WHERE'S THE BEEF? FACILITATING VOLUNTARY RETIREMENT OF FEDERAL LANDS FROM LIVESTOCK GRAZING

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INTRODUCTION

Acre for acre, grazing of domestic livestock is the most widespread extractive use of the federal lands. It takes place on well over one quarter of a billion acres—almost ten times the size of Pennsylvania. These lands are nearly all in the eleven western states. The Bureau of Land Management (BLM) in the Department of the Interior manages about 258 million of these acres, about 90 percent of BLM lands in the lower 48 states. The U.S. Forest Service (USFS) in the Department of Agriculture manages approximately 100 million acres, or about 60 percent of national forest lands in the lower 48.[1] Some 20,000 livestock operators (hereafter, ranchers) use these federal lands: BLM has issued about 18,000 permits and USFS about 7,000; several thousand ranchers have both. Collectively, these permits authorize a maximum use of about 22 million "animal unit months" (AUMs) of forage

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[1] BUREAU OF LAND MANAGEMENT, FACT SHEET ON THE BLM'S MANAGEMENT OF LIVESTOCK GRAZING, http://www.blm.gov/wo/st/en/prog/grazing.1.html (last visited Sept. 21, 2008); U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., PUBLIC LAND STATISTICS Table 1-3 (2007), *available at* http://www.blm.gov/public_land_statistics/pls07/pls1-3_07.pdf; U.S. DEP'T OF AGRICULTURE, FOREST SERV. RANGE MGMT., GRAZING STATISTICAL SUMMARY iii (2005), http://www.fs.fed.us/rangelands/ftp/docs/graz_stat_summary_2005.pdf; *see also infra* notes 7, 32, and accompanying text (livestock grazing is also permitted in some units of the national wildlife refuge and national park systems).

harvesting.[2]

Despite the vast acreage, the meat produced from public land forage is a tiny fraction (about 2 percent) of national meat production, and provides few jobs or economic activity in the region.[3] But the ecological costs are "profound," even though it "often takes a trained eye to comprehend damage to rangeland" because the ecological harm "is so pervasive and has existed for so long that it frequently goes unnoticed."[4] Livestock congregate in riparian areas, which are the most productive habitats for flora and fauna in the arid West, where the "ecological stakes are highest."[5] This magnifies their adverse impacts, and is a primary reason livestock grazing affects nearly twice as many imperiled species as either logging or mining.[6] Climate change is expected to exacerbate these impacts.[7]

For many decades conservationists have sought to ameliorate these impacts by curtailing or, in cases of the most severe damage eliminating, livestock grazing by tougher federal regulation. Their efforts have been marked more by failure than success. One measure is this: Livestock grazing continues on millions of acres

[2] An AUM is the amount of forage eaten by one cow, or five sheep or goats, grazing for one month—or about 750–800 pounds of grass.

[3] *See generally* DEBRA DONAHUE, THE WESTERN RANGE REVISITED 250–63 (1999); SONORAN INSTITUTE, PROSPERITY IN THE TWENTY-FIRST CENTURY WEST: THE ROLE OF PROTECTED PUBLIC LANDS (2004), *available at* http://sonoran.org/index.php?option=com_docman&task=doc_download&gid=66&Itemid=74.

[4] Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 CONSERVATION BIOLOGY 629, 629–30 (1994). Land in the lower 48 that has never been grazed by domestic livestock is, Fleischner notes, "extremely rare." This makes it hard to gauge the environmental effects of grazing, and Fleischner argues that studies of lands where livestock have been excluded in recent years "probably underestimate[s]" grazing's impacts because it does not reveal the "most drastic damage" that occurred many decades ago when domestic livestock, often very large herds of omnivorous sheep, were first introduced. *Id.* at 630; *see also* Jason C. Neff et al., *Increasing Eolian Dust Deposition in the Western United States Linked to Human Activity*, 1 NATURE GEOSCIENCE 189, 189, tbl.1 (2008) (citing an intriguing recent study of sediment deposition in alpine lakes in southwestern Colorado showed a 500 percent increase in dust, persisting to the present, that began around the time that massive numbers of livestock were introduced in the arid west toward the end of the nineteenth century).

[5] Fleischer, *supra* note 4; *see also* NAT'L RES. COUNCIL, RIPARIAN AREAS: FUNCTIONS AND STRATEGIES FOR MANAGEMENT (2002).

[6] David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 607, 610 (1998).

[7] *Id.* at 613–14.

of federal land that have been given protective designations like national conservation areas, monuments, and wildlife refuges. This is the result of special legislative exemption and compliant land managers. Even in many congressionally designated "wilderness" areas—the most protective federal category, designed to preserve "natural conditions" in areas "untrammeled by man"—livestock grazing is not only tolerated, but can be expanded as well as protected by government-sponsored extermination of wild predators.[8]

Over the last decade or so, a promising non-regulatory solution to the continued wrangling between federal lands ranchers and conservationists has emerged. It involves conservation-minded purchasers acquiring federal land grazing permits from willing sellers, and then offering to relinquish the permits to the government if it will retire the federal lands from livestock grazing.

These marketplace-based "purchases and retirements" may achieve tangible environmental improvements in a shorter time by less contentious means than pitched battles over regulation. They can help restore the health of grasslands, riparian areas, water quality, and wildlife populations. They can make it easier for government land managers to cope with drought, fire, and insect outbreaks, and to combat the invasions of exotic species. They can help sequester carbon from the atmosphere. They can save the government money, because federal land livestock grazing generally costs considerably more—in managing the permits and the land, conducting predator control and other supportive activities, and dealing with the environmental damage—than any measurable benefit derived from it.[9] Buyouts can also improve the

[8] *See generally* Mitchel P. McClaran, *Livestock in Wilderness: A Review and Forecast*, 20 ENVTL. L. 857, 859, 887, n.15 (1990) (stating that about half of the congressionally-designated wilderness areas in the national forests have some livestock use and the proportion is probably substantially higher in BLM-managed wilderness areas). *See also* Forest Guardians v. Animal and Plant Health Inspection Serv., 309 F.3d 1141, 1141 (9th Cir. 2002) (upholding a federal program to kill mountain lions in a congressionally-designated wilderness area in order to protect livestock grazing, even though the program was instituted after the area was designated wilderness).

[9] Robert H. Nelson, *How to Reform Grazing Policy: Creating Forage Rights on Federal Rangelands*, 8 FORDHAM ENVTL. L.J. 645, 653, 656–67 (1997) (examining the reason economists have advocated grazing buyouts since the 1950s); Mark Salvo & Andy Kerr, *The National Public Lands Grazing Campaign*, 11 WILD EARTH 83, 83 (2001–2002); NATIONAL PUBLIC LAND

political climate for other conservation measures on the federal lands because ranchers—whose political influence far exceeds their numbers and economic impact—have tended to strongly oppose such measures.[10]

These buyouts often make sense for the ranchers themselves. The globalization of the beef market has put the economic return from western federal-land-based livestock grazing operations below those of almost all other investments.[11] Sometimes, in fact, federal grazing allotments with high biological or recreational value are the most marginal and troublesome to manage for livestock. Ranchers may find it simpler to cash out of such allotments, either to retire from ranching altogether or to reorganize their operations around less highly contested pastures.

It is the premise of this paper that—because it has the potential to resolve vexing conflicts of resources and values, and to restore environmental health to millions of acres of federal land—conservation-minded acquisitions of grazing permits could be greatly expanded, except for one major problem: On most lands managed by the BLM and USFS, those wishing to commit funds to such acquisitions have no assurance that the federal lands associated with the purchased grazing permits will be permanently retired from grazing. Indeed, under current law and policy, there is a serious risk that, if the conservation buyer relinquishes the permits, the federal land manager may allow other ranchers to

GRAZING CAMPAIGN, http://www.publiclandsranching.org (last visited Sept. 21, 2008).

[10] There are exceptions. Conservationists have sometimes formed alliances with ranchers on efforts to fight development of minerals like coal, oil, and gas, and coalbed methane, and sometimes to curtail off-road vehicle use. But the two camps tend to remain at loggerheads on protecting things like endangered species, wolves and other livestock predators, water quality, and wildlife habitat.

