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Part II

Department of the Interior

Bureau of Land Management

43 CFR Part 4100

Grazing Administration—Exclusive of Alaska; Proposed Rule

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 4100

[WO–220–1020–24 1A]

RIN: 1004–AD42

Grazing Administration—Exclusive of Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Land Management (BLM) proposes amending its regulations concerning how BLM administers livestock grazing on public lands. The proposed changes would: improve BLM's day-to-day grazing management efficiency; ensure BLM documents its considerations of the social, cultural, environmental, and economic consequences of grazing changes; provide that changes in grazing use be phased-in under certain circumstances; allow BLM to share title with permittees and lessees to range improvements in certain circumstances; make clear how BLM will authorize grazing if a BLM decision affecting a grazing permit is stayed pending administrative appeal consistent with court rulings; remove provisions in the present regulations concerning conservation use grazing permits; ensure adequate time for developing and successfully implementing an appropriate management action when BLM finds that current grazing management does not meet standards and guidelines for rangeland health, and that authorized grazing is a significant factor in not achieving one or more land health standards or not conforming with guidelines for grazing administration; and revise some administrative fees. We intend these changes to improve working relationships with permittees and lessees, enhance administrative efficiency, and cost effectiveness, clarify the regulations and protect the health of rangelands.

DATES: You should submit your comments on or before February 6, 2004. The BLM may not necessarily consider comments postmarked or received by messenger or electronic mail after the above date in the decision-making process on the final rule.

Public meetings will be held on dates and at times and places to be announced in subsequent **Federal Register** documents.

ADDRESSES: Mail: Director (630), Bureau of Land Management, Eastern States Office, 7450 Boston Boulevard, Springfield, Virginia 22153, Attention: RIN 1004–AD42.

Personal or messenger delivery: 1620 L Street NW., Suite 401, Washington, DC 20036.

Direct Internet response: *http://www.blm.gov/nhp/news/regulatory/index.htm.* or *http://www.blm.gov/grazing.*

E-mail: WOComment@blm.gov.

FOR FURTHER INFORMATION CONTACT: Ken Visser, Rangeland Management Specialist, Rangeland, Soils, Water and Air Group, (202) 452–7743, Ted Hudson (202) 452–5042 or Cynthia Ellis (202) 452–5012 of the Regulatory Affairs Group. Individuals who use a telecommunications device for the deaf (TDD) may contact them individually through the Federal Information Relay Service at 1–800/877–8339, 24 hours a day, seven days a week.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How Do I File Comments?

If you wish to comment, you may submit your comments by any one of several methods.

- You may mail your comments to: Director (630), Bureau of Land Management, Eastern States Office, 7450 Boston Boulevard, Springfield, Virginia, 22153.
- You may deliver comments to 1620 L Street NW., Suite 401, Washington, DC 20036.
- You may comment via the Internet by accessing our automated commenting system located at *www.blm.gov/nhp/news/regulatory/index.htm* and following the instructions there.
- You may comment via email at *WOComment@blm.gov.*

Please make your comments on the proposed rule as specific as possible, confine them to issues pertinent to the proposed rule, and explain the reason for any changes you recommend. Where possible, your comments should reference the specific section or paragraph of the proposal that you are addressing.

The Department of the Interior may not necessarily consider or include in the Administrative Record for the final rule comments that we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (*see* **ADDRESSES**).

B. May I Review Comments Others Submit?

BLM intends to post all comments on the Internet. If you are requesting that your comment remain confidential, do not send us your comment at the Internet or e-mail address because we immediately post all comments we receive on the Internet. Also, comments, including names and street addresses of respondents, will be available for public review at the address listed under **ADDRESSES**: Personal or messenger delivery'' during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except holidays.

Individual respondents may request confidentiality, which we will honor to the extent allowable by law. If you wish to withhold your name or address, except for the city or town, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

II. Background

The regulations on livestock grazing provide the framework for a public land use that has its roots in the settlement of West. The tradition of orderly use of public range in conjunction with private lands was recognized in law with the passage of the Taylor Grazing Act (TGA) in the 1930s, and again in 1976 with the Federal Land Policy and Management Act. The intent of the regulations has always been for the agency to consult and cooperate with the ranchers, private landowners, and other users of the public lands. Our shared purpose must be to sustain the open space, habitat, and watershed values that the public and private lands together can offer.

Providing for livestock grazing is part of the BLM mission to sustain the health, diversity, and productivity of public lands. In part because of its long history, public land grazing is woven into the landscapes and cultures of the rural West, and contributes valuable landscape and culture elements. Our challenge is to establish a framework that helps us accomplish our shared stewardship purpose in a manner that works well in the social and economic context of affected communities.

The ranching families of livestock permittees live and work in the heart of the Western rural landscapes. Their relationship with BLM needs to be more than regulatory if we are to engage in conservation of entire landscapes. Our goals must be to establish simple and

practical ways for permittees, lessees, affected state and local officials, and the interested public to engage with BLM in partnerships that will leave improved open space, watershed, and habitat conditions to the next generation.

Without careful consideration of policy decisions affecting ranching, conversion of this rural West to something different is entirely possible. This conversion is frequently in evidence along the expanding urban interfaces of the West: development of ranchland into subdivisions, changes in water use and watershed characteristics, and changes in fire frequency and effects. Some of these changes are necessary as populations grow and shift, but also necessary is retaining large tracts of the rural West. A proper regulatory framework for managing grazing use can contribute to maintaining Western landscapes.

Whenever BLM addresses changes in regulations, we engage in a public dialogue to ensure all points of view are considered. The changes proposed in this rule seek to strike a balance among competing goals, and to keep administrative processes as simple, understandable, and flexible as possible. Meaningful, positive, and sustainable change on the rangelands of the West can best be accomplished through cooperation.

The proposed amendments of the grazing regulations were developed using three primary concepts:

(1) Improving cooperation with all interested persons, especially with directly affected permittees and landowners;

(2) Promoting practical mechanisms for assessing change in rangelands and protecting rangelands by increasing monitoring activities; and

(3) Enhancing administrative efficiency and effectiveness, including addressing legal issues that need clarification.

Applying these three concepts should strengthen the regulations and promote communication oriented toward seeking agreement and working together. Together we can gather more and better information on observed trends in the vegetation communities of the West. We can resolve some legal matters that have been barriers to meaningful dialogue about the issues we need to address. And we can sharpen the focus on the issues that truly need our attention as we seek to ensure proper grazing management as a part of conserving the rural landscapes of the West.

BLM administers livestock grazing on BLM lands within the continental United States under the regulations found at 43 CFR 4100. Statutory authorities supporting these regulations include the following:

1. The Taylor Grazing Act (TGA) as amended (43 U.S.C. 315, 315a through 315r);

2. The Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1701 *et seq.*) as amended by the Public Rangelands Improvement Act (PRIA) (43 U.S.C. 1901 *et seq.*);

3. Section 4 of the Oregon and California Railroad Lands Act (43 U.S.C. 1181d);

4. Executive orders that transfer land acquired under the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1012) to the Secretary and authorize administration under TGA; and

5. Public land orders, executive orders and agreements authorizing the Secretary to administer livestock grazing on specified lands under TGA or on other lands as specified.

BLM land use plans guide and direct public lands resource management under the multiple-use mandate of the Federal Land Policy and Management Act of 1976. Land use plans specify lands that are available for livestock grazing and the parameters under which grazing is to occur. BLM issues grazing permits or leases for available grazing lands. Grazing permits and leases specify the portion of the landscape BLM authorizes to the permittee or lessee for grazing (*i.e.*, one or more allotments) and establish the terms and conditions of grazing use. Terms and conditions include, at a minimum, the number and class of livestock, when and where they are allowed to graze, and for how long. Grazing use must conform to any applicable allotment management plans, the terms and conditions of the permit or lease, land use plan decisions, and the grazing regulations.

Since the first set of grazing regulations was issued after passage of the TGA in 1934, they have been periodically amended and updated. The last major revision effort was called ''Rangeland Reform '94''. In February 1995, BLM published comprehensive changes to the grazing regulations and put them into effect in August 1995. Changes made to the rules in 1995 include the following:

1. Revised the term ''grazing preference'' to mean a priority position against other applicants for receiving a grazing permit, rather than a specified amount of public land forage apportioned and attached to a base property owned or controlled by a permittee or lessee, and added the term ''permitted use'' to describe forage use amounts authorized by grazing permits or leases;

2. Removed the requirement that one must be engaged in the livestock business to qualify for grazing use on public lands;

3. Required applicants for a new or renewed grazing permit to have a satisfactory record of performance;

4. Provided that BLM could issue a conservation use permit to authorize permittees not to graze their permitted allotments;

5. Limited authorized temporary nonuse to 3 years;

6. Required grazing fee surcharges for permittees who do not own the cattle that graze under their permits;

7. Provided that the United States holds 100 percent of the vested title to permanent range improvements, constructed under cooperative agreements, rather than proportionately sharing title with the cooperators;

8. Required livestock operators and the BLM to use cooperative agreements to authorize new permanent water developments, instead of allowing some water developments to be authorized under range improvement permits;

9. Provided that after August 21, 1995, the United States, if allowed by state water laws, would acquire livestock water rights on public lands;

10. Authorized BLM to approve non-monetary settlement of non-willful grazing trespass under certain circumstances;

11. Expanded the list of prohibited acts applicable to grazing activities;

12. Established Fundamentals of Rangeland Health; and

13. Created a process for developing and applying state or regional standards for land health and guidelines for livestock grazing as a yardstick for grazing management performance.

The Public Lands Council sought judicial review with respect to a number of these provisions. The court upheld all provisions except conservation use (*see* 4, above) (*Public Lands Council* v. *Babbitt,* 929 F.Supp. 1436 (D. Wyo. 1996), *rev'd in part and aff'd in part,* 167 F.3d 1287 (10th Cir. 1999), *aff'd,* 529 U.S. 728 (2000)).

III. Why We Are Proposing This Rule

The current regulations, issued in 1995, require amending to comply with court decisions, improve working relationships with permittees and lessees, enhance administrative procedures and business practices, and promote conservation of public lands.

BLM published an Advance Notice of Proposed Rulemaking (ANPR) and Notice of Intent (NOI) to Prepare an Environmental Impact Statement (EIS) in the **Federal Register** on March 3, 2003, (68 FR 9964–66 and 10030–

10032). These notices requested public comment and input to assist BLM with the scoping process for this proposed rule and the EIS. The comment period on the ANPR and the NOI ended on May 2, 2003.

During the scoping process, BLM held four public meetings to elicit comments and suggestions for the proposed rule and development of the draft environmental impact statement. The meetings were held during March 2003 in Albuquerque, New Mexico; Reno, Nevada; Billings, Montana; and Washington, DC.

We received approximately 8,300 comments on the ANPR and the NOI. The majority of these were varying types of form letters. In response to the ANPR, the majority of commenters opposed allowing livestock operators to temporarily lock gates on public lands in order to protect private property in specific limited situations. We have dropped this proposal from this proposed rule. Many commenters also opposed making any changes to the 1995 grazing regulations and several questioned why BLM was proposing amendments to the grazing regulations so soon after the 1995 changes. Some members of the ranching industry commented that they supported allowing categorical exclusions for routine activities during National Environmental Policy Act (NEPA) compliance; however, this is outside the scope of the rulemaking and is not addressed in today's proposed rule. Many commenters urged BLM to consider increasing monitoring efforts on grazing allotments. Some commenters recommended raising the grazing fees to reflect current market values for livestock. BLM is not addressing grazing fees in today's proposed rule.

We will distribute the Draft EIS (DEIS) on approximately December 19, 2003. Copies will be available on the Internet at *http://www.blm.gov/grazing,* and at the Department of the Interior Library, C Street Lobby, 1849 C Street, NW, Washington, DC 20240. Copies of the DEIS will also be available at BLM State Offices. BLM will publish a Notice of Availability of the DEIS in a separate publication in the **Federal Register**. The DEIS examines the impact of the proposed regulatory changes and alternatives for improving the management of the Nation's public rangelands.

This proposed rule would make changes in several sections of BLM's existing regulations, including revising and creating definitions for key terms pertinent to the grazing administration program. Such changes would include modifying the public participation requirements relating to some day-to-day grazing management matters, and removing provisions authorizing conservation use permits to comply with a Federal Court decision.

The 1995 rule greatly expanded the list of situations in which BLM solicits public comment on pending grazing management decisions. This has led to BLM focusing scarce staff resources and time primarily on managing the public participation process, including organizing and updating mailing lists and handling mailings, rather than on conducting necessary day-to-day grazing management work such as monitoring resource conditions. BLM proposes to retain the interested public consultation requirements for the following specific BLM actions:

1. Apportioning additional forage on BLM managed lands;

2. Development or modification of a grazing activity plan and other BLM land use plans;

3. Planning of the range development or improvement program; and

4. Reviewing and commenting on grazing management evaluation reports.

Also retained in the regulations will be the requirement that BLM provide the interested public with copies of proposed and final grazing decisions and allow them respectively to protest and appeal such grazing decisions.

Although this proposed rule would remove the requirement that BLM consult with the interested public about the following administrative day-to-day actions, BLM could still consult voluntarily on these matters before:

1. Adjusting allotment boundaries,

2. Changing grazing preference,

3. Issuing emergency closures,

4. Renewing or issuing a grazing permit or lease,

5. Modifying permits and leases, or

6. Issuing temporary and non-renewable grazing permits.

BLM may also consult with permittees and lessees, state and local officials, and the interested public on any other matter where the authorized officer finds that such consultation would facilitate management of grazing on the public lands.

This change would require consultation with the interested public where such input would be of the greatest value, such as when deciding vegetation management objectives in an allotment management plan, or preparing reports evaluating range conditions. BLM in cooperation with the grazing operator, would retain the discretion to determine and implement the most appropriate on-the-ground management actions to achieve the objectives and/or respond to the conditions. BLM values productive consultation with the interested public. However, BLM needs some flexibility in order to take responsive, timely, and efficient management action without being required to first undertake mandatory consultation.

We received comments asking BLM to remove the term ''interested public'' from the regulations and replace the term with ''affected interests'' as it appeared prior to the 1995 grazing regulation changes. Commenters stated that the involvement of ''interested public'' is more appropriate for the broader land use plan process and that increased participation from the interested public in day-to-day grazing management matters created more work for BLM and resulted in substantial program-related backlogs. As discussed above, our proposal attempts to address these issues through a change to the definition and modifications in requirements to consult with the interested public.

In order to comply with the 10th Circuit Court of Appeals decision in *Public Lands Council* v. *Babbitt*, 929 F.Supp. 1436 (D. Wyo. 1996), *rev'd in part and aff'd in part*, 167 F.3d 1287 (10th Cir. 1999), *aff'd*, 529 U.S. 728 (2000) the proposed rule would remove language from the 1995 regulations that allowed BLM to issue conservation use permits. The court ruled that the TGA does not authorize BLM to grant conservation use permits.

