

Chapter 5

Public Participation, Consultation, Coordination, and Response to Comments



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5.0 Public Participation, Consultation, Coordination, and Response to Comments

Chapter 5 contains a summary of the public participation process, consultation and coordination with other Federal agencies on this rulemaking and responses to comments on the draft EIS. Also incorporated in this section is a list of preparers for the draft and final EIS.

Changes in Chapter 5 include the following:

- Update of information:
 - 5.1 Public Participation – Updated information on process and incorporated by reference the brief summary of scoping comments that were set forth in the draft EIS in Section 5.1.2
 - 5.2.1 Tribal - Provided updated information on Tribal consultation process
 - 5.2.2 Threatened and Endangered Species – Provided update on determination of no effect
 - 5.3 List of Preparers – Updated list to include individuals who assisted in coding comments, reviewing and analyzing comments, preparing responses to comments and revising/preparing the final EIS.
- Additional information:
 - 5.4 Response to Comments – Based on comments received the draft EIS, incorporated summary comment statements and responses by category.

5.1 Public Participation

As described in Chapter 1, the EIS public participation process consists of several phases. Public participation begins with scoping, which is conducted to help identify issues and alternatives before the proposed action and alternatives have been developed. Information gathered during scoping is analyzed and used in determining the issues to be addressed and the alternatives to be presented in detail in the draft EIS.

The draft EIS is subject to further public review and comment during the 60-day public comment period. Public meetings are held during the comment period on the draft, allowing individuals to present oral comments on the draft. After the comment period, a final EIS is developed that responds to comments received on the draft and incorporates, as appropriate, changes in the proposed action, as well as the analysis of effects.

Including public involvement throughout the process ensures that the process is open and considers information from all interested parties, including other Federal agencies, state and local governments, the scientific community, professional organizations, public land users, conservation organizations, and citizens at large.

5.1.1 Scoping Process

The BLM published an Advance Notice of Proposed Rulemaking (ANPR) and Notice of Intent (NOI) to prepare an EIS in the *Federal Register* on March 3, 2003. These notices requested public comment to assist the BLM in the scoping process for both the proposed rule and associated draft EIS. The

comment period for both ended on May 2, 2003.

In the Notice of Intent to prepare the EIS, the BLM stated that it was considering changes to the present rule and establishing new options for BLM and rangeland users in the administration and management of public land. Comments were requested on topics under consideration that were related to both the EIS and the proposed rule. Copies of the ANPR and NOI were published in the draft EIS in Appendix D and Appendix E, respectively, and are incorporated herein by reference..

The BLM held four public scoping meetings during March 2003. Approximately 60 people attended the Billings, Montana, meeting (March 18) and 23 people offered testimony. Around 200 people attended the Reno, Nevada, meeting (March 20) and 25 offered testimony. Approximately 50 people attended the Albuquerque, New Mexico, meeting (March 25) with 27 individuals providing testimony, and approximately 25 people attended the Washington, D.C., meeting (March 27), with testimony provided by 5 individuals.

5.1.2 Summary of Scoping Comments

The BLM received more than 8,300 comments during scoping in response to the Advance Notice of Proposed Rulemaking and the Notice of Intent. Most of the comments were form letters; however, at least three dozen letters containing substantive comments from special interest organizations and state and Federal agencies were received. In addition, many substantive comments were provided orally at the public meetings.

The comments have been categorized into five topics: A) Definition changes. B) Changes in the regulations to clarify present requirements and to allow

better rangeland management and permit administration. C) Amendments related to changes in permitted use. D) New provisions to the regulations. E) General comments not addressed in the ANPR and NOI. A brief summary of the public comments by these topics was presented in the draft EIS and is incorporated herein by reference.

A more complete summary of the scoping comments is found in Appendix C.

5.2 Consultation and Coordination Actions

5.2.1 Tribal

The Bureau of Land Management works on a government-to-government basis with Native American Tribes. As a part of the government's Treaty and Trust responsibilities, the government-to-government relationship was formally recognized by the Federal government on November 6, 2000, with Executive Order 13175.

The BLM coordinates and consults with Tribal governments, Native communities, and Tribal individuals whose interests might be directly and substantially affected by activities on BLM-administered lands. The BLM strives to provide the Tribes sufficient opportunities for productive participation in BLM planning and resource management decision making.

The BLM contacted Tribal government representatives for input into the grazing rulemaking and draft EIS. It began with the initiation of the public scoping process. Issues raised by Tribal governments, Tribal entities and Native American individuals during meetings and received in letters were considered in the development of the draft EIS and proposed rule.

Once the draft EIS and proposed rule was ready for release and public review, including review by Tribal governments, more than 300 Tribes west of the Mississippi River, excluding Alaska, were sent a letter soliciting their comments to the draft EIS and proposed rule. Enclosed was a copy of the draft EIS and proposed rule on a compact disk and Web site information for finding the documents on the Internet. We received comments from the Agua Caliente Band of Cahuilla Indians, the Pueblo of Laguna, the Shakopee Mdewakanton Sioux Community, the Confederated Salish and Kootenai Tribes, the Mescalero Apache Tribe, and the Shoshone-Paiute Tribes.

5.2.2 Threatened and Endangered Species

BLM evaluated the regulatory changes to determine if candidate, proposed or listed species and Critical Habitat would be affected. A determination was made that the regulatory changes would have no effect on candidate, proposed, threatened or endangered species, or designated or proposed Critical Habitat.

Before grazing permits are issued, the appropriate BLM Office will review the adequacy of existing environmental analyses and determine if candidate, proposed, threatened or endangered species or designated or proposed Critical Habitat within the proposed permit or lease area may be affected. If adverse effects are likely, a formal Section 7 consultation will be conducted with FWS or NOAA, Fisheries.

5.2.3 Cultural and Historic

Before authorizing surface disturbance undertakings at the regional or local level, the BLM will identify cultural properties eligible for inclusion in the National Register of Historic Places and consider the effects

of the proposed undertakings through the consultation process in Section 106 of the National Historic Preservation Act of 1966.

In accordance with BLM's national Programmatic Agreement with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation officers in 1997, the BLM provides the Council information concerning prospects for regulations. In December of 2003, the BLM sent a letter to the Advisory Council on Historic Preservation notifying them of the proposed grazing regulation changes including a brief synopsis of the goals and objectives of the regulatory changes and information on where to find the current regulations for their review. Upon its release, the draft EIS was sent to the Council for their review.

Any new projects developed under the changed regulations would be analyzed for effects on cultural resources on a case-by-case basis; all applicable laws, executive orders, regulations, and manual requirements and procedures for identification, protection and utilization of, and consultation on cultural resources will be followed.

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5.4 Response to Comments

The extended comment period on the proposed rule and DEIS ended on March 2, 2004. We received more than 18,000 comment letters and electronic communications. An exact count of the comments is not available because of the large amount of duplication among the comments; very often a single individual or entity submitted identical comments multiple times or via different media. We did not attempt to keep track of all the duplications, although we observed many. .

In this section, we provide summary comment statements of the substantive comments on the proposed rule and the draft EIS and responses to those comments. We received a large number of comments that supported or opposed the proposed regulations in general terms. We have not attempted to respond to these general expressions of support or opposition. The comments are organized by subject and presented in groups that address a theme on the subject. Similar comments have been grouped together into themes and are addressed with a single response.

5.4.1 The Process

Comment: Some comments addressed the regulatory process itself. One comment urged the BLM to clarify when comments are due by specifying a date and time, including time zone, stating that they find it uncertain when the exact comment deadline is in the electronic age. Another comment stated that the BLM should not ignore comments received from the public during the rulemaking process.

Response: We always accept comments postmarked or electronically dated within the stated comment period, regardless of the time zone of origin. In future proposed rules, we

will make this clearer. We received almost 18,000 letters, postcards, e-mails, faxes, and web-based comments on the proposed rule and the DEIS, and statements made at the public meetings, and the BLM staff reviewed every comment numerous times.

We have responded to comments on the content of the proposed rule and the DEIS in either the final rule or the EIS, or both. In some cases, we responded with a change in the regulatory text, and in others with revised or additional language in the EIS. In other cases, we have tried to explain why we did not adopt the comment. Since we received so many communications to analyze, we have not attempted to respond separately to every duplicate or substantially similar communication individually, and not all suggestions in the comments are adopted. We often receive conflicting comments from the public. Opinions regarding the rule, especially suggestions to amend the language, were considered by the BLM in preparing the regulatory changes. We discuss in this EIS or we will discuss in the preamble of the final rule every discrete suggestion and argument raised in the comments.

Those comments that appeared in form letters or that were expressed multiple times in multiple ways have been addressed in a response to a prototypical example of each such communication, or have been summarized and responded to as a general comment.

Comment: One comment stated that the BLM should have answered questions at the public meetings to help clarify the proposed rule.

Response: During the public meetings, the BLM sought direction from the audience on other possible policy issues or regulation changes that we should consider for implementation. The BLM did not want to influence the audience or limit the possible discussion during the meetings.

Comment: One comment stated that the BLM should give more weight to comments and concerns from the agricultural industry than those from other interests. Another stated that the Public Lands Council comments should be the first guide in amending the grazing regulations.

Response: The BLM considered all substantive and relevant comments from the public equally on their merits, whether they were from industry, other government agencies, staff comments, academia, other interest groups, or individuals.

Comment: Some comments stated that the BLM should not have released the DEIS nearly one month after publication of the proposed rule and gave three reasons. The comments reasoned that the one month delay indicated that it was a rationalization of the rule, indicated that BLM did not take a hard look at the environmental consequences as required by NEPA and that BLM should have issued the rule and DEIS simultaneously as required by NEPA and CEQ.

Response: Although the Council on Environmental Quality regulations at 40 CFR 1502.5(d) require that the DEIS normally accompany the proposed rule, the proposed rule publication schedule was accelerated to coincide with an opportunity to announce the event publicly, resulting in a time gap prior to the publication of the EIS. Staff schedules and office closure during the holiday season in November and December also contributed to the delay. The analysis of environmental effects was completed prior to the publication of the proposed rule. This EIS documents in a broad way the environmental effects that would result from the proposed regulatory changes in several individual administrative steps in the overall process of managing grazing on public lands. Therefore the analysis is necessarily broad, and the environmental elements and the potential effects of the proposed regulatory changes are described

in a general context in Chapter 4 of this EIS. The BLM is not aware of any absolute requirement to publish the DEIS and proposed rule simultaneously.

Comment: The BLM should not implement the proposed rule because it will result in failure of the BLM to act as trustee of the environment for succeeding generations. BLM's implementation of the proposed regulations will not meet at least 3 of the 6 substantive obligations listed in Section 101(b) of NEPA. The first element is: Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations. The second element is: Assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings. The third element is: Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences. Portions of the rule will result in failure of the BLM to act as trustee of the environment by implementing regulations that limit the ability of the agency to respond in a timely manner to environmental concerns and ecological conditions (e.g., implementation of changes in grazing use, basis for rangeland health determinations, timeframe for taking action to meet rangeland health standards, and grazing use pending resolution of appeals when decision has been stayed.)

Response: The rule is designed to enable succeeding generations of ranching families to stay on their land, a crucial element of rural landscapes, and thus to preserve those landscapes for future generations of all Americans. The implementation schedule changes discussed in the comment are necessary to make the needed changes in grazing administration reasonably attainable from a management perspective, and, by allowing ranchers extra time in certain circumstances to prepare for the changes or

by allowing some uses to continue pending appeal, to make them less economically damaging without changing the substance of the necessary adjustments in use levels or other practices. The rulemaking is based on the axiom that preservation of open space, in the face of a trend toward urbanization and sprawl, is a good thing. The presence of ranch and livestock operations on private and public land is an important bulwark against urban and suburban sprawl. The proposed rule discussed this thoroughly in the preamble. Livestock permittees live and work in the heart of 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 are to establish simple and practical ways for permittees, lessees, affected state and local officials, and the interested public to engage in partnerships with BLM that improve open space, watershed, and habitat conditions. In addition, the incentives built into the changes in the regulations, such as shared ownership of range improvements and more flexible provisions for temporary nonuse, will lead to habitat restoration and other benefits. The changes in the rule will not interfere with attaining wide ranges of beneficial uses of the public rangelands, and will allow land managers and users to take steps to reverse degradation.

We explain in detail in Section 4.3 of this EIS why the largely administrative changes BLM is making in the rule will have little or no environmental effect.

Comment: The BLM should not ignore comments received from the public during the rulemaking process.

Response: BLM has not ignored any comments received at any point during the rulemaking process. We received more than 18,000 letters, postcards, e-mails, faxes, and web-based comments on the proposed rule

and the DEIS and the BLM staff reviewed every comment numerous times.

We have responded to comments on the content of the proposed rule and the DEIS in this EIS. In some cases, we responded with a change in the regulatory text, and in others with revised or additional language in the EIS. In other cases, we have tried to explain why we cannot adopt the comment. We discuss in the EIS every substantive suggestion and argument raised in the comments.

Since we received so many comments to analyze we cannot respond to every duplicative or similar comment individually, and we did not adopt every suggestion contained in the comments. We often receive conflicting comments from the public. BLM considered all views and suggestions regarding the rule, especially suggestions to improve the language in the regulations.

Those comments that appeared in form letters or that were expressed multiple times in multiple ways have been addressed in a response to a prototypical example of each such communication, or have been summarized and responded to as a general comment.

Comment: It seems from our review of the draft EIS that comments the BLM received in response to the ANPR and the NOI were ignored—especially those from nongrazing publics. Your proposal has changed little even in the face of some 8300 comments “expressing opposition.” You seem to have severely discounted the nongrazing public’s comments and characterized them as “form letters.” You characterize other comments, mostly from the grazing industry, as “three dozen letters containing substantive comments.”

Response: The BLM reviewed the comments received from the ANPR numerous times. The comments characterized in the DEIS as substantive came from

organizations representing environmental as well as grazing interests. All of the comments were analyzed and considered by BLM. The results of Scoping can be found in section 1.3.2 of the EIS. More detailed analyses of the scoping comments are in Appendix C of the EIS.

Comment: The BLM should send confirmation of receipt of comments for those who submit comments through BLM’s On-Line Regulations Comment System.

Response: The BLM does provide confirmation when a comment is received through the BLM’s On-Line Regulations Comment System. If a comment is entered via the BLM’s On-Line Regulations Comment System web version a confirmation is sent after the email is received. Due to Internet traffic and numerous Internet providers a response email may not be received by the comment immediately. It may take several hours for the receipt of email to be received. Many, if not most, of these factors are out of the control of the BLM.

Comment: The BLM should coordinate with other government agencies to develop a single public comment system because it is difficult for the public to learn so many different systems.

Response: The BLM is currently working with a number of other Federal Government agencies to consolidate on-line commenting on regulations for the public. The BLM’s On-Line Regulations Comment System is currently used by the BLM as well as the Bureau of Indian Affairs for regulation changes.

Comment: The BLM should continue the use of ePlanning for accepting comments from the public on EISs. This allows more people to participate in the BLM’s planning process and it is easier to use than other on-line systems. BLM should provide a feedback mechanism to the user who submits a

comment using ePlanning to verify that BLM actually received the comment.