[11] *See* E. Tom Bartlett et al., *Valuing Grazing Use on Public Land*, 55 J. RANGE MGMT. 426 (2002). Today, about half of federal land ranchers get most of their income elsewhere. Bradley J. Gentner & John A. Tanaka, *Classifying Federal Public Land Grazing Permittees*, 55 J. RANGE MGMT. 2, 8 (2002). Some of these are so-called "amenity ranchers" or hobbyists. They are not always conservation-minded. Some may be more interested in enhancing big game and sport fishery habitat (perhaps even stocking with non-native species) and limiting public access. Only a very small percentage of federal grazing permits and associated ranchland is bought by nonprofit conservation groups with a thoroughgoing conservation commitment. *See* WILLIAM R. TRAVIS ET AL., RANCHLAND DYNAMICS IN THE GREATER YELLOWSTONE ECOSYSTEM 13–15 (2002), *available at* http://www.centerwest.org/futures/ranchlands/ranchland_dynamics_gye.pdf.

expand their operations by putting their livestock on these federal lands. To avoid this result, conservation buyers may find themselves being required, against their better judgment, to buy livestock and negotiate with federal land managers over how few animals may be grazed without running the risk of losing their grazing privileges for "non-use."

The following addresses this problem in some detail, offers a simple statutory solution, compares this solution to alternatives, and explores the politics of securing its adoption by Congress.

I. HOW WE GOT TO THIS POINT: A BRIEF HISTORY OF FEDERAL LANDS GRAZING

For a long time, the official U.S. policy toward livestock grazing on federal lands was silence. It was not until the depths of the Great Depression in 1934 that Congress first addressed the subject for the largest category of federal lands—that managed by the BLM.[12] Before that, these lands were treated as a commons, open to all comers. And come the livestock operators did, literally in droves, flooding the lands with millions of head of cattle and sheep beginning in the 1880s. The courts in this era filled the vacuum left by congressional inaction by regarding the ranchers as having an implied and revocable license from the government to run their herds on the public lands.[13]

The government's acquiescence in this use of federal land forage gave rise to a classic "tragedy of the commons,"[14] where each operator's self-interest was to run as many head as possible on the "free" range before somebody else did. The consequence was predictable: In the most arid parts of the West, entire ecosystems were, within the span of a few short years toward the

[12] *See infra* note 18 and accompanying text (grazing on the national forests came under minimal federal regulation in the early twentieth century).

[13] The highwater mark of the implied license was *Buford*, where, according to the Supreme Court, it gave nomadic sheepherders the privilege of crossing *private* lands of other ranchers (foraging the private grass along the way) in order to gain access to the public lands. Buford v. Houtz, 133 U.S. 320, 325 (1890). Otherwise, the Court reasoned, these other ranchers, who were successors to a railroad land grant and owned 350,000 acres interspersed among more than 600,000 acres of public land in northern Utah, would be able to monopolize grazing on the public lands, thwarting the sheepherders' implied, equivalent license to use those lands. *Id.* at 327.

[14] Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (using overgrazing as the paradigm case in his classic article).

end of the nineteenth century, degraded and permanently transformed. Environmental historian Donald Worster has likened the "invasion" by millions of introduced forage animals in that era to the "explosive, shattering effect of all-out war."[15] Phillip Foss put it this way in his landmark 1960 study: "Overgrazing caused millions of acres of grassland to become desert. Lands which produced native grasses 'up to your stirrups' within the lifetime of persons now living became, and remain today, virtual deserts."[16] Drastic declines in forage, coupled with some particularly harsh winters in the north in the mid-1880s, and with drought in the southwest in 1893, led to a near-collapse of the industry.[17] But it retrenched, and unrestricted grazing continued as much as the abused land would permit. Some (particularly nomadic sheepherders) remained constantly on the move with their flocks. But more and more ranchers, especially those running cattle, obtained fee title to small tracts of federal land, usually along streams, under disposal laws like the Homestead Act, to take advantage of the forage on federal lands in the vicinity. This created the situation commonly found today, where a single ranch may own a few dozen or a few hundred acres in fee, but have permits to use many thousands, even hundreds of thousands, of acres of federal lands.

Beginning in the early 1890s, millions of acres of the open-to-all federal lands of the so-called "public domain" were designated as "forest reserves" (the original name for the national forests). After Congress gave the executive authority to regulate their "occupancy and use" in 1897,[18] the new U.S. Forest Service took some halting steps to bring ranchers on these lands under modest supervision, requiring them to obtain a permit and pay a token fee, and even in some cases to limit overgrazing.[19] Grazing on the

[15] DONALD WORSTER, UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST 45 (1992).

[16] PHILLIP FOSS, POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN 4 (1960).

[17] *See* FREDERICK MERK, HISTORY OF THE WESTWARD MOVEMENT 463 (1978). *See also* Worster, *supra* note 15, at 42 (describing it as one of the greatest losses of animal life in the history of pastoralism). Future President Theodore Roosevelt's ranch in the badlands of South Dakota suffered this fate in the terrible winter of 1886–87. EDMUND MORRIS, THE RISE OF THEODORE ROOSEVELT 364–67 (1979).

[18] 16 U.S.C. §§ 478, 551 (2000) (failing to mention grazing).

[19] *See generally* WILLIAM D. ROWLEY, U.S. FOREST SERVICE GRAZING AND

much larger expanse of federal lands outside the forest reserves, however, remained free and unregulated for several more decades.

As the 1920s drew to a close, overgrazing combined with drought and agricultural depression brought conditions on the public grazing lands outside the national forests to a state of crisis. By this time many public lands ranchers (as well as their longstanding champion in Congress, Edward Taylor of Colorado) were reluctantly concluding that something had to be done to address deteriorating rangelands (by then in Dust Bowl conditions) as well as conflicts among graziers. The result was the Taylor Grazing Act (TGA), signed into law by Franklin Roosevelt in 1934.[20]

The TGA ended the tradition of free uncontrolled grazing and substituted a new regimen of permits and fees to allocate the public forage. At the same time, it reaffirmed that ranchers had only a revocable license to use the public lands, for it provided that public land grazing permits "shall not create any right, title, interest, or estate in or to the lands."[21] Despite this disclaimer, federal grazing permits (on USFS as well as BLM lands) have long been bought and sold among ranchers, with federal approval, and are ordinarily included in the value of the ranch on the open market.[22] Banks loan money against the permits, and federal capital gains and estate tax calculations reflect the value the permits have in the marketplace. This paradox—that federal land grazing permits are legally merely revocable licenses, not compensable property rights, yet nevertheless command substantial value in the private marketplace—has led many ranchers to keep a particularly tenacious grip on public rangelands.

Despite the fact that the TGA was enacted to restore health to public rangelands, it did little to achieve this goal. Ranchers long accustomed to the open, bureaucracy-free grazing commons—even those who welcomed its demise—did not appreciate

RANGELANDS: A HISTORY 40 (1985). These steps were unsuccessfully challenged by the ranchers in court; *see* United States v. Grimaud, 220 U.S. 506 (1911); *see also* Light v. United States, 220 U.S. 523 (1911).

[20] *See* 43 U.S.C. § 315 (2000). *See generally* E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN 214–24 (1951).

[21] 43 U.S.C. § 315b (2000).

[22] FOSS, *supra* note 16, at 197; *see also* L. Allen Torell & Marc E. Kincaid, *Public Land Policy and the Market Value of New Mexico Ranches, 1979–1994*, 49 J. RANGE MGMT. 270, 270 (1996).

government interference. The result was cautious if not downright timid implementation. Federal officials often tended to act more as agents for the ranching industry than as regulators of it, and Stockmen's Advisory Boards dominated the administration of federal grazing lands for decades.[23] To ameliorate the effect on the ranchers of ending the commons, the new federal permits over-allocated the forage resource. Ferry Carpenter, a Harvard-trained lawyer who was the first director of the federal Grazing Service, could not have been more candid: As he put it, the choice was between moving faster and "hammer[ing] the heads of the operators unmercifully[, or going slower and] continu[ing] to hammer the public domain. Well, as the public domain range is less articulate than the stockmen, we have chosen to hammer the public domain."[24] In 1946 the federal Grazing Service was merged with the old General Land Office to create the Bureau of Land Management, just in time for Senator Pat McCarran of Nevada to lead a five-year effort to starve it into submission.[25] The episode, and others like it, helped keep federal land managers cowed on the subject of grazing.