BLM issues grazing permits and leases to authorize livestock grazing on public lands. In contrast, conservation use permits allowed a permittee to elect not to graze allotments for the duration of the permit, which is typically 10 years. The TGA requires BLM to issue a grazing permit expecting a permittee or lessee to use it to graze livestock. (167 F.3d at 1307–1308). If the permittee or lessee does not plan to graze livestock, BLM can cancel the permit and issue one for that allotment to someone who will use it for its intended purpose. There are circumstances, however, where it is desirable to allow the land to be rested from grazing to protect or improve the condition of resources or to allow relatively short periods of nonuse for the personal or business needs of the operator.

The Tenth Circuit Court's decision in *Public Lands Council* v. *Babbitt* affects another regulatory provision related to ''not grazing under a permit.'' BLM can authorize, on an annual basis, permittees and lessees to graze less than what is provided for in their permit, including not grazing at all. BLM calls

this practice ''authorized temporary nonuse'' and can allow it for purposes of conservation and protection of the public lands, or for reasons associated with business or personal needs of the permittee. The current regulation limits authorized temporary nonuse to 3 consecutive years, after which the permittees must graze as much as they are authorized in their permit or risk losing the unused portion.

The 3 consecutive year temporary nonuse limitation rule was intended to work in conjunction with the regulation that provided for conservation use permits. For example, if the permittee wanted authorized temporary nonuse for more than 3 consecutive years, and BLM agreed that continuing not to graze the allotment(s) was necessary to protect or enhance resources, BLM could replace his ''regular'' permit with a conservation use permit. However, because of the 10th Circuit Court decision, we no longer have that option, and BLM is limited to issuing ''regular'' permits only. The current regulations limit authorized temporary nonuse to 3 consecutive years. Therefore, BLM must require permit holders to use the grazing permit at the end of the 3 years even if both the permittee and BLM wish to continue the nonuse for resource stewardship purposes. BLM proposes not to require grazing use of a permit when both the BLM and permittee agree that temporary nonuse is needed for resource stewardship reasons. Although we propose to remove the 3-consecutive-year limitation on authorized nonuse if the purpose of the nonuse is for resource stewardship reasons, we realize that some may wish to acquire a permit and not use it indefinitely, despite the 10th Circuit Court's decision that BLM cannot issue grazing permits not to graze. Where land use plans provide that an acceptable use of the public lands is domestic livestock grazing, then BLM will manage those lands for grazing in accordance with the land use plan.

Failing to ''make substantial grazing use as authorized for two consecutive fee years'' is prohibited under current grazing regulations. BLM does not propose to amend this provision in this rule. BLM may deny nonuse of a permit if the permittee cannot justify that nonuse is for resource stewardship or personal or business reasons. If BLM denies nonuse, and the permittee does not graze livestock as allowed under the permit for two years in a row, the permit or portion of the permit that is not used is subject to cancellation and would be available for awarding to another applicant. (These same principles pertain to leases.) The changes to nonuse provisions that BLM is proposing today would provide that BLM could authorize nonuse for no longer than one year at a time, but could repeat such annual authorizations for more than 3 consecutive years.

We considered many of the substantive issues that were raised during the scoping period and have incorporated several of these as alternatives in the draft EIS. We did not address, however, some of the issues that commenters raised because they are either beyond the scope of the document, did not meet the basic purposes of these proposed changes to the regulations, or BLM decided we could better address the issues through policy.

The following are issues we considered but do not address in this proposed rule:

- Increasing grazing fees and restructuring grazing based on market demand are outside the scope of this proposed rule.
- Reestablishing BLM grazing advisory boards to provide local advice and recommendations to BLM on grazing issues is not addressed because BLM grazing advisory boards were ''sunset'' on December 31, 1985, by FLPMA. This proposed rulemaking, however, would provide that BLM cooperate with state, county or locally established grazing boards in reviewing range improvements and allotment management plans on public lands. This review would supplement the counsel of Resource Advisory Councils that BLM established in 1995 to advise BLM and recommend strategies for managing public lands under our multiple-use mandate.
- Modifying management of wild horses and burros or making any changes to The Wild Horse and Burro Act or its implementing regulations are outside the authority and scope of this proposed rule. Issues involving allocation of forage are addressed in land use plans.
- Counting 7 sheep, rather than the current 5, as the equivalent of one animal unit for the purposes of calculating grazing fee billings are not addressed because matters involving the grazing fee are outside the scope of this proposed rule.
- Establishing and managing Reserve Common Allotments is not addressed in this proposed rule. In the ANPR, BLM stated that we were considering proposing provisions to define, establish a regulatory framework, and otherwise support the creation of Reserve Common Allotments. BLM has decided not to proceed with developing Reserve Common Allotments at this time. During BLM's public scoping period many commenters expressed concern about adding special provisions for Reserve Common Allotments in the grazing regulations. Many commenters said they did not think such regulatory provisions were warranted. Ranching interests indicated they would rather have ''normal'' allotments while environmental interests questioned whether this would be the best use of the land. After considering the reception to this concept, BLM determined it was not in the public interest to proceed with this provision through regulations. BLM will continue to examine the concept of forage reserves through policy-making processes.
- Removing the grazing fee surcharge is not addressed in this proposed rule. The 1995 regulations added a grazing fee surcharge to address the concerns raised by the General Accounting Office and Office of the Inspector General regarding the potential for rancher ''windfall profits'' arising from BLM's practice of allowing for the subleasing of public land grazing privileges. Some BLM grazing permittees enter pasturing agreements allowing them to take temporary control of a third party's livestock and graze them under their permit or lease. The permittee pays the federal grazing fee and charges the third party an amount negotiated between them for the forage and care of the livestock. BLM assesses a fee surcharge in this circumstance that equals 35 percent of the difference between the current Federal grazing fee and private grazing land lease rates with one exception. BLM does not assess the surcharge when the livestock that are grazed under the permit or lease under a pasturing agreement belong to children of the permittee or lessee under certain circumstances set out under section 4130.7(f). BLM is not proposing to alter the existing surcharges for the following reasons:

1. BLM continues to believe that the surcharge is an equitable manner in which to address the issue of potential windfall profits to BLM permittees and lessees who choose to enter into pasturing agreements, and

2. BLM does not want to open issues related to grazing fees at this time.

- Assigning burden of proof to the BLM for appeals is not addressed in this proposed rule. BLM considered including a provision in the proposed rule requiring the BLM to assume the burden of proof for all appeals before the Office of Hearings and Appeals. The burden of proof has been clarified by the Supreme Court to mean the ''burden of persuasion'' which refers to ''the notion that if evidence is evenly balanced, the

party who bears the burden of persuasion must lose.'' (*Director, Office of Workers' Compensation Programs, Department of Labor* v. *Greenwich Collieries*, 512 U.S. 267, 272 (1994)). Often, the burden of proof had been confused with the ''burden of production,'' which refers to a party's obligation to come forward with evidence to support its claim. The burden of proving a fact remains where it started, but once the party with this burden establishes a prima facie case, the burden to produce evidence shifts. The burden of persuasion, on the other hand, does not shift except in the case of affirmative defenses. Decisions of the Interior Board of Land Appeals (IBLA) hold that a party appealing a BLM decision has the burden of showing the error in the agency's decision. If, for example, the agency denies a permit or lease to a new grazing applicant, that applicant would be expected to point out the error in BLM's decision. Because each case must be analyzed on its own facts, BLM is not proposing to change our regulations to assign the burden of proof for all appeals.

• Changing the definition of monitoring and the process for conducting monitoring is not addressed in this proposed rule. Few comments directly addressed the definition of ''monitoring'' and those we did receive did not recommend any substantive changes in the definition. Therefore we are not proposing changes to the definition of monitoring. Many comments contained recommendations on how BLM should conduct monitoring. We received many comments from the livestock industry, and environmental and conservation groups, asking BLM to increase monitoring efforts on public lands. BLM considered including new regulatory language regarding monitoring that would have contained explicit direction on the development of allotment-specific resource management objectives and short and long term monitoring programs in consultation with the permittee or lessee. The current regulations, however, already allow BLM to develop resource management objectives and monitoring plans as part of its allotment management plans. As a result, we determined that establishing monitoring methodologies and working with permittees and lessees in collecting and interpreting data and developing monitoring reports are more appropriately handled through BLM's own policy guidance in Manuals and Handbooks. Therefore, BLM has decided not to incorporate details on how to monitor in the proposed rule. We have, however, added a requirement for monitoring in making determinations on rangeland health.

• Requiring permittees or lessees to submit an application for renewal of their permit or lease when their permits or leases expire is not explicitly addressed in the current regulations nor incorporated in the proposed regulations. We are especially interested in public comment on this issue.

• Adding another opportunity for administrative remedy by allowing a protesting party to appeal a BLM field office decision to the BLM State Director was recommended by several commenters during scoping. Such a provision would allow the BLM State Director to stay a decision pending further review. BLM determined it was not advisable to include this provision in the proposed rule. Such authority could cause the appeals process to become too cumbersome and result in more delays in the decision-making process.

• Providing for permittees and lessees to have control of water developments authorized under a range improvement permit was recommended by commenters during scoping. The current regulations do not allow for water developments to be authorized under a range improvement permit. Other commenters suggested that the rule should propose that BLM allow the permittee or lessee to enter into a Memorandum of Understanding with the BLM allowing the improvements to be used other than by livestock owned or controlled by the permit holder. BLM does not believe these regulatory changes are necessary and therefore will not address them in this proposed rule. We believe we can better address these issues in BLM policy and guidance.

• Establishing criteria for BLM's use of full force and effect decision authority was recommended by some commenters during scoping. BLM believes that full force and effect decisions are fact-specific, so that it would be impossible to establish criteria to address each conceivable new decision. We disagree that developing criteria is necessarily helpful or relevant to the decision to issue a full force and effect decision to protect resources.

• Allowing for exchange of use agreements across allotments was recommended during scoping. Under the existing regulations, an exchange-of-use situation occurs where the permittee owns or controls unfenced private lands within the allotment where he grazes or wishes to graze. The permittee may request to graze additional livestock on the allotment to reflect the amount of forage on the private land. If BLM authorizes the additional grazing, all the authorized livestock may graze anywhere within the allotment, and BLM will not charge grazing fees for the extra livestock. BLM received comments requesting that BLM expand this authority to accommodate a transaction called ''trade of use'' by removing the requirement that private lands in the exchange-of-use situation be located in the same allotment being permitted for grazing. This kind of case might arise in the situation where one permittee or lessee owns or controls unfenced intermingled private lands that are not within his allotment, but rather, within a second permittee's allotment.

The first permittee cannot derive economic gain from the grazing use made on his private lands by the second permittee, unless either—

(1) The first permittee acts to control use of his own land, by means of fencing or through sale of the land or assignment of the land lease for a consideration to the second permittee; or

(2) BLM manages the second permittee's grazing on the first permittee's private land, which BLM currently does not have regulatory authority to do.

A commenter urged that BLM facilitate the ''trade-of-use'' between these permittees by collecting a grazing fee from the second permittee for grazing use of lands owned by the first permittee but located in the second permittee's allotment, and crediting the fees collected from the second permittee for these lands to the first permittee's grazing fee billing. BLM believes that this type of arrangement is best handled by private arrangement between the permittees, but we encourage additional comments as to whether BLM should set up a separate process for such ''trade of use'' arrangements, or act as a broker between grazers on such transactions affecting private lands, perhaps for a service charge.

• Allowing BLM to have unrestricted discretion to determine circumstances that would warrant non-monetary settlement of a non-willful grazing trespass was recommended by a commenter during scoping. The current regulations identify the following four conditions—all of which must be satisfied before BLM can approve a non-monetary settlement for non-willful unauthorized livestock use:

1. Evidence that unauthorized use occurred through no fault of the operator.

2. The forage used was insignificant.

3. Public lands have not been not been damaged.

4. Non-monetary settlement is in the best interest of the United States.

We believe this continues to be a reasonable approach, and therefore BLM has decided not to change this provision.

• Removing the requirement for Secretarial approval of amendments to regional standards for healthy rangelands was not addressed in this proposed rule. BLM received a comment urging that we revise the process for approving standards for rangeland health to allow approval of revisions to the standards by BLM State Directors. BLM believes that the requirement for Secretarial approval of standards that BLM State Directors develop ensures that the basic components of rangeland health are reflected in the regionally developed standards. We are not proposing any changes to the applicable provisions of the current regulations.

• Allowing grazing operators, when authorized by BLM, to temporarily lock gates on public lands when necessary to protect private property or livestock was initially considered for incorporation in this proposed rule. Comments during the scoping were nearly unanimously in opposition to this suggestion. This proposed rule does not include this provision.

• Using competitive bidding for assigning permits and leases in place of the current system for allocating grazing preference, assigning grazing permits and the present grazing fee formula was recommended by several commenters. This recommendation would require legislative action and is therefore beyond the scope of this proposed rule.

• Requiring the posting of a bond before filing an appeal was recommended by several commenters. BLM considered the implications and potential challenges to such a provision, and determined that such a provision would burden the general public as well as permittees and lessees. Therefore, it is not included in the proposed rule.

• Moving the general requirements in section 4180 related to the fundamentals of rangeland health and public land health standards and guidelines to BLM's planning regulations at 43 CFR 1610 was recommended during scoping. BLM did not consider such an expansion of the scope of this rulemaking appropriate at this time, and therefore it is not included in the proposed rule.

Whenever BLM proposes changes to these regulations, we are continuing a public dialogue. These proposed changes seek to keep administrative processes as simple, understandable, and flexible as possible.

When we developed proposed changes to the grazing regulations, we considered whether each specific change facilitates any of the following:

1. Promoting cooperation, especially with directly affected permittees and landowners;

2. Promoting practical mechanisms for protecting rangeland health; and

3. Improving administrative efficiency.

By incorporating these criteria, BLM can improve the regulations while creating a climate for communication and cooperation. Working together, BLM, and the public we serve, can obtain better information about observed trends in the vegetative communities of the West. BLM can improve some of the administrative processes so that we can sharpen our focus on the issues that are truly in need of attention as we seek to conserve the rural landscapes of the West.

IV. Section-by-Section Analysis

Rules of Construction: Words and Phrases

For simplicity and to make the rule easier to read and understand we use words that signify the singular to include and apply to the plural and vice versa as provided in 43 CFR 1810.1. Words that signify the masculine gender also include the feminine. Words used in the present tense also apply to the future. The terms ''BLM'' and ''authorized officer'' are used interchangeably and include any person authorized by law or by lawful delegation of authority to perform the duties described in this proposed rule.

