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## **A Changing of the Cattle Guard: The Bureau of Land Management’s New Approach to Grazing Qualifications**

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Throughout the western United States, cattle guards serve as a barrier containing livestock and preventing them from wandering down roads, crossing property lines, and otherwise escaping the bounds of their confinement.<sup>1</sup> Older models have parallel metal bars over the top and a concrete pit underneath; any animal unlucky enough to attempt a crossing would find itself stranded on the bars.<sup>2</sup> Over time, ranchers discovered that painting parallel white lines over the surface of the road had the same effect, creating the illusion of danger and invoking the same fear of stranding, but resulting in an easy crossing for those animals that tried.<sup>3</sup>

The BLM's system of determining whether an applicant is qualified for a federal grazing permit on public domain lands under its jurisdiction<sup>4</sup> traditionally resembled the older model of cattle guard. Those applicants not savvy enough to stay on the bars while avoiding the gaps found themselves stranded upon taking the first or second step, having expended time and money in their attempt and left with no permit. In this way, the older model excluded any applicant other than a traditional, large-scale, for-profit ranching operation. Recently, however, the BLM has replaced the older qualifications model with a less complicated version, which looks similar and appears to pose a danger of stranding to unknowledgeable applicants, but is actually much easier to navigate. As more nontraditional applicants have discovered how to navigate the new model, the face of federal lands ranches is beginning to change.

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<sup>1</sup> JAMES F. HOY, *THE CATTLE GUARD: ITS HISTORY AND LORE* 6 (1982).

<sup>2</sup> *Id.* at 4.

<sup>3</sup> *Id.* at 153–55.

<sup>4</sup> This includes all public domain lands under BLM jurisdiction, but does not include other types of public domain lands, such as those managed by the U.S. Park Service or Forest Service.

This Article examines the traditional permit qualifications analysis, explains the role played by the regulations that created it, and argues that the BLM's new approach to the qualifications issue has finally opened the door for nontraditional permittees to a degree not seen before in over seventy years of federal government regulation of livestock grazing on public lands. In Part I, this Article introduces the concept of federal lands ranches and discusses the exclusive club of federal lands ranchers, who, until recently, controlled the vast majority of grazing permits. Part II examines the history of livestock grazing on public domain lands prior to Congress's passage of the Taylor Grazing Act in 1934<sup>5</sup> and the origins of the terminology contained in the past and present qualifications rules. Part III discusses the provisions of the Taylor Grazing Act under which the Secretary of the Interior asserts the authority to create qualifications regulations. Part IV traces the historical evolution of the qualifications regulations and discusses the BLM's current requirements and approach. Part V analyzes one example of a modern, nontraditional permittee that became qualified and obtained grazing permits on environmentally sensitive allotments in Utah and Arizona under the new model and concludes that this model will allow the BLM to more easily implement its statutory obligations and will greatly benefit the federal range.

## I

### FEDERAL LANDS RANCHES: AN EXCLUSIVE CLUB

A federal lands ranch consists of private property, usually containing the ranch buildings and some pasture land, and public lands used primarily for grazing livestock. The public lands used by federal lands ranchers are divided up into large tracts called allotments, which are often several thousand acres in size.<sup>6</sup> Currently, the BLM manages over 18,000 livestock grazing permits on more than 21,000 allotments, which make up approximately 160 million acres of federal lands dedicated to livestock grazing.<sup>7</sup> Grazing is by far the most widespread, extractive use of BLM lands, even though it

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<sup>5</sup> Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315–315r (2006)).

<sup>6</sup> BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, FACT SHEET ON THE BLM'S MANAGEMENT OF LIVESTOCK GRAZING (2009), <http://www.blm.gov/wo/st/en/prog/grazing.1.html>.

<sup>7</sup> *Id.*

is not the most visible extractive use due to the migratory and seasonal nature of livestock grazing on arid western allotments.<sup>8</sup>

The majority of federal lands ranchers holding BLM grazing permits have obtained them because their predecessors grazed livestock on the public range in the early twentieth century. Despite the Taylor Grazing Act's explicit statement that grazing permits "shall not create any right, title, interest, or estate in or to" federal lands,<sup>9</sup> the BLM and its predecessor agency, the Federal Grazing Service, have consistently promulgated regulations that, for more than seventy years, have created an expectation on the part of traditional federal lands ranchers that they hold grazing privileges as private property rights.<sup>10</sup> Historically, the regulations have simultaneously protected the federal lands ranching industry,<sup>11</sup> while almost foreclosing any opportunity for nontraditional applicants to obtain permits.

The qualifications regulations, in particular, have made it nearly impossible for anyone outside of this club of federal lands ranchers and their successors to obtain grazing permits.<sup>12</sup> Although permits have a limited duration of ten years, the agency's rules have always given priority in the renewal and issuance of new permits to existing permittees.<sup>13</sup> The BLM has also historically required applicants to show more in the way of qualifications than the language of the Taylor Grazing Act and other applicable statutes required, which favors the established livestock industry.<sup>14</sup> These requirements have essentially served as a bar to most nontraditional applicants.

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<sup>8</sup> John D. Leshy & Molly S. McUsic, *Where's the Beef? Facilitating Voluntary Retirement of Federal Lands From Livestock Grazing*, 17 N.Y.U. ENVTL. L.J. 368, 368 (2008).

<sup>9</sup> Taylor Grazing Act § 3, 43 U.S.C. § 315b (2006).

<sup>10</sup> See *United States v. Cox*, 190 F.2d 293, 295 (10th Cir. 1951) (holding that government's "taking" of federal lands covered by grazing permits were not compensable as part of an "economic unit" of federal lands ranches).

<sup>11</sup> See *Public Lands Council v. Babbitt (PLC II)*, 529 U.S. 728, 745 (2000).

<sup>12</sup> This group is not very large. As of 1992, 9.1% of permittees controlled 74% of the forage on BLM Lands. U.S. GEN. ACCOUNTING OFFICE, RANGELAND MANAGEMENT: PROFILE OF THE BUREAU OF LAND MANAGEMENT'S GRAZING ALLOTMENTS AND PERMITS 9 fig.1.1 (1992).

<sup>13</sup> The BLM also issues leases to graze sections of land outside of established grazing districts, which are governed by separate qualifications rules. See Taylor Grazing Act, 43 U.S.C. § 315m (2006); 43 C.F.R. pt. 4600 (2009).

<sup>14</sup> See *PLC II*, 529 U.S. at 745.

Many have argued that traditional federal lands ranchers have captured the BLM by essentially taking over the agency that is charged with regulating them.<sup>15</sup> Some have argued that the agency has lost its objectivity over time, making all grazing management decisions in favor of the federal lands ranchers and to the exclusion of anyone else, especially during the last fifteen years.<sup>16</sup>

This does not appear entirely true, especially in recent years, for several reasons. In 1995, during the Clinton administration, the BLM made major changes to its permitting qualifications rules to expand the club of BLM grazing permittees by specifically allowing environmental and conservation organizations to apply for permits.<sup>17</sup> Although traditional ranchers challenged the 1995 qualifications rules, the Supreme Court upheld them in *Public Lands Council v. Babbitt*,<sup>18</sup> and the BLM, for the most part, began to adopt a more open approach to the issue of qualifications. This new approach has resulted in more nontraditional permit applicants, such as environmental and conservation organizations, obtaining permits despite not having previously grazed federal lands and in the face of strenuous opposition from traditional federal lands ranchers.<sup>19</sup>

## II

### THE ORIGINS OF QUALIFICATIONS TERMINOLOGY

The concept of a federal lands ranch, which uses private land for a ranching base and public lands for additional forage, started with Spanish and Mexican ranchers who used their governments' land

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<sup>15</sup> E.g., Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 748 (2005) (discussing public lands ranchers' influence over Congress and the BLM).

<sup>16</sup> Raymond B. Wrabley, Jr., *Cowboy Capitalism or Welfare Ranching? The Public Lands Grazing Policies of the Bush Administration*, 29 PUB. LAND & RESOURCES L. REV. 85, 101–06 (2008) (discussing various Bush appointees' affiliations with livestock industry and public statements of sympathy to industry). There is some support for this theory in the numbers. According to a 2004 survey by the Government Accounting Office, federal agencies spent \$144.3 million in 2004 to support grazing, while grazing permits and leases only generated about \$21 million in revenue, which is less than one-sixth of the government's expenditures. U.S. GEN. ACCOUNTING OFFICE, LIVESTOCK GRAZING: FEDERAL EXPENDITURES AND RECEIPTS VARY, DEPENDING ON THE AGENCY AND THE PURPOSE OF THE FEE CHARGED 20, 30 (2005).

<sup>17</sup> *PLC II*, 529 U.S. at 745.

<sup>18</sup> *Id.*

<sup>19</sup> See *Stewart v. Kempthorne*, 554 F.3d 1245, 1250 (10th Cir. 2009) (discussing Grand Canyon Trust's acquisition of various base properties and grazing privileges on several allotments in southern Utah and northern Arizona).

grant system to maximize their ranching operations in what is now the American Southwest.<sup>20</sup> Because the land grants did not convey an adequate amount of rangeland to sustain a large ranching operation in this arid region of the country, recipients used their land grant property as a ranching base and grazed their livestock predominantly on adjacent, unclaimed government land.<sup>21</sup>

American ranchers later followed suit. In the latter part of the nineteenth century especially, the U.S. government strongly urged its citizens to move west and settle, both to establish control over territory occupied by Indian tribes and to prevent land from being claimed by the Mexican government.<sup>22</sup> Homesteading was the government's preferred method of settlement, so Congress induced settlers to establish themselves and cultivate tracts of land in return for title to the homesteaded property in fee simple absolute.<sup>23</sup> During this time, and continuing into the early part of the twentieth century, livestock grazing on federal lands was basically unregulated.<sup>24</sup> The government acquiesced to the stock owners' use of open lands and only minimally regulated grazing on the federal range. Moreover, the government did not require these stock owners to pay any compensation for their use of these lands.<sup>25</sup>

However, as with the Spanish and Mexican land grant systems, the homestead laws of the United States which initially granted 160, then 320, and ultimately 640 acres per homestead, left western ranchers well short of the acreage they needed to sustain their ranching

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<sup>20</sup> Marc Stimpert, *Counterpoint: Opportunities Lost and Opportunities Gained: Separating Truth from Myth in the Western Ranching Debate*, 36 ENVTL. L. 481, 490 (2006).

<sup>21</sup> *Id.*

<sup>22</sup> Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 IDAHO L. REV. 505, 514–15 (1993–1994).

<sup>23</sup> *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 868 (1999).

<sup>24</sup> MARION CLAWSON & BURNELL HELD, *THE FEDERAL LANDS: THEIR USE AND MANAGEMENT* 57–58, 84–85 (1957); *see also* *Leo Sheep Co. v. United States*, 440 U.S. 668, 683 (1979) (discussing the Homestead Act and Unlawful Inclosures of Public Lands Act as federal government's limited attempts to regulate homesteaders' use of the federal range for grazing).

