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## The Death of Rangeland Reform

I.	The Basics of Public Choice Theory .....	54	R
II.	Bruce Babbitt Attempts to Reform Public-Land Grazing .....	58	R
	A. Babbitt as a Centrist .....	60	R
	B. Jim Baca’s More Radical View .....	61	R
	C. The Birth of Rangeland Reform .....	62	R
	D. The Vision of Rangeland Reform ‘94 .....	62	R
	1. Reforming Rangeland Regulations and Policy .....	63	R
	2. Establishing National Standards and Guidelines .....	64	R
	3. Grazing Fees.....	65	R
III.	The Erosion of Rangeland Reform ‘94 .....	65	R
	A. Congressional Battles over Rangeland Reform ‘94 .....	66	R
	B. The Beginning of the End for Rangeland Reform .....	67	R
	1. Babbitt Attempts Compromise to Salvage Reform Effort .....	67	R
	2. Baca Put Out to Pasture .....	68	R
	C. Proposed Regulations.....	70	R
	1. Softening the Grazing Fee .....	70	R
	2. The Death of National Standards and Guidelines .....	71	R
	3. Elimination of Suspended Non-Use and Shortened Permit Tenure .....	73	R
	D. Final Grazing Regulations Promulgated .....	73	R
IV.	Challenges to Rangeland Reform ‘94 .....	75	R
	A. Legislative Efforts to Eliminate Rangeland Reform .....	75	R

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48 J. ENVTL. LAW AND LITIGATION [Vol. 21, 47

B.	<i>Public Lands Council v. Babbitt</i> .....	75	R
1.	Procedural Chronology of the Public Lands Council's Challenge .....	76	R
2.	The Public Lands Council's Challenge to Babbitt's Regulations .....	78	R
a.	Elimination of the Grazing Preference .....	78	R
b.	Affiliate Regulations .....	81	R
c.	Title to Range Improvements .....	82	R
d.	Conservation-Use Permits .....	85	R
e.	Limits on Temporary Non-Use .....	88	R
f.	Permittee Qualifications .....	89	R
g.	Exclusive Use of Water-Related Range Improvements .....	92	R
h.	Conditions for Suspension or Cancellation of Grazing Permits .....	93	R
i.	Surcharges for Pasturing Agreements ..	95	R
j.	Fundamentals of Rangeland Health ...	96	R
3.	The Upshot of <i>Public Lands Council v. Babbitt</i> .....	96	R
V.	The George W. Bush Administration's Efforts to End Rangeland Reform .....	97	R
A.	Vindicating the Public Lands Council's Challenge to Babbitt's Reform .....	98	R
1.	Elimination of the Grazing Preference .....	99	R
2.	Vesting Title to Range Improvements in the Federal Government .....	100	R
3.	Limits on Temporary Non-Use .....	101	R
4.	Addition of Conditions Under Which Grazing Permits Will Be Suspended or Cancelled .....	102	R
5.	The Fundamentals of Rangeland Health and Standards and Guidelines .....	103	R
B.	What Remains of Rangeland Reform '94? .....	104	R
VI.	Public Choice Theory and the Death of Rangeland Reform .....	106	R
A.	The Birth of Rangeland Reform .....	106	R
B.	Legislative Efforts .....	106	R
C.	Administrative Reform .....	108	R
VII.	Conclusion .....	109	R

Twenty-two thousand ranchers graze livestock on federal land.<sup>1</sup> Yet, ranchers grazing on public land represent only 3% of the beef producers in the United States.<sup>2</sup> Ranchers with federal grazing permits represent less than one-quarter of the total number of beef producers in the eleven western states<sup>3</sup> where federal grazing is concentrated.<sup>4</sup> Even within this group of public-land ranchers, the majority of the benefits are conferred on an astonishingly small number of individuals and corporations: the largest 2000 permits, approximately 10% of the total, account for two-thirds of the available forage.<sup>5</sup> As a result, a tiny fraction—less than 0.25%—of the cattle growers in the United States consumes the vast majority of the forage on public land.<sup>6</sup>

Until the passage of the Taylor Grazing Act (TGA) in 1934, grazing livestock on public land was virtually unregulated.<sup>7</sup> Congress intended that the TGA would provide for the “orderly use, improvement, and development” of federal rangeland.<sup>8</sup> To this end, Congress provided the Interior Secretary with the authority to create grazing districts, promulgate regulations, issue permits, and charge a fee for grazing the federal range.<sup>9</sup>

After passing the TGA, Congress waited more than forty years before it passed the next significant law governing federal grazing, the Federal Land Policy and Management Act of 1976 (FLPMA).<sup>10</sup> FLPMA established the standard permit tenure,<sup>11</sup>

<sup>1</sup> BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, RANGELAND REFORM '94: DRAFT ENVIRONMENTAL IMPACT STATEMENT 3-65 (1994).

<sup>2</sup> *Id.* at 3-66 tbl.3-15.

<sup>3</sup> *Id.* (approximately 22% of beef producers in the eleven western states have federal permits or leases).

<sup>4</sup> *See id.* at 3-66 tbl.3-15, 3-67 (93% of all federal permittees operate in Washington, Oregon, California, Idaho, Utah, Nevada, Arizona, Wyoming, Colorado, New Mexico, and Montana).

<sup>5</sup> U.S. GEN. ACCOUNTING OFFICE, PUBL'N NO. GAO/RCED-92-213FS, RANGELAND MANAGEMENT: PROFILE OF THE BUREAU OF LAND MANAGEMENT'S GRAZING ALLOTMENTS AND PERMITS 16 & fig. 2.1 (1992), available at <http://archive.gao.gov/d32t10/146906.pdf>.

<sup>6</sup> In the forty-eight contiguous states, there are 906,700 cattle producers. BUREAU OF LAND MGMT., *supra* note 1, at 3-66. Therefore, the largest 2000 permits represent no more than 0.22% of the producers in the contiguous United States. The actual percentage may be lower since a single producer may hold multiple permits.

<sup>7</sup> *See* Karl N. Arruda & Christopher Watson, *The Rise and Fall of Grazing Reform*, 32 LAND & WATER L. REV. 413, 421 (1997).

<sup>8</sup> Taylor Grazing Act, ch. 865, § 2, 48 Stat. 1269, 1270 (1934).

<sup>9</sup> *Id.* §§ 1-3, 48 Stat. 1269-70.

<sup>10</sup> *See* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743.

<sup>11</sup> *Id.* § 402(a)-(b).

required the Secretaries of the Interior and Agriculture to conduct a study on the value of federal forage,<sup>12</sup> and required permits to include allotment-management plans.<sup>13</sup> Two years later, in 1978, Congress passed the Public Rangelands Improvement Act (PRIA).<sup>14</sup> The most significant contribution of PRIA was the establishment of a formula for determining the federal grazing fee.<sup>15</sup> Although these two statutes improved federal rangeland management, the Bureau of Land Management (BLM) has failed to exercise its modest authority to limit the ecological damage inflicted by intensive grazing.<sup>16</sup> As a result, the negative environmental impacts of the federal grazing program continue to be substantial.

Although few people directly benefit from grazing on federal lands,<sup>17</sup> the economic and environmental burden borne by the public is substantial. The land managed by the BLM is largely arid and rugged; it damages easily and recovers slowly.<sup>18</sup> As a

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<sup>12</sup> *Id.* § 401(a).

<sup>13</sup> *Id.* § 402(d). The allotment management plan requirement was ultimately very short-lived. When FLPMA was originally passed, the Secretary of the Interior was only required to include allotment management plans for permits issued prior to October 1, 1988. *Id.* § 402(d). However, when the Public Rangelands Improvement Act was passed two years later, Congress eliminated the requirement and left the inclusion of an allotment management plan to the discretion of the Secretary. See Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514, § 8, 92 Stat. 1803, 1807. An allotment management plan describes the manner in which an allotment is to be grazed. See 43 U.S.C. § 1702(k) (2006). It is “basically [a] land use plan tailored to [a] specific grazing permit[.]” George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 24 (1983).

<sup>14</sup> See Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514, 92 Stat. 1803.

<sup>15</sup> *Id.* § 6(a). Although PRIA expressly limited the applicability of its grazing fee formula to the period from 1979 through 1985, the formula’s applicability has been extended indefinitely by executive order. Exec. Order No. 12,548, 51 Fed. Reg. 5985 (Feb. 14, 1986).

<sup>16</sup> See Joseph M. Feller, *What Is Wrong with the BLM’s Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 572 (1994); cf. George Cameron Coggins, *The Law of Public Rangeland Management V: Prescriptions for Reform*, 14 ENVTL. L. 497, 540-41 (1984) (suggesting changes in BLM’s management philosophy). Coggins also blamed the failure of PRIA and FLPMA on the lack of clear statutory goals and judges’ failure to require the BLM to adhere to the Acts’ terms. *Id.* at 504-07.

<sup>17</sup> Only 22,000 ranchers graze their cattle on public land. See BUREAU OF LAND MGMT., *supra* note 1, at 3-65. By way of comparison, 31,932 people ran the New York Marathon in 2002. Bobby Cuza, *Ladies’ Day at the Races*, NEWSDAY (New York), Nov. 4, 2002, at A8.

<sup>18</sup> WELFARE RANCHING: THE SUBSIDIZED DESTRUCTION OF THE AMERICAN WEST xiii (George Wuerthner & Mollie Matteson eds., 2002).

result, livestock grazing has significantly degraded these fragile landscapes. By the BLM's own account, only a third of riparian areas on the land it manages function properly.<sup>19</sup> Livestock grazing contributes to the decline of native trout species<sup>20</sup> and degrades spawning and rearing habitat for imperiled salmon.<sup>21</sup> Grazing activities are also implicated in the increase in the severity of wildfires.<sup>22</sup> The environmental costs of grazing are compounded by significant economic costs. The fee charged for an Animal Unit Month (AUM) by the BLM does not even cover the cost of administering the grazing program<sup>23</sup> and is a fraction of its fair market value.<sup>24</sup>

Traditional notions of democracy predict that political representatives who promote the interests of their constituencies will dominate political races.<sup>25</sup> Therefore, one would expect that when the burden of a federal program is borne by the majority for the benefit of the few, the political branches would reallocate the benefits and burdens. Yet, with a few notable exceptions, substantive grazing reform has not occurred. The fact that Congress has not undertaken grazing reforms calls into question the predictive ability of traditional notions of representative democracy.

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<sup>19</sup> BUREAU OF LAND MGMT., *supra* note 1, at 4-24.

<sup>20</sup> DENZEL FERGUSON & NANCY FERGUSON, *SACRED COWS AT THE PUBLIC TROUGH* 76-77 (1983).

<sup>21</sup> BUREAU OF LAND MGMT., *supra* note 1, at 4-28 to -29.

<sup>22</sup> A. Joy Belsky & Dana M. Blumenthal, *Effects of Livestock Grazing on Stand Dynamics and Soils in Upland Forests of the Interior West*, 11 *CONSERVATION BIOLOGY* 315, 319 (1997). Belsky and Blumenthal assert that wildfires are more intense in areas that have been grazed by cattle for two reasons. First, cattle consume the fine fuels that would otherwise fuel periodic low-intensity fires. Due to the absence of low-intensity fires, the overall fuel loads are generally higher than in ungrazed areas. Second, cattle consume grass that would otherwise compete with conifer seedlings for nutrients. As a result, forests that have been grazed tend to be more densely stocked than ungrazed forests. *Id.* at 318-19.

<sup>23</sup> U.S. GEN. ACCOUNTING OFFICE, PUBL'N NO. GAO/OCG-93-17TR, *NATURAL RESOURCES MANAGEMENT ISSUES 19-20* (1992), available at <http://archive.gao.gov/d36t11/148261.pdf>.

<sup>24</sup> An AUM on federal land cost \$1.43 in 2002. Press Release, Bureau of Land Mgmt., U.S. Dep't of the Interior, 2002 Grazing Fee Announced (Feb. 14, 2002), available at [http://www.blm.gov/nhp/news/releases/pages/2002/pr020214\\_grazing.htm](http://www.blm.gov/nhp/news/releases/pages/2002/pr020214_grazing.htm). The average cost of an AUM on private land in the eleven western states was \$12.50 in 2002. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., *AGRICULTURAL STATISTICS 2003 IX-42 tbl.9-43* (2003), available at [http://www.nass.usda.gov/Publications/Ag\\_Statistics/agr03/03\\_ch9.pdf](http://www.nass.usda.gov/Publications/Ag_Statistics/agr03/03_ch9.pdf).

<sup>25</sup> Jonathan Macey, *Representative Democracy*, 16 *HARV. J.L. & PUB. POL'Y* 49, 49-50 (1993).

Public choice theory provides an alternate view of political decision making. Public choice theory suggests that small, well-organized interest groups pursuing concrete financial gain will have a disproportionate impact on political bodies.<sup>26</sup> Although ranching interests are spread across remote parts of the West, they have successfully lobbied the federal government for favorable access to public forage through organizations such as the National Cattlemen's Beef Association. The cost of rangeland degradation due to grazing is borne by the undifferentiated, distant public, who generally lack firsthand knowledge of or a vested interest in the federal range.

Under these circumstances, public choice theory predicts that ranchers can have a disproportionate impact on political decisions. And indeed, the history of rangeland management supports this hypothesis. Historically, ranching interests have defeated most legislative attempts to reform grazing practices.<sup>27</sup> Similarly, the executive branch has rarely exercised its broad authority to regulate grazing under the TGA,<sup>28</sup> FLPMA, and PRIA.<sup>29</sup>

In 1993, Secretary of the Interior Bruce Babbitt attempted to challenge this state of affairs by reforming public-lands grazing.<sup>30</sup> Although it was not a particularly ambitious plan,<sup>31</sup> Babbitt's initiative was the first significant proposal to reform grazing prac-

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<sup>26</sup> Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 407 (1994) (citing DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991)).

<sup>27</sup> See, e.g., *Westerners Defeat Babbitt Range Policy—Or Do They?*, PUB. LAND NEWS, Nov. 25, 1993, at 3, 3.

<sup>28</sup> See George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 100-01 (1982).

<sup>29</sup> See George Cameron Coggins, *The Law of Public Rangeland Management V: Prescriptions for Reform*, 14 ENVTL. L. 497, 504-07 (1984).

<sup>30</sup> Notice of Intent to Prepare an Environmental Impact Statement, 58 Fed. Reg. 43,234, 43,234 (Aug. 13, 1993).

<sup>31</sup> Critics of the BLM's grazing program have advocated eliminating grazing where its costs outweigh its benefits. See U.S. GEN. ACCOUNTING OFFICE, PUBL'N NO. GAO/RCED-92-12, *RANGELAND MANAGEMENT: BLM'S HOT DESERT GRAZING PROGRAM MERITS RECONSIDERATION* 58 (1991), available at <http://archive.gao.gov/d31t10/145487.pdf>; Joseph M. Feller, *'Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Lands Grazing Policy*, 25 ENVTL. L. 703, 704-05 (1995) (criticizing the grazing of fragile arid lands and noting that a "rational approach would be to continue grazing only where its economic benefits exceed its costs by a margin sufficient to justify its environmental impacts"). However, Babbitt's proposal failed to consider any programmatic reduction in the extent of federal grazing.

tices since the enactment of PRIA in 1978. Despite his efforts to build consensus for reform,<sup>32</sup> Babbitt faced considerable opposition to his initial proposal.<sup>33</sup> When he promulgated final regulations, Babbitt's attempts to reach a compromise had eliminated or substantially weakened the key elements of the initial proposal.<sup>34</sup> Before the new grazing regulations could take effect, ranching interests challenged the regulations in federal court.<sup>35</sup> The case eventually found its way into the Supreme Court, where in 2000, the Court unanimously upheld key provisions of Babbitt's grazing regulations as lawful exercises of his statutory authority.<sup>36</sup>

The following year, George W. Bush was inaugurated as the forty-third President of the United States.<sup>37</sup> Bush replaced Secretary Babbitt with Gale Norton, a disciple of former Secretary James Watt.<sup>38</sup> Two years later, on March 3, 2003, the BLM an-

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<sup>32</sup> See Notice of Intent to Prepare an Environmental Impact Statement, 58 Fed. Reg. at 43,234 ("During the spring and summer of 1993, Interior Secretary Bruce Babbitt held five meetings in the West . . . to obtain public views on rangeland management."); *Westerners Defeat Babbitt Range Policy—Or Do They?*, *supra* note 27, at 3 ("Babbitt has promised to go to Denver every week for the next eight weeks to talk with affected interest groups.").

<sup>33</sup> In response to a bill based on Babbitt's reform proposal, Senator Malcolm Wallop (R-Wyo.) addressed the Senate, "I tell you my friends and colleagues, this is not a grazing issue . . . This is an issue of a war on the West. This is an issue of the assault of the Secretary of Interior to try to gain control over the West." *Senate Refuses to Consider Range Policy Changes—Thus Far*, PUB. LANDS NEWS, Oct. 28, 1993, at 1, 2.

<sup>34</sup> Between the announcement of the initial proposal and promulgation of the final rule, Babbitt made two major changes. First, he eliminated an increase in the grazing fee. See Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894, 9899 (Feb. 22, 1995) (to be codified at 43 C.F.R. pts. 1780, 4100). Second, he gutted national standards and guidelines. See *id.* at 9902.

<sup>35</sup> The Public Lands Council's lawsuit was filed in the Wyoming District Court on July 27, 1995. *Ranchers Sue Government over Rules for Grazing*, SEATTLE POST-INTELLIGENCER, July 28, 1995, at A3; see also Pub. Lands Council v. U.S. Dep't of Interior Sec'y, 929 F. Supp. 1436 (D. Wyo. 1996), *aff'd in part, rev'd in part sub nom.* Pub. Lands Council v. Babbitt, 154 F.3d 1160 (10th Cir. 1998), *opinion am. and superseded on reh'g*, 167 F.3d 1287 (10th Cir. 1999), *aff'd* 529 U.S. 728 (2000) [hereinafter Pub. Lands Council I]. Babbitt's grazing regulations did not take effect until August 21, 1995. See Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. at 9894.

<sup>36</sup> See Pub. Lands Council v. Babbitt, 529 U.S. 728, 731 (2000) [hereinafter Pub. Lands Council III].

<sup>37</sup> Stewart M. Powell, *George W. Bush Becomes 43rd President*, TIMES UNION (Albany, N.Y.), Jan. 21, 2001, at A1.

<sup>38</sup> James Risen, *Vote Lifts Conservative Land Groups*, N.Y. TIMES, Jan. 31, 2001, at A15.

nounced that it would rewrite its grazing regulations.<sup>39</sup> In its Advanced Notice of Proposed Rulemaking, the BLM proposed eliminating many of the reforms in Babbitt's grazing regulations, including reforms affecting title to range improvements, title to water rights, and the definition of grazing preference.<sup>40</sup>

Traditional theories of representative democracy would not have predicted the arc traced by rangeland reform. Public choice theory provides a more satisfactory explanation of the death of Babbitt's reform efforts. Although public choice theory cannot account for all of the factors leading to the death of rangeland reform, it offers meaningful insights into the political realities of federal rangeland management.

This Article examines the lessons of public choice theory in the context of rangeland reform. Part I briefly surveys public choice theory. Part II explores Babbitt's initial proposal to reform public land grazing. From the apogee of his initial proposal, Part III traces the erosion of his reform efforts. Part IV then discusses legal and judicial challenges to Babbitt's regulations. Part V proceeds to examine the second Bush administration's efforts to revoke rangeland reform, while Part VI applies public choice theory to the death of rangeland reform.

This Article concludes that public choice theory predicts that significant and rapid reform of public rangeland policy is unlikely. Due to the disproportionate influence of ranchers on the political process, legislative reforms are unlikely. Ranchers will also have a significant impact on administrative reform efforts. However, as Babbitt's reform effort demonstrates, modest administrative reforms are possible. Therefore, the most promising path to rangeland reform is gradual administrative reform.

## I

### THE BASICS OF PUBLIC CHOICE THEORY

The influence of special interests has been a concern since the Founding. James Madison was particularly concerned about the potential for factions to interfere with the political process.<sup>41</sup>

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<sup>39</sup> Advance Notice of Proposed Rulemaking for Proposed Amendments to the BLM's Grazing Administration Regulations, 68 Fed. Reg. 9964, 9964 (Mar. 3, 2003).

<sup>40</sup> *Id.* at 9965-66.

<sup>41</sup> William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 280 (1988) (citing THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961)).



However, over the past two centuries, as Americans have grown more cynical, we have grown to accept that special interests wield substantial political influence.<sup>42</sup> Despite this growing cynicism, economic theory illustrates why special interests are so influential.