Section 4100.0–2 Objectives

The proposed rule would remove reference to 43 CFR part 1720, subpart 1725, to reflect changes made to the regulations in 1994 (59 F.R. 29206). Today's proposal acknowledges that the Public Rangelands Improvement Act (PRIA) contributes to the objectives of the regulations. These are technical and editorial corrections.

Section 4100.0–3 Authority

The proposed rule would make 3 editorial corrections to this section. These are non-substantive and would not change the existing regulations.

Section 4100.0–5 Definitions

During the scoping period, BLM received public comments addressing specific definitions. Several commenters asked BLM to keep all current terms consistent with their use, definition, and intent in the TGA. The following describes the proposed changes in definitions and the rationale for each change.

Active use: BLM proposes amending this definition to make clear that the term refers to a forage amount based on the carrying capacity of, and resource conditions in, an allotment. The term does not refer to forage that had been allocated in the past but which BLM has determined is no longer present. We now consider such forage to be in suspension, not in active use. The current definition of ''active use'' includes ''current authorized use including livestock grazing and conservation use.'' BLM must remove conservation use from the definition because of the 1999 10th Circuit Court decision in *Public Lands Council* v. *Babbitt*.

The 1995 final rules defined conservation use as ''authorized active use,'' in contrast to ''nonuse'' and ''suspended use'' even though the term conservation use did, by definition, exclude livestock grazing. The 1995 definition used the term livestock grazing to distinguish between ''active'' authorized grazing use and ''active'' authorized conservation use. Removing conservation use from this definition eliminates the need for this distinction. We propose that the amended definition of active use refer to that portion of grazing preference (see proposed definition, this section) that is now available for livestock grazing use based on the known livestock carrying capacity of the rangeland and the resource conditions in an allotment under a permit or lease. The definition would make it plain that ''suspended use'' is not active use.

Conservation use: The proposed rule would remove the term conservation use, from the definition of ''active use,'' and anywhere else it appears in the existing regulations, in keeping with the 10th Circuit Court decision discussed above. Removing the term conservation use includes revising the definitions of grazing lease and grazing permit to remove all references to conservation use.

Grazing lease: In addition to removing conservation use, BLM proposes editorial changes to this definition to make it easier to read. These changes will not substantively change the current regulations. Several commenters stated that the original meaning of ''grazing lease'' comes from the TGA and has been subsequently changed and therefore, BLM should restore it. The definition is consistent with the TGA. We intend only to make it clear that BLM issues grazing leases to authorize grazing on lands that are not within grazing districts established under the

TGA, and that these leases include both mandatory terms and conditions (livestock number, place of use, period of use, and amount of forage removal), and other terms and conditions of grazing use.

Grazing permit: In addition to removing conservation use, BLM proposes editorial changes in this definition to make the section easier to read. BLM intends to make it clear that BLM issues grazing permits authorizing grazing within grazing districts established under the TGA. These permits include both mandatory terms and conditions (livestock number, place of use, period of use and amount of forage removal), and other terms and conditions of grazing use. Several environmental and conservation advocacy groups said this term was adequately addressed in the last rulemaking effort and they do not think BLM is justified in changing it now. As with the term ''grazing lease,'' this change is only to clarify and standardize, not substantively change, this definition. We are not making substantive changes to this definition other than removing the term conservation use.

Grazing preference or *preference:* BLM is proposing to define ''grazing preference'' or ''preference'' as: ''the total number of animal unit months (AUMs) on public lands apportioned and attached to base property owned or controlled by a permittee, lessee, or an applicant for a permit or lease. Grazing preference includes active use and use held in suspension. Grazing preference holders have a superior or priority position against others for the purpose of receiving a grazing permit or lease.''

This definition is similar to the definition in the grazing regulations in 1978, which was used until the 1995 rule changes. The 1995 definition, which changed preference from a term having a quantitative meaning (number of AUMs) to a qualitative meaning (superior position), has proven to be confusing. We believe that returning to its long standing meaning will provide greater clarity throughout the regulations.

The concept of grazing preference, as we would define it in this rulemaking, includes two elements:

1. Livestock forage allocation on public lands.

2. Priority for receipt of that allocation, as determined through ownership or control of attached base property.

BLM is proposing to define grazing preference as the total number of AUMs within a grazing allotment that BLM has allocated for livestock use. This forage amount would include ''active use,'' use that is currently available, and ''suspended use,'' that is, use that had been allocated and used by the permittee or lessee, or a predecessor, but that currently is not available and therefore the subject of a BLM suspension. These apportioned forage amounts would be attached to base property. Base property, in turn, is land or water owned or controlled by a permittee, lessee, or party who holds or has applied for a permit or lease.

Ownership or control of base property gives the owner or person controlling the property a preference for receiving a grazing permit or lease authorizing grazing use to the extent of the active preference already ''attached'' to that property, and priority for receipt of forage that BLM may later determine to be available for livestock grazing to the extent of any suspended preference that may be attached to that property. Attaching or associating a public land forage allocation to or with base property provides a reliable and predictable way to connect ranch property transactions with the priority for use of the public land grazing privileges that BLM associates with that property. This has been the basis for BLM's system of tracking who has priority for receipt of public land grazing privileges since the enactment of the TGA.

The ranch property transaction alone, however, does not provide absolute assurance of receiving the privileges, for two reasons:

(1) TGA provides that only certain parties qualify for grazing use on public lands. Therefore, if an unqualified party acquires a base property, BLM would not issue the party a term grazing permit or lease, regardless of the preference for public land grazing use associated with the base property that the party acquired; and

(2) The forage amount available for livestock grazing use on public lands can fluctuate because of changed resource conditions or changed administrative or management circumstances. When necessary, BLM may adjust the amount of forage available for livestock grazing. Case law has determined that BLM land use planning decisions may adjust livestock forage allocations made before enactment of the Federal Land Policy and Management Act of 1976 to change grazing use to meet objectives specified in land use plans (*see*, for example, *Public Lands Council* v. *Babbitt*, 529 U.S. 728, 739–744 (2000)).

The 1978 definition of ''grazing preference'' was crafted to meet a specific need. Pre-FLPMA public land livestock forage allocations were linked to base property productivity. This means that among applicants competing for grazing privileges on public lands BLM would not grant privileges to support livestock in excess of the number that they could support on their base property during the time that their livestock were not allowed on public lands. The connection between this base property productivity, called ''commensurability,'' and the amount of grazing privileges granted on public lands was severed by the 1978 regulation change (the same change that defined, for the first time, the term ''grazing preference''). The 1978 rule provided that BLM would associate public land grazing privileges with private base properties on a pro-rata acreage basis, rather than on base property productivity.

This change simplified BLM's record-keeping needs. However, the commensurability requirement served as a guidepost for fair and consistent allocation of available forage. To ensure that the record of allocation was preserved, BLM defined the term ''grazing preference.'' Attaching Federal grazing privileges to base properties has been and continues to be the foundation for adjudicating these privileges. BLM has always had the authority and discretion to adjust grazing levels on public lands. The proposed change will once again associate the term ''preference'' with an amount of allocated forage on public land.

Today's proposed change would ensure that the term ''preference'' is used consistently. For example, 43 CFR 4110.2–3 (4) states, regarding the transfer of preference, that ''The transferee shall file an application for a grazing permit or lease to the extent of the transferred preference * * *'' although preference is defined in the same regulations as a ''priority position,'' that is, a singular quality. One either has a priority position or one does not. It is not possible to define the ''extent'' of a ''priority position'' in terms of anything but a level or amount, and in the context of the remainder of the rule, that would mean a level or amount of forage.

Another inconsistency arises if one considers the circumstance of a parcel of base property owned by one party, giving that party a priority position (preference), which is subdivided and half sold to another party. Then, the single ''preference'' accorded the sole owner now is split into two ''preferences'' because the second party now is accorded preference due to its ownership of base property. The proposed change to this definition and

its usage throughout the rule should provide a consistent framework for the efficient administration of the public rangelands.

Interested public: BLM proposes amending the present definition to mean an individual, group, or organization that has:

1. Submitted a written request to BLM to be provided an opportunity to be involved in the process leading to a BLM decision on the management of livestock grazing on public lands, and

2. Followed up that request by commenting on or otherwise participating in the decision-making process as to the management of a specific allotment if there has been an opportunity for such participation, or

3. Submitted written comments to the authorized officer regarding the management of livestock grazing on a specific allotment, as part of the process leading to a BLM decision on the management of livestock grazing on the allotment.

Permitted Use: BLM proposes removing the definition of ''permitted use'' and replacing this term wherever it occurs in the regulations with either ''grazing preference'' or ''preference,'' or ''active use'' depending on the regulatory context. ''Permitted use'' was introduced as a term in the 1995 regulations change to define an amount of forage allocated by a land use plan for livestock grazing in an allotment. It is expressed in AUMs and includes ''active use'' (which was further divided into ''livestock use'' and conservation use) and ''suspended use.'' As discussed above, BLM is proposing to return to using the term ''grazing preference'' or ''preference'' to refer to that same livestock forage allocation. Therefore, there is no need for the term ''permitted use.'' Grazing preference would have two components:

1. ''Active use,'' or use currently available on a sustained yield basis, and

2. ''Suspended use,'' or use that had been allocated and available for livestock grazing at some point in the past, but is now in suspension until BLM determines that an increased amount of forage is available on a sustained yield basis for allocation to livestock grazing.

Although the connection between land use plans and grazing preference would not be stated in the definition of ''grazing preference'' or ''preference'' as it is being proposed today, the regulatory text would reflect the relationship between ''active use'' and land use plans at §§ 4110.2–2, 4110.3(a)(3), and 4110.3–1 and between grazing permits and leases and land use plans at § 4130.2.

Suspension: BLM proposes to remove the word ''temporary'' from the current definition because the word is superfluous. The status of suspended preference is not affected.

Temporary nonuse: BLM proposes making it clear that ''temporary nonuse'' would mean that portion of active use that BLM allows a permittee or lessee not to use. The permittee or lessee must apply for temporary nonuse.

Subpart 4110—Qualifications and Preference

Section 4110.1 Mandatory Qualifications

We revised this section by moving parts of paragraph (b) and all of paragraph (c), which relate to procedure as opposed to qualifications, to section 4130 and redesignating paragraph (d) as paragraph (c).

Section 4110.2–1 Base Property

The proposed rule makes editorial changes to this section.

Section 4110.2–2 Specifying Grazing Preference

BLM proposes removing the term ''permitted use'' wherever it occurs in this section and replacing it with the term ''grazing preference'' or ''preference'' for the reasons previously explained. BLM does not establish a grazing preference in designated ephemeral or annual rangelands because the forage production on these lands can vary greatly from year to year. On these rangelands, BLM bases the authorized forage removal amount on the availability of forage in that year. As stated earlier, BLM also proposes that grazing preference would include active use and any suspended use.

Section 4110.2–3 Transfer of Grazing Preference

The proposed rule would make editorial changes to this section to conform the rule to the definition of ''grazing preference.''

Section 4110.2–4 Allotments

BLM proposes to remove the requirement that BLM consult with the interested public before making an allotment boundary adjustment because it is primarily an administrative matter that we implement by decision or agreement following a NEPA analysis of the action. BLM would provide the interested public an opportunity to comment on the action as part of the NEPA process. The interested public would also receive a copy of the proposed and final decisions, including those on allotment boundary adjustments, and would be able to protest and appeal such decisions. This change would contribute to administrative efficiency as discussed above under changes to section 4100.0–5, Definitions.

Section 4110.3 Changes in Grazing Preference

BLM proposes to remove the term ''permitted use'' wherever it occurs in this section and replace it with the term ''grazing preference'' for the reasons explained previously. BLM also proposes to simplify this section by dividing the existing text into two paragraphs and adding a third paragraph to clarify that our NEPA documentation addressing changes in grazing preference would include our consideration of the effects of changes in grazing preference on relevant social, economic, and cultural factors.

Generally, BLM managers routinely consider the possible effects of their decisions on these factors through the NEPA process. Public officials use the NEPA process to understand the environmental consequences of potential decisions affecting the human environment. NEPA (42 U.S.C. 4321 *et seq.*) requires Federal agencies to utilize a systematic, interdisciplinary approach to ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making. In the proposed rule, BLM would analyze and, if appropriate, document the relevant social, economic and cultural effects of the proposed action. BLM is proposing the change to ensure that our managers document their consideration of relevant social, economic, and cultural factors when they comply with NEPA.

Section 4110.3–1 Increasing Active Use

In the 1995 rule, section 4110.3–1 addressed ''permitted use.'' This proposed amendment addresses that portion of the livestock forage allocation that is ''active use'' as explained in the discussion of its definition. This change is necessary to link the proposed definitions of ''preference'' and ''suspended use.'' BLM proposes to remove the term ''permitted use'' from this section wherever it appears and replace it with the term ''active use'' for the reasons explained previously.

Because the regulation would affect how we regulate available forage, we are asking the public to comment on whether BLM should use the term ''available forage'' instead of ''active use.''

BLM is also asking for specific comments relating to this section to help determine whether there have been

situations in which the ability of permittees or lessees to obtain loans was adversely affected by having some of their forage allocation suspended.

BLM also proposes to reorganize this section to describe how we would authorize increased grazing use when additional forage is available either temporarily, or on a sustained yield basis. BLM proposes to add two new paragraphs, (a) and (b), that would clarify who gets priority when we grant additional grazing use because livestock forage has become available on either a nonrenewable basis or a sustained yield basis. This change would clarify existing language and does not substantially depart from the requirements of the existing regulations.

Section 4110.3–2 Decreasing Active Use

BLM proposes replacing the term ''permitted use'' with the term ''active use'' wherever it occurs in this section. BLM is proposing to clarify this section by amending paragraph (a) to provide that BLM will document its observations that support the need for temporary suspension of active use and by amending paragraph (b) to provide that BLM will place any reductions in active use made under this paragraph into suspension rather than require a permanent reduction. BLM wants to ensure that it clearly documents the justification for the suspension and believes that it is important to maintain a complete record of forage allocation actions so that it may fairly remove suspensions upon future range recovery.

Section 4110.3–3 Implementing Changes in Active Use

BLM proposes changing the title of this section to reflect that it pertains to both increases and decreases grazing use and to add language to this section to modify how BLM would implement changes in active use. This section would provide that BLM would phase in changes in active use of more than 10 per cent over a 5-year period unless either the affected permittee or lessee agrees to a shorter period or the changes must be made before the end of 5 years to comply with applicable law. When possible, the 5-year phase-in period for changes in active use would provide time for gradual operational adjustments by grazing permittees or lessees to lessen sudden adverse economic impacts that may arise from a reduction, or to allow time to build their herd in the event of an increase. The phase-in period also allows for ongoing monitoring in order to determine whether the initial decision needs to be adjusted. This 5-year phase in period is similar to that specified by the regulations in effect before 1995.

