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## GRAZING MANAGEMENT ON THE PUBLIC LANDS: OPENING THE PROCESS TO PUBLIC PARTICIPATION

*Joseph M. Feller\**

*Livestock grazing on the western public lands has long been a subject of public environmental concern, but the public has had little voice in the management of such grazing. In this article, the author explores the institutional barriers to public participation in grazing management that have been erected by the United States Bureau of Land Management, and then discusses a recent decision in an administrative appeal that may help to break down those barriers.*

For citizens concerned about the protection of environmental resources on the western public lands, the problem of excessive and poorly-managed livestock grazing<sup>1</sup> on lands administered by the United States Bureau of Land Management (BLM)<sup>2</sup> has long proven an exceedingly difficult nut to crack. Despite two decades of environ-

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1. For descriptions of the impacts of overgrazing in the western United States, see *Natural Resources Defense Council v. Morton*, 388 F. Supp. 829, 840 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir.) (per curiam), *cert. denied*, 427 U.S. 913 (1976) [hereinafter *NRDC v. Morton*]; U.S. ENVIRONMENTAL PROTECTION AGENCY, *LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS* 5-6 (1990); D. FERGUSON & N. FERGUSON, *SACRED COWS AT THE PUBLIC TROUGH* (1983); COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, *ENVIRONMENTAL QUALITY* 182 (1970); Wuerthner, *Public Lands Grazing: What Benefits at What Costs?*, *WESTERN WILDLANDS*, Fall 1989, at 24.

2. The BLM administers approximately 270 million acres of public land, which makes it the largest land manager, public or private, in the United States. Approximately 93 million acres of BLM land are in Alaska. The remainder is concentrated in the eleven far western states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. The BLM administers over half of the land in the state of Nevada and over one quarter of the land in the states of Oregon, Utah, and Wyoming. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, *PUBLIC LAND STATISTICS 1988*, at 5-6 (1989).

mental legislation<sup>3</sup> and litigation,<sup>4</sup> and despite public pronouncements suggesting a new direction for the BLM,<sup>5</sup> on-the-ground management has continued to reflect the historic priority<sup>6</sup> given by the Bureau to the needs of livestock operators over environmental considerations.<sup>7</sup> And despite statutes<sup>8</sup> and regulations<sup>9</sup> requiring public participation in the BLM's management of the public lands, the BLM's written and unwritten policies and procedures have placed substantial barriers<sup>10</sup> in the path of those who seek to work within the system to bring about positive changes.

A recent decision by an administrative law judge about a grazing

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3. *E.g.*, National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370b (1988), *see infra* notes 57-65 and accompanying text; Federal Water Pollution Control Act of 1972 (Clean Water Act), 33 U.S.C. §§ 1252-1387 (1988); Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784 (1988), *see infra* notes 38-56 and accompanying text.

4. *See* Natural Resources Defense Council v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985) [hereinafter *Hodel I*] (striking down BLM program to transfer to livestock grazing permittees the authority to manage their grazing allotments "as they determine appropriate"); Natural Resources Defense Council v. Morton, 388 F. Supp. 829 (D.D.C. 1974), *infra* notes 60-65 and accompanying text. Not all litigation concerning public lands livestock grazing has been successful for environmental interests. *See* Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. 1045 (D. Nev. 1986) [hereinafter *Hodel II*], *aff'd*, 819 F.2d 927 (9th Cir. 1987), *infra* notes 52, 65.

5. *See, e.g.*, BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, RIPARIAN-WETLAND INITIATIVE FOR THE 1990'S (1990); BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, STATE OF THE PUBLIC RANGELANDS 1990 (1990); Conniff, *Treasuring 'The Lands No One Wanted'*, SMITHSONIAN, Sept. 1990, at 30.

6. *See* P. FOSS, POLITICS AND GRASS (1960).

7. G. COGGINS, PUBLIC NATURAL RESOURCES LAW § 19.05[2] (1990) ("Watershed, wildlife, and recreation remain the orphan resources on BLM public lands. . . . Statutory mandates and judicial orders have not overcome historic tendencies in BLM public rangeland management."); *id.* § 19.05[3] ("The agency is firmly wedded to the pre-FLPMA status quo."); U.S. GENERAL ACCOUNTING OFFICE, MANAGEMENT OF PUBLIC RANGELANDS BY THE BUREAU OF LAND MANAGEMENT (Statement of James Duffus III, Associate Director, before the House Subcommittee on National Parks and Public Lands) (Aug. 2, 1988) (GAO/T-RCED-88-58). *See also* U.S. GENERAL ACCOUNTING OFFICE, PUBLIC RANGELANDS: SOME RIPARIAN AREAS RESTORED BUT WIDESPREAD IMPROVEMENT WILL BE SLOW 46-49 (1988) (GAO/RCED-88-105) (documenting lack of support by BLM management for measures opposed by livestock permittees); U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: MORE EMPHASIS NEEDED ON DECLINING AND OVERSTOCKED ALLOTMENTS 3, 40-41 (1988) (GAO/RCED-88-80) (documenting lack of management attention by the BLM to grazing allotments that are overstocked or in a declining condition). The author can also state from personal experience in two western states, Utah and Arizona, that BLM range management practices still give priority to the needs of livestock operators over environmental considerations. For an account of the author's experience in Utah, *see* Feller, *The Western Wing Of Kafka's Castle*, High Country News, March 12, 1990, at 9.

The principal manifestation of the BLM's commitment to the livestock industry is the Bureau's insistence that, except in extraordinary circumstances, the numbers of livestock grazing public land allotments be maintained or increased. *See* G. COGGINS, *supra*, § 19.05[1]. In a future article, I will explore in detail the BLM's policy on maintenance of livestock numbers and demonstrate how that policy frustrates rational land use planning and environmental protection.

8. *See infra* notes 53-65 and accompanying text.

9. *See infra* notes 66-85 and accompanying text.

10. *See infra* notes 102-116 and accompanying text.

allotment in a remote corner of southeastern Utah, however, may facilitate efforts by concerned citizens to influence the management of this most entrenched use of the public lands. In *Feller v. Bureau of Land Management*,<sup>11</sup> it was held that the renewal of a grazing permit is an "action" within the meaning of the BLM's grazing regulations<sup>12</sup> and therefore requires notice to affected individuals and organizations, a statement of the Bureau's reasons for the action, and opportunity for administrative protest and appeal.<sup>13</sup> If followed in other areas,<sup>14</sup> this decision could open up the Bureau's heretofore closed process<sup>15</sup> of management of individual livestock grazing allotments.

In Parts I.A and I.B of this article, I will present an overview of the management processes that govern livestock grazing on BLM lands and of the statutory and regulatory provisions affecting public participation in those processes. In Part II, I will describe how the BLM's interpretation and application of those statutes and regulations has stymied effective public participation in grazing management. In Part III, I will discuss the decision in *Feller v. BLM* overturning the BLM's interpretation of one critical regulation. Finally, in Part IV, I will discuss the implications of the decision for future public participation in BLM grazing management.

## I. OVERVIEW

### A. BLM Grazing Management

Pursuant to the Taylor Grazing Act of 1934,<sup>16</sup> the public lands managed by the BLM are divided into grazing allotments. BLM grazing allotments vary in size from less than one hundred acres to hundreds of thousands of acres.<sup>17</sup> Although the average allotment size is under ten thousand acres,<sup>18</sup> most of the land is in the larger allotments.<sup>19</sup> A single allotment may contain extensive ecological, cultural,

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11. *Feller v. Bureau of Land Management*, No. UT-06-89-02 (U.S. Dep't of the Interior, Office of Hearings and Appeals, Hearings Division, August 13, 1990). For a copy of the slip opinion, write to Hearings Division, U.S. Dep't of the Interior, 6432 Federal Building, Salt Lake City, Utah 84138-1194. A copy is also on file in the office of the LAND & WATER LAW REVIEW.

12. See *infra* notes 80-85 (regulations), 141-142 (holding) and accompanying text.

13. See *infra* notes 80-85 and accompanying text.

14. The BLM has passed up its opportunity to appeal the decision to the Interior Board of Land Appeals, see *infra* note 85. It is still possible, however, that the BLM may challenge the decision in future cases concerning other allotments.

15. See *infra* notes 102-116 and accompanying text.

16. 43 U.S.C. §§ 315-315r (1988).

17. See, e.g., BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, LOWER GILA NORTH DRAFT GRAZING ENVIRONMENTAL IMPACT STATEMENT (1982) (grazing allotments varying in size from 79 to 223,933 acres).

18. 162 million acres of BLM land is divided into approximately 20,000 allotments, for an average of about 8,000 acres per allotment. BUREAU OF LAND MANAGEMENT, *supra* note 2, at 25.

19. The largest 15 percent of the allotments account for 58 percent of the grazing on BLM lands. U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: MORE



and recreational resources.<sup>20</sup>

Livestock grazing on each allotment is authorized by a permit issued by the BLM.<sup>21</sup> The permits are issued for a maximum period of ten years,<sup>22</sup> but the holder of an existing permit has priority over other applicants for receipt of a new permit when the existing permit expires.<sup>23</sup> Each permit must specify, at a minimum, the kind and number of livestock, and the time of the year in which the allotment will be grazed.<sup>24</sup>

If livestock are to be managed in order to protect the range and minimize adverse impacts on environmental resources, additional

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EMPHASIS NEEDED ON DECLINING AND OVERSTOCKED GRAZING ALLOTMENTS, *supra* note 7, at 14.