<sup>25</sup> *Leo Sheep Co.*, 440 U.S. at 683; *Omaechevarria v. Idaho*, 246 U.S. 343, 352 (1918) (“Congress has not conferred upon citizens the right to graze stock upon the public lands. The government has merely suffered the lands to be so used.” (citing *Buford v. Houtz*, 133 U.S. 320, 326 (1890))).

operations.<sup>26</sup> Because vast stretches of federal lands remained unclaimed, homesteaders simply used the adjacent rangeland to graze their livestock.<sup>27</sup> This system worked effectively in the beginning of the nineteenth century, when the number of homesteaders and their stock was low enough that competition over resources occurred infrequently.<sup>28</sup>

By 1867, many western states had large-scale cattle operations. An American scene memorialized in novels and films began transforming the West; cattle drives moved stock from grazing lands to railheads for slaughter, and from the railheads the hides were transported east to markets in Kansas and Chicago.<sup>29</sup> Although cattle owners moved their herds at the end of a grazing season, cattle were generally grazed for the duration of the season within one defined area. When sheep began to appear on the range in the 1870s, grazing in a more nomadic pattern, competition and tensions between sheep and cattle ranchers began to escalate, culminating in range wars as forage dwindled.<sup>30</sup> Meanwhile, as it appeared that homesteaders would not occupy all of the unclaimed land over which the federal government asserted dominion, the government encouraged those not owning private base property or water rights to graze public lands.<sup>31</sup> Soon, these nomadic, propertyless grazers gained a significant foothold on the public range.<sup>32</sup>

In their attempts to exclude others, stock owners sought control of water rights and monopolized them to effectively control vast areas of federal land.<sup>33</sup> As barbed wire came into extensive use, the large swathes were broken up, and those able to make use of the newly fenced federal range most effectively were large sheep ranches.<sup>34</sup> As herd sizes increased and forage became scarcer, range wars became more frequent and intense, resulting in calls for Congressional action

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<sup>26</sup> *See id.* (noting that western ranches often required several thousand acres of pasture land).

<sup>27</sup> Stimpert, *supra* note 20, at 490.

<sup>28</sup> *Leo Sheep Co.*, 440 U.S. at 683.

<sup>29</sup> *PLC II*, 529 U.S. 728, 731 (2000); Farrington R. Carpenter, Dir. of Grazing, Dep't of the Interior, *The Range Livestock Industry of the West*, Radio Talk Delivered by NBC Radio 2 (1935) (transcript on file with author).

<sup>30</sup> *PLC II*, 529 U.S. at 732.

<sup>31</sup> Stimpert, *supra* note 20, at 490.

<sup>32</sup> *Id.*

<sup>33</sup> *Leo Sheep Co.*, 440 U.S. at 683.

<sup>34</sup> *Id.*; Carpenter, *supra* note 29, at 2.

from the ranchers themselves.<sup>35</sup> Meanwhile, the available public domain lands shrank from 917 million acres in 1900 to 200 million in 1920.<sup>36</sup> By the early 1930s, unregulated access to the increasingly limited federal range had resulted in overgrazing, soil deterioration, and low forage productivity.<sup>37</sup> At that time, both the federal government and ranchers themselves recognized that, if allowed to continue, this grazing free-for-all would render the already taxed range barren.<sup>38</sup>

### III

#### THE STATUTORY SOURCE OF THE QUALIFICATIONS REQUIREMENTS: SECTION 315b OF THE TAYLOR GRAZING ACT

Congress's response to calls for federal intervention was the Taylor Grazing Act, passed in 1934.<sup>39</sup> According to its preamble, the Taylor Grazing Act was intended "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes."<sup>40</sup> Upon passage of the Act, President Roosevelt withdrew all lands in the public domain from disposition; however, the federal government continued to grant mineral leases. This was intended to be a temporary action that would give the federal government time to make a final decision about whether to dispose of these lands.<sup>41</sup>

By the time the Act was passed, there was nothing "orderly" about private citizens' use of federal lands for grazing. Sheep and cattle ranchers were pitted against one another, and those owning base property opposed the nomadic grazers. Congress attempted to resolve

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<sup>35</sup> See Stimpert, *supra* note 20, at 491. By 1894, approximately seventy million cattle grazed pastures throughout the western United States, a figure only matched again briefly in 1920. Farrington R. Carpenter, *Today's Challenge to the Cattle Industry 2* (Feb. 1934) (unpublished manuscript, on file with author). From 1894 to 1914, the amount of cattle grazing decreased by thirty-eight percent across the country. *Id.* at 3.

<sup>36</sup> Carpenter, *supra* note 35, at 3.

<sup>37</sup> See Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315–315r (2006)).

<sup>38</sup> See *PLC II*, 529 U.S. 728, 732 (2000).

<sup>39</sup> Colin Foley, Comment, *The Grand Staircase-Escalante National Monument: Balancing Public and Private Rights in the Nation's Lands*, 25 B.C. ENVTL. AFF. L. REV. 743, 751 (1998).

<sup>40</sup> 48 Stat. at 1269.

<sup>41</sup> Foley, *supra* note 39, at 752.



the massive conflicts that had developed by authorizing the Secretary of the Interior to establish grazing districts, develop a permitting system, and issue permits to graze designated tracts of land within each district.<sup>42</sup>

There is nothing in the text of the Taylor Grazing Act itself that refers to qualifications of permit applicants.<sup>43</sup> However, section 315b of the Act authorized the Secretary to issue permits to “such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range.”<sup>44</sup> It also requires permittees to be “citizens of the United States or . . . those who have filed the necessary declarations of intention to become such, as required by the naturalization laws, . . . [or] groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located.”<sup>45</sup>

Section 315b also states that the Secretary of the Interior shall give “preference” to applicants “within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them.”<sup>46</sup> The meaning and role of this language governing preferences has caused extensive debate over the years.<sup>47</sup> While the provision acknowledges Congressional intent to give preference to those engaged in the livestock business, owners of water rights, and others, it does not actually require the BLM to ignore other applicants who meet the other mandatory requirements of residency and stock ownership. Over time, to a greater or lesser degree depending on the period in question, this language has played a significant role in the qualifications regulations.<sup>48</sup>

As noted above, Congress intended that the Taylor Grazing Act would be a transitional statute, temporarily alleviating the problem of overgrazing until the federal government determined how and if it

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<sup>42</sup> Taylor Grazing Act § 3, 43 U.S.C. § 315b (2006).

<sup>43</sup> *See id.* §§ 315–315r.

<sup>44</sup> *Id.* § 315b.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See PLC II*, 529 U.S. 728, 745 (2000).

<sup>48</sup> *Id.* (discussing evolution of the stock ownership requirement and interpreting preference language in light of past qualifications regulations).

would dispose of the federal rangelands.<sup>49</sup> However, its outdated language remains in effect, leaving much of the control over the issue of applicant qualifications to the BLM. In this way, section 315b of the Taylor Grazing Act, enacted with homesteaders and early twentieth-century ranchers in mind, remains the statutory backbone of the modern qualifications analysis.

#### IV

#### THE EVOLUTION OF THE QUALIFICATIONS REGULATIONS

Since 1934, when the Taylor Grazing Act was passed, the Federal Grazing Service, and later, the BLM, has imposed qualifications requirements on all permit applicants, whether they seek to graze under a new permit or by virtue of a transfer of another's grazing privileges.<sup>50</sup> These requirements basically fall into four categories: (1) citizenship or residency requirements, (2) base property requirements, (3) ownership of livestock, and (4) grazing preference.

##### *A. Citizenship or Residency Requirements*

As noted above, section 315b of the Taylor Grazing Act provides that permits "shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such" and also "to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located."<sup>51</sup> The Department of the Interior's first qualifications regulations closely mirrored the statutory language; the regulations required an applicant to be either a citizen or prospective citizen of the United States or a "group[],

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<sup>49</sup> The Act begins with the phrase "pending its final disposal" and proceeds to discuss how federal lands could be used in the interim period. Taylor Grazing Act, 43 U.S.C. § 315; see George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 40-41 (1982). The temporary withdrawal of public lands by the Taylor Grazing Act became final with the passage of the Federal Land Policy and Management Act (FLPMA) forty years later, thus leaving grazing as the predominant use of public domain lands. FLPMA, 43 U.S.C. § 1701(a)(1) (2006).

<sup>50</sup> See 43 C.F.R. § 4110.1 (2009) (mandatory qualifications); see also *id.* § 4110.2 (rules relating to base property and grazing preference).

<sup>51</sup> Taylor Grazing Act § 3, 43 U.S.C. § 315b.

association[], or corporation[] authorized to conduct business under the laws of the [s]tate in which the grazing district is located.”<sup>52</sup>

When the first formal Federal Range Code (Range Code) was issued in 1938, it contained a requirement that mirrored the 1936 regulation, with the additional caveat that associations or corporations must be authorized to do business in the state where the district is located and, if the district traversed state boundaries, in any other state where the applicant sought grazing privileges.<sup>53</sup> This requirement has changed little during the subsequent regulation of grazing on BLM lands.<sup>54</sup>

Currently, BLM regulations require applicants to be either citizens of the United States or to have filed “a valid declaration of intention to become a citizen or a valid petition for naturalization.”<sup>55</sup> Groups, associations, or corporations, must be “authorized to conduct business in the [s]tate in which the grazing use is sought” and all members must be citizens of the United States or have taken steps to become citizens in accordance with the rule regarding individual qualifications discussed above.<sup>56</sup> The citizenship or residency requirement is the least controversial and least complicated qualifications requirement and requires little or no financial investment for most applicants.

### ***B. Base Property Requirements***

Base property refers to private property, in the form of land or water rights, which is a requirement for any applicant seeking a grazing permit on BLM lands.<sup>57</sup> This concept originated in the late nineteenth century, when federal lands ranchers used homesteading

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<sup>52</sup> Eligibility of Indians & Indian Pueblos for Grazing Privileges Under the Taylor Grazing Act, 56 Interior Dec. 79, 81 (1937) (quoting DEP’T OF THE INTERIOR, RULES AND REGULATIONS OF SECRETARY OF THE INTERIOR (1936)).

<sup>53</sup> Federal Range Code, 43 C.F.R. § 501.3 (1938).

<sup>54</sup> The Range Code later added some additional language with respect to individuals applying for citizenship, requiring those who had filed a declaration to file a petition for naturalization within seven years of filing the declaration or forfeit their grazing privileges. 43 C.F.R. § 501.3(a)(2) (Cumulative Supp. 1938).

<sup>55</sup> *Id.* § 4110.1(a)(1) (2009).

<sup>56</sup> *Id.* § 4110.1(a)(1)–(2).

<sup>57</sup> *See id.* § 4110.1(a). Certain exceptions to this rule apply (1) when the applicant is purchasing or exchanging lands subject to preexisting permits, (2) when the applicant is seeking a “free-use” permit to graze livestock for domestic purposes, and (3) when the applicant is seeking a “crossing permit” to temporarily allow livestock to pass over a grazing allotment. *Id.* §§ 4110.1-1, 4130.5, 4130.6-3.

laws to purchase a minimal amount of private property and then grazed the adjoining federal rangeland.<sup>58</sup> Base property is often a minimal part of a federal lands ranch in terms of acreage, but it is a requirement for anyone seeking to qualify for a BLM grazing permit.

The origin of the base property requirement is the Taylor Grazing Act's provision stating that preference in the issuance of permits "shall be given" to "landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them."<sup>59</sup> The first grazing regulations, promulgated in 1936, provided that the government would issue temporary licenses to those applicants holding base property pending the development and implementation of a permitting system.<sup>60</sup> The regulations defined "base property" as "land and its products or stock water owned or controlled and used according to local custom in livestock operations."<sup>61</sup> As noted above, these were typically properties that had been acquired pursuant to the homesteading laws.<sup>62</sup>

During the late 1930s, the Department of the Interior, and specifically, the Grazing Service, began the arduous task of adjudicating the grazing privileges associated with every applicant's base property.<sup>63</sup> Until the Grazing Service could establish forage capacity and allotment acreage in each grazing district, it issued temporary licenses authorizing grazing at pre-1934 levels. Because adjudication was so time consuming, the first permit to graze a federal allotment was not issued until 1940, and the process was not entirely

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<sup>58</sup> See discussion *supra* Part II.