Response: Based on this comment, BLM has added this feature to be applied to the next version of ePlanning.

Comment: The BLM should not implement ePlanning because it is too difficult to use.

Response: We are working on a revised version of ePlanning that incorporates some changes intended to make the system more user friendly. Specific recommendation from the public for improving its usability would be appreciated. You may submit such suggestions to Director (210), Bureau of Land Management, Washington, DC 20240.

5.4.2 General Opposition

Comment: Many of those who opposed the proposed rule stated that BLM should not adopt the rule because it would give ranchers preferential treatment at the expense of the nation's natural resources; favor ranchers and elevate grazing as the primary use of public land instead of managing for multiple resources and restoring degraded resources; weaken the conservation and restoration of public lands; limit public participation; limit BLM's regulatory authority with respect to public lands; and return to the archaic notion that the grazing lessee in essence owns the public's land. Others opposed the rule, stating that it hampers the work of BLM field offices, or that it fails to identify good and bad grazing practices. Many comments opposing the rule expressed their opposition in terms of opposing public land grazing itself.

Response: We agree that we are a multiple use agency and that single uses should not generally be favored at the expense of other users or resources. These regulations do not favor ranchers at the expense of other resources. Rather, the changes are intended, among other things, to

improve the cooperative environment within which ranching takes place on public land. At the same time we have made certain that these adjustments to the regulations do not harm the rangeland resources or prevent significant involvement of the public in rangeland management. We need to amend the current regulations to improve working relationships with permittees and lessees, to protect and enhance the health of public rangelands, to resolve some legal issues, and to improve administrative efficiency. The rule continues to provide for BLM cooperation with other government agencies that have responsibility for grazing on public lands. The rule provides for the interested public to review, provide input, and comment on reports that evaluate monitoring and other data used as a basis for developing terms and conditions of a grazing permit or lease. Also, the rule retains interested public participation when preparing allotment management plans, developing range improvement projects, and apportioning additional forage. In the rule, the interested public retains the opportunity to review proposed and final decisions, as well as the right to protest proposed decisions and appeal final decisions as long as they meet the requirements of 43 CFR 4.470.

The BLM manages for multiple uses. We also restore degraded resources, and believe that we can pursue restoration while managing under the regulations to achieve responsible grazing.

We do not seek to elevate grazing to be the primary use of public land. BLM manages the public land on the basis of multiple use and sustained yield. We intend the regulatory changes to improve working relationships with permittees and lessees. We anticipate that these changes will enhance consultation, cooperation, and day-to-day coordination with them. Additionally, the rule focuses communication efforts on those groups most interested in the management

of public lands for grazing. The cooperation fostered by the rule should help make BLM's field work more efficient and cost effective.

The BLM does not believe that the rule weakens environmental standards. For example, it strengthens standards by requiring monitoring and land assessment in areas that do not meet rangeland health standards due to grazing practices before BLM makes a determination to that effect. As a result, BLM's decisions are expected to reflect a more comprehensive analysis that in turn can be anticipated to ensure defensible decisions if appealed and ultimately more effective decisions from both an implementation and land health perspective. Nothing in the rule diminishes BLM's regulatory authority.

As for distinguishing between good and bad grazing practices, the rule does change the way BLM determines whether an operator has a satisfactory record of performance. See the discussion under Qualifications, Applications, Service Charges, and Satisfactory Performance, below.

Comment: Some comments stated that BLM should not change the regulations because the new regulations do not follow the Secretary's "4 Cs" philosophy.

Response: The changes in the regulations are designed to improve communication, consultation, and cooperation in the service of conservation. We explain elsewhere in this EIS how the various changes help to conserve the health of the land by encouraging cooperation between BLM and grazing permittees and lessees, and how the interested public can participate at various stages of the range management process.

Comment: One comment stated that BLM should revise the proposed regulations in order to better reflect its multiple use mandates, and that BLM fails to justify reversing current regulations. Another stated

that the proposed rule represents fundamental policy shifts. Others stated that the current regulations were litigated and upheld in Federal court.

Response: The reasons for the changes in the grazing regulations are stated in the proposed rule and in the DEIS. We do not believe that the proposed changes reflect "fundamental" policy shifts, although it reverses some changes made in the 1995 rule. We intend the revisions to improve working relations with permittees and lessees, to protect the health of the rangelands, to increase administrative efficiency and effectiveness, and resolve legal issues. The fact that a regulation has been approved in a court decision does not mean that the agency can never amend it further if it finds a need to do so. The changes in the rule are driven by specific issues and concerns that have come to BLM's attention through experience with the 1995 regulations and from public comments.

The regulatory changes are narrow in scope, make no changes in the substance of the fundamentals of rangeland health or the standards and guidelines for grazing administration, and otherwise leave the majority of the 1995 regulatory changes in place. FLPMA provides authority and direction for managing the public lands on the basis of multiple use and sustained yield principles. FLPMA land use planning has determined that grazing continues to be an appropriate use of a large portion of the public lands administered by the BLM. The rule will not affect BLM's multiple use mandate. In fact, one of the major areas of focus of the grazing regulations revisions is protecting the health of the rangelands by making temporary nonuse a more flexible option, by requiring a BLM finding that additional forage is available for livestock use as opposed to other uses before authorizing livestock grazing use of

it on a temporary or sustained-yield basis, and by emphasizing monitoring as a basis for BLM decisions on grazing management, including any increases in active use as well as decreases.

Comment: Comments opposing the rule asserted that grazing has degraded wildlife habitat, soils, cultural sites, native plant communities, and riparian resources, leading to increased erosion, loss of range productivity, and invasion by exotic plants, and will result in desertification and increased listing of species as threatened or endangered. Other comments stated that the proposed rule would do little to promote recovery of streamside vegetation and would cause short-term damage to rangeland and wildlife habitat. Comments urged BLM to take actions to restore these lands, not weaken the grazing regulations, stating that the effects of overgrazing on western rangeland streams, rivers, and fisheries have been documented. A comment said that BLM should allow the land to rest to heal from overgrazing.

Response: Inappropriately managed grazing can cause the effects described in the comment. Other uses can also contribute to these problems. Within its resource capabilities, BLM, in cooperation with users and the public, manages grazing and other uses in a manner that recognizes and addresses the potential for these effects so that, ideally, they are avoided. Under Subpart 4180 of the grazing regulations, BLM must manage grazing, which includes rest from grazing where appropriate, in a manner that achieves or makes progress towards achieving, standards for rangeland health. These standards have been developed on a regional basis and address watershed function, nutrient cycling and energy flow, water quality, habitat for endangered, threatened, proposed, candidate or other special status species. The rule will strengthen BLM's ability to

implement grazing strategies that provide for maintenance or achievement of healthy rangelands.

Comment: A comment asserted that stocking levels are too high, and forage production is only one-fifth of its potential, resulting in conflict with rangeland health standards. Another comment stated that light stocking levels would provide the highest long-term financial return. A third comment stated that BLM should not allow utilization levels based on the take half-leave half principle.

Response: These comments appear to suggest that stocking and utilization levels should be determined through a rulemaking process. Stocking levels are better addressed during the land use planning process where the wide variety of relevant factors, such as climate, competing forage use, and other multiple use needs, can be addressed. What the rule is doing, on the other hand, is to make mainly procedural changes to improve administration of the grazing program as a result of experience implementing the 1995 rule.

Comment: A comment stated that BLM should not renew grazing permits when they expire. Ranchers should not be allowed to graze cattle for personal gain on public land.

Response: The Taylor Grazing Act, the Federal Land Policy and Management Act, and other laws authorize grazing on public land for private business purposes.

Comment: A comment stated that BLM should not place western grazing rights above those in other areas of the country, and that the government provides competitive advantages to public land grazing permittees and lessees.

Response: The comment raises fee and subsidy issues, which were not part of this rulemaking. The grazing fee formula was established in the Public Rangelands Improvement Act (PRIA) of 1978 (43

U.S.C. 1901, 1905) through 1985. The applicability of the formula was extended by Executive Order 12548 on February 19, 1986 (51 FR 5985). The regulatory provision implementing PRIA and the Executive Order appears at 43 CFR 4130.8-1. The formula is not affected by the costs of grazing in other parts of the country outside of the 11 western states of Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, and California. Fee and subsidy issues were examined in BLM's EIS for Rangeland Reform '94. This proposed action addresses refinements of Rangeland Reform '94, including, among other things, inefficiencies in the current regulations.

Comment: One comment objected to the "unfair treatment BLM has given to wild horses, using them as scapegoats for the abuses of livestock and plotting to eliminate them along with the vested interest livestock community."

Response: BLM manages rangelands for multiple use and sustained yield, and follows all laws and regulations governing the management of public lands, including the Wild and Free Roaming Horse and Burro Act of 1971. Management considerations for and analysis of effects on wild horse and burro populations are described in EIS chapters 3.12, 4.2.9, 4.3.9, and 4.4.9. BLM consults with the Wild Horse Advisory Board to coordinate an efficient management program in accordance with statutory direction and at a level commensurate with funding appropriated by Congress.

5.4.3 Purpose and Need

We received numerous comments regarding our reasons for amending the grazing regulations, including many form letters and form emails.

Comment: Several comments, although they supported the purpose of the proposed

rule, stated that, with regard to the proposed provisions on grazing preference and removal of the term "permitted use," active use phase-in, and title to range improvements, the rulemaking record lacks concrete examples of problems with the current regulations that warrant the proposed changes. The comments stated that this may cause problems because BLM is effectively rescinding the 1995 grazing regulations as to these particular matters and restoring the pre-existing status quo. The comments went on to say that an agency rescinding a rule must "explain why the old regulation is no longer desirable," citing *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209, 1216 (D.C.Cir.1983). The comments concluded that, in the 1995 final rule, BLM rejected the concerns expressed in many of the comments on the 1994 proposed rule, and now needs to explain what has changed, including recognition that the concerns stated in those comments on the 1994 proposed rule have proven to be valid.

Response: We believe the changes made in the rule are consistent with the standard announced in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983): "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis." *Id.* at 57. We will supply the requisite reasoned analysis for the changes in the Record of Decision and in the respective section-by-section discussion in the preamble of the final rule.

Comment: Some comments stated that the current rules are consistent with the TGA because they have been tested in court, and that BLM should comply with Supreme Court rulings.

Response: The changes being made in this rule are based on 9 years of experience implementing the 1995 regulations. In some

instances, we found that provisions of those regulations were impairing our ability to protect and enhance rangeland health. For example, providing for sole United States ownership in range improvements led to a reduction in range improvement applications throughout the time that the regulations have been in effect. Also, requiring BLM to take action by the start of the next grazing year after determining that existing grazing management practices or levels of grazing use were significant factors in failing to achieve standards of rangeland health has been seen to be an impracticable decision because it sets a deadline that is impossible to meet in most instances. Further, it is counterproductive because BLM has had to divert resources from rangeland management and monitoring to deal with legal challenges that arise when we fail to meet the unreasonable deadlines. We will discuss these and other problems with the 1995 regulations in more detail when we address comments on the relevant provisions of the proposed rule.

The Supreme Court did not require BLM to retain its existing regulations. It found that the 1995 grazing regulations that it reviewed did not exceed the authority granted to the Secretary under the TGA. BLM does not dispute that the regulations being changed today were in compliance with the TGA and within the Secretary's statutory authority. Changes being made today also are in compliance with the TGA and are within the Secretary's statutory authority.

Comment: Some comments on the proposed rule suggested that BLM consider making changes through policy instead of through regulation changes.

Response: BLM very often does make changes through policy rather than rulemaking. However, if regulations in place need to be modified to achieve improved management, we can only change those regulations through rulemaking.

Comment: A comment stated that BLM should not enact excessive regulations because they make it uneconomic for traditional ranching families to pursue their business.

Response: Excessive regulation can increase costs to user groups. We believe the changes made in the rule will make grazing on public land more efficient without negatively affecting the health of the public rangelands.

Comment: Many of the comments on the proposed rule stated that the regulation changes seem to be driven by only one small faction: grazing permittees and lessees. They went on to say that the regulations should balance the requirements of consultation, cooperation, and coordination (CCC), and no emphasis should be placed on a single user group. The comments concluded that this will not result in increases in cooperation with interested publics as stated because the proposed regulations diminish the levels of CCC with other interested publics and emphasize CCC with a single commercial user of public resources. Other comments stated that improving efficiency would be detrimental to public participation.

Response: The rule provides a mechanism for persons and organizations to attain and maintain "interested public" status for purposes of participating in management decisions as to specific allotments. At the same time, the rule provides a way to remove from the list of interested publics those individuals, groups, or organizations that have been on the list indefinitely without ever commenting on or otherwise providing input in the decision process. These regulations will provide numerous opportunities for the interested public input into resource management allocation decisions.

BLM believes that in-depth involvement of the public in day-to-day management decisions is neither warranted nor

administratively efficient and can in fact delay BLM remedial response actions necessitated by resource conditions. Day-to-day management decisions implement land use planning decisions in which the public has already had full opportunity to participate. Also, such in-depth public involvement can delay routine management responses, such as minor adjustments in livestock numbers or use periods to respond to dynamic on-the-ground conditions. Cooperation with permittees and lessees, on the other hand, usually results in more expeditious steps to address resource conditions and can help avoid lengthy administrative appeals.

Comment: Some comments supporting the purposes of the proposed rule, agreed that there is a need for improving working relationships with users. One comment pointed out that cooperation with ranchers would minimize incompatible uses of interspersed private lands, such as subdivisions, and another said that it would provide better care for the land.

Response: BLM recognizes that ranchers who are committed to the health of the land are valuable partners. These regulatory changes are designed, among other things, to ensure sufficient oversight of public land grazers, and to facilitate better cooperation between BLM and the ranching community, while protecting the land.

Comment: Comments opposing the rule stated that the emphasis on certain considerations, such as the social, economic, and cultural effects of agency actions that change levels of grazing preference, would have adverse effects on natural resources, leading to degradation of the public lands. Comments stated that improving working relationships with grazing permittees and lessees would tend to weaken the ability of BLM to manage rangelands in a timely fashion by adding considerable time before

action can be taken. One comment stated that BLM should have working relationships with the public, not just ranchers. Another accused BLM of appeasing ranchers and increasing the level of environmental damage.

Response: BLM retains the discretion to determine how much time is warranted in coordinating with grazing permittees and lessees. Considering the social, economic, and cultural effects of actions that change grazing use levels contemporaneously with considering the environmental effects should not appreciably increase this time or the time consumed in implementing decisions. We have not materially changed current policy in this regard in this rule, and therefore anticipate few additional delays in the authorization or implementation of grazing management actions on public lands.

BLM does have a working relationship with many publics and encourages public participation in the management of public lands. However, with respect to management actions involving livestock, close coordination by BLM with those responsible for the “hands on” management of the livestock, in other words, the permittees and lessees, is essential to ensure that livestock use effects on resources do not prevent achieving other multiple use management objectives.

Comment: Many comments stated that the proposed rule will slow down or diminish any progress made by the 1995 rule.

