI Validly Authorized Conservation Use As an Improvement on the Preexisting Non-Use for Conservation Purposes

Conservation use both preserves grazing resources and provides for orderly development of the grazing industry. "It provides flexibility that is needed to enable permittees or lessees to undertake activities on a portion or all of an allotment to protect resource protection or enhancement . . . [and] will provide permittees and lessees with an additional tool to manage grazing operations properly." 60 Fed. Reg. 9898. A permittee must voluntarily seek conservation use, and must obtain the authorized officer's approval based on consistency with the land use plan. 43 C.F.R. § 4130.2(g); 60 Fed. Reg. 9939. The permittee may either obtain a permit for up to a 10-year period specifying conservation use, or may simply place AUMs in conservation use where an existing permit affirmatively allows for conservation use. 43 C.F.R. §§ 4130.2(g), 4130.4(b), "The 10-year limitation on conservation use is consistent with the statutory requirements for [grazing] permit limitations."²⁸ 60 Fed. Reg. 9940.

Conservation use substantially improves on the BLM's long-standing prior practice of non-use for conservation purposes. See Pet. Br. at 40-41 (discussing non-use). In contrast to non-use, conservation use provides that the inactivated forage will not be made available to others while the land is being rested. Compare 43 C.F.R. § 4130.2(h) (1995) with 43 C.F.R. §4110.3-1(a) (1994). As a result, both the permittee and the land benefit from the improved rangeland resources and the certainty that increased forage will be available. 60 Fed. Reg. at 9898. Far from being inconsistent with the governing statutes, conservation use helps

²⁷ Petitioners also cite to affidavits outside the administrative record which are not properly before the court on this issue. (Pet. Br. at 38.)

²⁸ Permits may be issued for a shorter term in several situations, including when "it will be in the best interest of sound land management." 43 U.S.C. § 1752(b).

implement FLPMA's mandate to manage the public lands on a multiple use and sustained yield basis, and PRIA's policy directive to improve the condition of the public rangelands so that they become as productive as feasible for all rangeland values. Finally, conservation use reflects the TGA's twin goals of protecting the land and stabilizing the resources for the grazing industry.

Petitioners fundamentally misinterpret conservation use as an attempt permanently to "withdraw public lands from livestock grazing." (Pet. Br. at 26.) To the contrary, four features of conservation use show that this is not the case. First, while conservation use is in effect, "permittees will be required to maintain improvements" for grazing purposes "in most, if not all, cases." 60 Fed. Reg. 9939; see also id. at 9898. Range improvements that will benefit future grazing must be maintained because "it is not expected that conservation use would be approved on a continuing basis." FEIS at 147. Second, conservation use must be consistent with the land use plans for an area, which provide for grazing in grazing districts and on other grazing lands. Third, permits under conservation use will be subjected to monitoring, 60 Fed. Reg. at 9939, and "once resource goals [are] met, the area would not be eligible for conservation use." FEIS at 147. Finally, conservation use is limited to voluntary periods of 10 years or less. See 43 C.F.R. § 4130.2(d)(4) (1995), 60 Fed. Reg. 9966 (permits or leases may be for less than 10 years when "in the best interest of sound land management"). "The BLM will not impose conservation use on an unwilling permittee." 60 Fed. Reg. at 9939. Where conservation use is designed as a temporary practice consistent with the long-term resumption of grazing, petitioners cannot prevail on a facial challenge based on speculations to the contrary.

1. Conservation Use Permits are Consistent With the Governing Statutes

a. There is ample authority for conservation use

The governing statutes provide both specific authority for conservation use and an overarching mandate that DOI manage public lands on a multiple use basis to provide a combination of balanced and diverse resource uses. The specific authority derives from section

2 of the TGA's command that the Secretary "shall make such rules and rules . . . and do any and all things necessary to . . . preserve the land and its resources from destruction or unnecessary injury." 43 U.S.C. § 315a (emphasis added); see Tenth Circuit cases broadly construing this provision in section IV.B. supra. The TGA therefore gives the Secretary broad independent authority to implement conservation use to preserve the land and its resources.

Furthermore, in FLPMA Congress directed that "[t]he Secretary shall manage the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a) (emphasis added). FLPMA defines multiple use in part to "take into account the needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." 43 U.S.C. § 1702(c); see full definition at Section II supra. This Court has recognized that through FLPMA "Congress set out new goals for the public lands," including management for fish and wildlife habitat. United States v. Lawrence, 620 F. Supp. 1414, 1417 (D. Wyo. 1985); see also section IV.B. supra. Thus, FLPMA affirmatively requires the Secretary to manage the public lands for a variety of uses. Comments on the proposed rulemaking stated that conservation use is an excellent step toward integration of multiple uses. See NWF Comment at 18579 p.8; **Record Document #114**, In contrast, management of the land for grazing purposes alone would contradict FLPMA's multiple use mandate.

Subsequent to FLPMA, Congress found in PRIA that "vast segments of the public rangelands are producing less than their potential for livestock, wildlife habitat, recreation, forage, and soil and water conservation benefits." 43 U.S.C. § 1901(a)(1). In order to address these problems, Congress reaffirmed a national policy and commitment to "manage, maintain and improve the condition of the public rangelands so that they become as productive as

possible for all rangeland values . . ." 43 U.S.C. § 1901(b)(2).²⁹ Conservation use achieves in part these Congressional findings and policies.

Finally, besides the TGA's provision discussed above, the statute elsewhere emphasizes that the Secretary has a dual mandate to protect the public rangelands and provide for their orderly use and development. In the uncodified preamble to the Act, Congress indicated that its purposes were "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration" as well as "to provide for their orderly use, improvement and development to stabilize the livestock industry dependent on the public range." 48 Stat. 1269, *pincite* (June 28, 1934). The TGA's legislative history repeatedly references the need to preserve rangeland resources within grazing districts.³⁰

²⁹ Congress also called for "an intensive public rangelands maintenance, management and improvement program . . . for multiple use values." *Id.* § 1901(a)(4).

³⁰ Congressman Taylor himself referred to his Act as "this gigantic conservation measure." ___ Cong. Rec. at 5373; *see also id.* at 5371. The Senate and House Committee Reports both called for conservation of grazing lands. *See* S. Rep. No. 1,182 73d Cong., 2d Sess. 1-2 (seeking "the conservation and wise development of an extremely valuable, natural resource"); H.R. Rep. No. 903, 73d Cong., 2d Sess., 1-2 (1934) (calling for regulation to counter the "lack of proper care and progressive deterioration in the value of the native forage crop, with the attendant evils of soil erosion and removal of protection in draining areas.") *See also* ___ Cong. Rec. H6356 (Apr. 10, 1934) (statement of Rep. Robinson of Utah); ___ Cong. Rec. at 5375 (statement of Representative DeRouen, Chairman of the House Committee on Public Lands).

Petitioners cite to the TGA's legislative history to suggest that efforts to preserve the public lands were intended to coexist with grazing. (Pet. Br. at 27-28.) This long-term coexistence is exactly what conservation use seeks to achieve, as discussed above. Additionally, petitioners lift out of context Congressman Taylor's statement that the public lands are "only fit for grazing, and poor grazing at that." 78 Cong. Rec. at 11,816. Examined in context, it becomes clear that the lands were unfit for family farms and that grazing was considered the only means by which a man could "make a living for himself and a family," on the vacant lands of the West. *See id.* Congressman Taylor never suggested that a "gigantic conservation measure" was not necessary to keep grazing feasible. *See id.*; ___ Cong. Rec. at 5373.

b. Petitioners' reading of the TGA is not sensible

Petitioners base their statutory argument on provisions of the TGA and FLPMA which generally authorize the Secretary to issue grazing permits to graze livestock. Imposing a brittle rigidity on this language, petitioners insist that it forbids the Secretary "to issue permits not to graze livestock" (Pet. Br. at 25), and therefore requires constant grazing on all the lands covered by the TGA. This reading ignores longstanding rules authorizing temporary nonuse, irrationally conflicts with recognized livestock grazing practices, and contradicts the fundamental canon that legislative language must be interpreted in the context of the entire statute.

As petitioners themselves recognize, the DOI has long authorized temporary nonuse for environmental reasons including drought, fire, and pest infestation, as well as nonuse for personal reasons or market fluctuations. See Pet. Br. at 40-41; 43 C.F.R. § 4110.3-2 (1994); late 1937 Federal Range Code, ¶ 2(q); BLM Manual H-4130-1.15, Rel. 4-75 (7/3/84); 43 C.F.R. §§ 4130.1, 4130.1-1, 4130.4-2 (how others can apply for forage) (1994). Like nonuse for conservation purposes, conservation use recognizes livestock grazing practices which accommodate economic and environmental realities. "[R]esting grazing land is a commonly accepted grazing practice." 60 Fed. Reg. at 9939.