20. *See, e.g.*, Feller, *supra* note 7, at 9 (Comb Wash Allotment in Utah includes five scenic redrock canyons that are popular for hiking and sightseeing, contain numerous ancient Indian ruins, and three of which have been recommended by the BLM for designation as wilderness under the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1988)); J. Feller, Scoping Comments for the Santa Maria Ranch Allotment 2-3 (Feb. 18, 1990) (on file with the LAND & WATER LAW REVIEW) (single BLM allotment in Arizona contains extensive riparian habitat, part of a proposed area of critical environmental concern, *see* 43 U.S.C. § 1712(c)(3) (1988), a river determined to be eligible for inclusion in the National Wild and Scenic Rivers System, *see* 16 U.S.C. §§ 1271-87, a creek designated as an "outstanding National resource" water, *see* 40 C.F.R. § 131.12(a)(3) (1990), 16,000 acres of congressionally-designated wilderness, habitat for sixteen species of wildlife that have been designated as threatened, endangered, or sensitive by the federal or state government, and two bighorn sheep reintroduction areas).

21. *See* 43 U.S.C. § 315b (1988). On certain isolated tracts of BLM land, the grazing authorization is called a lease rather than a permit. *See id.* § 315m. The distinction between a permit and a lease is irrelevant for the purpose of this article, and I use the term permit to refer to both permits and leases.

Grazing of livestock on BLM lands without a permit, or in violation of the terms and conditions of a permit, is prohibited. 43 C.F.R. § 4140.1(b)(1) (1990). Unauthorized grazing use renders the user liable to the United States for the value of the forage consumed and for the government's enforcement expenses. *Id.* §§ 4150.1, 4150.3. Willful violators are liable for double damages, *id.* § 4150.3(b); repeated willful violators are liable for treble damages, *id.* § 4150.3(c). Willful violators may also be subject to permit revocation, *id.* § 4170.1-1, fines, *id.* § 4170.2-1, or imprisonment, *id.* § 4170.2-2. The BLM's enforcement of permits, however, has been notoriously lax, and the stronger penalties are rarely invoked. *See* U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: BLM EFFORTS TO PREVENT UNAUTHORIZED LIVESTOCK GRAZING NEED STRENGTHENING, No. GAO/RCED-91-17 (1990). For discussions of BLM enforcement practices and some interesting examples, *see* Williams, *Rhoads Stonewalls the BLM*, High Country News, July 2, 1990, at 1, and McMillan, *Grass-Roots Rustling*, High Country News, July 2, 1990, at 11.

22. 43 U.S.C. §§ 315b, 1752(a)-(b) (1988).

23. 43 U.S.C. § 1752(c) (1988). Although the holder of the expiring permit has priority for receipt of a new permit, issuance of a new permit is not required. *See id.* § 1752(c)(1) (conditioning issuance of a new permit on whether the lands in question remain available for grazing in accordance with land use plans). *See also id.* § 1903(b) (reserving the authority of the Secretary of the Interior to discontinue grazing on selected lands).

The revocation of grazing privileges on public lands does not constitute a taking of private property within the meaning of the fifth amendment to the United States Constitution. *See* United States v. Fuller, 409 U.S. 488 (1973); *Swim v. Bergland*, 696 F.2d 712, 719 (9th Cir. 1983); G. COGGINS, *supra* note 7, § 19.02[1][c].

24. 43 U.S.C. § 315b (1988); 43 C.F.R. § 4130.6-1 (1990).

management terms and conditions must be specified. Such additional terms and conditions may include such stipulations as exclusion of livestock from sensitive areas of an allotment, subdivision of the allotment into pastures with alternating periods of rest and use for each pasture, measures to keep livestock from concentrating in riparian areas, and requirements for construction and maintenance of fences and watering facilities.<sup>25</sup> These additional terms and conditions may be specified either in the permit itself<sup>26</sup> or in an allotment management plan (AMP)<sup>27</sup> that is incorporated in the permit.<sup>28</sup> As of 1988, approximately one third of the BLM's grazing allotments had AMPs in place, although nearly half of those AMPs may be out of date.<sup>29</sup>

Although the permit or the AMP should prescribe the terms and conditions necessary to ensure proper management of livestock grazing on an allotment, in reality many management decisions are made on an annual basis. For example, although the permit specifies a number of livestock, the BLM annually determines how many livestock will actually graze on an allotment.<sup>30</sup> The actual number allowed to graze may be less than the number in the permit either because the permittee has requested voluntary "non-use" of all or a part of the permitted number,<sup>31</sup> or because the BLM has concluded that the allotment in its current condition cannot actually support the permitted number.<sup>32</sup> On many allotments, the BLM also issues an annual graz-

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25. For examples of grazing management prescriptions, see U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 1, at 9-31.

26. See 43 U.S.C. § 1752(e) (1988); 43 C.F.R. § 4130.6-2 (1990).

27. See 43 U.S.C. § 1752(d) (1988); 43 C.F.R. § 4120.2 (1990).

28. See *Hodel I*, 618 F. Supp. at 859-60, 869-70 (holding that these are the only two permissible methods of specifying livestock management practices on an allotment).

29. U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: MORE EMPHASIS NEEDED ON DECLINING AND OVERSTOCKED GRAZING ALLOTMENTS, *supra* note 7, at 40-41.

30. See Feller, *supra* note 7, at 11. The number of livestock specified in the permit is known as the "preference." See 43 C.F.R. § 4100.0-5 (1990) (definition of "grazing preference"). In 1988, the average actual use of BLM grazing allotments was approximately seventy-five percent of the preference. Compare BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 1988, at 23-24 (approximately 10 million animal unit months (AUMs) of actual use of BLM grazing permits and leases) *with id.* at 25 (approximately 13.5 million AUMs of preference). An animal unit month is the amount of forage consumed by one cow in one month. 43 C.F.R. § 4100.0-5.

In extreme cases, actual use may be only a small fraction of the preference. See, e.g., Feller, Comments on the Draft Allotment Management Plan and Environmental Assessment for the Santa Maria Community Allotment 4-5 (June 8, 1990) (on file with the LAND & WATER LAW REVIEW) (average actual use from 1979 to 1990 on the Santa Maria Community Allotment in Arizona was only one third of the preference) [hereinafter cited as Santa Maria AMP comments].

31. See BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, BLM MANUAL § H-4130.15 (1984) [hereinafter cited as BLM MANUAL]; OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF THE INTERIOR, AUDIT REPORT: REVIEW OF THE BUREAU OF LAND MANAGEMENT'S GRAZING MANAGEMENT AND RANGE IMPROVEMENT PROGRAMS, No. W-LM-BLM-11-85, at 20-23 (1986).

32. See 43 C.F.R. §§ 4110.3-2, 4110.3-3(c) (1990). See also OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF THE INTERIOR, *supra* note 31, at 21 (sample of 51 allot-

ing schedule specifying which pastures on an allotment will be grazed and which will be rested that year, and the dates of use and numbers of livestock for each of the pastures that will be grazed.<sup>33</sup> Where an AMP is in place, this annual grazing schedule should be, but sometimes is not, consistent with the AMP.<sup>34</sup>

In principle, these annual decisions provide the flexibility needed to adapt the permitted numbers, and the terms and conditions of the permit or AMP, to changing and unpredictable circumstances, particularly variations in rainfall.<sup>35</sup> In practice, these annual decisions sometimes supplant the permit and the AMP as the mechanisms for prescribing the management of an allotment. The number of livestock specified in the permit often substantially exceeds the number that the permittee ever actually places on the allotment or that the allotment could accommodate without resource damage.<sup>36</sup> In such a case, the permit acts as a blank check, allowing the permittee and the BLM to agree privately each year on how many livestock will actually graze.<sup>37</sup> Further, on many allotments without an AMP, the permit contains only the minimum specifications (number and kind of livestock and dates of use of the allotment), leaving all other management prescriptions to the annual grazing schedule.

Superimposed on the allotment-specific system of permits, AMPs, and annual grazing decisions is a system of larger-scale land use plans, called Resource Management Plans,<sup>38</sup> which are being developed pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA).<sup>39</sup> These plans are supposed to be the primary mechanism

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ments with total preference of 271,499 animal unit months (AUMs) had only 213,384 AUMs of available forage).

33. See, e.g., Feller, *supra* note 7, at 11.

34. See, e.g., Statement of Reasons for Appeal at 11, *Feller v. BLM* (on file with the LAND & WATER LAW REVIEW) (annual grazing schedule for the Comb Wash Allotment in Utah has permitted grazing for up to seven months in pasture which, according to AMP, should be grazed only for fifteen days each year). See also U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: MORE EMPHASIS NEEDED ON DECLINING AND OVERSTOCKED GRAZING ALLOTMENTS, *supra* note 7, at 41 (nearly half of BLM AMPs "may no longer have been sufficiently current to properly guide the management of the allotments").

35. See 43 C.F.R. § 4110.3-3(c) (1990) (providing for temporary adjustments in livestock numbers "because of conditions such as drought, fire, flood, or insect infestation").

36. See, e.g., Feller, *supra* note 7, at 11. See also *supra* notes 30, 32.

37. See, e.g., Statement of Reasons for Appeal at 10-11; Reply of Appellant Joseph M. Feller to the Bureau of Land Management's Answer at 30-31, *Feller v. BLM* (on file with the LAND & WATER LAW REVIEW).

38. See 43 C.F.R. § 1601.0-5(k) (1990).

39. 43 U.S.C. §§ 1701-1784 (1988). Land use plans are mandated by section 202 of FLPMA, *id.* § 1712. For a comprehensive analysis of FLPMA's planning provisions, see G. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA and the Multiple Use Mandate*, 14 ENVTL. L. 1, 74-100.