Public choice theory is an economic theory of law creation. In its most basic form, public choice theory views political actors as rational economic actors who are motivated solely by re-election.<sup>43</sup> The theory predicts that legislators will enact laws that they believe will lead to their re-election.<sup>44</sup>

Interest-group theory is a branch of public choice theory that examines the influence that interest groups have when legislation is created by economically rational legislators.<sup>45</sup> The basic teaching of the interest-group theory is that small, well-organized groups seeking to protect a narrow interest by opposing changes to the status quo will have an undue influence on the law-making process.<sup>46</sup> The comparative weakness of large groups seeking broad remedies is due in part to the free-rider problem. Simply stated, the free-rider problem is that when the benefits to be reaped are widely shared, many will fail to take action on the assumption that they will reap the benefits of someone else's hard work.<sup>47</sup> The free-rider problem is most effectively overcome by small groups promising concrete benefits.<sup>48</sup> When members of an organization stand to receive concrete benefits from its actions, its members are less likely to free-ride and are more likely to actively support the organization's efforts.

Public choice theory predicts that new legislation is unlikely if the benefits are widespread or if the costs are concentrated. The reason for this is what William Eskridge, Jr. calls the "dilemma of the ungrateful electorate": the electorate will forget the good things a legislator does much more rapidly than it will forgive the legislator for her bad acts.<sup>49</sup> A legislator may try to avoid the dilemma by taking positions that do not injure any of her constit-

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<sup>42</sup> FARBER & FRICKEY, *supra* note 26, at 12.

<sup>43</sup> *Id.* at 22.

<sup>44</sup> *See* Eskridge, *supra* note 41, at 288.

<sup>45</sup> *See* Blumm, *supra* note 26, at 415-16; Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 879-80 (1987).

<sup>46</sup> FARBER & FRICKEY, *supra* note 26, at 19.

<sup>47</sup> *Id.* at 23.

<sup>48</sup> *See id.*

<sup>49</sup> Eskridge, *supra* note 41, at 288.

uents. However, she finds herself in a precarious position when legislation will benefit one segment of her constituency and injure another segment. If she takes a firm position on the issue, she will disappoint one of the groups.

To satisfy two groups with adverse interests, legislators may, where possible, attempt to reach a compromise that upsets neither group.<sup>50</sup> If a compromise is not possible, legislators may draft legislation that establishes noble policy objectives, but is written with the knowledge that the responsible agency is unlikely to rigorously enforce it.<sup>51</sup> The noble policy objectives satisfy the proponents of the legislation and the lax enforcement satisfies its opponents.

Legislators may also create vague and ambiguous objectives in the statute and effectively delegate resolution of the problem to an administrative agency.<sup>52</sup> Due to the vague provisions in the legislation, both sides can claim victory and the legislator can distance herself from any negative consequences that result from the agency's ultimate resolution of the issue.<sup>53</sup> However, when the beneficiaries of a piece of legislation are only weakly interested, and its opponents have a strong interest in its defeat, a legislator has little to gain by voting to enact the legislation. When a legislator stands to lose a lot by injuring a group that has a strong interest in the legislation, she has little incentive to enact the legislation.<sup>54</sup> In the absence of legislative action, resolution of the issue will fall to an administrative agency.

Public choice theory can also be employed to explain the decisions of administrative agencies. In its pure form, public choice theory is based on the premise that political actors will act to secure their re-election. However, because officers of administrative agencies are not up for re-election, to effectively apply public choice theory to administrative agencies it is necessary to identify an alternative principle that motivates the agencies. For administrative agencies, public choice theorists identify an alter-

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<sup>50</sup> *Id.*

<sup>51</sup> Michael Lyons, *Political Self-Interest and U.S. Environmental Policy*, 39 NAT. RES. J. 271, 287-88 (1999).

<sup>52</sup> See Eskridge, *supra* note 41, at 288.

<sup>53</sup> *Id.*; see also Lyons, *supra* note 51, at 288 n.86 ("Congress may deliberately establish infeasible policy objectives and otherwise write laws that are intrinsically impossible to implement so that the bureaucracy will become a scapegoat for the failures of government.").

<sup>54</sup> Eskridge, *supra* note 41, at 288-89.

nate motivating principle. William Niskanen, Jr. has articulated an economic theory that attempts to explain what motivates administrative agencies. According to Niskanen, an administrative agency is a rational entity that will seek to maximize its budget.<sup>55</sup> Substituting Niskanen's budget-maximizing theory for the legislators' desire to be re-elected allows public choice theory to be effectively applied to administrative agencies.

To justify its existence and maximize its budget, an agency will attempt to demonstrate that it has produced useful services that warrant continued or increased funding. Public choice theory predicts that an agency will be more likely to provide benefits and services to small, well-organized groups than to diffuse large groups. If an agency confers benefits broadly, the benefit each individual receives will be modest or insignificant. As a result, the beneficiaries are unlikely to strongly support the agency, and therefore legislators will have few incentives to sustain or increase the agency's budget. On the other hand, when an agency confers benefits on or reduces costs borne by a small, economically motivated group, the members of the group are likely to actively support the continued existence and expansion of the agency.<sup>56</sup>

Additionally, the influence of a small, economically motivated group on an administrative agency is likely to be greater than its influence on the legislature because of the increased information costs associated with administrative rulemaking. Administrative rulemaking is a more obscure and technical proceeding than legislating. As a result, those interested in influencing the proceeding must spend more time and energy to acquire and analyze the information relevant to the rulemaking process. A small, eco-

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<sup>55</sup> WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38-42 (1971) ("Bureaucrats maximize the total budget of their bureau during their tenure, subject to the constraint that the budget must be equal to or greater than the minimum total costs of supplying the output expected by the bureau's sponsor.").

<sup>56</sup> Budget maximizing does not necessarily mean acting to grow the agency's budget. In the case of a regulatory agency, the regulated entities are unlikely to favor much growth in the agency since a larger agency may have a greater ability to oversee and regulate. However, if an agency is too rigorous in its oversight and regulation, the regulated entities may use their political power in the legislature to reduce the agency's financial support. See DENNIS C. MUELLER, PUBLIC CHOICE III 386-88 (2003). Therefore, pleasing powerful interest groups may be a self-preservation strategy (i.e., maximizing the agency's budget may mean simply preventing significant decreases).

nomically motivated group that stands to receive concrete benefits, or avoid concrete costs as a result of the rulemaking, has a strong incentive to bear the increased costs of participating in administrative proceedings.<sup>57</sup> In contrast, a large group seeking diffuse benefits has fewer incentives to bear the costs required to participate effectively in the rulemaking process.

Bruce Babbitt's efforts to reform federal grazing practices provide an excellent context for examining the predictions of public choice theory. Concentrated in a handful of western states and represented by powerful national groups,<sup>58</sup> public-lands ranchers are a small, well-organized group. Moreover, grazing reform may impose concrete costs on public-lands ranchers. The most dramatic example is the grazing fee assessed by the BLM. The undifferentiated public would benefit financially from an increase in the fee. However, the fiscal benefit would be so small it would be unnoticeable.<sup>59</sup> Similarly, any environmental benefit that may result from an increased grazing fee would only be evident on remote, rural western landscapes, far from most Americans. In contrast, the cost to an individual rancher could be significant if he were forced to pay market value for the forage his livestock consume. Although the effects of changes to grazing regulations are more subtle, most attempts to reform grazing practices will, at least in the short term, impose a burden on public-land ranchers. As a result, public choice theory predicts that public-land ranchers will organize and be very effective at obstructing attempts to reform grazing practices on BLM land.

## II

### BRUCE BABBITT ATTEMPTS TO REFORM PUBLIC-LAND GRAZING

Bruce Babbitt is a man of apparent contradictions. On one hand, he has close ties to ranching. He grew up in a ranching

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<sup>57</sup> Eskridge, *supra* note 41, at 289 (arguing that when legislation imposes concentrated costs on a small, well-organized group, the group "will tend, over time, to organize themselves effectively to influence the agency").

<sup>58</sup> These groups include the American Farm Bureau Federation, the National Cattlemen's Beef Association, and the Public Lands Council.

<sup>59</sup> Not only would the gain to an individual citizen be small, but the gain would appear in the federal treasury. It is highly unlikely that an increased grazing fee would have any detectable financial impact on an individual taxpayer. Had the cost per AUM on federal lands been equal to that of private lands, an additional \$243,540 would have been raised. *See supra* notes 17, 24.

family in northern Arizona.<sup>60</sup> His grandfather homesteaded the family ranch in 1886.<sup>61</sup> Prior to his confirmation as Secretary of the Interior, he owned a share of his family's 400,000 acre ranch.<sup>62</sup>

Despite his ranching heritage, Babbitt has been an outspoken advocate for environmental causes. Before his nomination, Babbitt served as the president of the League of Conservation Voters (LCV), a conservation organization that examines the environmental friendliness of senators and representatives.<sup>63</sup> By his own admission, Babbitt made strong statements while advocating for the LCV.<sup>64</sup> He has also publicly advocated for the end of "multiple use,"<sup>65</sup> a principle that has been heavily relied upon to justify extractive uses of public land.<sup>66</sup>

Despite the apparent irreconcilable conflict between grazing and environmental protection, Babbitt managed to find a middle ground, avoiding both extremes. In his conception of dominant public use, domestic livestock would not be removed from the

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<sup>60</sup> Bruce Babbitt, *Remarks to the Society of Range Management*, 29 LAND & WATER L. REV. 399, 399 (1994).

<sup>61</sup> *Id.* at 399-400.

<sup>62</sup> Associated Press, *Babbitt Role in Waste Dispute Questioned, Environmentalists Claim Conflict of Interest for Cabinet Appointee*, BUFFALO NEWS, Jan. 5, 1993, at A5. Due to the potential conflict between his role as the top governmental official responsible for managing public lands and his role as a part-owner of a ranch, Babbitt divested himself of his interest in the ranch. *Bruce Babbitt Nomination: Hearings on the Proposed Nomination of Bruce Babbitt to BE Secretary of the Interior Before the S. Comm. on Energy & Natural Resources*, 103d Cong. 36-37 (1993) [hereinafter *Babbitt Nomination Hearings*] (prepared statement of Gov. Bruce Babbitt, Secretary of the Interior nominee).

<sup>63</sup> League of Conservation Voters, About LCV, <http://www.lcv.org/about-lcv/> (last visited Oct. 5, 2006) (The LCV calls itself the "political voice for the environment" and pledges its support for "leaders who stand up for a clean, healthy future for America.").

<sup>64</sup> *Babbitt Nomination Hearings*, *supra* note 62, at 34 (statement of Bruce Babbitt) ("[M]y advocacy for [the LCV], whose broad goals I concur with, led me to make some strong and vigorous advocacy statements.").

<sup>65</sup> Tom Kenworthy, *Pragmatic Critic Is Set to Be Interior's Next Landlord*, WASH. POST, Jan. 19, 1993, at A9 (Babbitt once wrote that the "next step in the evolution of public land use policy is to replace multiple use management with a new concept—dominant public use—that gives priority to recreation, wildlife and watershed uses."); *see also* Judy Fahys, *If Bruce Babbitt Gets Interior . . . Western Land Users Detect Cold Winds of Change*, SALT LAKE TRIB., Dec. 13, 1992, at A1 (noting Babbitt's declaration that multiple-use management has largely been a failure).

<sup>66</sup> *See* Blumm, *supra* note 26, at 406-07.

landscape but rather would be managed to minimize their detrimental impact on federal rangeland.<sup>67</sup>

Although grazing did not figure prominently in Governor Bill Clinton's campaign,<sup>68</sup> western ranchers saw his running mate, Senator Al Gore, as an enemy and a threat to their way of life.<sup>69</sup> However, Clinton demonstrated support for grazing reform by nominating Babbitt to serve as his Secretary of the Interior.<sup>70</sup> As Secretary of the Interior, Babbitt would oversee more than 503 million acres of federal land,<sup>71</sup> including more than 159 million acres of rangeland in the western United States.<sup>72</sup>

### A. *Babbitt as a Centrist*

After his nomination, Babbitt faced confirmation hearings before the Senate Committee on Energy and Natural Resources. Although his nomination was never truly in jeopardy,<sup>73</sup> the conservative western senators on the committee expressed concern over some of Babbitt's public statements.<sup>74</sup>

Babbitt's fundamentally centrist approach to public-land management became evident later in the hearing when, in response

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<sup>67</sup> See *A Question-and-Answer Session with Interior Secretary Bruce E. Babbitt*, 25 NAT'L J. 2714, 2714 (1993) [hereinafter *Babbitt Q&A*].

<sup>68</sup> See Jane Ann Morrison, *Campaign Trails Cross Nevada*, LAS VEGAS REV.-J., Oct. 18, 1992, at 1A (When asked whether he supported a grazing-fee increase, Clinton replied, "[i]f elected, I will confer with all interested parties before making a decision on this issue.").

<sup>69</sup> See Associated Press, *Farm Official Fears Clinton*, LAS VEGAS REV.-J., Oct. 8, 1992, at 13E (president of the Nevada Farm Bureau Federation expressing her fear that Gore represents a threat to grazing on public land); Bill Mintz & William E. Clayton, *Many in Oil and Gas Industries Pessimistic Despite Assurances*, HOUSTON CHRON., Aug. 18, 1992, at B10 (Senator Alan Simpson commenting on the devastating impact Gore's policies would have on Wyoming's extractive industries).

<sup>70</sup> It was widely known that Babbitt was critical of the Interior Department's existing management of the public range. See, e.g., Gregg Easterbrook, *Bruce Babbitt's Interior Motives*, NEWSWEEK, Mar. 29, 1993, at 25, 25 (quoting Babbitt as saying that "[f]or 12 years Interior has been the center of the Washington anti-environmental movement").

<sup>71</sup> James Conaway, *Babbitt in the Woods: The Clinton Environmental Revolution That Wasn't*, HARPER'S MAG., Dec. 1993, at 52, 52.

<sup>72</sup> BUREAU OF LAND MGMT., *supra* note 1, at 3-5 tbl.3-2.

<sup>73</sup> Following the opening statements of the senators, Senator Malcolm Wallop, a conservative Republican from Wyoming known for his fierce loyalty to ranchers, stated that he had no doubts that Babbitt would be confirmed. *Babbitt Nomination Hearings*, *supra* note 62, at 37.

<sup>74</sup> In his opening remarks, Senator Wallop expressed concern about a lecture in which Babbitt told ranchers to prepare for the end of grazing on public land. *Id.* at 4. Similarly, Senator Frank Murkowski expressed concern about Babbitt's call for the end of multiple use. See *id.* at 16.

to a question from Utah Senator Robert Bennett, he assured the committee that he believed, “there is an important place for ranching, regardless of how much . . . we may quarrel on the margins . . . .”<sup>75</sup> Reassured by Babbitt’s moderate approach to public-land management, the Senate Committee on Energy and Natural Resources unanimously voted to approve his confirmation as the Secretary of the Interior.<sup>76</sup> The Senate confirmed Babbitt as Secretary of the Interior on January 21, 1993.<sup>77</sup>

### **B. Jim Baca’s More Radical View**

The BLM is responsible for the majority of federally managed rangeland.<sup>78</sup> Although grazing occurs on land managed by the Forest Service<sup>79</sup> and the Fish and Wildlife Service,<sup>80</sup> grazing is most commonly associated with the BLM.<sup>81</sup> Because of the important role that the BLM plays in public-rangeland administration, Babbitt’s choice for Director of the BLM would send a strong message to ranchers and environmentalists. On February 23, 1993, the White House nominated Jim Baca to serve as director of the BLM.<sup>82</sup> Many ranchers were critical of Babbitt’s choice and feared it was a sign of the end of public-land grazing.<sup>83</sup> Before his appointment, Baca served on The Wilderness

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<sup>75</sup> *Id.* at 78. Babbitt also took the opportunity to reemphasize his familial connection to ranching. He completed his answer by asserting that, as Secretary, he intended to “do [his] very best to reconcile the conflicts and to keep that industry on the land for the good of the West.” *Id.*

<sup>76</sup> Tony Batt, *O’Leary to Lead Energy; Babbitt, Interior*, LAS VEGAS REV.-J., Jan. 22, 1993, at 3A.

<sup>77</sup> *Id.*

<sup>78</sup> U.S. GEN. ACCOUNTING OFFICE, PUBL’N NO. GAO/RCED-88-80, RANGELAND MANAGEMENT: MORE EMPHASIS NEEDED ON DECLINING AND OVERSTOCKED GRAZING ALLOTMENTS 10 (1988), available at <http://archive.gao.gov/t2pbat17/136027.pdf>.

<sup>79</sup> *Id.*

<sup>80</sup> ROBERT L. FISCHMAN, *THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW* 99, 163 (2003).

<sup>81</sup> The BLM’s history has been strongly influenced by grazing. In 1946, the BLM was formed by the merger of the Grazing Service with the General Land Office. PHILLIP O. FOSS, *POLITICS AND GRASS* 84-85 (1960).

<sup>82</sup> Timothy Egan, *Big Changes Ahead for West; Public Resource Plan Alters Management of 500 Million Acres*, SEATTLE POST-INTELLIGENCER, Feb. 24, 1993, at A7.

<sup>83</sup> See, e.g., *id.*; Associated Press, *Nevada Ranchers Worry About Babbitt’s Appointees*, LAS VEGAS REV.-J., Feb. 26, 1993, at 6B (quoting an executive board member of the Nevada Cattlemen’s Association, “I was quite surprised that Babbitt picked someone who was that far into the environmental movement.”); Maura Dolan, *Environmental Activists Adapt to Insider Role*, L.A. TIMES, Mar. 23, 1993, at A1.

Society's governing board.<sup>84</sup> Perhaps more troubling to ranchers than his close ties to an environmental organization was a significant increase in state grazing fees that occurred during Baca's term as New Mexico's land commissioner.<sup>85</sup>

### C. *The Birth of Rangeland Reform*

The federal regulations governing grazing on federal land had not been significantly amended since shortly after the enactment of FLPMA in 1976.<sup>86</sup> Yet within six months of Baca's nomination as BLM director, Secretary Babbitt and Baca had published a pragmatic proposal to reform grazing on public lands. The reform effort, titled "Rangeland Reform '94," stated three reasons for the proposed changes: (1) to improve administration of the BLM grazing program, (2) to restore and improve the ecological condition of the rangeland, and (3) to establish a "fair and equitable grazing fee."<sup>87</sup>

### D. *The Vision of Rangeland Reform '94*

Babbitt was fundamentally a moderate on grazing. Although environmental advocates have argued for the elimination of grazing on at least some of the land managed by the BLM,<sup>88</sup> Babbitt

<sup>84</sup> Associated Press, *supra* note 83. For additional information about The Wilderness Society, see The Wilderness Society, About The Wilderness Society, <http://www.wilderness.org/AboutUs> (last visited Oct. 6, 2006).

<sup>85</sup> The grazing fee on state lands increased from \$1.60 to \$3.30 per AUM during Baca's tenure. *Baca, Possible BLM Boss, Has Rich Grazing Policy History*, PUB. LANDS NEWS, Feb. 18, 1993, at 5, 5.

<sup>86</sup> See Alteration of Grazing Regulations to Allow for Management Flexibility to Achieve Multiple Use, Sustained Yield, Environmental, Economic, and Other Objectives, 43 Fed. Reg. 29,058, 29,062 (July 5, 1978) (to be codified at 43 C.F.R. pts. 4100-4300). The 1978 rulemaking effort actually began before Congress enacted FLPMA. See Modernization of Regulations for Administering Grazing on Public Lands, Exclusive of Alaska, to Meet Present-Day Needs, 41 Fed. Reg. 31,504, 31,504 (proposed July 28, 1976) (to be codified at 43 C.F.R. pts. 4100-4300). The intent of the initial rulemaking was to modernize existing rules that had become outdated. *Id.* After the passage of FLPMA on October 21, 1976, the BLM broadened its proposed rulemaking to include provisions required by FLPMA. Modernization of Livestock Grazing Regulations for Public Lands and Addition of Provisions to Comply With the Federal Land Policy and Management Act of 1976, 42 Fed. Reg. 35,334, 35,334 (proposed July 8, 1977) (to be codified at 43 C.F.R. pts. 4100, 4700, 9230).

<sup>87</sup> BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, RANGELAND REFORM '94 3 (1993).