Congress could not have intended its language in FLPMA silently to forbid recognized grazing practices and overturn longstanding and practical rules. Petitioners' reading overlooks the elemental rule of statutory construction that "particular statutory language" must be evaluated in relation "to the design of the whole and to its object and policy." Crandon v. United States, 494 U.S. 152, 158 (1990); see also Aulston v. United States, 915 F.2d 584, 589 (10th Cir. 1990). The content of grazing permits must be flexible enough to incorporate temporary conservation use, in light of the FLPMA's multiple use framework and TGA's mandate to preserve the land and its resources.

There are two critical flaws to petitioners' additional argument that conservation use represents a "withdrawal" of public lands without compliance with proper procedures. (See Pet.

Br. at 26.) First, conservation use is designed to be temporary and consistent with long-term grazing, as discussed above. Second, even if it were permanent, conservation use would not represent a "withdrawal" of public lands as the word is defined by FLPMA. "The term 'withdrawal' means the withholding of an area of Federal land from settlement, sale, location, or entry . . . or transferring jurisdiction over an area of Federal land" from one agency to another. 43 U.S.C. § 1702(j). Conservation use does not involve agency withholding of federal land from entry, because the permittee must originally apply for conservation, and can also apply to activate forage after conservation use has been granted. See 60 Fed. Reg. 9940; 43 C.F.R. § 4130.4(b). Thus, even if it were permanent, conservation use would not constitute a withdrawal under FLPMA.

FLPMA also provides for "exclusions (that, is total elimination) of one or more of the principal uses" of the public lands. 43 U.S.C. § 1712(e) (emphasis added). Like the longstanding practice of nonuse, conservation use does not represent a "total elimination" of grazing where it is temporary and serves grazing management purposes. As the preamble to the final rule states, "Conservation use is a grazing management practice and does not constitute a permanent retirement of . . . grazing allotments. Decisions to retire grazing allotments are considered through BLM's land use planning process." 60 Fed. Reg. 9940.

2. The DOI Had a Reasoned Basis for Authorizing Conservation Use

Contradicting their own argument that conservation use radically departs from "long-standing interpretation of TGA," petitioners turn around and contend that conservation use is not really necessary because it is essentially the same as the currently authorized non-use for conservation purposes. (Pet. Br. at 40.) Petitioners are correct that the DOI rules have long supported a form of conservation use.

Petitioners overlook, however, two important practical advantages of conservation use over the previously authorized nonuse. When permittees apply for nonuse, their forage can be made available to others; in contrast, "[f]orage used for conservation purposes would not be

available to other livestock operators." 60 Fed. Reg. at 9903; ANPR at 4217; compare 43 C.F.R. § 4130.2(h) (1995) with 43 C.F.R. §4110.3-1(a) (1994). Conservation use thus benefits both the operator and the range. First, "[t]he operator will be able to enjoy the benefits of a long-term rest of the allotment from grazing while preserving the ability to resume grazing" with improved forage in the future. 60 Fed. Reg. at 9898. Second, "[c]onservation use benefits the range by facilitating improvement in forage conditions, watersheds, riparian areas, and so on." Id. As an additional advantage, the revised rules "would trim the administrative workload since conservation use would be incorporated into the conditions of grazing permits, thereby alleviating an annual assessment and approval." DEIS at 4-40; cite Rod

3. The DOI Responded to all Significant Comments on Conservation Use

Petitioners also argue that the DOI failed to respond to public comments criticizing the rule. To the contrary, all the comments petitioners cite were addressed. First, a group of related comments suggested that multiple 10-year permits would be granted, and the new rules would allow environmental organizations to purchase base property and ultimately remove all grazing from the public lands.³¹ (Pet. Br. at 41; see Pet. App. ___, WRCC-40 at 17; Pet. App. ___, E.L. Smith Comments at 7.³²) The preamble to the final rule addressed these concerns. The requirements of consistency with land use plans, maintenance of range

³¹ Petitioners also contend that the DOI did not respond to public comments that "the primary beneficiary of the conservation use and related regulatory changes is TNC [The Nature Conservancy]". (Pet. Br. at 42.) Petitioners somewhat mischaracterize the cited comments on this subject. Although the comments, all by one organization, discussed the TNC case, they concluded that removal of the requirement that applicants be engaged in the livestock business benefitted certain larger groups. The commenter argued that the changes were "designed to allow individuals or organizations to purchase grazing permits and to retire them from grazing, probably permanently." Pet. App. ___, PLC Comments at 49; see id. at 96. Thus, the comments on the TNC addressed the same concern discussed above.

³² Petitioners cite to the E.L. Smith comments at 11. However, Smith appears to discuss conservation use at page 7 of his comments.

improvements, environmental monitoring of conservation use, and "the 10-year limit on permits specifying conservation use, will discourage persons from obtaining permits for the sole purpose of placing them in conservation use." 60 Fed. Reg. at 9939. Furthermore, "it is not expected that conservation use would be approved on a continuing basis." FEIS at 147.

Another commenter suggested an "Economic Impact Statement" should be prepared for any lengthy nonuse because of indirect effects on the local economy and the loss of federal payments in lieu of taxes. (See Pet. App. ___, WRCC-40 at 17.) The DOI responded that "[t]he draft EIS concluded the impacts to local communities and local tax revenues from issuing conservation use would not be significant." FEIS at 116.

Finally, some commenters suggested that rangeland condition will suffer negative impacts from the removal of livestock grazing. (See Pet. App. ___, ___, E.L. Smith Comments at 19, 22; FEIS at 72-73, 87-89; and CAST at 11-12.) None of these comments concerned conservation use. In any case, the FEIS responded that the temporary cessation of grazing could have different impacts depending on the ecosystem involved, and management decisions would need to reflect these variations. FEIS at 74-75. The FEIS noted that some scientific studies had showed recovery of desired plants with little or no grazing, while other studies had shown the absence of any recovery. *Id.* Other comments stated that up to 10 years of non-use is not scientifically warranted. (Pet. App. ___, WRCC-40 Report at 17, Pet. App. ___, E.L. Smith Comments at 7-8.) Furthermore, "allotments placed in conservation use will be monitored in a fashion similar to other allotments to determine whether such use is consistent with standards and guidelines, and established resource management objectives." 60 Fed. Reg. 9939.

G. The Regulations Validly Simplify Mandatory Qualifications to Eliminate the Potential for Unnecessary Disputes

The challenged rules impose three mandatory qualifications for applicants for permits or leases. Applicants 1) "must own or control land or water base property;" 2) must have a

satisfactory record of performance, and 3) must be U.S. citizens or groups or corporations authorized to do business in the appropriate State. 43 C.F.R. § 4110.1. Closer consideration of the first requirement shows that base property must be "capable of serving as a base of operation for livestock use of public lands within a grazing district."³³ 43 C.F.R. §§ 4110.2-1(a)(1), see also id. at § 4100.0-5. Thus, base property must be near the public lands sought to be grazed in order to serve as an effective base of operations.

Petitioners attack the 1995 rules on mandatory qualifications because they delete the requirement that applicants be "engaged in the livestock business." Petitioners argue that "[t]he requirements that a permittee or lessee be 'engaged in the livestock business' and that the permittee or lessee own base property used in the livestock business are derived from the precise language of Sections 3 and 15 of the TGA, 43 U.S.C. §§ 315b, 315m." (Pet. Br. at 42-43, emphasis added.) However, neither section of the TGA imposes such a requirement. The TGA grants the Secretary broad discretion to determine who may obtain permits under 43 U.S.C. § 315b and leases under 43 U.S.C. § 315m. To the extent the statute constrains the DOI's discretion, it requires only that preference in the issuance of grazing permits and leases should be given to those "within or near a district," or, outside grazing districts, those who are "owners, homesteaders, lessees, or other lawful occupants of contiguous lands." 43 U.S.C. §§ 315b, 315m. Furthermore, within grazing districts applicants must be citizens or groups licensed to do business in the appropriate State. 43 U.S.C. § 315b. As discussed above, the 1995 rules faithfully incorporate these Congressional directives, in part through the requirement that applicants to own or control nearby base property. The only place where the TGA even mentions applicants "engaged in the livestock business," the statute simply grants preference in the issuance of permits to three groups, including nearby landowners engaged in the livestock business. See the following subsection.

³³ The definition of base property is essentially the same for permit applications outside grazing districts. 43 C.F.R. § 4110.2-1(a)(2).

The 1995 rules rationally deleted the requirement that permittees be "engaged in the livestock business" in response to trends in the cattle industry and increasing numbers of certain permit applicants. See 60 Fed. Reg. 9926. The rules "clarify that mortgage insurers, national resource conservation organizations, and private parties whose primary source of income is not the livestock business, but who meet the criteria of this section, are qualified for a grazing permit or lease." Id. at 9901.

1. The Mandatory Qualifications Regulations are Consistent with the TGA

Petitioners argue that applicants must be "engaged in the livestock business" in order to receive a permit under the TGA. To the contrary, "[t]he TGA gives preference to landowners engaged in the livestock business but does not require it." 60 Fed. Reg. 9960. The TGA's provisions on leases outside grazing districts do not refer at all to applicants "engaged in the livestock business." See 43 U.S.C. § 315m. The statute only mentions applicants "engaged in the livestock business" in the one place, in relation to permits issued within grazing districts. 43 U.S.C. § 315b. The TGA states:

Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights.