Prior to the passage of FLPMA, the BLM had developed plans for most of its lands pursuant to the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411-1418 (expired 1970). See G. COGGINS, *supra* note 7, § 13.04[2]. These pre-FLPMA plans, known as Management Framework Plans, were not developed according to the

for implementing FLPMA's mandate that the public lands be managed in accordance with the principle of "multiple use,"<sup>40</sup> which is defined as "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people."<sup>41</sup> Each resource management plan provides management direction for an area of BLM land called a resource area,<sup>42</sup> which typically comprises over one million acres of BLM land<sup>43</sup> and typically includes on the order of one hundred grazing allotments.<sup>44</sup> The plans govern all uses of BLM lands and are intended to specify which uses, and what levels of those uses, will be permitted on which areas of the public lands, and what restrictions, special designations, and other measures will be employed to ensure that those uses do not cause unacceptable damage to resources.<sup>45</sup> As of 1990, resource management plans were in place for just under half of the BLM's resource areas, and the BLM hopes to develop plans for the remainder of its resource areas by 1997.<sup>46</sup>

In principle, prescriptions contained in resource management plans should be a major determinant of grazing management by the BLM. A resource management plan can specify which portions of a BLM resource area should be used for livestock grazing and which should not,<sup>47</sup> and can specify the numbers of livestock that will graze in those areas that are to be so used.<sup>48</sup> A resource management plan

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substantive and procedural standards subsequently enacted in FLPMA. *National Wildlife Federation v. Burford*, 835 F.2d 305, 320-22 (D.C. Cir. 1987), *rev'd on other grounds*, 110 S. Ct. 3177 (1990) [hereinafter *NWF v. Burford*]. Professor Coggins has described the process for development of Management Framework Plans as "early and primitive" and the plans themselves as "little more than map overlays and inlays." G. COGGINS, *supra* note 7, § 13.04[2].

40. See 43 U.S.C. §§ 1712(c)(1), 1732(a) (1988).

41. *Id.* § 1702(c). For excellent discussions of the meaning of "multiple use," see G. COGGINS, *supra* note 7, ch. 16; Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. COLO. L. REV. 229 (1982).

42. See 43 C.F.R. § 1601.0-5(j) (1990).

43. The BLM plans to develop 136 resource management plans for its 176 million acres of land in the 11 far western states, for an average of about 1.4 million acres per plan. U.S. GENERAL ACCOUNTING OFFICE, *PUBLIC LANDS: LIMITED PROGRESS IN RESOURCE MANAGEMENT PLANNING*, GAO/RCED-90-225, at 8, 10. (1990). The correspondence between resource areas and resource management plans is not exact. Where resource areas are smaller than average, a single plan may cover more than one resource area. *Id.* at 10.

44. There are approximately 20,000 BLM grazing allotments, see *supra* note 18, or an average of about 150 allotments for each of the 136 resource management plans that the BLM has developed or intends to develop.

45. 43 C.F.R. § 1601.0-5(k) (1990). See also FLPMA § 102(a)(8), 43 U.S.C. § 1701(a)(8) (1988) (congressional policy that the public lands be managed in a manner that will protect environmental values).

46. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 43, at 15.

47. 43 U.S.C. §§ 1752(c)(1), 1903(b) (1988); BLM MANUAL, *supra* note 31, § 1622.31.A.1.

48. 43 C.F.R. §§ 4110.2-2(a), 4110.3 (1990); BLM MANUAL, *supra* note 31, § 1622.31.A.3.a.



may also contain standards and criteria to govern subsequent allotment-specific decisions such as permit terms and conditions or AMPs.<sup>49</sup> Grazing permits and other management actions are required to be consistent with the resource management plans.<sup>50</sup>

In reality, however, resource management plans have had little effect on grazing management because the vast majority of the resource management plans developed to date by the BLM have contained virtually no specific prescriptions for grazing management.<sup>51</sup> Instead, most of these plans have simply provided that, subsequent to plan promulgation, AMPs will be developed for allotments that are in need of improved management, and that data will be gathered to determine whether changes in livestock numbers are needed on any allotments.<sup>52</sup>

## B. Public Participation

### 1. Statutes

Two statutes, FLPMA<sup>53</sup> and the National Environmental Policy Act (NEPA),<sup>54</sup> contain provisions relevant to public participation in grazing management on BLM lands. FLPMA contains a broad mandate for public participation in public lands management:

In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures, including public hearings

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49. BLM MANUAL, *supra* note 31, §§ 1622.31.A.3.b, c, e.

50. 43 U.S.C. § 1732(a) (1988); 43 C.F.R. §§ 1601.0-5(b), 4100.0-8 (1990).

51. Professor Coggins has described a typical BLM land use plan as a "nonplan," a "confused melange of do-nothing motherhood statements which offered neither managers nor users much useful guidance on future management," and a "nugatory, meaningless exercise." G. COGGINS, *supra* note 7, § 13.04[4][b].

52. *See, e.g., Hodel II*, 624 F. Supp. at 1050-52 (upholding such a plan); G. COGGINS, *supra* note 7, § 13.04[4][b] (discussing *Hodel II*). *See also* G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 760 (2d ed. 1986) (suggesting that, after *Hodel II*, BLM planning may be pointless).

The resource management plan for the San Juan Resource Area, which contains the allotment at issue in *Feller v. BLM*, is a typical example of a BLM land use plan that places virtually no constraints on the management of individual grazing allotments. The plan simply states that AMPs will be developed for allotments in need of improvement. The plan contains no schedule for development of the AMPs. Not only are the contents of the AMPs left unspecified, but the plan also contains no standards or criteria to constrain the development of the AMPs. *See* SAN JUAN RESOURCE AREA, MOAB DISTRICT, BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PROPOSED RESOURCE MANAGEMENT PLAN 29-38 (Apr. 1989). With respect to livestock numbers, the plan suggests, but does not require, that permittees restrict grazing to the past five years' average use. *Id.* at 29. Permittees who do not agree to this restriction are authorized to graze up to their full "preference," *id.*, which sometimes substantially exceeds the carrying capacity of the land, *see supra* notes 32, 36. Any mandatory changes in grazing use levels are deferred pending the results of a monitoring program, whose details are also unspecified. PROPOSED RESOURCE MANAGEMENT PLAN, *supra*, at 29.

53. 43 U.S.C. §§ 1701-1784 (1988).

54. 42 U.S.C. §§ 4321-4361 (1988).



where appropriate, to give the Federal, State, and local governments and the public adequate notice and opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.<sup>55</sup>

The United States Court of Appeals for the District of Columbia Circuit has held that this mandate applies not only to the development of resource management plans by the BLM, but to "all decisions that may have significant impact on Federal lands."<sup>56</sup>

NEPA affects public lands management<sup>57</sup> primarily through its requirement for environmental impact statements<sup>58</sup> (EISs) that analyze the environmental consequences of proposed administrative actions and consider alternatives to such actions.<sup>59</sup> In *Natural Resources Defense Council [NRDC] v. Morton*,<sup>60</sup> the United States District Court for the District of Columbia held that the issuances of grazing permits by the BLM, collectively if not individually, constitute "major federal actions significantly affecting the human environment" within the meaning of NEPA<sup>61</sup> and therefore require EISs. Pursuant to *NRDC v. Morton*, the BLM has prepared 144 grazing EISs for its lands.<sup>62</sup> These EISs cover areas that are comparable in size with, and often identical to, the areas covered by resource management plans promulgated pursuant to FLPMA,<sup>63</sup> which was enacted two years after the *Morton* decision.

In recent years, the BLM has integrated the processes of grazing EIS preparation and resource management plan development. Resource management plans are accompanied by EISs that purport to satisfy the *Morton* mandate as well as analyze the environmental impacts of other land uses authorized in the plans.<sup>64</sup> Most of these EISs, like the resource management plans that they have accompanied, have been highly generic, and have provided little or no detailed, site-specific environmental information or analysis.<sup>65</sup>

55. 43 U.S.C. § 1739(e) (1988). See also *id.* § 1712(f) (similar requirement).

56. *NWF v. Burford*, 835 F.2d at 322.

57. For the application of NEPA to public lands management, see generally G. COGGINS, *supra* note 7, ch. 12.

58. See 42 U.S.C. § 4332(c) (1988).

59. See G. COGGINS, *supra* note 7, § 12.03.

60. 388 F. Supp. 829 (D.D.C. 1974), *aff'd* 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied*, 427 U.S. 913 (1976).

61. 388 F. Supp. at 833-34.

62. See G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND & RESOURCES LAW* 711-16 (2d ed. 1987). For an evaluation of the EISs prepared by the BLM pursuant to *NRDC v. Morton*, see G. Coggins, *The Law of Public Rangeland Management III: A Survey of Creeping Regulation at the Periphery, 1934-1982*, 13 ENVTL. L. 295, 360-63 (1983).

63. See *supra* notes 38-50 and accompanying text.

64. See, e.g., SAN JUAN RESOURCE AREA, MOAB DISTRICT, BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, DRAFT SAN JUAN RESOURCE MANAGEMENT PLAN ENVIRONMENTAL IMPACT STATEMENT (1986).