<sup>59</sup> Taylor Grazing Act § 3, 43 U.S.C. § 315b (2006).

<sup>60</sup> PAMELA BALDWIN, LEGAL ISSUES RELATED TO LIVESTOCK WATERING IN FEDERAL GRAZING DISTRICTS (Cong. Research Serv., CRS Code No. 94-688 A, 1994), <http://www.ncseonline.org/nle/crsreports/water/h2o-14.cfm> (quoting the DEP'T OF THE INTERIOR, RULES FOR THE ADMINISTRATION OF GRAZING DISTRICTS WITH APPROVED FORMS (1937)).

<sup>61</sup> *Id.* (quoting the DEP'T OF THE INTERIOR, RULES FOR THE ADMINISTRATION OF GRAZING DISTRICTS WITH APPROVED FORMS (1937)).

<sup>62</sup> *Id.* With respect to stock water bases, in 1937, the Grazing Service amended the regulations to require water base applicants to show that the water right was used in connection with an existing livestock operation and that any pertinent water rights had been formally recognized by the state. *Id.*

<sup>63</sup> The Supreme Court described this as "an enormous administrative task," which required the Division of Grazing to divide and allocate forage capacity on over 140 million acres of federal range among applicants. *PLC II*, 529 U.S. 728, 734 (2000).

completed until 1967.<sup>64</sup> Also, because the Grazing Service was occupied with the adjudication process and because the licenses issued in these early years did not change the status quo with respect to prior grazing levels, federal lands ranchers who had consolidated power over federal grazing lands in the years leading up to the Taylor Grazing Act's passage obtained most of the licenses issued under the new system.<sup>65</sup>

### *1. Base Property Requirements in the 1938 Federal Range Code*

The 1938 Range Code contained a section entitled “[p]ersonal qualifications of applicants,” which required applicants to show citizenship or corporate residence in the state in which the grazing district was located, as well as ownership of livestock.<sup>66</sup> However, in a separate section, the Range Code provided that licenses and permits would be issued to only those applicants who could demonstrate “[p]ossession of sufficient land, water, or feed to insure a year-round operation for a certain number of livestock in connection with the use of the public domain.”<sup>67</sup> To further narrow the pool, the regulations ranked those qualified applicants owning adequate base properties into classes depending on the property's characteristics.<sup>68</sup> “Base property” was defined as “[p]roperty used for the support of the livestock for which a grazing privilege is sought and on the basis of which the extent of a license or permit is computed.”<sup>69</sup>

Prior use of the federal range was the key factor in determining the class, and thus the priority status, of a base property under the 1938 Range Code. The Grazing Service's preference system ranked properties into three classes: class 1 base properties, which received the highest priority consideration; class 2 base properties, which received second priority; and class 3 base properties, which received no priority.<sup>70</sup> Class 1 base property was “[f]orage land dependent by

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<sup>64</sup> Buffalo Creek Coop. State Grazing Dist. v. Tysk, 290 F. Supp. 227, 229 & n.3 (D. Mont. 1968).

<sup>65</sup> Donahue, *supra* note 15, at 754.

<sup>66</sup> 43 C.F.R. § 501.3 (1938). *See infra* Part IV.C (discussing the stock ownership issue).

<sup>67</sup> 43 C.F.R. § 501.1(a).

<sup>68</sup> *Id.* § 501.4.

<sup>69</sup> *Id.* § 501.2(e).

<sup>70</sup> *Id.* §§ 501.4(a), 501.6(b). The 1937 rules ranked base properties by “group,” which was changed to “class” in the 1938 Federal Range Code. *See* Nunez, 56 Interior Dec. 363, 364 (1938).

both location and use, and full-time prior water.”<sup>71</sup> Land dependent by use was defined as:

Forage land which was used in livestock operations in connection with the same part of the public domain, which part is now Federal range, for any 3 years or for any 2 consecutive years in the 5-year period immediately preceding June 28, 1934, and which [wa]s offered as base property in an application for a grazing license or a permit filed before June 28, 1938.<sup>72</sup>

According to the 1938 Range Code, land was dependent by use only to the extent “necessary to maintain the average number of livestock grazed on the public domain in connection with it for any three years or for any two consecutive years” during the five years prior to the Taylor Grazing Act’s passage, which became known as the priority period.<sup>73</sup>

Land dependent by location was forage land located adjacent to the federal range or nearby, “which [wa]s so situated and of such character that the conduct of economic livestock operations require[d] the use of the federal range.”<sup>74</sup> These early regulations guaranteed that only applicants who could demonstrate prior use of base property in connection with an established livestock operation would receive first priority in the new permit-granting process. As discussed above, those applicants tended to be large-scale federal lands ranching operations that had utilized the federal lands for grazing in the years leading up to the passage of the Taylor Grazing Act.

Second in line under the 1938 Range Code were the owners of class 2 base properties, which were defined as lands “dependent by use only, and full-time waters.”<sup>75</sup> Full-time water, which was a water source that could sustain a year-round grazing operation, was distinguishable from the class 1 prior water in that it had not been used during the priority period. Finally, class 3 base properties were

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<sup>71</sup> 43 C.F.R. § 501.4(a).

<sup>72</sup> *Id.* § 501.2(g).

<sup>73</sup> *Id.*; Smith, 58 Interior Dec. 183, 184 (1942). The priority period for some grazing districts was modified by special rule because of unique circumstances in the district, as explained in *McNeil v. Seaton*, 281 F.2d 931, 935 (D.C. Cir. 1960).

<sup>74</sup> 43 C.F.R. § 501.2(h). Property that is dependent by location is also referred to as “commensurate” base property. *McNeil*, 64 Interior Dec. 423, 431 (1957).

<sup>75</sup> 43 C.F.R. § 501.4(a). *See also id.* § 501.2(k) (defining “full-time water” as “water which is suitable for consumption by livestock and available, accessible, and adequate for a given number of livestock during those months in the year for which the range is classified as suitable for use”).

those dependent by location only, meaning they were necessary to sustain a nearby grazing operation, but had not been used during the priority period, and all water sources other than full-time waters.<sup>76</sup> In short, the early classification system was highly favorable to those applicants whose base properties had been used in the years leading up to the passage of the Taylor Grazing Act and whose base properties were dependent on the federal range for additional forage.

Because the range had been so depleted in the years leading up to the passage of the Taylor Grazing Act and forage was so limited, these first base property rules essentially excluded any applicant other than a rancher who owned land base property located near or within the desired federal allotment and who had a history of using it to graze the federal range, or an owner of a water right used to graze during the priority period, regardless of whether the applicant was otherwise qualified under the rules.<sup>77</sup> Therefore, prior use was the most important factor in the base property analysis for those seeking grazing licenses or permits under the first Range Code.

Despite favoring established ranchers, the early regulations governing transfers of grazing privileges provided one possible means of entry for first-time grazers. From the outset, the Range Code allowed for the transfers of base property and the associated grazing privileges, “whether by agreement or by operation of law,” provided the transferee was “otherwise properly qualified” under the rules.<sup>78</sup> This allowed a permit holder to sell all or part of his base property, and with it, the class designation and its associated grazing privileges. For example, an owner of a one hundred acre class 1 land base property could sell fifty acres of it to someone else, who would then become a class 1 base property owner with respect to the fifty acres she had purchased. In this way, prior use continued to determine an applicant’s qualifications even after the property was sold or otherwise disposed of. However, for those outside the club of

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<sup>76</sup> 43 C.F.R. § 501.4(a). An example of a property dependent by location is a private ranch that is entirely surrounded by federal range land and of such a size that maintenance of a significant livestock operation would be impossible without the use of the federal lands.

<sup>77</sup> Clements, 56 Interior Dec. 360, 362 (1938). In published decisions adjudicating grazing privileges, the Department of the Interior acknowledged that an application attaching group 2 or class 2 base property would not be considered if there were any class 1 or group 1 applications. *E.g.*, Smith, 56 Interior Dec. 370, 371 (1938) (noting that “[c]lass 1 and [c]lass 2 waters cannot compete for the same range”).

<sup>78</sup> 43 C.F.R. § 501.7(a).

established federal lands ranchers, the transfer regulations provided at least a means of qualifying for a permit.

## 2. *Base Property Requirements in the 1940s Federal Range Code*

In 1942, the Grazing Service adopted significant changes to the Range Code provisions related to base property, which further narrowed the developing club of those who could qualify for BLM permits.<sup>79</sup> The definition of dependency by use was changed to include only those properties forming the base of an “economic livestock operation” that required “the use of the Federal range.”<sup>80</sup> Properties dependent by use were still required to have been grazed during the priority period, but the Grazing Service limited the forage allowed under the permit to the average use during that time.<sup>81</sup> The 1942 definition of dependency by use, which basically awarded the choice federal allotments to those who were already established in the for-profit ranching business, remained in effect until the Federal Range Code was completely revised in 1956.<sup>82</sup>

In the 1942 revisions, the Grazing Service also expanded the base property rules to recognize ownership or “control” of land or water

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<sup>79</sup> The 1942 amendments to the grazing regulations were incorporated in the 1938 Cumulative Supplement to the C.F.R., which was published in 1944. CUMULATIVE SUPPLEMENT TO THE CODE OF FEDERAL REGULATIONS OF THE UNITED STATES OF AMERICA TITLE 33–45, at iii, 10,191 (1944). *Compare* Notice, 9 Fed. Reg. 13,513, 13,514 (Nov. 11, 1944) (giving notice that the volume of the Cumulative Supplement to the Code of Federal Regulations containing title 43, the title concerning grazing regulations, is available and covers the period between June 2, 1938, and June 1, 1943), *with* Notice, 9 Fed. Reg. 13,315, 13,316 (Nov. 10, 1944) (giving notice that indicates the volume of the Cumulative Supplement to the Code of Federal Regulations containing title 43 is not yet available). *See generally* SANDRA JABLONSKI, THE FEDERAL REGISTER AND THE CODE OF FEDERAL REGULATIONS 1 (1996), available at <http://www.llsdc.org/attachments/wysiwyg/544/fr-cfr-1996.pdf>.

<sup>80</sup> 43 C.F.R. § 501.2(g) (Cumulative Supp. 1938) (“‘Land dependent by use’ means forage land which is of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the 5-year period immediately preceding June 28, 1934 (hereinafter referred to as the ‘priority period’), was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years in connection with substantially the same part of the public domain, now part of the Federal range . . .”).

<sup>81</sup> *Id.*

<sup>82</sup> On December 11, 1946, 43 C.F.R. § 501 was redesignated 43 C.F.R. § 161, and § 501.2(g) became § 161.2(g) without any amendments to the text. Subchapter H-Grazing, 11 Fed. Reg. 14,483, 14,496–98 (Dec. 18, 1946).



base property.<sup>83</sup> Generally, grazing districts were classified as land or water base districts, depending on which property type was required to sustain a livestock operation in the particular area.<sup>84</sup> Water base districts were those where water rights, rather than land that could be grazed, formed the necessary private base land to support grazing on an adjacent federal allotment.<sup>85</sup> Certain areas where a bright-line distinction was impossible due to the character of the range were known as “transitional” areas, and the Grazing Service authorized local boards to determine the percentage allocation between land and water base property for each of these transitional areas.<sup>86</sup>

With respect to the nature of land base property, the 1942 amendments added further restrictions. In areas that could not sustain year-round grazing, an applicant was required to demonstrate possession of sufficient private land or water ““to insure a year-round operation for a certain number of livestock in connection with the use of the public domain.””<sup>87</sup> An applicant was further required to show that the private base property was of a different nature than the federal land and capable of supporting a herd during the portion of the year when the permit holder was required to remove stock from the public lands.<sup>88</sup> In other words, land would only qualify as base property if it was ““improved, cultivated, [or] cropped land[] supporting the growth of hay and grain, [or] irrigated pastures or native range lands . . . used by the licensees or permittees at a period of the year when not using the Federal range.””<sup>89</sup>

Private pastures that were similar in nature to the federal rangeland because they were unimproved, not cultivated, or not irrigated became known as parallel lands or parallel use lands and did not qualify as base property.<sup>90</sup> The 1942 revisions in particular sought to encourage established, year-round livestock operations, so if base property was identical in character to the federal lands, producing the

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<sup>83</sup> See Anderson, 58 Interior Dec. 419, 425–26 (1943) (citing section 7(a) of 1942 Federal Range Code). See generally 43 C.F.R. § 501.7(a) (Cumulative Supp. 1938).