Response: The Rangeland Reform effort of 1994-95 made numerous significant changes directed at restoring rangeland health. The changes in this rule continue to provide strong regulation to protect resources while allowing public land grazing to occur as allowed under the Taylor Grazing Act and other laws. In this rule, some timeframes for developing appropriate management decisions and, in some cases, implementing changes in the amount of forage authorized

for grazing use have been lengthened. We expect that having more time to make decisions will lead to better decisions, supported by reliable data gathered through monitoring, and to result in achieving long-term management goals and rangeland health. These new regulatory changes do not change the resource protection values of Rangeland Reform, but they do provide additional time for developing appropriate actions to effect grazing changes.

Comment: A comment stated that the final rule should reflect the legal requirements for cooperation with the public, other agencies, and users, in various laws, including the Federal Land Policy and Management Act (FLPMA), the Fish and Wildlife Coordination Act, the Migratory Bird Treaty Act, the Public Rangelands Improvement Act (PRIA), the Sikes Act, and the Taylor Grazing Act (TGA).

Response: We are complying with all relevant laws. However, attempting to list the various requirements of multiple Federal laws in the grazing regulations would be unwieldy and would require amendment of the regulations to reflect future changes in these laws or the addition of new laws. Rather, the BLM utilizes manuals, handbooks, and other guidance to ensure compliance with relevant laws.

Comment: One comment stated that the proposed rule failed to consider the definition of “principal or major uses” in Section 103 of FLPMA, which “includes, and is limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, and timber production.”

Response: The rule addresses domestic livestock grazing, which is one of the principal uses of the public lands under FLPMA. Regulations on other principal uses of public lands are found elsewhere in Title 43 of the CFR.

Comment: One comment stated that politicians should be barred from direct intervention in matters related to public lands grazing.

Response: Presumably the comment is referring to congressional contacts or oversight associated with livestock grazing. BLM manages the public land, and takes into consideration the views of all interested parties when it is appropriate to do so. This may include the views of public officials, including Members of Congress.

Comment: Many comments expressed the concern that the proposed rule would lead to impairment of the health of the rangelands. They phrased this concern in a variety of ways. Comments stated that the proposed rule would do little to promote riparian recovery or prevent decline of plants or animals. Others stated that the rule would cause additional resource damage to specific geographical areas, such as the Northern Rockies. Comments stated that granting greater discretion to permittees and lessees and to BLM managers may result in more resource impairment. One comment stated that the proposed changes would reduce cooperation in achieving rangeland health objectives. One comment urged that the rule should provide for rangeland management to avoid resource depletion and to conserve resources for the future. Comments disagreed that the changes in the rule were largely administrative in nature with little direct effect on the environment. Comments urged that the rule should be amended to avoid the short-term adverse effects on the environment predicted in the Environmental Impact Statement. Comments stated that the objectives of the regulations should be revised to recognize the real purpose of the proposed rule: to keep ranching operations viable, with rangeland health as a secondary objective. One comment urged that BLM

consider that healthy lands improve local economies.

Response: BLM has not changed the regulatory text in response to these comments. Many provisions in the proposed rule, including increasing the requirements for monitoring, removing the 3-year limit on temporary nonuse, sharing title to range improvements, and others, are designed to protect and enhance the long-term health of the land. The anticipated environmental impacts of the changes are set forth in detail in Section 4.3 of this EIS. We believe that the changes will improve working relationships with permittees and lessees, protect and improve the health of the public rangelands, and improve administrative efficiency. Again, we will address specific regulatory changes in greater detail later in this chapter of the EIS.

Comment: Many comments stated that the monitoring requirements in the proposed rule would cause increased workloads for BLM field managers and personnel.

Response: We acknowledge that the monitoring requirements in the rule will likely increase the workload of BLM field range managers and specialists somewhat, but we anticipate that the increases in monitoring will be accompanied by the benefits of improved management and saved time in the end. This workload increase will require BLM to reprioritize work or to find alternative means of collecting monitoring data, or some combination of these, to the extent that additional monitoring is required. This may include cooperation with the grazing permittees and lessees themselves and with local citizen volunteers. BLM believes the changes in the regulations associated with monitoring will help achieve sustainable management objectives.

Comment: One comment stated that BLM has indicated the necessity of making permit administration more efficient, but that these regulatory changes are motivated

by a determination to exclude the interested public from the decision process. It went on to say that if BLM claims to have processed over 10,000 permits and issued over 13,000 permits, the agency should break down these numbers to show what percent of permits were renewed each year, how many were renewed under Appropriations Act “riders”, and how many were appealed. The comment said that this would help establish a quantitative assessment of the need for change.

Response: The BLM does not believe a quantitative assessment of permit renewals is necessary to explain the need for efficiency changes to the overall administration of the grazing program. Efficient use of public resources, including Federal funding and management, are always proper goals of agency management. However, BLM has revised Section 3.4.1 in the EIS in an effort to address the concerns expressed in the comment. Section 3.4.1 in the EIS now provides additional information which further quantifies and explains the permit renewal process.

The comment also states that our motive in making these regulatory changes was to exclude the interested public from the decision process. In fact, the final rule requires consultation with the interested public where such input is of the greatest value, such as when deciding vegetation management objectives in an allotment management plan, or preparing reports evaluating range conditions. BLM retains the discretion to determine and implement the most appropriate on-the-ground management actions to achieve the objectives and/or respond to range conditions. BLM values productive consultation with the interested public. However, we must retain flexibility in order to take responsive, timely, and efficient management action. We believe that a more efficient consultation process

will help facilitate efficient management of the rangelands while still providing for significant input from interested parties.

Comment: Many comments stated that BLM should increase funding to improve working relations with permittees and lessees and promote conservation of public lands, and that even small funding increases could greatly contribute to the mutual goals of continued grazing and healthy rangelands, if they are applied in an innovative and collaborative manner to facilitate improved on-the-ground livestock management practices.

Response: BLM manages its Congressional appropriations in light of its varied and diverse statutory missions and responsibilities, and seeks opportunities to leverage its funding by engaging in partnerships wherever possible. Funding of BLM programs is not within the scope of this rulemaking. However, BLM intends that the rule will broaden opportunities for partnerships.

Comment: BLM should establish policy and subsequent regulations with procedures for optimizing habitat quantity and quality for the variety of multiple uses and those species that are considered biologically dependent on their respective ecosystems.

Response: BLM manages for multiple uses under the guidance found in BLM land use plans. BLM land use planning regulations, and policy and procedure are found in 43 CFR Subparts 1601 and 1610, BLM Manual 1601—*Land Use Planning*, and BLM Handbook H-1601-1—*Land Use Planning Handbook*. BLM policy and procedures regarding management of wildlife and their habitats, sensitive species and the introduction, transplant and augmentation of fish, wildlife, and plants are found in BLM Manuals 6500—*Wildlife and Fisheries Management*, 6525—*Sikes Act Wildlife Programs*, 6840—*Special*

Status Species Management and 1745—Introduction, Transplant, Augmentation, and Reestablishment of Fish, Wildlife and Plants. Promulgating regulations concerning these subjects is outside the scope of this rule. Species-specific provisions are not appropriate for national regulations, and should be contained in local land use plans issued in accordance with these manual provisions and the planning regulations.

Comment: BLM should not change the regulations because there has been no data presented that support the contention that range health standards will improve as a result of the changes.

Response: The intent of the proposed regulations is to improve working relationships with permittees and lessees, protect the health of the rangelands, and increase administrative effectiveness and efficiency. Most the regulatory changes are administrative and are expected to have little or no effect on the environment. We believe the rationale in Section 1.2 of the EIS, “The Purpose and Need for the Proposed Action,” provides sufficient justification for changing the regulations. Section 4.3, “Alternative Two: Proposed Action,” presents a detailed analysis of the environmental consequences of the proposed alternative. Data show declines in development of range improvements since 1995 (see Table 3.4.3.1), and inability to meet action deadlines (leading to resource-diverting legal challenges and a cumulative negative impact on our administrative procedures). The invalidation of the regulatory provisions on conservation permits led to the need for more flexibility in allowing and administering temporary nonuse.

5.4.4 Range of Alternatives Considered

Comment: Some comments recommended major changes to the grazing

program. Some comments asked BLM not to permit grazing on arid lands. Others advocated eliminating grazing in riparian areas. Other comments recommended use of long-term rest to help achieve standards. One comment recommended reducing stocking rates by 25 percent on allotments not meeting standards of rangeland health. Some comments recommended that the alternatives considered address the relationship between livestock grazing and other uses of the public lands. Some comments recommended that BLM develop alternatives to address a number of specific aspects of grazing management, such as: (1) determining the capacity of the land to support wildlife, watershed function, and livestock; (2) determining livestock stocking rates; and (3) requiring allotments to demonstrate statistically significant improvement.

Response: In light of the broad sweep of the changes in the regulations in 1995 and the accompanying analysis in the EIS at that time, and based on the nine years of experience in implementing those regulatory changes, we have determined that meeting our purposes and needs – the health of the public rangelands, improved working relationships with permittees and lessees, and improved administrative efficiency – does not require major changes in the grazing program.

The matters identified in these comments generally are best considered in land use planning or otherwise on a site-specific basis, not in a rule related to overall regulatory provisions. The relationship between livestock grazing and other uses of the public lands, and the capacity of the land to support wildlife, watershed function, and livestock, are questions of multiple use management, i.e., how public lands and their various resources “are utilized in the combination that will best meet the present and future needs of the American people.” 43 U.S.C. 1702(c)

(definition of “multiple use”). Pursuant to section 202 of FLPMA (43 U.S.C. 1712), BLM prepares resource management plans (RMPs) to consider and balance the multiple uses that may be appropriate for tracts of public lands. Decisions determining or adjusting livestock stocking rates, or determining how to measure an allotment’s improvement in rangeland health, ordinarily require site-specific information that can most efficiently be obtained by developing an allotment management plan (AMP) or a grazing decision.

Comment: Some comments suggested that the EIS should have included an alternative more directed at conservation interests and the recommendations of environmental advocates, such as one that includes sage grouse conservation measures. They believed that the regulation changes are biased toward the interests of the livestock industry and that the livestock industry would benefit at the expense of other users and the environment. One comment urged BLM to add specific sage grouse consideration measures to the alternatives considered.

Response: BLM does not believe that these changes will benefit the livestock industry at the expense of other users and the environment. The long-term objective of requiring livestock grazing operations to meet standards for rangeland health has not been changed from the 1995 regulations. As discussed in the Draft and Final EIS for Rangeland Reform ’94, the overall changes adopted in that rulemaking were anticipated to have a number of positive environmental impacts, including positive impacts for sage grouse. The rule now under consideration is designed to make refinements in the existing regulations and is not a significant departure from the regulations as revised in 1995. We believe that standards for rangeland health can be achieved without the major changes that may have been included under

a substantially different “conservation alternative” suggested by some of the comments. Such changes would be likely to have significant effects on many livestock operators who are dependent on public rangelands for their livelihood. The changes to the regulations were never intended to be either a comprehensive restructuring of the grazing program or a replacement of the 1995 grazing regulations. We do not believe that a broad “conservation alternative” which makes major changes to the livestock grazing program falls within a reasonable range of alternatives that meet the purpose and need of the Proposed Action. Measures to protect sage grouse and their habitat are appropriately considered in the Bureau’s sage grouse conservation measures. We address the sage grouse conservation strategy generally in Chapter 1 and Chapter 4 of this EIS.

Comment: Some comments suggested that the alternatives analyzed in detail in the EIS do not provide a clear basis for choice. Some comments focused on a concern that the alternatives in the EIS do not represent a reasonable range of alternatives because they are too similar. Some comments stated that BLM should prepare an EIS that thoroughly analyzes the cumulative impacts of a range of alternative actions that will truly enable the agency to manage grazing lands under its jurisdiction responsibly. Some comments suggested an alternative that would provide for the development of baseline data on the grazing capacity of public lands. Some comments said that BLM cannot so narrowly define the scope of a project that it forecloses a reasonable consideration of alternatives. (Colorado Environmental Coalition v. Dombeck, (185 F.3d 1162, 1174 (10th Cir. 1999))). Many comments recommended that BLM should examine alternatives that would make major changes in the grazing program or in the relationship

between livestock grazing and other uses of the public lands.

Response: The broad-ranging analysis suggested by these comments was addressed in Rangeland Reform in 1994 and the accompanying EIS for the 1995 regulatory changes. As explained in the EIS for this rulemaking under The Purpose of and Need for the Proposed Action, some of these revisions to the grazing regulations were developed as a means of achieving BLM’s rangeland management objectives, including meeting the standards for rangeland health. It is not BLM’s intent to revise major aspects of multiple use management or the livestock grazing program in this rule. BLM’s intent is to make the existing livestock grazing program work better to achieve the standards for rangeland health on all allotments. The regulatory changes are narrow in scope, and make no changes in grazing fees, the substance of the fundamentals of rangeland health, or the standards and guidelines for grazing administration. They leave the majority of the 1995 regulatory changes in place. The changes are driven by specific issues and concerns that BLM has recognized, either based on our own experience or from input by stakeholders, and we believe that all may benefit from these amendments of the regulations. Additional, markedly different, alternatives would not meet the purpose of and need for the action. While there may be conflicts among resource uses on specific sites that may point to a need to change the way in which livestock grazing occurs on an allotment, such conflicts are more appropriately resolved on an allotment-specific basis, rather than in the grazing regulations. We believe the three alternatives analyzed in detail in the EIS provide a reasonable range of alternatives that best provides a meaningful comparison for achieving the purpose and need described in the EIS.

Comment: Some comments expressed concern over the relative lack of quantification of effects in the EIS. They contended that this limits BLM's ability to compare alternatives.

Response: At the rulemaking tier of decision-making, such as in the case of developing the rule now considered in this EIS, meaningful quantification is generally not appropriate. Quantification is more appropriate at site-specific levels of decision, where on-the-ground issues are analyzed and resolved. To provide perspective on how the regulation changes may affect all allotments, the EIS provides information (see Section 5.4.5) on the number of allotments where assessments have been completed, and the percentage of those that meet standards for rangeland health. Of those that do not meet the standards, we also provide the percentage of allotments where standards are not met because of livestock grazing on the allotment. BLM will make grazing decisions to ensure that management on all allotments that do not meet standards due in significant part to existing grazing management practices or levels of grazing use is changed to help achieve the standards. The timeframes amended under the rule may also affect those allotments. These numbers provide a perspective on the percentage of allotments where the rule, e.g., in section 4110.3, may apply. Because the rule does not make any of the site-specific decisions on where livestock grazing occurs and how, BLM's ability to present and analyze quantifiable estimates in this EIS is limited.

Comment: Some comments recommended the No Action alternative, or at least the No Action alternative with regard to one or more of the changes. The No Action alternative considers that each of the changes would not occur. Some comments stated they preferred the No Action alternative because they believed that the proposed changes were

designed to undermine the amendments made in the regulations in 1995. Some comments believed the regulatory changes could open the door to potentially adverse environmental consequences.

Response: The changes in the regulations were designed to accomplish one or more of the three objectives stated at the beginning of this section and under purpose and need for the Proposed Action. The overall land management objective, both in 1995 and in this rulemaking, is to amend the regulations to assist BLM in managing the grazing program in a way that makes progress toward achieving the standards for rangeland health on all allotments. As experience has shown, some provisions in the 1995 rule have negative effects on BLM's ability to improve rangeland health, and the Federal Court rejection of the provision for conservation use permits created a need for more flexibility in authorizing temporary nonuse to promote rangeland recovery.