<sup>88</sup> See, e.g., Feller, *supra* note 16, at 572-73 (criticizing the BLM for its failure to use its FLPMA authority to exclude grazing "where its routine impacts—trampling, soil erosion, watershed deterioration, water pollution, scenic degradation, competition with wildlife—or the costs of grazing administration, may exceed its economic



never espoused such a position.<sup>89</sup> His proposed reforms reflected his centrism; Rangeland Reform '94 was hardly a radical proposal. Instead, it was fundamentally a common-sense approach to addressing the dismal state of federal rangelands.<sup>90</sup>

Rangeland Reform '94 consisted of three separate reform efforts that reflected the purpose and need for the proposal.<sup>91</sup> The first reform was a package of amendments to the regulations and policies that govern grazing on federal land.<sup>92</sup> The second was a proposal to add national standards and guidelines to the regulations in order to establish minimum acceptable ecological conditions for federal rangeland.<sup>93</sup> The third reform proposed to bring federal grazing fees closer to the fee charged for forage on private land.<sup>94</sup>

### *1. Reforming Rangeland Regulations and Policy*

Babbitt and Baca presented Rangeland Reform '94 as the next step in the evolution of rangeland reform that began with the passage of the 1934 Taylor Grazing Act.<sup>95</sup> The core of Rangeland Reform '94 was an effort to modernize federal grazing management.<sup>96</sup> To this end, they proposed a package of fourteen additions and amendments to the grazing regulations.<sup>97</sup>

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benefits"); PUB. EMPLOYEES FOR ENVTL. RESPONSIBILITY, PUBLIC TRUST BETRAYED: EMPLOYEE CRITIQUE OF BUREAU OF LAND MANAGEMENT RANGELAND MANAGEMENT 7-8 (1993) (lamenting BLM's failure to appreciate "that a tremendous amount of public land is unsuitable for livestock grazing").

<sup>89</sup> See, e.g., *Babbitt Nomination Hearings*, *supra* note 62, at 78.

<sup>90</sup> See Public Rangelands Improvement Act of 1978, 43 U.S.C. § 1901(a) (2006) (congressional finding that "vast segments of the public rangelands . . . are in an unsatisfactory condition"); U.S. GEN. ACCOUNTING OFFICE, *supra* note 78, at 22 & tbl.2.1 (noting 1986 BLM report which indicates that nearly 60% of grazing allotments are in "fair" or "poor" condition).

<sup>91</sup> See BUREAU OF LAND MGMT., *supra* note 87, at 3 (reform proposal addresses three concerns and needs).

<sup>92</sup> *Id.* at 9.

<sup>93</sup> *Id.* at 17.

<sup>94</sup> *Id.* at 26.

<sup>95</sup> *Id.* at 1-2.

<sup>96</sup> See *id.* at 2 (acknowledging that much has changed since the enactment of the TGA).

<sup>97</sup> *Id.* at 9-16. The fourteen regulatory changes proposed by Babbitt and Baca were: (1) imposition of a surcharge on subleasing agreements, (2) development of a "procedure for resolving small unauthorized use incidents at the local level," (3) expansion of opportunities for public participation in rangeland management, (4) creation of conservation use permits and addition of a requirement to apply for temporary non-use annually, (5) elimination of suspended AUMs when permits are renewed, (6) consideration of the permittee's past performance during allocation of

## 2. *Establishing National Standards and Guidelines*

The establishment of national standards and guidelines, arguably the most ambitious reform proposed by Babbitt in Rangeland Reform '94, would ensure that grazing did not interfere with properly functioning ecosystems.<sup>98</sup> Although the proposal did not mention Babbitt's conception of "dominant public use,"<sup>99</sup> the discussion that immediately preceded the national standards and guidelines clearly reflected the influence of his vision for a "new land ethic."<sup>100</sup>

The national standards and guidelines proposed by Babbitt were ambitious, particularly in contrast to the BLM's customary management of federal rangeland. The BLM manages rangelands pursuant to the directives in the TGA, FLPMA, and PRIA. Although these statutes reduce the adverse effects of grazing on federal rangeland,<sup>101</sup> they contain only vague requirements to protect rangeland ecosystems.<sup>102</sup> As a result, the BLM has rarely considered the effect of grazing on rangeland ecosystems. In

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additional forage that becomes available, (7) creation of an exemption from the appeals process for certain administrative actions, (8) addition of a provision that would prohibit ranchers from holding a BLM grazing permit if a previously held permit had been cancelled, (9) addition of a provision that would allow the BLM to cancel the grazing permit of a permittee who had been convicted of violating environmental laws or regulations, (10) addition of a provision for the issuance of permits for a period less than ten years, (11) establishment of Resource Advisory Councils, (12) addition of a provision that would provide more flexibility in the use of Range Improvement Funds, (13) a requirement that title to all future range improvements vest in the federal government, and (14) a requirement that title to water rights on federal lands vest in the federal government.

<sup>98</sup> See *id.* at 17.

<sup>99</sup> See *supra* text accompanying note 67.

<sup>100</sup> See BUREAU OF LAND MGMT., *supra* note 87, at 17 ("In those cases where livestock grazing is detrimental to the health of the ecosystem, grazing must be modified or eliminated. The adjustments called for are in the best interest of ecological sustainability, biodiversity, and society as a whole, which ultimately is in the best interest of the livestock industry.").

<sup>101</sup> See Taylor Grazing Act, ch. 865, 48 Stat. 1269, 1269 (1934) (officially titled: "An Act [t]o stop injury to the public grazing lands . . ."); Public Rangeland Improvement Act of 1978, Pub. L. No. 95-514, 92 Stat. 1803, 1803 (officially titled: "An Act [t]o improve the range conditions of the public rangelands.").

<sup>102</sup> See 43 U.S.C. § 315a (2006) ("The Secretary of the Interior . . . shall . . . do any and all things necessary . . . to preserve the land and its resources from destruction or unnecessary injury . . ."); *id.* § 1908(a) (granting the Secretary the authority to develop an experimental program that would provide ranchers with incentives to improve the conditions of the range); *id.* § 1732(b) ("In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through . . . permits, . . . the use, occupancy, and development of the public lands . . .").

contrast, Babbitt's proposed standards and guidelines would require the BLM to consider a broad array of environmental impacts in its administration of the public rangeland.<sup>103</sup>

### 3. *Grazing Fees*

The proposal to increase the cost of grazing federal land was unquestionably the most controversial element of the reforms proposed in Rangeland Reform '94. Despite its controversial nature, there was widespread agreement that an increase in the grazing fee was necessary.<sup>104</sup> The fee formula proposed in Rangeland Reform '94 attempted to establish a fee structure that would result, over the course of three years, in a fee that more closely represented the fair market value of the forage on federal land. The proposed fee structure, had it been in effect in 1993, would have resulted in a grazing fee of \$4.28 per AUM,<sup>105</sup> rather than the \$1.86 per AUM actually charged by the BLM.<sup>106</sup>

## III

### THE EROSION OF RANGELAND REFORM '94

Despite the centrist approach of the proposal, ranching interests responded strongly and negatively to the proposed reforms.<sup>107</sup> The proposed grazing fee increase drew especially harsh criticism.<sup>108</sup> An aide to Colorado Senator Ben Nighthorse

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<sup>103</sup> The national standards and guidelines would require grazing to be managed in a manner that, for example, "ensure[s] the recovery of threatened or endangered species, . . . maintain[s] or restore[s] water quality . . . that meet[s] or exceed[s] State standards for the protection and propagation of fish, shellfish, and wildlife, . . . [and] . . . maintain[s] or restore[s] vegetation communities." BUREAU OF LAND MGMT., *supra* note 87, at 19.

<sup>104</sup> For example, in June 1991, the GAO published a report indicating that the BLM's grazing fee formula established by PRIA, and extended by a series of Executive Orders, resulted in a grazing fee that was not even sufficient to cover the cost of administering the federal grazing programs. U.S. GEN. ACCOUNTING OFFICE, PUBL'N NO. GAO/RCED-91-185BR, RANGELAND MANAGEMENT: CURRENT FORMULA KEEPS GRAZING FEES LOW 31 (1991), available at <http://archive.gao.gov/d20t9/144191.pdf>.

<sup>105</sup> BUREAU OF LAND MGMT., *supra* note 87, at 30.

<sup>106</sup> CONG. BUDGET OFFICE, CONGRESS OF THE UNITED STATES, MAINTAINING BUDGETARY DISCIPLINE: SPENDING AND REVENUE OPTIONS 74 (1999), available at <http://www.cbo.gov/ftpdocs/12xx/doc1222/wholereport.pdf>.

<sup>107</sup> Babbitt's efforts to reform rangeland management ignited a small "Fire Babbitt!" movement in the West. See, e.g., Valerie Richardson, *Babbitt's 'Green' Policies Provoke Anger in West*, WASH. TIMES, Nov. 14, 1993, at A1.

<sup>108</sup> Despite the ranchers' outrage, Babbitt's proposed fee increase was not a radical idea. Even the BLM director in the George H.W. Bush administration had advo-

Campbell stated that the proposed fee increase was absolutely unacceptable.<sup>109</sup> Similarly, the *Rocky Mountain News* published an editorial claiming that the fee increase was not about protecting the environment or ensuring that the public receives a fair return for its resources, but rather it was about pitting the “government class and its monied allies against working people and small communities.”<sup>110</sup> Randall Brewer, then-president of the Public Lands Council, predicted that the proposed fee increase would “be the end of grazing on federal land.”<sup>111</sup>

Brewer also criticized Babbitt’s proposal to create national standards and guidelines. In Brewer’s view, Babbitt’s standards and guidelines “hold great potential for mischief as either a safe harbor for poor performance by federal land managers or as a club in the hands of an overly zealous land manager.”<sup>112</sup>

#### A. *Congressional Battles over Rangeland Reform ‘94*

On October 7, 1993, Babbitt and congressional Democrats reached a compromise that promised to legislatively enact most of the reforms in Rangeland Reform ‘94.<sup>113</sup> The proposal, added as an amendment to the 1994 appropriations bill, would reduce Babbitt’s proposed grazing-fee by about seventy-five cents per AUM and implement approximately two-thirds of the regulatory reforms proposed in Rangeland Reform ‘94.<sup>114</sup> The House easily

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cated for a fee increase. See Associated Press, *Bureau Chief Seeks Change in Grazing Fees*, OMAHA WORLD-HERALD, Oct. 30, 1992, at 22.

<sup>109</sup> *Babbitt Seeks Tough New Range Standards, Higher Fees*, PUB. LANDS NEWS, Aug. 19, 1993, at 1, 2. Senator Campbell was so concerned with Babbitt’s fee increase, he introduced legislation in the Senate that would result in a much smaller increase and cap future increases two weeks before Babbitt released his proposal. See *DOI Range Policy May Change More Than Fees; House Prepares*, PUB. LANDS NEWS, Aug. 5, 1993, at 2, 3 (Campbell’s proposal would have resulted in a grazing fee of \$2.36 per AUM in 1994); see generally Federal Forage Fee Act of 1993, S. 1326, 103rd Cong (1993).

<sup>110</sup> Philip Burgess, Editorial, *Babbitt’s Beef Is With a Way of Life*, ROCKY MOUNTAIN NEWS (Denver), Aug. 17, 1993, at 35A.

<sup>111</sup> *House Dems Back Off Range Bill; Ranchers Hit DOI Plan*, PUB. LANDS NEWS, Sept. 16, 1993, at 3, 4.

<sup>112</sup> *Id.*

<sup>113</sup> *Babbitt, Hill Dems Agree on Grazing Fees, Range Policy*, PUB. LANDS NEWS, Oct. 14, 1993, at 1, 1.

<sup>114</sup> *Id.* Under the agreement between Babbitt and congressional Democrats, Babbitt would be left to develop national standards and guidelines without congressional guidance or interference. *Id.* at 1-2.

passed the appropriations bill with Babbitt's reforms attached.<sup>115</sup> However, the bill encountered substantial difficulty in the Senate. Western senators successfully filibustered and prevented the Senate from considering the range reforms attached to the appropriations bill.<sup>116</sup> On November 9, 1993, the western senators ultimately triumphed and successfully removed the range reform provisions from the bill.<sup>117</sup> Although Babbitt believed that legislation was a more complete solution to the problems of rangeland management, he vowed that if and when legislative efforts failed, he would pursue regulatory changes.<sup>118</sup> With the death of the legislative attempts to reform rangeland management, Idaho Senator Larry Craig declared victory for the West,<sup>119</sup> and the task of reform fell back into Babbitt's hands.

### ***B. The Beginning of the End for Rangeland Reform***

The proposal detailed in Rangeland Reform '94 was the apogee of Babbitt's attempt to reform rangeland management. The defeat of Babbitt's legislative attempt to reform rangeland management marked the beginning of the end for grazing reform.

#### *1. Babbitt Attempts Compromise to Salvage Reform Effort*

During the heat of the battle to pass his reforms through the Senate, Babbitt promised that if the legislative effort failed, he would proceed with his administrative efforts to reform grazing, including his proposed fee hike.<sup>120</sup> His stance softened soon after his reform package was defeated in the Senate. Perhaps motivated by political pressure brought to bear on President Clinton,<sup>121</sup> he vowed to make considerable changes to his propo-

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<sup>115</sup> *Senate Refuses to Consider Range Policy Changes—Thus Far*, *supra* note 33, at 1.

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

<sup>117</sup> *Westerners Defeat Babbitt Range Policy—Or Do They?*, *supra* note 27, at 3.

<sup>118</sup> *Filibuster Still Has Range Policy Trapped; One More Try*, PUB. LANDS NEWS, Nov. 11, 1993, at 4, 4.

<sup>119</sup> *Westerners Defeat Babbitt Range Policy—Or Do They?*, *supra* note 27, at 3; Associated Press, *Ecological Goals Still Elusive Acknowledging Failures, Babbitt Calls Struggling Talks 'Work in Progress,'* ROCKY MOUNTAIN NEWS (Denver), Dec. 26, 1993, at 88A (According to Senator Craig, "[t]hey had to be stopped cold in their tracks.").

<sup>120</sup> *Filibuster Still Has Range Policy Trapped; One More Try*, *supra* note 118, at 4.

<sup>121</sup> Valerie Richardson, *Clinton Warned to Soften up on Riled West*, WASH. TIMES, Nov. 28, 1993, at A1.

sal before publishing proposed regulations,<sup>122</sup> and he backed off of his threat to enact the grazing fee administratively.<sup>123</sup>

As further evidence of his desire to reach a compromise, Babbitt announced he would spend the winter traveling to Colorado to discuss the proposed reforms with ranchers and environmentalists.<sup>124</sup> Throughout the winter, Babbitt publicly emphasized the importance of compromise<sup>125</sup> and of giving all interested parties a voice in the decision.<sup>126</sup>

## 2. *Baca Put Out to Pasture*

Babbitt provided further evidence of the erosion of his reform efforts when, on February 3, 1994, he forced Jim Baca to resign.<sup>127</sup> Publicly, Babbitt asserted that Baca's resignation should not be construed as a reflection of the administration's grazing policy.<sup>128</sup> Instead he insisted that Baca's resignation was a result of conflicting management styles.<sup>129</sup> Babbitt's protestations to the contrary notwithstanding, the reaction of the stakeholders in the ranching debate to Baca's resignation and public statements by Baca after his resignation suggest that something more than management styles was involved.

From the outset Baca was not welcomed by the ranching community. Ranchers saw Baca as an environmental advocate and a threat to their way of life.<sup>130</sup> Therefore, ranchers saw his resignation as a victory. Wyoming Senator Malcolm Wallop, a staunch supporter of public-lands ranching, saw Baca's resignation as a direct consequence of the Senate's defeat of Babbitt's rangeland

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<sup>122</sup> Associated Press, *supra* note 119; Ellen Miller, *Ranchers Spring a Surprise*, DENVER POST, Dec. 10, 1993, at B1. While Babbitt promised substantial changes, he also promised that the proposed regulations would remain true to the vision of Rangeland Reform '94. *Babbitt Said Interested in Gunnison Range Plan, to a Degree*, PUB. LANDS NEWS, Dec. 9, 1993, at 2, 2-3.

<sup>123</sup> Richardson, *supra* note 121.

<sup>124</sup> Mark Obmascik, *Babbitt Discovers New Middle Ground on Ranching Policy*, DENVER POST, Dec. 4, 1993, at B1; *Westerners Defeat Babbitt Range Policy—Or Do They?*, *supra* note 117, at 3.

<sup>125</sup> *Compromises Spurring Rangeland Reforms*, COLO. SPRINGS GAZETTE-TELEGRAPH, Dec. 28, 1993, at B5.

<sup>126</sup> *Babbitt Says Modified Plan Allows for Some Local Flexibility*, OREGONIAN (Portland), Dec. 17, 1993, at C9.

<sup>127</sup> Tom Kenworthy, *Interior Dept. Official Resigns Under Pressure*, WASH. POST, Feb. 4, 1994, at A17.

<sup>128</sup> *Id.*

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

<sup>130</sup> See *supra* notes 82-85 and accompanying text.

proposal.<sup>131</sup> Similarly, upon learning of Baca's resignation, a representative of a New Mexican grazing organization declared, "One down and 100 to go."<sup>132</sup>

The reaction of the environmental community gave further support to the proposition that Baca's resignation reflected the administration's softening of its position on grazing. The president of The Wilderness Society saw Baca's resignation as "a serious blow to the Clinton administration's credibility on public lands reform."<sup>133</sup> Similarly, the vice president of the National Wildlife Federation expressed concern about the administration's commitment to grazing reform.<sup>134</sup> The president of the National Wildlife Federation put Baca's resignation in starker terms and declared it a "major retreat" by the administration.<sup>135</sup>

Following his resignation, Baca made several statements that belied Babbitt's claim that his resignation was due to conflicting management styles. Baca believed that political pressure from western politicians was behind his removal.<sup>136</sup> For example, Cecil Andrus, the governor of Idaho and Secretary of the Interior in the Carter administration, had made his displeasure with Baca well-known to the Clinton administration.<sup>137</sup> The political pressure exerted by western politicians was due, in part, to Baca's unwillingness to compromise or grant exception for special interests.<sup>138</sup>

Further, Babbitt's own behavior suggests that Babbitt simply wanted Baca removed from the politically fractious grazing debate. Before he asked for Baca's resignation, Babbitt offered him a position as Deputy Assistant Secretary in the Interior Department.<sup>139</sup> If Babbitt had genuine concerns about conflicting management styles, offering Baca another prominent position in the Department was a puzzling attempt at resolution.

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<sup>131</sup> Kenworthy, *supra* note 127.

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

<sup>133</sup> *Id.*

<sup>134</sup> Mary Beth Regan, *Rough Ride for an Ex-Cowboy*, Bus. Wk., Feb. 28, 1994, at 70, 72.

<sup>135</sup> Kenworthy, *supra* note 127.

<sup>136</sup> *Id.* ("Frankly, this came about because those western elected officials are worried about fund-raising from those traditional extractive industries," Baca claimed.)

<sup>137</sup> Regan, *supra* note 134, at 72.

<sup>138</sup> *Id.*

<sup>139</sup> Kenworthy, *supra* note 127.

### C. Proposed Regulations

Before the proposed grazing regulations were released, Babbitt continued his efforts to build credibility with the ranching community. Speaking before the Society of Range Management,<sup>140</sup> Babbitt emphasized his personal connections to ranching and stated that his reform efforts were an attempt to find common ground among westerners.<sup>141</sup>

Despite the predictions that the Clinton administration would cave on grazing regulations, the proposed regulations, issued on March 25, 1994,<sup>142</sup> remained faithful to the vision of Rangeland Reform '94.<sup>143</sup> But the proposed regulations clearly bore the scars of Babbitt's battles throughout the previous fall. Two of the most controversial provisions of the original proposal, increasing the grazing fee and developing national standards and guidelines, were significantly diluted. But two other controversial reforms, vesting title to range improvements in the federal government and requiring water rights to be federally owned, remained intact.

#### 1. Softening the Grazing Fee

The most notable retreat from the reforms proposed in Rangeland Reform '94 was the modification of the proposed grazing fee increase. Since the first fee for grazing on BLM land was imposed in 1934,<sup>144</sup> the amount of the fee has been a substantial source of controversy.<sup>145</sup> However, Babbitt was not alone in his belief that the grazing fee needed to be increased. The George H.W. Bush administration had been considering changes to the grazing fee before Clinton was elected.<sup>146</sup>

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<sup>140</sup> The Society for Range Management is an organization "concerned with studying, conserving, managing and sustaining the varied resources of the rangeland." Society for Range Management, About SRM, [http://www.rangelands.org/about\\_srm.shtml](http://www.rangelands.org/about_srm.shtml) (last visited Oct. 12, 2006).