Id. (emphasis added). The statute indicates that preference in the issuance of grazing permits shall be given to those who are "within or near a district" if they are either landowners engaged in the livestock business, or bona fide occupants or settlers, or owners of water or water rights. If preference is to be given to these latter two groups, necessarily they must be qualified to receive permits.

Petitioners' insistence that permittees be engaged in the livestock business would simply read out of the statute the independent provisions giving preference to "bona fide occupants or settlers" or "owners of water or water rights." Yet "[i]t is an elemental rule of statutory construction that effect must be given, if possible, to every word, clause, and sentence of a statute." Knutzen v. Eben Ezer Lutheran Housing Ctr., 815 F.2d 1343, 1348 (10th Cir. 1987).

Thus, the court "cannot ignore the use of the 'or'" in the statutory text. Id. "Moreover, unless the context or congressional intent indicates otherwise, the use of a disjunctive in a statute and rules indicates that alternatives were intended [citations omitted]." Id.

Because this is the only place where the statute mentions applicants "engaged in the livestock business," there is nothing that indicates a different Congressional intent. Furthermore, to interpret "or" as "and" would not make sense in this case. Under this reading, applicants would have to be both "bona fide occupants or settlers" and "owners of water or water rights" to receive preference. Nothing in the TGA or its implementing regulations has ever been interpreted to require that applicants possess both land and water rights before they can receive grazing permits. Rules for Administration of Grazing Districts (1936); Rules for Administration of Grazing Districts (1937); BLM Manual H-4110-1.21 Rel. 4-71 (6/20/84) Thus, Congress intended to give preference in the issuance of grazing permits to applicants from any of three categories.

What Congress required of all applicants seeking preference was that they be "within or near a district." 43 U.S.C. § 315b. The legislative history petitioners cite shows that Congress's chief concern was that applicants possess nearby base property, not that they be engaged in the livestock business. Petitioners rely on statements of four members of the House of Representatives: Ayers, Pierce, Robinson and Martin. (Pet. Br. at 29-30.) None of these four stated, on the cited pages, that permittees need be engaged in the livestock business. Instead, petitioners' extended quotation from Congressman Robinson shows that Congress was most concerned about "[s]ome foreigner [who] travels from one place to another, camping first at one watering hole or spring and then another until the grasses are all destroyed." See Pet. Br. at 29. Each of the representatives cited by petitioners expressed concern over such

"foreigners."³⁴ As a result, three of the four stated that preference in the issuance of grazing permits should be given to those who owned, controlled, or had improved nearby base property.³⁵

Thus, the 1995 rules faithfully reflect Congress's emphasis on applicants who own or control base property near the public land sought to be grazed. The governing statutes give the DOI discretion to delete the requirement that applicants be engaged in the livestock business. Furthermore, as with the other regulations, petitioners cannot prevail on a facial challenge where intended applications of the rule will be entirely valid. The DOI seeks to issue grazing permits to start-up operators, banks, conservation organizations who wish to run cattle on the range but may not have an established record as livestock operators at the time they apply for their permit. See 60 Fed. Reg. 9901, 9926; see also section 2.b. infra. The DOI's intended application of the 1995 rule is entirely within its statutory authority.

2. DOI's 1995 Rules Have a Reasoned Basis and are Consistent with Earlier Regulations

³⁴ 78 Cong. Rec. at 6358 (statement of Congressman Ayers); see also id. at 6356 (statement of Congressman Martin); id. (statement of Congressman Martin); id. at 6359 (statement of Congressman Pierce).

³⁵ See 78 Cong. Rec. at 6356 ("preference shall be given to occupants and settlers on land within or near the grazing district") (statement of Congressman Robinson); id. at 6358 (preference shall be given to "the person owning or having rights to land adjacent to the public domain") (statement of Congressman Ayers); id. at 6359 (preference shall be given to "those who have made improvements in the public range or waterholes") (statement of Congressmen Pierce) **check Pierce and fourth rep.** Petitioners' additional cites to the committee hearings also do not help them. The Senate hearing simply shows that a Senator Mahoney proposed adding a qualification that permittees be engaged in the livestock business. Senate Hearings at 74. Mr. Poole indicated that he would give the proposal consideration, not that it would be adopted. Id. The House hearings do not address the "engaged in the livestock business" requirement. House Hearings at 87. **John: check - see if statutory language on subject is mentioned**

a. The 1995 rules are consistent with both the TGA's initial implementing regulations and other later regulations

Contrary to petitioners' arguments, the DOI has not consistently required that permittees be "engaged in the livestock business." No such requirement can be found in the TGA's initial rules from 1936, other rules from the 1930's, or in a series of later rules.³⁶ To the contrary, the only discussion of "engaged in the livestock business" in the TGA's early rules support DOI's current interpretation of the statute. An applicant is preferred if "he is a member of any one of the following four classes:

1. Landowners engaged in the livestock business.
2. Bona fide occupants.
3. Bona fide settlers.
4. Owners of water or water rights."

1937 Rules at 1 (emphasis added). Thus, to be "engaged in the livestock business" was no less a requirement of DOI's early rules than it was of the TGA itself.

Furthermore, mandatory qualifications regulations during the 1960's were even broader than the challenged rules. The Secretary's mandatory qualifications requirements for leases during the 1960's simply required that the applicant be a U.S. citizen or a group authorized to conduct business under the laws of the relevant state. Federal Range Code § 160.4 (1964); § 4122.1-1 (1965); § 4122.1-1 (1966). Thus, these 1960's regulations were even less restrictive than the challenged rules.

b. The 1995 rules rationally addressed substantial complications for legitimate applicants including start-up grazing operations

³⁶ Rules for the Administration of Grazing Districts (March 2, 1936) ("1936 Rules"); Rules for the Administration of Grazing Districts (June 14, 1937) ("1937 Rules"); The Federal Range Code ¶ 3 (March 16, 1938); § 160.4 (1964); § 4122.1-1 (1965); § 4122.1-1 (1966).

The DOI removed the "engaged in the livestock business" requirement in order to respond to trends in the cattle industry which had created complications for legitimate applicants under the TGA. The preamble to the final rules states:

This change is made necessary by the increasing number of part-time ranchers, permits held by financial institutions and other non-ranching organizations, and permits where the livestock operator is in an initial developmental stage and is not yet ready to run cattle on the range.

60 Fed. Reg. at 9926; see also id. at 9901. The IBLA caselaw shows that the DOI had a substantial basis for making this change.

Contrary to petitioners' arguments, permit applicants who were "not yet ready to run cattle on the range," 60 Fed. Reg. 9926, have been denied permits for this very reason. The IBLA has stated on several occasions that the "engaged in the livestock business" requirement strictly applies to the time a permit application is filed. For example, the IBLA has stated:

The requirement that, in order to be awarded [a] grazing lease on federal land under the Taylor Grazing Act, an applicant must be engaged in the livestock business at the time of his application is mandated by the regulation. [citation omitted] The fact that an application has been engaged in the livestock business in the past or that the intends to purchase livestock provided that he obtains a lease may not be sufficient.

George T. McDonald, 18 IBLA 159, 161 (1974) (emphasis added). In another case, the IBLA upheld the denial of a permit application even though the applicant specifically stated that "he would be in the livestock business if the BLM were to grant him the lease." Ralph E. Holan, 18 IBLA 432, 432 (1975). The IBLA rejoined that, "Proposed or future ownership of livestock is not sufficient."³⁷ Id. at 434. See also John F. MacPherson, IGD 566, 567-68 (1952)

³⁷ As the McDonald decision stated, "[a]n exception is recognized when the failure of a livestock operator to show ownership at the time of the application was either temporary or due to circumstances beyond his control, i.e., losses due to disease, foreclosure, fire or other cause." 18 IBLA at 161. However, this exception could not help start-up operators like McDonald and Holan who had not yet established a track record as recognized livestock

(continued...)

(requiring that applicant be engaged in the livestock business on the date of his application); Ruth E. Han, 13 IBLA 296, 299, 300 (1973) (rejecting applicant who only owned two horses at the time of the application, even she had held a grazing permit and owned 200 cattle over the previous decade).³⁸

Thus, DOI had substantial reason to conclude that removing the "engaged in the livestock business" requirement would alleviate potential legal complications for start-up ranchers, banks and other non-traditional entities with an uncertain track record in the livestock business.

³⁷(...continued)

operators. Furthermore, the exception would not necessarily protect banks, conservation organizations and other non-traditional entities, in cases where they also lacked established track records in the business.

