THREE CONGRESSIONAL MANDATES, AN ENVIRONMENTAL IMPACT STATEMENT, AND THE BUREAU OF LAND MANAGEMENT: CAN AN OLD DOG BE TAUGHT NEW TRICKS?

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Range war! Here and now! No, it's not the Old West. It's not the clash of cattlemen against sheep herders or ranchers against sodbusters in time warp. It's today's headlines about Congress threatening to increase stiff grazing fees ranchers already pay on federal land in the eleven western states. It's Forest Service and Bureau of Land Management bureaucrats sharply curtailing grazing permits to broaden their regulatory powers. It's PBS television specials about environmentalists accusing ranchers of overgrazing, and pressing to eliminate the livestock industry from federal

> lands with slogans such as "Livestock-Free by '93!" . . . Today's range war is for control of our nation's greatest storehouse of natural resource wealth--the federal lands.[1]

Elko, Nevada: In defiance of a local court order and before cheering crowds, the Commissioners of Nye County and members of the Nevada Legislature posted "No Trespassing" signs on land owned by the federal government.[2] This assertion of ownership over the public rangelands came in response to recent efforts made by the Secretary of Interior Bruce Babbitt to prevent overgrazing.[3] The leaders of the "range wars" are elected officials, ranchers, miners, and loggers with permit rights to use the federally owned land.[4] This group, and many similar to it seek to abolish the government's control over all public lands.[5]

A few hundred miles away at the Comb Wash Allotment in Utah, a similar controversy erupted.[6] Rich in aesthetics, the Comb Wash Allotment provides spectacular canyons and scenic beauty for the camper, hiker, backpacker, and sightseer.[7] The allotment is abundant with archaeological resource sites containing remnants of the ancient Anasazi Indian culture.[8] Unfortunately, chronic overgrazing has placed the Comb Wash Allotment in danger.[9] Overgrazing threatens to destroy the abundant archaeological resources found in the allotment.[10] Grazing cattle have destroyed Indian artifacts and trampled various ruins.[11] The harmful effects of overgrazing on the aesthetics of the Comb Wash Allotment have caused the local economy to suffer as well.[12]

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1. WAYNE HAGE, STORM OVER RANGELANDS, PRIVATE RIGHTS IN FEDERAL LANDS, 1 (1989) [hereinafter STORM OVER RANGELANDS].

2. *See* Jane Hunter, *U.S.: County Supremacy Movement Defies Federal Government in West*, Inter Press Service, Jan. 10, 1996.

3. *See id*.

4. *See id*. Hunter states: "The so-called county supremacists--a network of elected officials like John Carpenter and ranchers, miners and loggers with permits to use public lands--are not only unchallenged. They, and their political first cousins, the self-styled militia groups, are getting encouragement in their anti-federal stance from Republicans in Congress."

5. *See id.*

6. *See* Joseph M. Feller, *What is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 586-88 (1994). The Comb Wash Allotment is located in Utah's famous canyon country. It is approximately fifteen miles southwest of Blanding, Utah. The Allotment is approximately twenty miles southeast of the Natural Bridges National Monument. *See id.*

7. *See id.* at 587.

8. *See id.*

9. *See id.* at 589.

10. *See id.* at 589-90 ("They threaten to topple the remaining accessible standing ruins because they use them for shelter from the wind and they rub up against them to scratch themselves.").

11. *See id.* at 589-90 ("Grazing in the . . . canyons also has a severe effect on their scenic and recreational values . . . Visitors encounter ground that has been 'beat out,' and grasses grazed down 'to the ground,' vegetation that has been 'pounded right in the ground' and 'smashed and packed.'").

12. *See id.* at 591 ("Effects of overgrazing on local outfitting enterprises has resulted in a decrease in revenue totaling $15,000-$30,000 per year.").

Currently the Ute Mountain Indian Tribe has grazing preference and permit rights to graze cattle in the canyons of the allotment.[13] The Tribe's actual grazing use of the land is significantly less than the allowable grazing preference granted under the permit issued by the Bureau of Land Management (BLM).[14] Despite the lessened use of the land, the effects of overgrazing in the canyons are apparent.[15] One commentator noted:

> The stream channels in the canyon bottoms are badly downcut, with raw, exposed banks that erode back with each rainstorm. Continued grazing prevents the development of riparian vegetation that could stabilize the streambanks, slow floodwater, trap sediment, and rebuild the riparian areas. Above the streambanks, vast areas of the alluvial terraces that fill the canyon bottoms are nearly devoid of perennial grasses and are covered instead with annual grasses and forbs, rabbit brush, and snakeweed - all characteristics of overgrazed areas.[16]

Overgrazing on federal lands is not a new problem. Before 1934, public rangelands suffered under a system allowing unlimited grazing.[17] One commentator stated: "The cumulative environmental impacts of livestock grazing on BLM lands over the last century have been devastating."[18] Despite various congressional efforts to rectify the problem, overgrazing continues to wreak havoc on America's public rangelands. Efforts to prevent overgrazing are controversial and have met immediate resistance. The resistance has been primarily from ranchers who hold federal grazing permits, and communities that depend on the same ranchers.[19]

The complexity of overgrazing as a problem entails the need for more than a unilateral solution such as privatization.[20] This note will analyze the response of each branch of government to the developments and problems of overgrazing. The first section of this note will address congressional attempts, some successful some not, to mandate change in rangeland management policy. The second section will

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13. *See id.* at 588.

14. *See id*. (explaining the Tribe has averaged about 250 Animal Unit Months (AUMs) in the five canyons of the allotment. The market value of this use is approximately $2,500. Other sections of the allotment, more suitable to grazing were virtually unused by the Ute Mountain Indian Tribe).