<sup>84</sup> See *Sellas v. Kirk*, 200 F.2d 217, 218 (9th Cir. 1953).

<sup>85</sup> Holmgren, 175 I.B.L.A. 321, 326, [Misc. Land Decisions] Gower Fed. Serv. 31 (Rocky Mountain Mineral Law Found.) (Aug. 19, 2008).

<sup>86</sup> *Sellas*, 200 F.2d at 218–19 (citing 43 C.F.R. § 161.15 (1949)).

<sup>87</sup> *Fine Sheep Co.*, 58 Interior Dec. 686, 690 (1944) (quoting Federal Range Code of 1942, section 1(a)).

<sup>88</sup> *Id.* at 689 (quoting testimony of the district grazier).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

same amount of forage at the same time of year and not producing forage at other times of year due to weather, other physical factors, or because grazing at that time would cause damage to the range, there would not be an opportunity to rotate cattle onto the base property during those periods of time when the permit holder was not allowed to graze the federal lands.<sup>91</sup> By restricting the types of livestock operations that could use the federal range for grazing, the parallel-lands rules complemented the dependency-by-use rules, but at the same time further narrowed the pool of applicants to those who could demonstrate cultivation of the base property and prior use of the range by a for-profit livestock operation.

With respect to water base property, after 1942, to be considered a class 1 water base, an applicant's water source needed to be large enough to sustain his livestock during the entire year.<sup>92</sup> The rules governing classification of water base property became much more onerous in the 1942 revisions, and the resulting classification was subject to re-examination at any time.<sup>93</sup> Thus, if the Division became aware that the water source was insufficient for year-round use, it could revoke the permit.<sup>94</sup> These stringent requirements ensured that applicants who might be obtaining water for their stock from water sources controlled by others, or from sources that did not produce water on a year-round basis, could not retain permits, but it also had the effect of excluding those who did not hold older water rights.<sup>95</sup>

With respect to the transfer rules, as before, the transfer applicant was required to satisfy all of the other qualification requirements, such as stock ownership and residency, in addition to ownership or control of base property.<sup>96</sup> However, the Grazing Service closed one window that might have been open to newcomers under the 1938 Range Code. After 1942, the regulations provided that if the transfer

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<sup>91</sup> *Id.* at 690.

<sup>92</sup> *See* Presley, 60 Interior Dec. 290, 291-92 (1949) ("Full-time water is defined . . . as 'water which is suitable for consumption by livestock and available, accessible, and adequate for a certain number of livestock during those months in the year for which the range is classified as suitable for use.'" (quoting Federal Range Code of 1942, section 2(k))).

<sup>93</sup> *See* 43 C.F.R. § 501.2(l) (1942) (containing a revised definition of "prior water").

<sup>94</sup> Presley, 60 Interior Dec. at 290.

<sup>95</sup> *See id.* Eventually, certain districts came to be classified as "water base districts" and use of the public range in these districts was based solely on the priority of the applicant's water right. Allan, 78 Interior Dec. 55, 60 (1971).

<sup>96</sup> *See* Oman v. United States, 179 F.2d 738, 740 & n.2 (10th Cir. 1949) (citing 43 C.F.R. § 161.7 (1949)).

of base property from one owner to another could “result in an interference with the stability of livestock operations or with proper range management,”<sup>97</sup> or if the transfer might “affect adversely the established local economy,” the Grazing Service could deny the transfer application.<sup>98</sup> This rule gave the Department of the Interior significant discretion in approving transfers and expressly established that traditional, large-scale federal lands ranching operations would be favored at the application stage.

The 1942 revisions to the Federal Range Code gave those traditional ranchers who could establish prior use of their base property a priority status in the application process. Moreover, because a base property could lose its priority status if the corresponding federal lands were not grazed, startup ranching operations or ranchers who had managed to obtain permits, but were unable to graze because of weather, financial stress, or other circumstances, lost their permits.<sup>99</sup> This resulted in only larger, established ranching operations retaining grazing permits, solidifying their hold on the public range and developing an expectation that the Grazing Service would prefer them over all other applicants.

### *3. Base Property Requirements in the 1950s Federal Range Code*

By 1955, the BLM, which had taken over the responsibilities of the Grazing Service in 1946, recognized that even though class 1 base properties should continue to receive priority, those holding priority base properties should not be able to tie them up without using them to graze federal allotments.<sup>100</sup> Thus, the 1955 revisions to the Range Code reflected several new rules governing the terms and conditions of permits specifically relating to base property. First, any class 1 base property would lose its priority status if it went unused in connection with a grazing operation for two consecutive years, if it was not substantially used by the permit holder, or if it was formally placed into nonuse status by the BLM.<sup>101</sup> Additionally, the failure of any applicant to apply for and accept a grazing permit offered in

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<sup>97</sup> *Id.*

<sup>98</sup> Brown, 65 Interior Dec. 394, 399 (1958) (quoting 43 C.F.R. § 161.7(b) (1949)).

<sup>99</sup> See Call, 65 Interior Dec. 409, 412 (1958).

<sup>100</sup> See Anawalt Ranch & Cattle Co., 70 Interior Dec. 6, 7 (1963).

<sup>101</sup> 43 C.F.R. § 161.6(c)(6), (10) (1955).

connection with a class 1 base property would result in the property losing its priority classification.<sup>102</sup>

These rules further solidified large, established ranchers' hold on the available grazing permits because smaller, less financially stable permittees were now under more serious threat of losing their permits should they fail to graze the federal lands on a consistent basis. To save the priority status of a base property, the applicant was required to either use it or apply to transfer any unused portion to another base, which in turn required the permit holder to already own another base property or to go out and purchase one.<sup>103</sup> At the same time, the regulations continued to ensure that those ranchers who used their grazing permits for economic livestock operations would be given priority renewals, which ensured that larger, for-profit ranching operations continued to be able to hold onto the highest priority grazing permits.<sup>104</sup>

By this point, the Grazing Service and the BLM's pattern of awarding permits had created the expectation on the part of class 1 and class 2 base property owners that they owned their permits and the associated grazing rights.<sup>105</sup> If the BLM chose to reduce or cancel grazing privileges on an allotment, ranchers filed takings claims, asserting ownership of either the permit, the associated grazing levels, or both.<sup>106</sup> Continual reminders from the federal courts that the Taylor Grazing Act conferred no property rights in the form of grazing privileges on federal lands did nothing to change this expectation,<sup>107</sup> which the qualifications regulations themselves have helped to create.

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<sup>102</sup> *Id.* § 161.6(c)(9).

<sup>103</sup> *Id.* § 161.6(c)(7).

<sup>104</sup> *McNeil v. Seaton*, 281 F.2d 931, 934–35 (D.C. Cir. 1960) (noting that “[i]t would seem beyond peradventure that when the Secretary in 1935 created Montana Grazing District No. 1 which included lands upon which this appellant then was grazing, he and others similarly situated ‘who have been grazing their livestock upon these lands and who bring themselves within a preferred class set up by the statute and regulations, are entitled as of right to permits as against others who do not possess the same facilities for economic and beneficial use of the range’” (quoting *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938))).

<sup>105</sup> *United States v. Cox*, 190 F.2d 293, 295 (10th Cir. 1951).

<sup>106</sup> *See id.*

<sup>107</sup> *Id.*; *see also Hage v. United States*, 35 Fed. Cl. 147, 169–70 (1996) (acknowledging plaintiffs’ “creative, though rather stretched” arguments that permits to graze Forest Service lands constituted compensable property interests under the Fourth and Fifth Amendments to the Constitution); *Hat Ranch, Inc.*, 83 Interior Dec. 542, 545 (1976) (affirming the BLM officer’s decision to modify permit on renewal, despite permittee’s

#### 4. Base Property Requirements from the 1970s–1995

The qualifications rules related to base property changed again significantly in the 1970s.<sup>108</sup> First, in 1973, the BLM removed the category of class 3 base property.<sup>109</sup> For several more years, therefore, all base properties were categorized as class 1, dependent by use, or class 2, dependent by location.<sup>110</sup> Therefore, during the early to mid-1970s, prior use, which was still defined as use during the priority period, continued to dominate over location in terms of an applicant's priority consideration.

That changed in 1978, when the BLM eliminated the class designations altogether, which removed prior use and dependency by location from the definition of base property, and in turn, from the qualifications analysis.<sup>111</sup> After 1978, base property was defined as “[I]and that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year” or “water that is suitable for consumption by livestock and is available and accessible . . . when the public lands are used for livestock grazing.”<sup>112</sup> This change meant that historical use was no longer a factor in determining whether property qualified as base property.

However, the new regulation did not affect previously adjudicated base property classifications, and by this point most of the grazing privileges on the federal range had been adjudicated in connection with a specific base property. In *McLean v. BLM*, the appellants Delmer and Jo McLean challenged the BLM's decision denying their permit application for additional forage in an area they had

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arguments that, when grazing privileges are pledged as security for loans, permittees are entitled to renewal permits at same levels as previously grazed).

<sup>108</sup> The 1964 Code of Federal Regulations referred to the Federal Range Code only in a parenthetical manner and reflected the renumbering of the grazing regulations. *McLean*, 133 I.B.L.A. 225, 232 n.8, [Misc. Land Decisions] Gower Fed. Serv. 38 (Rocky Mountain Mineral Law Found.) (Aug. 3, 1995). Thereafter, the grazing regulations were located at 43 C.F.R. pt. 4110 (1964). *See id.* The title, Federal Range Code, was eliminated altogether in the 1978 amendments. *Id.*

<sup>109</sup> Eason, 145 I.B.L.A. 78, 91, [Misc. Land Decisions] Gower Fed. Serv. 73 (Rocky Mountain Mineral Law Found.) (July 16, 1998) (citing 43 C.F.R. § 4111.2-1(b) (1972)).

<sup>110</sup> *Id.*

<sup>111</sup> *See* 43 C.F.R. § 4100.0-5 (1978). In 1978, the BLM also eliminated separate sections of regulations for grazing permits and leases. *See id.* pt. 4100. Thereafter, the regulations governing permits and leases were contained in 43 C.F.R. pt. 4100 (1978).

<sup>112</sup> *Id.* § 4100.0-5(f) (1978).

historically grazed.<sup>113</sup> The Interior Board of Land Appeals (IBLA) affirmed the permit denial and held that, although the class 1 and 2 designations had been eliminated by the 1978 amendments, the new base property regulations protected these prior adjudications.<sup>114</sup> Moreover, the IBLA noted in dictum that the new base property regulation still “effectively require[d] an on-going operation which utilize[d] the Federal range as a prerequisite to recognition of base property”<sup>115</sup> even though the text of the regulation said nothing about prior use.