As the regulatory preamble indicates, an applicant who already was in the livestock business would ordinarily receive preference in the issuance of permits. See 60 Fed. Reg. 9926. This does not mean, however, that an applicant who wished to enter the business would necessarily be utterly unqualified under the statute. **Laura: is this a correct reading of the 1995 regs? if there are conflicting applications, will someone already in the livestock business necessarily prevail, even if the grazing novice purchased the base property that had historically grazed the AUMs at issue?**

³⁸ Furthermore, the Defenders of Wildlife and Forgey Ranch cases cited by petitioners show that non-traditional entities could have a difficult time preserving their grazing privileges. Even though the Defenders of Wildlife "engaged in livestock business for profit as part of its investment portfolio," the BLM District Office denied its lease application and one of three ALJs would have affirmed the denial. Defenders of Wildlife, 19 IBLA 219 (1975). Regardless of whether or not the specific legal issue in Defenders of Wildlife recurs in other cases, this case illustrates how non-traditional entities were vulnerable to challenge under the prior regulation. In the Forgey Ranch case, Metropolitan Life Insurance Company was found to be engaged in the livestock business because it had long held ranches in three states and in fact operated a commercial livestock business several times greater than the combined operations of the ranchers who challenged its lease. Forgey Ranch Co. v. BLM, 116 IBLA 32, 35 (1990). Forgey Ranch does not establish that a bank, part-time rancher or non-traditional operator with less of a grazing track record would necessarily fare as well.

H. Providing That Range Improvement Work By A Permittee Does Not Confer the Exclusive Right to Use Is Proper

The 1995 rules provide that "[r]ange improvement work performed by a cooperator or permittee on the public lands or lands administered by BLM does not confer the exclusive right to use the improvement or the land affected by the range improvement work." 43 CFR § 4120.3-2(d) (1995). Petitioners complain that this reverses longstanding policy and contradicts the water law of many western states. Petitioners are wrong on both accounts.

Revisions to the Department's grazing rules in 1981 added a provision regarding control of livestock use of range improvements on public lands.³⁹ In 1984 DOI redesignated section 4120.6-3 as 4120.3-3 and removed redundant language. 48 FR 21820, 21821. The redesignated subsection declares "[t]he use by livestock of stock ponds or wells authorized by a range improvement permit shall be controlled by the grazing permittee or lessee holding the range improvement permit." 43 CFR § 4120.3-3(c) (1984). In the first place, the 1984 language does not say that use of stock ponds or wells shall be controlled by the permittee, but that use by livestock of such facilities shall be controlled by the permittee. The plain language of the provision evidences an intent specifically to require permittees to control the use of livestock at certain water sources authorized by a range improvement permit. The BLM Manual makes this even clearer when it states that "[t]he use by livestock of stock ponds or wells, or

³⁹"The use by livestock of stock ponds or wells on public lands which are recognized as base water under § 4110.2-1 of this title and authorized by a range improvement permit shall be controlled by the grazing permittee or lessee holding the range improvement permit." This language was not in the proposed rule:

In response to comments, a provision has been added to clarify that livestock use of such improvements authorized by a range improvement permit (Section 4, Taylor Grazing Act) shall be controlled by the permittees.

wells authorized by a range improvement permit, must be controlled by the permittee or lessee holding the range improvement permit." **CITE TO MANUAL H-4120-1.33 (1984)**

The preamble to the final 1984 rules addresses this provision briefly. To one comment favoring BLM control of the use of stock ponds or wells because of their importance for wildlife habitat, DOI responded that "[w]here range improvements are privately funded the range improvement permit will include design requirements and other stipulations to assure that these improvements are compatible with wildlife habitat and other multiple use management objectives." 49 FR 6445 (1984). This was echoed in the BLM Manual: "Improvements must meet the same multiple-use and construction standards as those [range improvements] constructed solely or cooperatively by BLM." BLM Manual 14-4120-1.33 Rel 4-73, June 20, 1984. Those contemporaneous statements of BLM's position clearly reflect the understanding that range improvement permits could be so conditioned that the control by the permittee of the use of stock ponds or wells would not be exclusive.

The 1995 rules specify that prospectively, title to permanent range improvements will be in the United States to ensure multiple use management goals. The new rules also provide that permanent water improvements will be undertaken by cooperative range improvement agreements, rather than range improvement permits, again, to ensure that developments address multiple-use needs. As noted in the preamble to the proposed 1995 rules, "[m]ost projects constructed and used in rangeland management facilitate the management of other resources or resource uses. To preserve their availability for multiple use the BLM must retain ownership of the project and have management control of the use. The amendment would not change the agreements currently in effect nor affect ownership of rights granted by a State certificate of water right." 58 FR 43215 (August 13, 1993).

The ANPR and proposed rule explained deletion of the 1984 subsection in the context of the overall range improvement changes to make it clear that prospectively range improvement permits will be issued for temporary livestock handling facilities and temporary improvements

such as troughs for hauled water. Id. The preamble for the proposed rule states that the proposed rules would also clarify that permanent water improvement projects would be authorized through a cooperative range improvement agreement "to protect the public interest for multiple use management." The preamble goes on to pronounce that "[t]he proposed amendment would remove the provision that permittees or lessees would control the use of ponds or wells by livestock. Permittees and lessees would be the graziers and, therefore, would control livestock use of water sources. The proposed amendment will not affect ownership or rights currently held in a range improvement permit or a State certificate of water right." Id.

Thus, the change in 1995 did not eliminate a longstanding policy of exclusive use. Indeed, exclusive use of stock ponds and wells by permittees has not been the recognized form of management. Nothing connected to the regulatory provisions on range improvements indicates an intent to grant exclusive use to the permittee, but rather an intent that range improvements meet the requirements of multiple use. Either a range improvement permit or a cooperative range improvement agreement is required for installation or use of range improvements on public lands. 43 CFR § 4120.3-1(b) (1984). "Range improvements shall be installed, used, maintained, and/or modified on the public lands, or removed from these lands, in a manner consistent with multiple-use management." Id. at 4120.3-1(a). "A range improvement permit or cooperative agreement does not convey to the permittee or the cooperator any right, title, or interest in any lands or resources held by the United States." Id. at 4120.3-1(e).⁴⁰

⁴⁰In fact, range improvement permits contain the following explicit conditions:
Any public lands or impounded waters will be available for wildlife use and open to the public for hunting and fishing in accordance with State regulations. Such lands and water will also be open for other authorized public use to the extent that such use is consistent with the multiple-use management objectives for the area.

(continued...)

Plaintiffs argue that this provision contradicts the water law of many western states. In the first place, one must ask how it contradicts the water code of any state. Exclusive use is not a mandated feature of the water law of any state, the absence of which nullifies a water right. Moreover, nothing in the record demonstrates that any of the plaintiffs owns a water right affected by this provision. There is no water right before this court, let alone one that is jeopardized by the regulatory provision proscribing exclusive use by permittees of range improvements installed and used by conditional permit or agreement. Whether this provision contradicts the water law of any western state is an issue that must await a specific application.

I. The Secretary Provided a Reasoned Basis for Time Limits on Non-Use

Petitioners claim that the 1995 rules' three consecutive-year limit on temporary non-use lacks a reasoned basis and fails to account for the relevant facts. (Pet. Br. at 52.) To the contrary, the Secretary implemented needed changes based on a thorough study of non-use practices. "The procedures guiding approval of nonuse have been developed in response to a recommendation from the March 19, 1986, OIG's [Interior Office of the Inspector General's] review of the grazing management program."⁴¹ 60 Fed. Reg. at 9903.

Petitioners contend that procedures prior to the 1995 rules were fully adequate and "limited the risk that a permittee or lessee would abuse non-use." (Pet. Br. at 52.) To the

⁴⁰(...continued)
and

The permit is subject to modification or cancellation if the improvement no longer serves the purpose for which it was installed or if the improvement is not compatible with the multiple-use objectives for the area.

⁴¹ For some reason, petitioners challenged the temporary nonuse regulations in the portion of their brief that addressed DOI's handling of public comments. Yet petitioners never identified any comments to which the DOI assertedly failed to respond. (See Pet. Br. at 52-53.) Accordingly, respondents will confine their attention to petitioners' argument that the rule lacked a rational basis.

contrary, the OIG study criticized the prior procedures as inadequate and documented substantial abuse of the non-use option. U.S. Department of the Interior, Office of Inspector General, Audit Report at 20-24 (March 1986) ("1986 OIG Report"). The OIG study reviewed 51 allotments with a total of 271,499 AUMs. 1986 OIG Report at 21. This review revealed substantial nonuse, including at least four sizeable allotments which failed to use the majority of their allotments for 4-5 years or longer, where "continued nonuse without adequate justification should have been questioned by the BLM." *Id.* at 22. In order to reduce these abuses, the OIG recommended that the BLM revise its procedures to more closely police nonuse. *Id.* at 24.

Accordingly, the 1995 rules have imposed a three-year limit on nonuse, required it to be justified, and mandated consistency "with the applicable land use plans, AMP or other activity plans and [the standards and guidelines for rangeland condition.]" 43 C.F.R. § 4130.2(g). Thus, the 1995 rules on temporary nonuse had a substantial reasoned basis and considerable support in the record.

