



Defending the Planet One Beat at a Time

**102 Dogwood Lane
Pittsburgh, Pennsylvania 15237**

February 29, 2004

VIA OVERNIGHT MAIL & ELECTRONIC MAIL

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

**Re: Grazing Administration—Exclusive of Alaska; Proposed Rule Amendments,
43 CFR Part 4100, 68 FR 68451-68474.**

Dear Sir or Madam:

The members of Rock the Earth, a national nonprofit corporation, hereby submit comments on the proposed amendments to the Bureau of Land Management's ("BLM") regulations concerning how BLM administers livestock grazing on public lands, which amendments were published in the Federal Register on December 8, 2003 (68 FR 68451-68474) (hereinafter "proposed amendments"). The stated purpose for these proposed amendments is to "improve working relations with permittees and lessees, protecting the health of the rangelands, and increasing administrative efficiency and effectiveness." DEIS 03-62, December 2003, Executive Summary. It is our opinion, however, that in attempting to accomplish such goals, the BLM has taken actions that violate law, are not in accord with their Mission and are contrary to the public's best interests.

I. Rock the Earth

Rock the Earth ("RtE") is a Pennsylvania nonprofit corporation with a national membership of concerned citizens who believe that the public lands of the United States, while subject to multiple uses, must, nevertheless be maintained in a responsible and sustainable

manner. Furthermore, as undeveloped federal property, public lands are reserved lands that the government holds in the public's trust, often critical to a healthy environment and ecosystem, and are important for many unique, threatened and endangered forms of life. RtE's membership includes many environmental professionals who practice in the fields of science, engineering, law, and public policy. Members of RtE regularly utilize public lands, year-round, for recreational activities. Its members regularly seek the peace, quiet and solitude of these spaces for reflection, spiritual inspiration, and exercise, while engaging in recreational activities which include hiking, camping, photography, meditation, cross-country skiing and non-motorized water sports. Its members will be directly affected by the proposed amendments. Furthermore, a failure to maintain BLM public lands in a manner that is sustainable will compromise their ability to be used for their intended purpose and may threaten to upset the ecological balance for which these lands were set aside.

II. The Proposed Amendments Are Contrary To Law And Fail to Address Key Issues.

More than 160 million acres of public lands in the western United States have been determined to be suitable for livestock grazing and are subject to regulation. The BLM administers its grazing program—excluding Alaska—under 43 CFR 4100 of the Code of Federal Regulations. These grazing regulations implement the laws that govern public land grazing. The primary statutory laws that the regulations implement are: the Taylor Grazing Act of 1934 (“TGA”), 43 U.S.C. §§315, 315a-315r, as amended, and the Federal Land Policy and Management Act of 1976 (“FLPMA”), 43 U.S.C. §§1701 et seq., as amended by the Public Rangelands Improvement Act of 1978 (“PRIA”), 43 U.S.C. §§1901 et seq.¹ See 68 FR 68453.

In response to damage to the public rangelands caused by decades of unregulated livestock grazing, Congress enacted the TGA in 1934, in part, to preserve the land and its resources from injury due to overgrazing. 43 U.S.C. §315a. Specifically, one of the purposes of the TGA is “to preserve the land and its resources from destruction or unnecessary injury.” 43 U.S.C. §315a.

In 1976, in response to a further degradation of federal lands, the Congress enacted the FLPMA, declaring that it shall be the policy of the United States to manage public lands, in accordance with the views of the general public, in a sustainable matter. Specifically, the FLPMA provides:

- (a) The Congress declares that it is the policy of the United States that:

¹ In addition to the TGA, FLPMA and the PRIA, other statutory authorities implemented by the regulations are: Section 4 of the Oregon and California Railroad Lands Act (43 U.S.C. §1181d); Executive Orders that transfer land acquired under the Bankhead-Jones Farm Tenant Act (7 U.S.C. §1012 to the Secretary of the Interior and authorize administration under TGA; and public land orders, executive orders and agreements authorizing the Secretary of the Interior to administer livestock grazing on specified lands under TGA or other lands as specified. See 68 FR 68453.

... (5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations ***after considering the views of the general public***; and to structure adjudication procedures to ***assure adequate third party participation***, objective administrative review of initial decisions, and expeditious decision-making;...

(8) 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 archeological 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 and use.