Under *McLean*, those who had held grazing privileges, but had not exercised them in connection with a base property prior to 1978, stood to lose their priority status.<sup>116</sup> As the IBLA explained, “an individual, who had established class 2 qualifications for base property but who did not actually obtain use of the Federal range prior to 1978, would see his class 2 rights lapse since his property could no longer be considered base under the new regulations.”<sup>117</sup> The holding of *McLean* carried through subsequent decisions, in which the IBLA continued to refer to the class of previously adjudicated base properties.<sup>118</sup>

Theoretically, at least, the 1978 change in the definition of base property relaxed the qualifications requirements. However, because grazing privileges were issued based not only on citizenship and residency requirements and ownership of base property, but also based on the applicant’s grazing preference, the door was not really opened any further after 1978, for reasons that will be discussed in Part IV, section C, subsection 3, *infra*.

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<sup>113</sup> *McLean*, 133 I.B.L.A. at 226, [Misc. Land Decisions] Gower Fed. Serv. 38 (Rocky Mountain Mineral Law Found.).

<sup>114</sup> *Id.* at 232 n.12, [Misc. Land Decisions] Gower Fed. Serv. 38 (Rocky Mountain Mineral Law Found.).

<sup>115</sup> *Id.* (referring to “class 1 preferences” and “class 2 preferences,” which reflected the common practice of merging the grazing preference with the class designation of base property; however, the class designation always referred only to the base property, to which the preference was attached).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (citing Hutchings, 116 I.B.L.A. 55, 59–60, [Misc. Land Decisions] Gower Fed. Serv. 64 (Rocky Mountain Mineral Law Found.) (Sept. 5, 1990)).

<sup>118</sup> See Holmgren, 175 I.B.L.A. 321, 345–46, [Misc. Land Decisions] Gower Fed. Serv. 31 (Rocky Mountain Mineral Law Found.) (Aug. 19, 2008).

### 5. Current Base Property Requirements

Although the Range Code as a whole was significantly overhauled in 1995 as part of the Range Reform initiated by President Clinton's Interior Secretary, Bruce Babbitt, the base property rules did not materially change after 1978. The current qualifications section requires an applicant to "own or control land or water base property."<sup>119</sup> Base property is defined as:

- (1) Land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or
- (2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing.<sup>120</sup>

There is nothing in the current grazing regulations requiring base property to have been used previously to graze on a federal allotment. Theoretically, these rules allow the BLM to at least consider applications attaching base property that *could* be used to support a livestock operation, as opposed to the pre-1978 regulations, under which the BLM could only consider those holding base property that *had* been used to support a livestock operation. The problem for any new applicant, though, continues to be the issue of grazing preference, which will be discussed further in Part IV, section D, *infra*. The preferences related to base properties have long since been adjudicated<sup>121</sup> and base properties with adjudicated preference rights will retain them as long as the permittee has not violated the permitting conditions, the BLM has not decided to retire grazing on the allotment in connection with a land use plan pursuant to the Federal Lands Policy and Management Act (FLPMA), or for any other reasons authorized by the Taylor Grazing Act or the grazing regulations.<sup>122</sup>

In theory, under the current base property rules, if the BLM opened a new allotment to grazing, or reopened grazing on an allotment where grazing privileges had been cancelled, an applicant owning land capable of serving as a base for livestock operations on that allotment could qualify for a permit, even with a base property that had not been previously used in connection with a federal allotment.

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<sup>119</sup> 43 C.F.R. § 4110.1 (2009).

<sup>120</sup> *Id.* § 4100.0-5.

<sup>121</sup> The adjudication of preference will be discussed in Part IV.D, *infra*.

<sup>122</sup> *PLC II*, 529 U.S. 728, 743 (2000).

However, practically speaking, the BLM does not open new allotments to grazing, so those holding base properties with previously adjudicated grazing rights will continue to receive priority if they wish to renew their existing permits, making it difficult for applicants new to the federal permitting process to qualify unless they purchase a property with an existing preference or purchase a preference and transfer it to another base property.<sup>123</sup> In short, for today's applicants, base property involves a significant financial investment, which is probably not worth making unless the property has an attached grazing preference or unless a preference can be purchased and transferred to that base. Without the grazing preference, although the property itself might technically qualify as base property under the regulations, its holder will not be able to obtain a grazing permit.

### *C. Stock Ownership Requirements*

In addition to ownership or control of base property, the Taylor Grazing Act contains language suggesting that all federal permit holders should be livestock owners.<sup>124</sup> The source of this language is section 315b of the Taylor Grazing Act, which authorizes the Secretary of the Interior to issue permits to "such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range."<sup>125</sup> Although the language seems clear, this phrasing has generated a significant amount of controversy over the years, especially regarding the extent to which it forms a qualifications requirement for permit applicants.

#### *1. Stock Ownership Requirements From 1936–1941*

In 1936, the Secretary of the Interior promulgated the first regulation that required grazing permit applicants to demonstrate that

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<sup>123</sup> It might be possible for someone residing on adjacent private property, and who seeks a grazing permit only for personal domestic use, to obtain a "free-use" grazing permit under 43 C.F.R. § 4130.5.

<sup>124</sup> Taylor Grazing Act § 3, 43 U.S.C. § 315b (2006).

<sup>125</sup> *Id.* Notably, the text of the statute does not require *applicants* to be livestock owners, only *permittees*, theoretically allowing the BLM to consider applicants who do not own livestock at the time of application as long as they demonstrate that they will own stock by the time the permit is issued. However, from 1936 until 1995, the regulations required livestock ownership at the time of application. *PLC II*, 529 U.S. at 745.



they “own[] livestock.”<sup>126</sup> This requirement was carried through the 1937 revisions and became part of the 1938 Range Code, which provided that “[a]n applicant for a grazing license or permit is qualified if he owns livestock.”<sup>127</sup> Yet, although the regulations required stock ownership at the application stage, the Department of the Interior did not rigidly apply this requirement in all cases. In a 1937 appeal by members of several Pueblo Tribes who had applied for grazing rights on public lands in New Mexico, the Department was faced with the question of what was required to satisfy the stock ownership requirement.<sup>128</sup> The Tribes’ applications were initially denied because the Tribes did not recognize individual property rights, so the individual members could not demonstrate that they owned base property, even though they did own stock.<sup>129</sup> The Department of the Interior recognized that the Tribes’ view of communal property ownership placed them in a dilemma: any application made by the Tribes would be “subject to rejection because it [was] not regarded as an owner of livestock,” and any individual Tribal member’s application, reflecting ownership of livestock, would be “subject to rejection because he [was] unable to show the exclusive control of definitely described base property.”<sup>130</sup>

In reversing the decision below, the Department of the Interior recognized that “it scarcely can have been the legislative intent to require that a successful applicant have the full legal and beneficial title to the livestock proposed to be grazed on the public domain, else the security transactions which are both necessary and common in the livestock industry, as in any other, would be impossible.”<sup>131</sup> Yet, in a preview of rules to come, the Department noted that ownership of a small number of livestock would not suffice under the 1938 Code, stating that “[i]t would appear rather that ‘stock owner’ should be construed as synonymous with ‘in the livestock business’ in the popular sense.”<sup>132</sup> According to the agency, the key inquiry was

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<sup>126</sup> Eligibility of Indians & Indian Pueblos for Grazing Privileges Under the Taylor Grazing Act, 56 Interior Dec. 79, 81 (1937) (quoting DEP’T OF THE INTERIOR, RULES AND REGULATIONS OF SECRETARY OF THE INTERIOR (1936)).

<sup>127</sup> 43 C.F.R. § 501.3 (1938).

<sup>128</sup> Rights of Pueblos & Members of Pueblo Tribes Under the Taylor Grazing Act, 56 Interior Dec. 308, 309 (1938).

<sup>129</sup> *Id.* at 310.

<sup>130</sup> *Id.* at 311.

<sup>131</sup> *Id.* at 312–13.

<sup>132</sup> *Id.* at 313.

whether “the applicant ha[d] some substantial interest in the livestock to be grazed.”<sup>133</sup>

Consistent with the decision in *Pueblo Tribes*, the Department continued to indicate that it would informally allow a certain degree of latitude to some applicants who did not own livestock.<sup>134</sup> In *Colvin*, for example, the Department noted that “recognized livestock operators who possess the necessary qualifications as to citizenship and ownership or control of base property should [not] be denied licenses because, at the time of the application, they failed to show ownership of livestock,” because “[s]uch failure may be due to losses through disease, fire, foreclosure, or other causes, and to deny an applicant a license under such circumstances would work a serious hardship and injustice.”<sup>135</sup> The Department’s decision instructed that this rule should “be construed more liberally” and held that “the test should not be whether or not an applicant owns livestock but whether or not he is a recognized operator whose failure to own livestock is only a temporary condition or is due to circumstances over which he had no control.”<sup>136</sup> In short, the earliest requirements were stringent, but applied with some leniency.

## 2. *Stock Ownership Requirements From 1942–1995*

In 1942, the qualifications landscape changed when the Department of the Interior amended the stock ownership requirement, requiring applicants to show that they were “engaged in the livestock business.”<sup>137</sup> This language was modeled on section 3 of the Taylor Grazing Act, which gives preference to those stock owners “engaged in the livestock business.”<sup>138</sup> The purpose statement introducing the 1942 amendments provided that grazing districts shall be administered to “stabilize the livestock industry dependent upon them” and stated that, “[i]n furtherance of these objectives, grazing privileges will be granted with a view to the protection of those livestock operations that are recognized as established and continuing and which normally involve the substantial use of the public range in

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<sup>133</sup> *Id.* (emphasis omitted).

<sup>134</sup> *Colvin*, Interior Grazing Dec. 245, 250 (1941).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> 43 C.F.R. § 501.3(a) (Cumulative Supp. 1938).

<sup>138</sup> Taylor Grazing Act, ch. 865, §3, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315–315r (2006)).

a regular, continuing manner each year.”<sup>139</sup> This was a significant change to the rule, which for the following fifty-three years, tended to exclude all applicants who were not established livestock operators, such as small-scale ranchers and farmers, and new operators.

However, after this change, the Department of the Interior had a certain degree of difficulty in determining what exactly it meant to be “engaged in the livestock business.” Over the next thirty years, various factors were used to determine whether the standard was met, such as an applicant’s intentions to enter into the livestock business,<sup>140</sup> the amount of livestock owned at the time of application,<sup>141</sup> the applicant’s prior history in the livestock business,<sup>142</sup> and actions taken subsequent to the submission of the application.<sup>143</sup> In general, applicants who could demonstrate ownership of only “a few livestock” were held to be unqualified.<sup>144</sup> The rule requiring applicants to show they were “engaged in the livestock business” went unchanged until 1995.<sup>145</sup>

### 3. *Stock Ownership Under the 1995 Regulations*

In 1993, President Clinton’s Interior Secretary, Bruce Babbitt, proposed significant changes to the grazing regulations in response to

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<sup>139</sup> 43 C.F.R. § 501.1.

<sup>140</sup> Han, 80 Interior Dec. 698, 701 (1973) (affirming a decision denying a grazing lease application under identical stock ownership requirement when applicant had sold all of her livestock six years into the previous ten-year lease term and owned no cattle at time of renewal application, but demonstrated ownership of two horses).

<sup>141</sup> *Id.* at 699 n.1. In 1968, the BLM amended the qualifications requirements for grazing lease applicants to require that they too be “engaged in the livestock industry,” as with permit applicants. Holan, 18 I.B.L.A. 432, 433, [Misc. Land Decisions] Gower Fed. Serv. 22 (Rocky Mountain Mineral Law Found.) (Feb. 14, 1975) (citing 43 C.F.R. § 4121.1-1(a) (1974)).

<sup>142</sup> Han, 80 Interior Dec. at 701–02.