BLM also proposes amending paragraphs (a) and (b) by removing the phrase ''the interested public'' from this section. Any change in active use would be preceded by reports, including NEPA documents, that analyze data that BLM would use to support the change. Under section 4130.3–1, BLM would provide the interested public the opportunity to comment on these reports. Under section 4160.1 BLM would provide a copy of the proposed and final grazing decisions to implement the change to the interested public. BLM will provide the interested public full opportunity for participation and comment on the action prior to actual implementation. For this reason additional consultation with the interested public regarding the actual scheduling of the change is redundant.

Section 4110.4–2 Decrease in Land Acreage

BLM proposes removing the term ''permitted use'' from this section and replacing it with the term ''grazing preference'' for the reasons explained previously.

Subpart 4120—Grazing Management

Section 4120.2 Allotment Management Plans and Resource Activity Plans

BLM proposes to revise paragraph (c) for clarity only.

4120.3 Range Improvements

4120.3–1 Conditions for Range Improvements

BLM proposes to revise paragraph (f) for clarity and to correct a citation to NEPA. The change is not substantive.

4120.3–2 Cooperative Range Improvement Agreements

BLM proposes to revise paragraph (b) to provide that, subject to valid existing rights, cooperators and the United States would share title to permanent structural range improvements constructed under cooperative range improvement agreements on public lands. Such structural improvements include wells, pipelines, or fences constructed on BLM managed public lands. BLM is proposing to revise the regulations to allow contributors to share title to range improvements of public lands proportionate to the value of their contributed labor, material, or equipment to make on-the-ground structural improvements, subject to valid existing rights. This would return the provision on how title for improvements constructed under Cooperative Range Improvement Agreements is shared to that in place before 1995.

During scoping, BLM received comments supporting and opposing the revision. Some opponents to the revision commented that, by re-instituting shared title to range improvements, BLM would be allowing private property rights on public lands. Some commenters supported the provision, stating that it gives livestock operators, who pay for and construct improvements, incentive to invest funds, time, and effort in their allotments.

The current regulations provide that the United States has title to new permanent structural range improvements. BLM has the discretion in administrating the public rangelands to determine where title to range improvements should lie. Sharing title among cooperators and the United States provides the opportunity to maintain some asset value for investments made, thereby encouraging and facilitating private investment in range improvements. Granting title to a structural improvement on public lands does not grant title to the underlying lands. Cooperative Range Improvement Agreements will continue to include provisions that protect the interests of the United States in its lands and resources and ensure BLM's management flexibility on public lands.

Section 4120.3–3 Range Improvement Permits

BLM must remove the term conservation use from this section to comply with the decision of the Tenth Circuit Court of Appeals.

Section 4120.3–8 Range Improvement Fund

BLM is proposing to amend this section only to correct a misspelling.

Section 4120.3–9 Water Rights for the Purpose of Livestock Grazing

BLM proposes to amend this section by removing the reference date in the first sentence and the second sentence in total. This would remove the requirement that livestock water rights be acquired, perfected, maintained and administered in the name of the United States to the extent allowed by the laws of the states where the rights would be acquired. The proposed amendment would provide BLM greater flexibility in negotiating arrangements, within the scope of state processes, for construction of watering facilities in states where the United States is allowed to hold a livestock water right. In those states, BLM would continue to have the option of acquiring the water

right as long as we do so in compliance with state water law.

Section 4120.5–2 Cooperation with State, County, and Federal Agencies

BLM proposes amending this section by making an editorial correction and adding a new paragraph (c) to specify that BLM would add state, local, and county-established grazing boards to those groups we routinely cooperate with in administering laws and regulations relating to livestock, livestock diseases, and sanitation. Currently BLM's Resource Advisory Councils provide advice to BLM on the broad range of multiple use activities on public lands including grazing management. Field-level range improvement and allotment management planning programs would also benefit from the additional perspective that locally established grazing advisory boards could provide.

Many states have state, county, or locally established grazing advisory boards whose function is to provide guidance on range improvements on public lands. Section 401(b)(1) of FLPMA states that a portion of the grazing fees BLM collects are set aside for range betterment. BLM is authorized to use one-half the amount collected from the area in which the moneys were derived. BLM may direct these funds after consulting with local area user representatives, to implement on-the-ground range rehabilitation, protection, and improvements on the lands.

Grazing interests and state and local governments expressed concern that BLM has not used state, county, and locally established grazing advisory boards effectively. They commented that these grazing advisory boards are underutilized, yet are a valuable tool for gathering local input for BLM's decision-making processes related to range improvements and allotment management planning. This proposed rule would require BLM to cooperate with state, county, or locally established grazing advisory boards when reviewing range improvements and allotment management plans on public lands. A requirement for BLM to cooperate with such boards would ensure a consistent community-based decision-making process throughout the BLM.

Subpart 4130—Authorizing Grazing Use

Section 4130.1–1 Filing Applications

The existing regulations are somewhat unclear as to the circumstances under which BLM will consider an applicant for a new permit or lease not to have a satisfactory record of performance.

The existing regulations state that we deem applicants for renewals of permits and leases not to have a satisfactory record of performance if:

1. They have had a Federal lease canceled within the previous 36 months;

2. They have had a state lease canceled, for lands in the grazing district where they are seeking a Federal permit, within the previous 36 months, or

3. They have been legally barred from holding a grazing permit or lease.

Under the proposed regulations BLM would limit the number of possible infractions that we would take into account for determining whether an applicant for a new permit has a satisfactory record of performance. The proposed rule would deem applicants for issuance of a new permit or lease to have a satisfactory record of performance if:

1. The applicant or affiliate has not had a Federal lease canceled within the previous 36 months;

2. The applicant or affiliate has not had a state lease canceled, for lands in the grazing district where they are seeking a Federal permit, within the previous 36 months, or

3. The applicant or affiliate has not been legally barred from holding a federal grazing permit or lease by a court of competent jurisdiction.

In addition, BLM proposes moving provisions specifying what we consider to be ''satisfactory performance'' by an applicant for a permit or lease from section 4110.1 to this section to better organize the regulations.

Section 4130.2 Grazing Permits or Leases

BLM proposes revising this section to make it clear that the grazing permit or lease is the document BLM uses to authorize grazing use for those who hold grazing preference on BLM-managed lands. BLM has been questioned about what we consider to be the fundamental document authorizing preference holders' grazing use. This section makes it clear that it is the permit or lease that authorizes such grazing use and no other document. An example of such a non-authorizing document is a paid grazing fee billing. Although not paying a fee when it is due is a prohibited act, the document upon which BLM bases fees, either a permit or lease, is the document that authorizes the grazing use, not the billing. BLM also uses ''other grazing authorizations'' such as free use permits, exchange-of-use permits, and crossing permits to authorize grazing for preference and non-preference holders in limited circumstances. These are addressed in §§ 4130.5 and 4130.6.

We propose removing the phrase ''types and levels of use authorized'' from paragraph (a) and replacing it with the term ''grazing preference'' because the level of use, the forage amount expressed in AUMs, and the ''type'' of use, whether active or suspended, are embodied in the term ''grazing preference.''

We also propose removing the requirement in paragraph (b) that BLM would consult, cooperate, and coordinate with the interested public prior to the issuance or renewal of grazing permits and leases because this consultation is redundant to consultation that already would have occurred as part of the process of completing NEPA analysis and other documentation that is pre-requisite to permit or lease issuance or renewal.

Section 4130.3 Terms and Conditions

BLM proposes adding a new paragraph to this section to specify that when BLM offers a permit or lease, the terms and conditions may be protested and appealed unless the terms and conditions are not subject to OHA appeals (*e.g.* terms and conditions mandated by a biological opinion issued under the Endangered Species Act) or terms and conditions that are part of a permit or lease offered for grazing use on additional land acreage (*see* 4110.1). The proposed rule further states that if those terms and conditions are stayed, BLM could authorize grazing use in accordance with section 4160.4. By adding this language, BLM seeks to clarify that we are providing the opportunity to protest and appeal decisions that specify the terms and conditions of the permit or lease we are offering.

Section 4130.3–2 Other Terms and Conditions

BLM proposes removing paragraph (h) from this section because it is unnecessary. There is no need to disclose on the permit or lease the requirement that the permittee or lessee provide administrative access to BLM. The absence of such disclosure under the proposed rule would not affect the underlying requirement. In 1999 IBLA held that administrative access is an implied condition of a grazing permit whenever administrative access is necessary in order for BLM to carry out its statutory responsibilities on the public lands. (IBLA 98–180R; 98–404R)

Section 4130.3–3 Modifications of Permits or Leases

BLM proposes to amend this section to make it clear that BLM may modify terms and conditions of a permit or lease if we determine that either the active use or related management practice is no longer meeting the management objectives specified in the land use plan, an allotment management plan, or an applicable decision issued under section 4160.3. In addition, BLM is removing the regulatory requirement that we consult with the interested public on any decisions to modify terms and conditions on a permit or lease for the reasons discussed previously.

In the proposed rule the interested public retains, to the extent practical, the opportunity to review and provide input on reports supporting BLM's decisions to increase or decrease grazing use. In clarifying this provision, BLM recognizes that the interested public, permittees and lessees, and the state should all have opportunity to review and submit input to Biological Assessments when they are used to supplement grazing management evaluations.

BLM also proposes to reorganize this section for the sake of clarity and logical flow.

Section 4130.4 Authorization of Temporary Changes in Grazing Use Within the Terms and Conditions of Permits and Leases

BLM is proposing to amend section 4130.4 to provide additional detail on what is meant by the phrase ''within the terms and conditions of the permit or lease.'' BLM proposes that when we refer to ''temporary changes within the terms and conditions of the permit or lease,'' we mean changes to the number of livestock and period of use that BLM may grant in any one grazing year. We would authorize such changes in response to annual variations in growing conditions that arise from normal year-to-year fluctuations in temperature and the timing and amounts of precipitation and to meet locally established range readiness criteria. Under the proposed regulations, ''within the terms and conditions of a permit or lease'' means that grazing use will:

1. Not result in removing more forage than the ''active use'' specified by the permit or lease;

2. Begin no earlier than 14 days before the grazing begin date specified by the permit or lease, and end no later than 14 days after the grazing end date specified by the permit or lease.

Providing for temporary changes allows sufficient flexibility to BLM land managers, permittees, and lessees to address seasonal and annual changes, thereby supporting efficient and responsive management of public rangelands.

Livestock periods of use established by the grazing permits are based on the anticipated average dates that the range is ''ready'' to be grazed. ''Range readiness'' is the stage of plant growth at which grazing may begin without doing permanent damage to the vegetation community or the soil. The point where the range is ''ready'' for grazing use can and does vary from year to year around a long-term average date of readiness. A 14-day flexibility period on either side of the grazing begin and end dates specified by the permit or lease is a reasonable way to allow for minor adjustments in grazing use in response to these variations to better correspond grazing use to rangeland conditions. BLM would consider applications for changes in grazing use ''within the terms and conditions of the permit or lease'' on a case-by-case basis. If BLM approves the change, no formal action other than the issuance and payment of a relevant grazing fee billing would be required. The change would not constitute a formal permit or lease modification. In other words, a temporary change that BLM allowed in one year to respond to the conditions of that year would not be carried forward to the next year. BLM would not consider an application for grazing use that falls outside of this flexibility ''within the terms and conditions'' of the authorizing permit or lease.

BLM proposes to move provisions addressing approval of ''temporary nonuse'' from section 4130.2 to this section and amend them to allow BLM to have the discretion to approve applications on a year-to-year basis for temporary nonuse of all or part of the grazing use authorized by a permit or lease when the nonuse is warranted by rangeland conditions or the personal or business needs of the permittee or lessee. Events such as drought, fire or less than average forage growth typically result in ''rangeland conditions'' that will prompt the need for temporary nonuse of all or part of the grazing use allowed by the permit or lease.

When rangeland conditions are such that less grazing use would be appropriate, BLM encourages operators, if they have not done so already, to apply for nonuse for ''conservation and protection of rangeland resources.'' This is the simplest way to achieve temporary reduced use to respond to rangeland condition needs. In some cases, approval of an application for temporary nonuse precludes the need for BLM to issue a decision to temporarily suspend use under section 4110.3–3(b), although BLM retains the discretion to do this. ''Personal and business needs'' of the grazing operator refer to actions operators take in the course of managing their business, such as livestock sale, that result in temporary herd size reductions.

Paragraph (e) of this section (paragraph 4130.2(h) in the existing regulations, as revised for clarity) would continue BLM's current discretion to issue a nonrenewable authorization to other qualified applicants to use the forage that became temporarily available as a result of nonuse approved for business or personal reasons. When BLM approves nonuse because we agree that rangeland conditions would benefit from temporary nonuse, we would not authorize another operator to use it. We propose moving the current paragraph (a) to the end of this section and redesignating it as paragraph (f). In newly designated paragraph (f), BLM makes several editorial changes.

BLM also proposes to remove the current three-consecutive-year limit on temporary nonuse. In the ANPR we stated that we would be considering increasing the number of consecutive years that we could authorize temporary nonuse from 3 years to 5 years. In response, BLM received numerous comments on this topic. Some commenters appeared to be confused about this provision as presented in the ANPR because they did not distinguish between the permittee-initiated action of applying for nonuse in proposed section 4130.3 and a BLM initiated action to change preference in proposed section 4110.3. Other commenters asked BLM to allow longer periods of temporary nonuse, and some expressed concerns that extending the authorized nonuse could have impacts on a permittee's ability to retain water rights. We are proposing that BLM have the same discretion to approve temporary nonuse as existed before the 1995 rule changes, to provide us with management flexibility needed to respond to the common occurrence of site-specific fluctuations in available forage levels that may occur for a variety of reasons as explained above.

Section 4130.5 Free-Use Grazing Permits

The proposed rule would remove reference to conservation use in paragraph (b)(1) of this section to conform the regulation to the decision of the Tenth Circuit Court of Appeals. We also propose to remove the word ''authorize'' to keep the rule internally consistent.

Section 4130.6–2 Nonrenewable Grazing Permits and Leases

The proposed changes to this section would remove the requirement that BLM consult with the interested public before issuing nonrenewable permits and leases. BLM issues nonrenewable permits and leases to allow grazing use of additional forage that is temporarily available. One circumstance under which we would apply this is when BLM has approved an application for nonuse for personal or business reasons as described above. Another circumstance where this regulation might apply is to manage grazing use authorized on ''cheatgrass'' ranges.