The most useful comparison for the changes in the regulations is to compare the changes (Proposed Action) to the 1995 regulations (No Action). Most of the regulation changes do not lend themselves to being implemented in stages or degrees of implementation in a way that would materially affect environmental effects or rangeland health. Those that do are addressed in the section-by-section analysis of comments.

Comment: Many comments expressed concern that alternatives should have been considered for several of the changes in specific sections of the regulations. These specific provisions include the 24-month period after a determination on an allotment that livestock grazing is a significant factor failing to achieve the standards for rangeland health under section 4180.2(c), and the 5-year period for phasing in reductions in active use of more than 10 percent, under section

4110.3-3(a).

Response: We examined what we believe to be an appropriate range of alternatives, and have not added additional ones in the final EIS. When considering time limitations, an infinite array of options is theoretically possible. The alternatives considered here were reasonable, given the nature of the proposed rule, and sufficiently distinct to allow for meaningful comparisons in the analysis.

Currently, section 4180.2(c) requires that corrective action to be taken by the start of the next grazing season when grazing is determined to be a significant factor in the failure to achieve a rangeland health standard. While BLM desires to take effective corrective action as quickly as possible, recent experience has demonstrated that complex circumstances can sometimes require extended periods of time to form effective long-term solutions. Rangeland standards failures have often developed slowly over many years and may take years to remedy completely. Factors complicating the formulation of action plans include the legal requirements of NEPA, the National Historic Preservation Act (NHPA), and ESA; water rights adjudications; and the presence of multiple permittees on an allotment. We determined the proposed action timeframe of 24 months to be the shortest reasonable timeframe that would accommodate the vast majority of corrective actions. The final rule added language to recognize that, in some instances, even more time may be required due to delays outside the control of BLM. We initially considered other deadlines, such as 12 or 18 months, but we viewed them as inadequate to deal with the more complicated situations. We considered removing all timeframe guidance, but determined that a reasonable deadline would be useful to help ensure that BLM actions were not inadvertently delayed.

BLM examined two alternatives for active use changes greater than 10 percent in this EIS, in addition to the current regulations (the No Action Alternative). Scoping indicated that permittees and lessees supported a five-year option to address the financial shocks that can come in the rare instances when large decreases are made in active use. Scoping did not indicate strong support for longer or shorter timeframes. BLM addressed the impacts associated with mandatory or discretionary phase-in systems. This was a reasonable range of alternatives for this issue.

Comments that address specific sections of the regulations and BLM's responses are addressed under separate headings, in this case the section entitled "Timeframe for Taking Action" and "Active use- Definition, Increases and Decreases."

5.4.5 Affected Environment and Impact Analysis

Comment: Large numbers of comments addressed environmental effects of the proposed rule, mostly in opposition to the rule. One comment, however, stated that BLM has overstated the adverse effects of the proposed rule, and that we should say that the short-term effects of regulatory changes would be so minuscule as to be not worth mentioning. It went on to agree that, in the long term, changes under the proposed rule can be expected to improve range conditions.

Response: The environmental effects of the rule are analyzed in Section 4.3 of this EIS. As discussed in detail in Section 4.3 2, we anticipate short-term adverse effects only in those few instances where vegetation recovery is delayed by the extended implementation deadline. This will likely be rare, since BLM has authority under section 4110.3-2 and section 4110.3-3 of the rule to decrease use or suspend use if resource conditions demand, even if the 24 months

allowed for determining an action have not passed. Only in those instances where longer term reductions are requested and rangeland health is not imperiled would the recovery of vegetation be somewhat delayed.

Comment: Many comments expressed concern that the combination of changes in the regulations would lead to multiple-year deferment of appropriate actions. The concern was that requiring monitoring in order to make a determination, allowing up to 24 months to develop and analyze an appropriate action, and requiring up to 5 years to implement changes of more than 10 percent in level of use, could lead to as much as 9 years of delay in changes being made on allotments that most needed the adjustment in grazing management. Effects on wildlife and habitat, threatened and endangered species, invasive weed infestations, recreational uses, and BLM workload and funding were all issues of concern.

Response: The timeframes provided for each of the actions listed are limits. In most cases, the maximum amount of time allowed for each of the 3 issues (monitoring, appropriate action development, and implementing changes) will not likely be needed. At the end of Fiscal Year 2002, only about 16 percent of the 7,437 (or about 1,189) allotments assessed for land health status were not achieving standards because of existing livestock grazing management. Assessments of the remaining 84 percent indicated that standards were met, or that there was a reason other than existing livestock grazing for not meeting standards. Most of the adjustments on these less than 1,190 allotments that failed to meet standards due to existing livestock management have been made in the season of use, or movement and control of livestock, rather than in levels of active use, leaving less than 595 that required decreases in active use. An unknown portion of these adjustments were changes of

more than 10 percent in active use and would be allowed to phase in their reductions over 5 years.

In 2003 the forage actually consumed, as documented by billings, was 6.7 million AUMs, while the amount authorized by term permits was 12.6 million AUMs. This reduced amount of actual grazing was largely due to drought, plus other reasons, such as fire. However, it reflects the fact that grazers are already taking temporary nonuse or being suspended, either voluntarily or by agreement, due to the current range and weather conditions.

As stated in section 4.3.7 of the EIS, there may be limited short-term negative effects if the full 24 months or more is needed to develop an appropriate action and complete the required coordination and consultation. However, the extra time taken to develop a meaningful action is expected to provide greater long term benefits to other resources. For example, merely reducing the level of use in a riparian area is not likely to improve the riparian area condition, because adjustments in season, frequency, and duration of use are much more effective management strategies for restoring riparian functionality. Taking the additional time to develop an appropriate action may actually decrease the amount of time taken to implement the decision, particularly if the decision is not appealed as a result of the additional time spent in consulting with permittees and formulating and analyzing options. Implementing decisions can be delayed by 18 to 36 months if appealed and if a stay is granted.

Under the selected alternative, monitoring will not be necessary on every allotment in order to make a determination, but only on those allotments that fail to meet standards due to levels of grazing use or management practices. The number of allotments where all three action issues (monitoring, 24 months to develop remedial action, and 5-year phase

in of adjustments) are needed is expected to be small. Finally, the rule provides the authorized officer authority to close an allotment or portions thereof immediately if continued grazing use poses an imminent likelihood of significant resource damage. As a result, BLM retains the discretion to address resource problems on a timely basis.

Comment: One comment that opposed the rule stated that BLM should not adopt grazing regulations that will hurt the land in the short-term while betting that long term studies will lead to better land conditions at some indefinite time in the future.

Response: BLM believes that adoption of the rule will lead to improved land conditions in the long-term as indicated in the analysis in section 4.5 of the EIS. That analysis states that some adverse effects are unavoidable, but in the long-term more comprehensive and sustainable decisions would be developed by relying on data and information collected through monitoring.

Comment: One comment stated that BLM should acknowledge that western rangelands are in decline due to improper grazing strategies, and lack of appropriate measures or changes to deal with drought, fire, exotic weeds, and excessive horse populations.

Response: As stated in a previous response, as of the end of 2002, we had completed evaluations on 7,437 allotments. We determined approximately 16 percent of those allotments not to be meeting land health standards because of livestock grazing management. We conclude from this that generally most public rangelands are not in decline, or at least not to levels that we deem unsatisfactory. To the extent that more than 16 percent of allotments may have declined to a state of unsatisfactoriness, we have found that grazing is not a significant cause. We have begun actions to address the problems we identified. The changes made in the rule now under consideration in this EIS.

The rule will improve our ability to assess rangeland health and implement effective corrective measures. Furthermore, we believe the rule will result in more collaboration and cooperation with permittees and lessees in addressing problems. We believe that we have adequate measures in place in the grazing regulations to deal with emergency situations such as drought and fires (section 4110.3.3(b)). The BLM believes it continues to make progress in our livestock grazing and wild horse and burro management programs, particularly in terms of taking appropriate action to address rangeland health issues. The long term goal of this rule is to reverse declines in western rangeland health, in those areas where there are declines, through improved consultation and cooperation with ranchers, state and local authorities in devising means to restore degraded areas and maintain currently healthy areas.

Comment: Comments stated that BLM should not adopt the new regulations because they will weaken wildlife protections. One comment stated that BLM's analysis shows that the regulatory changes would not mitigate declines in populations of mule deer, sage grouse, and many other species, except when ranchers agree not to graze for 3 years. Another comment asked BLM to show by allotment the current status and population trends of greater sage grouse and analyze the cumulative effects of the regulatory changes. One comment asked BLM to discuss the agency's capacity, in terms of budget and personnel, to assess and monitor the status of sage grouse, and how its capacity would be affected by the regulatory changes. Other comments urged BLM to add specific sage grouse conservation measures to the regulations. A comment stated that BLM should consider the effects of the rule on nongame bird species that are likely candidates for listing as threatened or endangered species. Another said that BLM

should consider values of wildlife displaced by livestock on public lands in order to address the loss of wildlife associated recreation which has occurred under current management

Response: Most of the changes in the rule will have little or no detrimental effect on wildlife. The changes are largely administrative in nature to improve working relationships with permittees and lessees, to protect rangeland health, and to improve efficiency and effectiveness, including bringing the regulations into compliance with court decisions. Land use plans and site-specific analyses are the proper vehicles for considering the site-specific effects of grazing on wildlife. Allowing adjustments in active use in excess of 10 percent to be implemented over a 5-year period could have short-term adverse effects on plants and wildlife. Specific effects would be determined on a case by case basis in site-specific NEPA analyses and would identify possible mitigation measures. Changes in active grazing use in excess of 10 percent are infrequent. Also, the provision for phased in changes in use would not apply if it conflicted with an applicable law, e.g., if immediate implementation was a condition of a biological opinion under the Endangered Species Act.

Furthermore, under section 4110.3-3(b), if BLM determines that resources require immediate protection or continued grazing use poses an imminent likelihood of significant resource damage, we can immediately close allotments or portions of allotments or modify grazing use to protect the resources in question. Providing BLM up to 24 months to propose and analyze appropriate action to address failure to meet rangeland health standards may adversely affect wildlife in the short-term, but will benefit wildlife in the long term. The provision which allows for BLM to extend

the timeframe beyond the 24 months would only be invoked if failure to comply with legal requirements was outside of BLM's control, i.e., the responsibility of another agency. The most likely occurrence of that nature would be if there was a delay due to the requirements of the Endangered Species Act not being fully met. Concerns and issues regarding specific species such as sage grouse and any specific threatened, endangered, or other special status species are fully addressed in land use or activity planning or permit or lease issuance or renewal environmental analyses. Specific detailed analysis for individual species is beyond the scope of this rule. In developing these regulations, BLM ensured that it had the mechanisms in place to take appropriate action to protect, as necessary, wildlife resources. This EIS discusses the sage grouse conservation strategy at the end of Chapter 1 and addresses the effects of the rule on the sage grouse strategy in the cumulative effects analysis in Section 4.4.6. Effects on wildlife in general are discussed are analyzed in Sections 4.3.7 through 4.3.9 of this EIS.

Comment: One comment stated that procedures followed by BLM in the management of public rangelands contribute to petitions for Federal listings under the Endangered Species Act, and ultimately to more restricted and costly management of Federal lands. The result of this management is rangeland with reduced capacity to support native big game and upland game species, which has an adverse affect on western cultural, social, and economic values.

Response: This rule focuses on improving the efficiency of livestock grazing administration on public lands. During each step of the land use planning process, BLM considers and analyzes the potential effects on wildlife. This consideration begins at the broad land use planning phase, and continues through allotment management planning,

activity planning, and during development of terms and conditions of a grazing permit or lease. We recognize that recreation and tourism, including the viewing or hunting of animals, have increased in their relative contribution to many local and regional economies. The rule adopted today does not alter the way BLM considers potential effects on wildlife. Therefore, this rule is not expected to have an observable direct effect on the ability of the public to enjoy wildlife, and will not adversely affect the economic values associated with wildlife. Specific effects on local or visiting wildlife enthusiasts would be more appropriately addressed in any subsequent land use plan or allotment management plan analysis.

Comment: Several comments raised a number of other environmental factors that BLM should discuss, and stated that grazing has adverse effects on them: air quality, wild horses and burros, the prevalence of invasive weed species. Comments stated that the proposed rule would encourage the spread of invasive species, threatening shrub-steppe habitat, and damaging riparian and wet areas.

Response: These issues are discussed in detail in the EIS in sections 4.3.6, 4.3.9, and 4.3.2, respectively. To the extent that the fundamentals of rangeland health and the standards and guidelines for grazing administration address these issues in Subpart 4180, the rule makes no substantive changes in the fundamentals or standards themselves. Addressing more specific effects on wild horses and burros is outside the scope of the rule. Specific effects on wild horses and burros are more appropriately addressed in subsequent land use plans, landscape-level analyses, or undertaking-specific analyses.

Comment: Comments also asked BLM to impose various levels of restriction on grazing in the rule, including eliminating public land grazing altogether on the grounds that domestic livestock are exotic

to the western range. Some urged us not to increase grazing in arid lands. Another comment suggested that BLM should require permittees and lessees to fence all riparian areas to eliminate livestock as a cause of degraded riparian areas. Others advocated eliminating grazing in riparian areas.

Response: The rule does not directly result in a change in levels of active use on arid lands or anywhere else. The rule continues to allow BLM to manage the public rangelands to address adverse effects. For example, the rule retains BLM's authority to close allotments or portions of allotments to grazing by any kind of livestock or to modify authorized grazing use when we determine and document that continued grazing use poses an imminent likelihood of significant resource damage. Thus, if a riparian area is threatened with significant damage, we can have it fenced to exclude livestock. The rule also retains the fundamentals, standards and guidelines provisions of the rule to address rangeland health.

Although fencing of riparian areas to improve grazing management is appropriate under certain circumstances, a requirement to fence all riparian areas would be impractical due to potential conflicts the fences might pose with other multiple uses such as recreation and wildlife habitat, and because of the expense of construction and ongoing maintenance.

Comment: Some comments suggested that the EIS should include a description and analysis of the effects that the proposed changes would have on specific resource elements. Comments asked the BLM to describe the water quality effects resulting from livestock waste; the effects of livestock grazing on water quality because of the interaction between livestock, watersheds, riparian zones and streams; livestock grazing effects on fish, birds and many animal species; effects on wildlife resulting from

competition for forage between livestock and wildlife; the capability and suitability of grazing on steep slopes; and finally a quantitative expression of the overall effects of the proposed changes on the land and the resources. Other comments suggested that the role of soil microbiotic crusts and the extent of different soil types, their erosion rates, and the effects of livestock grazing on each soil type should be described in the EIS.