<sup>143</sup> Platt, 86 Interior Dec. 458, 468 (1979) (Thompson, A.L.J., dissenting) (arguing against majority’s decision reversing denial of application for a section 15 grazing lease because applicant had begun acquiring livestock between date of application and appeal).

<sup>144</sup> *Id.* at 467 (citing *Holan*, 18 I.B.L.A. at 432, [Misc. Land Decisions] Gower Fed. Serv. 22 (Rocky Mountain Mineral Law Found.); Han, 80 Interior Dec. at 698. An exception to this rule was allowed “when the failure of a livestock operator to show ownership at the time of application was either temporary or due to circumstances beyond his control, i.e., losses through disease, foreclosure, fire or other cause.” McDonald, 18 I.B.L.A. 159, 161 n.1, [Misc. Land Decisions] Gower Fed. Serv. 5 (Rocky Mountain Mineral Law Found.) (Dec. 19, 1974)).

<sup>145</sup> Platt, 86 Interior Dec. at 467 (Thompson, A.L.J., dissenting) (citing prior version of 43 C.F.R. § 4110.1).

the deteriorating condition of the federal range.<sup>146</sup> With conservation as one of its stated goals, and with a view toward expanding the federal permitting process to include more nontraditional permittees, the BLM removed any reference to stock ownership from the qualifications regulations, including the requirement that applicants show they were “engaged in the livestock business.”<sup>147</sup> According to the agency, the new rule was adopted to “clarify that mortgage insurers, natural resource conservation organizations, and private parties whose primary source of income is not the livestock business” could qualify for grazing permits.<sup>148</sup>

Despite litigation initiated by several public lands ranching organizations challenging this particular rule, the Supreme Court upheld it in *Public Lands Council v. Babbitt (PLC II)*, noting that the only qualifications rule regarding livestock ownership in the Taylor Grazing Act is the authorization to issue permits to stock owners.<sup>149</sup> The *PLC II* Court noted that the 1995 amendments did not change the rule that those who are engaged in the livestock business will continue to “enjoy a preference in the issuance of grazing permits.”<sup>150</sup> Yet, the Court clarified that the Taylor Grazing Act does not require the BLM to issue permits only to those “actively involved in the livestock business,” to the exclusion of others.<sup>151</sup>

Even after the 1995 regulations eliminated the provision requiring an applicant to be “engaged in the livestock business,” and the Supreme Court upheld the regulation in *PLC II*, the BLM continued to struggle over the degree to which an applicant’s history in the livestock business should be included as part of the initial qualifications assessment.<sup>152</sup> The agency’s uncertainty over how to

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<sup>146</sup> Scott Nicoll, *The Death of Rangeland Reform*, 21 J. ENVTL. L. & LITIG. 47, 52 (2006).

<sup>147</sup> Compare 43 C.F.R. § 4110.1(a) (1994) (requiring applicants to show engagement in livestock business), with 43 C.F.R. § 4110.1(a) (1995) (making no reference to engagement in livestock business).

<sup>148</sup> *Public Lands Council v. Babbitt (PLC I)*, 167 F.3d 1287, 1292 (10th Cir. 1999), (quoting Mandatory Qualifications for Grazing Administration, 60 Fed. Reg. 9894, 9901 (1995)), *aff’d*, 529 U.S. 728 (2000).

<sup>149</sup> *PLC II*, 529 U.S. at 745.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 746–47.

<sup>152</sup> Mercer, 159 I.B.L.A. 17, 52–53, [Misc. Land Decisions] Gower Fed. Serv. 14 (Rocky Mountain Mineral Law Found.) (May 8, 2003) (Roberts, A.L.J., dissenting). Thus, even when applicants who were not “engaged in the livestock business,” but were otherwise qualified under the 1995 regulations succeeded in obtaining permits, they faced

apply the 1995 regulations persisted for several years after the *PLC II* decision.<sup>153</sup>

In the past ten years, however, the BLM has begun to implement the 1995 changes in a way that has broadened the pool of potential permit applicants. In a recent decision by the Tenth Circuit Court of Appeals, *Stewart v. Kempthorne*, one of the issues on appeal was whether Canyonlands Grazing Corporation, a Utah grazing corporation affiliated with a conservation organization called the Grand Canyon Trust, was qualified to receive permits to graze several allotments located in the Grand Staircase–Escalante National Monument (Monument) in southern Utah.<sup>154</sup> In 2000, Canyonlands purchased base property and preferences to graze several allotments where drought and overgrazing had caused severe erosion and forage depletion and the BLM was contemplating retiring the allotments from grazing.<sup>155</sup> As of the time it applied for a transfer of the preference rights for the allotments, Canyonlands did not actually own any livestock.<sup>156</sup> However, in connection with its purchase of the preference associated with one of the allotments, it acquired four stray cattle, for which it subsequently paid outstanding trespass fees.<sup>157</sup> The strays were later branded with the Canyonlands brand, continued to graze the allotment and the BLM later approved the transfer applications.<sup>158</sup> On appeal, the federal district court and, later, the Tenth Circuit Court of Appeals, held that these cattle qualified Canyonlands as a “stock owner” under the Taylor Grazing Act.<sup>159</sup>

After *Stewart v. Kempthorne*, it is clear that the language in section 315b of the Taylor Act limiting the issuance of permits to stock owners is the only binding rule on the stock ownership issue.<sup>160</sup> At

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challenges to their permits from traditional ranchers who considered the livestock business requirement to be an unwritten rule of permitting decisions. *Id.*; *Stewart v. Kempthorne*, 554 F.3d 1245, 1249 (10th Cir. 2009) (detailing overfiling by multiple ranchers seeking grazing permits already held by Canyonlands Grazing Corporation, a conservation organization).

<sup>153</sup> *Mercer*, 159 I.B.L.A. at 35, [Misc. Land Decisions] Gower Fed. Serv. 14 (Rocky Mountain Mineral Law Found.).

<sup>154</sup> *Stewart*, 554 F.3d at 1249–50.

<sup>155</sup> *Id.*

<sup>156</sup> *See id.* at 1252.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Taylor Grazing Act § 3, 43 U.S.C. § 315b (2006).

the application stage, permit applicants are no longer required to demonstrate they are engaged in the livestock business, nor are they required to express any intent to graze livestock, or even ownership of any livestock.<sup>161</sup> In one of the most significant changes from the old qualifications model to the new, applicants are now required to be stock owners only as of the time their grazing permit is issued.<sup>162</sup>

#### *D. Grazing Preference*

The concept of a grazing preference has changed more over time than either that of base property or stock ownership, and it is one of the least understood but most important issues to consider for anyone seeking a grazing permit on a BLM allotment. Although it is not technically a requirement set forth in the grazing regulations,<sup>163</sup> obtaining a grazing preference is a highly advisable step in the qualifications process.

##### *1. The Origin of the Grazing Preference on BLM Allotments*

The concept of a preference system for awarding BLM grazing permits grew out of the National Park Service's system of allocating grazing rights on U.S. Forest Service lands after the passage of the National Park Service Organic Act in 1916.<sup>164</sup> Under the Park Service's system, ranchers who owned private land, homesteads, or water rights were given priority with respect to the grazing rights on adjacent public rangelands.<sup>165</sup> When the Taylor Grazing Act was passed, Congress recognized this system of preference in the following language in section 315b:

Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them . . . . Such permits shall be for a period of not more than ten

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<sup>161</sup> *Stewart*, 554 F.3d at 1252–53. It would be wise, however, for those considering applying for a grazing permit, who have never owned livestock or been in the livestock business, to purchase at least some stock after applying for a new permit or a preference transfer.

<sup>162</sup> Thus, while it is advisable for applicants to acquire stock as early as possible, they may do so during the application process and still qualify for a permit.

<sup>163</sup> See 43 C.F.R. §§ 4110.3, 4100.0-5 (2009) (discussing grazing preference).

<sup>164</sup> National Park Service Organic Act, 16 U.S.C. § 1 (1916).

<sup>165</sup> Stimpert, *supra* note 20, at 497–98.

years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use.<sup>166</sup>

As early as 1937, however, the Department of the Interior was uncertain as to how to apply this language regarding preference. Early on, it determined that the language was not mandatory and did not categorically exclude those outside the preferred classes from obtaining grazing rights.<sup>167</sup> Although section 315b required the Department of the Interior to consider those qualified applicants in the preferred categories first, it did not require that permits be issued to those applicants before other qualified applicants.<sup>168</sup> According to the Department, “if a contrary meaning were intended, the Congress more reasonably would have said that ‘permits shall be issued to those within or near a district who are landowners,’ etc., rather than that ‘preference shall be given’ to those persons.”<sup>169</sup>

Because the number of qualifying grazing applicants far exceeded the available federal range in the years shortly after Congress passed the Taylor Grazing Act, the Grazing Service began the process of adjudicating grazing privileges.<sup>170</sup> This process helped determine which of the categories of preferred applicants under section 3 of the Taylor Grazing Act would receive grazing licenses, and eventually, permits.<sup>171</sup> The Grazing Service collected data, sought input from local grazing advisory boards and made a case-by-case assessment of the prior use and forage capacity of each base property grazed in

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<sup>166</sup> Taylor Grazing Act, ch. 865, §3, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315–315r (2006)).

<sup>167</sup> Nature and Extent of the Dep’ts Auth. to Issue Grazing Privileges Under the Taylor Grazing Act, 56 Interior Dec. 62, 64 (1937).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* (emphasis omitted).

<sup>170</sup> See discussion of adjudication *supra* Part IV.B.

<sup>171</sup> *PLC I*, 167 F.3d 1287, 1295 (10th Cir. 1999), *aff’d*, 529 U.S. 728 (2000). The term “adjudication” did not actually appear in the Federal Range Code until 1962. 43 C.F.R. § 161.2(r) (Cumulative Supp. 1962). The 1962 Code defined “adjudication of grazing privileges” as:

[T]he determination of the qualifications for grazing privileges of the base properties . . . offered in support of applications for grazing licenses or permits in a range unit or area, and the subsequent equitable apportionment among the applicants of the forage production within the proper grazing season and capacity of the particular unit or area.

*Id.*

connection with public rangeland.<sup>172</sup> Because of the extensive acreage involved, preference adjudications took quite some time, and were not completed until the 1960s.<sup>173</sup>

## 2. *Preference Under the 1937 Regulations*

The earliest grazing regulations recognized a distinction between those who were qualified applicants because they owned base property and livestock and those who were entitled to preference.<sup>174</sup> These rules generally followed the language governing preference in section 315b of the Taylor Grazing Act.<sup>175</sup> In general, they provided that “[q]ualified preferred applicants will be given licenses to graze the public range insofar as available and necessary to permit a proper use of the lands, water, or water rights owned, occupied or leased by them,” and that licenses would be issued “until the carrying capacity of the public range [was] attained.”<sup>176</sup>

In practice, this meant that applicants holding base property commensurate with a designated area of the federal range were given a preference to graze the approximate level of livestock that the base property had supported during the priority period, as long as the Grazing Service determined that the level could be sustained.<sup>177</sup> In allocating grazing preferences between class 1 applicants, the Grazing Service based its decision on the amount of livestock that the applicant had grazed during the priority period.<sup>178</sup> Preference was measured by the historical and current capacity of the commensurate base property, not the applicant’s historical or current use of the federal lands.<sup>179</sup>

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<sup>172</sup> *Sellas v. Kirk*, 200 F.2d 217, 218–19 (9th Cir. 1953).

<sup>173</sup> *Allan*, 78 Interior Dec. 55, 64–65 (1971).

<sup>174</sup> *Eligibility of Indians & Indian Pueblos for Grazing Privileges Under the Taylor Grazing Act*, 56 Interior Dec. 79, 81–82 (1937).