65. See, e.g., *Hodel II*, 624 F. Supp. at 1050-56 (upholding a grazing EIS with

## 2. Regulations

Three pertinent sets of agency regulations implementing NEPA and FLPMA contain specific requirements for public participation: the NEPA regulations promulgated by the Council on Environmental Quality (CEQ),<sup>66</sup> the BLM's regulations prescribing procedures for the development of area-wide resource management plans,<sup>67</sup> and the BLM's grazing regulations,<sup>68</sup> which prescribe procedures for the management of individual grazing allotments. The CEQ regulations require all federal agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures,"<sup>69</sup> to "[h]old or sponsor public hearings or public meetings whenever appropriate,"<sup>70</sup> and to "[s]olicit appropriate information from the public."<sup>71</sup> The BLM's regulations concerning resource management plans provide for several stages of participation by the general public,<sup>72</sup> from initial identification of issues<sup>73</sup> to protests of completed plans.<sup>74</sup>

The BLM's grazing regulations provide for the participation of "affected interests" in the management of individual grazing allotments. An "affected interest" is defined as

an individual or organization that has expressed in writing to the authorized officer concern for the management of livestock grazing on specific grazing allotments and who has been determined by the authorized officer to be an affected interest.<sup>75</sup>

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little specific information about individual grazing allotments); SAN JUAN RESOURCE AREA, MOAB DISTRICT, BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, DRAFT SAN JUAN RESOURCE MANAGEMENT PLAN ENVIRONMENTAL IMPACT STATEMENT (1986). The latter EIS purports to analyze the environmental impacts of all authorized activities, including livestock grazing, on 1.8 million acres of BLM land comprising 69 grazing allotments. See *id.* at i, 3-53. It also purports to satisfy the mandate of *NRDC v. Morton*. *Id.* at i. The EIS, however, devotes only a few pages to livestock grazing and contains no detailed information about grazing management and environmental impacts on any of the 69 allotments. See Statement of Reasons for Appeal at 6-7, *Feller v. BLM*.

66. 40 C.F.R. §§ 1500-1508 (1990).

67. 43 C.F.R. §§ 1601-1610 (1990). For a critical discussion of the BLM's planning regulations, see G. COGGINS, *supra* note 39, at 96-98.

68. 43 C.F.R. §§ 4100-4170 (1990).

69. 40 C.F.R. § 1506.6(a) (1990).

70. *Id.* § 1506.6(c).

71. *Id.* § 1506.6(d).

72. See 43 C.F.R. § 1610.2 (1990).

73. *Id.* § 1610.2(f)(1).

74. *Id.* § 1610.2(f)(4).

75. *Id.* § 4100.0-5. A previous definition of "affected interest" had included anyone who had expressed in writing concern about a particular allotment, without requiring a determination by the authorized BLM officer. The current, more restrictive definition was promulgated in 1984, and was challenged by environmental and wildlife organizations as being contrary to the public participation mandate of FLPMA. See *Hodel I*, 618 F. Supp. at 880-81. The court held that the issue would not be ripe for judicial review unless and until the BLM applied it in an impermissibly restrictive manner. *Id.* at 881. Since that time, the issue has not resurfaced in the courts.

For suggestions on how to be designated an affected interest and what to do once so designated, see Feller, *A Do-It-Yourself Guide*, High Country News, March 12,

Although this circular definition gives no clue as to what type of interest in an allotment would qualify an individual or organization as an affected interest, the BLM has determined that recreational use of the lands on an allotment is sufficient,<sup>76</sup> thus potentially qualifying many interested individuals and organizations.

The grazing regulations require consultation with affected interests in the development of AMPs,<sup>77</sup> in the implementation of changes in livestock numbers,<sup>78</sup> and whenever temporary reduction or cessation of livestock grazing is required because of conditions such as drought, fire, flood, or insect infestation.<sup>79</sup> In addition, the regulations contain the following provision:

§ 4160.1-1 PROPOSED DECISIONS ON PERMITS OR LEASES.

In the absence of a documented agreement between the authorized officer and the permittee(s) or lessee(s), the authorized officer shall serve a proposed decision on any applicant, permittee, or lessee . . . who is affected by the proposed action on applications for permits (including range improvement permits) or leases, or by the proposed action relating to terms and conditions of permits (including range improvement permits) or leases, by certified mail or personal delivery. The authorized officer shall also send copies to other affected interests. The proposed decision shall state reasons for the action, including reference to pertinent terms, conditions and/or provisions of these regulations, and shall provide for a period of 15 days after receipt for the filing of a protest.<sup>80</sup>

A "protest" is simply an objection to a proposed decision, expressed to the authorized officer either in person or in writing.<sup>81</sup> An additional provision clarifies that a protest may be filed by an "other affected interest" as well as by a permittee or applicant.<sup>82</sup>

A proposed decision automatically becomes final if a protest is not filed within the fifteen-day period.<sup>83</sup> If a protest is filed, the authorized officer must consider the protest and then issue a final deci-

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1990, at 9.

76. See, e.g., Arizona State Office, Bureau of Land Management, U.S. Dep't of the Interior, Instruction Memorandum No. AZ-89-313, Guidelines for Determining Affected Interest (Aug. 1, 1989); Letter from Joseph Feller to BLM San Juan Resource Area Manager Edward Scherick (Aug. 29, 1988) (requesting designation as an affected interest on the Comb Wash Allotment in Utah based on recreational use); Letter from Acting Area Manager Sherwin Sandberg to Joseph M. Feller (Feb. 3, 1989) (granting request). These sources are all on file with the LAND & WATER LAW REVIEW.

77. 43 C.F.R. § 4120.2(a) (1990).

78. *Id.* § 4110.3-3(a)-(b).

79. *Id.* § 4110.3-3(c).

80. *Id.* § 4160.1-1.

81. *Id.* § 4160.2.

82. *Id.*

83. *Id.* § 4160.3(a).

sion.<sup>84</sup> The final decision may be appealed to an administrative law judge by "any person whose interest is adversely affected" by the decision.<sup>85</sup>

These provisions for protest and appeal could provide an important tool for affected citizens to influence the BLM's management of livestock grazing on the public lands, depending on which BLM management activities affecting grazing permits are considered "actions" within the meaning of the regulations. The regulations, however, contain no definition of "action." As will be discussed in the next part of this article, the BLM has given that term an exceedingly narrow interpretation which has, until recently, severely limited public participation in the Bureau's grazing management.

## II. THE BLM'S LIMITATION OF PUBLIC PARTICIPATION

In areas of public lands management other than livestock grazing, the authorization of an activity that may have a substantial environmental impact is usually preceded by an opportunity for concerned citizens to raise environmental issues and to insist on compliance with applicable laws. For example, when the United States Forest Service plans a timber sale, it generally goes through some form of public participation process that allows interested individuals and organizations to question the Forest Service's plans and to suggest alternatives.<sup>86</sup> If the Forest Service fails to resolve environmental concerns through this process, and if the failure rises to the level of a violation of an applicable statute such as NEPA,<sup>87</sup> the National Forest Management Act,<sup>88</sup> the Clean Water Act,<sup>89</sup> or the Endangered Species Act,<sup>90</sup> the sale may be appealed administratively.<sup>91</sup> If the administrative appeal fails to resolve the issues, the sale is subject to judicial review.<sup>92</sup>

84. *Id.* § 4160.3(b).

85. *Id.* §§ 4.470, 4160.4. A decision of an administrative law judge may be appealed to the Interior Board of Land Appeals. *See id.* § 4.410.

86. *See, e.g.*, FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, ENVIRONMENTAL POLICY AND PROCEDURES HANDBOOK §§ 11.6, 11.8, 21, 33.1, 33.4; SOUTHWESTERN REGION, FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, INTEGRATED RESOURCE MANAGEMENT: PROJECT IMPLEMENTATION PROCESS (2d ed. 1988).

87. 42 U.S.C. §§ 4321-4370a (1988). For the application of NEPA to timber sales, see G. COGGINS, *supra* note 7, § 20.02[4][a].

88. 16 U.S.C. §§ 1600-1614 (1988). For the application of the National Forest Management Act to timber sales, see G. COGGINS, *supra* note 7, § 20.02[3][d].

89. 33 U.S.C. §§ 1251-1376 (1988). For the application of the Clean Water Act to timber sales, see G. COGGINS, *supra* note 7, § 20.02[3][c].

90. 16 U.S.C. § 1531-1543 (1988). For the application of the Endangered Species Act to timber sales, see G. COGGINS, *supra* note 7, § 20.02[3][b].

91. *See* 36 C.F.R. Part 217 (1990).

92. *See, e.g.*, *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195-96 (9th Cir. 1988) (reviewing timber sales for compliance with NEPA); *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 604-05 (N.D. Cal. 1982), *aff'd*, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds*, 485 U.S. 439 (1988) (reviewing timber sales and road construction for compliance with the Clean Water Act); *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988) (reviewing timber sales for compliance with

In the realm of livestock grazing on the public lands, the closest analogue to a decision to undertake a timber sale is a decision to issue a grazing permit.<sup>93</sup> Since a BLM grazing permit authorizes an activity that may have a substantial environmental impact on the public lands,<sup>94</sup> it would seem to follow that the decision whether to issue such a permit, like the decision whether to undertake a timber sale on a National Forest, should be a subject of public consultation,<sup>95</sup> and issuance of a permit should be contingent on compliance with applicable environmental laws.<sup>96</sup> Furthermore, permit terms and conditions,<sup>97</sup> as well as annual adjustments in grazing schedules and livestock numbers,<sup>98</sup> that significantly affect the environment should also be a subject of public consultation.

Since almost all BLM land is already under grazing permit,<sup>99</sup> the issuance of permits for previously ungrazed areas is very rare. But each permit comes up for renewal at least once each decade.<sup>100</sup> The BLM's regulations<sup>101</sup> requiring notice to affected interests of an action concerning a grazing permit, a statement of reasons for the proposed action, opportunity for protest, and administrative appeal of any final decision, should facilitate public participation in the decision whether to renew a permit and in the setting of the terms and conditions of the new permit if one is issued.