Response: This EIS documents in a broad way the environmental effects that would result from the proposed regulatory changes. The proposed regulatory changes address several individual administrative steps in the overall process of managing grazing on public lands. Therefore the analysis is necessarily broad, and ecological elements and the potential effects of the proposed regulatory changes are described in a general context. It is not BLM's intent in this rule making to initiate major changes to the livestock grazing program or to make land use decisions. Most of the changes in the rule will have little or no effect on wildlife, water quality or soil erosion rates. Normally, land use plans and activity level plans are the proper vehicles for analyzing the effects on and interaction of grazing, wildlife, soils and water quality. We have modified the EIS to quantify the amount of public lands that may be affected in the short-term by those regulatory changes that may affect wildlife, soils, or water quality. The total number of allotments affected by the selected alternative is expected to be small because only 16 percent of the allotments evaluated during the last 5 years needed adjustments in current livestock grazing management. See Section 4.3.1 of this EIS.

Steep slopes can strongly influence livestock grazing patterns on rangelands. When preparing allotment evaluations at the field office level, BLM evaluates this influence when conducting livestock use

pattern mapping, range trend analysis, range health assessments and through other monitoring efforts. This information is considered when developing effective livestock management strategies at the allotment planning level, along with the locations of highly erodible soils, fragile biotic soil crusts, critical fish and wildlife habitat, riparian zones, water bodies, and other resource values. Again, the proposed action and alternatives analyzed here do not address this level of detail, which is more appropriately analyzed at the allotment management and activity planning level.

Comment: Some comments suggested that BLM use information from several references and studies to analyze the impacts of grazing management because these publications describe the flaws with livestock management on public lands. The following references were suggested: "Welfare Ranching, The Subsidized Destruction of the American West"; "The Western Range Revisited: Removing Livestock from Public Lands to Conserve Native Biodiversity"; "Waste of the West"; and the National Research Council's "Riparian Areas: Functions and Strategies for Management"; a 1988 GAO study that determined the best method for promoting riparian recovery is livestock exclusion; a BLM study and the methodology used to show why enclosure fences are unnecessary if allotments are rested to allow recovery; and a study by Catlin et al (2003) and Stevens et al (2002) which criticize a number of elements of the current PFC assessment processes.

Response: The BLM selected the literature used in this EIS based on the resource specialist's best professional judgment as to its relevance and suitability for the analysis. It would be impossible to review and include all literature on a particular topic. We are familiar with several of the references and

studies identified in the comments. Welfare Ranching, *The Subsidized Destruction of the American West* was cited in the discussion on social effects. Several of the studies address issues that are not relevant to the analyses in this EIS. We did not examine large scale changes to the grazing program in this rulemaking, nor did we consider a no grazing scenario. The intent was to address amendments fine-tuning the regulations rather than wholesale revisions. In conclusion, we believe that the studies and reports reviewed for and used in the preparation of this EIS were pertinent and sufficient for the level and focus of the analyses.

Comment: One comment suggested that the EIS should include a summary of BLM surveys (showing densities, population sizes, and distributions) of special status species, how much of its land has been surveyed, what species are considered special status species by states and how they and their habitat are affected by livestock grazing because actions are commonly taken without presenting supporting data. The comment also suggested that BLM should delineate how its management will specifically protect each threatened, endangered or sensitive species or their habitat that occurs on BLM lands.

Response: It is not practical or necessary to summarize all surveys and maintain an inventory of special status species on a national level for the purpose of analyzing a programmatic regulatory amendment such as this rulemaking. Individual BLM state offices manage current information and data relative to special status species in close coordination with the U.S. Fish and Wildlife Service (FWS), the National Oceanic and Atmospheric Administration, Fisheries (NOAA Fisheries), and appropriate state agencies. Special status species surveys are periodically conducted in BLM Districts and are required for all activity level projects. The

conservation and protection of special status species is outlined in the BLM Special Status Species Management Policy as reflected in section 3.11 of the EIS. Actions taken to protect special status species from livestock grazing are developed in interdisciplinary allotment evaluations and outlined in the terms and conditions of grazing permits and leases. In the case of listed species, grazing permit terms and conditions are developed from a Biological Opinion issued by the FWS or NOAA Fisheries, and are based on supporting data from a BLM Biological Assessment.

Comment: Some comments recommended that the EIS should provide additional data on range improvements, allotment conditions, permit renewals, and the use of authority in section 4110.3-3(b) to curtail grazing because of grazing effects on upland soils. The range improvement data requested was the type, proportion funded by BLM, and the current condition of the range improvement. Permit renewal information the comment requested was the number of permits renewed since 1999 that were analyzed through a NEPA process, number of permits expiring in the next 5 years, and the current schedule to complete NEPA analysis of the remaining permits that were re-issued using Congressional authority that allowed renewal without NEPA analysis.

Response: This programmatic EIS documents the environmental effects that would result from the proposed regulatory changes. The changes affect several individual administrative and timing provisions in the grazing regulations. Therefore the analysis is necessarily broad, and ecological elements and the potential effects of the proposed regulatory changes are described in a general context. Detailed data on range improvements is not readily available or relevant to the analysis of the regulatory changes that would allow shared

title between BLM and the permittee or lessee. Table 3.4.3.1 in the EIS presents data on range improvements to aid in analyzing the proposed regulatory amendment. Allotment level activity and condition data is valuable for land use planning and allotment management planning but would not provide meaningful analysis for this programmatic EIS. NEPA guidance provided by the President's Council for Environmental Quality states that the level of detail presented in the affected environment section be succinct and only provides detail that is relevant to the level of impact analysis.

Section 3.4.1 of the EIS provides a discussion of BLM's permit renewal status including the number of permits expiring, permits renewed, and the number that will expire in the next 5 years. In response to the request for additional information on grazing permit renewals, we have added information to this section of the EIS on the permits renewed using the authorization provided in the Congressional appropriations language and the schedule to eliminate this backlog. Proposed and final decisions to renew grazing permits under this authority remain subject to protest and appeal by the interested public and monitoring and evaluation reports used as a basis for permit renewal remain available to the interested public in the rule.

BLM does not maintain data on the frequency of use of authority in section 4110.3-3(b) to curtail grazing because of grazing effects on upland soils.

Comment: Some comments requested that we provide additional explanation of the process used to transfer range improvement ownership between permittees, how ownership of range improvement is determined in a cooperative range improvement agreement, and the reason a section 4 range improvement permit can not be used to develop water.

Response: In response to the request for explanation of the process used to transfer any interest in range improvement between permittees or lessees we have added information on the pertinent sections of the regulations that require a documented agreement between the new and former permittee or lessee in section 3.4.3 of the EIS. The transfer of any interest or obligation in permanent range improvements is provided for in section 4110.2-3(a)(2) and section 4120.3-5. As described in section 4.3.1 of the EIS, shared title to range improvements is documented in a cooperative range improvement agreement (CRIA) between the United States and a cooperator "in proportion to their financial or labor contribution toward the project's development and construction." Section 4 range improvement permits can not be used to authorize water developments because section 4120.3-2(b) states "authorization for all new permanent water developments...shall be through cooperative range improvement agreements" as mentioned in the EIS in 3.4.4.

Comment: One comment requested that the affected environment section of the EIS disclose additional information about the methodology used to show vegetation composition. This comment expressed doubt in the validity of using this condition assessment tool to depict environmental conditions of wildlife habitat on public land. Another comment wanted BLM to describe why vegetation conditions appear to have declined from those conditions presented in the 1994 Range Reform DEIS.

Response: BLM used standard protocols (BLM Technical Manual on Site Condition/ Status) to portray vegetation conditions in this EIS. As the comment stated, wildlife habitat is dependent on structural qualities, forage species abundance, diversity and production of both overstory and understory

vegetation. The National Rangeland Inventory data is not intended as the single data element used to rate habitat condition, however it is useful for characterizing general rangeland vegetation condition. The environmental analysis is specific to changes in grazing regulations and is not intended to address wildlife habitat assessment methods. Vegetation information at the ecological site level, where available, resides in the field offices. This information is often summarized and utilized for analysis in land use plans and allotment management plans but is not appropriate for a programmatic analysis.

At present it is unclear whether vegetation conditions on public lands have markedly improved or declined in the 10 years since publication of the 1994 Rangeland Reform DEIS. Many factors such as sustained drought conditions, livestock use and many other public land uses can play a role in the status of plant communities. Natural revegetation tends to be slow and stochastic on arid and semiarid rangelands, where water frequently limits or prevents plant establishment and growth (Call, C. A., and B. A. Roundy, 1991). The influence of grazing on species composition and productivity can be minor relative to the changes caused by variations in rainfall (Archer, S., and F.E. Smeins, 1991).

Comment: Some comments suggested that BLM should include in the Affected Resource section of this EIS additional information regarding fire and fuels, the various studies that describe the influence of human activities, including grazing, on the proliferation and spread of exotic annual grasses, and the resulting changes in fire regimes. Another comment suggested that BLM should include a discussion of the role of livestock in changing the dynamics and moisture characteristics in the Basin sage and sage-steppe communities and their effects on fire frequency and intensity. Finally another

comment suggested that BLM should clarify whether pinyon–juniper habitat has expanded due to grazing.

Response: In response to these comments we have modified section 3.6, Description of Affected Environment, of the EIS to address the proliferation and spread of annual grasses, resulting in larger and more intense wildfires.

Grazing practices prior to 1934 played a role in the reduction of herbaceous vegetation and the increase in woody vegetation. The dramatic changes resulting from these grazing practices are one of the reasons the Grazing Service and later BLM, was established. There are now over 50 percent fewer livestock on public lands now than there was in 1934. The combination of historic grazing practices and 50 years of aggressive fire suppression has had a major effect in the increase in woody vegetation, a buildup of fuels and the increase in severity of fire. A major contributing factor to the increased severity of fires is the prolonged drought in the west. The fuel loading and dryness of the fuels are causing suppression problems, further contributing to the size of recent fires.

While it is likely that there has been some change in the dynamics and moisture regimes in the Great Basin sagebrush steppe vegetation communities, the documentation of the degree of change and its affect on fire frequency and intensity would be difficult, if not impossible to define, especially in view of the other confounding factors like the invasion of cheatgrass and other changes in vegetation composition. For this reason we are not incorporating this discussion in the EIS.

There are three major thoughts about the causal factors of juniper expansion on shrub and grasslands: (a) grazing of domesticated livestock, (b) suppression of wildfires, and (c) climactic shifts (Young and Evans 1981).

European activity may have played a role in limiting fire spread with the construction of roads and breaking up the continuity of fuels. There are too many variables affecting the expansion of pinyon–juniper on rangelands, and some that are of varied opinions, therefore the EIS will not be modified to address this comment.

Comment: We received comments on the description of BLM’s wild horse and burro program. One comment stated that BLM should recognize that establishing Appropriate Management Levels (AML) by 2005 is unlikely based on past performance and on the requirement that a “thriving natural ecological balance” be achieved. Another comment asked BLM to explain why it believes that AML can be achieved by 2007, since that goal seems unlikely in light of past performance and the fiscal situation of the wild horse and burro program.

Response: The establishment of Appropriate Management Levels (AMLs) for all Herd Management Areas by 2005 is a “strategic goal” of the BLM. The agency has developed a blueprint to reach this goal, pursuant to adequate funding provided by Congress. Achieving AML by 2005, not 2007, as stated in the comment, will be useful for the purpose of analysis of the direct and indirect effects of the proposed action and alternatives. Achieving AML by 2005 is feasible, considering current funding proposals and internal capabilities of BLM.

Comment: One comment pointed out that the statement in section 3.13 of the EIS: “More highly developed recreational activities and those recreationists from local or rural areas tend to be less affected by rangeland conditions” is incorrect. Recreationists from local and rural areas can be more affected by rangeland conditions because they tend to recreate on rangelands more than people from distant or urban areas.

Response: We agree that local and rural recreationists may be more affected by rangeland conditions than urban visitors, in that they often spend more time on public lands due to the close proximity of public lands and ready accessibility. We have revised section 3.13 accordingly.

Comment: Some comments suggested that BLM add detailed economic analysis of the effects of the proposed changes to the regulations. One comment asked the BLM to make distinctions and cite statistics for each recreation group (for example, hunters, fishermen, off highway users) to identify the economic costs and benefits of grazing compared to the loss of recreation benefits. One comment suggested the addition of economic data on wildlife and other resource values in order to understand the economic importance of each resource segment. Some comments stated that the economic contribution of public land livestock grazing is insignificant at the local, regional and national scale therefore BLM should acknowledge this and revise its analysis of effects. Another comment stated that the community of Leadore, Idaho should not be used to illustrate ranching’s contributions to local economies. Finally, a comment requested responses to specific questions about livestock economic contributions and proportions attributable to Federal land grazing.

Response: This programmatic EIS documents in a broad way the economic effects that would result from proposed changes in several individual administrative and timing provisions in the grazing regulations. Therefore the analysis is necessarily broad, and describes economic factors and the potential effects of the proposed regulatory changes in a general context. Estimating costs associated with decreased recreational opportunities is

possible at the allotment or land use plan scale but would be difficult to do for this programmatic analysis. In a strict quantitative economic sense, the EIS does not analyze tradeoffs in dollars for wildlife or other resource values. However, BLM does include consideration of wildlife and other resources in the EIS, including analysis of effects of the alternatives on those resources. BLM recognizes that other resources as noted in section 3.16 of the EIS, especially recreation and wildlife, contribute significantly to the growing diversification of rural, regional, and statewide economies in the western states.

We acknowledge in EIS Tables 3.16.3, 3.17.1, and 3.17.2 as well as Section 3.16 that there are other social, economic, and demographic conditions and trends occurring in the western U.S. that affect the relative contribution of agriculture, such as a higher rate of population growth than other regions of the country, diversification of local, regional, and statewide economies, and that agriculture itself is undergoing structural change. Among those changes are increasing reliance on off-farm income to supplement the income of low- to negative-profit livestock operations. The EIS also acknowledges that livestock grazing on public lands is increasingly competing with other growing multiple-use demands that contribute to economic activity, including recreational pursuits such as hunting, fishing, wildlife viewing, OHV use, mountain biking, hiking, and camping. Because of these changes, livestock grazing on public lands has become more limited in regional and national economic importance. The EIS discusses the proportion of the livestock industry to which public lands grazing contributes, and also the varying levels of dependency of public lands livestock operations, e.g. Table 3.16.3. However, authorized livestock grazing on public lands remains an important contributor to the social

and economic fabric of many communities throughout the western U.S.

The example of Leadore, Idaho presented in Section 3.17 of the EIS, is provided as a case study to supplement more general discussions presented in this section. It is used to illustrate the reliance of one community on livestock ranching and the authorized grazing of adjoining public lands. Livestock grazing is the economic basis for much of that population and supports the social fabric of the community. As noted in the EIS... "dominance of ranches, both economically and socially, fosters a common social view that the entire community's social future is tied to the fate of ranchers." Whether the income derived from livestock grazing is spent within or outside the community does not diminish the relative importance of the source of the income or the support of the local tax base to the affected citizens of Leadore.

Comment: One comment found fault with the analysis of the effects of the proposed regulations on BLM Special Areas. The comment suggested that the analysis should include information on which areas are grazed or not grazed, the laws and mandates for each area, or the effects on attributes of these areas that resulted in their designation.

Response: The information presented in this EIS analyzes the environmental effects that would result from proposed regulatory changes in administrative and timing provisions. The continuation or termination of grazing on individual special areas is not an issue addressed in this rulemaking. Individual land use plans are appropriate venues for addressing these types of questions and land use decisions.