<sup>141</sup> Babbitt, *supra* note 60, at 399-400.

<sup>142</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 59 Fed. Reg. 14,314, 14,314 (proposed Mar. 25, 1994) (to be codified at 43 C.F.R. pts. 4, 1780, 4100).

<sup>143</sup> See Feller, *supra* note 31, at 710-12.

<sup>144</sup> See Taylor Grazing Act, ch. 865, § 3, 48 Stat. 1269, 1270 (1934).

<sup>145</sup> See S. REP. NO. 95-1237, at 6 (1978), as reprinted in 1978 U.S.C.C.A.N. 4069, 4070 (noting the ongoing debate over grazing fees); Administration of Livestock Grazing—Exclusive of Alaska, 59 Fed. Reg. at 14,335 (noting controversy over grazing fee formula created by PRIA).

<sup>146</sup> See Associated Press, *supra* note 108.



Despite the apparent fairness of Babbitt's initial fee increase,<sup>147</sup> he made two concessions on the grazing fee. His first concession was minor. To ease the concerns of the ranching community, he delayed implementation of the fee increase until the 1995 grazing season and established 1996 as the base year for determining future increases.<sup>148</sup> His second concession was more significant. The proposed rule modified the fee structure by allowing ranchers who participate in rangeland improvement programs to receive a 30% discount on their grazing fees.<sup>149</sup> Although the criteria for receiving the incentive-based reduction was left for future rulemaking, Babbitt anticipated that the criteria would require the permittee to undertake actions to improve the "ecological health of the public rangelands" beyond those required by law.<sup>150</sup> Notably, President George H.W. Bush's BLM Director, Cy Jamison, was working on incentive-based grazing fees when Clinton was elected.<sup>151</sup> Although the discounts would have been deeper under Jamison's proposal and the criteria to qualify for the discounts much lower,<sup>152</sup> the similarities between the two plans are significant considering the conservative political stance of the George H.W. Bush administration.

## 2. *The Death of National Standards and Guidelines*

A key piece of Babbitt's initial reform proposal was the development of national standards and guidelines to govern the management of grazing activities. The national standards and guidelines would define the minimum acceptable conditions for public rangeland.<sup>153</sup>

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<sup>147</sup> The then-existing fee formula, created by Congress in 1978, resulted in a fee that was substantially below market value and was relatively stagnant over time. The fee formula proposed in August as part of Rangeland Reform '94 was an attempt to bring the federal grazing fee closer to the fee charged for forage on private lands. See Notice of Proposed Rulemaking for the Regulation of Livestock Grazing on Federal Rangelands—Exclusive of Alaska, 58 Fed. Reg. 43,208, 43,209-10 (Aug. 13, 1993).

<sup>148</sup> Administration of Livestock Grazing—Exclusive of Alaska, 59 Fed. Reg. at 14,336.

<sup>149</sup> *Id.* at 14,316-17.

<sup>150</sup> *Id.* at 14,317.

<sup>151</sup> Associated Press, *supra* note 108.

<sup>152</sup> Jamison's proposal would have allowed ranchers to receive a discount of up to 75%. *Id.* Jamison's lowest discount, 25%, would have been available to ranchers who met the objectives in their allotment management plans. *Id.*

<sup>153</sup> BUREAU OF LAND MGMT., *supra* note 87, at 17.

Despite the relative lack of controversy over the national standards and guidelines,<sup>154</sup> the proposed rule largely eliminated them.<sup>155</sup> In their place, each state BLM office was required to develop standards and guidelines consistent with national requirements.<sup>156</sup> The rationale for the new approach was that national standards and guidelines could not be developed to apply across the West.<sup>157</sup> However, the national standards and guidelines proposed in Rangeland Reform '94 were quite broad.<sup>158</sup> Although local conditions may require more specific and/or stringent requirements, the proposed standards and guidelines were sufficiently general to permit national application.

Babbitt's decision to scuttle the national standards and guidelines and implement statewide standards and guidelines was sharply criticized by environmentalists.<sup>159</sup> Remarkably, ranching interests were also not particularly pleased with the proposal, al-

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<sup>154</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 59 Fed. Reg. at 14,315 (noting that the proposed grazing fee increase and the changes to water rights generated the most comments).

<sup>155</sup> A fragment of Babbitt's original standards and guidelines appeared as a restriction on the terms and conditions contained in grazing permits. See *id.* at 14,353 (proposed 43 C.F.R. § 4180.1(a)).

<sup>156</sup> *Id.* at 14,325.

<sup>157</sup> See *id.*

<sup>158</sup> The proposed standards sought to ensure recovery of threatened and endangered species, would have included terms and conditions in permits requiring maintenance and restoration of water quality, and mandated "period(s) of rest during times of critical plant growth or regrowth." BUREAU OF LAND MGMT., *supra* note 87, at 19.

<sup>159</sup> See Timothy Noah, *Babbitt Unveils a New Version of Grazing Plan*, WALL ST. J., Mar. 18, 1994, at A5 (One staff scientist at the U.S. Public Interest Research Group complained, "[t]he only teeth in the plan are those on the cows."). Environmentalists were also concerned about the change in political dynamics that would result from transferring responsibility for developing standards and guidelines from Washington, D.C. to the state BLM offices. See Christopher Smith & Mike Gorrell, *Babbitt Feels Barbed Wire Straddling Grazing-Fee Fence*, SALT LAKE TRIB., June 9, 1994, at B3. The factors giving rise to the disproportionate influence of ranchers under public choice theory become more pronounced when the debate moves to the state or local level. Promulgation of state standards and guidelines has the potential to impose substantial costs on ranchers grazing in the affected state. Therefore, each rancher has a strong incentive to ensure that the standards and guidelines promulgated by his state BLM office are as favorable to him as possible. In contrast, the broad interests of the beneficiaries of rangeland reform become more diffused. The beneficiaries are interested in improvements in rangeland health, but improvements in Wyoming are equally as valuable as improvements in New Mexico. Therefore, the intensity of the beneficiaries' interests will be spread equally across eleven (or more, depending on the prevalence of regional standards) separate proceedings. The end result is that the balance of power is likely to shift to more strongly favor ranching interests. See generally *supra* notes 45-48 and accompanying text.

though a representative of the American Sheep Industry Association saw the demise of national standards and guidelines as a step in the right direction.<sup>160</sup>

### 3. *Elimination of Suspended Non-Use and Shortened Permit Tenure*

The proposed rule abandoned two other proposals contained in Rangeland Reform '94: eliminating suspended AUMs when renewing permits and authorizing shortened permit tenure.<sup>161</sup> In both cases, Babbitt dropped the proposals in response to comments received in response to the Advance Notice of Proposed Rulemaking.<sup>162</sup> Although these two provisions played a less significant role in the overall vision of Rangeland Reform '94, their death reflected the steady erosion of Babbitt's reform efforts.

#### ***D. Final Grazing Regulations Promulgated***

The Babbitt BLM promulgated final grazing-administration rules on February 22, 1995.<sup>163</sup> With three notable exceptions, the final rule was largely the same as the proposed rule. First, the proposed grazing-fee increase was eliminated from the final version.<sup>164</sup> Babbitt's retreat on the grazing fee was a substantial victory for the ranching community. The proposed increase in the grazing fee had met substantial resistance from ranchers and their senators.<sup>165</sup> With the death of Babbitt's administrative-fee proposal, proponents of a grazing-fee increase were left to pursue an increase legislatively.<sup>166</sup> However, after the congressional elections in November 1994, reform proponents were faced with a Republican Congress led by Newt Gingrich and his "Contract

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<sup>160</sup> Noah, *supra* note 159.

<sup>161</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 59 Fed. Reg. at 14,322-23; *see also* Notice of Proposed Rulemaking for the Regulation of Livestock Grazing on Federal Rangelands—Exclusive of Alaska, 58 Fed. Reg. 43,208, 43,212-13 (Aug. 13, 1993); BUREAU OF LAND MGMT., *supra* note 87, at 11 (describing the original proposal regarding suspended AUMs);

<sup>162</sup> Administration of Livestock Grazing—Exclusive of Alaska, 59 Fed. Reg. at 14,322-23.

<sup>163</sup> Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894, 9894 (Feb. 22, 1995) (to be codified at 43 C.F.R. pts. 1780, 4100).

<sup>164</sup> *Id.* at 9899.

<sup>165</sup> See *supra* notes 109-12 and accompanying text.

<sup>166</sup> Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. at 9899 (stating that the BLM had abandoned the proposed grazing fee "in order to give the Congress the opportunity to . . . enact legislation addressing appropriate fees for grazing on public lands").

for America.” Ranchers scarcely could have hoped for a more potent ally in their battle to keep the federal grazing fee low.<sup>167</sup>

The second significant concession was that, at the request of Senators Domenici and Craig,<sup>168</sup> the BLM delayed the date the new regulations would take effect by six months.<sup>169</sup> The delay guaranteed that the regulations would not apply to the 1995 grazing season. As a result, the ranchers had more than a year to pursue federal legislation that would overturn Babbitt’s regulations.

The third departure from the proposed rule was the continued erosion of Babbitt’s proposal for national standards and guidelines. The Fundamentals of Rangeland Health (FRH) made their appearance in the final rule.<sup>170</sup> The proposed rule contained a provision that required the terms and conditions of all grazing permits to guarantee ecological health.<sup>171</sup> The final rule softened the requirement: instead of demanding permit conditions to guarantee each permittee’s compliance with the FRH, the final rule required only that the “authorized officer shall take appropriate action” when ecological conditions are not being met.<sup>172</sup>

Although the final rule was substantially less ambitious than Babbitt’s initial proposal, the rule did make significant changes to the management of public rangeland. Although solutions to the most pernicious problems (e.g., grazing ecologically fragile landscapes, selling federal forage for a fraction of its market value) were absent from the final rule, the 1995 regulations were the first significant reform of federal grazing activities since the

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<sup>167</sup> Nevada Senator Harry Reid expressed confidence that the new Republican Congress would not address the federal grazing fee anytime soon. Tony Batt, *Nevada’s Fate Unlikely to Change*, LAS VEGAS REV.-J., Nov. 11, 1994, at 1A. Inaction on the grazing fee is a victory for the ranchers. Inaction means that ranchers can continue grazing under artificially low fees. A representative of the National Cattlemen’s Association went one step further and predicted that the new Republican Congress would make changes to Babbitt’s regulations. *Id.*

<sup>168</sup> *Babbitt Tosses Grazing Fee Hot Potato to Hill; Keeps Rest*, PUB. LANDS NEWS, Jan. 5, 1995, at 2, 2.

<sup>169</sup> *Id.*; see also Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. at 9894.

<sup>170</sup> Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. at 9898.

<sup>171</sup> Administration of Livestock Grazing—Exclusive of Alaska, 59 Fed. Reg. 14,314, 14,353 (proposed Mar. 25, 1994) (to be codified at 43 C.F.R. pts. 4, 1780, 4100) (proposed 43 C.F.R. § 4180.1).

<sup>172</sup> See 43 C.F.R. 4180.1 (1995).

passage of FLPMA in 1976. The new regulation marked an important first step in the effort to reduce the detrimental ecological consequences of public land ranching.

#### IV

#### CHALLENGES TO RANGELAND REFORM '94

##### A. *Legislative Efforts to Eliminate Rangeland Reform*

Despite Babbitt's efforts to forge a compromise reform package from his initial common-sense reform proposal, ranchers and their congressional representatives sought to reverse the modest progress Babbitt's regulations represented. Shortly after the publication of the BLM's final grazing regulations, conservative western Republicans launched a legislative effort to supersede Babbitt's reforms. On May 25, 1995, Representative Wes Cooley of Oregon introduced the Livestock Grazing Act, which would have overturned Babbitt's reforms regarding water rights and title to range improvements.<sup>173</sup> Remarkably, the bill also included a modest grazing fee increase.<sup>174</sup> When the bill was introduced in the House, Cooley strongly criticized Babbitt's reform effort, characterizing it as "a direct threat to [w]estern livestock producers and rural communities through the West . . . a prime component of the Clinton Administration's War on the West."<sup>175</sup> Despite more than a year of maneuvering, the legislative effort to undermine Babbitt's reform effort eventually died.

##### B. *Public Lands Council v. Babbitt*

When the final regulations were published on February 22, 1995, the BLM announced that the rules would not take effect until August 21, 1995.<sup>176</sup> As the effective date of Babbitt's regulations approached with no prospect of legislative resolution in the near term, the Public Lands Council and several grazing organizations filed suit in the District of Wyoming on July 27,

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<sup>173</sup> Livestock Grazing Act, H.R. 1713, 104th Cong. §§ 122-123 (1995).

<sup>174</sup> If the Livestock Grazing Act had been in effect in 1992, it would have resulted in a grazing fee of \$2.10 per AUM instead of \$1.87 per AUM. *GOP Range Bill Would Ease NEPA, Transfer Grasslands from FS*, PUB. LANDS NEWS, June 8, 1995, at 1, 2.

<sup>175</sup> *Id.*

<sup>176</sup> See *supra* notes 161-62 and accompanying text.

1995.<sup>177</sup> The plaintiffs alleged that ten of Babbitt’s regulations were unlawful and sought to prevent them from taking effect.<sup>178</sup>

1. *Procedural Chronology of the Public Lands Council’s Challenge*

Before the Wyoming District Court, the Public Lands Council challenged ten provisions of Babbitt’s regulations: (1) the modification of the grazing preference,<sup>179</sup> (2) the addition of a regulation that would consider the past performance of a permit applicant’s affiliate,<sup>180</sup> (3) vesting title to range improvements in the federal government,<sup>181</sup> (4) conservation use permits,<sup>182</sup> (5) limits on temporary non-use,<sup>183</sup> (6) elimination of the requirement that permittees be engaged “in the livestock business,”<sup>184</sup> (7) denial of exclusive use of water-related range improvements,<sup>185</sup> (8) addition of conditions under which grazing permits will be suspended or cancelled,<sup>186</sup> (9) addition of surcharges for pasturing agreements,<sup>187</sup> and (10) the Fundamentals of Rangeland Health.<sup>188</sup> In the District Court of Wyoming,<sup>189</sup> Judge Brim-

<sup>177</sup> See *Ranchers Sue Government over Rules for Grazing*, *supra* note 35.

<sup>178</sup> See *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1289 (10th Cir. 1999) [hereinafter *Pub. Lands Council II*].

<sup>179</sup> Babbitt’s final regulations altered the regulatory definition of “grazing preference.” Compare 43 C.F.R. § 4100.0-5 (1995) with 43 C.F.R. § 4100.0-5 (1994).

<sup>180</sup> 43 C.F.R. § 4110.1(b)(1) (1995). For a definition of “affiliate,” see 43 C.F.R. § 4100.0-5 (1995).

<sup>181</sup> 43 C.F.R. § 4120.3-2(b) (1995).

<sup>182</sup> The 1995 regulations altered the definition of “active use” to include “conservation use.” Compare 43 C.F.R. § 4100.0-5 (1996) with 43 C.F.R. § 4100.0-5 (1994). This change had the effect of allowing a permittee to receive a permit to conserve forage. See *Pub. Lands Council I*, 929 F. Supp. 1436, 1443 (D. Wyo. 1996).

<sup>183</sup> 43 C.F.R. § 4130.2(g) (1995).

<sup>184</sup> Compare 43 C.F.R. § 4110.1 (1995) with 43 C.F.R. § 4110.1 (1994).

<sup>185</sup> 43 C.F.R. § 4120.3-2(d) (1995).

<sup>186</sup> 43 C.F.R. § 4140.1(c) (1995).

<sup>187</sup> 43 C.F.R. § 4130.8-1(d) (1995).

<sup>188</sup> 43 C.F.R. § 4180.1 (1995).

<sup>189</sup> The Public Lands Council’s decision to file its case in the District of Wyoming is significant. Wyoming is perhaps the most ranching-friendly state in the nation. Wyoming has the fifth-highest number of federal grazing permittees. BUREAU OF LAND MGMT., *supra* note 1, at 3-65 tbl.3-17. Because Wyoming has a large number of federal grazing permittees and a relatively small population, it has the highest number of federal ranch permit holders per capita in the nation. See U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, CENSUS 2000: RANKING TABLES FOR STATES: 1990 & 2000 (2001), available at <http://www.census.gov/population/cen2000/phc-t2/tab01.pdf>. Wyoming Senator Malcolm Wallop was one of the most outspoken opponents to Babbitt’s legislative reform package in 1993. See, e.g., *Senate Refuses to Consider Range Policy Changes—Thus Far*, *supra* note 33. Ranching is also an im-

mer held that Babbitt had lawfully exercised his statutory authority when he promulgated six of the challenged regulations, but that he had acted beyond his statutory authority<sup>190</sup> when he promulgated the remaining four regulations.<sup>191</sup>

Following the partial defeat, Babbitt appealed to the Tenth Circuit.<sup>192</sup> Remarkably, the Public Lands Council did not appeal the six regulations the District Court upheld.<sup>193</sup> At the time, the Council indicated that it believed its best course of action was to pursue a legislative solution.<sup>194</sup> As a result, the only issue before

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portant part of Wyoming's cultural heritage. *See, e.g.*, State of Wyoming, General Wyoming Information, <http://wyoming.gov/general/general.asp> (last visited Oct. 14, 2006) (explaining that the state seal pays tribute to the state's four main industries: oil, mines, livestock and grain); *id.* (The State's license plates feature a cowboy riding a bucking horse.); Univ. of Wyoming, Factbook: Athletics and Sports, <http://uwadmnweb.uwyo.edu/uw/facts/athletics.asp> (last visited Nov. 22, 2006) (University of Wyoming athletes are known as the cowboys and cowgirls.); State of Wyoming, Welcome to Wyoming, <http://wyoming.gov/> (last visited Nov. 22, 2006) (The state's home page contains an image of a cowboy riding a bronco.). In addition to selecting a grazing-friendly jurisdiction, the Council was fortunate enough to have Judge Brimmer assigned to its case. Judge Brimmer has become a controversial figure in debates over the use of federal land. He has invalidated regulations promulgated by the Clinton administration that restrict the use of federal land. *See, e.g.*, Int'l Snowmobile Mfrs. Ass'n v. Norton, 304 F. Supp. 2d 1278, 1293 (D. Wyo. 2004) (enjoining the National Park Service from implementing a 2001 rule that would have reduced snowmobile traffic in Yellowstone National Park); Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003) (enjoining Forest Service regulation that would limit activity in roadless areas). Following his injunction of the Clinton Roadless Rule in Wyoming, two watchdog groups—Community Rights Council, Inc. and Citizens for Responsibility—filed an ethics complaint against Brimmer alleging that his ownership of stock in oil and gas companies presented a conflict of interest. Theo Stein, *Wyo. Judge Cleared in Ethics Gripe*, DENVER POST, Sept. 19, 2003, at A1.

<sup>190</sup> *See infra* notes 201-360 and accompanying text (detailing Judge Brimmer's decision to overturn four of the challenged regulations).

<sup>191</sup> The court upheld: (1) the affiliate regulations, 43 C.F.R. §§ 4110.1-1(b)(1) (1995); (2) limits on temporary non-use, 43 C.F.R. § 4130.2(g) (1995); (3) exclusive use of water diversions, 43 C.F.R. § 4120.3-2(d) (1995); (4) suspension and cancellation of grazing permits if the permittee is convicted of violating environmental laws, 43 C.F.R. § 4140.1(c) (1995); (5) surcharges on certain pasturage arrangements, 43 C.F.R. § 4130.8-1(d) (1995), and; (6) the Fundamentals of Rangeland Health, 43 C.F.R. § 4180.1 (1995). *See generally* Pub. Lands Council I, 929 F. Supp. 1436 (D. Wyo. 1996).

<sup>192</sup> Pub. Lands Council II, 167 F.3d 1287, 1289 (10th Cir. 1999), *aff'd* 529 U.S. 728 (2000).

<sup>193</sup> *Id.* at 1293.