Cheatgrass (*Bromus tectorum*), a nonnative introduced annual, is established on vast acreages in the intermountain west. Its growth characteristics are such that under favorable growing conditions, ranges dominated by cheatgrass may produce 5 times or more forage than what that same range produces in a year experiencing average growing conditions. Its value as forage, however, is limited (hence the common name) because its nutritional value diminishes rapidly by summer, when it dries and becomes highly flammable. Grazing permits issued for use of ''cheatgrass range'' specify stocking rates on the number of livestock that can be supported in the ''average'' growth year, and provide generally that we allow use during the spring, when the cheatgrass can meet livestock nutritional needs. When the growth year is favorable, cheatgrass range provides more forage, and in some cases considerably more forage, than that which is allowed to be grazed under the term grazing permit. When this occurs, BLM must be able to respond rapidly to applications for temporary and nonrenewable grazing use because forage quality declines rapidly as the season progresses. Because BLM provides full opportunity for the interested public to comment during the NEPA and planning processes, and because consultation can be a time-consuming process, not generally conducive to the ''rapid response'' needed to take advantage of situations that would give rise to approval of an application for temporary and nonrenewable use, BLM is proposing to remove the additional public consultation requirement before issuing temporary and nonrenewable grazing permits or leases.

Section 4130.8–1 Payment of Fees

BLM is proposing editorial changes to this section to make it easier to read and corrects a cross-reference in the existing regulations in paragraph (f) (paragraph (h) in the proposed rule) to subpart 4160.

Section 4130.8–3 Service Charge

The proposed rule would remove the reference to conservation use in this section to conform to the Tenth Circuit decision.

BLM is authorized under FLPMA to assess a service charge that reflects our processing costs. The current regulations provide for periodic fee adjustments as costs change. BLM has not adjusted our service charges in many years. When BLM does make changes, the current regulations require public notification in the **Federal Register**.

Except when BLM initiates an action, we are proposing to increase service charge fees as shown in the following table:

Action	Current service charge	Proposed service charge
Issue Crossing Permit ..	$10	$75
Grazing Preference Transfer	10	145
Canceling and replacing grazing fee billing	10	50

As required by Section 304(b) of FLPMA, the service fees on this chart represent BLM's average cost of processing these applications less the estimated portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant.

Subpart 4140—Prohibited Acts

The current regulations specify a number of prohibited acts. Some of the prohibited acts apply only to grazing permittees or lessees while others apply to anyone who commits those acts while on BLM lands. There are 3 different categories of prohibited acts in the current regulations.

The first category of prohibited acts is set forth in section 4140.1(a) which provides that permittees and lessees who perform any of the 6 prohibited acts listed under this section may be subject to civil penalties under § 4170.1 (*e.g.*, withholding issuance, suspending, or canceling a permit or lease.) Examples of prohibited acts in this category include: violations of special terms and conditions of permits or leases and refusing to remove range improvements when BLM directs their removal. In this category, BLM is proposing to clarify the provision which prohibits the placement of supplemental feed on public lands without authorization. Under the proposed regulation, we are proposing to add that placement of supplemental feed without authorization ''or contrary to the terms and conditions of the permit or lease'' is a prohibited act. This will further clarify the intent of this section to ensure strict compliance with the terms and conditions of the permit or lease.

A second category of prohibited acts is set forth in section 4140.1(b). Any person (not just a permittee or lessee) who performs one of the 11 prohibited acts in this section is subject to civil and criminal penalties under sections 4170.1 and 4170.2. Examples of the prohibited acts identified in this section include: allowing livestock or other privately owned or controlled animals to graze on or be driven across public lands without a permit or lease; destroying vegetation; and damaging property owned by the United States. BLM is proposing to clarify that a violation of any of the prohibited acts set forth in § 4140.1(b) must occur on BLM-administered lands to be considered a violation. BLM is also proposing to modify and clarify one of the prohibited acts in this section. The current rule at § 4140.1(b)(1)(i) states that it is a prohibited act to graze livestock without a permit or lease and ''an annual grazing authorization.'' This paragraph would be revised to state that it is a prohibited act to graze without a permit or lease or other grazing use authorization and ''timely payment of grazing fees.'' This revision would more accurately characterize the relationship between the document that authorizes grazing, the permit or lease, and the requirement to pay grazing fees as stated in Section 3 of the Taylor Grazing Act. Section 3 states:

> The Secretary of the Interior is * * * authorized to issue * * * permits to graze livestock * * * to settlers, residents and other stock owners * * * upon the payment annually of reasonable fees * * *.

The requirement to pay fees annually has led to the characterization of a paid grazing fee billing as an ''annual grazing authorization'' for the purposes of applying other provisions of the regulations such as requirements for consultation, the ability to protest and appeal grazing decisions, and what grazing use BLM may authorize if a grazing permitting decision is stayed. This change is intended to make this regulation consistent with the regulation at section 4130.2 which provides that the grazing permit or lease is the document that authorizes grazing use on public lands.

The third category of prohibited acts is set forth in section 4140.1(c). Under this provision, the BLM may take civil

action under section 4170.1 against a grazing permittee or lessee that violates any of the prohibited acts identified in this section. For this category of prohibited acts, unlike the first two categories, the primary responsibility for enforcement generally rests with a Federal or state agency other than BLM. Three sets of prohibited acts are identified in this section. The first set consists of Federal or State laws or regulations pertaining to 6 different activities. Examples include: placement of poisonous bait or hazardous devices designed for the destruction of wildlife; pollution of water resources; and illegal removal or destruction of archeological or cultural resources. The second set of prohibited acts in this section identifies as prohibited acts the violation of specific laws and regulations including the Bald Eagle Protection Act, Endangered Species Act, and any provision of the regulations concerning wild horses and burros. The third set of prohibited acts in this section identifies as prohibited acts the violation of State livestock laws or regulations relating to branding and other livestock related issues. BLM proposes to retain the provisions in the third category of prohibited acts which allow us to withhold, suspend, or cancel all or part of a grazing permit if the lessee or permittee is convicted of violating any of the prohibited acts. The proposed rule would, however, clarify and limit BLM's enforcement authority by limiting its application to prohibited acts performed by a permittee or lessee on his allotment where he is authorized to graze under a BLM permit or lease. This change is intended to further ensure that the performance of the prohibited act is related to the permit or lease under which the violator is operating.

In the ANPR, BLM announced that it was considering which ''non-permit related'' violations BLM may take into account in penalizing a permittee. BLM received numerous comments opposing and supporting changes to this section. Many affiliates of the livestock industry characterized the current rule's provisions as a form of ''double jeopardy.'' BLM does not believe that violation of the Federal or state laws listed in section 4140.1 violates the Double Jeopardy Clause of the Fifth Amendment of the Constitution when a civil sanction, such as suspending or canceling a permit after conviction for violating environmental laws on an allotment where an individual has a permit or lease to graze, furthers the legitimate objective of encouraging responsible stewardship of public rangelands. Therefore, section 4140.0 is not a punitive measure that can be viewed as causing multiple punishments for the same offense. Furthermore, both the Endangered Species Act (ESA) and the Bald Eagle Protection Act (BEPA) provide for grazing sanctions. The ESA provides that if a Federal grazing permittee or lessee is convicted for a criminal violation of the Act, the agency may suspend, modify, or revoke the permit or lease. The BEPA provides that the head of a Federal agency that issues a grazing permit or lease may immediately cancel such permit or lease when a person who holds it is convicted of violating the Act. Commenters who opposed any changes in the prohibited acts section of the regulations urged BLM to retain current authority to cancel, suspend, or deny permits when the violation is related to environmental protection.

Subpart 4150—Unauthorized Grazing Use

Section 4150.3 Settlement

Existing paragraph (e) of this section has been modified to correct the reference to subpart 4160. We also propose adding a new paragraph (f) to this section to specify that if a permittee or lessee obtains a stay of a decision that demands payment or cancels or suspends a grazing authorization, BLM will allow him to graze under his existing authorization pending resolution of the appeal. This proposed change clarifies existing procedures and will ensure consistent implementation of the regulations.

Subpart 4160—Administrative Remedies

Section 4160.1 Proposed Decisions

BLM proposes to amend this section to specify that a biological evaluation or biological assessment that BLM prepares for purposes of the Endangered Species Act (16 U.S.C. 1531–1544) (ESA) is not a proposed decision for purposes of a protest to BLM, or a final decision for purposes of an appeal to the Office of Hearings and Appeals under the Taylor Grazing Act. This provision would prospectively supersede the decision of the Interior Board of Land Appeals (IBLA) in *Blake* v. *BLM,* 145 IBLA 154, 166 (1998) *aff'd*, 156 IBLA 280 (2000), holding that the protest and appeal provisions of 43 CFR subpart 4160 apply to a biological evaluation or biological assessment.

A Federal agency prepares a biological assessment or biological evaluation when it considers action that may affect species or habitats that are protected under the ESA and are located on land managed by the Federal agency. A biological assessment or biological evaluation necessarily identifies what action an agency is considering, so that the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) can prepare a biological opinion pursuant to section 7 of the ESA (16 U.S.C. 1536). In addition, a description of the contemplated action would be necessary under proposed section 4130.3–3(b), which would provide for consultation with the interested public and others during the preparation of biological assessments or biological evaluations, to the extent practical. However, biological assessments and biological evaluations are tools that the FWS and the NMFS use to decide whether to initiate formal consultation under section 7 of the ESA. Therefore, they are not proposed grazing decisions that may be protested to BLM, or final grazing decisions appealable to OHA. If formal consultation is not required upon completion of the biological assessment, BLM will issue a proposed decision, such as the issuance of a permit or lease, that may be protested and appealed. If formal consultation is required, upon completion of the Section 7 consultation process BLM will issue a decision that may be the subject of protest and appeal.

Section 4160.3 Final Decisions

In order to reconcile statutory directives found in the Administrative Procedure Act, 5 U.S.C. 701–706 (APA), TGA and FLPMA, BLM proposes to amend this section by—

- Cross-referencing the Department's administrative appeals regulations,
- Clarifying the requirement that one must exhaust administrative remedies, and
- Defining what grazing is authorized while an administrative appeal is pending.

Current paragraph (c) states the 30-day deadline for filing an appeal of a final grazing decision or of a proposed decision that has become final ''by default'' because no party protested it. The proposed rule would move this text to section 4160.4 on Appeals, where it more properly belongs. BLM believes that the proposed revision would avoid duplication and more clearly cross-reference procedures applicable to grazing decision appeals in the regulations at 43 CFR 4.470. Paragraph (f) of this section would be redesignated paragraph (c) and edited for clarity.

Current paragraphs (d) and (e) describe what grazing is authorized if a petition for stay of a final grazing

decision is granted by the Office of Hearings and Appeals. Additional discussions related to those paragraphs appear in section 4160.4, below.

Section 4160.4 Appeals

The proposed rule would amend this section by adding language clarifying how the appeal of a BLM grazing decision, and a petition for a stay of the decision pending appeal, affect the effectiveness of the decision and the continuity of ongoing grazing operations, if any. The current provision merely states the procedural requirements for filing appeals, and defers to the Department of the Interior regulations at 43 CFR 4.470, which do not address the issues of whether and to what degree ongoing activities should continue in the face of an appeal or stay.

The APA provides a right of action against agencies and officers of the United States to persons adversely affected or aggrieved by agency action. However, such action may be sought in a federal court only when a decision is ''final.'' 5 U.S.C. 704. An agency action is not considered final where the agency requires by rule that an administrative appeal to a superior agency authority be filed and provides that the agency action is inoperative while the appeal is pending. The Department's administrative appeals regulations recognize the requirement that a party must first exhaust administrative remedies before resorting to Federal Court: ''No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for a stay of decision has been timely filed and the decision being appealed has been made effective. * * *'' 43 CFR 4.21(c).

Under the Department's administrative appeals regulations, unless the authorized officer, the Director of OHA, or IBLA places a decision in immediate effect, a BLM grazing decision is ineffective until the 30-day appeal period expires. If a petition for stay is filed within the appeal period, the decision is not in effect for 45 days after the expiration of the appeal period or until OHA acts on the stay petition, whichever occurs first. If the stay is not granted, the party has exhausted his administrative remedies and may seek review in federal court. If a stay is granted, the decision, with exceptions discussed below, is inoperative while the appeal is pending, and thus under the APA a party must exhaust his administrative remedies before resorting to federal court.

There are instances, however, where grazing may continue even though an appeal has been filed and a stay of the decision has been granted. These situations do not, however, present a conflict with the ''finality'' requirement found in the APA. The first example occurs when a party appeals, but does not seek a stay of the decision. In such a case the decision will be in effect after the 30-day appeal period, but it is not considered ''final'' for purposes of the APA since the party did not exhaust his administrative remedies. Under the current regulations, grazing is allowed even after the decision is stayed when there was no valid permit or lease in effect at the time of the appealed decision. BLM regulations provide that in such a situation, grazing would be allowed consistent with the appealed decision even when the decision is stayed. In such a case, a party would have fully complied with OHA's regulations pertaining to exhaustion of administrative remedies, but grazing would be allowed. BLM believes it is necessary to allow grazing even if a stay is granted because the OHA regulations do not establish time frames for resolution of appeals. To do otherwise would potentially eliminate grazing and deny a user the ability to graze the lands for years awaiting an administrative decision. As a result, a party could seek judicial review of the decision since the decision would be effective during the appeal. In cases such as these, the BLM is attempting to find a balance between the exhaustion of administrative remedies under the APA and its responsibilities under FLPMA and TGA to:

- Manage lands for multiple use and sustained yield,
- Regulate the occupancy and use of the rangelands,
- Safeguard grazing privileges,
- Preserve the public rangelands from destruction or unnecessary injury, and
- Provide for the orderly use, improvement, and development of the range.

BLM proposes to set forth the kinds of grazing decisions that would be rendered inoperative by the granting of a stay of a BLM grazing decision:

- Those that modify terms and conditions of a permit or lease during its current term or during the renewal process; and
- Those that offer a permit or lease to a preference transferee with terms and conditions that are different from the previous permit or lease terms and conditions.

It is proposed that if a stay of either of these kinds of decisions is granted, the immediately preceding grazing authorization would not expire and the affected permittee, lessee, or preference applicant would continue grazing under the immediately preceding grazing authorization, subject to any applicable provisions of the stay order and subject to the provisions of proposed section 4130.3(b).

As a result, the appealed decision is inoperative. Nonetheless, grazing under the prior grazing authorization would continue under the APA provision at 5 U.S.C. 558 requiring that ''a license with reference to an activity of a continuing nature'' does not expire until an agency makes a new determination. Thus, a permittee or lessee who has made timely and sufficient application for a renewal or a new license in accordance with part 4100 would not have his permit or lease expire until the application has been finally determined by the Department of the Interior (5 U.S.C. 558(c)). This approach reconciles the exhaustion provision of the APA and the expectation set forth in the APA that a permittee will continue to operate under the immediately preceding authorization in order to ensure security of tenure.