The BLM, however, has taken the position that the renewal of a grazing permit is not an "action" within the meaning of its regulations, and therefore is not subject to administrative appeal and requires neither public notice, nor opportunity for protest, nor a demonstration by the Bureau of compliance with any laws.<sup>102</sup> The BLM routinely renews grazing permits without notice to, or input from, an-

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the Endangered Species Act); *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 592 F. Supp. 931, 936-38 (D. Or. 1984) (reviewing timber sales for compliance with National Forest Management Act).

93. See *supra* notes 21-24 and accompanying text. See also *NRDC v. Morton*, 388 F. Supp. at 834 ("In the BLM grazing license program the primary decision-maker is the individual district manager, with his staff, who approves license applications.")

94. See *supra* note 1.

95. See *supra* note 86 and accompanying text.

96. See, e.g., *NRDC v. Morton*, 388 F. Supp. at 834 ("The term 'actions' [as used in NEPA] refers not only to actions taken by federal agencies, but also to decisions made by the agencies, such as the decision to grant a license, which allow another party to take an action affecting the environment.")

97. See *supra* note 25 and accompanying text.

98. See *supra* notes 30-37 and accompanying text.

99. See G. COGGINS, *supra* note 7, § 19.01[3]; Coggins, *supra* note 41, at 237; see also *id.* at 236 (noting that, with respect to BLM grazing lands, the dominant environmental issue is whether and how to improve the condition of already degraded lands, whereas, with respect to National Forest timber lands, the dominant issue is whether to preserve or to cut remaining virgin stands of timber).

100. See 43 U.S.C. §§ 315b, 1752(a)-(b) (1988) (limiting grazing permits to terms of not more than ten years).

101. See *supra* notes 80-85 and accompanying text.

102. See Answer of the Bureau of Land Management to Appellant's Statement of Reasons at 1-5, *Feller v. BLM* (on file with the LAND & WATER LAW REVIEW).



yone. Annual adjustments in grazing use also are generally made without any public consultation.<sup>103</sup> In the BLM's view, an "action" occurs only when the Bureau decides to make some change in the permitted number of livestock or in some other term or condition of the permit.<sup>104</sup>

The BLM's foreclosure of any opportunity to raise environmental issues at permit renewal time would, if sustained, severely limit the public's ability to participate in land management and to see that environmental laws are enforced on BLM rangelands. As long as the BLM simply continued to renew a permit unchanged, no matter how environmentally destructive and contrary to environmental laws the grazing authorized by that permit might be, affected citizens would never be consulted and would have no administrative avenue of redress. The only avenue of redress would be judicial review,<sup>105</sup> which requires legal expertise and financial resources beyond the means of most individuals and grass-roots organizations.

While the BLM's position that the renewal of a grazing permit is not an "action" would allow the BLM to perpetuate the status quo without consulting the public, the BLM's shield against public participation extends even further when the BLM refuses to consult with affected citizens concerning annual decisions on livestock numbers and grazing schedules.<sup>106</sup> Through these annual decisions, significant changes in livestock numbers<sup>107</sup> and management practices,<sup>108</sup> with

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103. See *infra* note 106.

104. Answer of the Bureau of Land Management to Appellant's Statement of Reasons at 12, *Feller v. BLM*; BLM MANUAL, *supra* note 31, § H-4160-1.1. The BLM Manual does not explicitly state whether the original issuance of a grazing permit is an "action" within the meaning of the regulations. The Manual states that the *rejection* of an application for grazing use requires issuance of a proposed decision, suggesting by negative implication that the *granting* of an application does not. *Id.* At least in Arizona, however, the BLM has issued proposed decisions before issuing grazing permits for land newly acquired by the Bureau in land exchanges. See, e.g. PHOENIX DISTRICT OFFICE, BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, NOTICE OF PROPOSED DECISION (Sept. 11, 1990) (proposing to increase the permitted grazing level on an allotment to reflect the addition of newly acquired lands).

105. Judicial review of grazing permits should be available under section 10 of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1988). The APA provides for review of "agency action," and "agency action" is defined to include a license. See *id.* § 551(13).

106. The BLM has made no formal statement of its position as to whether it will consult with affected interests on these annual decisions. It is my experience that the BLM's willingness to engage in such consultation varies from place to place and is changing with time. In 1988, the Area Manager of the BLM's San Juan Resource Area in Utah told me that the BLM never had, and would not, consult with affected interests on these decisions. Staff of the Lower Gila Resource Area in Arizona told me the same thing in 1989.

In the fall of 1989, however, after I filed an administrative appeal of an annual decision on livestock numbers, the San Juan Resource Area changed its position, and since that time has consulted annually with affected interests. The District Manager of the BLM's Phoenix District, which includes the Lower Gila Resource Area, has also recently stated that such consultation would be made available.

107. See, e.g., *Feller*, Santa Maria AMP Comments, *supra* note 30, at 5 (grazing

substantial impacts on public environmental resources, can and do occur without any public notice or opportunity for comment.

The BLM has insisted that the development of area-wide resource management plans<sup>109</sup> and accompanying EISs,<sup>110</sup> and site-specific AMPs,<sup>111</sup> provide the appropriate occasions for public participation in grazing management. For a number of reasons, however, these planning activities are not an adequate substitute for public participation in permitting and annual decisionmaking. First, there is no way of ensuring that such planning activities will take place in any particular area within any particular time, or even at all.<sup>112</sup> Second, most of the BLM's resource management plans and accompanying EISs have been so general in nature that they have had little or no influence on actual grazing management on individual allotments.<sup>113</sup> Finally, even if resource management plans or AMPs prescribe positive management changes, as long as there is no opportunity for public input or administrative review at the permit renewal and annual decisionmaking stages, then there is no means, short of expensive and time-consuming judicial review, of ensuring that the grazing permits and annual decisions will be consistent with resource management plans and AMPs.<sup>114</sup>

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use on the Santa Maria Community Allotment in Arizona increased from fewer than 600 animal unit months in the years 1979-1986 to over 2,000 animal unit months in 1987).

108. An excellent example of the importance of annual grazing management decisions is Arch Canyon on the Comb Wash Allotment in Utah, the location at issue in *Feller v. BLM*. See *infra* note 118 and accompanying text. The annual grazing schedule for the Comb Wash Allotment in Utah determines whether or not Arch Canyon will be grazed, which in turn determines whether or not visitors to Arch Canyon will encounter stripped vegetation, trampled stream banks, and polluted water. See *Feller*, *supra* note 7, at 10.

109. See *supra* notes 38-52 and accompanying text.

110. See *supra* notes 57-65 and accompanying text.

111. See *supra* notes 27-29 and accompanying text.

112. See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 43, at 15-20 (thirteen years after the enactment of FLPMA, less than half of the resource management plans needed to implement the statute have been completed); U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: MORE EMPHASIS NEEDED ON DECLINING AND OVERSTOCKED GRAZING ALLOTMENTS, *supra* note 7, at 40-41 (sixty-six percent of all BLM grazing allotments, including sixty percent of the allotments that have been identified by the BLM as declining or overstocked, are without allotment management plans, and progress in developing plans has been slow).

113. See *supra* notes 51-52 and accompanying text.

114. See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 43, at 25 ("The goals and decisions contained in the Bureau's resource management plans . . . are of little practical value unless steps are taken to convert the conceptual ideals of approved plans into on-the-ground actions."). The GAO found that the BLM "had made only limited progress in converting approved plan goals and decisions into on-the-ground actions." *Id.* at 21.

The BLM's resource management plans usually call for the collection of range monitoring data to determine whether changes in the number of livestock on individual allotments are needed in order to meet resource management objectives. See, e.g., *Hodel II*, 624 F. Supp. at 1050, 1061. Without public oversight, however, the data may be ignored by the BLM. See, e.g., Reply of Appellant Joseph M. Feller to the Bureau of Land Management's Answer at 24-28, *Feller v. BLM* (on file with the LAND &

The BLM has, in effect, maintained two different management processes, one public and the other a private process in which no one but the livestock permittees and the BLM participates. The public process—development of resource management plans, EISs, and AMPs—has proceeded on a plodding schedule limited by budgets, bureaucratic inertia, and the institutional and economic interests in maintenance of the status quo.<sup>115</sup> Even where it has been carried through to completion, the public process has often produced plans and documents that have little or no effect on the ground.<sup>116</sup> Meanwhile, the private process—renewal of grazing permits, and annual decisions on livestock numbers and grazing schedules—proceeds with unfailing regularity and determines actual grazing practices on most allotments.

### III. FELLER V. BUREAU OF LAND MANAGEMENT

This author's frustration with the BLM's dual management system led to the decision in *Feller v. Bureau of Land Management*.<sup>117</sup> A devotee of southern Utah's red rock canyon country, I was appalled at the devastation caused by overgrazing in the winter of 1987-88 in Arch Canyon,<sup>118</sup> a spectacular and popular canyon on BLM land near Natural Bridges National Monument in San Juan County, Utah. I wrote to, and later met with, the Area Manager of the BLM's San Juan Resource Area to express my concern and to find out what opportunities would be available to participate in future decisionmaking by the BLM about cattle grazing in Arch Canyon and the surrounding area. The Area Manager, while expressing considerable sympathy with my concerns, informed me that there would be no opportunity for public input until the BLM developed a new AMP<sup>119</sup> for the Comb Wash Allotment, which included Arch Canyon, and that he could not state when such an AMP would be developed.<sup>120</sup>

Unsatisfied, I requested to be notified of, and given an opportu-

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WATER LAW REVIEW). Opportunity for public input at the time a permit is renewed could help to ensure that changes indicated by the data are implemented.