A quarter-century later, when federal rangeland conditions had not much improved, Congress adopted a spate of environmentally-oriented laws that seemed to brighten the prospect for making federal rangelands healthier. The fledgling modern environmental movement seized on one of these, the National Environmental Policy Act (NEPA), in the early 1970s as the best hope of improving conditions on BLM lands. Initially it won a major victory in court,[26] which led BLM to prepare, over

[23] The federal officials did have to address conflicts between those running sheep and those running cattle. To some extent this posed the issue whether to favor those with earlier use (which tended to be nomadic sheepherders) or those who came later but often owned homesteaded land near the public range (cattlegrowers). Ultimately the Interior Department created a preference system that worked to favor cattle ranchers and disadvantage those who did not own "base property" or fee land in the vicinity of the public lands. Earlier, the USFS had reached a similar resolution, tending to allocate forage in favor of those who lived or maintained ranches within or in the "immediate vicinity" of the forest reserve. *See generally* LEIGH RAYMOND, PRIVATE RIGHTS IN PUBLIC RESOURCES 115–17 (2003).

[24] RAYMOND, *supra* note 23, at 216, n.93 (quoting transcript of statewide meeting in Oregon, Dec. 15, 1934).

[25] PEFFER, *supra* note 20, at 247.

[26] NRDC v. Morton, 388 F. Supp. 829 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d 1386 (D.C. Cir. 1976).

more than a decade, dozens of environmental impact statements on its grazing program. These documented what was known all along; namely, overgrazing kept many public lands in unhealthy condition, and to improve matters the number of grazing animals had to be reduced or in some areas eliminated altogether. But NEPA requires only disclosure, not results. Conservation interests also attempted to use other new laws like the Clean Water Act, the Endangered Species Act, the Wild & Scenic Rivers Act, and the Federal Land Policy and Management Act (FLPMA). While these efforts occasionally met with some (albeit limited) success,[27] generally the courts were not very hospitable to the idea of becoming, as one federal judge put it, the "rangemaster" for hundreds of millions of acres of federal lands.[28]

While not notably successful, the conservationists' campaign did spark a counter-movement. In the late 1970s ranchers on federal lands spearheaded the so-called "Sagebrush Rebellion," which persuaded several western states to pass laws laying claim to ownership of the federal lands. (Conservationists called it the "Great Terrain Robbery.") In 1980 presidential candidate Ronald Reagan declared himself a sagebrush rebel and once in office, made a half-hearted attempt to sell millions of acres of federal land (mostly rangeland) in the early 1980s, but the idea provoked widespread opposition and quickly foundered.[29]

The net result of all this activity over the past four decades has been a kind of uneasy stalemate. While there has been some decline in grazing levels,[30] the vast majority of federal lands

[27] The grazing provisions of FLPMA, enacted in 1976, 43 U.S.C. §§ 1751–1753 (2000), and the Public Rangelands Improvement Act, enacted in 1978, 43 U.S.C. §§ 1901–08 (2000), both rested on a congressional determination that the rangelands remained in unhealthy condition and should be improved, but neither made major changes in the governing legal standards. *See* GEORGE C. COGGINS, CHARLES F. WILKINSON, JOHN D. LESHY & ROBERT L.FISCHMAN, FEDERAL PUBLIC LAND AND RESOURCES LAW 319–28, 792–93, 798, 806–30, 1101–09 (6th ed., 2007).

[28] NRDC v. Hodel, 624 F. Supp. 1045, 1048 (D. Nev. 1985), *aff'd* 819 F.2d 927 (9th Cir. 1987).

[29] COGGINS ET AL., *supra* note 27, at 77, 450–51. Twenty years later, ranchers in a few rural western counties led a similar protest, this time dubbed the "County Supremacy" movement, but—in a stark reflection of the changing politics of the West—no western state government supported (and several actively opposed) the movement. *Id.* at 76–77.

[30] "Permitted" AUMS (in BLM-speak, the total amount of allowable grazing specified in federal grazing permits) declined about a third of 1 percent per year from 1962 to 2005. "Authorized" AUMs (the number of livestock actually

remain devoted to livestock grazing, and many are still in ecologically unhealthy condition.

II. EFFORTS AT GRAZING REFORM

Advocates of federal policy reform to improve this situation have tended to fall into two predictable camps: more privatization, or more regulation.

A. *Privatization*

Using the market rather than regulation to address the problem has long been the solution favored by conservative commentators and by some ranchers. The strongest version is to expand the homesteading idea under which many ranchers first acquired their "base property," to give them fee title to the federal lands they graze.[31] Once privatized, the argument goes, land use would respond purely to market forces. Ranchers would graze their land at the optimal level because they would bear the full cost of not doing so. If condominiums are a more efficient use of the land, the individual rancher would more likely respond to this market signal than the government.

But federal grazing lands are today used by many different interests for many purposes. Ranchers, once their primary user, now must share the terrain with the likes of hunters, anglers, hikers, skiers, off-road vehicle enthusiasts and oil, gas, mining, logging and utility companies. This makes privatization more complicated both from a political and an efficiency perspective.

Although long the official goal of national policy,

allowed on the public lands by BLM in that year, a number which is usually less than "permitted" AUMs because lack of precipitation may restrict forage in some places) declined about 1 percent per year in that same period. These statistics are compiled from BLM's annual Public Lands Statistics, 1962–2005. BUREAU OF LAND MANAGEMENT, BLM PUBLICATIONS, www.blm.gov/publications (last visited Oct. 10, 2008). *See also* Public Lands Council v. Babbitt, 529 U.S. 728, 736–37 (2000) (suggesting active grazing on the public range declined from eighteen million to ten million AUMs between 1953 and 1998). It is not easy to determine whether such statistics accurately reflect uses on the ground, for BLM's statistics may not be entirely reliable for a variety of reasons. *See generally* DONAHUE, *supra* note 3, at 250–63 (1999). Moreover, it is impossible to say how much any decline can be attributed to regulation as opposed to economic conditions or other factors.

[31] *See, e.g.*, GARY D. LIBECAP, LOCKING UP THE RANGE: FEDERAL LAND CONTROLS AND GRAZING (1981); TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM 37–50, 61–79 (1991).

privatization of what are now the national forests was effectively rejected by Congress and the President around the turn of the twentieth century. Privatization of BLM-managed lands was effectively rejected by Congress and the President in the 1930s, when the Taylor Grazing Act was passed and the remaining public domain withdrawn from most further disposal by President Franklin Roosevelt.[32] Time has made the idea even less plausible to the American public and its elected officials. In the last quarter century, proposals to sell off a significant portion of federal lands around the West have been met with a resounding resistance from a wide range of interests and quickly died.[33]

Even if privatization were politically feasible, the multiple use services derived from the federal lands call into question efficiency gains forecast by privatization advocates. Formidable legal and institutional barriers prevent ranchers from collecting rents from all the beneficiaries of services (like watershed protection, flood control, and wildlife habitat) those lands provide, and make it impossible to calibrate the efficient amount of grazing relative to other uses.[34] Without a market mechanism to ascertain the highest

[32] *See generally* PEFFER, *supra* note 20, at 214–24. This was shortly after the western states rejected President Hoover's proposal to give them outright title (minus mineral rights) to these lands. *Id.* at 203–13.