<sup>194</sup> *Judge Voids Four Pillars of DOI Range Policy*, PUB. LANDS NEWS, June 27, 1996, at 2, 3. The Council's decision may have been motivated by the fact that a friendly judicial forum had been unable to find a way to overturn Babbitt's regulations. A Council representative said, "Judge Brimmer made clear that [Babbitt's] policy was outside the law. . . . The law is not clear and Congress should make it

the Tenth Circuit was whether the district court had erroneously overturned four of the BLM's 1995 grazing regulations. The Tenth Circuit voted 2-1 to reverse Judge Brimmer's decisions on three of the four regulations.<sup>195</sup> The lone dissenter, Judge Tacha, would have affirmed Judge Brimmer on three of the four regulations.<sup>196</sup>

On October 12, 1999, the Supreme Court granted certiorari to hear the Public Land Council's appeal of the Tenth Circuit's decision.<sup>197</sup> Although his conservation-use regulation was overturned by the Tenth Circuit, Babbitt chose not to appeal the decision to the Supreme Court.<sup>198</sup> The Supreme Court, in an opinion written by Justice Breyer, unanimously rejected the Public Land Council's appeal and affirmed the Tenth Circuit.<sup>199</sup>

## 2. *The Public Lands Council's Challenge to Babbitt's Regulations*

The Public Lands Council's legal challenge sought to overturn ten of the BLM's 1995 grazing regulations. Ultimately, its challenge was almost entirely rejected. Only the regulation providing for conservation-use permits was invalidated by the courts.<sup>200</sup> Below is a discussion of the judicial resolution of each of Public Lands Council's ten legal challenges to the BLM's 1995 grazing regulations.

### a. *Elimination of the Grazing Preference*

The Babbitt BLM's 1995 regulations revised the definition of grazing preference. The previous regulations defined "grazing preference" as a quantity of forage attached to a permittee's base property.<sup>201</sup> The BLM's new regulation redefined grazing preference to indicate that it represented only the priority for obtaining forage; the regulation no longer included any reference to a

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clear. In other areas the judge said [Babbitt's] actions were bad ideas, but there is nothing he could do about it. Our first and foremost concern is to move legislation."  
*Id.*

<sup>195</sup> *Pub. Lands Council II*, 167 F.3d at 1309.

<sup>196</sup> *Id.* at 1309-18 (Tacha, J., dissenting).

<sup>197</sup> *Pub. Lands Council v. Babbitt*, 528 U.S. 926 (1999).

<sup>198</sup> *Pub. Lands Council III*, 529 U.S. 728, 739 (2000).

<sup>199</sup> *Id.* at 750.

<sup>200</sup> See *infra* text accompanying note 274.

<sup>201</sup> 43 C.F.R. § 4100.0-5 (1994).



quantity of forage.<sup>202</sup> Decoupling forage-allocation priority from forage quantity destroys the illusion that ranchers are guaranteed any amount of forage.<sup>203</sup> Due to the appearance of guaranteed forage under the previous rule, ranchers strongly resisted the BLM's attempts to reduce the quantity of forage available to individual permittees.<sup>204</sup>

Judge Brimmer held that the BLM's modification of the grazing preference violated the TGA by failing to adequately safeguard grazing privileges.<sup>205</sup> Although permittees would have a right of renewal based on their grazing preference, Brimmer was concerned that the BLM's decision to eliminate the certainty of forage allocation would mean it would be more difficult for ranchers to obtain bank financing, and as a result, ranchers would be forced out of the livestock business.<sup>206</sup> Judge Brimmer therefore held that the BLM's redefinition of grazing preference was unlawful because it had "boldly and blithely wrested away from [w]estern ranchers the very certainty . . . that their livestock operations require."<sup>207</sup>

The Tenth Circuit rejected Brimmer's reasoning for overturning BLM's modification of the grazing preference definition.<sup>208</sup> The court found no statutory requirement in the TGA or FLPMA that would require permanent recognition of grazing preferences.<sup>209</sup> Moreover, both the TGA and FLPMA provided the Secretary with the authority to adjust grazing levels to protect the range.<sup>210</sup> Although Babbitt's modification was compelled by neither the TGA nor FLPMA, the Tenth Circuit

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<sup>202</sup> See 43 C.F.R. § 4100.0-5 (1995). A definition of "permitted use" was created to represent the quantity of forage available. *Id.*

<sup>203</sup> See 43 U.S.C. § 315b (2006) (grazing permits do not create any right to forage).

<sup>204</sup> See, e.g., *Pub. Lands Council III*, 529 U.S. at 740-41.

<sup>205</sup> *Pub. Lands Council I*, 929 F. Supp. 1436, 1440-41 (D. Wyo. 1996) (citing 43 U.S.C. § 315b). Following the enactment of the TGA, the Interior Department engaged in an extensive adjudication process to determine which applicants should be granted permits to graze in the newly created grazing districts. Judge Brimmer was concerned that by eliminating the adjudicated grazing rights, Babbitt had failed to adequately safeguard grazing rights. *Id.*

<sup>206</sup> *Id.* at 1441.

<sup>207</sup> *Id.*

<sup>208</sup> See *Pub. Lands Council II*, 167 F.3d 1287, 1302 (10th Cir. 1999).

<sup>209</sup> See *id.* at 1299-1301.

<sup>210</sup> The TGA only requires grazing privileges to be "adequately safeguarded as long as they are consistent with the purposes and provisions of the TGA, namely protecting the federal rangelands and ensuring their orderly use." *Id.* at 1299 (citing 43 U.S.C. § 315b). FLPMA gives the Secretary the authority to adjust stocking

acknowledged that it was required to defer to reasonable interpretations of federal statutes contained in administrative regulations.<sup>211</sup>

Before the Supreme Court, the Public Lands Council argued that the longstanding practice of defining grazing preference in terms of a quantity of forage had created an expectation that permittees had come to rely upon.<sup>212</sup> Because of the ranchers' reliance on the existing definition, the Public Lands Council argued that the TGA required the Secretary of the Interior to safeguard that reliance.<sup>213</sup> The Council also argued that without certainty in forage allocations, banks would be less likely to loan ranchers money. Therefore, the financial security of public-lands ranchers would be undermined.<sup>214</sup> The Supreme Court was not persuaded by the Council's arguments.

First, the Court concluded that the TGA's statutory provisions requiring grazing privileges to "be adequately safeguarded" created no absolute right to forage.<sup>215</sup> The TGA requires the Secretary of the Interior only to safeguard grazing privileges to the extent that they are "consistent with the purposes and provisions" of the statute.<sup>216</sup> Further, the TGA expressly warns that grazing permits "shall *not* create any right, title, interest or estate."<sup>217</sup>

Second, the Court found the Council's argument unpersuasive because, even under the pre-1995 regulations, the Interior Secretary retained broad authority to reduce or eliminate the forage available to a permittee.<sup>218</sup> For example, if a permittee failed to use the forage allocated in his permit, the Secretary could cancel the permit to the extent of non-use.<sup>219</sup> The Secretary also has

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levels at any time based on the condition of the range. *Id.* at 1300 (citing 43 U.S.C. § 1752).

<sup>211</sup> *See id.* at 1302 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984)).

<sup>212</sup> *Pub. Lands Council III*, 529 U.S. 728, 740-41 (2000).

<sup>213</sup> *Id.* at 741.

<sup>214</sup> *Id.*

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

<sup>216</sup> *Id.* (citing 43 U.S.C. § 315b (1994)).

<sup>217</sup> *Id.* (citing 43 U.S.C. § 315b).

<sup>218</sup> *Id.* at 742.

<sup>219</sup> 43 C.F.R. § 4170.1-2 (1994); *see Pub. Lands Council III*, 529 U.S. at 735.

express authority under the TGA and FLPMA to “withdraw rangeland from grazing use.”<sup>220</sup>

Finally, the Court reasoned that the regulatory change would not necessarily lead to less security for grazing privileges.<sup>221</sup> The Court pointed to two statements by the BLM to support its conclusion. When the BLM published final regulations in the Federal Register, it wrote that the definitional change does “‘not cancel preference,’ and that any change is ‘merely a clarification of terminology.’”<sup>222</sup> The Court also relied on the BLM’s abandonment of its proposal to eliminate suspended AUMs as evidence that the BLM did not intend to make sweeping changes to historical forage allocation.<sup>223</sup>

Ultimately, the Tenth Circuit and the Supreme Court agreed that the definition of grazing preference under the 1995 regulations was a valid exercise of Babbitt’s statutory authority as Secretary of the Interior. Despite the legality of the 1995 definition, the Bush administration has promulgated regulations restoring the pre-1995 definition.<sup>224</sup>

#### *b. Affiliate Regulations*

The BLM’s 1995 regulations also added a requirement that applicants for new or renewed permits and their “affiliates” must demonstrate “a satisfactory record of performance.”<sup>225</sup> An “affiliate” is any “entity or person that controls, is controlled by, or is under common control” with the applicant.<sup>226</sup> Prior to Babbitt’s changes, the regulations did not require applicants to demonstrate a history of satisfactory performance and did not include a definition of “affiliate.”<sup>227</sup> However, Judge Brimmer ultimately upheld the affiliate regulations on the ground that the Secretary has broad authority under the TGA to “do ‘any and all things necessary’ to preserve the public lands and ‘to provide for

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<sup>220</sup> *Pub. Lands Council III*, 529 U.S. at 742-43 (citing 43 U.S.C. §§ 315f, 1712, 1752(c)).

<sup>221</sup> *Id.* at 743.

<sup>222</sup> *Id.* (citing Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894, 9922 (Feb. 22, 1995) (to be codified at 43 C.F.R. pts. 1780, 4100)).

<sup>223</sup> *Id.*; see *supra* notes 161-62 and accompanying text (discussing removal of proposals to eliminate suspended AUMs and limit permit tenure).

<sup>224</sup> See *infra* notes 375-79 and accompanying text.

<sup>225</sup> 43 C.F.R. § 4110.1(b) (1995).

<sup>226</sup> 43 C.F.R. § 4100.0-5 (1995).

<sup>227</sup> Compare 43 C.F.R. § 4110.1(b) (2005), and 43 C.F.R. § 4100.0-5 (2005), with 43 C.F.R. § 4110.1(b) (1994), and 43 C.F.R. § 4100.0-5 (1994).

the orderly use, improvement, and development of the range.’”<sup>228</sup> Based on this broad authority, Brimmer concluded that considering the past performance of an applicant’s affiliates was a rational exercise of the Secretary’s statutory authority.<sup>229</sup>

The Public Lands Council chose not to appeal Judge Brimmer’s decision upholding the 1995 definition of affiliate.<sup>230</sup> Further, the Bush administration elected not to modify the 1995 definition in its 2006 amendments to the grazing regulations.<sup>231</sup> Although the 1995 definition of affiliate is a subtle change to federal grazing regulations, it has survived a court challenge and the Bush administration’s rulemaking, and it forms part of the remaining legacy of Rangeland Reform ‘94.

*c. Title to Range Improvements*

One of the more controversial changes contained in the Babbitt regulations was the provision governing the ownership of range improvements.<sup>232</sup> Under the previous regulations, title to any structural or removable range improvement was shared between the permittee and the United States, based on the share of labor and capital supplied.<sup>233</sup> The new regulations required title to all future range improvements to vest exclusively in the United States.<sup>234</sup> The regulation vesting title to range improvements in the federal government exacerbated fears of financing ruin among ranchers, because it would mean that ranchers would lose any investment they made in range improvements. Under the old regulations,<sup>235</sup> a rancher would retain title to range im-

<sup>228</sup> Pub. Lands Council I, 929 F. Supp. 1436, 1441 (D. Wyo. 1996) (citing 43 U.S.C. § 315a).

<sup>229</sup> *Id.* at 1442.

<sup>230</sup> See Pub. Lands Council II, 167 F.3d 1287, 1293 (10th Cir. 1999).

<sup>231</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. 39,402, 39,503 (July 12, 2006) (to be codified at 43 C.F.R. pt. 4100) (maintaining the concept of affiliates in the final regulations).

<sup>232</sup> Babbitt’s regulations were controversial, in part, because ranchers were concerned that the new regulations would increase the financial burden borne by ranchers and perhaps drive many of them out of business. See, e.g., Associated Press, *Federal Judge Reverses Portions of 1995 Rangeland Reform Rules*, LAS VEGAS REV.-J., June 15, 1996, at 3B (Livestock groups argued that Babbitt’s regulations “would force up to 60 percent of those holding federal grazing permits off the land.”); Michael McCabe, *Ranchers Say Grazing Plan Will Ruin Them*, S.F. CHRON., Nov. 13, 1993, at A1 (“Ranchers insist that their profits are so marginal that any substantial change in . . . the way they are allowed to use the grazing land spells disaster.”).

<sup>233</sup> 43 C.F.R. § 4120.3-2 (1994).

<sup>234</sup> 43 C.F.R. § 4120.3-2(b) (1995).

<sup>235</sup> See 43 C.F.R. § 4120.3-2 (1994).

provements. Additionally, a rancher could recover his investment if he had to stop grazing because his permit was not renewed or the land was withdrawn from grazing.<sup>236</sup>

In addition to the ranchers' financial concerns, the 1995 regulation made it easier for the BLM to withdraw land from grazing. Under the TGA, the BLM cannot withdraw land from grazing unless it pays the affected permittees for the value of any improvements made on the allotment.<sup>237</sup> By vesting title to all future range improvements in the federal government, the 1995 regulation reduced the financial burden on the BLM associated with withdrawing land from grazing use.

Judge Brimmer held that vesting title to range improvements in the United States violated Congress's intent in the TGA and FLPMA.<sup>238</sup> The TGA prohibits permittees from using "improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements."<sup>239</sup> Similarly, FLPMA requires the federal government to compensate a permittee for "his interest in authorized permanent improvements placed or constructed by the permittee" when the permit is cancelled so that the underlying land may be put to another public purpose.<sup>240</sup> Judge Brimmer concluded that the BLM's 1995 regulations conflicted with these statutory provisions, because under the regulations permittees would never acquire an interest requiring compensation.<sup>241</sup> Therefore, Congress must have intended that the individual or entity that constructed the improvement would own it.<sup>242</sup>

On appeal to the Tenth Circuit, the Public Lands Council argued that "constructed and owned" meant that a permittee would have an interest in any range improvement he wholly or partially constructed.<sup>243</sup> However, Judge Seymour, writing for the majority, interpreted the "constructed and owned" language to mean that "if the Secretary allows a permittee *both* to construct *and* own an improvement" he would be entitled to com-

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<sup>236</sup> 43 U.S.C. § 1752(g) (2006); *see also id.* § 315c.

<sup>237</sup> 43 U.S.C. § 1752(g).

<sup>238</sup> Pub. Lands Council I, 929 F. Supp. 1436, 1443 (D. Wyo. 1996).

<sup>239</sup> 43 U.S.C. § 315c.

<sup>240</sup> 43 U.S.C. § 1752(g).

<sup>241</sup> *See Pub. Lands Council I*, 929 F. Supp. at 1443.

<sup>242</sup> *Id.*

<sup>243</sup> Pub. Lands Council II, 167 F.3d 1287, 1316 (10th Cir. 1999) (Tacha, J., dissenting).

pensation under the TGA; the statute does not “*require*[ ] the Secretary to allow a permittee to own an improvement he has constructed.”<sup>244</sup>

Further, the majority read section 402(g) of FLPMA to indicate that Congress did not believe that the TGA would automatically vest title to improvements in the permittee.<sup>245</sup> FLPMA provides compensation for the permittee’s “interest” in range improvements; therefore, the majority concluded that Congress must not have believed that permittees would own every range improvement they constructed.<sup>246</sup> Thus, the court held that the Babbitt BLM had based its regulation “on a permissible interpretation of the TGA.”<sup>247</sup> As a result, the court held that it was bound to defer to Babbitt’s interpretation unless he had “failed to provide a reasoned basis for modifying the previous regulations.”<sup>248</sup>

The BLM supplied three reasons for modifying the previous regulations. First, it would be easier for the BLM to manage its lands according to the multiple-use, sustained-yield requirement in FLPMA if permittees did not have an interest in permanent range improvements.<sup>249</sup> Second, modifying the regulations to require federal ownership of range improvements on BLM land would make federal land management more consistent because the Forest Service already required federal ownership of permanent range improvements.<sup>250</sup> Finally, the BLM argued that its modification would clarify management of range improvements by eliminating a confusing provision in the previous rule that made it difficult to determine whether title to certain range improvements was shared or was vested solely in the United States.<sup>251</sup> The majority held that due to the narrow standard of review that applied to the case, any of the BLM’s three arguments would, by itself, be a sufficient basis for upholding the new regulation.<sup>252</sup>

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<sup>244</sup> *Id.* at 1303-04 (majority opinion).

<sup>245</sup> *Id.* at 1304 (citing 43 U.S.C. § 1752(g) (1994)).

<sup>246</sup> *See id.* at 1304.

<sup>247</sup> *Id.* at 1305.

<sup>248</sup> *Id.* (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>249</sup> *Id.*; *see also* 43 U.S.C. § 1732(a) (2006).

<sup>250</sup> *Pub. Lands Council II*, 167 F.3d at 1305.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

The Council made the same argument to the Supreme Court that it had to the Tenth Circuit: because the TGA says “constructed and owned,” the BLM is required to allow permittees to own some of the range improvements they construct.<sup>253</sup> The Supreme Court responded that the permittee may still own removable range improvements,<sup>254</sup> and a subsequent permittee would be prohibited from using such improvements until their owner had been compensated.<sup>255</sup> After it addressed the Council’s chief argument, the Court simply concluded that there is nothing in the TGA that “denies the Secretary authority reasonably to decide when or whether to grant title to those who make improvements.”<sup>256</sup> Although the Tenth Circuit and the Supreme Court upheld the 1995 regulation vesting title to range improvements in the federal government, the Bush administration has elected to restore the pre-1995 regulations and allow ranchers to obtain title to range improvements.<sup>257</sup>

*d. Conservation-Use Permits*

The new grazing regulations authorized conservation-use permits—permits for purposes other than grazing.<sup>258</sup> A conservation-use permit would allow its holder to engage in activities other than grazing to improve the ecological health of the range covered by the permit.<sup>259</sup> Before 1995, a rancher with a federal grazing permit was required to either graze his allotment<sup>260</sup> or obtain permission from the BLM on a yearly basis to rest his

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<sup>253</sup> Pub. Lands Council III, 529 U.S. 728, 749 (2000).

<sup>254</sup> *Id.* at 750 (citing 43 C.F.R. § 4120.3-3(b) (1995)).

<sup>255</sup> *Id.* (citing 43 U.S.C. § 315f) (1994).

<sup>256</sup> *Id.*

<sup>257</sup> See *infra* notes 380-83 and accompanying text.

<sup>258</sup> See 43 C.F.R. § 4100.0-5 (2005) (grazing permits may authorize conservation use).

<sup>259</sup> *Id.* (Conservation use includes using an allotment for purposes of: “(1) [p]rotecting the land and its resources from destruction or unnecessary injury; (2) [i]mproving rangeland conditions; or (3) [e]nhancing resource values, uses, or functions.”). Prior to the 1995 revisions to the regulations, a permittee who failed to graze in the name of conservation would have risked cancellation of her permit. See 43 C.F.R. § 4170.1-2 (1994).

<sup>260</sup> See 43 C.F.R. § 4140.1(a)(2) (1994) (subjecting the failure to graze for two consecutive fee years to civil penalties under 43 C.F.R. § 4170.1); 43 C.F.R. § 4170.1-2 (1994) (authorizing cancellation of a grazing preference for violation of § 4140.1(a)(2)).

allotment.<sup>261</sup> The pre-1995 regulations required a rancher to show that temporary non-use was necessary due to drought, fire, other natural causes, or overgrazing.<sup>262</sup> A rancher who failed to graze without persuading the BLM that temporary non-use was necessary could lose his right to graze under his permit.<sup>263</sup>

The creation of conservation-use permits made it easier for ranchers to rest allotments. Under the 1995 regulations, a conservation-use permit would be approved for up to ten years if the BLM determined that “the proposed use [would] promote rangeland resource protection or enhancement of resource values or uses, including more rapid progress toward resource condition objectives.”<sup>264</sup> This is a much easier standard to satisfy than the standard for temporary non-use. In fact, because of the significant environmental degradation associated with grazing on federal land<sup>265</sup> it seems unlikely that any application for conservation use could ever have been denied under this rule. Further, the availability of conservation permits opened up the possibility that conservation groups could encourage periods of non-use by compensating ranchers who placed their allotments into conservation use.<sup>266</sup> The upshot is that conservation use would have provided federal permittees with a great deal more flexibility in determining how intensively to graze their allotments.

In the district court, the plaintiffs argued that the TGA precluded the BLM from issuing grazing permits for purposes other than livestock grazing.<sup>267</sup> Judge Brimmer agreed, citing one of the purposes of the TGA: to “provide certainty and predictability in the livestock industry.”<sup>268</sup> He held, therefore, that issuing permits excluding livestock grazing within grazing districts estab-

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<sup>261</sup> See Feller, *supra* note 16, at 574 (describing annual process of determining a permittee’s grazing use, including non-use); see also 43 C.F.R. § 4130.1-1 (1994) (application for changes in grazing use); 43 C.F.R. § 4100.0-5 (definition of suspension).