<sup>175</sup> Brief for the Respondents at 9, *PLC II*, 529 U.S. 728 (2000) (No. 98-1991), 2000 WL 35853 (quoting DEP’T OF THE INTERIOR, RULES FOR ADMINISTRATION OF GRAZING PRIVILEGES 1 (1937)).

<sup>176</sup> *Id.* (quoting DEP’T OF THE INTERIOR, RULES FOR ADMINISTRATION OF GRAZING PRIVILEGES 2–3 (1937)). The base property connected to a grazing allotment was referred to as “commensurate” base property. *Eligibility of Indians & Indian Pueblos for Grazing Privileges Under the Taylor Grazing Act*, 56 Interior Dec. at 82.

<sup>177</sup> *Eason*, 145 I.B.L.A. 78, 91, [Misc. Land Decisions] *Gower Fed. Serv.* 73 (Rocky Mountain Mineral Law Found.) (July 16, 1998).

<sup>178</sup> *McNeil*, 64 Interior Dec. 423, 428 (1957).

<sup>179</sup> *McLean*, 133 I.B.L.A. 225, 232, [Misc. Land Decisions] *Gower Fed. Serv.* 38 (Rocky Mountain Mineral Law Found.) (Aug. 3, 1995). The 1938 Range Code defined



If there was insufficient forage to satisfy the needs of all applicants with dependent, commensurate property, the regulations provided that prior use was the determining factor.<sup>180</sup> Thus, applicants with dependent commensurate base property who could show prior use were given an additional preference over applicants with dependent commensurate property who could not. The level of grazing preference was measured in terms of animal unit months, or AUMs, which was defined as the amount of forage needed to sustain one cow or its equivalent for one month.<sup>181</sup> The number of AUMs allocated to a base property during the adjudication phase was referred to as the property's commensurability or commensurability rating.<sup>182</sup>

Once forage was allocated among the class 1 base properties, the class 2 base properties received a second preference to graze the amount of livestock that they could sustain.<sup>183</sup> Thus, one applicant might also have a first preference as to a certain number of AUMs on an allotment based on prior grazing use, and a second preference as to any additional AUMs.<sup>184</sup> When all class 2 base property owners' forage needs had been allocated, class 3 base property owners were eligible for consideration for any remaining forage.<sup>185</sup>

The preference system did not change through subsequent revisions of the Range Code in the 1940s and 1950s.<sup>186</sup> However, as early as 1938, courts began recognizing the grazing preference attached to base property as an equitable property right, albeit an uncertain one.<sup>187</sup> In one of the earliest cases, the Circuit Court of Appeals for the District of Columbia held that, under the Taylor Grazing Act, if the Secretary decided to create a grazing district encompassing lands previously grazed by these applicants, their act of prior grazing brought them "within a preferred class set up by the

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"commensurability" as "the number of livestock which can be properly supported for a designated period of time from the forage and feed produced on dependent base property." Heller, 66 Interior Dec. 65, 68 (1959).

<sup>180</sup> Heller, 66 Interior Dec. at 68–69.

<sup>181</sup> Brown, 65 Interior Dec. 394, 395 (1958).

<sup>182</sup> Heller, 66 Interior Dec. at 66.

<sup>183</sup> See *id.* at 67–68 & n.2.

<sup>184</sup> 43 C.F.R. § 501.6(c) (1938).

<sup>185</sup> *Id.* § 501.4.

<sup>186</sup> *Id.*; *id.* § 501.6(b) (Cumulative Supp. 1938); *id.* § 161.6(b) (1949); *id.* 161.6(b) (1955).

<sup>187</sup> Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 314–16 (D.C. Cir. 1938).

statute and regulations.”<sup>188</sup> As such, they were “entitled as of right to permits as against others who do not possess the same facilities for economic and beneficial use of the range.”<sup>189</sup> However, this entitlement did not create a property right in any specific grazing level or grazing privilege.<sup>190</sup>

Once an applicant’s grazing preference was adjudicated, it added value to the base property and could be transferred with the base property if the base property was sold or otherwise disposed of.<sup>191</sup> Grazing preference was often used to add value to base properties in connection with the financing of loans using those properties as collateral.<sup>192</sup> The grazing preference was always a tenuous entitlement because of the government’s reserved power under section 315b of the Taylor Grazing Act to cancel, reduce, or modify the terms of a grazing permit.<sup>193</sup>

### 3. *Preference Under the 1978 Regulations*

The concept of preference did not materially change again for approximately forty years.<sup>194</sup> By the late 1970s, Congress recognized that public domain lands were deteriorating under the existing management schemes, the lands needed to be more systematically managed, and that such management had to encompass a growing number of nonextractive uses by the general public. Thus, it enacted FLPMA in 1976<sup>195</sup> and the Public Rangelands Improvement Act (PRIA) in 1978,<sup>196</sup> both of which reflected a growing concern that more needed to be done to protect federal lands under the management of the BLM.<sup>197</sup> FLPMA, in particular, required the

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<sup>188</sup> *Id.* at 314.

<sup>189</sup> *Id.*

<sup>190</sup> Taylor Grazing Act §3, 43 U.S.C. § 315b (1940).

<sup>191</sup> Falen & Budd-Falen, *supra* note 22, at 508.

<sup>192</sup> *Id.* at 523.

<sup>193</sup> Cent. Ariz. Ranching Co. v. Comm’r, 23 T.C.M. (CCH) 1304 (1964); *see* Taylor Grazing Act §3, 43 U.S.C. § 315b (1964).

<sup>194</sup> McLean, 133 I.B.L.A. 225, 232 n.9, [Misc. Land Decisions] Gower Fed. Serv. 38 (Rocky Mountain Mineral Law Found.) (Aug. 3, 1995).

<sup>195</sup> Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. §§ 1701–1785 (2006)).

<sup>196</sup> Pub. L. No. 95-514, 92 Stat. 1803 (1978) (codified as amended at 43 U.S.C. §§ 1901–1908 (2006)).

<sup>197</sup> In FLPMA, Congress stated that public lands should “be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values,” under land use plans mandated by

BLM to undertake a comprehensive land management process with respect to all uses of public domain lands under its jurisdiction, which affected all post-1976 grazing adjudications connected with BLM allotments.<sup>198</sup>

By 1976, the Department of the Interior had also recognized that livestock grazing had become the most widespread use of BLM lands and the result of its “significant influence on resource conditions” required some modifications in the agency’s approach to permitting.<sup>199</sup> In one case where an established cattle ranch applied for renewals of two of its ten-year permits, the BLM District Manager initially granted the applications, but only for three years, citing concerns that the agency needed to evaluate the allotments at issue in connection with its new goal of “proper resource planning.”<sup>200</sup> The record reflected the BLM District Manager’s concerns that “[t]erm permits . . . not tied to proper resource planning may not provide for other public land management considerations,” such as “improvement in resource condition and enhancement of environmental values.”<sup>201</sup> The decision also noted the growing “public awareness and interest” in protecting public lands.<sup>202</sup> This decision was later reversed by an administrative law judge, but upheld on appeal by the IBLA, which held that, despite the existence of a grazing preference, “[a] grazing permit is not a guarantee that [f]ederal range for grazing a specified number of livestock will be available over a period of time.”<sup>203</sup>

In 1978, the BLM made significant changes to the federal grazing regulations, as required by FLPMA and PRIA.<sup>204</sup> The preamble to the 1978 amendments expressed the agency’s “serious concern” that the regulations recognize existing permit holders’ “preference for continued grazing use on these lands,” especially with respect to their

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the statute. Federal Lands Policy and Management Act § 102(a)(8). In PRIA, Congress noted its findings that “vast segments of the public rangelands are producing less than their potential for livestock, wildlife habitat, recreation, forage, and water and soil conservation benefits, and for that reason are in an unsatisfactory condition.” Public Rangelands Improvement Act § 2(a)(1).

<sup>198</sup> See Federal Lands Policy and Management Act § 102(a)(8).

<sup>199</sup> Hat Ranch, Inc., 83 Interior Dec. 542, 544 (1976).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 544–45.

<sup>202</sup> *Id.* at 545.

<sup>203</sup> *Id.* at 547.

<sup>204</sup> Range Management and Technical Services, 43 Fed. Reg. 29,058, 29,058 (July 5, 1978); see Public Rangelands Improvement Act § 4, 43 U.S.C. §§ 1901–1908 (2006).

“adjudicated grazing use, their base properties, and their areas of use (allotments).”<sup>205</sup> Under these rules, the holder of an expiring permit continued to receive first priority in the issuance of any new permit, provided that the lands remained available for grazing under any applicable land use plan mandated by FLPMA, the permittee was in compliance with all applicable regulations and the terms of the permit, and the permittee accepted the terms and conditions of the new permit.<sup>206</sup>

Notably, though, the 1978 grazing regulations explicitly connected the term “preference” to the level of grazing use of the federal rangelands by a permit holder, measured in terms of Animal Unit Months (AUMs).<sup>207</sup> The preference was thereafter linked directly to the *permittee’s* level of prior use of the federal range,<sup>208</sup> not to the use of the relevant base property, which continued for the next two decades.

#### 4. Preference Under the 1995 Regulations

In connection with Range Reform in 1995, the BLM changed the definition of a grazing preference to eliminate the link to any particular base property production, and thus, to any particular permittee, as in the pre-1978 regulations. The 1995 regulations defined a grazing preference as “a superior or priority position against others for the purpose of receiving a grazing permit or lease.”<sup>209</sup> The priority position was “attached to base property owned or controlled by [the] permittee [or] lessee.”<sup>210</sup>

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<sup>205</sup> Range Management and Technical Services, 43 Fed. Reg. at 29,058.

<sup>206</sup> Platt, 86 Interior Dec. 458, 462 (1979) (Thompson, A.L.J., dissenting) (quoting 43 C.F.R. § 4130.2(e) (1978)).

<sup>207</sup> 43 C.F.R. § 4100.0-5(o) (1978). The regulations defined “grazing preference” as “the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee.” *Id.*

<sup>208</sup> With respect to commensurability, the 1978 regulations continued to require that base property be commensurate, but only required applicants to show that crops potentially could be produced on the base property, without requiring the applicant to show that crops had actually been produced or were currently being produced. 43 C.F.R. § 4110.0-5(f) (1978). This change opened the door slightly to applicants owning commensurate base properties who had not produced crops for several years, and to those owning “new” base properties, which had a current capability of producing forage but had not in the past. *See* Sellas, Interior Grazing Dec. 526 (1950); 43 C.F.R. § 161.2(k)(3)(ii) (1964).

<sup>209</sup> 43 C.F.R. § 4100.0-5 (1995).

<sup>210</sup> *Id.*

Instead of binding itself to a previously determined measurement of AUMs grazed in connection with a base property, the BLM included language in the 1995 regulations providing that forage would be “allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit.”<sup>211</sup> This gave the agency the discretion to apportion grazing privileges in light of other management concerns, as required by FLPMA and PRIA. Although it was challenged by traditional federal lands ranchers, the Supreme Court, in *PLC II*, upheld the 1995 amendments to the regulations governing grazing preference as a valid exercise of the BLM’s permitting authority.<sup>212</sup>

##### *5. Current Rules Regarding Grazing Preference*

The five-year battle over the 1995 changes to the concept of preference was rendered moot in 2006, when the BLM changed the definition back, so that it now ties a specific number of AUMs to a particular base property.<sup>213</sup> The current definition of grazing preference is “the total number of animal unit months on public lands apportioned and attached to base property owned or controlled by a permittee, lessee, or an applicant for a permit or lease.”<sup>214</sup> As before, the grazing preference gives its holder “a superior or priority position against others for the purpose of receiving a grazing permit or lease.”<sup>215</sup>

Under the current rules, base property that has been grazed in connection with a federal allotment has an attached grazing preference, denominated in AUMs. This means that an applicant owning such a base property will receive priority consideration over an applicant with another base property. However, it is possible under the current regulations to purchase a grazing preference from an existing permittee and then seek approval of the transfer from the BLM.<sup>216</sup> This method of obtaining grazing privileges carries with it

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<sup>211</sup> *Id.* The regulations referred to this allocation as the “permitted use” associated with a particular allotment. *Id.*

<sup>212</sup> *PLC II*, 529 U.S. 728, 741 (2000).