Comment: The BLM should clearly show its long-term budget strategy that outlines the monitoring programs, funding, and personnel that will be added to the agency's capacity to carry out the implied monitoring because

BLM does not have adequate funding, personnel, and management support to adequately monitor vegetation, Special Status Species, and Birds of Conservation Concern, let alone other resources.

Response: BLM funding is beyond the scope of this rulemaking. Funding is provided by annual congressional appropriation. We will prioritize allocation of monitoring funding to address issues and provide a foundation for management adjustments. BLM agrees that monitoring is a critical component providing data for evaluation and adjustments of terms and conditions of grazing authorizations. We will continue to prioritize funding to fill monitoring needs.

Comment: BLM should revise the analysis in Chapter 4 and other sections because the effects are greatly understated, there is no link on effects to any valid science and the BLM has omitted scientific literature.

Response: Many of the proposed changes are largely administrative and would have little direct effect on the environment. They are intended to improve agency administrative efficiency and effectiveness, improving consistency across the Bureau, or meeting other administrative objectives. The analysis presented in the DEIS represents the best available knowledge of the potential effects of the regulation changes.

Comment: BLM Range Health Standards should be based on reputable science and research.

Response: The 1994 National Research Council publication *Rangeland Health: New Methods to Classify, Inventory, and Monitor Rangelands* provided the basis for BLM's Fundamentals of Rangeland Health and, subsequently, the rangeland health standards developed by BLM State Directors in consultation with appropriate Resource Advisory Councils.

5.4.6 Definitions— Other Recommendations

This section contains comments on some of the proposed definition changes and recommendations that we received during the comment period. Definition changes for active use, grazing preference, interested public, and temporary nonuse are addressed under separate headings on those specific issues.

Comment: One comment suggested that we revise the definition of ephemeral grasslands. Other comments also suggested changes in this definition similar to those suggested by this comment. Changing this definition was not in the proposed rule, but the change suggested in the comment was more of a clarification than a change, removing the notion that production of sufficient forage by ephemeral range was necessarily unusual.

Response: We have revised the definition for this term as suggested in the comments. We removed the phrase “may briefly produce unusual volumes of forage” and added in its place the phrase “from time to time produce sufficient forage.”

Comment: One comment from a State game and fish agency stated that we should not amend the definitions of “grazing lease” and “grazing permit,” because inclusion of preference in the text of a grazing lease leads to the lease establishing the stocking rate. The comment contended that a grazing lease is not the appropriate vehicle for establishing a stocking baseline.

Response: Changes in the definitions are required in order to remove conservation use from the regulations, based on the 1999 Tenth Circuit Court of Appeals decision. Grazing preference, as well as other allowable uses on BLM lands, is established in land use plans. Grazing permits and leases are the instruments that authorize grazing use, based

on land use planning allocations. Under section 4110.3, BLM will periodically review the grazing preference specified in a grazing permit or lease, and make changes in the grazing preference as needed to help achieve management objectives to attain rangeland health.

Comment: Comments stated that the definitions should not provide that the grazing permit or lease is the document that authorizes grazing on public lands, because this unnecessarily triggers the need to document NEPA compliance.

Response: The Taylor Grazing Act directs BLM to authorize livestock grazing through a permit or lease. The National Environmental Policy Act provides requirements for Federal actions including the issuance of grazing permits and leases. BLM must comply with provisions of both laws.

Comment: Comments urged BLM to amend the definition of a grazing permit to require that landowners be engaged in the livestock business in order to acquire a Federal grazing permit. They stated that this requirement is based on a provision of the Taylor Grazing Act.

Response: The Taylor Grazing Act does not require a permit or lease holder to be in the livestock business. Section 3 of the Act states, "Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business." Therefore, being in the livestock business is not a requirement, only a point of priority for receipt of a forage allocation.

Comment: Other comments cited legislation pending in Congress that would allow the voluntary buyout of grazing permits, and stated that the proposed definition of "grazing permit" would complicate the potential for such voluntary buyouts.

Response: BLM has not changed the rule in response to this comment. Pending legislation is not authority for regulation. If the legislation were to pass both Houses of Congress and be signed by the President, BLM would, if necessary, amend the regulations to implement the new legislation.

Comment: Some comments urged BLM to clarify the regulations by changing the term "actual use" to "actual livestock use," and "actual use report" to "actual livestock use report," because the terms relate only to use by livestock.

Response: The definitions of "actual use" and "actual use report" in the final regulation remain unchanged. The current definition states that actual use relates to livestock use. Incorporating the suggestion would require adjusting the regulations in a number of areas in the regulations. We believe that such changes would not add clarity to the regulations.

Comment: One comment stated that BLM should revise the grazing rules to make consistent the concepts of active use, monitoring, rangeland studies, livestock carrying capacity and the term "forage available on a sustained yield basis." The comment contended that currently they lack consistency between themselves and throughout the existing rules and the proposed rules.

Response: We believe that these terms, as used in the grazing regulations, are used consistently with one another.

Comment: Many comments suggested that we define the term "affected interest." Some provided suggested language: "Affected interest means a permittee, lessee, allotment owner, or property owner who is directly and materially affected by BLM action related to livestock grazing plans or actions related to those plans" and stated that under Section 8 of PRIA, BLM has responsibility to directly consult, coordinate,

and cooperate with any allottee, lessee, and landowner in a situation where they would be directly and materially affected by a BLM action or proposed action. Another comment asked BLM to define the term “affected person, interest, or party” and clearly limit those who are considered “affected” to people who would directly suffer economic and cultural loss. The comment said that this would prevent those who would use legal processes to impair or stop prudent land management from having standing to bring suit. Another said that such a definition would be consistent with the difference between a member of the public who enjoys certain opportunities for public involvement in BLM land use plans as part of the NEPA process, and the permittee, lessee, or landowner who is assured of “careful and considered consultation, cooperation, and coordination.” One comment stated that the term “affected interest” was too vague and could be misused, and suggested that BLM should refer instead specifically to the permittee or the landowner, as the case might be.

Response: The terms “affected person,” “affected interest,” and “affected party” do not appear in Part 4100. There are references to “affected applicant, permittee or lessee, and any agent and lienholder of record,” “affected permittees or lessees, and the State having lands or responsibility for managing resources within the area” and other references to affected parties such “as landowners.” In these cases, the definition of the word “affected” is clearly evident, as pertaining to those persons whose interest is directly affected by the provision of the regulation. There is therefore no need to provide a separate definition for the term “affected interest” or any of its variants.

We have not adopted the recommendation to replace the term “interested public” in the regulations with the term “affected interest” and to restrict its definition to include only

an allotment owner, lessee, or landowner that is directly and materially affected by a BLM action related to livestock grazing plans or actions related to those plans. Although the sections of PRIA that address consultation and coordination (sections 5 and 8) list those entities that BLM should include in the decision process on allocation of range improvement funds and in the formulation of allotment management plans, they do not limit public involvement during the process leading to such BLM decisions. To involve all those who may be interested in participating in the decision process is not in conflict with the portions of PRIA that address consultation and coordination. As noted elsewhere, the rule does affect the role of the interested public and removes the consultation requirement from several day-to-day management level decisions. The effect of these changes is that the interested public, permittees, and lessees all have opportunities to participate under Section 202 of FLPMA (43 U.S.C. 1712) in decisions on land use plans and allotment management plans that form part of the basis for grazing management decisions, while some day-to-day management decisions require consultation opportunities for permittees and lessees but not with the interested public. BLM believes that this best balances the legitimate need for wide public participation in the management of public lands with the need for efficiency in day-to-day matters that directly affect permittees and lessees.

Comment: One comment urged BLM to revise the definition of “animal unit month,” stating that the existing definition is outdated and causes confusion. It suggested that the definition should be based on livestock size and class, since these vary.

Response: The suggestion to define an animal unit month in terms of livestock size and class would make implementation of the regulation prohibitively complex and costly.

Comment: One comment stated that BLM should define the term “authorized use” as it was defined by the Interior Board of Land Appeals in New Burlington Group Grazing Association, IBLA 2003-324: “the level of AUMs granted in the permittee’s grazing permit.” According to the comment, this would make it clear that authorized use is not the previous year’s actual use, an interpretation rejected by IBLA in New Burlington, and would avoid confusion as to what use is authorized.

Response: We have not adopted the recommendation in the comment, since the term does not appear in this form in these regulations. Terms similar to “authorized use” that appear in these regulations include “preference” or “grazing preference” and “active use,” all of which are defined in section 4100.0-5. These definitions and the use of these terms in the regulations address the concern in the comment that the regulations should have a term pertaining to the number of AUMs authorized by a permit or lease.

Comment: One comment asked BLM to define the terms “authorization” and “authorized” to ensure clarity of application of these terms in the regulations. Another comment stated that, to end current confusion and ambiguity regarding meaning of the terms “authorization” and “authorized” in the grazing regulations, BLM should include a definition of “authorized” in the regulations as “the level of AUMs granted by the permittee’s term grazing permit,” or, as “all AUMs included within the permittee’s term grazing permit.”

Response: BLM does not agree that it should define the terms “authorization” and “authorized” as the comment suggested. In the absence of a definition in the regulations, we apply the common dictionary definition and meaning. This is true for terms like “authorization” and “authorized,” whose

dictionary definition is sufficient. The term is used throughout the regulations in the sense of to “allow” or “grant permission,” and in areas that do not directly relate to forage amounts, such as when BLM authorizes construction of a range improvement through a cooperative range improvement agreement. Moreover, the BLM is not limited to authorizing grazing through the use of term permits and leases. We may also authorize grazing on a temporary and nonrenewable basis where the applicant is not a preference holder.

The rule states unambiguously at section 4130.2(a) and through the definitions of “grazing permit” and “grazing lease” at section 4100.0-5 that the grazing permit or lease is the document that authorizes grazing use on the public lands and other BLM-administered lands that are designated in land use plans as available for livestock grazing. Consistent with statutory language in Sections 3 and 15 of the Taylor Grazing Act, and with the use of the term “permit or lease” in Section 402 of the Federal Land Policy and Management Act, BLM intends that the grazing permit or lease, which specifies the terms and conditions of grazing use allowed by the permit or lease during its term, be relied upon as the document that authorizes grazing use.

In the proposed rule, we removed the term “annual grazing authorization” from section 4140.1(b)(1)(i) (which had prohibited grazing without a permit or lease and an “annual grazing authorization”). We found that this term was confusing because it implied that there was some other document besides a permit or lease (or in limited circumstances, an exchange of use agreement) that authorizes public lands grazing.

The grazing regulations provide some flexibility to make minor adjustments in the grazing use within the terms and conditions

of the permit or lease. The amount of forage consumed in any one year need not exactly reflect the amount of forage that could be allowed to be consumed as shown on the authorizing permit or lease. Such flexibility is necessary to be responsive to forage conditions that can vary from year to year due to weather conditions or as a result of emergencies such as wildfire, or to be responsive to personal or business needs of the livestock operator.

BLM collects fees for use authorized by the grazing permit or lease, as may be adjusted. The use shown on the grazing fee billing becomes a part of the permit or lease for the period of grazing use that is specified by the grazing fee billing

Comment: One comment urged BLM to define “livestock carrying capacity” in terms that address and meet ecological needs, including plant productivity, soil nutrient cycles, ground cover, plant community composition, wildlife habitat function, and habitat resilience.

Response: The current definition of “livestock carrying capacity” found in the BLM grazing regulations accords with the commonly accepted definition of this term and reads: “Livestock carrying capacity means the maximum stocking rate possible without inducing damage to vegetation or related resources. It may vary from year to year on the same area due to fluctuating forage production.” “Related resources” include the ecological needs of rangelands. Also, Subpart 4180—Fundamentals of Rangeland Health and Standards and Guidelines for Grazing Administration, provides guidance for ensuring that grazing management meets the ecological needs of rangelands.

Comment: One comment urged BLM to clarify the regulations by adding a definition of “forage available on a sustained yield basis,” as follows: “Forage available on a sustained yield basis means the average

“livestock carrying capacity” as determined by monitoring over time.”

Response: We considered the proposed definition and determined that it would not add clarity to the regulations. The proposed definition would equate an amount of forage with livestock carrying capacity. “Livestock carrying capacity” is defined by the regulations in terms of a “stocking rate.” “Stocking rate” is a standard term that describes a number of animals, over time, per unit area. Ultimately, were the suggestion to be adopted, the result would be to make an amount of forage the equivalent of a number of animals over time per unit area. To put it simply, “forage available on a sustained yield basis” is not the same thing as a number of animals per unit area per time period. Moreover, adopting this suggestion would create an internal conflict with 43 CFR § 4100.0-8, which states that land use plans establish allowable resource uses and program constraints. In other words, BLM may consider factors other than the results of monitoring in determining livestock carrying capacity.

Comment: Comments suggested that BLM should include in the definitions of “monitoring” and “rangeland studies” the requirement to apply BLM-approved analytical methodology. One criticized BLM’s proposal that monitoring methodologies be handled through policy guidance in manuals and handbooks. Another comment asked for clarification that monitoring is not mere observation but must occur through rangeland studies set forth in approved BLM manuals. It concluded that this monitoring should include data collected on actual use, utilization, climatic conditions, special events, and trend. Others urged that the rule ensure that monitoring will occur through rangeland studies, as set forth in approved BLM Manuals, and not by the “whims” of the authorized officer.

Response: We have not changed the regulations in response to these comments. The BLM Manual, handbooks, and other BLM internal instruction materials provide adequate guidance on monitoring and rangeland studies, and these materials are more easily updated than regulations. The comments generally agree with this approach, and mainly discuss how we should address monitoring in our internal guidance. We will consider these comments when we review our Manual provisions and other internal guidance.

Comment: Comments stated that BLM should restrict monitoring to rangeland studies. They suggested that “monitoring” should be defined as “means the orderly collection of rangeland studies data to evaluate . . .,” stating that this would contrast monitoring with observations and indicate that only the collection of “rangeland studies” will be considered valid monitoring. Further, they stated, “rangeland studies” should be defined as “any study methods as set forth in approved BLM manuals for collecting data on actual use, utilization, climatic conditions, other special events, and trend to determine if management objectives are being met.” The comment’s position was that this will ensure that management decisions are based on sound information.

Response: We considered the suggested definitions. However, we determined that BLM needs flexibility to use site-specific methods in addition to those monitoring methods set forth in Manual guidance. This flexibility will allow BLM to employ techniques that meet local needs and that we can develop in cooperation with other agencies and partners.

Comment: One comment stated that BLM should define the term “multiple use” to include outdoor recreational activities, such as hiking, hunting, fishing, and other outdoor activities, because the Federal Land Policy

and Management Act provides authority for managing lands on the basis of multiple use.

Response: Although the comment correctly interprets outdoor recreation activities to be included in any definition of multiple use, we have not adopted the recommendation to define the term “multiple use” in the regulations on livestock grazing. The term “multiple use” is defined in the Federal Land Policy and Management Act and the BLM planning regulations (43 CFR 1600.0-5) and needs no further definition in these regulations.