<sup>262</sup> See 43 C.F.R. § 4110.3-2(a) (1994).

<sup>263</sup> See 43 C.F.R. § 4140.1(a)(2) (1994); 43 C.F.R. § 4170.1-2.

<sup>264</sup> 43 C.F.R. § 4130.2(g)(1) (1995).

<sup>265</sup> See, e.g., *supra* notes 17-22 and accompanying text.

<sup>266</sup> As an example of conservation groups providing financial incentives to ranchers to help further conservation objectives, consider the Defenders of Wildlife Wolf Compensation Trust. In its efforts to reduce opposition to wolf reintroduction, the Defenders of Wildlife has established a trust to compensate ranchers whose livestock is killed by wolves. Defenders of Wildlife, About Us, <http://www.defenders.org/about/about2.html> (last visited Oct. 16, 2006).

<sup>267</sup> Pub. Lands Council I, 929 F. Supp. 1436, 1443 (D. Wyo. 1996).

<sup>268</sup> *Id.*



lished by the Secretary under the TGA would be contrary to Congress' intent, evinced in the Act itself, to make federal land available for grazing.<sup>269</sup>

The district court's decision regarding the lawfulness of conservation-use permits was the only part of Judge Brimmer's opinion that the Tenth Circuit upheld. Before the Tenth Circuit, the Babbitt BLM argued that because the TGA, FLPMA, and PRIA confer broad authority upon it to protect federal rangeland, issuing conservation-use permits was a valid exercise of its statutory authority.<sup>270</sup> In response, the court applied *Chevron* deference analysis and concluded that the statutes were not ambiguous.<sup>271</sup> Therefore, the BLM's regulatory interpretation was not entitled to deference, and the court was bound to give effect to the plain language of the statutes.<sup>272</sup>

The Tenth Circuit interpreted the plain language of the governing statutes to preclude the issuance of conservation-use permits. The TGA gives the Interior Secretary the authority to issue "permits to graze livestock."<sup>273</sup> Similarly, FLPMA and PRIA define grazing permits as "any document authorizing use of public lands . . . for the purpose of grazing domestic livestock."<sup>274</sup> Based on these statutory provisions, the court concluded that when the Interior Secretary issues permits under the TGA, "the primary purpose of the permit must be grazing."<sup>275</sup>

The BLM chose not to appeal the Tenth Circuit's decision invalidating conservation-use permits to the Supreme Court.<sup>276</sup>

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<sup>269</sup> *Id.* at 1444. See, for example, 43 U.S.C. § 315 (2006), which provides:

[i]n order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized . . . to establish grazing districts . . . of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska) . . . which in his opinion are chiefly valuable for grazing and raising forage crops . . .

See also 43 U.S.C. § 315b (The Secretary has authority "to issue or cause to be issued permits to graze livestock.")

<sup>270</sup> Pub. Lands Council II, 167 F.3d 1287, 1307 (10th Cir. 1999).

<sup>271</sup> *Id.* Earlier, the court had emphasized that the *Chevron* doctrine required it to uphold reasonable interpretations of ambiguous laws. *Id.* at 1293-94 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

<sup>272</sup> See *id.* at 1307.

<sup>273</sup> *Id.* at 1307 (citing 43 U.S.C. § 315b (1994)).

<sup>274</sup> *Id.* at 1307-08 (citing 43 U.S.C. §§ 1702(p), 1902(c)).

<sup>275</sup> *Id.* at 1308.

<sup>276</sup> See Pub. Lands Council III, 529 U.S. 728, 739 (2000); see also Brief for the Respondents in Opposition to Petition for a Writ of Certiorari at 9 n.6, Pub. Lands Council v. Babbitt, 529 U.S. 728 (2000) (No. 98-1991), 1999 WL 33611468 (conced-

Although it is not clear why the BLM chose not to appeal the ruling, its decision meant that the Tenth Circuit would be the last word on the legality of issuing conservation permits. The invalidation of conservation-use permits dealt yet another blow to the vision Babbitt had presented in his Rangeland Reform '94 proposal.<sup>277</sup>

*e. Limits on Temporary Non-use*

The 1995 grazing regulations authorized the BLM to approve temporary non-use of a grazing permit for up to three consecutive years.<sup>278</sup> Babbitt added the cap on the number of consecutive years of non-use in response to a 1986 recommendation from a review of grazing management by the Office of the Inspector General.<sup>279</sup> The Inspector General's examination of grazing management practices revealed widespread abuse of the non-use classification. Many permittees were placing their forage in non-use for long periods of time without a valid reason for doing so.<sup>280</sup> The Inspector General's report estimated that abuse of temporary non-use cost the BLM a million dollars in 1984 alone.<sup>281</sup> To help curb abuses and reduce lost revenue, the Babbitt BLM included an absolute three-year limit on temporary non-use in its 1995 regulations.<sup>282</sup>

The Public Lands Council argued to Judge Brimmer that the BLM had no rational basis for imposing a three-year limit on non-use.<sup>283</sup> Additionally, the Council argued that after the expiration of a three-year period of non-use the new regulation would compel permittees to graze or risk permit cancellation even if continued non-use would improve the condition of the land.<sup>284</sup> By forcing permittees to graze at the end of an allegedly

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ing that Babbitt was not seeking review of the Tenth Circuit's invalidation of conservation use permits).

<sup>277</sup> BUREAU OF LAND MGMT., *supra* note 87, at 11.

<sup>278</sup> 43 C.F.R. § 4130.2(g)(2) (1995).

<sup>279</sup> Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894, 9903 (Feb. 22, 1995) (to be codified at 43 C.F.R. pts. 1780, 4100).

<sup>280</sup> Pub. Lands Council I, 929 F. Supp. 1436, 1444 (D. Wyo. 1996). The pre-1995 regulations allowed for temporary non-use "due to drought, fire, or other natural causes, or to facilitate installation, maintenance, or modification of range improvements." See 43 C.F.R. § 4110.3-2(a) (1994).

<sup>281</sup> *Pub. Lands Council I*, 929 F. Supp. at 1444.

<sup>282</sup> *Id.*; see also Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. at 9903.

<sup>283</sup> *Pub. Lands Council I*, 929 F. Supp. at 1444.

<sup>284</sup> *Id.*

arbitrary three-year period, the Council argued that the BLM had failed to provide for the possibility that poor range conditions may require longer periods of non-use.<sup>285</sup> Despite his agreement with the Council's position that a three-year limit on non-use "might be bad judgment," Judge Brimmer concluded that because Babbitt had a rational basis for promulgating the regulation—to reduce unused AUMs and increase revenue—it was not arbitrary and capricious.<sup>286</sup> Therefore, Judge Brimmer concluded that he was powerless to overturn the regulation.<sup>287</sup> Although the Public Lands Council chose not to appeal Brimmer's decision,<sup>288</sup> the Bush administration has vindicated the Council's position by eliminating the three-year cap on temporary non-use.<sup>289</sup>

*f. Permittee Qualifications*

Under the previous grazing regulations, permittees were required to be "engaged in the livestock business."<sup>290</sup> The BLM's 1995 grazing regulations eliminated that requirement.<sup>291</sup> The BLM explained that removing the requirement that permittees be engaged in the livestock business was "made necessary by the increasing number of part time ranchers, permits held by financial institutions and other non-ranching organizations, and permits where the livestock operator is in an initial developmental stage and is not yet ready to run cattle on the range."<sup>292</sup> Ranchers were concerned that eliminating the "livestock business" requirement would allow non-ranchers who own livestock to obtain federal grazing permits and effectively mothball them.<sup>293</sup>

In the district court, the Public Lands Council argued that Babbitt had violated the TGA by eliminating the requirement that permittees be "engaged in the livestock business."<sup>294</sup> Judge

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<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> Pub. Lands Council II, 167 F.3d 1287, 1293 (10th Cir. 1999).

<sup>289</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. 39,402, 39,506 (July 12, 2006) (new 43 C.F.R. § 4130.2 eliminates three-year limit).

<sup>290</sup> 43 C.F.R. § 4110.1 (1994).

<sup>291</sup> Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894, 9926 (Feb. 22, 1995) (to be codified at 43 C.F.R. pts. 1780, 4100).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 9925; see also Brief for the Petitioners at 47-48, Pub. Lands Council v. Babbitt, 529 U.S. 728 (2000) (No. 98-1991), 1999 WL 1123723.

<sup>294</sup> Pub. Lands Council I, 929 F. Supp. 1436, 1444-45 (D. Wyo. 1996).

Brimmer concluded, based on the text and legislative history of the TGA,<sup>295</sup> that Congress intended the Act to benefit those who are “actually engaged in the livestock business.”<sup>296</sup> Babbitt argued that eliminating the “livestock business” requirement was necessary to allow non-traditional applicants, such as conservation organizations and banks, to hold grazing permits.<sup>297</sup> However, Brimmer held that even the previous regulations allowed banks and conservation organizations to hold grazing permits.<sup>298</sup> Because the new regulation was unnecessary to achieve the BLM’s stated goal of allowing banks and conservation organizations to hold permits, Judge Brimmer determined that Babbitt had failed to provide a “reasoned basis” for eliminating the “engaged in the livestock business” requirement and declared the regulation unlawful.<sup>299</sup>

Before the Tenth Circuit, the Council argued that the TGA requires grazing permittees to be “engaged in the livestock business.”<sup>300</sup> In support of its argument, the Council referred extensively to the TGA’s legislative history.<sup>301</sup> However, the Tenth Circuit refused to consider the legislative history of the TGA because the language of the statute was unambiguous.<sup>302</sup> Ultimately, the Tenth Circuit rejected the Council’s argument because it concluded that there was “not even a colorable argument that [the TGA] *requires* the Secretary to issue grazing permits *only* to those engaged in the livestock business.”<sup>303</sup> The TGA merely requires the Secretary to give preference to appli-

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<sup>295</sup> *Id.* at 1445 (citing 43 U.S.C. § 315b (1994) & *To Provide for the Orderly Use, Improvement, and Development of the Public Range: Hearings on H.R. 2835 and H.R. 6462 Before the S. Comm. on Public Lands*, 73d Cong. 74 (1934)).

<sup>296</sup> *Pub. Lands Council I*, 929 F. Supp. at 1445.

<sup>297</sup> *Id.*; see also *Administration of Livestock Grazing—Exclusive of Alaska*, 60 Fed. Reg. at 9925 (eliminating the “livestock business” requirement was intended to clarify that “mortgage insurers, natural resource conservation organizations, and private parties whose primary source of income is not the livestock business, could meet the criteria for qualifications for a grazing permit or lease”).

<sup>298</sup> *Pub. Lands Council I*, 929 F. Supp. at 1445. Judge Brimmer cited two decisions of the Interior Board of Land Appeals, *Forgey Ranch Co. v. Bureau of Land Mgmt.*, 116 IBLA 32 (1990), and *Defenders of Wildlife*, 19 IBLA 219 (1975), as evidence that the Interior Department had allowed banks and conservation groups to hold grazing permits. *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Pub. Lands Council II*, 167 F.3d 1287, 1306 (10th Cir. 1999).

<sup>301</sup> *Id.* (citing appellee’s brief).

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

cants engaged in the livestock business.<sup>304</sup> The TGA also requires the Secretary to give preference to “bona fide occupants or settlers, [and] owners of water or water rights.”<sup>305</sup> Because the language of the TGA was unambiguous, Babbitt’s elimination of the “livestock business” requirement was not entitled to *Chevron* deference.<sup>306</sup> However, the Tenth Circuit concluded that Babbitt’s new regulation gave “proper effect to [the] unambiguous statutory language” of the TGA and was a lawful exercise of Babbitt’s statutory authority.<sup>307</sup>

Before the Supreme Court, the Public Lands Council repeated its argument that the TGA only allows grazing permits to be issued to those engaged in the livestock business.<sup>308</sup> To support its argument, the Council relied on the TGA’s limits on the Secretary’s authority to issue grazing permits.<sup>309</sup> Under the TGA, the Secretary may issue permits only to “bona fide settlers, residents, and other stock owners.”<sup>310</sup> The Council maintained, and Babbitt conceded,<sup>311</sup> that this language requires permittees to be stock owners.<sup>312</sup> The Council further argued that “stock owner should be construed as synonymous with in the livestock business in the popular sense,”<sup>313</sup> because when the TGA was enacted, stock owner meant “commercial stock owner.”<sup>314</sup>

The Court’s ultimate rejection of the Council’s argument was based on the principle that a “statute must, if possible, be construed in such fashion that every word has some operative effect.”<sup>315</sup> Accepting the Council’s argument would mean that the phrase “engaged in the livestock business” would be redundant when used to modify “landowners.”<sup>316</sup> To be eligible for a permit, landowners must be stock owners.<sup>317</sup> Yet the Secretary must

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<sup>304</sup> *Id.* (quoting 43 U.S.C. § 315b (1994)).

<sup>305</sup> *Id.* (quoting 43 U.S.C. § 315b).

<sup>306</sup> *See id.*

<sup>307</sup> *Id.* at 1307.

<sup>308</sup> Brief for the Petitioners, *supra* note 293, at 43-48.

<sup>309</sup> *See id.* at 43.

<sup>310</sup> *Id.* (quoting 43 U.S.C. § 315b).

<sup>311</sup> *See* Brief for the Respondents at 39, *Pub. Lands Council III*, 529 U.S. 728 (No. 98-1991), 2000 WL 35853.

<sup>312</sup> Brief for the Petitioners, *supra* note 293, at 43-44; *see also Pub. Lands Council III*, 529 U.S. at 746 (noting that only “stock owners” may hold permits).

<sup>313</sup> Brief for the Petitioners, *supra* note 293, at 44 (internal quotations omitted).

<sup>314</sup> *Pub. Lands Council III*, 529 U.S. at 746.

<sup>315</sup> *Id.* (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)).

<sup>316</sup> *See id.*

<sup>317</sup> *See* 43 U.S.C. § 315b (2006).

also give preference to “landowners engaged in the livestock business” when he issues permits.<sup>318</sup> Because the Secretary cannot issue permits to those who are not stock owners, the phrase “engaged in the livestock business” would be redundant if stock owners must, by definition, be “engaged in the livestock business.” To give effect to the phrase “engaged in the livestock business,” stock owners must include those who are not “engaged in the livestock business.”

In response to the Council’s argument that Congress intended all permittees to be in the livestock business, the Court considered the legislative history of the TGA.<sup>319</sup> However, the Court found no indication that Congress’ intent would be frustrated if stock owners were not required to be engaged in the livestock business.<sup>320</sup> As a result, the Court concluded that eliminating the “livestock business” requirement was a lawful exercise of Babbitt’s statutory authority.<sup>321</sup> Remarkably, the Bush administration’s regulations did not restore the “livestock business” requirement.<sup>322</sup> As a result, the elimination of the “livestock business” requirement is one of the lasting regulatory legacies of Rangeland Reform ‘94.

*g. Exclusive Use of Water-Related Range Improvements*

Babbitt’s new regulations added a provision making it clear that constructing a range improvement “does not confer the exclusive right to use the improvement or the land affected by the range improvement work.”<sup>323</sup> Although the BLM failed to explain the motivation behind the change,<sup>324</sup> the previous version of the regulation may have impaired the BLM’s ability to allow another permittee to graze the allotment.<sup>325</sup>

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<sup>318</sup> *Id.*

<sup>319</sup> See *Pub. Lands Council III*, 529 U.S. at 746-47.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 747.

<sup>322</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. 39,402, 39,503 (July 12, 2006) (to be codified at 43 C.F.R. pt. 4100) (listing modifications to 43 C.F.R. § 4110.1).

<sup>323</sup> 43 C.F.R. § 4120.3-2(d) (1995).

<sup>324</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894, 9934-35 (Feb. 22, 1995) (to be codified at 43 C.F.R. pts. 1780, 4100).

<sup>325</sup> See 43 C.F.R. § 4120.3 (1994). Under Babbitt’s regulations, when a permittee was granted temporary non-use, the BLM could make the permittee’s unused forage available for others to graze. 43 C.F.R. § 4130.2(h) (1995).

The Public Lands Council's challenge to the regulation was limited to its application to water-related range improvements.<sup>326</sup> The Council argued that, under the previous regulations, permittees were granted exclusive use of water-related range improvements, and that Babbitt had reversed course without providing an adequate reason for doing so.<sup>327</sup>

Judge Brimmer reviewed the previous regulations and concluded that the plain language of the previous regulations did not support the Council's contention.<sup>328</sup> The Interior Department had never recognized exclusive rights to range improvements, and Babbitt's regulation simply "clarified existing practice."<sup>329</sup> As a result, Brimmer upheld the regulation as a lawful exercise of Babbitt's statutory authority.<sup>330</sup> The Public Lands Council chose not to appeal Brimmer's decision<sup>331</sup> and the Bush administration has allowed the regulation to stand.<sup>332</sup>

#### *h. Conditions for Suspension or Cancellation of Grazing Permits*

The 1995 regulations added a provision that allowed the BLM to suspend or cancel a permit if the permittee was found by a court or administrative agency to be in violation of certain state and federal environmental laws.<sup>333</sup> The pre-1995 regulations included a list of prohibited acts; the 1995 regulations simply expanded the list to include violations of state and federal environmental laws.<sup>334</sup> The BLM expanded the list based on its conclusion "that good stewardship of the public lands, as well as the intent and specific language of FLPMA, are served by expanding the prohibited acts section to include violations of State

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<sup>326</sup> Pub. Lands Council I, 929 F. Supp. 1436, 1445 (D. Wyo. 1996).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* (citing 43 C.F.R. § 4120.3-3(c) (1994)).

<sup>329</sup> *Id.* at 1445-46.

<sup>330</sup> *Id.* at 1446 (citing 43 C.F.R. § 4140.1 (1995)).

<sup>331</sup> Pub. Lands Council II, 167 F.3d 1287, 1293 (10th Cir. 1999).

<sup>332</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. 39,402, 39,505 (July 12, 2006) (to be codified at 43 C.F.R. pt. 4100) (making no change to subsection (c) of 43 C.F.R. § 4120.3-3).

<sup>333</sup> Pub. Lands Council I, 929 F. Supp. 1436, 1446 (D. Wyo. 1996) (citing 43 C.F.R. § 4140.1(c) (1995)); see also 43 C.F.R. § 4170.1-1 (1995) (full list of the remedies available to the Interior Department).

<sup>334</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894, 9946 (Feb. 22, 1995) (to be codified at 43 C.F.R. pts. 1780, 4100) (describing changes made to section 4140.1).

and Federal laws related to natural resources.”<sup>335</sup> Additionally, the BLM hoped that the expanded list would provide ranchers with better notice of applicable environmental laws.<sup>336</sup>

In the district court, the Public Lands Council argued that permit suspension or cancellation would constitute double punishment for a single offense, in violation of the Double Jeopardy Clause of the Fifth Amendment.<sup>337</sup> Judge Brimmer was not persuaded by the Council’s argument. First, the Council brought a facial challenge to the regulation.<sup>338</sup> As a result, it could prevail only by showing that under no circumstances would the regulation be valid.<sup>339</sup> However, the Double Jeopardy Clause does not prohibit separate sovereigns from imposing separate punishments for the same offense.<sup>340</sup> Therefore, if a state imposed a punishment on a permittee for violating a state law and the Interior Department cancelled the permittee’s permit pursuant to Babbitt’s new regulations, the punishments would be imposed by separate sovereigns, and the Double Jeopardy Clause would not attach.<sup>341</sup> Because the regulation was constitutional in at least one set of circumstances, Brimmer upheld the regulation.<sup>342</sup> Although the Public Lands Council chose not to appeal Brimmer’s decision,<sup>343</sup> the Bush administration’s regulations have narrowed the circumstances in which a permittee’s violation of an environmental law would trigger the cancellation of his permit.<sup>344</sup>

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<sup>335</sup> *Id.* at 9947.

<sup>336</sup> *Id.*

<sup>337</sup> *Pub. Lands Council I*, 929 F. Supp. at 1446.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 301 (1992)).

<sup>340</sup> *Id.* (citing *Abbate v. United States*, 359 U.S. 187, 194-96 (1959)).