15. *See id.*

16. *Id.* at 589 (citations omitted).

17. *See* George C. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL L. 1, 2 (1983) [hereinafter *Multiple Use Mandate*] ("Western ranchers put too many animals out to graze, and the consequent overgrazing caused the erosion of the land, destruction of the native grass ecosystems, and invasion of unpalatable shrubs and forbs.").

18. Feller, *supra* note 6, at 560.

19. *See* D. Bernhard Zaleha, *The Rise and Fall of BLM's 'Cooperative Management Agreements': A Livestock Management Tool Succumbs to Judicial Scrutiny*, 17 Envtl. L. 125 (1986).

20. *See STORM OVER RANGELANDS, supra* note 1, at 4. (suggesting that privatization of all public lands is the answer to the controversy and that ranchers have an undeniable and absolute right to graze on federal rangelands).

examine the judiciary's interpretation of the legislation. The third section will discuss the executive branch's role in rangeland management and policy. Finally, the fourth section of the note will provide recommendations to effectuate real change in rangeland management policy.

I. LEGISLATIVE ACTION/INACTION: GOALS OR MANDATES?

A. *The Taylor Grazing Act*

Before 1934, the federal government allowed unlimited grazing over the nation's undervalued public rangelands.[21] Congress responded in 1934 and enacted the Taylor Grazing Act bringing public rangeland management back under its control.[22] The Taylor Grazing Act sought to stabilize, protect, and preserve public rangelands for livestock grazing purposes.[23]

The Act established a permit system and divided the public rangelands into allotments.[24] Under the Act, ten-year permits are available at a low cost to applicants seeking to use the land.[25] The permit specifies the amount of livestock each rancher can graze and the allowable grazing periods.[26] The BLM grants owners of land or water rights near the federal rangelands priority in the issuance of grazing permits.[27] Furthermore, the permit/preference system gives the current permit holder priority to renew when the permit expires.[28] It is clear, however, that the Bureau of Land Management retains discretion to deny or revoke the grazing permits, or reduce the number of livestock grazing on the federal rangelands.[29] The Taylor Grazing Act provides:

> The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts. . . . and to insure the objects of such grazing districts, namely, to *regulate their occupancy and use*, to preserve the land and *its resources from destruction or unnecessary injury*, to provide for the orderly use, improvement, and development of the range.[30]

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21. *See* George C. Coggins, *The Law of Public Rangeland Management III: A Survey of Creeping Regulation at the Periphery, 1934-1982*, 13 ENVTL. L. 295, 296 (1983) [hereinafter Creeping Regulation].

22. 43 U.S.C. §§ 315-315b (1994).

23. *See also* Faulkner v. Watt, 661 F.2d 809 (9th Cir. 1981).

24. Feller, *supra* note 6, at 563-64.

25. *See id*. at n. 42 (citing 43 U.S.C. § 315b; 43 C.F.R. § 4130.6-1 (1993); 43 U.S.C. § 1752(a), (e) (1988)).

26. *See* Feller, *supra* note 6, at 563-64.

27. *See id*.

28. *See id.*

29. *See* 43 U.S.C. § 315(a) (1994).

30. 43 U.S.C. § 315b (1994) (emphasis added).

The permit does not grant an unprivileged right in the use of the land. In fact, the Act grants considerable discretion to the Secretary of the Interior to guide rangeland management policy.[31]

Under the Taylor Act, western ranchers can graze cattle at a much lesser cost than the rancher utilizing private or state land.[32] Some commentators suggest the permit system established by the Taylor Act did nothing more than create monopolies and subsidies in favor of the western rancher, thereby encouraging overgrazing.[33] The archaic preference/permit system established by the Taylor Act subsidizes western ranchers without any comparable benefits to the public.[34]

As one of President Roosevelt's "New Deal" Measures enacted during the depression, the Taylor Grazing Act successfully reasserted federal control over the public rangelands,[35] and stabilized the collapsing livestock grazing industry.[36] The Act did little, however, to effectuate change in the policy followed by the Executive Branch. Because of this, the Taylor Act failed to prevent the deleterious effects on the public rangelands caused by chronic overgrazing.[37] The BLM continued under the Taylor Grazing Act for more than thirty years before being forced by the National Environmental Policy Act to make substantive changes in rangeland management policy.[38]

B. *National Environmental Policy Act*

In 1970, Congress enacted the National Environmental Policy Act (NEPA).[39] Although not aimed at overgrazing, the Act profoundly altered BLM

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31. *See id.* ("So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.").

32. *See* George C. Coggins, *The Law of Public Rangeland Management V: Prescriptions For Reform*, 14 ENVTL. L 497, 503-04 (1984) [hereinafter *Prescriptions for Reform*] ("This congressionally-mandated welfare subsidy is the root of most range evils.").

33. *See Prescriptions for Reform, supra* note 32, at 503; *see* Dale Bumpers & Judd Gregg, *Gravy Train for Corporate Cowboys*, WASH. TIMES, Aug. 18, 1996, at B3 ("American taxpayers are being fleeced by the federal grazing fee system.").

34. *See Prescriptions for Reform, supra* note 32, at 502-03.

35. *See* Lisa J. Hudson, Note, *Judicial Review of Bureau of Land Management's Land use Plans Under the Federal Rangeland Statutes*, 8 PUB. LAND L. REV. 185, 186-87 (1986).

36. *See* George C. Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management IV: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 2 (1982) [hereinafter *The Taylor Act*].

37. *See Creeping Regulation, supra* note 21, at 296.