115. See *supra* notes 7, 29. See also G. COGGINS, *supra* note 7, § 13.04[2] ("BLM planning has been hampered by a chronic (and sometimes self-induced) shortage of resources, personnel, and expertise, poor timing, changes in policy direction, and unenthusiastic high-level commitment.").

116. See *supra* notes 51-52, 65 and accompanying text.

117. *Feller v. Bureau of Land Management*, No. UT-06-89-02 (U.S. Dep't of the Interior, Office of Hearings and Appeals, Hearings Division, August 13, 1990). For a copy of the slip opinion, write the Hearings Division at 6432 Federal Building, Salt Lake City, Utah 84138. A copy is also on file in the office of the LAND & WATER LAW REVIEW.

118. For descriptions of Arch Canyon see D. HALL, *THE HIKER'S GUIDE TO UTAH* 183-87 (1982); M. KELSEY, *CANYON HIKING GUIDE TO THE COLORADO PLATEAU* 136-37 (1986); B. WEIR, *UTAH HANDBOOK* 398 (1988).

119. See *supra* note 27 and accompanying text.

120. For a narrative of the author's dealings with the BLM concerning Arch Canyon and the Comb Wash Allotment, see *Feller*, *supra* note 7.

nity to comment on, the renewal of the grazing permit for the Comb Wash Allotment, which was due to expire at the end of February, 1989.<sup>121</sup> I also requested to be designated an "affected interest," as defined in the BLM's grazing regulations,<sup>122</sup> with respect to the allotment.<sup>123</sup>

Just a few days before the grazing permit was renewed, I was informed in a letter from the BLM that I was being recognized as an "affected interest" with respect to the Comb Wash Allotment.<sup>124</sup> In the same letter, however, the BLM stated its position that the renewal of a grazing permit was not an action within the meaning of its regulations and that therefore I would not be consulted regarding the renewal of the Comb Wash permit.<sup>125</sup>

On February 20, 1989, the BLM issued a new ten-year grazing permit for the Comb Wash Allotment. In keeping with its stated position, the BLM did not give me advance notice of, or opportunity to protest, the issuance of the permit. I learned of the issuance of the permit only when I called the BLM to ask whether it had been issued. On request, the BLM sent me a copy of the permit.

I filed an appeal of the permit issuance to an administrative law judge.<sup>126</sup> In my Statement of Reasons<sup>127</sup> for the appeal of the new permit I made the following allegations:

(1) The issuance of the permit was an "action" within the meaning of the BLM's grazing regulations,<sup>128</sup> but the BLM had failed to give me notice of, a statement of reasons for, or an opportunity to protest its proposed issuance of the permit.<sup>129</sup>

(2) The BLM had failed to prepare an adequate environmental impact statement analyzing the environmental consequences of the permit and considering alternatives.<sup>130</sup>

121. Letter from Joseph M. Feller to Edward Scherick 5 (Aug. 29, 1988) (copy on file with the LAND & WATER LAW REVIEW).

122. See *supra* note 75 and accompanying text.

123. Second letter from Joseph M. Feller to Edward Scherick (Aug. 29, 1988) (copy on file with the LAND & WATER LAW REVIEW).

124. Letter from Acting San Juan Resource Area Manager Sherwin Sandberg to Joseph Feller (February 3, 1989) (copy on file with the LAND & WATER LAW REVIEW).

125. *Id.*

126. See *supra* note 85 and accompanying text.

127. See 43 C.F.R. § 4.470(a) (1990).

128. Statement of Reasons for Appeal at 1-4, *Feller v. BLM*.

129. *Id.* at 4-5.

130. *Id.* at 6-7. My NEPA claim was based on the holding in *NRDC v. Morton*. See *supra* note 60 and accompanying text. The court in *Morton* held that NEPA requires the BLM to prepare EISs that assess the "actual environmental effects of particular permits or groups of permits in specific areas." 388 F. Supp. at 841. See also *id.* ("The crucial point is that the specific environmental effects of the permits issued, or to be issued, in each district be assessed.")

The BLM had prepared, in conjunction with the San Juan Resource Management Plan, an area-wide EIS that purported to satisfy the *Morton* mandate. See *supra* note 65. I alleged, however, that that EIS did not contain sufficient site-specific information



(3) The BLM had failed to ensure that the grazing authorized by the permit would not cause violations of water quality standards in the streams on the allotment.<sup>131</sup>

(4) The BLM had failed to determine whether the number of livestock authorized by the permit was within the livestock carrying capacity of the allotment.<sup>132</sup>

(5) The BLM had failed to include or incorporate in the permit the terms and conditions necessary to protect the environmental and recreational resources on the allotment.<sup>133</sup>

(6) The BLM had failed to consider whether selected portions of the allotment, such as Arch Canyon, should be removed from livestock grazing in order to protect competing values and uses.<sup>134</sup>

The relief requested was that the permit be vacated and remanded to the BLM for correction of the alleged errors and development of a new permit.<sup>135</sup>

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or analysis to satisfy the requirements of NEPA or *Morton* with respect to the issuance of the grazing permit for the Comb Wash Allotment. *See id.*

My argument is supported by dicta in *Hodel II*, *see supra* note 65. Although the *Hodel* court held that a non-specific EIS similar to the one accompanying the San Juan Resource Management Plan was sufficient to support an area-wide land use plan, the court also suggested that greater detail would be required when a more site-specific decision is involved. *See* 624 F. Supp. at 1051 ("the scope of the EIS is determined by the scope of the proposed action"); *id.* at 1055 ("Again, the specificity of the EIS is governed by the proposed action.").

I did not claim that a separate EIS is always required for every grazing permit. Rather, I argued that the area-wide EIS would have sufficed if it contained sufficient detailed information about the Comb Wash Allotment, but it did not, so additional NEPA documentation was required. *See* Reply of Appellant Joseph M. Feller to the Bureau of Land Management's Answer at 22 n.8, *Feller v. BLM*.

For allotments on which livestock grazing does not significantly affect the environment, the requirements of NEPA could be satisfied by an environmental assessment, a shorter and simpler document than an EIS. *See* 40 C.F.R. § 1508.9 (1990). Where environmental effects are significant, and they have not been previously analyzed, an EIS is required. *See id.* §§ 1502.3, 1508.27.

131. Statement of Reasons for Appeal at 7-8, *Feller v. BLM*. Water quality standards are required by section 303 of the Clean Water Act, 33 U.S.C. § 1313 (1988). Compliance with such standards by federal agencies is required by section 313 of the Act, *id.* § 1323. For a discussion of the application of water quality standards to livestock grazing on the public lands, see Braun, *Emerging Limits on Federal Land Management Discretion: Livestock, Riparian Ecosystems, and Clean Water Law*, 17 ENVTL. L. 43 (1986).

132. Statement of Reasons for Appeal at 8-10, *Feller v. BLM*. The requirement that authorized livestock grazing be within carrying capacity is found at 43 C.F.R. § 4130.6-1(a) (1990). *See also Hodel II*, 624 F. Supp. at 1060 (noting that the BLM is required to determine grazing capacity at the time it issues grazing permits and prepares allotment management plans).

133. Statement of Reasons for Appeal at 10-11, *Feller v. BLM* (citing 43 U.S.C. §§ 1752(d), (e) (1988)). *See supra* notes 25-29 and accompanying text.

134. Statement of Reasons for Appeal at 13-14, *Feller v. BLM* (citing 43 U.S.C. § 1702(c) (1988) (definition of "multiple use")); Reply of Appellant Joseph M. Feller to the Bureau of Land Management's Answer at 33-34, *Feller v. BLM*.

135. Notice of Appeal, *Feller v. BLM*. Vacation of the permit would not require the permittee to cease grazing on the allotment. The BLM's regulations allow contin-



In its Answer to my Statement of Reasons, the BLM requested that the appeal be dismissed because the issuance of a grazing permit to an existing permittee is not an action subject to protest and appeal.<sup>136</sup> The permit, according to the BLM, "does not convey any new rights or privileges . . . , but merely recognizes the grazing preference situation between the BLM and the [permittee] which had existed in the past."<sup>137</sup> The BLM characterized the expiration of the previous permit as an "arbitrary" date<sup>138</sup> and concluded that "Mr. Feller should be required to wait until some decision comes along involving the allocation of this range before he files an appeal on behalf of environmental interests."<sup>139</sup>

Because the issues raised by the appeal were primarily legal, the BLM and I agreed to waive the normal evidentiary hearing and to have the appeal decided on the written submissions.<sup>140</sup>

Chief District Administrative Law Judge John R. Rampton, Jr. issued his decision on the appeal on August 13, 1990. Judge Rampton decided only the first issue raised by the appeal, namely, whether the renewal of a grazing permit is an action within the meaning of the BLM's regulations requiring notice, a statement of reasons, and opportunity for protest and appeal. Judge Rampton decided that it is:

The renewal of a ten-year grazing permit clearly is an action both on an application for a permit and relating to its terms and conditions. It is therefore subject to protest and appeal pursuant to 43 C.F.R. Subpart 4160.<sup>141</sup>

Judge Rampton also concluded that the BLM's failure to provide notice and opportunity for protest was a substantial error requiring a remand to the BLM:

[V]iolations of the applicable regulation at 43 C.F.R. Subpart 4160 did occur to the substantial prejudice of Mr. Feller's ability to participate as an affected interest in BLM's decision to reauthorize grazing in the Comb Wash allotment. For that reason, BLM's decision to issue the present 10-year grazing permit to the White Mesa Ute Cattle Company must be set aside and the matter must be returned to BLM for proper processing.<sup>142</sup>

Judge Rampton gave the BLM sixty days in which to issue a new de-

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ued grazing at the preceding year's level pending resolution of an appeal. See 43 C.F.R. § 4160.3 (1990).