[33] The proposal by the Reagan Administration has already been mentioned. *See* COGGINS ET AL., *supra* note 27, at 76–77. In 2005, the effort by Congressmen Richard Pombo (R-CA) and Jim Gibbons (R-NV) to reform the Mining Law in a way that could have privatized millions of acres of federal lands actually passed the House before dying a quick death in the Senate. *See, e.g.*, Kirk Johnson & Felicity Barringer, *Bill Authorizes Private Purchase of Federal Land*, N.Y. TIMES, Nov. 20, 2005, at 1. In 2006 the George W. Bush Administration proposed to sell some federal lands to support public schools in areas of timber industry decline. *See, e.g.*, Cicero A. Estrella, *Sale of Public Lands Proposed: White House Hopes to Replace Funds Lost to Logging Cutbacks*, SAN FRANCISCO CHRONICLE, Feb. 11, 2006, at A.4. All these proposals sought in part to raise revenue for various purposes, unlike the proposal in *supra* note 31, simply to give the federal land to ranchers. As noted earlier, grazing also takes place in many wilderness areas and in some national parks and wildlife refuges, none of which the public has any intention of selling.

[34] *See* B. Delworth Gardner, *A Proposal to Reduce Misallocation of Livestock Grazing Permits*, 45 J. OF FARM ECON. 109, 114 (Feb. 1963) ("Due to the nature of the services and the problems of collecting rentals from the beneficiaries in the present legal and institutional setting, an efficient solution would be difficult and probably impossible."); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 5–65, 159–67 (rev. ed. 1971). On ecological services generally, see NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS (Gretchen Daily ed., 1997); *Symposium on Ecological Services*, 20 STAN. ENVTL. L.J. 308–536 (2001).

and best uses of these lands, it is unclear how privatization will allow the rancher-owner to choose the most efficient ones.[35]

Some privatization supporters, implicitly acknowledging that giving fee ownership to ranchers is neither politically nor economically viable, have advocated giving them a narrower property right, just to the forage on the land, with the other resources and values remaining in public ownership.[36] They argue the federal government would save at least the estimated $100 million it spends every year managing its grazing program.[37] But this approach fails to solve the difficulties just described. Not just the land but the forage itself is subject to multiple use; that is, optimizing grazing for livestock gives short shrift to wildlife. Moreover, rural and urban interests downstream benefit from a healthy vegetative cover that protects water quality, reducing treatment costs and lengthening the life of reservoirs. There are significant, probably insurmountable transaction costs in organizing all the hunters and hikers and bird watchers and farmers and city dwellers and whoever else would desire to "use" the forage into a single entity that could offer to buy it from the rancher/owner. Even if they did somehow manage to solve this problem and make an offer, the price they would pay would not accurately reflect the optimal forage value because of the significant transaction costs the buyer group would have to bear.

This problem of multiple use might be solved if the rancher's property right was only to a portion of the forage, leaving the rest for other uses such as wildlife and watershed protection.[38] But this approach merely replaces one regulatory regime with another, without solving the underlying problem. The government (or somebody on its behalf) would still have to calculate each year how much forage should be available to the rancher and how much is needed for these other purposes. If the federal government is

[35] *See* Gardner, *supra* note 34, at 114.

[36] *See, e.g.*, Nelson, *supra* note 9, at 671–72 (describing advocates for privatizing forage rights in ranchers).

[37] The government recovers only a small fraction of this through the small fee it charges for each AUM made available. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, LIVESTOCK GRAZING: FEDERAL EXPENDITURES AND RECEIPTS VARY, DEPENDING ON THE AGENCY AND THE PURPOSE OF THE FEE CHARGED 6 (2005).

[38] *Cf.* Nelson, *supra* note 9, at 681–83. Nelson suggests that some communal body with an undetermined but seemingly complicated system for selecting its representatives would determine the amount of grazing needed for non-ranching purposes each year.

currently incapable of limiting livestock grazing to an appropriate amount of forage each year, as the condition of some federal rangelands indicates, it is not clear how this idea would produce a different result.[39]

Beyond these somewhat technical concerns lies a more fundamental issue. As far as grazing on federal land is concerned, privatization is the problem, not the solution. The ranchers have, predictably, taken the resource effectively "sold" to them through grazing permits, and used it efficiently without taking much into consideration their external costs to other users. There is, as noted earlier, almost no surer tenure of ownership in the entire system of federal law than a grazing permit. Practically everyone—from the ranchers to their bankers to the BLM—treats it as essentially a permanent entitlement.[40] Public lands forage is, in other words, already effectively privatized. If ranchers limit grazing and bring back the grass on their public land allotments, it is theirs, and their children's, to reap in future years. As a result, privatizing the rangelands will not lead to healthy ecosystems because the amount of grazing that is optimum for maximizing the economic return from livestock is not the same amount that is optimum for a healthy landscape in parts of the arid west.

B. *Regulation*

At the other end of the spectrum are those who advocate a more vigorous and effective regulatory approach.[41] They believe that a more environmentally sensitive Executive Branch could use its ample legal authority to control livestock grazing better, and curtail at least those operations which cause the most ecological harm. Indeed, in theory stronger enforcement could, considering

[39] What would be different is that the market for selling the forage right would be larger than it is now, because no longer would the stock owner be the only one competing to buy. As we will explain below, this can make a significant difference, but the advantage can be gained much more expeditiously without a new, complicated right to forage.

[40] About the only way to lose a permit is to engage in some egregious scofflaw conduct over a long period of time, and even then the legal machinery moves very slowly. *See, e.g.*, Klump v. United States, 50 Fed. Cl. 268, 269 (2001), *aff'd*, 30 Fed. App'x. 958 (Fed. Cir. 2002); Diamond Bar Cattle Co. v. United States, 168 F.3d 1209, 1210 (10th Cir. 1999); Diamond Ring Ranch, Inc. v. Morton, 531 F.2d 1397, 1397 (10th Cir. 1976).

[41] *See, e.g.*, Todd Oppenheimer, *The Rancher Subsidy*, The Atlantic Monthly, Jan. 1996, at 38.

the poor economics that characterize much ecologically destructive grazing, eliminate livestock grazing from many degraded federal lands. While the process would involve some expense, it likely would save the government money in the long run.

These arguments are not without merit. But the biggest problem with the argument for more regulation is that it represents, to borrow Samuel Johnson's famous description of a second marriage, the triumph of hope over experience. More than a century of regulatory history (for the USFS, and seventy-five years for the BLM) reveals how deeply sympathy for ranchers is embedded in agency culture—a classic case of regulatory agency "capture."[42] Local ranchers press agency personnel, who respond predictably. Even if conditions on the public lands are seen as intolerable, federal land managers tend to tighten regulation only after years of monitoring, and in sedulous consultation with the rancher. They know that, if they show unaccustomed vigor, ranchers can call on Members of Congress and other political actors to intervene.[43] And even if the federal land managers limit the amount of grazing on particular tracts of federal land, history shows that they are extremely unlikely to retire tracts of federal lands permanently from livestock grazing altogether.[44] Yet

[42] BLM's current policy shows clearly how the agency is culture-bound to view any acre of federal land not grazed as wasted. It finds grazing permit "relinquishments" are "an increasing concern," because there is "some expectation" that the lands will be "devoted to uses other than livestock grazing." It emphasizes that grazing retirements are "not suited for resolving" ecological degradation, and that retirements should only be done when BLM can determine that "there are no feasible and practicable solutions readily available that can resolve livestock grazing issues in a timely manner." Finally, it underscores that, even if an area is retired, BLM remains free to allow "livestock use to resume on the subject area." *See* Memorandum, Bureau of Land Management, Instruction Memorandum No. 2007-067 (Feb. 20, 2007). On agency capture more generally, *see, e.g.*, Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 407 (1994); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988).

[43] A recent example is congressional direction that expiring grazing permits be renewed notwithstanding the failure of federal land managers to complete NEPA compliance. *E.g.,* Consolidated Appropriations Act, Pub. L. No. 108-447, § 339, 118 Stat. 3103,(2004); Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 108-108, § 325, 117 Stat. 1307, 1307 (2003); Great Old Broads for Wilderness v. Kempthorne, 452 F. Supp. 2d 71 (D.D.C. 2006).