38. *See* Zaleha, *supra* note 19, at 132. (stating, In a 1975 report to the Senate Appropriations Committee, the BLM noted that only nineteen percent of the lands under its control were improving, while sixty-five percent were static, and sixteen percent were deteriorating. The report further predicted that the public rangelands would continue to deteriorate. BLM and the U.S. G.A.O. suggest that BLM's 1975 report understated the poor and deteriorating state of the rangelands under its jurisdiction).

39. 42 U.S.C. §§ 4321-61 (1996).

management policies.[40] NEPA commands government agencies to prepare environmental impact statements when any agency proposes a major action that significantly affects the environment.[41] Thus, the NEPA legislation has at least forced the BLM to consider the environmental degradation caused by overgrazing.[42] One commentator commented: "[r]angeland managers have become intimately acquainted with NEPA's ubiquitous procedural requirements, often to their inconvenience and dismay."[43] The enactment of NEPA eventually forced the BLM to prepare environmental impact statements (EISs) for all grazing districts.[44]

Unfortunately, NEPA is purely procedural and its policies lack any enforcement mechanisms.[45] Even in the most extreme situations of ecological harm, the EIS places no demands on the Executive Branch, nor does it bind the particular agency to a certain course of action.[46] The EIS requirement has, however, forced the BLM to recognize the deleterious effects of overgrazing.[47]

C. *The Federal Land Management and Policy Act (FLPMA)*

In 1976, Congress aimed legislation directly at the executive branch's rangeland management policies by enacting the Federal Land Policy and Management Act.[48] FLPMA declares that it is the policy of the United States to manage public lands in a way that protects and preserves the quality of the inherent scientific, scenic, and environmental values.[49]

FLPMA contains a broad, thorough, and clear declaration of the expected public land management policy. FLPMA represented a significant leap over the Taylor Act and its goal of protecting rangelands for the ranchers.[50]

FLPMA mandated that the Bureau develop land use plans guided by the "multiple-use" philosophy.[51] Congress provided that the Secretary of Interior

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40. *See* George C. Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 Envtl. L. 535, 556-58 (1982) [hereinafter *Federal Power*].

41. *See id.* at 554.

42. *See* Natural Resources Defense Council, Inc. v. Morton, 388 F. Supp. 829 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976).

43. *Creeping Regulation, supra* note 21, at 351-52 (stating the BLM did not make a good faith effort to meet the rigorous requirements of the statute).

44. *See* Morton, 388 F. Supp at 840.

45. *See Creeping Regulation, supra* note 21, at 352-53.

46. *See id.* at 353-54.

47. *See id.* at 357-58.

48. *See* 43 U.S.C. §§ 1701-1784 (1994).

49. *See* 43 U.S.C. § 1701 (1994). (providing that the public lands be managed so that "they are utilized in the combination that will best meet the present and future needs of the American people.").

50. *See Prescriptions for Reform, supra* note 32, at 505.

51. *See Multiple Use Mandate*, *supra* note 17, at 15.

devise, implement, and maintain land use plans for the public rangelands in a way that reflects a multiple-use philosophy.[52] Congress defined multiple-use as:

> [T]he management of 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 . . . a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land.[53]

One commentator opined: "The statute uses the phrase 'multiple use, sustained yield' in a galaxy of provisions. . . . In theory, the standard requires the agency to give all listed resources roughly equal consideration and weight in all decision making."[54] Congress provided the BLM with certain criteria to follow for the development and revision of land use plans.[55] These include the following: (1) follow the principles of multiple use and sustained yield; (3) give priority to protecting public land of critical environmental concern; (5) consider the current and potential uses of the public rangelands; and, most important, (7) weigh the long-term benefits to the public against short-term benefits.[56]

Although FLPMA initially seemed to be the solution to the mismanagement of the BLM, the legislation failed in critical areas. Unfortunately, FLPMA lacked clarity, and gave the BLM enormous discretion to implement the multiple-use mandate.[57] Use of the words consider and weigh permeate FLPMA in its grant of discretion to the BLM. The grant of discretion and the lack of any enforcement mechanisms allowed the Executive Branch to escape any change in rangeland management reform.[58] FLPMA also failed to alter or eradicate the permit/preference system and ranchers' subsidies.[59] FLPMA's lack of binding commands, prerequisites, or requirements ensured its failure.[60]

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52. *See* 43 U.S.C. § 1712(a) (1994).

53. 43 U.S.C. § 1702(c) (1994).

54. *Multiple Use Mandate, supra* note 17, at 15-16 ("Multiple use, sustained-yield is basically a utilitarian principle requiring high-level annual production of all resources in combination.").

55. *See* 43 U.S.C. § 1712(c) (1994).

56. *See id.*

57. *See Prescriptions for Reform, supra* note 32, at 504-06.

58. *See id.*

59. *Id.*

60. *See id*.

D. *Public Rangelands Improvement Act of 1978 (PRIA)*

Two years later Congress attempted to clarify FLPMA by enacting the Public Rangelands Improvement Act.[61] By enacting PRIA, Congress sought to provide specific guidance to the BLM concerning range management. Congress recognized the deterioration of the public rangelands and declared them to be in an "unsatisfactory" condition.[62] PRIA established and reaffirmed a national policy to "manage, maintain and improve the condition of the public rangelands so that they become *as productive as feasible for all rangeland values* in accordance with management objectives and the land use planning process."[63] The Act requires the Secretary of Interior to follow the above stated policy as its top management priority and goal.[64] In fact, PRIA section 1903 advises the Secretary of Interior to cease grazing if it conflicts with the overall goals of rangeland management.[65] Commentators suggest this passage is the most important passage in all public rangeland legislation.[66]

The Public Rangeland Improvement Act also provides for an experimental stewardship program.[67] This section authorizes the Secretary of Interior to initiate programs that will provide incentives or rewards for individual permit holders whose stewardship results in an improvement of public rangeland condition under the permit or lease.[68] Section 1908 is an unprecedented approach to improve public rangelands.[69]

Although PRIA made unprecedented strides toward providing rangeland managers with the tools to prevent overgrazing, it failed to effectuate any real change in *rangeland management*. PRIA suffers from the same lack of binding commands that doomed FLPMA.[70] Again, Congress failed to establish any management duties or procedural requirements for the achievement of its goal, rangeland improvement.[71] The enactment of FLPMA and PRIA signified congressional

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61. 43 U.S.C.A. §§ 1901-1908 (1994).