Petitioners inexplicably ignore the Secretary's repeated explanation of the 1995 nonuse rule as based on the OIG's findings. Instead, citing to 60 Fed. Reg. 9894, petitioners assert that the Secretary adopted the nonuse regulation in order to conform to Forest Service practice. (Pet. Br. at 52-53.) Yet the cited portion of the record merely states that "[m]any of the provisions" of the 1995 rules would increase BLM conformance with Forest Service practice. 60 Fed. Reg. 9894. The Secretary never indicated that the nonuse rules in particular sought consistency with Forest Service practice.

Petitioners also claim that the 1995 rules will make it very difficult for permittees to take partial nonuse. (Pet. Br. at 53.) Yet "[w]here the limitations placed on temporary nonuse (maximum of three years and open to other applicants) prevent the permittee or lessee from meeting their needs, the option of applying for conservation use remains." 60 Fed. Reg. 9940. Furthermore, petitioners' argument on this point entirely relies on affidavits outside the

administrative record that the court cannot consider under Olenhouse. Petitioners also contend that the NEPA compliance involved in placing permits in conservation use will be impossibly burdensome. Some form of NEPA compliance would be appropriate, however, not just for conservation use, however, but also for the long-term nonuse for conservation reasons authorized under the prior rules. Furthermore, for most allotments temporary changes in use levels will not significantly affect the environment, and the preparation of environmental assessments will be sufficient. Accordingly, the 1995 rules do not generate irrational NEPA burdens for permittees.⁴²

Finally, petitioners cannot prevail on their facial challenge. At the very least, the 1995 rules are rationally applied to the permittees such as those documented in the OIG report who have used the prior rules to place their allotments in extended nonuse without adequate review or justification.

J. Adoption of Fundamentals of Rangeland Health Is A Proper Element of Rangeland Management

The 1995 rules adopt a set of general, basic requirements for achieving functional, healthy public rangelands and with which state or regional standards and guidelines to be

⁴² Petitioners charge respondents with "contradictory statements" on the subject of NEPA compliance for conservation use. (Pet. Br. at 53, n.10.) Evaluation of the comments cited, however, reveals that they are fully consistent. Respondents require NEPA compliance for planning activities and the issuance of permits and leases, 60 Fed. Reg. 9902, 9943, but not for actions that require "the authorized officer's ministerial validation." 60 Fed. Reg. 9943. These actions include "proposed changes in grazing use in any given year . . . when the changes . . . are consistent with the terms and conditions of the permit and lease." Id. Because conservation use must be specified in a permit's terms and conditions, 60 Fed. Reg. 9939, the placement of an allotment in previously approved conservation use can be a ministerial action. See 60 Fed. Reg. 9943. DOI's distinctions between activities that require NEPA compliance and ministerial actions that do not reflect no inconsistency, but full consistency with NEPA law. **Laura: is this correct? for conservation use to be approved, must it be affirmatively specified in the permit's conditions? or must it not avoid any inconsistency with the permit's conditions?**

developed must conform. These are termed fundamentals of rangeland health. 43 CFR § 4180.1 (1995). The fundamentals are expressed in terms of: 1) properly functioning watersheds; 2) hydrologic and nutrient cycles and energy flow sufficient to support healthy biotic communities; 3) water quality in compliance with state standards and capable of meeting wildlife needs; and 4) habitats restored or maintained for special status species. Id. BLM considers such conditions "critical to ensuring that [its] administration of grazing helps preserve currently healthy rangelands and restore healthy conditions to those areas currently not functioning properly, especially riparian areas." 60 FR 9898.

The rule provides that "upon determining that existing grazing management needs to be modified to ensure that the" fundamentals of rangeland health are being met or that satisfactory progress toward attainment is being made, "[t]he authorizing officer shall take appropriate action . . . as soon as practicable but not later than the start of the next grazing year." 43 CFR § 4180.1 (1995). Appropriate action may include reduction of livestock stocking rates, adjustment of season or duration of livestock use, or modification or relocation of range improvements. 60 FR 9898.

Petitioners maintain that the only realistic management change possible for the upcoming season is a reduction in grazing use. They complain about the possible effects of immediate reductions in grazing use and the removal from the rules of the requirement for phased-in reductions. Petitioners contend that the rule change is arbitrary because DOI allegedly failed to consider relevant factors or public comments and because of alleged scientific controversy regarding the fundamentals.

To begin with, the determination as to what corrective actions, if any, are appropriate in a given situation will be made on a case-by-case basis. "In some cases the corrective action may not result in a reduction in permitted AUMs[;] a change in use periods or temporary suspension in use may be determined to be the appropriate action [or] data may show that other uses of the public lands need to be modified." 60 FR 9931. Thus, a reduction in permitted use

is not the only realistic action that may be taken with respect to some grazing permits by the start of the upcoming grazing season. No such action has been taken as yet in any event.

Moreover, while the 1995 rule eliminates the previous requirement for phased-in reductions⁴³ in order to provide more flexibility to deal with situations requiring immediate action to protect against imminent likelihood of significant resource damage, phase-in periods are still available if determined appropriate by the authorized officer of BLM. 60 FR 9932. And, of course, even in cases where a decision is implemented without a phase-in period, aggrieved parties could seek a stay. 43 CFR § 4160.3(c) (1995).

Adoption of fundamentals to help establish appropriate grazing practices and ensure productive rangelands is clearly within the Secretary's authority under the TGA, FLPMA and PRIA. While plaintiffs allude to scientific controversy related to the fundamentals, actually, the controversy on which they hang their argument is directed more at the standards and guidelines than the fundamentals.

V. CONSTITUTIONAL CLAIMS: THE REGULATIONS SATISFY DUE PROCESS AND AVOID DOUBLE JEOPARDY
[Section VI in Petitioners' Brief]

A. Petitioners Have Failed to Prove 43 C.F.R. § 4140.1(c) Violates the Double Jeopardy Clause of the Fifth Amendment

Interior has adopted a rule that permits BLM officials, under appropriate circumstances, to cancel or suspend a grazing permit or lease when the permittee has been convicted of violating certain environmental laws. See 43 C.F.R. § 4140.1(L) (1995). As the agency has explained, the purpose of this regulation is to manage the federal rangeland for multiple use and improve the condition of the ecosystem.

⁴³The previous rules provide that "[c]hanges in active use in excess of 10 percent shall be implemented over a 5-year period, unless after consultation with the affected permittees or lessees and other affected interests, an agreement is reached to implement the increase or decrease in less than 5 years." 43 CFR 4110.3-3(a) (1994).

Petitioners challenge this regulation as a violation of the Double Jeopardy Clause of the Fifth Amendment of the Constitution. Petitioners contend that the provision violates the Double Jeopardy Clause because it "is clearly intended as an additional punishment . . . for the same offense." Those contentions are entirely unfounded.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits "three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." United States v. Helper, 490 U.S. 435, 440 (1989). Here petitioners contend the regulation violates the Double Jeopardy Clause by providing "a second punishment for the same offense." (Pet. Br. at 48.)

As an initial matter, we have explained that petitioners face an exceedingly heavy burden when challenging the facial validity of a regulation under the Constitution. Rust v. Sullivan, 500 U.S. at 183. To prevail on such a challenge, petitioners "must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid." Id.

Petitioners' own papers demonstrate they fail this test. They posit the situation in which a permittee could lose a grazing permit after conviction in State Court for "killing elk out of season." (Pet. Br. at 48.) Although it is speculative to assume that such an infraction would lead to revocation of a grazing permit, revocation on those grounds clearly would not violate the Double Jeopardy Clause. It is well-established that the Double Jeopardy Clause does not "prohibit successive prosecutions by different sovereigns based on the same conduct." Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937, 1948 n.22 (1994). Thus, petitioners posit a constitutionally permissible application of the regulations that, under their facial challenge, requires that the regulation be upheld.

Furthermore, petitioners have failed to carry their burden of showing that the revocation of a grazing permit following a federal conviction for violating environmental laws would

violate the Double Jeopardy Clause. A civil sanction imposed after conviction of a crime will not automatically violate the Double Jeopardy Clause. For example, a civil sanction which furthers nonpunitive objectives of the government, such as remedial objectives, would not violate the Double Jeopardy Clause. See Kurth Ranch, 114 S. Ct. at 1953 (O'Connor, J. dissenting) citing Bell v. Wolfish, 441 U.S. 520, 539 n. 20 (1979). And, any determination about whether a civil sanction is punitive within the meaning of the Double Jeopardy Clause requires a careful factual analysis of the nature of the offense giving rise to the conviction as well as the nature of the civil sanction applied thereafter. See e.g., United States v. Halper, 490 U.S. 435, 447-451 ("determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes the penalty may fairly be said to serve"); Kurth Ranch, 114 S. Ct. 1937, 1948 ("labels do not control in a double jeopardy inquiry"). Furthermore, the Supreme Court has observed that "a statute must be construed, if fairly possible, so as to avoid . . . the conclusion it is unconstitutional." Rust, 500 U.S. at 191.