[44] Advocates of greater regulation are, as noted earlier, unlikely to achieve this result in the courts either. *See supra* note 28 and accompanying text. The

because vegetation is slow to respond and soils slow to rebuild in the more arid parts of the West, nothing short of permanent removal may allow that land to begin to regain health.[45]

C. *A Market/Regulatory Hybrid*

Some conservation organizations have occasionally tried a third approach. They have bought federal grazing permits from willing seller ranchers, and then sought approval from the federal land agencies to eliminate livestock grazing on the federal lands covered by the permits. This approach effectively changes forage use from livestock production to wildlife, watershed protection, grassland restoration, and other ecological purposes.[46]

On a willing buyer-willing seller basis, this "conservation-purchase-and-retirement" approach combines privatization and regulation. Like privatization, it brings the competitive workings of the marketplace to bear, at least in part, to determine whether the best use is ranching or conservation.

Meanwhile the federal government would maintain its regulatory program for the federal lands that remain subject to livestock grazing. This may enhance the prospect that conservation-oriented buyouts can occur in areas of greatest

exception that proves the rule is the Comb Wash case, *Nat'l Wildlife Fed'n v. BLM*, 140 I.B.L.A. 85, 104 (1997), a practically unique case where the Interior Board of Land Appeals held that BLM had not, on the record before it, justified its decision to allow continued grazing on a tract of federal land despite much evidence of resource damage. Although BLM could have attempted such a justification and probably been given significant deference had it done so, it decided instead to order 350 cows removed from 7000 acres of federal land. *See also* discussion *infra* note 51.

[45] One range scientist estimated that grazing would need to be eliminated from only 10 percent of the federal rangeland to restore the riparian habitats. Jerry L. Holechek, *Policy Changes on Federal Rangelands: A Perspective*, 48 J. SOIL AND WATER CONSERVATION 166 (1993). Of course, this likely requires eliminating substantially more than 10 percent of the livestock because riparian areas are much more productive of forage.

[46] These kinds of acquisitions are possible even though the permits are simply "privileges" and contain no "rights" because, as noted earlier, federal grazing permits are marketable. *See supra* text accompanying note 23. Permits under the TGA can only be granted to "settlers, residents and *other stock owners*." 43 U.S.C. § 315(b) (2000) (emphasis added). The Grand Canyon Trust, a regional conservation group which has made buyouts, met this requirement by forming a livestock-owning subsidiary to hold the permits. This contortion would not be necessary under our proposal, discussed below, because conservation interests could simply pay the rancher to relinquish the TGA permit directly to the government for retirement.

environmental damage. Federal land managers may be most willing to regulate to reduce grazing levels in such areas, furnishing ranchers in those areas with an incentive to sell. The government can also enhance the efficiency of conservation-oriented buyouts by engineering trades in appropriate circumstances. That is, if a rancher is willing to sell to a conservation-oriented buyer a permit that includes relatively healthy rangeland, the federal land manager can sometimes persuade another rancher in the vicinity who is grazing more damaged land to shift her livestock off that impaired land (allowing its restoration) to public land covered by the permits purchased by the conservation buyer.

In addition to attaining a solution—no grazing—that would be nearly impossible to achieve with regulation alone, the buyout serves a important distributional purpose. It protects the rancher's economic interest in a time of economic transition in the rural West. Capitalizing the subsidy to the rancher into a one-time payment, the buyout is consistent with longstanding federal policy of not seeking to maximize economic return to the Treasury from the use of federal lands, but rather to serve other objectives.[47]

Purchase and retirement of grazing permits have, however, been rare—discouraged by two problems: lack of permanence, and opposition by locals and by rancher trade associations.

III. LACK OF PERMANENCE

The Secretary of the Interior[48] has wide authority and a number of different ways to retire permits. Each is, however, discretionary and quite readily reversible, as follows:

1. The Secretary can merely accept the permittee's offer to relinquish an existing grazing permit, and refuse to entertain the issuance of any new grazing permit to a neighboring rancher. Ordinarily this requires little process and paperwork. But the decision not to issue new grazing

[47] It is not always only well-connected interests that profit from the federal government's redistribution efforts. *See* Burkhard Bilger, *Letter from Oregon, The Mushroom Hunters*, THE NEW YORKER, Aug. 20, 2007, at 62 (explaining that federal land managers in Oregon allow migrant workers and other low-income people to collect highly valuable mushrooms for a nominal price).

[48] Here the discussion focuses on the Interior Secretary (acting through the BLM), but essentially the same mechanisms are available to the Agriculture Secretary (acting through the USFS) on national forest lands.

permits can be reversed nearly as easily as it is made.[49]

2. The Secretary can "withdraw" the federal lands from livestock grazing under FLPMA. This entails somewhat more paperwork and process, including submitting a formal report to Congress. Withdrawals over five thousand acres may not exceed twenty years in duration, and can be revoked earlier, by a less cumbersome process than making them in the first place.[50]
3. The Secretary can formally amend the applicable resource management plan to provide that particular tracts shall not be grazed. Paperwork and a public process are required here as well. The plan may be amended at any time (using the same process) to rescind the retirement.[51]

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[49] The Public Rangelands Improvement Act of 1978 provides for retiring public land from livestock grazing either through FLPMA's land use planning process or "where . . . the Secretary determines, and sets forth his reasons for this determination, that grazing uses should be discontinued (either temporarily or permanently) on certain lands." 43 U.S.C. § 1903(b) (2000). The Interior Solicitor (full disclosure: one of the co-authors of this paper) issued an opinion on January 19, 2001 that a decision to discontinue grazing need not be based on any specific finding of harm, but instead requires only a determination that the public lands should be devoted to other objectives like ecological restoration or protection of wildlife habitat. The Bush (II) Administration's Solicitor (the former Executive Director of the Public Lands Council, the principal public land ranching trade association), subsequently issued two confusing opinions that, while not overruling the January 2001 Opinion, sought to discourage retirements. He warned that eliminating grazing can "disrupt the orderly use of the range, breach the Secretary's duty to adequately safeguard grazing privileges, be contrary to the protection, administration, regulation and improvement of public lands within grazing districts, hamper the government's responsibility to account for grazing receipts, [and] impede range improvements. . . ." Memorandum, Interior Solicitor, Solicitor Memorandum Opinion M-37008 (Oct. 4, 2002) (clarified in May 2003) (on file with journal); *see also supra* note 42. A decision to resume grazing after a period of retirement would presumably require compliance with NEPA, but that procedural hoop is unlikely to be a significant obstacle in a livestock-friendly Administration.

[50] *See* 43 U.S.C. §§ 1702(j) (defining "withdrawal") & 1714 (explaining the processes for and limitations on withdrawals). Withdrawals can be renewed for up to twenty years at a time. *Id.,* § 1714(c)(1); *see also* 43 U.S.C. § 1712(e) (requiring notice to Congress when a management decision "excludes (that is, totally eliminates) one or more" principal uses of a tract of public land of one hundred thousand acres or more). FLPMA does not subject a decision to revoke a withdrawal to the same reporting requirements for making it in the first place. It may require compliance with NEPA, but challenging revocation decisions in court may not be easy. *See, e.g.*, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

[51] FLPMA specifically acknowledges this method of grazing retirement by giving an existing permittee first priority for renewal only "[s]o long as [among

The market price a buyer pays for a federal grazing permit reflects the reality that a buyer can expect to have that permit in perpetuity. A conservation buyer would like the forage covered by his permit to be used perpetually for something other than cows. The law allows the federal land manager to refuse to retire the land from livestock grazing, and even to return livestock to the land later. This creates a grave risk that the conservation investor will not get what it paid for.[52]

A. *Opposition to Buyouts*

If a governmental decision to retire federal lands from grazing were at little risk of reversal, the lack of legal permanence might not be a serious impediment. But a political problem exacerbates the legal one. Conservation buyouts of federal grazing permits can trigger opposition and paralyze federal land managers. The most noteworthy example occurred in the Grand Staircase Escalante National Monument in southern Utah. The Grand Canyon Trust[53]

other things] the lands for which the permit or lease is issued remain available for . . . grazing in accordance with land use plans" prepared under FLPMA. 43 U.S.C. § 1752(c) (2006); *see also* Memorandum, Interior Solicitor, Solicitor Memorandum Opinion IM 2001-079 (Jan. 19, 2001) (on file with author). If the area being retired is within a "grazing district" established under the TGA, the Secretary may also excise it from the district, with a finding that the area is not "chiefly valuable" for grazing. Even if the lands are removed from a grazing district, however, the TGA gives the Secretary discretion to lease them for grazing. 43 U.S.C. § 315m (2000). Therefore, taking federal lands out of grazing districts does not make it more difficult to reintroduce livestock to them.