62. *See* 43 U.S.C. § 1901(a)(1) (1994).

63. 43 U.S.C.A. § 1901(b)(2) (1996) (emphasis added).

64. *See Cooperative Management Agreements, supra* note 19, at 133-34 (citation omitted) ("[T]his provision provides 'the first nonambiguous policy statement in rangeland legislation,' one that establishes 'a single management priority' to which all other objectives must be related and subordinated.").

65. *See* Feller, *supra* note 6, at 566-67 (suggesting the requisite procedural mechanisms to discontinue grazing are in place).

66. *See Cooperative Management Agreements, supra* note 19, at 133-34; *See Multiple Use Mandate, supra* note 17, at 116 (suggesting a fair reading of the statutes indicates that improvement of the rangelands is the overriding goal of the statutes, not just a priority).

67. *See* 43 U.S.C. § 1908 (1994).

68. *See* 43 U.S.C. § 1908(a) (1994).

69. *See Multiple Use Mandate, supra* note 17, at 128-29.

70. *See Prescriptions for Reform, supra* note 32, at 505-6.

71. *See id*. at 506 (suggesting the broad discretion of the Bureau of Land Management is the critical deficiency in the legislation).

recognition of the problems associated with overgrazing. Congress granted the BLM the discretion and authority to prevent overgrazing on all of its lands.[72] PRIA grants the BLM specific authority to forbid grazing on public rangelands temporarily or permanently.[73]

The policy and process outlined in FLPMA and PRIA provide a method for BLM land managers to decide if grazing is the best use for a particular BLM tract of land.[74] This authority is found also in BLM regulations.[75] One commentator noted: "Requirements to consider present and potential land uses, to consider alternative means and sites, and to weigh long-term benefits against short-term benefits in the land use planning process all indicate that the process *should be* a forum for weighing and balancing the pros and cons of grazing on particular tracts of BLM land."[76]

The enactment of FLPMA and PRIA troubled ranchers who were concerned with the BLM's newfound authority to redefine rangeland management policy.[77] Rangeland controversy erupted after the enactment of FLPMA and PRIA. Ranchers, miners, and loggers feared that this "creeping regulation" would detrimentally affect their businesses and lives.[78] Various state legislatures, and local county seats enacted statutes and ordinances claiming absolute title over the federal rangelands.[79] The "Sagebrush Rebellion" began. Seven years after the passage of PRIA in 1978, the rebellion landed in the courtroom. Both sides sought judicial interpretation of the so-called congressional mandates.

II. JUDICIARY'S RESPONSE: INTERPRETATION OF NEPA, FLPMA, AND PRIA.

A. *National Environmental Policy Act*

The primary purpose of NEPA is to force federal agencies to recognize the adverse environmental impacts of their actions.[80] The Bureau of Land Management initially resisted adherence to NEPA's procedural requirements.[81] Shortly after the Act's passage, the BLM prepared one Environmental Impact Statement (EIS) for all

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72. *See* Feller, *supra* note 6, at 566.

73. *See* 43 U.S.C. § 1903(b) (1994).

74. *See* Feller, *supra* note 6, at 567.

75. *See* 43 C.F.R. §4130.2(d)(1) (1992). *See also* Feller, *supra* note 6, at 602 n.62 (stating permits can be rescinded if the public lands are going to be utilized for a public purpose other than livestock grazing).

76. Feller, *supra* note 6, at 566-68 (emphasis added) (stating the BLM has authority to discontinue grazing, and to reduce/adjust stocking levels of each permit holder).

77. *See Cooperative Management Agreements, supra* note 19, at 134.

78. *See id.*

79. *See id.*

80. *See* Friends of the Endangered Species v. Jantzen, Inc., 760 F.2d 976, 985 (9th Cir. 1985).

81. *See Creeping Regulation, supra* note 21, at 352-54.

the rangelands under its control.[82] A U. S. district court declared this attempt at compliance to be inadequate, and forced the BLM to prepare EISs for each grazing district.[83] The court required the BLM to take into account local geographic conditions "necessary for the decision-maker to determine what course of action is appropriate under the circumstances."[84]

NEPA's influence on BLM decision-making has been significant.[85] Generally, the question of whether the BLM has followed the procedural NEPA requirements is the first question raised in litigation over rangeland management policies.[86]

Judicial review under NEPA is two-tiered.[87] First, the court determines if the BLM has satisfied the procedural requirements of NEPA.[88] Second, the court determines whether the EIS fulfills the policies required by NEPA.[89] Under the second tier of review, the court, governed by a 'rule of reason,' determines if the submitted EIS sets forth enough alternatives to permit a reasonable choice by the agency.[90] If the BLM meets these procedural requirements, a finding of overgrazing is not sufficient to challenge the rangeland management plans.[91] Thus, the BLM can sidestep the problems of overgrazing by preparing an adequate environmental impact statement that supports continued grazing on public rangelands.[92]

B. *Federal Land and Policy Management Act & the Public Rangelands Improvement Act*

Environmentalists anticipated enjoining the BLM from continuing its harmful management policies after the passage of FLPMA and PRIA.[93] Unfortunately, old habits die hard and FLPMA and PRIA failed to change the BLM's management policies. Judicial interpretation of FLPMA and PRIA first came in 1985.[94]

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82. *See* Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. 1045, 1048 (D. Nev. 1985).