5.4.7 Documentation of Social, Economic and Cultural Effects

Comment: We received several comments that opposed including language providing that before BLM changes grazing preference, we will analyze, and if appropriate, document relevant social, economic, and cultural effects of this action. These comments urged BLM to abandon the provision to include social, economic, and cultural considerations in its grazing decisions. The reasons provided by these comments were: neither NEPA, FLPMA, nor PRIA authorize BLM to adopt rules to protect the “custom and culture” of the western cowboy or rancher, protect ways of life, or insulate the public land livestock industry from economic effects, nor does NEPA authorize BLM to ignore the resource protection requirements of FLPMA and PRIA; BLM should apply an even-handed administration of existing laws and regulations rather than try to preserve a way of life and rural character of ranching communities, which the agency has no authority to do; open space and rural character are best preserved through local zoning and tax policies; despite the fact that NEPA does not require analysis of social, economic, and cultural considerations except in connection with preparing an EIS, BLM field managers have routinely considered

these effects, which is why rangeland conditions are still unsatisfactory; it sets the agency up for failure, since no permittee would be willing to share the financial aspects of their operation with BLM; NEPA already allows for consideration of such effects into environmental analyses, so this proposal is duplicative and unnecessary; BLM's policy strategy is based on a skewed interpretation of the law; NEPA does not require that grazing decisions incorporate analyses of social, economic and cultural effects when preparing environmental assessments (EA); Federal law directs that the public lands be managed for multiple uses, of which grazing is only one; it would result in management that benefits ranchers over the short-term and damages the land over the long term; and public land grazing is not very cost effective to begin with, and this provision would perpetuate that.

Response: We have not adopted the suggestion to abandon the requirement for BLM managers to analyze and, if appropriate, document their consideration of relevant social, economic, and cultural factors before changing grazing preference. BLM is obligated under 40 CFR 1508.8(b) to assess the consequences, i.e., impacts or effects, of BLM actions, authorizations, and undertakings on environmental, aesthetic, historic, cultural, economic, social, or health aspects of the human environment. CEQ regulations at 40 CFR 1508.9(b) also direct that Environmental Assessments include brief discussions of the effects of the proposed action and alternatives. The provision at section 4110.3 is consistent with this direction and intent of NEPA. Consideration of these factors in the NEPA context does not result in a particular outcome, but ensures from a procedural perspective that the information is considered and, if appropriate, documented in the associated NEPA analysis.

Comment: Other comments urged BLM

to include in any future direction, guidance, or regulation formulated with respect to social, economic, or cultural considerations, an emphasis on the requirement for a comprehensive and thorough assessment of the effects on multiple resource values of the public rangelands, not just grazing effects, including: the ecological, educational, aesthetic, cultural, recreational, economic and scientific value to the nation of fish and wildlife; the relevant social, economic and cultural effects of livestock overgrazing on recreational users, municipal water users, threatened and endangered species management, the need and cost for erosion control, threatened and endangered species recovery, and restoration and rehabilitation of public lands, watersheds, and wildlife habitat damaged by livestock grazing; the economic, social, and cultural considerations of the vast majority of the people in this country who view public lands as a place to produce wildlife, for recreational enjoyment, clean water, and wild and scenic vistas, and; any economic effects of the subsidy inherent in the grazing program due to the cost of administering the program, undervalued Federal grazing permits, and the benefits of foregone uses.

Response: The BLM agrees that some of the considerations and assessment topics listed in the comment may be relevant to specific proposal(s) for changes in grazing preference. Those determinations would be made for each individual proposal on a case-by-case basis. BLM would likely consider other factors listed in the comment, such as grazing subsidies related to grazing fee issues or costs of administering the program, and the value of grazing permits, outside the scope of future site-specific proposals for changes in grazing preference.

Comment: Another comment stated that, if BLM adopts the proposal to consider social, economic, and cultural considerations

in its grazing decisions, we should be required to consider the past, present, and future effects of grazing management decisions on the culture and traditions of Tribal members. This comment asserted that BLM must include in its analysis a full review of the economic costs to the public of livestock grazing on public lands, and the economic, social, and cultural effects that grazing has on Tribal nations and their members due to the effect of grazing activities on the Tribal resources (e.g., fish, wildlife, roots, berries).

Response: With respect to considering effects of changing grazing preference on Tribal members, the consideration, when appropriate, of social, economic, and cultural factors will not necessarily preserve any particular lifeway associated with the use of public lands. Under NEPA, the American Indian Religious Freedom Act, and the National Historic Preservation Act, however, BLM must specifically consider the effects of BLM actions and undertakings with respect to the concerns and traditional cultural properties of federally recognized Indian Tribes. The rule does not subvert this direction.

Comment: One comment stated that BLM should consider social, economic, and cultural effects only to the extent that agency decisions move toward balance and harmony with the environment, which is the stated purpose of NEPA. Another urged BLM to provide criteria for an “appropriate analysis,” because the regulation is not clear as to what analysis would be appropriate and whether any action could be taken until the analysis has been conducted.

Response: NEPA is a procedural statute, and does not direct the outcome of any agency decision-making process. The selection of impact topics to be considered in any environmental document is not pre-ordained and BLM must tailor it to

the issues identified for each proposed action, authorization, or undertaking. The commensurate level of impact analyses are tied to these selections. BLM believes the consideration of social, economic, and cultural factors provided for in section 4110.3(c) of the regulatory changes making — “analyze and, if appropriate, document relevant social, economic, and cultural effects of the proposed action” — is consistent with the intent of NEPA.

BLM has decided not to provide criteria for an “appropriate analysis” because the level of analysis considered to be “appropriate” will vary with each site-specific proposal and, consequently, specific criteria are unnecessary. As with all proposed actions for which environmental analysis is conducted pursuant to NEPA, the level of analysis must be tailored to the issues identified for each proposal and the level of effects anticipated. Additionally, as with other Federal actions for which NEPA analysis is required, no action may be taken until a decision by the authorized officer is final. This is no different from any other analysis conducted under NEPA where a decision must be made before taking action.

Comment: Other comments stated that emphasis on considerations such as the social, economic, and cultural effects of agency decisions that change levels of grazing preference would have adverse effects on natural resources, leading to degradation of the public lands. Comments stated that improving working relationships with grazing permittees and lessees would tend to weaken the ability of BLM to manage rangelands in a timely fashion by adding considerable time before action can be taken. One comment stated that BLM should have working relationships with the public, not just ranchers. Another accused BLM of appeasing ranchers and increasing the level of environmental damage.

Response: We have not materially changed current policy with regard to the consideration of social, economic, and cultural effects of decisions in the grazing program. We currently consider the social, economic, and cultural effects of actions that change grazing use levels, as well as other aspects of grazing operations in the NEPA process. The main difference is that, under these changes to the regulations at section 4110.3 (c), BLM will more consistently document these considerations. This change in the regulations will help improve evenness across the Bureau in the analysis of social, economic, and cultural effects. The consistent documentation of these concerns does not come at the expense of protecting natural resources and maintaining healthy rangelands. Rather, it improves working relationships between BLM and ranchers by ensuring that social, economic and cultural effects are analyzed and disclosed where appropriate. Since this provision requires no additional analysis than current policy does, we anticipate few delays in the authorization and implementation of grazing management actions on public lands attributable to this provision.

Comment: Several comments suggested that BLM include a “social and economic” land health standard to demonstrate consistency with the proposed requirement that BLM consider relevant social, economic, and cultural effects in their NEPA analyses of the effects of changing levels of grazing use.

Response: BLM believes that land health standards should focus on the biotic and physical components of the ecosystem, and that “human dimension” considerations are best dealt with in the National Environmental Policy Act (NEPA) analyses that we conduct. In order to assure consistent disclosure and consideration of social and economic effects, we have included requirements in section 4110.3(c) to analyze and, if appropriate,

document relevant social, economic, and cultural effects as required by the National Environmental Policy Act before changing grazing preference.

5.4.8 Active Use— Definition, Increases, and Decreases

Comment: BLM received several comments that suggested alternative definitions for the term “active use.” Some comments suggested that active use should be based on “forage available on a sustained yield basis.” The comments also suggested that we define the term “forage available on a sustained yield basis.” Other comments suggested that the definition of active use should include reference to monitoring data and documented resource conditions in an allotment. One comment suggested that “active use” should include both “authorized use” and “nonuse.”

Response: The term “active use” is the amount of forage that is available for grazing use under a permit or lease. Active use is based upon resource conditions within an allotment. When permittees or lessees apply not to use all or a portion of their active use in any particular year, they are applying for “nonuse.” If BLM finds it necessary to reduce the level of grazing use permitted either temporarily or indefinitely, we will suspend “active use.” At that point, active use is reduced and suspended use is created or increased, either temporarily or indefinitely. “Active use” is a grazing-program-specific administrative term and does not include all forage available on a sustained yield basis within an allotment, because other forage, or potential forage, within the allotment is allocated under the auspices of the applicable land use plan to watershed protection, plant maintenance and reproduction, to wildlife habitat and, where wild horses or burros are present, to forage for those animals.

Comment: BLM received numerous comments asking that a permittee's or lessee's stewardship efforts be included as criteria for determining who is to receive temporary, as well as permanent, increases in grazing use.

Response: Additional forage that is temporarily available most often occurs in years when favorable growing conditions result in forage production exceeding the average livestock grazing capacity in a given area, upon which the active grazing preference is based. Although stewardship efforts can contribute to additional forage for livestock that is temporarily available, BLM believes that in most cases, it would be difficult to ascertain the role of stewardship versus the role of good growing conditions in contributing to the increase. Therefore, requiring BLM to consider and reward this role would be impractical.

Comment: One comment asserted that only existing permittees and lessees should be eligible for being granted additional forage for livestock when BLM finds that it is available under section 4110.3-1(b).

Response: Section 4110.3-1 provides that if BLM determines that there is additional forage available for livestock within an allotment, it will first be apportioned to remove any suspensions of that allotment's permittees or lessees, then to those permittees or lessees in proportion to their contributions to stewardship efforts that led to the increased forage production, then to those permittees and lessees in proportion to the amount of their grazing preference, then to other qualified applicants. The comment urges BLM to remove "other qualified applicants" from the list of possible recipients of the forage increase. BLM believes that it would be a rare occasion when there would be an increase in forage available for livestock that would be made available, following satisfaction of the other requirements of this

regulation, to "other qualified applicants." Nonetheless, BLM sees no need for undue restrictions on who may receive this public benefit.

Comment: One comment advocated that BLM should determine if additional forage is temporarily available only upon application by a qualified applicant. If, the comment went on, following such application, BLM finds additional forage to be temporarily available, we should be obliged to approve its use by the applicant, following consultation, cooperation, and coordination with the preference permittee or lessee.

Response: BLM generally responds to, rather than solicits, applications for TNR use. It is unnecessary to make it a regulatory provision that BLM can determine additional forage to be available only if first a qualified applicant applies for it. Most commonly, BLM receives applications for TNR use from the permittee or lessee with preference for use in the allotments where the forage is available. The regulations provide also that a person other than the preference permittee or lessee may apply for TNR use.

Comment: One comment urged us to provide in this section that BLM must consult with wildlife agencies before temporarily, as well as permanently, increasing grazing use, so that they can effectively manage wildlife whose populations can be affected by grazing.

Response: As provided by section 4130.6-2, BLM is required to consult, cooperate, and coordinate with the preference permittee or lessee and the state having lands or responsibility for managing resources in the area prior to authorizing TNR use. Thus the state agencies responsible for managing wildlife resources will be consulted prior to a proposed decision for increases or decreases in active use as well as for TNR use. In addition, BLM will consult with state wildlife

agencies as part of the process to develop the NEPA compliance documentation.

Comment: One comment suggested that the interested public should be excluded from consultation, cooperation, and coordination under section 4110.3-1(b)(2).

Response: The allocation of additional livestock forage available on a sustained yield basis, after satisfaction of any suspension of preference of the permittee or lessee for the allotment where the additional forage is located, is considered a planning decision by the BLM. Therefore, it is appropriate to consult, cooperate, and coordinate with the interested public, as well as affected permittees, lessees, and the state, before issuing a proposed decision allocating that additional livestock forage.

Comment: One comment asked BLM to clarify in this section that additional forage will be, rather than may be, apportioned to qualified applicants consistent with land use plans.

Response: BLM retained the term “may,” rather than “will,” apportion additional forage available for livestock grazing to retain its complete discretion in this matter. The wording in the rule reflects that in the pre-1995 provision. It means that BLM will not apportion additional forage temporarily available if there is no demand for it. (As to additional forage available on a sustained yield basis, on the other hand, the regulations state that BLM will first use it to end suspensions that were in place due to lack of forage. Any further apportionment of such forage, however, will occur only after consultation with the affected state agencies, permittees, lessees, and the interested public.)

Comment: One comment interpreted changes in this section to mean that BLM could designate ephemeral or annual rangelands based on a finding that forage was temporarily available and allow BLM to

approve grazing regardless of land use plan decisions and land conditions.

Response: A BLM determination that additional forage for livestock is available on a temporary basis does not serve to designate ephemeral or annual rangelands. BLM makes these determinations in land use plans.

Comment: One comment asked BLM to make it clear that section 4110.3-1(b)(2) refers only to forage available for livestock, so that the regulation is not interpreted to preclude allocations of additional forage available on a sustained yield basis to other uses.

Response: Section 4110.3-1 (b)(2) is within paragraph (b), which would amend in the final rule by adding the word “livestock,” so that it states in part, “When the authorized officer determines that additional forage is available for livestock use on a sustained yield basis, he will apportion it in the following manner” BLM believes that this makes it clear that the forage being referred to is forage allocated to livestock through planning and decision processes, as compared with, for example, forage that is allocated to wild horses and burros, or forage that is allocated to wildlife, using the same planning and decision processes.

Comment: Another comment asked BLM to include assurances or a requirement that increased forage allocation to wildlife will result when wildlife organizations contribute to a project that increases available forage.

Response: The suggestion to provide assurances in this Subpart that increased forage resulting from projects funded by wildlife organizations is outside of the scope of this rule. However, before agreeing to fund projects that will increase forage available on public lands, wildlife organizations are free to negotiate the terms under which to make such contributions, and to memorialize these arrangements through cooperative

agreements with BLM and other project participants.

Comment: Another comment urged BLM to establish criteria that must be met before preference can be increased.

Response: Regulatory criteria for making changes in grazing preference, including increases in preference, appear in section 4110.3(a). They include: to manage, maintain, or improve rangeland productivity, to assist in restoring ecosystems to properly functioning condition, to conform to land use plans or activity plans, or to comply with the provisions of Subpart 4180.

Comment: One comment urged BLM to provide permittees and lessees the right to “petition” for increased grazing use up to the limit of their preference, subject to its availability.

Response: Under previous and current regulations at section 4130.1-1, permittees and lessees have the right to apply for grazing use at whatever level they desire, regardless of preference. BLM’s response to the application, however, will be guided by available resource information pertinent to the decision, be consistent with land use plan objectives and decisions, and comply with these grazing regulations.

Comment: One comment stated that BLM should develop and demonstrate a process that would allow grazing to increase if monitoring shows that an increase is warranted.

Response: The section discussed in this portion of the EIS already contains procedures to allow grazing to be increased.