[52] The Clinton Administration sought to recognize conservation buyouts by a different mechanism. Its "rangeland reform" regulations gave the Interior Secretary authority to issue TGA grazing permits for "conservation use," which meant the land covered by the permit would not be used by livestock for the permit term (ordinarily, ten years). Although the provision allowed the Secretary to issue "conservation use" permits only when the permittee requested it, the ranchers' trade association challenged it, and a federal appellate court struck it down, holding that the TGA did not authorize the issuance of permits not to graze livestock. Public Lands Council v. Babbitt, 167 F.3d 1287, 1308 (10th Cir. 1999); *rev'd on other grounds*, 529 U.S. 728 (2000). The decision precludes the Secretary from halting grazing on lands covered by a TGA permit other than by making annual determinations of how much, if any, use is appropriate. Presumably, the Secretary could issue a conservation buyer a permit under FLPMA (rather than the TGA), authorizing it to use the land formerly grazed for wildlife habitat and ecological restoration, but this would not preclude a Secretary from issuing a TGA permit to a rancher to reintroduce cows on the same land.

[53] One of the co-authors is on the Board of the Trust and both are affiliated with a foundation that provides funds to the Trust.

purchased permits from willing-seller local ranchers, including a county commissioner, and asked the BLM to amend the pertinent land use plan to retire the land from grazing (at least for the duration of the plan). The idea was supported by the local BLM office. Initially, all political signs looked favorable. The local Congressman, Chris Cannon, wrote Interior Secretary Gale Norton to urge her "to support this worthwhile effort."[54] Norton, who had advocated "free market" solutions earlier in her career when she worked for the conservative, market-oriented Mountain States Legal Foundation, responded that she "strongly endorsed this action," because "this type of market-based solution can provide an excellent opportunity for local groups to work together to benefit the community and the land."[55]

It was not long, however, before a strong lobbying campaign against retirement was mounted. According to Interior Department sources who must remain confidential, the entire Utah congressional delegation, including Congressman Cannon, came to oppose the retirement, as did every single commissioner in the two counties involved—including even the rancher-commissioner who had sold his grazing permits to the Trust. The Secretary bowed to the pressure and ordered BLM to postpone work on the plan amendment. Six years later, the BLM has still not finished the necessary paperwork to make a decision whether to retire the land from grazing.

Such opposition is not unexpected. Neighboring ranchers may oppose retirement because they may wish to use those pastures to expand their own herds, or at least view them as backup forage if their own allotments become unavailable because of circumstances like drought. Opposition may also come from what economists call "third parties" in the community—interests

[54] Letter from Chris Cannon, Member of Congress, to Gale A. Norton, Secretary of the Interior, (Apr. 12, 2001).

[55] Letter from Gale A. Norton, Secretary of the Interior, to Chris Cannon, Member of Congress (Aug. 3, 2001) (on file with journal). Secretary Norton had earlier supported the project in an April 23, 2001 letter to Terry Anderson, a noted "free market environmentalist." Lynn Scarlett, then Interior's Assistant Secretary of Policy, Budget, and Administration (and, as of this writing, Deputy Secretary), who had also supported market solutions in her prior position at the libertarian Reason Foundation, expressed similar sentiments. Letter from Lynn Scarlett, Assistant Secretary of Policy, Management, and Budget, to Geoffrey Barnard, President of the Grand Canyon Trust (Nov. 6, 2001) (on file with journal).

like the local bank, feed supplier, and farm and ranch implement dealer. While the ranching industry and its suppliers have dwindled to a relatively small part of the economic base of most rural western communities,[56] they often continue to have great sway over local politicians. For their part, ranchers' trade associations like the Public Lands Council see retirements as eroding their institutional and political power. Accordingly, they favor allowing ranchers to sell permits only to other ranchers, even though limiting the market this way probably leads to lower prices for their rancher-members who want to sell.[57] Finally, and perhaps most important, there can be stout opposition based on ideology and culture. Rural western communities often strongly identify themselves as ranching communities no matter how little ranching contributes to the local economy, leading them to oppose any movement to end livestock grazing on some federal lands.

The purchase-and-retirement strategy has worked in a few places where special circumstances provide sufficient security that the retirement will be permanent. Sometimes Congress itself has provided the security, by specifically authorizing federal lands that are being used for military or conservation purposes to be retired from livestock grazing upon relinquishment of the grazing permits.[58] Grazing retirements have also occurred where the Endangered Species Act (ESA),[59] a powerful federal regulatory statute was involved because it furnished conservation purchasers with considerable confidence that the retirement decision would be difficult to undo. In national forests in the Greater Yellowstone region of the northern Rockies, for example, conservationists bought grazing permits from ranchers and persuaded the USFS to amend management plans to retire about half a million acres from grazing in order to eliminate conflicts with grizzly bears protected under the ESA.[60] Other federal laws may operate with similar

[56] *See supra* note 3 and accompanying text.

[57] As mentioned in note 46, *supra*, currently only stock owners can buy permits.

[58] *See* 16 U.S.C. § 410mm-1(e)(2)(B) (2000) (establishing the Great Basin National Park in Nevada); *id.* § 410aaa-50 (establishing the Mojave National Park and Preserve in California); *id.* § 272b(b) (enlarging Arches National Park in Utah); *see also* Central Idaho Economic Development and Recreation Act, H.R. 222, 110th Cong. (2007).

[59] 16 U.S.C. §§ 1531–1543.

[60] *See, e.g.*, Tom Kenworthy, *Coalition "Retires" Grazing Area in Wyoming*, USA TODAY, Aug. 1, 2003 at A4; Francisco Tharp, *Yellowstone Grazing*

effect. On National Wildlife Refuges, livestock grazing is generally permitted only where, "in the sound professional judgment of the Director [of the U.S. Fish & Wildlife Service, it] will not materially interfere with or detract from the fulfillment of the mission of the National Wildlife Refuge System or the purposes of the [individual] refuge."[61] This can raise the bar against resumption of grazing high enough to warrant investment in conservation purchases.[62]

The situations where conservation purchases and retirements have been achieved remain exceptional. There are more than two hundred million acres of federal grazing lands where laws and restrictions inspiring confidence that retirements will be permanent do not exist. On these lands, the experience of the Grand Canyon Trust—where locally-led opposition to grazing retirements and the reluctance of the government to move forward in the face of it—has chilled the ardor of conservation interests in making such buyouts, reduced competition for ranch purchases, dampening the prospects of ranchers who would like to sell out, and perpetuated environmental degradation.

B. *The Solution*

The solution we proffer is a statute (see Appendix A) that directs the responsible federal agency to retire federal land from grazing permanently if the holder of the federal permit requests it.[63] In one simple stroke it would remove the two major obstacles to conservation investments in grazing buyouts: It would be essentially permanent (the statute would deny the agency authority to reintroduce livestock on the public land once removed) and, being automatic, could not be stopped by local opposition. It would work only for full-fledged retirements, and not merely for reductions in the number of livestock grazing in a particular area. The government's regulatory authority would remain available to reduce (and, if appropriate, eliminate) livestock grazing where

Allotments, HIGH COUNTRY NEWS, Mar. 24, 2008, *available at* http://www.hcn.org/articles/17600.

[61] 16 U.S.C. § 668ee(1).

[62] This occurred in the Hart Mountain National Wildlife Refuge. *See* MICHAEL BEAN & MELANIE ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 297–98 (Praeger 1997) (1983); Wilderness Society v. Babbitt, 5 F.3d 383 (9th Cir. 1993).