136. Answer of the Bureau of Land Management to Appellant's Statement of Reasons 2-5, *Feller v. BLM*.

137. *Id.* at 2.

138. *Id.* at 3.

139. *Id.* at 12.

140. See *Feller v. BLM*, slip op. at 2.

141. *Id.* at 4.

142. *Id.* at 5.

cision in conformance with the regulations.<sup>143</sup> He ordered that "grazing levels should be maintained as currently authorized" in the interim while the BLM develops a new permit.<sup>144</sup>

#### IV. IMPLICATIONS

##### A. *The BLM's Responsibilities When Renewing a Grazing Permit*

Because he was remanding the matter to the BLM, and because he concluded that there was not an adequate factual record to support a decision on the other issues raised by the appeal, Judge Rampton did not decide whether my allegations concerning NEPA compliance, livestock carrying capacity, water quality standards, and the terms and conditions of the permit were meritorious.<sup>145</sup> He did, however, instruct the BLM to address those issues in its statement of reasons on remand:

On remand, BLM should take care to set out in an articulate and reasoned manner the basis for any decision regarding grazing in the Comb Wash allotment and, among other things, the decision should set forth the basis for asserting compliance with, or exemption from, the applicable provisions of law and regulation . . . .<sup>146</sup>

In leaving open the possibility that the BLM could demonstrate "exemption" from applicable laws and regulations, Judge Rampton's opinion was a model of judicial restraint. Without giving the Bureau the fullest opportunity to explain its position, he was not prepared to declare that NEPA, FLPMA, the Clean Water Act, or the substantive provisions of the BLM's regulations created any prerequisites to the issuance or renewal of a grazing permit. But he did hold that the regulations' procedural provision for a statement of reasons at least requires the BLM to explain its position with respect to those laws. In complying with Judge Rampton's order, the BLM may find it extremely difficult to argue credibly that it may totally ignore those laws at permit renewal time.

At the very minimum, the BLM, when renewing a grazing permit, should be required to review its available range monitoring data to determine whether the data indicate a need for an adjustment in the number of livestock on the allotment,<sup>147</sup> to make any modifications to

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143. *Id.* at 6.

144. *Id.* I had not requested any substantive relief, only a remand, and I had, in my reply brief, noted Judge Rampton's authority to authorize continued grazing of the allotment during the pendency of the remand. See Reply of Appellant Joseph M. Feller to the Bureau of Land Management's Answer at 11-12, *Feller v. BLM*.

145. *Feller v. BLM*, slip op. at 6.

146. *Id.*

147. See 43 C.F.R. § 4130.6-1 (1990) (requiring that every grazing permit specify a number of livestock that is within the carrying capacity of the allotment, as determined through monitoring). See also *Hodel II*, 624 F. Supp. at 1060 (noting that "the

the permit required by applicable land use plans,<sup>148</sup> and to address violations of water quality<sup>149</sup> or other environmental standards that have been documented in existing environmental impact statements or other agency records. The Bureau should also at least give rational consideration to whether other changes in the terms and conditions of permits should be made in response to additional environmental concerns raised by affected interests. Finally, permit renewal would be an appropriate occasion for analysis and consideration under NEPA of allotment-specific environmental impacts that have not been adequately addressed in area-wide environmental impact statements.<sup>150</sup>

### B. Opportunities for Public Participation

Judge Rampton's decision clarifies an important opportunity for concerned individuals and organizations to act on their convictions about the need for changes in the way the BLM manages livestock grazing on the public lands. Although much has been written,<sup>151</sup> and countless complaints have been voiced, about the abuse of public lands by overgrazing, public participation in livestock management on BLM lands at the allotment level has been virtually nonexistent over much of the West.<sup>152</sup> While participation in the development of area-wide land use plans<sup>153</sup> has been somewhat greater, those plans have generally not included the detailed prescriptions (such as numbers of livestock, which areas are to be rested and which grazed each year, and the dates of use of each pasture) that actually determine the impact of livestock grazing on environmental resources.<sup>154</sup> As long as the

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BLM is required to determine grazing capacity at the time it issues grazing permits and prepares Allotment Management Plans").

148. See 43 C.F.R. § 4100.0-8 (1990) (requiring that livestock grazing activities be in conformance with land use plans). See also *Hodel I*, 618 F. Supp. at 875-76 (holding that compliance with land use plans in grazing permits is mandatory); 43 U.S.C. § 1732(a) (1988) (requiring that the public lands be managed "in accordance with" land use plans).

149. See *supra* note 131.

150. See *supra* note 130. See also BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, INSTRUCTION MEMORANDUM No. 90-552, PLAN CONFORMANCE AND ENVIRONMENTAL REVIEW REQUIREMENTS IN THE RANGE MANAGEMENT PROGRAM at Attachment 1-4 (existing environmental impact statements should be reviewed when a grazing permit is renewed); *id.* at Attachment 1-5 (additional NEPA analysis and documentation is required if a proposed site-specific action is not adequately covered by existing NEPA documents).

151. See, e.g., *supra* note 1.

152. See G. COGGINS, *supra* note 7, § 20.05, at 20-34 (suggesting that high elevation, forested lands administered by the United States Forest Service may attract greater public interest than low elevation, desert lands administered by the BLM).

In a December 1989 telephone survey of BLM district managers in Arizona, I found that only one BLM grazing allotment in the entire state had had any individuals or organizations designated as "affected interests," see *supra* note 75 and accompanying text, for the purpose of participation in grazing management. With respect to that allotment, just one organization, and no individuals, had been designated as an "affected interest."

153. See *supra* notes 38-50 and accompanying text.

154. See *supra* notes 51-52 and accompanying text.

BLM insists on leaving specific management prescriptions out of its area-wide plans, public participation at the allotment level will be needed to ensure protection of environmental resources.<sup>155</sup>

Ideally, public participation in the issuance and renewal of grazing permits would result in permits that contain realistic livestock numbers rather than blank checks,<sup>156</sup> and in permit terms and conditions that are sufficient to protect environmental resources. Unless and until that happens, however, public participation will also be necessary in the BLM's annual decisions on livestock numbers and grazing schedules.<sup>157</sup> Where these annual decisions set the critical parameters—levels, dates, and locations of livestock grazing—that actually determine the condition of public environmental resources,<sup>158</sup> they are an appropriate subject for consultation with affected interests. Under the BLM's grazing regulations, such consultation could be required either because these annual decisions are "actions" requiring notice to affected interests and opportunity to protest,<sup>159</sup> or because they represent temporary modifications of grazing use, which require "consultation, cooperation, and coordination" with affected interests.<sup>160</sup>

Annual consultation with affected interests need not be an elaborate or formal process, and need not be overly burdensome for the BLM. On the Comb Wash Allotment, for example, where the BLM has recently begun to consult with affected interests about its annual grazing schedule,<sup>161</sup> the BLM simply sends out a notice of the proposed number of livestock and the proposed grazing schedule and gives the affected interests a few weeks in which to submit written comments.<sup>162</sup> The BLM also invites affected interests to visit the al-

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155. Without public oversight, general management objectives and guidance developed in land use plans and elsewhere may be ignored when specific management prescriptions are developed for individual allotments. Compare, e.g., BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, LOWER GILA NORTH DRAFT GRAZING ENVIRONMENTAL IMPACT STATEMENT 80 (1982) (stating that an allotment management plan (AMP) would be developed that would provide "several years" of rest for the riparian area of the Santa Maria River in order to facilitate regeneration of woody plants) with BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, DRAFT SANTA MARIA COMMUNITY/GRAPEVINE SPRINGS RANCH ALLOTMENT MANAGEMENT PLAN 7 (1990) (hereinafter cited as DRAFT SANTA MARIA AMP) (providing no rest period for the riparian area longer than six months at a time); BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, LOWER GILA NORTH HABITAT MANAGEMENT PLAN 17 (1983) (stating that AMP's would "discourage new livestock water development which would increase livestock distribution within bighorn sheep habitat or in desert tortoise habitat") with DRAFT SANTA MARIA AMP at 8 (providing for new livestock water developments that would increase livestock distribution within bighorn sheep habitat and in desert tortoise habitat). See also *supra* note 114.

156. See *supra* notes 36-37 and accompanying text.

157. See *supra* notes 30-34 and accompanying text.

158. *Id.*

159. See 43 C.F.R. § 4160.1-1 (1990); *supra* notes 80-82 and accompanying text.

160. See 43 C.F.R. § 4110.3-3(c) (1990); *supra* note 79 and accompanying text.

161. See *supra* note 33 and accompanying text.

162. See, e.g., Letter from Edward Scherick, San Juan Resource Area Manager, BLM, to Joseph Feller (Sept. 21, 1990) (on file with the LAND & WATER LAND REVIEW).

lotment with BLM staff and the permittee to review conditions and discuss the proposed schedule.<sup>163</sup> This informal process of consultation has increased communication and understanding between concerned citizens and BLM staff and has also, in my opinion, improved the management of the allotment.