<sup>213</sup> 43 C.F.R. § 4110.2-2(b) (2006).

<sup>214</sup> *Id.* § 4100.0-5.

<sup>215</sup> *Id.*

<sup>216</sup> See *Stewart v. Kempthorne*, 593 F. Supp. 2d 1240, 1245 (D. Utah 2008), *aff’d*, 554 F.3d 1245 (10th Cir. 2009). Purchasers should bear in mind, however, that the preference does not constitute a compensable property interest for the purpose of a takings claim under the Fifth Amendment because grazing permit levels can be reduced by the BLM at

the preference for renewal and is a highly advisable means of obtaining grazing privileges for any applicant seeking to enter the federal lands ranching club.

## V

### THE NEW CATTLE GUARD AT WORK

#### A. *An Example of the New Federal Lands Permittee: the Grand Canyon Trust*

Because the grazing regulations still require ownership of base property, ownership of stock, and essentially require any corresponding grazing preference, few nontraditional permittees have succeeded in qualifying for, and ultimately obtaining, BLM grazing permits.<sup>217</sup> An example of one that has succeeded is the Grand Canyon Trust,<sup>218</sup> which together with its affiliate, Canyonlands Grazing Corporation (Canyonlands), obtained grazing privileges on several allotments in southern Utah in 2001, 2002, and 2003.<sup>219</sup> Canyonlands entered into agreements with ranchers holding preferences on four allotments in the Monument, whereby Canyonlands purchased the preferences and then applied to the BLM for approval of the preference transfers to Canyonlands' base properties, which had not been previously grazed in connection with the Monument allotments.<sup>220</sup> The BLM later approved the transfers and issued permits on the four allotments to Canyonlands.<sup>221</sup> Several ranchers who had also filed applications to graze these four allotments appealed the BLM's decisions, which were affirmed by both the

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any point in time. *Sacramento Grazing Ass'n v. United States*, 66 Fed. Cl. 211, 216–17 (2005); *Alves v. United States*, 133 F.3d 1454, 1456–57 (Fed. Cir. 1998).

<sup>217</sup> *Wrabley*, *supra* note 16, at 110 (discussing Grand Canyon Trust's acquisition of various grazing permits in southern Utah at a cost of over one million dollars); Mercer, 159 I.B.L.A. 17, 20, [Misc. Land Decisions] Gower Fed. Serv. 14 (Rocky Mountain Mineral Law Found.) (May 8, 2003) (discussing The Nature Conservancy's attempts to obtain grazing permits).

<sup>218</sup> See discussion *supra* Part IV.C.3.

<sup>219</sup> *Stewart*, 554 F.3d at 1249–50.

<sup>220</sup> *Id.* Some of the agreements involved relinquishment of the permits to the BLM, either by the previous holder or Canyonlands, if the BLM decided through its land use planning process to retire the allotments from grazing. *Id.* If BLM decided not to retire them, Canyonlands would graze the allotments. *Id.*

<sup>221</sup> *Id.*

federal district court and, later, by the Tenth Circuit.<sup>222</sup> Canyonlands is currently the permittee on these four allotments.<sup>223</sup>

Since it acquired grazing rights on the four allotments in the Monument through Canyonlands, the Grand Canyon Trust has become the new model of a federal lands ranching operation.<sup>224</sup> In 2005, it acquired two ranches on the Arizona Strip, located along the border between Utah and Arizona, consisting of over 1000 acres of private property and an accompanying 860,000 acres of federal and state public land.<sup>225</sup> Grand Canyon Trust currently holds the federal permits associated with these two ranches as well and has become “one of the largest, active grazing permittees in the Southern-Utah, Northern-Arizona region.”<sup>226</sup>

As the Grand Canyon Trust and Canyonlands have demonstrated, it is now possible for nontraditional ranching operations to qualify for permits, although the process is not necessarily free from bars and gaps. Before, applicants faced mostly regulatory obstacles, such as establishing prior use and location of base property, being engaged in the livestock business, and demonstrating that they qualified for preference under section 315(b) of the Taylor Grazing Act and the regulations. Now, applicants face less onerous regulatory requirements and an agency more accepting of different types of applicants, yet they may still encounter resistance from traditional ranchers who perceive that their own operations may be threatened.<sup>227</sup>

However, despite traditional ranchers’ fears that, after *Stewart v. Kempthorne*, anyone owning private property and at least four cows

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<sup>222</sup> *Id.*

<sup>223</sup> It is worth noting, however, that Canyonlands began the process of acquiring these grazing rights in the late 1990s, and only in 2009 emerged successfully from an onslaught of administrative appeals and litigation in federal courts initiated by ranchers challenging Canyonlands’ qualifications. *Id.*; *Stewart v. Kempthorne*, 593 F. Supp. 2d 1240 (D. Utah 2008), *aff’d*, 554 F.3d 1245 (10th Cir. 2009).

<sup>224</sup> Judge Heffernan called Canyonlands and the Trust “a classic example of a grazing success story.” *LeFevre v. BLM*, UT-030-04-01, at 30 (Dep’t of the Interior Office of Hearings and App. Jan. 26, 2006).

<sup>225</sup> *See id.*

<sup>226</sup> *Id.* (noting that the Trust, a new operation that began with “a few inherited cattle,” shortly became sizable).

<sup>227</sup> Thus far, the opposition has taken the form of “overfiling” on permits, whereby competing applicants file their own applications after BLM has granted another applicant a permit. Also, affected ranchers can appeal BLM’s decisions to issue permits to nontraditional applications, challenging their qualifications and entangling them in lengthy litigation. *See Mercer*, 159 I.B.L.A. 17, 18–19, [Misc. Land Decisions] Gower Fed. Serv. 14 (Rocky Mountain Mineral Law Found.) (May 8, 2003).

can qualify for a grazing permit on BLM lands, significant regulatory and financial hurdles remain for all applicants. If they own base property without a preference, and are competing against a permittee with a preference, the permittee with the preference will receive the permit. The base property requires a substantial investment, in that it must be capable of supporting livestock during parts of the year when the federal lands are rested, and it must be located close enough to the allotment so the livestock can be rotated on and off the allotment easily, and watered. Similarly, all applicants must satisfy the citizenship or residency requirements and at least be in the process of acquiring livestock. In this way, there remain significant regulatory and market-based restrictions on the pool of potential applicants, even if the regulatory requirements are not as stringent as in years past.

***B. The BLM's New Grazing Qualifications Model and What It Means for the Federal Range***

The qualifications regulations of today are arguably the most welcoming in the history of the BLM's regulation of grazing on public lands. They allow nontraditional applicants who are citizens or corporate residents and own base property the latitude to at least apply for grazing privileges while in the process of purchasing livestock.<sup>228</sup> The current regulations do not limit the pool of applicants to those who can show that they are "engaged in the livestock business," nor do they require any link between the applicant and a predecessor who grazed the federal range during the priority period. In short, the BLM now welcomes all applicants who are citizens or residents owning base property and even allows them time to acquire livestock before being issued a permit.

This new model of qualifications rules bodes well for the BLM's range management obligations under the Taylor Grazing Act,<sup>229</sup> FLPMA,<sup>230</sup> and PRIA.<sup>231</sup> When the Taylor Grazing Act was first passed in 1934, livestock grazing was often the only use on any given parcel of federal land. Today, grazing must be managed alongside other uses, such as recreation, archeological preservation, and other

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<sup>228</sup> *Id.*

<sup>229</sup> 43 U.S.C. §§ 315–315r (2006).

<sup>230</sup> 43 U.S.C. §§ 1701–1785 (2006).

<sup>231</sup> 43 U.S.C. §§ 1901–1908 (2006).



non-extractive uses.<sup>232</sup> In some of the driest western states, many of which have long been suffering from drought and overgrazing, the older regulations prevented the BLM from even considering applicants other than traditional ranchers, many of whom do not necessarily share the agency's long-term goals for the land.<sup>233</sup> The new model allows the BLM to consider applicants, like the Grand Canyon Trust, which are willing to work with the agency to accomplish its land management goals.

Moreover, when the Taylor Grazing Act was passed, there was arguably a livestock industry dependent on the public rangelands for its existence.<sup>234</sup> Today, however, this industry does not depend on the use of public domain lands and federal lands ranches, as they supply only a small percentage of the nation's food.<sup>235</sup> Especially in the arid western states, many federal lands ranchers struggle to make a living grazing cattle on land that can barely sustain forage and are subsidized by taxpayers in the form of rock-bottom grazing fees.<sup>236</sup> During times of drought, the BLM's goals of range preservation, adopted pursuant to FLPMA, and PRIA, often conflict with those of these traditional ranchers, who seek to graze the maximum amount of stock allowed under the permit in order to maximize any potential profit.<sup>237</sup>

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<sup>232</sup> *Mercer*, 159 I.B.L.A. at 19, [Misc. Land Decisions] Gower Fed. Serv. 14 (Rocky Mountain Mineral Law Found.). Although, despite the fact that active grazing on the public range has declined steadily since the 1950s, grazing remains by far the most widespread "extractive use" of these public lands. GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW 777* (5th ed. 2002) (noting that livestock is most widespread commercial use of federal public lands).

<sup>233</sup> See Coggins & Lindeberg-Johnson, *supra* note 49.

<sup>234</sup> See Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315–315r (2006)) (regulating a seemingly extensive livestock industry). Although even in 1934, the amount of live cattle and processed beef imported into the country exceeded the amount of beef exported. Carpenter, *supra* note 35, at 7. By 1955, former Grazing Director Farrington Carpenter referred to the beef cattle industry as "an anachronism in the modern business world," given its "precarious position" in the nation's economy as of the 1950s. Farrington R. Carpenter, Dir. of Grazing, Dep't of the Interior, *More Beef for Less Money*, Speech Given to Saskatchewan Stockgrowers' Association 1 (Jan. 2, 1955) (transcript on file with author).

<sup>235</sup> Debra L. Donahue, *Federal Rangeland Policy: Perverting Law and Jeopardizing Ecosystem Services*, 22 J. LAND USE & ENVTL. L. 299, 345 n.296 (2007).

<sup>236</sup> See Jennifer Frazer, *Ranchers Hit Hard by Drought Now Struggle to Restock*, WYO. TRIB. EAGLE, Aug. 7, 2005, at A1. Wrabley, *supra* note 16, at 98 (describing system of grazing fees as "cowboy socialism").

<sup>237</sup> See Julie Cart, *Amid Drought, a Range War Erupts in Utah Over Grazing Restrictions*, L.A. TIMES, Dec. 26, 2000, at A1.

The state of the federal range today requires continued active management by the BLM in light of its various statutory mandates under the Taylor Grazing Act, FLPMA, and PRIA. In adopting the new qualifications model and opening the application process to more nontraditional applicants, the BLM appears to have recognized that the solution to some of these management problems lies in the permittees themselves. Allowing willing permittees, such as the Grand Canyon Trust, to obtain permits will help the agency continue to accomplish its management goals, which in turn, will result in a future of federal lands ranches that looks quite different than in years past.