Where a party has no valid grazing authorization at the time that the decision is rendered, there is a reduction in area available for grazing use, or the applicant is seeking use of ephemeral or annual rangelands, BLM could not authorize use based on the previous year's authorization. Thus, under the proposed rule, grazing would continue pursuant to the decision even in the case of a stay when a decision:

- Modifies a permit or lease because of a decrease in public land acreage available for grazing;
- Affects an application for grazing use of BLM-designated ephemeral or annual rangeland;
- Affects an application for additional forage temporarily available;
- Affects an application for a grazing permit or lease that is not made in conjunction with a preference transfer application.

In these cases, BLM would authorize grazing consistent with the final decision that has been stayed, and affected parties could resort to the Federal Courts without exhausting administrative remedies.

BLM specifically invites comment on this section regarding how it might effectively incorporate both the exhaustion and ''activity of a continuing nature'' requirements of the APA, and ensure that the public land grazing is managed in such a way as to meet the direction of the TGA and FLPMA.

Subpart 4170—Penalties

Section 4170.1–2 Failure To Use

BLM proposes to remove the term ''permitted use'' from this section and replace it with the term ''active use.'' This is consistent with our proposed definitions.

Subpart 4180—Fundamentals of Rangeland Health and Standards and Guidelines for Grazing Administration

Section 4180.1 Fundamentals of Rangeland Health

BLM proposes revising the introduction to provide that BLM will take action to change grazing management so that it will assist in achieving the fundamentals, only if there are no applicable standards and guidelines in place.

In the preamble to the final rule for the 1995 grazing regulation amendments, the fundamentals of rangeland health were identified as the basic components of rangeland health and were intended to serve as overarching principles to be supplemented by the standards and guidelines. Stated another way, the standards and guidelines were to be developed under the umbrella of the fundamentals. As such, the standards and guidelines serve as more locally specific measures of rangeland health and acceptable management practices consistent with intent of the fundamentals.

Under the existing regulations at section 4180.1, BLM is required to take appropriate action upon determining that existing grazing management needs to be modified to ensure that the four conditions, which make up the fundamentals of rangeland health, exist. In addition, under the existing regulations at section 4180.2, BLM is required to take appropriate action upon determining that existing management practices or levels of grazing use on public lands are significant factors in failing to achieve the standards and conform to the guidelines for grazing administration. Where regionally specific standards and guidelines have been developed and approved, there is no need for BLM managers to make two separate determinations as suggested by the existing rule. An evaluation of standards attainment and guidelines conformance to determine whether existing grazing management practices or levels of grazing use are significant factors in failing to achieve the standards and conform with the standards and guidelines will effectively satisfy the requirement for an evaluation to determine if existing grazing management needs to be changed to ensure the existence of the conditions as defined by the fundamentals. Thus, an evaluation relating to the fundamental of rangeland health is necessary only in those circumstances where standards and guidelines have not been developed and approved.

BLM proposes revising the introduction also to change the amount of time BLM would need to take action to ensure that resource conditions conform to the requirements of this section. The deadline would change from not later than the start of the next grazing year to not later than the start of the grazing year following BLM's completion of action, including consultation under sections 4110.3–3 and 4130.3–3. This change will provide time for BLM to complete relevant and applicable requirements of law and regulation, such as NEPA compliance documentation, consultation under ESA if applicable, and required consultation under sections 4110.3–3 and 4130.3–3. BLM is doing this because some decisions must address complex resource management circumstances and require time to determine the most appropriate course of action.

BLM received few comments on this provision in response to the ANPR. The ANPR stated that we are considering whether to amend the provision stating when BLM will implement action that changes grazing management after determining that the allotments used by a permittee or lessee are not meeting or significantly progressing toward meeting land health standards. Most of the comments BLM received asked us to implement stricter adherence to the already existing standards and to establish time frames for compliance and consequences for not achieving those time frames. We believe the current framework is effective and achieves compliance. Other commenters asked that we move the fundamentals of rangeland health provisions to Subpart 1610, Resource Management Planning. At this time we plan to leave the health standards in the grazing portion of our regulations.

Section 4180.2 Standards and Guidelines for Grazing Administration

BLM proposes revising paragraph (c) to provide that we would require both assessments of standards attainment and monitoring to support a determination that grazing practices are a significant factor in failing to achieve, or not making significant progress towards achieving rangeland health standards. BLM's current policy is to use all available relevant information, including monitoring data when available, to assess standards attainment.

The change proposed by this rule would require that BLM support standards attainment determinations with assessment and monitoring data.

We would also revise paragraph (c) to provide that within 24 months following a determination that current grazing practices are a significant factor in failing to achieve or make progress towards achievement of standards, BLM would, in compliance with applicable law and with consultation requirements, analyze, formulate, and propose appropriate action intended to remedy the failure to meet the standards. Under the current rule, following the determination BLM must take appropriate action ''before the start of the next grazing year.''

The new provision states that these requirements would be met upon execution of an agreement or issuance of a final decision to implement appropriate action. Following the agreement or decision, and resolution of any appeals to the decision, BLM would be required to implement the appropriate action before the start of the next grazing year.

BLM also proposes removing the phrase ''Category 1 or 2'' with respect to the designation of special status to candidate threatened and endangered (T&E) species because the FWS no longer uses these designations.

These changes are being proposed for several reasons. BLM recognizes that one of the thrusts of ''Rangeland Reform '94'' was to require BLM to implement timely and responsive remedial action upon determining that existing grazing practices were preventing achievement of rangeland health standards. Since the implementation of this rule, BLM has found that in many cases, requiring our field offices to take action ''before the start of the next grazing year,'' *i.e.* within a maximum of 12 months of the determination, is insufficient time to complete the governmental processes involved in making a reasoned choice regarding the appropriate action, and it does not allow for operation adjustments by the affected grazing operators that are not unduly economically disruptive.

Arriving at a proposed remedial response that requires gathering and analyzing relevant information and necessary coordination takes time. BLM must then consider the appropriate action and document reasonable alternatives in accordance with NEPA. Consultation under ESA, which can be time-consuming, may be required at this stage. Then, BLM must develop a proposed grazing decision that

implements the action, which is subject to protest and appeal. Should the final decision be stayed pending appeal, further time is consumed. In practice, implementing appropriate action within 12 months of determining that grazing practices need to be changed is unrealistic in many cases. BLM proposes to extend its self-imposed deadline to 24, rather than 12 months in which to complete these processes. BLM believes that this will allow the necessary time to deliberate and implement responsive, reasonable, and lasting remedies.

V. Procedural Matters

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget determined that these proposed regulations are a significant regulatory action and therefore subject to review under Executive Order 12866. These proposed regulations would not have an effect of $100 million or more on the economy. The proposed regulatory changes would not adversely affect, in a material way, the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

The proposed rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. BLM is aware that there are differences between its grazing program and the program administered by the U.S. Forest Service (USFS). For example, the USFS regulations and procedures do not include a temporary suspension category, unlike the BLM proposal in section 4110.3–2. The USFS regulations at 36 CFR 222.9(b)(2) provide that title to permanent structural range improvements on National Forest System lands such as pipelines and water troughs remains with the United States, unlike the BLM proposal in section 4120.3–2 that allows for the sharing of the title for some improvements with permittees and lessees. The USFS regulations may provide for a more streamlined process to modify grazing permits, particularly in situations where grazing activities need to be restricted.

Despite these and other differences, BLM believes that any inconsistencies between BLM's grazing program and USFS' are not serious and will not interfere with actions taken or planned by the agencies. They merely represent differences in management approach and philosophy. However, we specifically invite public comment on whether any inconsistencies between the regulations and practices of the two agencies interfere with the operations of any BLM lessees or permittees, or otherwise inconvenience them or any other stakeholders.

These proposed regulations do not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the right or obligations of their recipients; nor do they raise novel legal issues. However, the proposed rule raises novel policy issues by reversing or otherwise changing policy established in a 1995 rule.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act (RFA) of 1980, as amended, 5 U.S.C. 601–612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. BLM prepared an Initial Regulatory Flexibility Act Analysis to address changes we are considering in this proposed rule and has concluded that this proposed rule will not have significant economic impact, either detrimental or beneficial, on a substantial number of small entities. This document is available for review at 1620 L Street NW., Washington, DC 20036 and on the Internet at *http://www.blm.gov.grazing.*

The proposed rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The proposed change would not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients; nor does it raise novel legal or policy issues, except as discussed in the previous section of the preamble.

Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a ''major rule'' as defined at 5 U.S.C. 804(2). The changes BLM is proposing to the current grazing regulations would not result in an effect on the economy of $100 million or more, in an increase in costs or prices, or in significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The changes BLM proposes are intended to clarify existing requirements and qualifications. These changes would positively affect all applicants, whether small entities or not.

Unfunded Mandates Reform Act

This amendment of 43 CFR Part 4100, as proposed, would not result in any unfunded mandate to state, local, or tribal governments, or to the private sector, in the aggregate, of $100 million or more. The rule would continue and strengthen requirements for BLM to consult with all of these governmental and other entities whenever they would likely be affected by our actions relating to livestock grazing.

Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights

The proposed rule does not represent a government action capable of interfering with constitutionally protected property rights. The relevant statutes and regulations governing grazing on Federal land and case law interpreting these statutes and regulations have consistently recognized grazing on Federal land as a revocable license and not a property interest. Therefore, the Department of the Interior has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 13132, Federalism

The proposed rule would not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. BLM's inability to issue conservation use grazing permits neither hinders nor enhances authority vested in states or local governments. The rule would continue and strengthen requirements for BLM to consult with all of these governmental and other entities whenever they would likely be affected by our actions relating to livestock grazing. Therefore, in accordance with Executive Order 13132, BLM has determined that this proposed rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 13175 Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have determined that this rule does not include policies that have tribal implications. The rule expressly does not apply to, and these rules

expressly exclude, Indian lands set aside or held for the benefit of Indians from the effects of the rule.

Executive Order 12988, Civil Justice Reform

Under Executive Order 12988, the Office of the Solicitor has determined that this proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), BLM must consider whether this proposed rule will create any additional collection, paperwork, or record keeping burdens on the public. These burdens are permissible only when BLM can justify the practical utility of the information collected under the rule. Office of Management and Budget (OMB) approval is required of any new requirements for a collection of information imposed on 10 or more persons, and a valid OMB control number must be obtained for any covered paperwork.

The information collection requirements contained in Group 4100 have been approved by the OMB under 44 U.S.C. 3501 *et seq.* and assigned the following clearance numbers: 1004–0005, 1004–0019, 1004–0020, 1004–0041, 1004–0047, 1004–0051, 1004–0068. The information would be collected to permit BLM to determine whether an application to utilize public lands for grazing or other purposes should be approved.

Today's proposed rule will necessitate some modifications of terms in the forms used to collect information. However, there will be no change in the reporting burden as a result of today's proposed rule. Therefore, these regulations do not contain information collection requirements that OMB must approve.

National Environmental Policy Act

The BLM has determined that these proposed regulations constitute a major Federal action significantly affecting the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). BLM and all Federal agencies are required by the National Environmental Policy Act (NEPA) to prepare an EIS if a proposed action has potential for significant environmental impacts. BLM has prepared a draft environmental impact statement (DEIS) which will be on file and available to the public in the BLM Administrative Record at the address specified in the **ADDRESSES** section. The Draft Environmental Impact Statement will also be available at *http://www.blm.gov/grazing.* The draft document considers the impacts of this proposed rulemaking to amend the regulations governing livestock grazing on public lands. You may comment on the EIS via the interactive ePlanning Web site, at *http://www.blm.gov/grazing.*

Executive Order 13211, Action Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

In accordance with Executive Order 13211, BLM finds that this proposed rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The distribution of or use of energy would not be unduly affected by this proposed rule.

Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these proposed regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed regulations clearly stated? (2) Do the proposed regulations contain technical language or jargon that interferes with their clarity? (3) Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? (4) Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A ''section'' appears in bold type and is preceded by the symbol ''§'' and a numbered heading, for example ''§ 4160.4.'') (5) Is the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand?

Please send any comments you have on the clarity of the regulations to the address specified in the **ADDRESSES** section.

Author

The principal author of this rule is Ken Visser, Rangeland Management Specialist; Rangeland, Soil, Water and Air Group, assisted by Ted Hudson and Cynthia L. Ellis of the Regulatory Affairs Group.

List of Subjects in 43 CFR Part 4100

Administrative practice and procedure, Grazing lands, Livestock, Penalties, Range management, Reporting and record keeping requirements.

For the reasons stated in the Preamble, and under the authorities cited below, we propose to amend Title 43, Subtitle B, Chapter II, Subchapter D, Part 4100, as follows:

Dated: November 18, 2003.

J. Steven Griles,

Deputy Secretary of the Interior.

PART 4100—GRAZING ADMINISTRATION—EXCLUSIVE OF ALASKA

1. The authority citation for part 4100 continues to read as follows:

Authority: 43 U.S.C. 315, 315a–315r, 1181d, 1740.

Subpart 4100—Grazing Administration—Exclusive of Alaska; General

2. Amend § 4100.0–2 by redesignating the first sentence as paragraph (a) and the second sentence as paragraph (b), and by revising newly designated paragraph (b) to read as follows:

§ 4100.0–2 Objectives.

* * * * *

(b) These objectives will be realized in a manner consistent with land use plans, multiple use, sustained yield, environmental values, economic and other objectives stated in the Taylor Grazing Act of June 28, 1934, as amended (43 U.S.C. 315, 315a–315r); section 102 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701) and the Public Rangelands Improvement Act of 1978 (43 U.S.C. 1901(b)(2)).

3. Amend § 4100.0–3 by revising paragraphs (c), (d), and (f) to read as follows:

§ 4100.0–3 Authority.

* * * * *

(c) Executive orders that transfer land acquired under the Bankhead-Jones Farm Tenant Act of July 22, 1937, as amended (7 U.S.C. 1012), to the Secretary and authorize administration under the Taylor Grazing Act.

(d) Section 4 of the Oregon and California Railroad Land Act of August 28, 1937 (43 U.S.C. 1181d);

* * * * *

(f) Public land orders, Executive orders, and agreements that authorize the Secretary to administer livestock grazing on specified lands under the Taylor Grazing Act or other authority as specified.

4. Amend § 4100.0–5 by removing the definitions of ''conservation use'' and ''permitted use'', and revising the definitions of ''active use'', ''grazing lease'', ''grazing permit'', ''grazing preference or preference'', ''interested public'', ''suspension'', and ''temporary nonuse'', and adding a definition of ''preference'', to read as follows:

§ 4100.0–5 Definitions.

* * * * *

Active use means that portion of the grazing preference that is:

(1) Available for livestock grazing use under a permit or lease based on rangeland carrying capacity and resource conditions in an allotment; and

(2) Not in suspension.