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* Although the foregoing provided a sufficient basis for his holding, Brimmer presented another reason that Babbitt’s regulation was constitutional. The Double Jeopardy Clause does not prohibit the imposition of a civil penalty in addition to a criminal sanction provided that the civil penalty “is remedial in nature and is rationally related to a legitimate governmental objective.” *Id.* (citing *United States v. Halper*, 490 U.S. 435, 449 (1990)). Because Babbitt’s regulation was not punitive and was rationally related to the “legitimate goal of encouraging permittees to act responsibly and obey federal and state environmental laws,” Brimmer held that the regulation was a constitutional exercise of Babbitt’s statutory authority. *Id.*

<sup>343</sup> *Pub. Lands Council II*, 167 F.3d 1287, 1293 (10th Cir. 1999).

<sup>344</sup> See *infra* notes 394-96 and accompanying text.



*i. Surcharges for Pasturing Agreements*

The BLM's 1995 grazing regulations also added a provision that imposed a surcharge on pasturing agreements.<sup>345</sup> In an effort "[t]o ensure that the public receives a fair return from use of public forage,"<sup>346</sup> the 1995 regulations imposed a surcharge on permittees who enter into pasturing agreements that allow third parties to graze pursuant to the permittee's permit.<sup>347</sup> The regulatory surcharge would recover 35% of the difference between the prevailing value for forage on private land and the federal grazing fee.<sup>348</sup> The BLM added the surcharge due, in part, to its belief that pasturing agreements conferred windfall profits on the permittee.<sup>349</sup> The BLM was also concerned about the impact of pasturing agreements on the permittee's incentives to ensure good stewardship of the allotment.<sup>350</sup>

In the district court, the Public Lands Council facially challenged the constitutionality of the surcharge. The Council argued that the surcharge regulation violated the Due Process Clause of the Fifth Amendment because it was overinclusive. Specifically, the Council argued that the regulation was unconstitutionally overinclusive because it imposed a surcharge on permittees who failed to realize any profit from the pasturing agreement.<sup>351</sup>

Judge Brimmer concluded that the regulation must be upheld if it was "rationally related to a legitimate government goal."<sup>352</sup> Based on evidence suggesting that "a significant number of permittees had profited from pasturing agreements," Brimmer concluded that a surcharge to recover the windfall profits of pasturing agreements was "rationally related to a legitimate government interest," and therefore constituted a constitutional ex-

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<sup>345</sup> See 43 C.F.R. § 4130.8-1(d) (1996).

<sup>346</sup> BUREAU OF LAND MGMT., *supra* note 87, at 9.

<sup>347</sup> 43 C.F.R. § 4130.8-1(d).

<sup>348</sup> *Id.*

<sup>349</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894, 9946 (Feb. 22, 1995) (to be codified at 43 C.F.R. pts. 1780, 4100). Under a pasturing agreement, a permittee sells the right to graze under his permit to another rancher. The result is that the permittee receives a profit by recovering the difference between the subsidized federal fee and the actual market value of the forage. See *Pub. Lands Council I*, 929 F. Supp. 1436, 1447 (D. Wyo. 1996).

<sup>350</sup> Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. at 9946.

<sup>351</sup> *Pub. Lands Council I*, 929 F. Supp. at 1446-47.

<sup>352</sup> *Id.* at 1447 (citing *Dandridge v. Williams*, 397 U.S. 471, 484 (1970)).

ercise of Babbitt's statutory authority.<sup>353</sup> The Public Lands Council chose not to appeal Judge Brimmer's decision,<sup>354</sup> and the Bush administration's regulatory changes leave the surcharge intact.<sup>355</sup>

*j. Fundamentals of Rangeland Health*

The core provisions of the 1995 regulations were management standards known as the Fundamentals of Rangeland Health (FRH).<sup>356</sup> The FRH authorized the BLM to change grazing management practices to ensure the environmental health of federal rangeland.<sup>357</sup> Remarkably, the Public Lands Council conceded that Babbitt had not exceeded his statutory authority by promulgating the FRH.<sup>358</sup> Instead, the Council contended that Babbitt had provided inadequate responses to critical comments submitted during the rulemaking process.<sup>359</sup>

Judge Brimmer noted that Babbitt had dedicated ten pages of the Final Environmental Impact Statement to responding to comments criticizing the FRH.<sup>360</sup> As a result, Brimmer concluded that Babbitt's promulgation of the FRH was not arbitrary and capricious.<sup>361</sup> Although the FRH survived the Public Lands Council's challenge, the Bush administration has reduced the impact of the FRH by allowing the BLM to respond more slowly to environmental degradation and by limiting the circumstances in which the FRH apply.<sup>362</sup>

3. *The Upshot of Public Lands Council v. Babbitt*

After nearly five years of litigation, the federal courts held that nine of the ten regulations challenged by the Public Lands Council were valid exercises of Babbitt's statutory authority. Despite his general hostility to restrictions on the use of federal lands,

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<sup>353</sup> *Id.*

<sup>354</sup> Pub. Lands Council II, 167 F.3d 1287, 1293 (10th Cir. 1999).

<sup>355</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. 39,402, 39,507 (July 12, 2006) (to be codified at 43 C.F.R. pt. 4100) (43 C.F.R. § 4130.8-1(d) was redesignated § 4130.8-1(f) but left otherwise unchanged).

<sup>356</sup> GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND & RESOURCES LAW 817 (5th ed. 2002); see also 43 C.F.R. § 4180.1 (1995).

<sup>357</sup> 43 C.F.R. § 4180.1; see also *supra* notes 98-103 and accompanying text.

<sup>358</sup> Pub. Lands Council I, 929 F. Supp. 1436, 1447-48 (D. Wyo. 1996).

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 1448.

<sup>361</sup> *Id.*

<sup>362</sup> See *infra* notes 402-09 and accompanying text.

even District Court Judge Clarence Brimmer upheld six of the ten challenged regulations.<sup>363</sup> The Supreme Court subsequently affirmed the Tenth Circuit's reversal of Brimmer on three of the regulations bringing the total of upheld regulations to nine. The only regulation that was ultimately overturned by the courts was the regulation allowing for the issuance of conservation-use permits.<sup>364</sup>

## V

### THE GEORGE W. BUSH ADMINISTRATION'S EFFORTS TO END RANGELAND REFORM

The announcement of the Supreme Court's decision in *Public Lands Council v. Babbitt* largely ended the dispute over Rangeland Reform '94. However, the inauguration of George W. Bush as the nation's forty-third President reignited the battle over rangeland management. Bush campaigned in the West on a platform promising to limit the federal government's intrusion into extractive activities; however, he remained silent on the form of the changes he envisioned.<sup>365</sup>

Bush's grazing agenda became clearer after his inauguration with his appointment of Gale Norton as Secretary of the Interior.<sup>366</sup> Norton had served in the Reagan administration as associate solicitor at the Interior Department under James Watt.<sup>367</sup> Prior to her tenure in the Reagan administration, Norton had worked as a lawyer for the Watt-directed Mountain States Legal

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<sup>363</sup> See *supra* note 189-91.

<sup>364</sup> See *supra* notes 258-77 and accompanying text.

<sup>365</sup> Susan Greene, *The Wooing of the West: Conservation Question Weighs Needs of Few, Wants of Many*, DENVER POST, Oct. 15, 2000, at A1.

<sup>366</sup> Mike Soraghan & Jim Hughes, *Norton Gets Interior Post, But Eco-groups Wary*, DENVER POST, Dec. 30, 2000, at A1. Western land users generally praised Norton's appointment. See *id.* (The Executive Director of the Blue Ribbon Coalition approved of the nomination: "I think that Gale is an excellent choice. Frankly, with a more accommodating [I]nterior [S]ecretary, we're expecting to make some real progress getting our federal land-management agencies on the road toward a more user-friendly attitude."). Environmentalists, on the other hand, were less-than-pleased by her appointment. See Bill Dawson, *Disputes Cloud Norton's Nomination to Lead Interior*, HOUSTON CHRON., Jan. 18, 2001, at A6 (The Sierra Club charged that Norton "will be nothing more than 'James Watt in a skirt.'"); Al Knight, *The Babbitt Legacy Advice to GOP: It's Best to Skip the Flash and Dash*, DENVER POST, Jan. 28, 2001, at G1 (The President of Friends of the Earth likened Norton's appointment to "a declaration of war on the environment.").

<sup>367</sup> William Booth, *For Norton, A Party Mission; Nominee Fights GOP Environmental Image*, WASH. POST, Jan. 8, 2001, at A1.

Foundation.<sup>368</sup> Several months later, Bush nominated Kathleen Clarke to serve as his BLM Director.<sup>369</sup> Clarke is a less-polarizing figure than Norton, but neither side of the debate over public lands was particularly pleased with her. Environmentalists were worried about her close ties to extractive industries.<sup>370</sup> Conservatives were concerned by her support of a bill that would increase federal land acquisition.<sup>371</sup>

In a speech to the National Cattlemen's Beef Association on January 30, 2003, Clarke announced her proposal to rewrite the BLM's grazing regulations.<sup>372</sup> According to Clarke, the proposed changes would "enhance community-based conservation," "promote cooperative stewardship of the public rangelands," "improve BLM business practices," and "provide greater flexibility to managers and grazing permittees."<sup>373</sup> On March 3, 2003, Clarke formally declared her intent to amend the BLM's grazing regulations.<sup>374</sup> Approximately nine months later, the BLM proposed new grazing regulations.<sup>375</sup>

#### **A. *Vindicating the Public Lands Council's Challenge to Babbitt's Reform***

On July 12, 2006, the BLM published its final regulations.<sup>376</sup> Although Norton resigned her post as Interior Secretary prior to

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<sup>368</sup> *Id.* The Mountain States Legal Foundation is a conservative property-rights advocacy organization "dedicated to individual liberty, the right to own and use property, limited and ethical government and the free enterprise system." Mountain States Legal Found., <http://www.mountainstateslegal.org> (last visited Oct. 17, 2006).

<sup>369</sup> Bill McAllister, *Utah Resources Chief to Lead BLM*, DENVER POST, Aug. 28, 2001, at A8.

<sup>370</sup> Christine Dorsey, *'Use and Protect': Bush Picks Utah Official to Take Charge of BLM*, LAS VEGAS REV.-J., Aug. 28, 2001, at 2B (A representative of the Southern Utah Wilderness Alliance claimed that "[s]he's tended to side with the extractive industries.>").

<sup>371</sup> *Id.* (statement by a representative of the American Land Rights Association).

<sup>372</sup> Mike Soraghan, *Eased Cattle-Grazing Rules Sought*, DENVER POST, Jan. 31, 2003, at A4.

<sup>373</sup> *Id.*

<sup>374</sup> See Advance Notice of Proposed Rulemaking for Proposed Amendments to the BLM's Grazing Administration Regulations and Announcement of Public Meetings, 68 Fed. Reg. 9964, 9964 (Mar. 3, 2003).

<sup>375</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 68 Fed. Reg. 68,452, 68,452 (proposed Dec. 8, 2003) (to be codified at 43 C.F.R. pt. 4100).

<sup>376</sup> Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. 39,402, 39,402 (July 12, 2006) (to be codified at 43 C.F.R. pt. 4100).

the promulgation of the final regulations,<sup>377</sup> her successor, former Idaho Governor Dirk Kempthorne,<sup>378</sup> promulgated the final regulations without making any significant substantive changes to the proposed regulations.

In addition to a few minor technical changes,<sup>379</sup> the new regulations undo significant parts of the regulations the Babbitt BLM promulgated in 1995. Further, the new regulations vindicate much of the Public Lands Council's largely unsuccessful legal challenge to the regulations. Of the nine provisions unsuccessfully challenged by the Public Lands Council in *Public Lands Council v. Babbitt*, the new regulations amended five.

### 1. *Elimination of the Grazing Preference*

Although the Tenth Circuit and the Supreme Court upheld the 1995 definition of grazing preference, the Bush administration nevertheless proposed to restore the pre-1995 definition.<sup>380</sup> The Babbitt BLM had amended the definition of "grazing preference" to "clarify that [grazing preference] refers only to a person's priority to receive a permit or lease, and not to a specific number of AUMs."<sup>381</sup> The 1995 definition destroyed the illusion that a permittee was guaranteed a specific number of AUMs and forced ranchers to acknowledge that the amount of available forage would vary from year-to-year depending on the condition of the range.<sup>382</sup>

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<sup>377</sup> Press Release, U.S. Dep't of the Interior, Secretary Norton Announces Departure from Interior (Mar. 10, 2006), available at [http://www.doi.gov/news/06\\_News\\_Releases/060310.htm](http://www.doi.gov/news/06_News_Releases/060310.htm).

<sup>378</sup> Rocky Barker, *Interior's New Secretary—General or Foot Soldier?*, HIGH COUNTRY NEWS, June 12, 2006, at 3, 3.

<sup>379</sup> See, e.g., Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. 39,402, 39,404 (July 12, 2006) (to be codified at 43 C.F.R. pt. 4100) (removing references to "conservation use" to comply with the 10th Circuit's decision in *Pub. Lands Council II*, 167 F.3d 1287 (10th Cir. 1999)).

<sup>380</sup> The new regulation restores the 1978 definition with two additions: (1) the grazing preference includes suspended AUMs, and (2) grazing preference also indicates a superiority of position. Compare *id.* at 39,503 with Modernization of Livestock Grazing Regulations for Public Lands and Addition of Provisions to Comply With the Federal Land Policy and Management Act of 1976, 43 Fed. Reg. 29,058, 29,068 (July 5, 1978) (to be codified at 43 C.F.R. pts. 4100-4300).

<sup>381</sup> Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894, 9922 (Feb. 22, 1995) (to be codified at 43 C.F.R. pts. 1780, 4100).

<sup>382</sup> See *supra* notes 201-04 and accompanying text.

Bush's regulation restores the illusion that ranchers have an interest in a specific quantity of forage.<sup>383</sup> As the right to forage becomes more definite, efforts by the BLM to reduce grazing on federal rangeland will be strongly opposed because of the potential such reductions have to undermine ranchers' ability to obtain financing on favorable terms. Babbitt's regulation forced permittees and their banks to come to terms with the fact that federal forage availability cannot be guaranteed. The Bush administration has proffered two reasons for this change: Babbitt's definition "has proven to be confusing" and restoring the old definition would eliminate inconsistencies.<sup>384</sup>

## 2. *Vesting Title to Range Improvements in the Federal Government*

The Tenth Circuit and the Supreme Court also upheld the Babbitt BLM's decision to vest title to all permanent range improvements in the federal government. The BLM argued that this provision was necessary to allow it to fulfill its multiple-use mandate.<sup>385</sup> Allowing permittees to hold title to range improvements hinders the BLM's ability to change its management policies because the BLM must find money to compensate for the permittee's interest in range improvements before putting the land to a different use.<sup>386</sup> If the BLM cannot obtain the funds to compensate the permittee, it cannot devote the property to a new pur-

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<sup>383</sup> See, e.g., Pub. Lands Council I, 929 F. Supp. 1436, 1440 (D. Wyo. 1996) (grazing preference has been seen as a "right to place livestock on public lands").

<sup>384</sup> Administration of Livestock Grazing—Exclusive of Alaska, 68 Fed. Reg. 68,452, 68,458 (proposed Dec. 8, 2003) (to be codified at 43 C.F.R. pt. 4100). The Bush administration pointed to two inconsistencies in Babbitt's regulations regarding the use of "grazing preference." First, the regulations stated that when transferring property with a grazing preference attached to it, "the transferee shall file an application for a grazing permit or lease to the *extent of the transferred preference*." 43 C.F.R. § 4110.2-3(a)(4) (1996) (emphasis added). The Bush administration contended that because Babbitt's definition of grazing preference is a "singular quality"—a priority position for receiving a permit—it is not possible to refer to the "extent" of the preference, except by referring to an amount of forage which is inconsistent with the definition itself. Administration of Livestock Grazing—Exclusive of Alaska, 68 Fed. Reg. at 68,458. The second inconsistency, according to the Bush administration, is that when property with a grazing preference attached to it is subdivided, it creates two preferences where once there was one. *Id.* As a result, the only way to make sense of "grazing preference" in this situation is to change the definition to include an amount of forage. *Id.*

<sup>385</sup> Notice of Proposed Rulemaking for the Regulation of Livestock Grazing—Exclusive of Alaska, 58 Fed. Reg. 43,208, 43,215 (Aug. 13, 1993).

<sup>386</sup> See 43 U.S.C. § 1752(g) (2006).

pose even if the change is necessary to fulfill its multiple-use mandate. In the new regulations, the BLM has reversed course and restored the pre-1995 regulation allowing title to vest in the permittee in proportion to the cost and labor provided.<sup>387</sup> The stated reason for returning to the earlier version of the rule was that allowing permittees to retain some “asset value for investments made” would encourage private investment in range improvements.<sup>388</sup>

### 3. *Limits on Temporary Non-use*

In response to a 1986 study by the Inspector General,<sup>389</sup> the Babbitt BLM imposed a three-year cap on temporary non-use in its 1995 regulations.<sup>390</sup> The authors of the study discovered that permittees were abusing the temporary non-use provision by allowing their allotments to sit idle for multiple years without a valid reason for doing so.<sup>391</sup> The Wyoming District Court subsequently upheld the validity of the regulation, rejecting the claim of the Public Lands Council that the Babbitt BLM had not provided a rational basis for the change.<sup>392</sup>

The new rule eliminated the three-year cap and allows the BLM to approve temporary non-use perpetually on an annual basis.<sup>393</sup> The BLM explained that the change was necessary “to provide [it] with management flexibility needed to respond to the common occurrence of site-specific fluctuations.”<sup>394</sup>

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<sup>387</sup> *Compare* Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. 39,402, 39,505 (July 12, 2006) (to be codified at 43 C.F.R. pt. 4100) (amending 43 C.F.R. § 4120.3) *with* 43 C.F.R. § 4120.3 (1994).

<sup>388</sup> Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. at 39,410.

<sup>389</sup> Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894, 9903 (Feb. 22, 1995) (to be codified at 43 C.F.R. pts. 1780, 4100).

<sup>390</sup> 43 C.F.R. § 4130.2(g)(2) (1995).

<sup>391</sup> *See supra* note 259 and accompanying text. Valid reasons for suspending active use included “drought, fire, or other natural causes, or to facilitate installation, maintenance, or modification of range improvements.” 43 C.F.R. 4110.3-2(a) (1994).

<sup>392</sup> Pub. Lands Council I, 929 F. Supp. 1436, 1444 (D. Wyo. 1996). Although Judge Brimmer found for Babbitt, he noted that the cap “might be bad judgment.” *Id.*

<sup>393</sup> Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. at 39,506 (removing temporary non-use from 43 C.F.R. § 4130.2 and adding a provision for annual approval of temporary non-use to 43 C.F.R. § 4130.4).

<sup>394</sup> *Id.* at 39,475.

The Babbitt BLM's position on temporary non-use had always been somewhat puzzling. Its primary reason for capping temporary non-use was fiscal, not ecological.<sup>395</sup> However, the fiscal benefit of limiting the abuse of temporary non-use is tiny when compared to the lost revenue that results from charging below-market rates for federal forage.<sup>396</sup> In contrast, imposing a cap on temporary non-use is ecologically detrimental because it forces permittees to graze more intensively than they might otherwise. Further, ranchers oppose limits on temporary non-use, because it forces them to graze or risk losing their permits. The Babbitt BLM never explained why it chose to promulgate a regulation that would provide a very modest fiscal benefit at the expense of range health and the goodwill of the ranching community.

Although the Bush administration's elimination of the cap on temporary non-use may result in modest ecological benefits to the extent that it reduces grazing,<sup>397</sup> it is nonetheless a significant reversal of the 1995 regulations from the standpoint of tracing the death of Rangeland Reform. It is another example of the Bush administration vindicating the legal claims of the Public Lands Council and catering to the interests of the ranching community.

#### 4. *Addition of Conditions Under Which Grazing Permits Will Be Suspended or Cancelled*

In its challenge to the 1995 regulations, the Public Lands Council claimed that the Babbitt BLM was violating the Double Jeopardy Clause of the U.S. Constitution by allowing a permittee to have a permit or lease cancelled or suspended if the permittee is convicted of violating environmental laws. The district court

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<sup>395</sup> See *Pub. Lands Council I*, 929 F. Supp. at 1444.

<sup>396</sup> In 1991, BLM permittees grazed 13.3 million AUMs. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 5, at 13. At this level of grazing, even a modest increase in the grazing fee would produce millions of dollars of annual revenue. For example, increasing the grazing fee by \$0.10 per AUM would produce more than \$1.3 million in annual revenue. If Babbitt had successfully promulgated his proposed fee increase, the grazing fee would have been \$4.28 per AUM in 1993 instead of \$1.86 per AUM. See *supra* text accompanying notes 105-06. Such an increase would have resulted in about \$32 million of additional revenue annually. In contrast, abuse of temporary non-use was resulting in an annual loss to the federal treasury of about \$1 million. See *Pub. Lands Council I*, 929 F. Supp. at 1444.