Such annual consultation will not necessarily occur on every allotment. It will only be required on those allotments where grazing is of sufficient public concern to prompt citizens to request designation as "affected interests." Allotments that do not contain significant scenic, recreational, or wildlife resources, or that are already so well managed that those resources are not being damaged, will probably not attract such requests. In fact, the vast majority of BLM grazing allotments currently have no designated affected interests.<sup>164</sup>

## V. CONCLUSION

The opportunity for concerned citizens to participate in the issuance and renewal of grazing permits by the BLM could positively affect management in two ways. First, the opportunity to insist on compliance with environmental laws (and, as a last resort, to appeal decisions that do not conform to those laws) could begin to bring some semblance of legal normalcy to public lands livestock grazing. In general, such grazing is currently conducted for the most part as if environmental laws did not exist.<sup>165</sup> Grazing permits are regularly issued and renewed as "standard operating procedure" without any evaluation or consideration of their effect on water quality, on threatened and endangered species, or on any of the various other resources that the BLM is statutorily obligated to protect.<sup>166</sup>

Second, even without recourse to specific statutory mandates, the opportunity for concerned citizens to be notified of, to express their views on, and to suggest alternatives to, proposed local grazing management decisions may have a significant positive impact. It is my experience that, despite the weight of the BLM's history and traditions,<sup>167</sup> local BLM managers are generally not unresponsive to public criticism of their actions if that criticism is sufficiently specific and constructive.

Despite claims by livestock operators, and by some employees of the BLM, that the management of individual grazing allotments is a

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163. See, e.g., Letter from Edward Scherick to Joseph Feller (Sept. 11, 1990) (on file with the LAND & WATER LAW REVIEW).

164. See, e.g., *supra* note 152.

165. See *supra* note 7.

166. See, e.g., Federal Land Policy and Management Act § 102(a)(8), 43 U.S.C. § 1701(a)(8) (1988) (congressional policy that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values").

167. See *supra* note 7.



technical matter in which the participation of the non-professional public is neither necessary nor helpful, in fact such participation is absolutely essential if public rangelands are to be managed in a way that adequately protects environmental resources.<sup>168</sup> It is my repeated experience that, even where BLM personnel are aware that grazing is excessive or in need of better management, and even where broad-scale plans and policies call for corrective measures, without close public scrutiny and involvement those measures are often not taken, and those policies are often distorted beyond recognition in their on-the-ground application.<sup>169</sup> This observation is not necessarily an indictment of the BLM; it is merely a statement of the inevitable. When decisions are made in a forum in which only one group of interests is represented, those decisions will tend to be one-sided. Active participation by interested citizens, however, may help to bring balance to BLM management and to ensure that the lofty policies expressed by Congress in FLPMA, NEPA, and other environmental statutes find a home on the range.

## VI. EPILOGUE

On March 6, 1991, the BLM issued a Notice of Final Decision<sup>170</sup> in response to Judge Rampton's remand in *Feller v. BLM*. In the Notice, the BLM argued that my NEPA claim<sup>171</sup> should have been raised at the time the BLM developed its area-wide Resource Management Plan<sup>172</sup> and accompanying EIS,<sup>173</sup> and that such a claim could not be raised in a challenge to the issuance of a grazing permit.<sup>174</sup> The BLM also claimed that its obligations under the multiple-use mandate of FLPMA had been fully satisfied in the development of the Resource Management Plan,<sup>175</sup> and that I had presented no evidence of any Clean Water Act violations on the Comb Wash Allotment.<sup>176</sup>

With respect to my claim that the BLM had failed to ensure that authorized grazing was within the allotment's carrying capacity,<sup>177</sup> the

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168. See G. COGGINS, *supra* note 7, at 99 ("[U]ntrammelled expertise has had its day and has not worked.")

169. See *supra* notes 114, 155. See also G. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA and the Multiple Use Mandate*, 14 ENVTL. L. 1, 99 (1983) ("Many range managers ardently despise the notion that their discretion is bounded by prior land use plans.")

170. Moab District, Bureau of Land Management, U.S. Dep't of the Interior, Notice of Final Decision (Mar. 6, 1991) [hereinafter Final Decision on Remand]. The Notice of Final Decision was preceded by a Notice of Proposed Decision (Oct. 9, 1990), of which I filed a protest (Oct. 24, 1990).

171. See *supra* note 130 and accompanying text.

172. See *supra* note 52.

173. See *supra* note 65.

174. Final Decision on Remand, *supra* note 170, at 2-3.

175. *Id.*

176. *Id.* But see Supplement to Statement of Reasons for Appeal at 2-4, *Feller v. BLM* (presenting evidence of violations of water quality standards) (on file with the LAND & WATER LAW REVIEW).

177. See *supra* note 132 and accompanying text.

BLM reiterated that, as stated in the Resource Management Plan,<sup>178</sup> adjustments to the authorized grazing level would be made based on range monitoring data.<sup>179</sup> The BLM also announced that it would initiate a process to develop a "Coordinated Resource Management Plan" (CRMP)<sup>180</sup> that would revise the AMP for the Comb Wash Allotment, and that it would defer issuance of a new ten-year permit until the CRMP was complete.<sup>181</sup> In the interim, continued grazing of the allotment would be authorized through one-year permits.<sup>182</sup>

The National Wildlife Federation, The Southern Utah Wilderness Alliance, and I filed a joint appeal of the BLM's decision, arguing that the BLM had not fulfilled Judge Rampton's order<sup>183</sup> that it explain how it was complying with the applicable statutes and regulations.<sup>184</sup> We also filed a Motion for Interim Relief, requesting that grazing be suspended on the most environmentally sensitive parts of the allotment until the BLM adequately complied with the order.<sup>185</sup>

Five stockgrowers' and agricultural organizations, as well as the permittee, moved to intervene in the appeal and, along with the BLM, moved that the appeal be dismissed on ripeness and other grounds.<sup>186</sup>

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178. See *supra* note 52 and accompanying text.

179. Final Decision on Remand, *supra* note 170, at 3. *But see* Protest, *supra* note 170, at 4-5 (arguing that the BLM must consider other factors in addition to range monitoring data when it adjusts grazing use levels).

180. Coordinated Resource Management (CRM) planning is a process that has been adopted by the BLM and other agencies in Utah for addressing some site-specific land use problems such as the development or revision of AMPs. See COOPERATIVE EXTENSION SERVICE, UTAH STATE UNIVERSITY, UTAH COORDINATED RESOURCE MANAGEMENT AND PLANNING HANDBOOK AND GUIDELINES (1989). CRM planning is not mentioned in any federal statutes or regulations; it is simply a process that the BLM has chosen in some instances for performing its obligations under those statutes and regulations.

CRM planning should not be confused with the development of a BLM Resource Management Plan, which is specifically authorized by FLPMA and by the BLM's regulations, and which covers a much larger area than that covered by a CRM planning process. See *supra* notes 38-52 and accompanying text.

181. Final Decision on Remand, *supra* note 170, at 3-4.

182. *Id.* at 4.

183. See *supra* note 146 and accompanying text.

184. Appeal and Statement of Reasons, National Wildlife Federation v. Bureau of Land Management, No. UT-06-91-01 (U.S. Dep't of the Interior, Office of Hearings and Appeals, Hearings Division, filed Apr. 5, 1991) [hereinafter *NWF v. BLM*] (on file with the LAND & WATER LAW REVIEW).

185. Appellants' Motion for Interim Relief, *NWF v. BLM*. The portion of the allotment on which it was requested that grazing be suspended comprised Arch Canyon and four other canyons, which together contain approximately ten percent of the livestock forage on the allotment. *Id.* at 2.

186. See Petition for Intervention, Motion to Dismiss Appeal, and Alternative Request for Evidentiary Hearing, *NWF v. BLM* (filed by the Public Lands Council, the National Cattlemen's Association, and the American Sheep Industry Association) [hereinafter PLC/NCA/ASI Petition]; Motion to Dismiss, *NWF v. BLM* (filed by the BLM); Petition of American Farm Bureau Federation and Utah Farm Bureau Federation to Intervene, Motion to Dismiss Appeal, Alternative Request for Evidentiary Hearing, *NWF v. BLM*; Petition for Intervention, Motion to Dismiss Appeal, and Alternative Request for Evidentiary Hearing, *NWF v. BLM* (filed by permitted Ute Mountain Ute Indian Tribe) (all documents on file with the LAND & WATER LAW REVIEW).

The ripeness argument was based on the pending development of a CRMP; the BLM and the intervenors argued that the issues raised in the appeal would not be ripe for review until the CRMP is complete and a new ten-year permit is issued.<sup>187</sup>

On July 25, 1991, Judge Rampton issued an Order granting the motions to intervene but denying the motions to dismiss.<sup>188</sup> With respect to the ripeness issue, Judge Rampton concluded that the appeal was ripe for review because the BLM had decided to authorize grazing in the interim while the CRMP was under development:

The CRMP process will not provide an adequate forum for review. The CRMP will make recommendations for future allotments, but it will not prevent the damage that the appellants allege is occurring before the study is complete. The CRMP process may take several years and will likely not be completed before the next grazing season.<sup>189</sup>

Judge Rampton's Order also scheduled a hearing on the merits of the appeal and on the appellants' Motion for Interim Relief. The Order stated that, "[i]f the appellants are able to show adequate cause," the motion will be granted.<sup>190</sup>

Judge Rampton's July 25 Order is significant for two reasons. First, it establishes that, while grazing continues, the BLM may not indefinitely defer review of its compliance with environmental laws simply by announcing its intention to engage in additional planning. Second, it signals that, where it is alleged that the BLM is authorizing grazing without compliance with a previous order of an administrative law judge, the judge may be willing at least to consider temporarily suspending grazing in especially sensitive areas pending compliance by the BLM.

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187. See, e.g., PLC/NCA/ASI Petition, *supra* note 186, at 5-6.

188. *NWF v. BLM* (order dated July 25, 1991).

189. *Id.* at 5. See also *id.* at 2 ("Grazing privileges were granted through annual permits. These grazing privileges are present interests, and challenges to the issuance of such permits are ripe.")

190. *Id.* at 5.