83. *See* Natural Resources Defense Council v. Morton, 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1286 (D.C.Cir. 1976); *see also Creeping Regulation, supra* note 21, at 352; *Hodel*, 624 F. Supp. at 1048.

84. Morton, 388 F. Supp. at 838-39.

85. *See Creeping Regulation, supra* note 21, at 357.

86. *See id. at 352.*

87. *See* Hodel, 624 F. Supp. at 1050.

88. *See id.*

89. *See id.* (citations omitted).

90. *See id.* (citations omitted).

91. *See* Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927, 928 (1987) (holding an agency's interpretation of statutes it administers is granted deference.).

92. *See Creeping Regulation, supra* note 21, at 360; *see* Hodel, 624 F. Supp. at 1048.

93. *See Multiple Use Mandate, supra* note 17, at 1-4, 65-66.

94. *See* Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. 1045 (D. Nev. 1985).

Natural Resources Defense Council, Inc. v. Hodel:

In 1985, the conflict between environmentalists and BLM land managers came to a head in Nevada. Environmental organizations, armed with NEPA, FLPMA, and PRIA sought to overturn decisions made by the BLM relating to livestock grazing on public lands in Nevada.[95] The Natural Resources Defense Council argued that the BLM violated FLPMA and PRIA by failing to allocate forage according to the management framework plan.[96] The court found that although the BLM could have made reasonable livestock adjustments where the land showed "overutilization, poor range condition, and downward trend," it was not irrational, arbitrary, or capricious not to do so.[97] The court held:

> Plaintiffs are understandably upset at what they view to be a lopsided and ecologically insensitive pattern of management of public lands at the hands of the BLM . . . Congress attempted to remedy this situation through FLPMA, PRIA and other acts, but it has done so with only the broadest sorts of discretionary language, which does not provide helpful standards by which a court can readily adjudicate agency compliance . . . I am able to resist the invitation to become western Nevada's rangemaster.[98]

The standard applied by the *Hodel* court is whether the BLM's actions were arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the law.[99] Clearly, a reviewing court must give deference to the BLM's interpretation of FLPMA, and PRIA.[100]

One commentator suggested "[t]he court neglected its duty by failing to follow congressional mandates embodied in FLPMA and PRIA."[101] This author disagrees. FLPMA and PRIA do not establish criteria to be met; instead, they only establish guidelines for the BLM to follow in its management of public rangelands.[102]

The *Hodel c*ourt correctly interpreted the FLPMA and PRIA as lacking any binding mandates. The court aptly stated: "[t]hey are general clauses and phrases which can hardly be considered concrete limits upon agency discretion. Rather, it is

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95. *See id.*

96. *See id.* at 1046.

97. *Id.* at 1062-63.

98. *Id*. Court granted defendants' motion for summary judgment. Two years later, the Ninth Circuit Court of Appeals affirmed the District Court's judgment in Natural Resources Defense Council v. Hodel, 819 F.2d 927 (1987).

99. *See Hodel* 624 F. Supp. at 1058.

100. *See Hodel* 819 F.2d at 929 (reviewing the district court's refusal to become a rangemaster for the State of Nevada, the appellate court concluded that where the statute in question is vague, only a limited review of the district court's ruling is appropriate).

101. Hudson, *supra* note 35, at 198. (suggesting the federal district court in *Hodel* hid behind deference to agency management decisions); *see also Multiple Use Mandate, supra* note 17, at 1-4.

102. *See Cooperative Management Agreements*, *supra* note 19, at 134 (suggesting the BLM still has enormous discretion in the implementation of the statutes).

language which breathes discretion at every pore."[103] By enacting FLPMA and PRIA, Congress established the goals of rangeland management.[104] Congress provided the BLM with the means to achieve rangeland improvement, but failed to mandate improvement.[105] Section 1903 of the Public Rangelands Improvement Act is the only provision in PRIA or FLPMA that possibly could be interpreted as mandating land management policy.[106] It provides that the Secretary of Interior shall manage the rangelands with the *goal* to improve the range conditions of the public rangelands so that they become as productive as *feasible*.[107] Again, even the strongest language in PRIA fails to command, demand, or mandate rangeland improvement.[108] The words *goal and feasible* are vague words of discretion. As the court in *Hodel* stated, "If it were possible to glean more precise standards from the statutes or regulations (FLPMA & PRIA), against which these policy decisions could be measured, then I might be more able to discern a pattern of illegal or arbitrary conduct, and to fashion appropriate relief."[109]

Congress has failed to give the BLM a mandate, but it has given the agency the tools to carry out the goals of the FLPMA and PRIA.[110] The question is why the BLM has failed so miserably in preventing the continual destruction of America's public rangelands.

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103. *Hodel*, 624 F. Supp. at 1058.
104. *See Multiple Use Mandate, supra* note 17, at 122.
105. *See id*.
106. *See id.* at 115-17.
107. *See* 43 U.S.C. § 1903(b) (1994).
108. *See Multiple Use Mandate, supra* note 17, at 115-16.
109. *Hodel*, 624 F. Supp. at 1061.
110. *See Multiple Use Mandate, supra* note 17, at 122.