Here, on facial challenge, the rules cannot be deemed to violate the Double Jeopardy Clause. The rule furthers the legitimate government objective of managing the federal rangeland in conformance with multiple use principles. It is thus not punitive within the meaning of the Double Jeopardy Clause. See e.g., Bell v. Wolfish, 441 U.S. 520, 539 n.20. And, even if the petitioners could posit an application of the rule that would violate the Double Jeopardy Clause, the regulation still must be upheld. On a facial challenge, Petitioners must demonstrate "that no set of circumstances exists" under which the regulation is valid. Reno v. Flores, 113 S. Ct. at 1446.

In sum, petitioners have failed to carry their burden of demonstrating the regulation violates the Double Jeopardy Clause. The validity of the regulation must therefore be upheld.

B. Surcharges to Recapture the Landowner's Share Have a Rational Basis Under the Due Process Clause

The 1995 rules include a surcharge on "pasturing agreements," which apply when permittees allow others besides their children to graze livestock on the public lands. 43 C.F.R. § 4130.8-1(d) (1995). Petitioners claim that the surcharge violates the due process clause of the U.S. Constitution because it is overinclusive. (Pet. Br. at 48-49.) The surcharge attempts to capture for the federal treasury a portion of the profit realized when permittees initially pay the low federal rates for the use of the public lands and then turn around and charge others higher market rates for the same properties. 60 Fed. Reg. at 9900, 9946. The new rule also seeks to discourage short-term users of the public range who may not have the incentives to be good stewards.⁴⁴ Id.

Petitioners' due process claim invokes the rational basis standard that applies to administrative as well as legislative actions challenged under the Constitution.⁴⁵ Under this standard a classification may be upheld even if it "is to some extent both underinclusive and overinclusive." Phillips Chemical Co. v. Dumas School District, 361 U.S. 376, 385 (1960). "The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific [citation omitted]." Dandridge v. Williams, 397 U.S. 471, 485 (1970). The government must avoid only "a patently arbitrary classification, utterly lacking in rational justification." Weinberger v. Salfi, 422 U.S. 749, 768 (1975). **John: check pets' case** Furthermore, it is well settled that courts will construe statutes and regulations as constitutional where fairly possible. Boos v. Barry, 485 U.S. 312, 333 (1988); Rust v. Sullivan, 500 U.S. 173, 191 (1991).

⁴⁴ The surcharge equals 35 percent of the difference between the current year's federal grazing fee and the prior year's private land lease rate per AUM in the appropriate State. 43 C.F.R. § 4130.8-1(d).

⁴⁵ Dandridge v. Williams, 398 U.S. 471, 484 (1970) (discussing Maryland administrative regulation); New York Transit Authority v. Beazer, 440 U.S. 568, 592. 592 n.39 (1979) (involving Transit Authority regulation); Artez v. Mulcrone, 673 F.2d 1169, 1171 (10th Cir. 1982) (involving administrative parole category rating).

The surcharge regulation has substantial rational justification. Repeated agency reports and Congress itself have sought to correct the revenue losses involved when permittees unduly benefit from subleasing and pasturing agreements. The Secretary relied on formal reports by the General Accounting Office in 1986 and the Interior Department Inspector General in 1992. 60 Fed. Reg. at 9900. The Inspector General "estimated that the Bureau's unrecovered costs for grazing privileges applicable to base property lease arrangements totaled as much as \$2.9 million in 1990." U.S. Department of Interior, Office of Inspector General, Audit Report: Selected Grazing Activities, Bureau of Land Management, Report No. 92-I-1364 at 23 (September 1992). In illustrative cases, a California public utility and an out-of-state coal mining company made sizable profits by leasing base property with attached grazing privileges on the public lands. Id. The money the Secretary annually fails to recover from these and other permittees could reduce the Bureau's substantial operating deficit on its grazing program. Id. at 1.

Congress itself has taken action to stem the revenue losses associated with subleases and pasturing agreements. The 1985 Interior Department Appropriations Act required that permittees return profits from base property leases to the Bureau. P.L. 98-473 **pincite**; as recounted by Inspector General report cited by the regulatory preamble at 21-22. Congress further provided the serious sanction of permit cancellation for noncompliance. P.L. 98-473: **pincite**. The Bureau never fully implemented this provision, however. Inspector General Report at 22.

Petitioners do not deny the documented need for the surcharge. Instead, they claim that it will be applied to transactions which do not involve pasturing agreement profits or reduced incentives for stewardship. (Pet. Br. at 48-49.) Petitioners never dispute, however, that in some circumstances the surcharge will recoup a fair and reasonable return to the public and reduce the Bureau's deficit. See 60 Fed. Reg. at 9900; OIG Report at 1. Because petitioners concede that the rule will be legitimately applied in some circumstances, their facial attack

cannot prevail. A regulation with admittedly valid applications cannot be challenged in the abstract. See section IV.A.1. supra.

Furthermore, petitioners ignore the fact that the Bureau substantially reduced the scope of the initially proposed surcharge in order to prevent its overly broad application. In addition to their claim of overinclusiveness, petitioners advance the related argument that the Bureau failed to respond to their comments. The petitioners cite to two comment letters identifying transactions subject to the surcharge that did not serve its purposes. Yet the Bureau eliminated from the scope of the surcharge precisely the types of transactions most prominently featured by these comments. The Henderson Comments addressed themselves solely to the proposed surcharge on "subleasing agreements," which involve subleases of the permittee's base property.⁴⁶ See 60 Fed. Reg. at 9945. The final rule dropped this surcharge, "[i]n response to comments that putting a surcharge on authorized subleasing would adversely affect the ability of new ranchers with limited capital to enter the livestock business." 60 Fed. Reg. at 9900.

Petitioners also cite to the Ragsdale Comments. These comments focused on "estate planning activities" and the effect of a surcharge on the children of ranchers. Ragsdale at 8, Appendix A (detailed examples primarily involving parent-child relationships). In response to comments such as Ragsdale's, the Department provided an exception to the pasturing surcharge for sons and daughters, as long as the terms of the permit or lease and other reasonable conditions were met. See 43 C.F.R. § 4130.7(f); 60 Fed. Reg. 9946. Thus, the Department not only considered petitioners' comments, but substantially modified its proposed rules in response to them.

Petitioners' brief also presents extra-record evidence from affidavits submitted by the Little Sandy Grazing Association (LSGA). This material was not before the agency, and cannot be considered under Olenhouse. Petitioners' need to rely on affidavits concerning the LSGA

⁴⁶ In contrast, pasturing agreements allow others to run their cattle on the permittee's base property without leasing the land. See 43 C.F.R. § 4130.8-1(d) (1995).

only highlights their failure to submit comments on such organizations during the administrative proceedings. Petitioners have not pointed to any evidence which would allow the court to evaluate whether there is a rational basis for a surcharge on cooperative organizations such as the LSGA. Even if there were such evidence, petitioners' claims would still be insufficient, for two reasons. Most important, a rule with an unquestioned legitimate purpose and substantial valid applications cannot be overturned on a facial challenge. Additionally, DOI has substantially narrowed the proposed rule to exclude the broad classes of subleasing and parent-child relationships; the final rule would not violate the due process clause even if it remained slightly overinclusive in just one respect.

Thus, the DOI had a rational basis for the surcharge regulation, consistent with the due process clause.

VI. NEPA CLAIMS: THE FEIS MEETS ALL NEPA'S REQUIREMENTS

A. Standard of Review

Concurrently with the rulemaking procedure for the proposed changes to policies and rules related to rangeland management, BLM proceeded to comply with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, (NEPA) by preparing a programmatic environmental impact statement (EIS). BLM released the proposed rules for comment on March 25, 1994. Following the NEPA scoping process, which had begun July 13, 1993, BLM circulated for comment a draft EIS (DEIS) on May 13, 1994. The agency accepted comments on both the DEIS and the proposed rules themselves until September 9, 1994. In January 1995 BLM released the final EIS (FEIS). Petitioners challenge its adequacy.

In the Tenth Circuit, the standard of review applicable to the judicial assessment of the sufficiency of an EIS is stated as follows:

Judicial review of an EIS is limited to a consideration of the following: (1) does the EIS discuss all of the five procedural requirements listed in 43 U.S.C. § 4322(C); (2) does the EIS constitute a good faith compliance with the demands

of NEPA; and (3) does the statement contain a reasonable discussion of the subject matter involved in the five respective areas?

Johnston v. Davis, 698 F.2d 1088, 1091 (10th Cir. 1983). The reviewing court should examine the data and methodology underlying the EIS "for the limited purpose of insuring that the document is a good faith, objective, and reasonable explanation of environmental consequences that responds to the five topics of NEPA's concerns." Id. At the same time, the court should not "fly speck" the EIS or place unrealistic burdens on the agency that prepares it. Texas Committee On Natural Resources v. Marsh, 736 F.2d 262, 266 (5th Cir. 1984). Furthermore, the FEIS here is a programmatic document and, as such, the analyses and assessment of nonenvironmental impacts is properly general rather than particularized. Settle Audubon Society v. Lyons, 871 F.Supp. 1291, 1324 (W.D.Wash. 1994).