[63] *See* Appendix A, *infra.*

advisable.[64]

Our solution would bring more private philanthropic capital to bear, because conservation buyers would have assurance they would get what they are paying for—no more livestock grazing. Of course, Congress retains the authority to enact legislation opening particular tracts of retired land back up to livestock grazing. But this has never occurred to our knowledge, and thus we are confident our proposed statute provides sufficient real-world certainty to motivate many conservation investors.[65]

Beyond providing permanence, our proposed generic legislation insulates specific retirement decisions from local politics once a rancher decides to sell to a conservation buyer. By enacting our proposed statute, Congress would be making a national policy decision for the lands managed by the BLM and U.S. Forest Service. This is appropriate because, so long as the lands are owned by the whole nation, the ultimate test is what best serves the national interest. We hasten to add that the statute would not operate unless the owner of the grazing permit decided to sell the permit to the conservation buyer. Opponents of grazing retirement remain free either to outbid the conservation buyer or to persuade the rancher not to sell. But our proposal would not allow opponents to use local political pressure to override the decision,

[64] Congress might at the same time consider legislation replicating the tax deductibility of conservation easements. *See* I.R.C. § 170(b)(1)(E) (2000). This would allow ranchers who relinquish their permits back to the government to deduct the market value of those permits. Because ranchers have no property interest in their grazing permits, taking such a step would significantly extend the concept of tax deductibility, and for that reason ought to be carefully considered. If Congress were to move in this direction, we would recommend, in order to maximize conservation value and minimize the possibility of abuse, making the deduction available only if entire pastures were completely and permanently retired.

[65] Some have contended that this degree of permanence in land use decisions is unwise because we cannot know what land uses will be sensible decades down the road. *See generally* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002). Others have proposed various ways to mitigate that concern. *See, e.g.*, Barton H. Thompson Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601 (2004); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005). The concern has not prevented Congress from deciding to allow tax deductions only for "perpetual" conservation easements. *See* I.R.C. § 170(h)(5)(A) (2006); 26 C.F.R. § 1.170A-14(a) (2007). Should circumstances change dramatically, Congress could reverse course and open retired federal lands back up to livestock grazing, though that would seem unlikely.

once the rancher and the conservation buyer strike a deal.

C. *Criteria for Hybrid Market/Regulatory Solutions*

Those who oppose "buying" conservation in a regulated environment make a number of credible arguments. Some argue that ranchers should not be paid to stop doing something they have no right to do; in effect, they should not be paid to comply with environmental laws and regulations.[66] The opposition to paying is both principled and practical. The principled argument is that ranchers should not be allowed to profit further from their use of a resource owned by all Americans, a resource they have already overused at public expense. The practical concern is that, if the political system gets into the habit of buying greater protection for the public interest, it will lose its capacity to regulate to achieve the same end. "If one owner gets paid by a land trust to avoid unwanted development, then how is it legitimate for government to prohibit another landowner from doing the same without payment?"[67]

We generally agree that buying conservation is bad public policy in circumstances where it significantly undermines regulation,[68] or when it is an inefficient or ineffective use of public resources, such as when it costs much for only temporary change or marginal benefits. In our view, the key to successfully mixing the market and regulatory approaches is to do it in such a way as to address these valid concerns. We believe that the solution we advocate here—using private, albeit tax-subsidized[69] funds to

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[66] *See* John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 J. LAND RESOURCES & ENVTL. L. 1, 39–40 (2005).

[67] ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 80 (2007); *see also* Holly Doremus, *Shaping the Future: The Dialectic of Law and Environmental Values*, 37 U.C. DAVIS L. REV. 233, 238 (2003).

[68] *See* Echeverria, *supra* note 66, at 39–40 and accompanying text.

[69] The tax subsidy occurs either through the tax deduction given a donor to one of the tax exempt conservation organizations purchasing the permit, or where the rancher takes a tax deduction when she donates her permit (if such a deduction is allowed, see footnote 67 and accomanying text, *supra*). Although our proposal is aimed at privately-funded (albeit tax-subsidized) conservation purchases, there is no reason it could not be applied to buyouts achieved by more direct application of public funds. Such buyouts have occurred where the ESA and other special circumstances foster confidence that retirements will be permanent. In Clark County, Nevada, public land grazing permits were purchased and retired with public and private funds in order to create a habitat

permanently retire federal grazing permits—minimizes these pitfalls while bringing many benefits of the market to bear on the problem.

First, we believe our proposal is unlikely to undermine existing regulation. Decades of mostly unsuccessful conservationist advocacy and litigation for tougher regulation make it clear that while numbers of livestock may be reduced, and even eliminated for a while, many degraded federal lands will never be permanently retired from grazing by regulation alone. Federal land managers have almost never used the regulatory tool to eliminate livestock grazing even when the health of the land plainly requires it.[70] Against this historical record, we do not believe our proposal would undermine the government's appetite for regulation any more than an easement purchased to forestall development on a particular piece of land undermines the government's appetite to regulate building size and location throughout the neighborhood. Specifically, we do not expect federal land managers to alter whatever level of effort they are making toward achieving ecological health on public rangelands simply because a method has been created to facilitate retiring some federal land from grazing altogether. We also think that continuing federal regulation will minimize the possibility of "greenmailing" by those ranchers who might be tempted to put excess numbers of livestock on their federal allotments to motivate conservation interests to buy them out.

Buying grazing permits to remove livestock from tracts of federal lands would not work to recognize a new property right for ranchers. For many decades federal grazing permits have been bought and sold in the private market, with private funds, without undermining the federal policy, clearly expressed in federal law, that the grazing permit carries with it no property interest to federal land. Ranchers have kept up a steady stream of litigation seeking to gain property rights in federal lands comparable to those of miners and some others, but the courts have consistently ruled

conservation plan for the desert tortoise, a species subject to the ESA's protection, in order to allow more development elsewhere. CLARK COUNTY, NV, DESERT TORTOISE HABITAT CONSERVATION PLAN, (1991). In Idaho, with the support of the local Indian Tribe and the state Department of Game and Fish, the Bonneville Power Administration used fish restoration funds to buy and retire grazing permits on national forest land that was prime habitat for several endangered fish.

[70] *See supra* note 44.

against them.[71] It is hard to imagine that enactment of our proposed federal statute would transform the legal landscape in this area.

Our solution also minimizes the problem of using tax-subsidized funds to secure only marginal or temporary conservation. If past experience is an indicator, those philanthropic organizations most likely to fund conservation-oriented grazing buyouts will have access to good, site-specific information about the conservation benefits that might be generated from retirements; indeed, their information is often better than the government's (the BLM's in particular). Furthermore, with limited funds, these organizations have an incentive to ensure they are purchasing the permits most in need of retirement. Also, as noted earlier, the government has some ability to move grazing around by adjusting different ranchers' grazing patterns in order to retire the most damaged lands in the area.[72]

Another objection to our proposed solution is that it allows conservation buyers to turn what is at least nominally a public decision—whether particular tracts of federal lands are to be grazed by domestic livestock—into a private decision. That is, under our proposal if a conservation buyer like The Nature Conservancy decides there should be no grazing on a tract of federal land, and the rancher with the grazing permit is willing to sell to TNC, the federal land will not be grazed. This is the case regardless whether the federal land managing agency, the

[71] Most recently, federal and state courts have rejected ranchers' claims that the water rights they perfect under state law in association with their federal land grazing permits carry with them any sort of right, compensable or otherwise, to graze federal land. *See* Colvin Cattle Co. v. United States, 466 F.3d 803, 807 (9th Cir. 2006); Walker v. United States, 162 P.3d 882, 884 (N.M. 2007).