III. EXECUTIVE RESPONSE: THE BUREAU OF LAND MANAGEMENT: CAN AN OLD DOG BE TAUGHT NEW TRICKS

BLM land managers permit grazing on approximately 150 million acres of the public rangelands.[111] Grazing policy and politics "has been the story of competing interests, changing values, and unfortunately, deteriorating resources."[112] FLPMA and PRIA charge the Secretary of Interior with the management responsibilities of the BLM.[113] In fact, FLPMA and PRIA delegate powers directly to the Secretary.[114] The Supreme Court has described the Department of Interior as the trustee of all public land assets.[115]

Over the years, the BLM has ignored congressional directives and grossly mismanaged America's land trust.[116] Only recently has the specter of change in BLM land management policies become a reality.[117] The answers to the problems of overgrazing can be found in BLM land management policies and priorities. A review of BLM policy changes over the last one hundred (100) years illustrates the complexity of the competing interests, the changing values, and the deteriorating condition of the public rangelands.[118]

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111. *See* Bureau of Land Management, Public Land Statistics 21 (1975) (noting that a majority of public rangelands are located in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming).

112. Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848, 855 (E.D. Cal. 1985).

113. *See* 43 U.S.C. § 1903(b) (1994).

114. *See* 43 U.S.C. § 1903(b) (1994).

115. *See* Knight v. United States Land Ass'n, 142 U.S. 161, 178, 181 (1891).

116. *See* Feller, *supra* note 6, at 570-72 (stating the BLM has failed to implement the land-use planning process prescribed by FLPMA).

117. *See* Secretary of Interior Bruce Babbitt, Remarks to the National Press Club (Apr. 27, 1993) (Babbitt states: "[t]he grazing issue, then, is more about the condition of the land than the size of the grazing fee. And I therefore share the view of reformers who believe that grazing fees and land stewardship should be linked together to create direct incentives for restoring the public lands to good condition with a vigorous community of natural vegetation and wildlife.").

118. *See Hodel*, 618 F. Supp. at 855.

A. *The Tragedy of the Commons: (Mid-Nineteenth Century-1934).*

From the early 1800s to 1934, all were free to use, mine, or graze on federal lands free from government regulation.[119] Ranchers became accustomed to using the lands as their own, free from regulation.[120] The Supreme Court validated the Executive Branch's laissez-faire approach to rangeland management in 1890 in *Burford v. Houtz*.[121] The Court held:

> We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.[122]

This era of laissez-faire mismanagement of the federal rangelands laid the seeds of resistance toward any regulatory oversight of the public rangelands.

B. Regulated Tragedy of the Commons: (1934-1980).

In 1934 Congress enacted the Taylor Grazing Act and made an affirmative step to stabilize rangeland management by creating the Grazing Division of the Department of Interior.[123] The Taylor Act had two inherently contradictory goals: (1) improvement of range condition; (2) stabilization of the livestock industry.[124] Congress charged the BLM to achieve these goals through permits, preferences, and advisory boards.[125] Unfortunately, the BLM sought the achievement of only one of its goals, the stabilization of the livestock industry.[126]

Under the Taylor Act, the BLM set up Stockmens Advisory Boards.[127] The Act charged the BLM to consult the boards for advice and recommendations before every management decision.[128] Until recently, the BLM has excluded several classes of rangeland users and all members of the public from taking part on the

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119. *See The Taylor Act, supra* note 36, at 1-23 (stating frontier life encouraged a lack of respect for legal solutions, prizing individualism and self-interest. These attitudes have changed minimally). *Id.*

120. *See id.* at 24.

121. Burford v. Houtz, 133 U.S. 320 (1890).

122. *Id*. at 326.

123. *See Hodel*, 618 F. Supp. at 856-57.

124. *See The Taylor Act, supra* note 36, at 48-50.

125. *See id*.

126. *See id.*

127. *See id.*

128. *See id.*

boards.[129] These boards allowed ranchers to permeate the day-to-day management of the federal lands.[130] The boards, and the ranchers, ignored the problems of overgrazing and dictated land management policy.[131] Given the BLM's unbridled discretion in the management of public rangelands, the control of the ranchers has produced little change in the state of the range. Although Congress has attempted to limit the Executive Branch's discretion and focus the BLM's priorities, little has been accomplished.

The BLM has resisted every attempt to implement a land management process that aids the protection of the environment.[132] After the passage of the FLPMA and PRIA, many thought that the BLM's blind adherence to grazing as the predominant use would change.[133] However, the election of President Ronald Reagan brought about twelve more years of BLM mismanagement.

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129. *See id.*

130. *See id.*

131. *See id.*

132. *See* Natural Resources Defense Council v. Morton, 388 F. Supp. 829, 836 (D.D.C. 1974), *aff'd*, 527 F.2d 1286 (D.C.Cir. 1976)

133. *See Federal Power, supra.* note 40, at 556-58. ("Range managers now seem to have a growing recognition that not all is right with the world, and are seeking better ways to do their jobs. They have been abused from all sides, most ardently by the ranchers whose interests they have defended for a half century."); *see also* Feller, *supra* note 6, at 586-88.