Petitioners' attack on the sufficiency of the EIS is threefold: (1) the alleged failure to disclose the existence of any scientific controversy (Pet. Br. at 57-63); (2) the allegedly inadequate treatment of comments (Pet. Br. at 65-67); and (3) the allegedly inadequate analysis of the effects of the proposed action (Pet. Br. at 63-65, 67-69).

B. BLM Acknowledged and Considered Scientific Opinions

Clearly it is not the task of the court to decide whether the FEIS "is based on the best scientific methodology available, or resolve disagreements among experts." Seattle Audubon Society v. Mosley, 798 F.Supp. 1473, 1479 (W.D.Wash. 1992); Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1527 (10th Cir. 1992). "Courts should not engage in 'second guessing' the experts who have prepared the statement." Sierra Club v. Stamm, 507 F.2d 788, 793 (10th Cir. 1974). While scientific unanimity is not expected or required under NEPA, Olmsted Citizens for a Better Community v. United States, 606 F.Supp 964, 978 (D.Minn. 1985), the agency's duty is to acknowledge and consider responsible scientific opinions, Texas Committee on Natural Resources v. Bergland, 433 F.Supp. 1235, 1249 (E.D.Tex. 1977).

1. Scientific Disagreement Concerning Range Conditions

As part of the justification for the regulatory changes, BLM cites the current condition of the public rangelands and the need to accelerate restoration and improvement to proper functioning condition. DEIS at 1-3. In essence, BLM concludes that "[a]lthough uplands have improved since rangeland management began in the 1930's, riparian areas have continued to decline and are considered to be in the worst condition in history."⁴⁷ DEIS at 25. Petitioners point out that the "scientific community" furnished comments that contradicted the agency's views on this topic. It is, of course, true and unremarkable that several commenters, including some range scientists, expressed disagreement with BLM regarding range conditions. However, petitioners' accusation that BLM failed to acknowledge or consider such comments and that the NEPA documents do not reveal such disagreement is insupportable.

Petitioners refer to various comments to the effect that upland rangeland conditions have steadily improved since enactment of the TGA and are in the best condition of this century; that damage to vegetation occurred early in the century; that livestock grazing has less impact than stated in the DEIS and is not the only or even primary factor in the existing condition of the rangeland; and that BLM's own data reflected in *State of the Public Rangelands, 1990* describes an upward trend in rangeland resource conditions. BLM did not ignore these comments.

Throughout the NEPA documents, BLM acknowledges that "[m]uch controversy surrounds the interpretation of the true condition of the public rangelands. Some say the public rangelands are in better condition today than at any point during this century. Others say the public rangelands are in unsatisfactory condition. . . ." DEIS at 1-2, 1-3; FEIS at 4; see also DEIS at 5, 25 (interpreting rangeland conditions has always been controversial); FEIS at 72-73, 94. Clearly BLM acknowledges the disagreement as to condition of the range.

⁴⁷BLM's determination of the current condition of rangelands is as follows: upland habitat - 57% functioning properly, 30% functioning at risk, 13% not functioning properly; riparian habitat - 34% functioning properly, 46% functioning at risk, 20% not functioning properly. DEIS at 26; FEIS at 26.

Moreover, BLM readily acknowledges that there has been general improvement in upland habitat (DEIS at 25, 1-3, 3-27, 3-32; FEIS at 51-52, 73, 77, 94) and some improvement in localized riparian habitats (DEIS at 3-31; FEIS at 73, 94, 97). The agency also recognizes that "much of the degraded riparian condition resulted from improper grazing management near the turn of the century." FEIS at 94. Clearly, too, BLM acknowledges that factors other than livestock grazing, "such as fire, climate, wild horses and burros, wildlife, and recreation may affect plant succession and may also affect the functioning of a site." FEIS at 69; see also DEIS at 25; FEIS at 95, 96-97 ("[o]ther factors contributing to soil erosion include road construction, maintenance, and runoff; recreation trail development; off-road vehicle use; mining; timber harvesting; and wildfire").

With regard to the report *State of the Public Rangelands, 1990*, BLM states that the report considers the same parameters as considered in Rangeland Reform '94 and that the EIS team "is familiar with the contents of the report, has conducted a review of the report, and recognizes, as does [the report], that successes have been made on the public lands toward improving rangeland conditions, but that more improvements can and should be made." FEIS at 75. Furthermore, with regard to the statement that "[r]iparian areas are in the worst condition in history", BLM not only attributes it to the EPA report entitled *Livestock Grazing on Western Riparian Areas*, but also explains that it is a general statement applicable to riparian areas throughout the West. FEIS at 94. Petitioners' complaint about the reference to this EPA study is meritless.

Petitioners also note that some commenters argued that the criteria for riparian functioning are meaningless and that BLM should substantiate the claim that 70 to 90 percent of riparian areas have been lost. BLM defines the terms, "properly functioning condition", "nonfunctioning condition", and "functioning at risk" in the Glossary (DEIS at GL-9, 13, 15, 16; 2-9, 2-10; FEIS at 26) and explains that the riparian functioning condition inventory uses the methodology outlined in BLM Technical Reference 1737-9 - *Process for Assessing Proper*

Functioning Condition and BLM Technical Reference 1737-11 - *Process for Assessing Proper Functioning Condition for Lentic Riparian-Wetland Areas*. FEIS at 61, 97, 99-100; DEIS at 4-15, I-2, I-3. Moreover, BLM clearly cites to the source of the comment in the DEIS that "[i]t is estimated that 70 to 90 percent of the natural riparian ecosystems have been lost because of human activities. . . . (Cooperrider and others 1986)."⁴⁸ DEIS at 3-29.

2. Scientific Disagreement Concerning Biological Diversity

Petitioners next list various comments that expressed disagreement with BLM's conclusions concerning biological diversity. They concede that BLM responded to some of the criticism, but complain that the agency failed to acknowledge existence of a scientific controversy regarding livestock grazing and biological diversity and to explain why it did not change the assumptions in the NEPA documents.

BLM defines biological diversity (biodiversity) as

"[t]he full range of variability within and among living organisms and the ecological complexes in which they occur. Biological diversity encompasses ecosystem or community diversity, species diversity, and genetic diversity."

DEIS at GL-3. The agency also points out that "[b]iodiversity is a result of management and not a management technique." FEIS at 82. The FEIS clearly expresses BLM's view that proper livestock grazing is compatible with the goal of biological diversity. "With proper management, grazing can occur consistent with multiple use objectives and rangeland health. In many instances, well-managed grazing can be used as a tool to improve resource conditions." FEIS at 70; see also DEIS at 3-43; FEIS at 56, 65, 66, 74.

⁴⁸This refers to *Inventory and Monitoring of Wildlife Habitat*, by A.Y. Cooperrider, R.J. Boyd, and Hans. R. Stuart, 1986. DEIS RF-3.

BLM states that a "disclimax"⁴⁹ community", "may diminish the biological diversity of a landscape [and i]f it becomes too large, its state of disclimax can significantly change the objectives for managing all resources." DEIS at 3-14. In response to a comment that a mosaic of communities, including disclimax communities, provides the highest landscape diversity, BLM responds that it is a matter of scale.

At the large landscape scale described, landscape diversity would be highest with the widest array of communities in a mosaic. The highest biodiversity, however, does not necessarily occur in such a case. Too much edge habitat or too many nonnative monocultures or patches of insufficient size have been found to result in reduced biological diversity. A diversity of ecological status or seral stages in some arrangement over a very large area is needed.

FEIS at 80. Thus, the agency acknowledges the disagreement and responds to it. Furthermore, BLM readily acknowledges that in "ecosystems that developed with large ungulates, livestock grazing can stimulate some natural processes." FEIS at 81; see also DEIS at 3-22, 4-109, 4-112.

3. Scientific Disagreement Regarding Fish and Wildlife and Special Status Species

Petitioners list various comments pertaining to livestock grazing and fish and wildlife, including special status species, and complain that BLM fails to acknowledge any scientific controversy or the existence of data contradicting or qualifying the FEIS. In addition, they charge that the FEIS does not address actual listing decisions of several fish species that did not identify grazing as a cause of decline.

The DEIS states that "[p]opulations of most big game species are abundant and stable [while] many wildlife species associated with native grassland and riparian communities have declined." DEIS at 26. BLM acknowledges that well managed livestock grazing and associated

⁴⁹Disclimax is defined as a "relatively stable ecological community that has displaced the [highest ecological development of a plant community] as a result of repeated or continuous disturbance by humans, domesticated animals, or natural events." DEIS at GL-7.

rangeland improvements are not only compatible with certain species of wildlife but beneficial to them. FEIS at 89. With regard to declines in anadromous fisheries, BLM states that "[w]hile water levels and diversions are clearly major contributors to the salmonid's decline, other factors include diversions and impoundments . . . which can be attributed to improper livestock grazing management in certain areas." FEIS at 85. Finally, the FEIS makes clear that factors in addition to livestock grazing are responsible for the listing of many fish species as threatened or endangered. FEIS at 83, 85.