<sup>397</sup> The actual reduction in grazing that results from temporary non-use may be very modest because the BLM may allow another operator to graze the permittee's forage. See Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. at 9903.



rejected the Council's constitutional claim and held that the regulation was rationally related to the BLM's goal of encouraging its permittees to adhere to state and federal law.<sup>398</sup>

The Bush administration's new regulations narrow the scope of the 1995 regulations. Under those regulations, a permittee could lose a permit for any violation that occurred on BLM land and was related to grazing use.<sup>399</sup> The new regulation allows the BLM to revoke or cancel a permit only for violations that occur while the permittee is engaged in grazing activities on the allotment covered by the permit.<sup>400</sup> As a result, the BLM has less authority to ensure that its permittees are acting responsibly and in compliance with state and federal environmental laws. For example, if a permittee establishes a pattern of egregious violations of state and federal environmental laws, but commits his unlawful acts on land not covered by his grazing permit, the BLM would be powerless to suspend or cancel his permit.<sup>401</sup>

##### 5. *The Fundamentals of Rangeland Health and Standards and Guidelines*

The BLM's new rules are another blow to the vision of national standards and guidelines Babbitt articulated as part of Rangeland Reform '94.<sup>402</sup> The 1995 regulation required the BLM to take corrective action before the start of the next grazing season when it discovered that the range was not meeting either the FRH or the applicable standards and guidelines.<sup>403</sup> Under the new rules, the BLM has more time to take action. The Bush

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<sup>398</sup> *Pub. Lands Council I*, 929 F. Supp. at 1446.

<sup>399</sup> 43 C.F.R. § 4140.1(c) (1995).

<sup>400</sup> Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. 39,402, 39,507 (July 12, 2006) (to be codified at 43 C.F.R. pt. 4100) (listing changes to 43 C.F.R. § 4140.1(c)).

<sup>401</sup> *See id.*; *see also* 43 U.S.C. § 1732(c) (2006). Grazing permits must include terms and conditions that provide for cancellation of the permit for violations of “applicable State or Federal air or water quality standard or implementation plan[s]” that occur while the permittee is engaged in grazing activities on public land covered by the permit.

<sup>402</sup> Since National Standards and Guidelines first appeared in Rangeland Reform '94, they have been continually weakened. *See, e.g., supra* text accompanying notes 98-102 (the National Standards and Guidelines began as an ambitious reform); *supra* text accompanying notes 153-60 (the National Standards and Guidelines were weakened before the Babbitt BLM proposed regulations); *supra* notes 170-72 and accompanying text (the National Standards and Guidelines were weakened again and became the Fundamentals of Rangeland Health in the final 1995 regulations).

<sup>403</sup> 43 C.F.R. § 4180.1 (1995); 43 C.F.R. § 4180.2(c) (1995).

regulations do not require the BLM to act until the grazing season following the completion of its consultation process in the case of non-compliance with the Fundamentals of Rangeland Health, or for two years in the case of non-compliance with the applicable standards and guidelines.<sup>404</sup>

In addition to allowing the BLM to react more slowly when it learns of range degradation, the new rules almost entirely eliminate any national standards for grazing management. Under the 1995 regulations, the FRH provided only very general national standards for range management.<sup>405</sup> For example, the Fundamentals required the BLM to ensure that watersheds were functioning properly and that ecological processes were maintained.<sup>406</sup> But under the new rules, the BLM no longer has an independent obligation to ensure that the conditions described in the FRH exist on the rangeland it manages. Instead, regional standards and guidelines must simply be “consistent with” the FRH.<sup>407</sup> The rationale for eliminating the national umbrella of the FRH is that using the regional standards and guidelines as the benchmark for evaluating environmental conditions on federal rangeland will be more efficient.<sup>408</sup> According to the BLM, this increase in efficiency will ultimately “benefit the environment.”<sup>409</sup>

### ***B. What Remains of Rangeland Reform '94?***

Rangeland Reform '94 was a three-part effort to reform federal grazing management: (1) amending grazing regulations, (2) increasing the grazing fee, and (3) introducing national standards and guidelines. The Bush administration's new regulations have effectively eliminated two of three elements of the reform effort. The proposed grazing-fee increase proved too controversial for

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<sup>404</sup> Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. at 39,508-09 (making changes to 43 C.F.R. §§ 4180.1, 4180.2(c)(1)). *Contra* Idaho Watersheds Project v. Hahn, 187 F.3d 1035 (9th Cir. 1999) (per curiam) (holding that the 1995 FRH require the BLM to take “action that results in progress toward fulfillment of ecological standards and guidelines by the start of the next grazing year” when the agency determines that the standards and guidelines are not currently being met).

<sup>405</sup> See 43 C.F.R. § 4180.1 (1996).

<sup>406</sup> *Id.*

<sup>407</sup> Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. at 39,508 (altering 43 C.F.R. § 4180.1).

<sup>408</sup> *Id.* at 39,409.

<sup>409</sup> *Id.*

Babbitt and was abandoned before the 1995 regulations were published.<sup>410</sup> The national standards and guidelines have been continually eroded. By the time the Babbitt BLM published final regulations, the national standards and guidelines had become the FRH and were nearly unenforceable.<sup>411</sup> The new regulations promulgated by the Bush administration nearly eliminate the Fundamentals: they no longer have any direct effect on the management of BLM rangeland.<sup>412</sup> Instead, under the new regulations, the Fundamentals are little more than a yardstick by which the regional standards and guidelines will be measured.

The third element of Babbitt's reform—regulatory reform—has not been entirely eliminated. However, the legacy of Babbitt's regulatory reform will be limited to minor adjustments. For example, Babbitt's elimination of the requirement that permittees be engaged in the livestock business will endure.<sup>413</sup> Similarly, the subleasing provisions that require permittees to pay a surcharge when they sublease their allotment will survive.<sup>414</sup> But, most of the significant regulatory reforms Babbitt proposed have been eliminated by the Bush administration's final regulations. Babbitt abandoned reforms of suspended non-use and permit tenure before the final 1995 regulations were promulgated.<sup>415</sup> The Tenth Circuit struck down conservation use in *Public Lands Council v. Babbitt*,<sup>416</sup> and Bush's regulations will undo Babbitt's reforms of water rights,<sup>417</sup> title to rangeland improvements,<sup>418</sup> and limits on temporary non-use.<sup>419</sup>

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<sup>410</sup> See *supra* notes 166-67 and accompanying text.

<sup>411</sup> Enforcement of the FRH was limited to "appropriate action" by the BLM. 43 C.F.R. § 4180.1 (1996).

<sup>412</sup> See Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. at 39,409, 39,508.

<sup>413</sup> The new regulations do not include a provision that permittees be engaged in the livestock business. *Id.* at 39,503. Although Babbitt's regulation will endure, the requirements that permittees own base property and actively graze their allotments remain and will substantially limit the significance of the change. See *id.* at 39,503, 39,508 (new regulations do not modify the relevant provisions of 43 C.F.R. § 4110.1 (2005) (base property requirement) and 43 C.F.R. § 4170.1-2 (penalty for non-use)).

<sup>414</sup> See *id.* at 39,507 (redesignating, but not altering, 43 C.F.R. § 4130.8-1(d)).

<sup>415</sup> See *supra* notes 161-62 and accompanying text.

<sup>416</sup> 167 F.3d 1287, 1308 (10th Cir. 1999).

<sup>417</sup> Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. at 39,505 (proposed changes to 43 C.F.R. §§ 4120.3-9).

<sup>418</sup> *Id.* (proposed change to 43 C.F.R. § 4120.3-2).

<sup>419</sup> *Id.* at 39,506 (proposed change to 43 C.F.R. § 4130.4(d)).

Promulgation of the Bush administration's final regulations drove the final nail into the coffin of Babbitt's reform efforts. It will almost be as though Rangeland Reform '94 never existed.

## VI

### PUBLIC CHOICE THEORY AND THE DEATH OF RANGELAND REFORM

The death of Rangeland Reform is illustrative of the influence the ranching industry has over federal grazing management. Examining the death of Rangeland Reform '94 through the lens of public choice theory helps explain why the ranchers were ultimately so successful.

#### *A. The Birth of Rangeland Reform*

One of the sharpest criticisms of public choice theory is its failure to account for ideology. For example, public choice theory cannot account for voting. A rational economic actor would not vote, the costs are too high and the benefits are too small. Yet, millions of Americans vote.

Similarly, public choice theory does not account for the birth of Rangeland Reform '94. First, grazing was nearly nonexistent as a campaign issue for Bill Clinton; grazing reform was not necessary to fulfill any promise to the electorate. Second, grazing reform imposes a cost on a small, well-organized group for the benefit of a large, undifferentiated group. Under these circumstances, public choice cannot account for the rise of Rangeland Reform '94. Rangeland Reform '94 was instead a product of Babbitt's ideological belief that grazing could, and should, be managed to protect both ecological resources and ranchers.<sup>420</sup> Although public choice theory may be instructive in certain circumstances, its reach is clearly limited by its expectation that all actors always behave in an economically rational way.

#### *B. Legislative Efforts*

In the fall of 1993, Babbitt worked with congressional Democrats to implement his grazing reforms legislatively.<sup>421</sup> Public choice theory predicts that legislation to reform grazing would be quite difficult to pass because ranchers are well-organized, op-

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<sup>420</sup> See *supra* notes 67, 75 and accompanying text.

<sup>421</sup> See *supra* notes 113-19 and accompanying text.

posed to changes in the status quo, and protective of their own economic interests.<sup>422</sup>

Public choice theory accurately predicted that public-lands ranchers would have a disproportionate impact on the resolution of Babbitt's legislative proposal. Very few people, constituting a small fraction of U.S. beef producers, rely on public lands for grazing.<sup>423</sup> Yet despite their small numbers, ranchers created substantial opposition to Babbitt's proposal. Although Babbitt's bill passed in the House of Representatives with relative ease, nearly a quarter of the House opposed the proposal.<sup>424</sup> The ranchers' disproportionate impact is particularly evident in the eleven western states where federal grazing is concentrated.<sup>425</sup> House members from the eleven western states voted to approve the grazing amendment by a much smaller margin: 48-41.<sup>426</sup> Outside of California, House members from the other ten grazing states disapproved Babbitt's amendment 21-16.<sup>427</sup> The influence of the ranchers was even more dramatic in the Senate, where more than 40% of the chamber joined the filibuster that ultimately ended Babbitt's legislative reform efforts.<sup>428</sup> Senators from the eleven western grazing states were particularly supportive of the filibuster: they voted 16-6 to maintain the filibuster.<sup>429</sup> Due to their disproportionate impact on the legislative process,

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<sup>422</sup> See *supra* note 46 and accompanying text.

<sup>423</sup> See *supra* notes 1-5.

<sup>424</sup> See *Filibuster Still Has Range Policy Trapped; One More Try*, *supra* note 118, at 4 (bill passed in the House by a vote of 317-106).

<sup>425</sup> The eleven western grazing states are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. See *supra* notes 3-4 and accompanying text.

<sup>426</sup> See 139 CONG. REC. H8293-94 (daily ed. Oct. 20, 1993) (roll call vote on amending H.R. 2520 with Babbitt's grazing reform package); CLERK OF THE HOUSE OF REPRESENTATIVES, OFFICIAL LIST OF MEMBERS OF THE HOUSE OF THE UNITED STATES AND THEIR PLACES OF RESIDENCE: ONE HUNDRED THIRD CONGRESS 1-12 (1995), available at <http://clerk.house.gov/103/olm103.pdf>.

<sup>427</sup> See 139 CONG. REC. H8293-94 (daily ed. Oct. 20, 1993) (roll call vote on amending H.R. 2520 with Babbitt's grazing reform package); CLERK OF THE HOUSE OF REPRESENTATIVES, *supra* note 426, at 1-12.

<sup>428</sup> *Filibuster Still Has Range Policy Trapped; One More Try*, *supra* note 118, at 4-5. Senators failed to break up the filibuster by a vote of 53-41. Sixty votes are required to end a filibuster. RICHARD S. BETH & STANLEY BACH, CONG. RESEARCH SERV., LIBRARY OF CONGRESS, FILIBUSTERS AND CLOTURE IN THE SENATE CRS-1 (2003), available at <http://www.senate.gov/reference/resources/pdf/RL30360.pdf>.

<sup>429</sup> See 139 CONG. REC. S14,191 (daily ed. Oct. 21, 1993) (roll call vote on motion to end debate on H.R. 2520); CLERK OF THE HOUSE OF REPRESENTATIVES, *supra* note 426, at 13 (listing Senators of the 103d Congress by state).

ranchers were able to defeat Babbitt's attempt to enact his grazing reforms into law.

Because the benefits of rangeland reform are modest and widespread,<sup>430</sup> and the costs are concentrated on the ranching community, public choice theory predicts that legislators would delegate the reform to an agency like the BLM.<sup>431</sup> The ranchers' victory in the Senate led exactly to that result: Babbitt and the BLM were forced to pursue federal grazing reform administratively.<sup>432</sup>

### C. Administrative Reform

After the defeat of the grazing-reform bill in November 1993, Rangeland Reform '94 became an entirely administrative effort. Public choice theory predicts that public lands ranchers will wield substantial influence over the BLM because of their economic motivation and their familiarity with the agency and its regulations. The agency is unlikely to be rewarded for conservation efforts because the beneficiaries of the improved ecological health of public rangeland are large in number and undifferentiated in their interest. On the other hand, if the BLM angers the ranching community, it risks creating a significant opponent that may jeopardize the agency's continued funding.<sup>433</sup> The predictions of Niskanen's "budget maximizing" theory of agency behavior,<sup>434</sup> combined with public choice theory, are empirically supported by the death of rangeland reform.

Babbitt's initial reform proposal was hardly radical. For example, it resulted in no significant reduction in the extent of BLM grazing.<sup>435</sup> Babbitt, a centrist on grazing, believed Rangeland Reform '94 to be a common-sense approach to reform. How-

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<sup>430</sup> Every citizen in the country ostensibly benefits from the improved ecological health of public rangeland.

<sup>431</sup> The delegation would likely take one of two forms. The first possibility would be for Congress to pass legislation establishing broad goals and allow the agency to fill in the details. The second possibility would be for Congress to simply defeat the legislation and allow the agency to exercise its existing regulatory authority.

<sup>432</sup> See *supra* notes 117-19 and accompanying text.

<sup>433</sup> This result is predicted by the intersection of Niskanen's "budget maximization" theory and public choice theory. The basic theory is that a legislator is unlikely to continue to fund or delegate authority to an agency that is persistently angering her constituents. Therefore, an agency will act to avoid angering the parties it regulates. See *supra* notes 55-56 and accompanying text.

<sup>434</sup> *Id.*

<sup>435</sup> Many environmentalists have advocated for substantial reductions in the extent of grazing on BLM land. See, e.g., *supra* note 31.

ever, ranchers made it clear that they were dissatisfied with the proposal, and, as a result, Babbitt softened the proposal before publishing his proposed regulations.<sup>436</sup> The grazing-fee increase became an incentive-based fee.<sup>437</sup> The national standards and guidelines were progressively weakened.<sup>438</sup> Yet, the ranching community was still not satisfied, and Babbitt continued to dilute his proposal. By the time the final regulations were published, the proposed grazing fee had vanished and the national standards and guidelines were further weakened.<sup>439</sup> The BLM under the George W. Bush administration has now promulgated new regulations that effectively signal the death of Rangeland Reform '94.<sup>440</sup>

## VII

### CONCLUSION

The death of Rangeland Reform '94 should instruct future reform efforts in at least four ways. First, grazing reform is unlikely to succeed legislatively. Public choice theory predicts that ranchers will have a disproportionate impact on the political process and are likely to be successful in their efforts to defeat legislative grazing reform proposals.<sup>441</sup> The fate of Babbitt's reform efforts supports the grim predictions of public choice theory.<sup>442</sup>

Second, regulatory reform is possible. However, as this Article reveals, radical or rapid reform is unlikely. Ranchers successfully diluted the impact of Babbitt's initial reform and have succeeded in overturning many of the key 1995 regulations. Despite the Bush administration's elimination of the major provisions of the 1995 regulations, the regulations were a substantial improvement

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<sup>436</sup> See *supra* Parts III.C.1-3.

<sup>437</sup> See *supra* notes 149-50 and accompanying text.

<sup>438</sup> See *supra* notes 154-58 and accompanying text.

<sup>439</sup> See *supra* notes 163-64, 170-72 and accompanying text.

<sup>440</sup> See *supra* Part V.B.

<sup>441</sup> In addition to the disproportionate impact predicted by public choice theory, the makeup of the United States Senate amplifies the impact of ranching interests. The ten western states, excluding California, where the federal range is concentrated contain less than 10% of the total population of the United States but control 20% of the votes in the Senate. See U.S. Census Bureau, Geographic Comparison Table GCT-PH1: Population, Housing Units, Area, and Density: 2000, <http://factfinder.census.gov> (follow "Search" hyperlink; then search "GCT-PH1"; then follow "United States by States, and Puerto Rico" hyperlink) (of the 281 million who live in the U.S., 27.5 million live in Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming).

<sup>442</sup> See *supra* notes Part I.

to the existing regulations and changed federal grazing for more than a decade. Further, a handful of the provisions of the 1995 reform effort—admittedly representing the effort's most modest reforms—will survive the Bush administration's changes.

Third, future reforms should focus on changes that are supported by the ranching community. Many ranchers believe that it is in their best interest to provide for the long-term health of the range.<sup>443</sup> Although such reforms will tend to result in modest improvements in the condition of the federal range, they are an important first step. In his effort to implement Rangeland Reform '94, Babbitt's efforts to build consensus with ranchers began only after he encountered substantial opposition to his initial proposal and his legislative proposal had been defeated.<sup>444</sup> Similarly, future reform efforts should avoid reforms that polarize the ranching community. For example, increases in the grazing fee and other direct threats to the financial viability of ranching (e.g., elimination of the grazing preference) are likely to face strong opposition from ranchers that may doom the entire reform effort.

Finally, regulatory reform may not be the most expedient way to improve the health of the federal range. As the death of Rangeland Reform '94 shows, regulatory reform is an arduous process and the gains realized are easily reversed. However, the TGA and FLPMA confer upon the Interior Secretary broad authority to withdraw land from grazing use.<sup>445</sup> Although a subsequent Interior Secretary could easily use the same authority to restore grazing, using this authority to rest the most damaged and fragile allotments could dramatically improve the health of the federal range.<sup>446</sup>

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<sup>443</sup> See, e.g., Nat'l Cattlemen's Beef Ass'n, Who is Today's Rancher?, [http://web.archive.org/web/20040607161644/www.beef.org/dsp/dsp\\_content.cfm?locationId=30&contentType=1&contentId=206](http://web.archive.org/web/20040607161644/www.beef.org/dsp/dsp_content.cfm?locationId=30&contentType=1&contentId=206) (last visited Oct. 18, 2006) ("Success today in the ranching business requires the rancher to be a conservationist. . . . He knows that if he is to survive and pass his ranch on to his children, he can't abuse the land he is dependent upon for his survival.").

<sup>444</sup> See *supra* notes 124-26 and accompanying text.

<sup>445</sup> See, e.g., 43 U.S.C. § 315a (2006) (granting the Secretary the authority to "do any and all things necessary . . . to preserve the land and its resources from destruction and unnecessary injury"); *id.* § 1712 (investing the Secretary with broad authority to define how public lands are used).

<sup>446</sup> See Feller, *supra* note 16, at 572-73 (noting that reducing grazing on BLM lands could have positive ecological effects).



2006] *The Death of Rangeland Reform* 111

As predicted by public choice theory and demonstrated by the battle over Rangeland Reform '94, the prognosis for reform is grim. Regulatory reform promises to be a long and slow process; only the most modest reforms are likely to survive efforts by ranchers to protect the status quo. Rangeland Reform '94 and the 1995 regulations that resulted were an important step toward improving the condition of the federal range. However, due to the political influence of ranchers, the direct impact of the regulations was modest and relatively brief.

Grazing reform is still needed. The federal range has been badly damaged by decades of overgrazing,<sup>447</sup> but restoring the health of the federal range will require patience and perseverance to overcome the disproportionate political impact of ranchers and their allies.

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<sup>447</sup> See *supra* notes 18-22 and accompanying text.