C. *The Reagan Years (1980-1992).*

The Reagan Administration attempted to reverse the course of public land law away from increased regulatory oversight by the BLM, and toward the unregulated laissez-faire approach used before 1934.[134] Secretary of Interior James Gaius Watt led the battle against the environmentalists.[135] Secretary Watt viewed reports of overgrazing as a product of "faulty science."[136] Secretary Watt supported the views of permittee ranchers, believing they had the right to decide how to use the public rangelands.[137] Secretary Watt implemented drastic actions intending to privatize the public rangelands and to eliminate all regulatory restraints on the rancher/permittees.[138] Secretary Watt imposed a moratorium on grazing reductions, and implemented a cooperative management agreement (CMA) program designed to give management powers back to the permittee ranchers.[139]

Secretary Watt proposed the CMA program through a series of amendments to the BLM grazing regulations.[140] The CMA proposal eliminated BLM management responsibilities and handed over control of the rangelands to the permittee ranchers.[141] Under the CMA proposal, grazing would be free from regulation, and without any limitations or conditions.[142] In addition to the CMA proposal, Secretary Watt promulgated other regulations providing:

> (1) the BLM would no longer dictate permitted grazing limits in allotment management plans; (2) would allow local managers to ignore land use plans in making grazing decisions; (3) would remove penalties for rancher violations of air, water, and wildlife laws on federal lands; and (4) would no longer allow the general public to participate in or appeal from agency grazing decisions.[143]

Various environmental and wildlife organizations challenged the proposed agency regulations as in direct contravention of the Taylor Grazing Act, FLPMA and PRIA in *Natural Resources Defense Council, Inc v. Hodel*.[144] The court invalidated

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134. *See id.* at 557.

135. *See* George C. Coggins & Doris K. Nagel, "*Nothing Beside Remains": The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy,* 17 B.C. ENVTL. AFF. L. REV. 473, 540 (1990).

136. *See id.* at 540.

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.* at 543-44.

141. *See id.* (The BLM essentially agreed not to punish ranchers for any abuses of this new privilege).

142. *See id.*

143. *Id.* at 544.

144. *See* Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. 1045, 1048 (D. Nev. 1985).

every proposed regulation, ruling they were in direct contravention to every federal law that addressed overgrazing on public rangelands.[145] Judge Ramirez admonished the BLM for usurping the inherent role of the legislature as lawmaker.[146] The court directed the BLM to retain final control and management authority over all livestock grazing practices on public rangelands.[147]

Although the court reinforced the mandates of FLPMA and PRIA, land management under the BLM took a step backwards during the Reagan Administration. However, by bringing the issues revolving around public rangelands to the forefront of debate and by proposing radical regulations calling for the deregulation of the public lands, Secretary Watt unintentionally increased awareness of overgrazing and expanded the BLM's role as land manager.[148] "By any score sheet, Mr. Watt was a personal, professional, political, and philosophical loser."[149] Rangeland management policies remained static until the election of President William J. Clinton.

D. *Rangeland Reform I & II*

The election of President Clinton has brought about real change in the management of public lands for the first time since the enactment of the Taylor Grazing Act in 1934. Secretary of Interior Bruce Babbitt has proposed various rangeland reform measures seeking to restore America's public lands.

Secretary Babbitt attacked existing range policy immediately, and sought sweeping transformations of the BLM called "Rangeland Reform '94."[150] Not surprisingly, the reform measures instituted by Secretary Babbitt have met fierce opposition from western ranchers and cattlemen.[151] Grazing advocates in Congress halted the first wave of reforms by holding the Department of Interior's appropriations in limbo.[152] Secretary Babbitt withdrew the reforms, vowing to continue his efforts to reform public rangelands.[153] Secretary Babbitt did not break his promise: in February 1994, his department released "Rangeland Reform '94."[154]

Rangeland Reform consisted of various proposals. It established the goals of BLM to maintain the health of the rangelands and allow interested parties other than

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145. *See id*.
146. *See id.*
147. *See id.*
148. *See James Watt, supra* note 132, at 550.
149. *See id.* at 545-46. (stating that after three and a half years as Secretary of Interior, James G. Watt was dismissed in disgrace, "his programs and his department in shambles. Blanket judicial rejection of his initiatives was on the horizon.").
150. *See* William E. Riebsame, *Ending the Range Wars?*, ENVIRONMENT, May 1, 1996, vol. 38, no. 4.
151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.*

ranchers to join Grazing Advisory Boards (GAB).[155] These GABs guide the BLM on grazing issues and management decisions.[156] Enforcement provisions add the specter of criminal or civil penalties for violations of the grazing rules.[157] The proposals advocated by Secretary Babbitt refocus the priorities of the BLM.[158] As one commentator noted: "Rangeland reform totally rewrites the rules of the ball game . . . . Ranchers certainly dislike it. But more than that, there's panic."[159] Secretary Babbitt believes fears concerning the Clinton Administration's "War on the West" are overblown.[160] Despite the resistance, Babbitt has vowed to continue to reform federal rangeland management policies.[161]

Allowing the public and environmentalists onto the GABS has made an immediate impact. "Each grazing advisory board generally consists of five ranching and industry representatives, five environmentalists, and five members of the public."[162] The GAB provides recommendations and suggestions to local BLM land managers regarding proposed management initiatives.[163] Historically, the BLM has followed the advice of the advisory boards, although it is not required to do so.[164]

Colorado has led the fight against overgrazing by recently approving new BLM standards and guidelines that will improve more than 8.5 million acres of BLM rangeland in the state.[165] After Colorado's approval of the standards, Babbitt stated:

> Today, we move forward with a strong consensus for taking better care of the public lands . . . . After years of arguing, we are now moving to implement needed changes that have been agreed to by people from every part of the policy spectrum. These changes were recommended by the Bureau of Land Management (BLM) after intensive consultation with ranchers and environmentalists, academics and industry. It's quite an accomplishment, and I want to thank all the members of the Resource Advisory Councils and other members of the public who worked to bring this to fruition.[166]

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155. *See* Jonathan Brinckman, *Change on the Range*, IDAHO STATESMAN, July 16, 1995.