[72] *See supra* text accompanying note 48. We have noted the possibility of giving ranchers who donate their permits a tax deduction comparable to that obtained by donating a conservation easement. *See supra* note 64. Critics have pointed out the inefficient character of conservation easements—their conservation benefits may not approach their cost to the public treasury because in many situations those donating or selling the easement have no intention of developing anything for the foreseeable future, and those on the verge of development are unlikely to donate or sell an easement no matter how much conservation benefit would result. *See, e.g.,* Echeverria, *supra* note 66, at 21–22. We do not believe that is much of a problem in the federal land grazing context. Ranchers may be mostly likely to donate and retire permits to graze those federal lands which are most expensive to manage, and which produce the least profit, and we believe that in many cases those lands are likely to be the ones suffering the most ecologically.

surrounding landowners or the local communities agree. The concern here echoes a criticism sometimes leveled at conservation easements, that the public treasury is putting up the money (through the tax deduction) but the "choice about what land to protect is, for all intents and purposes, delegated to private owners."[73]

We do not find this argument persuasive in this context. For one thing, to the extent the proposal contemplates the use of tax-subsidized dollars to fund grazing retirements, the decision to retire the land is a public decision, not a private one—albeit a generic policy decision made by the U.S. Congress, rather than a site-specific decision by an official in the executive branch. Second, even when the decision about which particular federal lands will be retired is a private one (made by the rancher-seller and private conservation buyer), the result is a typical feature of tax policy. The generic tax subsidy for charitable activities leaves the question of how the subsidy is used, and whether it is used wisely, largely beyond public oversight except at the grossest level.[74]

Finally, it is entirely consistent with the historical evolution of federal land policy for Congress to decide federal grazing retirement policy generically, rather than to leave it to the executive branch through tract-by-tract decisions. For much of the nation's history, until around the turn of the twentieth century, private interests directly dictated what happened to federal lands.[75] Private livestock herders decided by their actions, without any sanction by Congress, that much of the federal lands would be grazed by domestic livestock. In that same earlier era, Congress gave homesteaders and other settlers, miners, railroads and others free rein to choose federal lands to pursue their missions because Congress decided settling and developing these lands was in the national interest.

Over the course of the twentieth century, Congress gradually changed policy. One change was to supplant private decision-making by enlarging the authority and discretion of the executive branch to decide how federal lands would be used. (But even in so

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[73] Echeverria, *supra* note 66, at 8.

[74] Of course, to the extent public funds are used directly for grazing buyouts. *See supra* note 73 and accompanying text. This problem of the private character of the retirement decision would attenuate.

[75] *See* Blumm, *supra* note 42.

doing, Congress left wide running room for private decisions about federal land use, for federal minerals are not developed nor federal trees harvested nor federal grass grazed by livestock unless private industry is willing to undertake the job.) Another change, even more pertinent to the present context, was that Congress increasingly decided for itself to favor one kind of land use and management over another. These generic congressional decisions were made principally in the direction of conservation, as exemplified by the trend, still underway, to put more and more tracts of federal lands in the national park and wilderness and other conservation systems.

The solution we propose is entirely consistent with both the long history of Congress making generic national decisions implemented locally through private decision-making, and the seemingly inexorable trend of congressional decisions promoting conservation on federal lands.

CONCLUSION

Adopting the simple statutory solution we propose offers the opportunity to restore environmental health to millions of acres of land, and to reduce continuing conflict between ranchers and conservation interests. It might also work in some other contexts to stop overexploitation and promote conservation of natural resources. As we see it, the following are some of the key features of this hybrid between regulation and private markets.

1. The hybrid solution is necessarily ad hoc, tailored to fit the specific factual and regulatory context and crafted to address the exact problem.
2. It creates no new private rights in public resources. Instead, it makes relatively small changes in the regulatory framework in order to permit private solutions to complement the regulatory regime, to provide both efficiency and distributional benefits. The continued enforcement of the regulatory regime remains an essential element of the hybrid solution.
3. It involves a market-setting mechanism—a new law—aimed at creating some legal certainty to furnish a conservation purchaser strong assurance that it will receive the conservation values it seeks.
4. It is aimed at achieving an objective that a long history has

persuasively shown is unattainable by regulation alone.

This approach may make it easier to protect conservation values on areas of federal land where private rights exist. A number of areas of federal land with high conservation values, and considerable public support for protecting these values, are subject to existing mineral leases, timber sale contracts and the like. Conservation-oriented dollars may be available to buy up those leases or contracts from willing sellers (who may not want the controversy of trying to develop the area by exercising their rights) and relinquish them back to the government. But, as with livestock grazing permits, this is often risky because federal land managers retain the authority to issue new leases or timber sale contracts. A solution comparable to what we offer here for livestock grazing is for Congress to legislate to protect the conservation values of the area, withdrawing it from new leasing, timber sales, and the like, while protecting valid existing rights. This creates a framework of permanence that would allow conservation dollars to be used to buy the outstanding private rights from willing sellers. Such a solution was adopted by Congress in 2006 in the Rocky Mountain Front of Montana,[76] and is currently before Congress in the Wyoming Range Legacy Act of 2007 introduced by Wyoming Senator John Barrassso.[77]

Another context where a similar approach is being taken is in the ocean off Big Sur, California, where an upwelling of water from the ocean floor disseminates huge amounts of nutrients, producing coral gardens seven feet tall, whole communities of rare species, and some of the world's biggest rockfish. Weighted nets dragged along the ocean floor by trawlers were causing heavy damage, but attempts at regulation had done little to stem it. Early in the new millennium, the Environmental Defense Fund and The Nature Conservancy bought fishing permits from trawlers as part of a package that included the trawlers and the conservationists persuading the federal regulators (the Pacific Fisheries Management Council and NOAA Fisheries) to create several "no-trawl" zones totaling more than three million acres of ocean bottom. Under current law, the zone is not permanent, but the conservationists have purchased all the trawler permits being

[76] Tax Relief and Health Care Act of 2006, Pub.L. 109-432, § 403, 120 Stat. 2922, 3050–53 (2006).

[77] S. 2229, 109th Cong. § 1 (2007).

operated out of Morro Bay, California (and have options to purchase most of the remaining central coast trawl permits), which reduces the likelihood that significant pressure will be brought to bear to reopen the area to trawling. Part of the motivation on the part of the fishing industry was that, like ranching, it was becoming more economically marginal. Like ranchers, commercial fishers have no property rights in their permits, but, like ranchers, they have a deep culture and long-held expectations that they could continue to fish. Moreover, as in the grazing context, federal regulation had not been able to address the problem satisfactorily.[78] Buying out fishing licenses or quotas to reduce overfishing may be possible elsewhere.[79]

[78] Personal communication with Rod Fujita, Staff Expert, Environmental Defense Fund (May 2, 2008).

[79] A key is having the ability to effectively halt fishing in the area in question as part of a buyout package. In June 2006, President Bush proclaimed the Northwestern Hawaiian Islands Marine National Monument and authorized the permanent retirement of fishing licenses in the area if they were offered back to the government. The Pew Charitable Trusts then opened negotiations to buy out the fishing licenses, if all eight of the existing fishing permit holders agreed to sell, if the compensation were based on fair market value as determined by catch history and fishing income, and if the federal government agreed to retire the fishing permits permanently, and not reissue new ones. *See* Press Release, The Pew Charitable Trusts, Pew Charitable Trusts Opens Formal Discussions with Northwestern Hawaiian Islands Fisherman (July 25, 2006), *available at* http://www.pewtrusts.org/news_room_detail.aspx?id=19740. Pew eventually abandoned its efforts after only two of the permit holders showed interest. *See* Jan TenBruggencate, *Pew Trust Gives Up On Fishermen Buyouts*, THE HONOLULU ADVERTISER, Nov. 3, 2006, at 5B.

APPENDIX A

Proposed regulatory language:

"Whenever the holder of a permit to graze livestock on a specific tract of federal land, for the express purpose of retiring that federal land from all livestock grazing in order to further the conservation of public resources, makes an irrevocable offer, in writing, to relinquish the permit to the federal agency responsible for managing that land, the federal agency shall forthwith withdraw that tract of federal land from grazing, and make conforming changes in the pertinent resource management plan. The withdrawal shall be effective, and the changes in the plan completed, within sixty days of receipt of the request, and shall remain in effect until the Congress provides otherwise."