43 U.S.C. §1701(a) (emphasis added). The term "public involvement" means the "opportunity for participation by affected citizens in rulemaking, decisionmaking, and planning with respect to the public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance." 43 U.S.C. §1702

Sadly, it was but two years after the passage of the FLPMA, that the Congress deemed it necessary to enact the PRIA, in which Congress declared that, due the current practices on public lands, there were unsatisfactory conditions: presenting a high risk of soil loss, desertification and a resultant unproductivity for large acreages of the public lands; contributing to unacceptable levels of siltation and salinity in major western watersheds including the Colorado River; threatening important and frequently critical fish and wildlife habitat; increasing surface runoff and flood danger; reducing the value of such lands for recreational and esthetic purposes; and may ultimately lead to unpredictable and undesirable long-term and regional climatic and economic changes. See PRIA, 43 U.S.C. §1901(a)(3).

Not only do the statutes enacted to address grazing specifically require meaningful public review of BLM decisions, but so does the National Environmental Policy Act, 42 U.S.C. §§4321 et seq. ("NEPA"). NEPA's fundamental purposes are to insure fully informed decision-making and to provide for public participation in environmental analyses and decision-making. See id. § 1500.1(b), (c). NEPA requires that the decision maker, as well as the public, be fully informed with respect to environmental information and consequences — i.e., "that environmental information is available to public officials and citizens before decisions are made and before action is taken." 40 C.F.R. § 1500.1(b). See also Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993) (stating that NEPA's purpose is "to protect the environment, not the economic interests of those adversely affected by agency decisions").

Based upon the mandates in these Congressionally enacted statutes, the BLM has a duty to not only preserve and protect these public lands in their natural condition, but must do so in a

way that allows for third party participation in the process. These statutes specifically provide that BLM, in exercising discretionary authority in administering the public lands program *must* seek out and consider the views of the general public. This is not an optional requirement. Unfortunately, the proposed amendments do not serve to further either of these mandates to preserve and protect these lands or to engage the public, but rather run contrary to these laws and fail to address other areas that would advance these goals.

A. The Proposed Amendments are Contrary to Law and BLM Policy.

RtE objects to the proposed amendments as the proposed amendments are contrary to Law and BLM policy in that they modify the public participation procedures and opportunities for the interested public to engage in the decision-making process. Furthermore, the proposed amendments place too much discretion into the hands of local BLM land managers and permittees. Finally, the proposed amendments are counter to a sustainable grazing policy.

The proposed amendments modify public participation requirements, eliminating or restricting public participation in several areas:

- Allotment adjustments²
- Changes in Active Use³
- Renewals
- Modifications to permits/leases

See Proposed Amendments, §§ 4110.2-4, 4110.3-3, 4130.2, 4130.3-3. Although the BLM could, at its discretion, still solicit public input on these types of decisions, the change is intended to “allow the authorized officer and the grazing operator the discretion to determine appropriate on-the-ground management actions.” *Id.* at 2-21. In effect, this change would insulate the BLM from any review, assessment, criticism, or other non-permittee input on controversial grazing management actions. It would further allow the agency to seal itself off from valuable information (from a conservation group, for example) that could directly inform the types of decisions listed above. Finally, there would also be no right to appeal field office decisions to the BLM State Director. 68 FR 68456.

The elimination of public participation in these areas is directly contrary to both the plain language and the statutory intent of NEPA and the laws enacted by Congress to manage public lands with adequate public participation and after considering the views of the general public. The proposed regulations simply remove the opportunity for the general public (or even the interested public potentially impacted by such decisions) to notice of changes in permits, use or allotments as well as renewals. Removing public participation from such actions runs directly contrary to the plain language of the TGA and the progeny of statutes and regulations that

² BLM proposes to remove the requirement that BLM consult with the interested public before making an allotment boundary adjustment. 68 FR 68459.

³ 68 FR 68460.

followed implementing the nation's grazing policy, not to mention being counter to common administrative procedures found in other federal permitting schemes.⁴

In addition, the proposed amendments place too much discretionary control into the hands of local land managers and permittees. For example, under the proposed amendments, trade of use between permittees is left to private arrangement between the permittees, which could lead to inconsistent or unsustainable uses of public lands. See 68 FR 68456. Further, BLM proposes to amend 43 CFR §4160.1, to specify that a biological evaluation or biological assessment that BLM prepares for purposes of the Endangered Species Act (16 U.S.C. 1531-1544), is not a proposed decision for purposes of a protest to BLM, or a final decision for purposes of appeal to the Office of Hearings and Appeals. This rule modification would stand contrary to the Interior Board of Land Appeals' decision in Blake v. BLM, 145 IBLA 154, 166 (1998), affirmed 156 IBLA 280 (2000), which held that the protest and appeal provisions of 43 CFR subpart 4160 apply to a biological evaluation or biological assessment. 68 FR 68464.