156. *See id.*

157. *See id.*

158. *Id.*

159. *See id.*

160. *See* Stephen Stuebner, *Babbitt: No New National Parks for Utah in Clinton's 2nd Term; Babbitt calls 'War on West' Fear Overblown*, SALT LAKE TRIB., Feb. 13, 1997.

161. *See id.*

162. Jonathon Brinckman, *BLM Promoting Stream-Saving Rules*, IDAHO STATESMAN, June 18, 1996 ("It's really a revolutionary sort of thing that's going on . . . . The public does not want to see the riparian areas trashed anymore.").

163. *See id.*

164. *See id.*

165. *See* Elizabeth Bryant, *Grazing Guidelines Unveiled*, DENV. POST, FEB. 4, 1997.

166. *DOI Approves Colorado Public Land Health Improvement*, (Feb. 3, 1997) *reprinted in* U.S. Newswire, Feb. 3, 1997 *available in* WESTLAW, ALLNEWSPLUS.

In Colorado, the new standards and guidelines will go into effect immediately.[167] The BLM has finally started following its anticipated role as a neutral and objective landlord of the ravaged public rangelands.

IV. WHERE DO WE GO FROM HERE?

To manage the federal rangelands effectively, the support of each branch of government is essential. The response of the legislative, judicial, and executive branches of government toward overgrazing has been varied. Although various legislative acts have stabilized the grazing industry, the government has made little progress toward rangeland improvement over the last sixty years. However, the efforts of Secretary Babbitt, and the enactment of FLPMA and PRIA have planted the seeds for true rangeland reform.

A. *The Legislative Branch:*

Congress has expressed its discontent with range conditions. FLPMA and PRIA supplemented the Taylor Grazing Act and gave the BLM explicit authority to reduce grazing levels.[168] Although the statute fails to impose standards for rangeland improvement, it has given the BLM the statutory backbone to force change on the federal lands.

The enactment of NEPA also has had a significant impact on the BLM.[169] The mandates of NEPA have forced the BLM to examine the rangelands under its control and examine the deleterious effect overgrazing has had on the rangelands.[170] Although NEPA is purely procedural, lacking enforcement mechanisms, it has provided environmental organizations a method of challenging BLM land management procedures.[171]

The various enactments have provided the Bureau of Land Management the tools to effectuate significant changes in the philosophy and policies of rangeland management. However, for change that lasts beyond the current BLM administration, more legislation is needed. The current legislation fails to provide the BLM with specific management duties in the implementation of the overriding goals of FLPMA and PRIA. To be effective, we need more legislation that ties preservation and conservation with permit renewal. Until Congress enacts legislation mandating the BLM to adopt a multiple-use approach, the BLM land management philosophy will vary from administration to administration. This will only add to the

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167. *See id.*
168. *See Multiple Use Mandate, supra* note 17, at 130-31.
169. *See Creeping Regulation, supra* note 21, at 362-64.
170. *See id.*
171. *See id.*

already misguided and confusing history of the federal government's management of public rangelands.

B. *The Judiciary*

As the interpreter of federal law, the judiciary has a limited role to play in rangeland improvement. The judiciary has resisted becoming "the rangemaster" for federal lands without clear and precise statutory mandates.[172] As Judge Burns commented:

> [T]he primary reason for the large scale intrusion of the judiciary into the governance of our society has been an inability or unwillingness of the first two branches of our governments-- both state and federal -- to fashion solutions for significant societal, environmental, and economic problems in America. Frankly, I see little likelihood that the legislative and executive branches will take the statutory (and occasional constitutional) steps which would at least slow, if not reverse, this trend.[173]

Judge Burns clearly is calling on Congress to address rangeland management reform. This call has gone unanswered. However, federal courts have found a point beyond which the BLM is unable to go.[174] After Secretary Watt proposed to turn over management to ranchers, the court in *Hodel* stated: "[I]t is the policy of the United States that the Secretary and the BLM, not the ranchers, shall retain final control and decision making authority over livestock grazing practices on the public lands."[175] The judiciary will not fully force the BLM to manage as suggested by FLPMA and PRIA until further legislation is enacted clarifying the commands imposed upon them by Congress.

C. *The Executive*

True reform of rangeland management policies and practices can be made by the Executive Branch. Armed with FLPMA, PRIA, and NEPA, the BLM has the power to fundamentally alter federal land management policy. The legislation empowers the agency to reduce stocking levels, prohibit grazing on specified lands, and permit environmental and public groups to participate in the decision-making process.[176] The success of the Executive Branch in preventing overgrazing is inexorably linked to who is sitting as President and the support received by Congress. Over the last twenty years, BLM implementation of the "multiple-use" philosophy

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172. *See* Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. 1045, 1062-63 (D. Nev. 1985).

173. *Id.*

174. *See Hodel*, 618 F. Supp. at 871.

175. *Id.*

176. *See* Feller, *supra* note 6, at 564-68.

has varied from one administration to the next.[177] The Clinton Administration is the first in more than twelve years to effectively address and effectuate rangeland reform.

A consistent "multiple-use" philosophy will be difficult to achieve without a clear command from Congress. In 1934 Congress successfully stabilized the western cattle grazing industry through the Taylor Grazing Act. Despite attempts by Congress to refocus the priorities of the BLM, it has largely ignored any problems of overgrazing until recently. Recently, efforts by the Executive Branch have spurred change in the BLM's land management philosophy. Unfortunately, these changes are reversible at the discretion of the Executive Branch. A specific and clear congressional mandate is needed to refocus the priorities of the BLM permanently.

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[177]. Within twelve years we have seen the fatal and destructive policies of James Watt and recently the positive "multiple-use" philosophy of Secretary of Interior Bruce Babbitt.