4. Scientific Disagreement Regarding Improvements

Petitioners argue that the NEPA documents assume both that the criteria in the new rules will accelerate improvement in the condition of the public rangelands and that nonuse is a universally beneficial management tool. Again petitioners complain that BLM fails to acknowledge scientific controversy in this regard. The FEIS includes several comments to the effect that the criteria proposed by BLM will not accelerate improvement with appropriate responses. See e.g. FEIS at 62, 64, 67, 71, 72, 73, 81, 82. A fair reading of the document demonstrates that BLM properly acknowledged the controversy surrounding its proposed criteria and responded to it. Moreover, that same reading demonstrates that the NEPA documents do not assume that nonuse is a universally beneficial management tool. For example, the FEIS clearly declares that neither frequent nor long-term rest is appropriate in every case. FEIS at 66-67, 147. As previously noted, the DEIS and FEIS express throughout that proper livestock grazing is fully compatible not only with multiple use management, but also with improvement of rangeland resources.

C. BLM Properly Responded to Public Comments

Petitioners criticize generally the way BLM addressed various public comments. They complain that BLM does not distinguish between comments by scientists and those by the general public. They also complain that in dealing with the comments in the FEIS BLM merged

comments in order to respond to them. Contrary to petitioners' complaints, BLM properly handled public comments on the DEIS.

In response to the DEIS, DOI received more than 20,000 pieces of mail during the comment period and reviewed transcripts of 49 public hearings. From both the letters and the hearing transcripts, BLM recorded more than 38,000 comments. FEIS at 40-41. In considering and responding to such a large number of comments, BLM quite sensibly grouped and summarized them. In no other way could the agency reasonably be expected to deal with the volume. Moreover, an objective reading of the comments and responses to them leaves no doubt that many of the comments were from individuals or groups involved in the study of range science and, therefore, raised scientific issues. Petitioners' complaints in this regard are meritless.

Petitioners cite to comments that indicated as many as 50 percent of the livestock operators with federal permits would leave the industry and up to 60 percent of FmHA borrowers would go out of business if the rules were adopted. BLM acknowledged these comments and responded appropriately with its evaluation of the data, which led it to disagree with the commenters. FEIS at 117, 128, 131.

Petitioners express a general unhappiness with the agency's response to public comments on the overall impact of certain provisions of the new rules, but are not specific about the alleged deficiency. The FEIS fairly and reasonably fulfills BLM's obligation to consider and respond to comments. A significant portion of the FEIS is devoted to the overall economic impacts not only on the livestock industry but the communities affected. FEIS at 111-131. The FEIS also considers social impacts. FEIS at 131-140. Because the periods for commenting on the DEIS and the proposed rules ran concurrently, many comments relating to issues such as nonuse, conservation use, range improvements, surcharges, and affiliate accountability, but not specifically to environmental effects, are dealt with in the preamble to the final rules.

D. BLM Properly Analyzed Effects of the New Rules

1. Cumulative impacts

The CEQ regulations implementing NEPA describe three types of actions and three types of impacts to be considered under NEPA. 40 CFR § 1508.25. Among the types of actions described are "cumulative" actions, "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement."⁵⁰ Id. That concept, which describes actions that together may require an EIS, is to be distinguished from a type of effect or impact⁵¹, also described by CEQ as "cumulative", which means

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.⁵²

40 CFR § 1508.7. Petitioners confuse the concepts.

In their list of seven "cumulative effects" allegedly omitted from the DEIS, petitioners combine cumulative impacts (e.g., effects of the new rules when added to management actions under the Endangered Species Act or the Wild and Free Roaming Horse and Burro Act) with direct or indirect effects of the proposed rules themselves (e.g., consequences for wildlife habitats and populations; air and water pollution resulting from rezoning of agricultural lands; consequences of reduced livestock grazing or removal; consequences for wildlife of non-maintenance or lack of new range improvements; and the consequences of vegetation changes

⁵⁰The other separate types of actions identified by CEQ are "connected actions" (1508.25(a)(1) and "similar actions" (1508.25(a)(3)).

⁵¹The terms "impacts" and "effects" are used synonymously in the CEQ regulations. 40 CFR 1508.8(b).

⁵²The other separate types of impacts identified by CEQ are direct and indirect. 40 CFR 1508.25(c).

on fish and wildlife habitat). The latter are not cumulative impacts within the meaning of the CEQ regulations. They are, however, treated with other direct or indirect effects in the DEIS and FEIS.

With regard to the cumulative impacts of the new rules when combined with management actions under the Endangered Species Act, BLM states that it is

committed to managing for the recovery of threatened or endangered species. Under all the alternatives, species recovery plans would continue to be implemented. Therefore, the alternatives would differ little in their impacts to federally listed species, except where one or more might indirectly expedite recovery and improve habitat to minimize future listings.

DEIS at 4-9. BLM acknowledges that the

protection and recovery of federally listed species and their habitats--for example, anadromous fisheries in the Pacific Northwest and desert tortoises in the Desert Southwest--are also likely to significantly change the way livestock grazing is managed on federal lands. Future activities designed to avert habitat loss and endangered species listings in the long term might help sustain livestock production.

DEIS at 4-8. Furthermore, BLM recognized that some of the options in PACFISH⁵³, if implemented, could restrict grazing management options for meeting objectives for riparian and anadromous aquatic habitats (DEIS at 4-27) and change recreational use, grazing practices, and timber harvesting to comply with the ESA (DEIS at 4-50).

BLM, in response to comments concerning the pros and cons of wild horses and burros, states that management of wild horses and burros is beyond the scope of Rangeland Reform '94 but that corrective actions could be expected if they are contributing to poor ecosystem health and nonfunctioning conditions. FEIS at 91. With regard to the cumulative impacts of the new rules in combination with actions under the Wild and Free Roaming Horse and Burro Act, BLM declares that the major objective of the Wild Horse and Burro Act is to maintain populations

⁵³An ecosystem approach to managing anadromous fish habitat that the BLM and Forest Service are developing to address the decline of this type habitat. DEIS at GL-14.

at levels that are in balance with natural resources, while prohibiting their relocation to areas where they had not lived before 1971. DEIS at 27, 3-52. BLM states that under the new rules management opportunities for wild horses and burros would increase (DEIS at 36) and that they would disperse over the entire herd area, reducing concentrations of grazing animals in many areas (DEIS at 4-53).

2. Other effects

Finally, petitioners list a number of other direct or indirect effects (in addition to the ones that they mistakenly call cumulative effects), which they claim are omitted from consideration in the NEPA process. A fair reading of the NEPA documents, however, reveals that none of them has been ignored.

For example, the consequences of the new rules for wildlife habitats and populations, in general, and of vegetation changes on fish and wildlife habitat, specifically, are discussed in several places in the documents. The FEIS concludes, in essence, that

[t]he overall improvements in vegetation and watershed conditions would benefit most wildlife species. Projected increases in upland grasses would favor such big game species as elk over pronghorn and mule deer. . . . Increases in functioning riparian habitat would improve food sources, nesting, broodrearing, and thermal cover for most wildlife. Big game, nongame, upland birds, waterfowl, raptors, and anadromous and resident fisheries would benefit over the long term [and the new rules] would improve the vegetation communities favored by most special status species.

FEIS at 31; see also DEIS at 4-49 - 4-52; FEIS at 90, 92. Likewise, the environmental and socio-economic consequences of reduced livestock grazing or removal are discussed throughout the NEPA documents. See DEIS at 3-15 - 3-25, 3-64 - 3-81, 4-54 - 4-62; FEIS at 70, 87, 93, 114-117, 119, 131, 133. Similarly, the consequences of subdivision or industrial development of private land are considered. See DEIS at 3-9, 3-36, 3-37, 4-8, 4-48, 4-31, 4-54; FEIS at 49, 80, 93, 115.

The consequences for range conditions and wildlife of changes related to range improvements occasioned by the new rules are also considered. Generally, BLM concludes that the "effect of livestock-related developments on specific wildlife species depends on the type of development, its location, and the species that have evolved naturally in the area." FEIS at 88. See also FEIS at 87, 89. And with regard to the relationship between the new rules and state and local land use plans, BLM acknowledges some possible conflicts, while noting correctly that CEQ does not require conformance. FEIS at 134-135. BLM also notes that it is not feasible in a programmatic document such as the present FEIS to conduct site-specific comparisons with hundreds or thousands of state or local plans throughout the West. Id. At the same time, BLM declares that "resource advisory councils would serve as a vehicle to work on resolving inconsistencies with state and local plans or mandates." FEIS at 49.

On balance, the FEIS is a good faith, objective, and reasonable explanation of the environmental consequences of the new rules. Moreover, notwithstanding petitioners' challenge, the agency properly acknowledged and considered scientific opinions that disagreed with its conclusions and appropriately addressed all comments, especially given their volume.

VII. CONCLUSION

For the foregoing reasons, the regulations and the FEIS fully complied with all applicable requirements.