Finally, cooperative range improvement agreements regarding new permanent water developments, would also not be subject to public scrutiny, but, rather, would be completed through agreements between BLM and the permittee. To provide for trade of use between permittees, non-appealable biological assessments, and cooperative range improvement plans all without interested public input, places an inordinate, if not illegal, amount of discretionary control into the hands of local BLM managers and permittees.

The proposed amendments also violate law in that they are contrary to a sustainable grazing policy. BLM, in the proposed amendments, eliminates the ability for public lands to be subject to a conservation easement.⁵ Furthermore, in reviewing whether a permittee should be subject to enforcement, the proposed amendments would clarify and limit BLM's enforcement authority to prohibited acts performed by the permittee or lessee *only* on the allotted land where they are authorized to graze under a BLM permit or lease. See 43 CFR 4140.1, 68 FR 68464, 68472-68473. Which means that if a permittee violates the law on property upon which they are not licensed or permitted to graze or upon non-BLM property, such violations shall not be considered in any enforcement proceeding.

⁴ See e.g., Water Pollution Prevention and Control Act, 33 U.S.C. § 1342; Air Pollution Prevention and Control Act, 42 U.S.C. §§7661 et seq., Surface Mining Control & Reclamation Act, 30 U.S.C. §1263, and the rules and regulations promulgated thereunder.

⁵ BLM rationalizes the removal of the language from the regulation that allowed BLM to issue conservation use permits on the basis of a court decision in Public Lands Council v. Babbitt, 929 F.Supp. 1436 (Wy. 1996), rev'd in part and aff'd in part, 167 F.3d 1287 (10th Cir. 1999). However, while the District Court held that the Secretary lacks the statutory authority to issue grazing permits intended exclusively for conservation use, the 10th Circuit never took up this issue. Therefore, a mere single district court decision has led to the BLM to propose eliminating this mechanism for arguably achieving the mandates of PRIA to "manage, maintain and improve the conditions of the public rangelands so they become as feasible as possible for all rangeland values." 43 U.S.C. §1901 (b)(2).

Finally, the proposed amendments are contrary to a sustainable grazing policy in that they allow for continued grazing (perhaps contrary to permit conditions, laws, statutes, regulations or policies) while adjudications are pending, even after a decision by BLM is stayed and *even when there is no valid permit or lease in effect* at the time of the appealed decision. See 43 CFR §4160.4; 68 FR 68465 (emphasis added). Given that such adjudications (especially if stayed) could remain outstanding for extended periods of time, allowing continued grazing (which may be violative of law or policy) may lead to further damage to the resource and would be contrary to a sustainable grazing policy.

RtE opposes the proposed amendments because they are contrary to Congressional mandates and agency regulations. Not only do the proposed amendments eliminate the requisite participation of the interested public in several critical areas, but they allocate too much discretion of the day-to-day operations of such lands to local BLM managers and permittees, while allowing grazing practices that are simply not sustainable uses of public lands.

B. The Proposed Amendments Fail to Address Several Critical Areas.

In addition to the proposed amendments being contrary to law and BLM policy, the proposed amendments also fail to address several critical areas for which BLM received comments during the Scoping process. Initially, the proposed amendments fail to review grazing fees and the need for said fees to reflect current market values for livestock. Currently, fees for grazing animals on public lands are well below the actual costs incurred by such activities and do not account for the adverse environmental damage that may result.⁶

In addition, BLM fails to change the definition or better define the process of “monitoring” of grazing leaseholds. Instead, what BLM proposes is that monitoring methodologies be handled through policy guidance in manuals and handbooks. Likewise, the proposed amendments do not address an ever-growing controversy in western land management - water rights developed appurtenant to BLM grazing leases, but, as with the case of monitoring methodologies, BLM leaves that to be addressed by BLM policy and guidance. Both monitoring and water development standards should not be left to policy or guidance documents, but are critical elements to successful management of public lands and are controversial enough to warrant the scrutiny of the regulatory promulgation process.

In light of the omission of these critical areas in the proposed amendments, we in RtE find the proposed amendments to be lacking.

⁶ See 43 CFR §4130.8

III. Conclusion

Therefore, for the reasons stated above, RtE opposes the proposed amendments to the livestock grazing rules for public lands. The proposed amendments are contrary to law and BLM policy and fall short of that which is necessary to manage public lands in a environmentally sustainable and responsible manner by failing to address several critical areas.

Thank you in advance for your attention to our concerns.

Sincerely,

Marc A. Ross
President
Rock the Earth