* * * * *

Grazing lease means a document that authorizes grazing use of the public lands under Section 15 of the Act. A grazing lease specifies grazing preference and the terms and conditions under which lessees make grazing use during the term of the lease.

Grazing permit means a document that authorizes grazing use of the public lands under Section 3 of the Act. A grazing permit specifies grazing preference and the terms and conditions under which permittees make grazing use during the term of the permit.

Grazing preference or *preference* means the total number of animal unit months on public lands apportioned and attached to base property owned or controlled by a permittee, lessee, or an applicant for a permit or lease. Grazing preference includes active use and use held in suspension. Grazing preference holders have a superior or priority position against others for the purpose of receiving a grazing permit or lease.

Interested public means an individual, group, or organization that has:

(1) (i) Submitted a written request to BLM to be provided an opportunity to be involved in the process leading to a BLM decision on the management of livestock grazing on public lands, and

(ii) Followed up that request by commenting on or otherwise participating in the decisionmaking process as to the management of a specific allotment if there has been an opportunity for such participation; or

(2) Submitted written comments to the authorized officer regarding the management of livestock grazing on a specific allotment, as part of the process leading to a BLM decision on the management of livestock grazing on the allotment.

* * * * *

Preference means grazing preference (see definition of ''grazing preference'').

* * * * *

Suspension means the withholding from active use, through a decision issued by the authorized officer or by agreement, of part or all of the grazing preference specified in a grazing permit or lease.

Temporary nonuse means that portion of active use that the authorized officer authorizes not to be used, in response to an application made by the permittee or lessee.

* * * * *

5. Revise § 4100.0–9 to read as follows:

§ 4100.0–9 Information collection.

The information collection requirements contained in Group 4100 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* The information is collected to enable the authorized officer to determine whether to approve an application to utilize public lands for grazing or other purposes.

Subpart 4110—Qualifications and Preference

6. Amend § 4110.1 by removing paragraphs (b)(1), (b)(2), and (c), by redesignating paragraph (d) as paragraph (c), and by revising paragraph (b) to read as follows:

§ 4110.1 Mandatory qualifications.

* * * * *

(b) Applicants for the renewal or issuance of new permits and leases and any affiliates must be determined by the authorized officer to have a satisfactory record of performance under § 4130.1–1(b).

* * * * *

7. Amend § 4110.2–1 by redesignating paragraphs (d) and (e) as paragraphs (e) and (f), respectively, and by redesignating the last two sentences of paragraph (c) as paragraph (d).

8. Revise § 4110.2–2 to read as follows:

§ 4110.2–2 Specifying grazing preference.

(a) All grazing permits and grazing leases will specify grazing preference, except for permits and leases for designated ephemeral rangelands, where BLM authorizes livestock use based upon forage availability, or designated annual rangelands. Preference includes active use and any suspended use. Active use is based on the amount of forage available for livestock grazing as established in the land use plan, activity plan, or decision of the authorized officer under § 4110.3–3, except, in the case of designated ephemeral or annual rangelands, a land use plan or activity plan may alternatively prescribe vegetation standards to be met in the use of such rangelands.

(b) The grazing preference specified is attached to the base property supporting the grazing permit or grazing lease.

(c) The animal unit months of grazing preference are attached to:

(1) The acreage of land base property on a pro rata basis, or

(2) Water base property on the basis of livestock forage production within the service area of the water.

9. Amend § 4110.2–3 by revising paragraph (b) to read as follows:

§ 4110.2–3 Transfer of grazing preference.

* * * * *

(b) If base property is sold or leased, the transferee shall within 90 days of the date of sale or lease file with BLM a properly executed transfer application showing the base property and the grazing preference being transferred in animal unit months.

* * * * *

10. Revise § 4110.2–4 to read as follows:

§ 4110.2–4 Allotments.

After consultation, cooperation, and coordination with the affected grazing permittees or lessees and the state having lands or responsibility for managing resources within the area, the authorized officer may designate and adjust grazing allotment boundaries. The authorized officer may combine or divide allotments, through an agreement or by decision, when necessary for the proper and efficient management of public rangelands.

11. Revise § 4110.3 to read as follows:

§ 4110.3 Changes in grazing preference.

(a) The authorized officer will periodically review the grazing preference specified in a grazing permit or lease and make changes in the grazing preference as needed to:

(1) Manage, maintain, or improve rangeland productivity;

(2) Assist in restoring ecosystems to properly functioning conditions;

(3) Conform with land use plans or activity plans; or

(4) Comply with the provisions of subpart 4180.

(b) The authorized officer will support these changes by monitoring, documented field observations, ecological site inventory, or other data acceptable to the authorized officer.

(c) Before changing grazing preference, the authorized officer will undertake the appropriate analysis as

required by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). The authorized officer will analyze and, if appropriate, document the relevant social, economic, and cultural effects of the proposed action.

12. Revise § 4110.3–1 to read as follows:

§ 4110.3–1 Increasing active use.

BLM may apportion additional forage to qualified applicants for livestock grazing use consistent with multiple-use management objectives specified in the applicable land use plan.

(a) *Additional forage temporarily available.* When the authorized officer determines that additional livestock forage is temporarily available, he may authorize its use on a nonrenewable basis in the following order:

(1) To permittees or lessees who have preference for grazing use in the allotment where the forage is available, in proportion to their active use; and

(2) To other qualified applicants under § 4130.1–2.

(b) *Additional forage available on a sustained yield basis.* When the authorized officer determines that additional forage is available on a sustained yield basis, he will apportion it in the following manner:

(1) First, to remove all or a part of the suspension of preference of permittees or lessees with permits or leases in the allotment where the forage is available; and

(2) Second, if additional forage remains after ending all suspensions, the authorized officer will consult, cooperate, and coordinate with the affected permittees or lessees, the state having lands responsibility for managing resources within the area, and the interested public, and apportion it in the following order:

(i) Permittees or lessees in proportion to their contribution to stewardship efforts that result in increased forage production;

(ii) Permittee(s) or lessee(s) in proportion to the amount of their grazing preference; and

(iii) Other qualified applicants under § 4130.1–2.

13. Revise § 4110.3–2 to read as follows:

§ 4110.3–2 Decreasing active use.

(a) The authorized officer may suspend active use in whole or in part on a temporary basis due to reasons specified in § 4110.3–3(b)(1), or to facilitate installation, maintenance, or modification of range improvements.

(b) When monitoring or documented field observations show grazing use or patterns of use are not consistent with the provisions of subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory, or other acceptable methods, the authorized officer will reduce active use, otherwise modify management practices, or both. To implement reductions under this paragraph, BLM will suspend active use.

14. Revise § 4110.3–3 to read as follows:

§ 4110.3–3 Implementing changes in active use.

(a)(1) After consultation, cooperation, and coordination with the affected permittee or lessee and the state having lands or managing resources within the area, the authorized officer will implement changes in active use through a documented agreement or by a decision. The authorized officer will implement changes in active use in excess of 10 percent over a 5-year period unless:

(i) After consultation with the affected permittees or lessees, an agreement is reached to implement the increase or decrease in less than 5 years, or

(ii) The changes must be made before 5 years have passed in order to comply with applicable law.

(2) Decisions implementing § 4110.3–2 will be issued as proposed decisions pursuant to § 4160.1, except as provided in paragraph (b) of this section.

(b)(1) After consultation with, or a reasonable attempt to consult with, affected permittees or lessees and the state having lands or responsibility for managing resources within the area, the authorized officer will close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use notwithstanding the provisions of paragraph (a) of this section when the authorized officer determines and documents that—

(i) The soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, insect infestation; or

(ii) Continued grazing use poses an imminent likelihood of significant resource damage.

(2) Notices of closure and decisions requiring modification of authorized grazing use may be issued as final decisions effective upon issuance or on the date specified in the decision. Such decisions will remain in effect pending the decision on appeal unless the Office of Hearings and Appeals grants a stay in accordance with § 4.21 of this title.

15. Amend § 4110.4–2 by revising the first sentence of paragraph (a)(2) to read as follows:

§ 4110.4–2 Decrease in land acreage.

(a) * * *

(2) Grazing preference may be canceled in whole or in part. * * *

* * * * *

Subpart 4120—Grazing Management

16. Amend § 4120.2 by revising the final sentence of paragraph (c) to read as follows:

§ 4120.2 Allotment management plans and resource activity plans.

* * * * *

(c) * * * The decision document following the environmental analysis will be issued in accordance with § 4160.1.

* * * * *

17. Amend § 4120.3–1 by revising paragraph (f) to read as follows:

§ 4120.3–1 Conditions for range improvements.

* * * * *

(f) The authorized officer will review proposed range improvement projects as required by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). The decision document following the environmental analysis shall be issued in accordance with § 4160.1.

18. Amend § 4120.3–2 by revising paragraph (b) to read as follows:

§ 4120.3–2 Cooperative range improvement agreements.

* * * * *

(b) Subject to valid existing rights, cooperators and the United States share title to permanent structural range improvements such as fences, wells, and pipelines where authorization is granted after February 6, 2004 in proportion to their contribution to on-the-ground project development and construction costs. The authorization for all new permanent water developments, such as spring developments, wells, reservoirs, stock tanks, and pipelines, shall be through cooperative range improvement agreements. The authorized officer will document a permittee's or lessee's interest in contributed funds, labor, and materials to ensure proper credit for the purposes of §§ 4120.3–5 and 4120.3–6(c).

* * * * *

19. Amend § 4120.3–3 by revising the introductory text of paragraph (c) to read as follows:

§ 4120.3–3 Range improvement permits.

* * * * *

(c) Where a permittee or lessee cannot make use of the forage available for livestock and an application for temporary nonuse has been denied or the opportunity to make use of the available forage is requested by the authorized officer, the permittee or lessee shall cooperate with the temporary authorized use of forage by another operator, when it is authorized by the authorized officer following consultation with the preference permittee(s) or lessee(s).

* * * * *

20. Amend § 4120.3–8 by removing the misspelling ''whith'' from where it appears in the last sentence of paragraph (b) and adding in its place the word ''which''.

21. Revise § 4120.3–9 to read as follows:

§ 4120.3–9 Water rights for the purpose of livestock grazing on public lands.

Any right that the United States acquires to use water on public land for the purpose of livestock watering on public land will be acquired, perfected, maintained, and administered under the substantive and procedural laws of the state within which such land is located.

22. Amend § 4120.5–2 by removing the word ''and'' after the semicolon at the end of paragraph (a), removing the period at the end of paragraph (b) and adding in its place a semicolon and the word ''and'', and adding paragraph (c) to read as follows:

§ 4120.5–2 Cooperation with state, county, and Federal agencies.

* * * * *

(c) State, local, or county-established grazing boards in reviewing range improvements and allotment management plans on public lands.

23. Revise § 4130.1–1 to read as follows:

§ 4130.1–1 Filing applications.

(a) Applications for grazing permits or leases (active use and nonuse), free-use grazing permits and other grazing authorizations shall be filed with the authorized officer at the local Bureau of Land Management office having jurisdiction over the public lands involved.

(b) The authorized officer will determine whether applicants for the renewal or issuance of new permits and leases and any affiliates have a satisfactory record of performance. The authorized officer will not approve such renewal or issuance unless the applicant and all affiliates have a satisfactory record of performance.

(1) *Renewal of permit or lease.*

(i) The authorized officer will deem the applicant for renewal of a grazing permit or lease, and any affiliate, to have a satisfactory record of performance if the authorized officer determines the applicant and affiliates to be in substantial compliance with the terms and conditions of the existing Federal grazing permit or lease for which renewal is sought, and with the rules and regulations applicable to the permit or lease.

(ii) The authorized officer may take into consideration circumstances beyond the control of the applicant or affiliate in determining whether the applicant and affiliates are in substantial compliance with permit or lease terms and conditions and applicable rules and regulations.

(2) *New permit or lease.* The authorized officer will deem applicants for new permits or leases, and any affiliates, to have a record of satisfactory performance when—

(i) The applicant or affiliate has not had any Federal grazing permit or lease canceled, in whole or in part, for violation of the permit or lease within the 36 calendar months immediately preceding the date of application; and

(ii) The applicant or affiliate has not had any state grazing permit or lease, for lands within the grazing allotment for which a Federal permit or lease is sought, canceled, in whole or in part, for violation of the permit or lease within the 36 calendar months immediately preceding the date of application; and

(iii) A court of competent jurisdiction does not bar the applicant or affiliate from holding a Federal grazing permit or lease.

(c) In determining whether affiliation exists, the authorized officer will consider all appropriate factors, including, but not limited to, common ownership, common management, identity of interests among family members, and contractual relationships.

24. Amend § 4130.2 as follows:

A. By adding the word ''and'' after the semicolon at the end of paragraph (e)(2);

B. By removing paragraphs (g) and (h) and redesignating paragraphs (i) and (j) as paragraphs (g) and (h), respectively;

C. In redesignated paragraph (g), by revising the reference ''(see § 4130.3–2)'' to read ''(see § 4130.3–2(g))''; and

D. By revising paragraphs (a), (b), and (f) to read as follows:

§ 4130.2 Grazing permits and leases.

(a) Grazing permits and leases authorize use on the public lands and other BLM-administered lands that are designated in land use plans as available for livestock grazing. Permits and leases will specify the grazing preference, including active and suspended use. These grazing permits and leases will also specify terms and conditions pursuant to §§ 4130.3, 4130.3–1, and 4130.3–2.

(b) The authorized officer will consult, cooperate, and coordinate with affected permittees and lessees, and the state having lands or responsibility for managing resources within the area, before issuing or renewing grazing permits and leases.

* * * * *

(f) A permit or lease is not valid unless both the BLM and the permittee or lessee have signed it.

* * * * *

25. Amend § 4130.3 by redesignating the existing text as paragraph (a) and adding paragraphs (b) and (c) to read as follows:

§ 4130.3 Terms and conditions.

* * * * *

(b) Upon a BLM offer of a permit or lease, the permit or lease terms and conditions may be protested and appealed under part 4 and subpart 4160 unless:

(1) The terms and conditions of the permit or lease, such as terms and conditions mandated by a biological opinion prepared under the Endangered Species Act, are not subject to review by the Office of Hearings and Appeals; or

(2) The offer of permit or lease responds to an application for a permit or lease for grazing use on additional land acreage (see § 4110.4–1).

(c) If any of the terms and conditions of a BLM-offered permit or lease are stayed pending appeal, BLM will authorize grazing use as provided in § 4160.4.

26. Amend § 4130.3–2 by adding the word ''and'' after the semicolon at the end of paragraph (f), by removing the semicolon and the word ''and'' at the end of paragraph (g) and adding in their place a period, and by removing paragraph (h).

27. Revise § 4130.3–3 to read as follows:

§ 4130.3–3 Modification of permits or leases.

(a) Following consultation, cooperation, and coordination with the affected lessees or permittees and the state having lands or responsibility for managing resources within the area, the authorized officer may modify terms and conditions of the permit or lease when the active use or related management practices:

(1) Do not meet management objectives specified in:

(i) The land use plan;

(ii) The pertinent allotment management plan or other activity plan; or

(iii) An applicable decision issued under § 4160.3; or

(2) Do not conform to the provisions of subpart 4180.

(b) To the extent practical, during the preparation of biological assessments or biological evaluations prepared under the Endangered Species Act, and other reports that evaluate monitoring and other data, that the authorized officer uses as a basis for making decisions to increase or decrease grazing use, or to change the terms and conditions of a permit or lease, the authorized officer will provide review opportunity and opportunity to provide input to:

(1) Affected permittees or lessees;

(2) States having lands or responsibility for managing resources within the affected area; and

(3) The interested public.

28. Revise § 4130.4 to read as follows:

§ 4130.4 Authorization of temporary changes in grazing use within the terms and conditions of permits and leases.

(a)(1) The authorized officer may authorize temporary changes in grazing use within the terms and conditions of the permit or lease to:

(i) Respond to annual fluctuations in timing and amount of forage production; or

(ii) Meet locally established range readiness criteria.

(2) The authorized officer will consult, cooperate and coordinate with the permittees or lessees regarding their applications for changes within the terms and conditions of their permit or lease.

(b) For the purposes of this subpart, ''within the terms and conditions of the permit or lease'' means temporary changes in livestock number, period of use, or both, that would result in grazing use that:

(1) Results in forage removal that does not exceed the amount of active use specified in the permit or lease; and

(2) Occurs either not earlier than 14 days before the begin date specified on the permit or lease, and not later than 14 days after the end date specified on the permit or lease.

(c) Permittees and lessees must apply if they wish—

(1) Not to use all or a part of their active use by applying for temporary nonuse under paragraph (d) of this section;

(2) To activate forage in temporary nonuse; or

(3) To use forage that is temporarily available on designated ephemeral or annual ranges.

(d)(1) Temporary nonuse is authorized—

(i) Only if the authorized officer approves in advance; and

(ii) For no longer than one year at a time.

(2) Permittees or lessees applying for temporary nonuse use must state on their application the reasons supporting nonuse. The authorized officer will authorize nonuse to provide for:

(i) Natural resource conservation, enhancement, or protection, including more rapid progress toward meeting resource condition objectives or attainment of rangeland health standards; or

(ii) The business or personal needs of the permittee or lessee.

(e) Under § 4130.6–2, the authorized officer may authorize qualified applicants to graze forage made available as a result of temporary nonuse approved for the reasons described in paragraph (d)(2)(ii) of this section. The authorized officer will not authorize anyone to graze forage made available as a result of temporary nonuse approved under paragraph (d)(2)(i) of this section.

(f) Permittees or lessees who wish to apply for temporary changes in grazing use within the terms and conditions of their permit or lease should file an application with BLM. The authorized officer will assess a service charge under § 4130.8–3 to process applications for changes in grazing use that require the issuance of a replacement or supplemental billing notice.

29. Amend § 4130.5 by removing the words ''authorized'' and ''or conservation use'' from where they appear in paragraph (b)(1).

30. Amend § 4130.6–2 by revising the second sentence to read as follows:

§ 4130.6–2 Nonrenewable grazing permits and leases.

* * * The authorized officer shall consult, cooperate, and coordinate with affected permittees or lessees, and the state having lands or responsibility for managing resources within the area, before issuing nonrenewable grazing permits and leases.

31. Amend § 4130.8–1 by redesignating paragraphs (d), (e), and (f) as paragraphs (f), (g), and (h), respectively, by revising paragraph (c), adding new paragraphs (d) and (e), and revising the last sentence of redesignated paragraph (h), to read as follows:

§ 4130.8–1 Payment of fees.

* * * * *

(c) Except as provided in § 4130.5, the full fee will be charged for each animal unit month of grazing use. For the purposes of calculating the fee, an animal unit month is defined as a month's use and occupancy of range by 1 cow, bull, steer, heifer, horse, burro, mule, 5 sheep, or 5 goats:

(1) Over the age of 6 months at the time of entering the public lands or other lands administered by BLM;

(2) Weaned regardless of age; or

(3) Becoming 12 months of age during the authorized period of use.

(d) BLM will not charge grazing fees for animals that are less than 6 months of age at the time of entering BLM-administered lands, provided that they are the progeny of animals upon which fees are paid, and they will not become 12 months of age during the authorized period of use.

(e) In calculating the billing, the authorized officer will prorate the grazing fee on a daily basis and will round charges to reflect the nearest whole number of animal unit months.

* * * * *

(h) * * * Failure to make payment within 30 days may be a violation of § 4140.1(b)(1) and will result in action by the authorized officer under § 4150.1 and subpart 4160.

32. Revise § 4130.8–3 to read as follows:

§ 4130.8–3 Service charge.

(a) Under Section 304(a) of the Federal Land Policy and Management Act of 1976, the service charge BLM assesses will reflect processing costs. BLM will adjust the charge periodically as costs change, and will inform the public of the changes by publishing a notice in the **Federal Register**.

(b) Except when BLM initiates an action, the authorized officer will assess a service charge for each of the following actions as shown on the table below—

Action	Service charge
Issue crossing permit	$75
Transfer grazing preference	145
Cancel and/or replace a grazing fee billing	50

Subpart 4140—Prohibited Acts

33. Amend § 4140.1 by—

a. Removing the introductory text; and

b. Revising paragraphs (a)(2), (a)(3), the introductory text of paragraph (b), paragraph (b)(1)(i), and paragraph (c) to read as follows:

§ 4140.1 Acts prohibited on public lands.

(a) * * *

(2) Failing to make substantial grazing use as authorized for 2 consecutive fee years. This does not include approved temporary nonuse or use temporarily suspended by the authorized officer;

(3) Placing supplemental feed on these lands without authorization, or contrary to the terms and conditions of the permit or lease;

* * * * *

(b) Persons performing the following prohibited acts on BLM-administered lands are subject to civil and criminal penalties set forth at §§ 4170.1 and 4170.2:

(1) * * *

(i) Without a permit or lease or other grazing use authorization (see § 4130.6) and timely payment of grazing fees;

* * * * *

(c)(1) A grazing permittee or lessee performing any of the prohibited acts listed in paragraphs (c)(2) or (c)(3) of this section on an allotment where he is authorized to graze under a BLM permit or lease may be subject to the civil penalties set forth at § 4170.1–1, if:

(i) The permittee or lessee performs the prohibited act while engaged in activities related to grazing use authorized by his permit or lease;

(ii) The permittee or lessee has been convicted or otherwise found to be in violation of any of these laws or regulations by a court or by final determination of an agency charged with the administration of these laws or regulations; and

(iii) No further appeals are outstanding.

(2) Violation of Federal or state laws or regulations pertaining to the:

(i) Placement of poisonous bait or hazardous devices designed for the destruction of wildlife;

(ii) Application or storage of pesticides, herbicides, or other hazardous materials;

(iii) Alteration or destruction of natural stream courses without authorization;

(iv) Pollution of water sources;

(v) Illegal take, destruction or harassment, or aiding and abetting in the illegal take, destruction or harassment of fish and wildlife resources; and

(vi) Illegal removal or destruction of archeological or cultural resources.

(3) (i) Violation of the Bald Eagle Protection Act (16 U.S.C. 668 *et seq.*), Endangered Species Act (16 U.S.C. 1531 *et seq.*), or any provision of part 4700 of this chapter concerning the protection and management of wild free-roaming horses and burros; or

(ii) Violation of State livestock laws or regulations relating to the branding of livestock; breed, grade, and number of bulls; health and sanitation requirements; and violating State, county, or local laws regarding the stray of livestock from permitted public land grazing areas onto areas that have been formally closed to open range grazing.

Subpart 4150—Unauthorized Grazing Use

34. Amend § 4150.3 by revising the second sentence of paragraph (e) and adding paragraph (f) to read as follows:

§ 4150.3 Settlement.

* * * * *

(e) * * * The authorized officer may take action under subpart 4160 to cancel or suspend grazing authorizations or to deny approval of applications for grazing use until such amounts have been paid. * * *

(f) Upon a stay of a decision issued under paragraph (e) of this section, the authorized officer will allow a permittee or lessee to graze in accordance with this part pending resolution of any appeal.

Subpart 4160—Administrative Remedies

35. Amend § 4160.1 by adding paragraph (d) to read as follows:

§ 4160.1 Proposed decisions.

* * * * *

(d) A biological assessment or biological evaluation prepared for purposes of an Endangered Species Act consultation or conference is not a decision for purposes of protest or appeal.

36. Amend § 4160.3 by removing paragraphs (c), (d), and (e), by redesignating paragraph (f) as paragraph (c), and by revising redesignated paragraph (c) to read as follows:

§ 4160.3 Final decisions.

* * * * *

(c) Notwithstanding the provisions of § 4.21(a) of this title pertaining to the period during which a final decision will not be in effect, the authorized officer may provide that the final decision shall be effective upon issuance or on a date established in the decision, and shall remain in effect pending the decision on appeal unless a stay is granted by the Office of Hearings and Appeals when the authorized officer has made a determination in accordance with § 4110.3–3(b) or § 4150.2(d). Nothing in this section shall affect the authority of the Director of the Office of Hearings and Appeals, the Interior Board of Land Appeals, or an administrative law judge, to provide that the decision becomes effective immediately as provided in § 4.21(a)(1) of this title.

37. Revise § 4160.4 to read as follows:

§ 4160.4 Appeals.

(a) Those who wish to appeal or seek a stay of a BLM grazing decision must follow the requirements set forth in § 4.470 *et seq.* of this title. The appeal or petition for stay must be filed with the BLM office that issued the decision within 30 days after its receipt or within 30 days after the proposed decision becomes final as provided in § 4160.3(a).

(b) When OHA stays implementation of a decision described in paragraph (b)(1) or (b)(2) of this section, the immediately preceding authorization and any terms and conditions therein will not expire, and the permittee, lessee, or preference applicant may continue to graze under the immediately preceding grazing authorization, subject to any relevant provisions of the stay order and § 4130.3(b), and except as provided in paragraph (c) of this section. This paragraph applies to decisions that:

(1) Change the terms and conditions of a permit or lease during the current term;

(2) Offer a permit or lease to a preference transferee with terms and conditions that are different from the permit or lease terms and conditions that are most recently applicable to the allotment or portion of the allotment in question; or

(3) Renew a permit or lease with changed terms and conditions.

(c) When OHA stays implementation of a decision described in paragraphs (c)(1) through (c)(4) of this section, the authorized officer, notwithstanding paragraph (b) of this section, will authorize grazing consistent with the final decision when the decision:

(1) Modifies a permit or lease because of a decrease in public land acreage available for grazing (see § 4110.4–2);

(2) Affects an application for grazing use of BLM-designated ephemeral or annual rangeland;

(3) Affects an application for additional forage temporarily available under § 4110.3–1(a); or

(4) Affects an application for a grazing permit or lease that is not made in conjunction with a preference transfer application (see § 4110.2–3(d)).

Subpart 4170—Penalties

38. Revise § 4170.1–2 to read as follows:

§ 4170.1–2 Failure to use.

If a permittee or lessee has, for 2 consecutive grazing fee years, failed to make substantial use as authorized in the lease or permit, or has failed to maintain or use water base property in

the grazing operation, the authorized officer, after consultation, coordination, and cooperation with the permittee or lessee and any lienholder of record, may cancel whatever amount of active use the permittee or lessee has failed to use.

Subpart 4180—Fundamentals of Rangeland Health and Standards and Guidelines for Grazing Administration

39. Amend § 4180.1 by revising the introductory text and paragraph (d) to read as follows:

§ 4180.1 Fundamentals of rangeland health.

Where standards and guidelines have not been established under § 4180.2(b), and the authorized officer determines that grazing management needs to be modified to assist in achieving the following conditions, the authorized officer will take appropriate action as soon as practicable under § 4180.2 but not later than the start of the grazing year that follows BLM's completion of relevant and applicable requirements of law and regulations and the consultation requirements of §§ 4110.3–3 and 4130.3–3:

* * * * *

(d) Habitats are, or are making significant progress toward being, restored or maintained for Federal threatened and endangered species, Federal proposed or candidate threatened and endangered species, and other at-risk and special status species.

40. Amend § 4180.2 by removing the semicolon at the end of paragraph (e)(12) and adding in its place a period, by revising paragraph (c), the introductory text of paragraph (d), paragraph (d)(4), paragraph (e)(9), the introductory text of paragraph (f), and paragraph (f)(2)(viii), to read as follows:

§ 4180.2 Standards and guidelines for grazing administration.

* * * * *

(c)(1) If the authorized officer determines through standards assessment and monitoring that existing grazing management practices or levels of grazing use on public lands are significant factors in failing to achieve the standards and conform with the guidelines that are made effective under this section, the authorized officer will, in compliance with applicable laws and with the consultation requirements of this part, formulate, propose, and analyze appropriate action to address the failure to meet standards or to conform to the guidelines not later than 24 months after the determination. The requirements of this paragraph are met when the parties execute an applicable and relevant documented agreement or the authorized officer issues an applicable final decision under § 4160.3.

(2) Upon executing the agreement or in the absence of a stay of the final decision, the authorized officer will implement the appropriate action as soon as practicable, but not later than the start of the next grazing year.

(3) The authorized officer will take appropriate action as defined in this paragraph by the deadlines established in paragraphs (c)(1) and (c)(2) of this section. Appropriate action means implementing actions pursuant to subparts 4110, 4120, 4130, and 4160 that will result in significant progress toward fulfillment of the standards and significant progress toward conformance with the guidelines. Practices and activities subject to standards and guidelines include the development of grazing-related portions of activity plans, establishment of terms and conditions of permits, leases, and other grazing authorizations, and range improvement activities such as vegetation manipulation, fence construction, and development of water.

(d) At a minimum, state and regional standards developed or revised under paragraphs (a) and (b) of this section must address the following:

* * * * *

(4) Habitat for endangered, threatened, proposed, candidate, or other at-risk or special status species; and

* * * * *

(e) * * *

(9) Restoring, maintaining or enhancing habitats of Federal proposed, Federal candidate, and other at-risk and special status species to promote their conservation;

* * * * *

(f) Until such time as state or regional standards and guidelines are developed and in effect, the following standards provided in paragraph (f)(1) of this section and guidelines provided in paragraph (f)(2) of this section will apply and will be implemented in accordance with paragraph (c) of this section.

* * * * *

(2) * * *

(viii) Conservation of Federal threatened or endangered, proposed, candidate, and other at risk or special status species is promoted by the restoration and maintenance of their habitats;

* * * * *

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