Comment: Several comments on this section stated that BLM should have the option to require that preference reductions made under section 4110.3-2(b) be placed in “nonuse” rather than be suspended by BLM.

Response: Adopting this suggestion would confound, rather than clarify, the management implications of the action

of “suspending” active preference versus approving the “nonuse” of active preference.

Before 1995, the grazing regulations provided that when active use was reduced, the amount reduced could be either “held [by BLM] in suspension or in nonuse for conservation or protection purposes.”

This pre-1995 terminology created three categories of preference: “active,” “suspended” and “nonuse for conservation or protection purposes.” Having three categories of preference made it less clear under what management circumstances it was appropriate for BLM to suspend active use rather than “hold” nonuse (of active use) for conservation or protection purposes.

Further conceptual blurring was created by BLM policy, as stated in our handbook, that a permittee or lessee could annually apply and receive approval for nonuse of all or a part of their active use for reasons associated with personal or business needs, or for “conservation and protection of the range,” but this “short-term” nonuse did not affect preference status. Based on the pre-1995 regulations, there currently are some grazing permits and leases which list nonuse that is being “held” by BLM and which is included as a part of the total grazing preference. However, this nonuse, i.e., that portion of active use that was “held in nonuse conservation or protection” under the pre-1995 regulations, is the practical equivalent of suspended preference as this term is used in this rule.

This rule intends to establish and clarify a distinction between “suspended” preference and “nonuse” of preference, thus:

- Suspended preference arises from an action initiated by BLM. BLM suspends preference when necessary to manage resources by decreasing active use under section 4110.3-1 or as a penalty action for grazing regulations violations under

section 4170.1-1. In contrast, nonuse arises when BLM approves an application submitted by a grazing permittee or lessee not to use some or all of the active use authorized by a permit or lease under section 4130.4.

- Suspended preference is shown on the grazing permit or lease, and along with active use is part of the total grazing preference of the permittee or lessee. BLM does not issue a grazing permit or lease to authorize nonuse. The “conservation use permitting” provisions that allowed for this practice were disallowed by the 10th Circuit Court of Appeals in 1998 and are removed from the grazing regulations by this rule. As explained previously, because of the regulations that were in place before 1995, there is one exception to the statement that we do not issue grazing permits or leases that authorize nonuse. On some permits and leases, BLM still shows nonuse as a part of the total preference because pre-1995 regulations allowed reductions of active preference to be “held in nonuse for conservation or protection purposes.” However, this nonuse is the practical equivalent of suspended preference as clarified by this rule.
- BLM may suspend preference on a short-term basis, as may be needed, for example, to allow recovery of vegetation after a fire. BLM also may suspend preference for a longer term or indefinitely, as may be needed, for example, when BLM determines through monitoring that there is not enough livestock forage produced on a sustained yield basis to support the active use authorized by a permit or lease, and that forage production is not expected

to be able to support that level of use for the foreseeable future. To receive BLM’s approval for nonuse, permittees or lessees must apply for nonuse of some or all of the active use authorized by their permit or lease, prior to the start date of the grazing use period specified on their permit or lease. The BLM authorized officer authorizes the nonuse by approving the application, as indicated by his signature on the application. BLM will not approve of nonuse for longer than one year at a time, and will approve it only if we agree that nonuse is warranted for the reasons provided on the application.

- BLM must issue a grazing decision to suspend preference. BLM records suspended preference on permits and leases and in operator case records for recordkeeping purposes, but suspended preference is not available for active use under the permit or lease. BLM need not issue a decision to approve nonuse. If BLM approves an application for nonuse for reasons of rangeland conservation, protection, or enhancement, or for personal or business needs, the permittee or lessee is precluded from using the amount of active use that has been approved for nonuse. BLM may subsequently approve a later application to make use of what had been approved as nonuse should circumstances change (e.g., moisture is received later in the season that increases forage production, thereby alleviating the need for nonuse for conservation reasons, or an operator purchases livestock mid-season and because of this can use forage that he previously could not because he did not own enough livestock).

Suspended preference is a recordkeeping convention adopted by the BLM. If, after the suspension, BLM determines that there is an increase in the amount forage available for livestock on a sustained yield basis, this record indicates who has priority for its use and in what amount. As explained above, due to the regulations in place before 1995, some permits and leases show “nonuse” as a part of the grazing preference. In actuality, this nonuse is equivalent to suspended use as the concept has been clarified by this rule

Comment: One comment requested that BLM not change the regulation and continue to provide that the active use that is reduced under section 4110.3-2 be terminated rather than suspended.

Response: It is important to keep record of any reductions in active preference as “suspended” preference. It helps BLM to track, by allotment, permittee or lessee, and base property, the original livestock grazing use forage allocation, the attachment of that allocation to base property, and subsequent adjustments arising both from management actions to increase or reduce use, and from administrative actions such as preference transfers. Suspended preference is attached to base property, and is transferred along with active preference. This record facilitates BLM’s ability to apply section 4110.3-1 to reinstate active use to permittees and lessees, upon a BLM determination that forage for livestock, in an amount that exceeds active preference, has become available on a sustained yield basis.

Comment: Another comment asked that BLM cross-reference this paragraph to section 4110.3-1 in order to make it clear that activation of preference suspended under section 4110.3-2(b) would be governed by that section.

Response: BLM did not adopt this suggestion. BLM does not believe that cross-referencing section 4110.3-1 in section

4110.3-2(b) is needed to ensure that it is understood that activation of preference suspended under section 4110.3-2(b) is, in fact, governed by section 4110.3-1.

Comment: One comment asked BLM to change the criteria that justifies a reduction of active use as described in paragraph 4110.3-2(b) from “when monitoring or documented field observations show that grazing use or patterns of use are inconsistent with Subpart 4180, or that grazing use is otherwise causing an unacceptable level or pattern of use, or that use exceeds livestock carrying capacity,” to “when monitoring shows that active use is inconsistent with objectives of the applicable land use plan, activity plan, or decision, or shows that active use exceeds the forage available on a sustained yield basis.” This comment said that this change would clarify that land use plans governed actions that affected the amount of active use authorized.

Response: BLM believes that these criteria are sufficiently clear to serve the purpose intended by the regulation. These criteria allow for the affects of grazing use to be measured against objectives tailored specifically to a local area, such as a single stretch of a riparian area, or an individual pasture, that may not be addressed in sufficient management detail in a land use plan, activity plan, or decision of the authorized officer. These local objectives would be consistent with the more general management objectives typically found in land use plans and activity plans. Moreover, section 4110.3(a) provides that BLM will change grazing preference as needed to conform to land use plans or activity plans.

Comment: Another comment stated that because grazing use or patterns of use are by definition a part of monitoring, including them in paragraph 4110.3-2(b) is redundant.

Response: BLM acknowledges that use pattern mapping and measurement of utilization are a part of monitoring. The

wording in the regulation, however, is not redundant. The regulation requires that when this information shows that grazing use levels or patterns of use are unacceptable, BLM will reduce active use, otherwise modify management practices, or both.

Comment: One comment stated that BLM should provide for payment to the permittee or lessee for any cuts in permit numbers at the prevailing appraised rate in order to curtail cutting permits under the pretense of the Endangered Species Act.

Response: It is not clear from the comment how the conclusion that BLM paying a permittee or lessee for reductions in grazing use would curtail reductions made as a result of compliance with the requirements of the Endangered Species Act. In any event, grazing permits and leases convey no right, title, or interest held by the United States in any lands or resources. Therefore, payment for reduced livestock use would be neither appropriate nor legally supportable.

Comment: One comment stated that BLM should not reduce preference, and suggested that individual monitoring would provide the information needed to make grazing changes that would address management issues without having to reduce preference.

Response: We have not adopted the suggestion that BLM not be allowed to reduce preference. This would unduly restrict the statutory authority of the Secretary to manage grazing use on public lands. Depending on circumstances, there are management solutions to grazing issues that do not involve reducing preference. However, this is not always the case.

Comment: One comment asked BLM to require that increases in active use be implemented by decision, so that the action could be protested and appealed, and to make it consistent with the requirement at section 4110.3-3(a)(2), which, the comment states, requires that decreases in active use be

implemented by decision. Another comment stated that BLM should remove its authority at section 4110.3-3 to implement changes in active use by decision, so that range improvements could be installed in lieu of reducing active use.

Response: This provision in section 4110.3-3 was not proposed for change in the proposed rule. BLM believes that it is important to retain the discretion to change preference by agreement or by decision, depending on management circumstances that can vary greatly from instance to instance, and not require the use of one method or the other. Section 4110.3-3(a)(2) does not require that decreases in active use be implemented by decision. This section requires that when a reduction in permitted use is implemented by decision, as opposed to by agreement, the decision first be issued as a proposed decision, except when immediate land protection is needed because of circumstances such as drought, fire, flood, or insect infestation, or when continued grazing use poses an imminent likelihood of resource damage. There are times when the installation of range improvements can negate the need for indefinite suspension of active use, such as when a new water development improves grazing distribution enough that forage not previously available becomes available for livestock use. However, range improvements are not always the appropriate management response.

Comment: One comment urged that, in case of fires in allotments, the allotment should be rested for a minimum of 3 years, and 5 years if any BLM permittee has livestock on a burn area prior to approval plus a substantial reduction in their grazing permit.

Response: The issue of how much rest from livestock grazing is needed after a fire is a matter for internal guidance, and is outside the scope of the rule and this EIS.

Furthermore, prescribing rest periods for lands through the regulatory process does not allow site-specific analysis and consideration of on-the-ground resource conditions and potential impacts.

Comment: One comment suggested rewriting sections 4110.3-2 and 4110.3-3 so that they are clearer and don't cross-reference each other so much.

Response: Each of the two sections specified in the comment contains one cross-reference to the other section. We do not consider this an unreasonable number of cross-references. We have reviewed the two sections and do not see how they could be written more clearly and still provide the information necessary.

Comment: One comment suggested making the 5-year phase in of changes in active use greater than 10 percent discretionary with BLM, stating that it would allow BLM to react in a timely manner if resource conditions were in more immediate need of improvement, for whatever reason, and result in greater benefits to wildlife.

Response: The additional discretion suggested by the comment would affect only a small number of allotments. At the end of FY2002, BLM determined that 16 percent of the allotments with completed land health evaluations needed adjustments to current livestock grazing management in order to help make progress toward meeting the standards, as described in section 4.3.1 of this EIS. Also, section 4110.3-3 provides mechanisms allowing BLM to act more quickly to avoid significant resource damage.

Comment: One comment urged BLM to make adjustments when data indicates livestock numbers are out of balance with the capacity of the land. Estimates of stocking rates in plans do not necessarily reflect BLM's willingness to reduce stocking levels. Another comment stated that Federal rangeland health standards demand that

the rule should focus decision-making on management objectives stated in land use plans, activity plans, and grazing decisions.

Response: Stocking rates are best determined in the land use planning process. However, as we stated earlier, the regulations contain mechanisms for making changes in grazing use to avoid significant resource damage. As provided in Subpart 4180, we will use monitoring and standards assessment to determine whether changes in management practices are necessary.

Comment: Several comments suggested modifications to this section of the proposed rule. One was that BLM should consult with any base property lienholder before closing allotments to grazing or modifying grazing authorizations due to emergencies or when continued grazing use will result in resource damage. Another was to include consultation with county commissioners where downward adjustments in grazing use levels are being planned, and that the reductions should be justified by reasons that are documented in an allotment evaluation that is conducted before the adjustments occur. A third suggested change was to change 4110.3-3 (b)(1) and (b)(2) by replacing the term "authorized grazing use" with "active use" because there is no definition of "authorized grazing use" in the regulations.

Response: BLM is not changing the regulations in response to these comments. BLM implements changes in active use by grazing decision. Our regulations provide for sending such decisions to any lienholder of record. If such lienholders requested "interested public" status, they would also be able to provide input and comment on reports BLM uses as a basis for making decisions to increase or decrease grazing use. Given these opportunities for lienholder input to BLM's decision-making process, there is no need for BLM to require itself to consult specifically with lienholders before implementing

changes in active use. Further, in the pursuit of sound resource management, it would be inappropriate to allow consideration of whether base property is subject to a lien to affect or change a BLM decision to close allotments to grazing or to modify grazing permits or leases due to emergencies or when continued grazing use will result in resource damage.

The state having lands or responsibility for managing resources in the affected area may choose to include county commissioners' input as part of the state's consultation with BLM. BLM may also consult directly with county commissioners at its option. BLM believes that these two avenues of consultation provide adequate opportunity for county commissioners to make their views known to BLM regarding management issues. BLM makes either downward adjustments in grazing use levels temporarily in response to emergencies or indefinitely after it has determined that livestock forage is insufficient on a sustained yield basis to support grazing at levels that had been previously authorized. In either case, the decision implementing the downward adjustment provides the rationale for the action and is subject to review upon appeal. In most cases of indefinite downward adjustments in grazing use levels, such rationale relies upon analysis found in a documented allotment evaluation.

Paragraphs 4110.3-3 (b)(1) and (b)(2) allow BLM to modify authorized grazing use in response to emergencies, including complete closure of an area to grazing when necessary to provide immediate protection because of conditions such as drought, fire, flood and insect infestation. "Active use" refers to a number of animal unit months (AUMs) of forage. The term "authorized grazing use" is more expansive and refers to all the terms and conditions of use authorized by a term permit or lease. These

terms and conditions include at a minimum, the number of livestock authorized, where they may graze, and the season of the year and period that they may graze. Although BLM may modify "active use" in response to emergency resource conditions, we may also modify the other parameters of use such as location, period, and season in response to these conditions.

Comment: One comment suggested removing the provision authorizing BLM to close allotments to grazing or modify authorized grazing use when the authorized officer determines that resources on public land require immediate protection or continued grazing use poses an imminent likelihood of significant resource damage (section 4110.3-3(b)(1)). The comment stated that the provision is too vague and could be used as a catch-all to eliminate grazing at any time.

Response: The phrase "or where continued use poses an imminent likelihood of significant resource damage" is in fact a catch-all to cover situations not otherwise specified in the regulation (i.e. "because of conditions such as drought, fire, flood, or insect infestation"). It would be impractical for BLM to list in the regulations all possible situations where an immediate closure or modification of grazing may be needed. All BLM decisions that close or modify grazing use are supported by rationale stated in the decision, and decisions may be appealed under Subpart 4160 and Part 4.

Comment: One comment stated that, because of the problems associated with recurrent long term drought, the regulations should require that base property provide forage or other means of sustaining livestock should the necessity arise to remove livestock from the public lands. Furthermore, the comment went on, the base property should be real fee property of the permittee or lessee

and not leased property from a state or other private property owner.

Response: In areas where land serves as base property, BLM specifies the length of time that the property must be capable of supporting authorized livestock during the year (see section 4110.2-1(b)), thus including the concept that the base could be used to sustain the livestock should the necessity arise to remove them from public lands. This “base property requirement” differs depending on the BLM jurisdiction, but generally ranges from 2 to 5 months. In the desert southwest, where water or water rights can serve as base property, there is no similar requirement. Regardless, BLM can close allotments or portions of allotments to grazing use immediately to protect resources because of conditions such as drought. BLM sees no need to require that base property must not be leased property.

Comment: One comment identified an incorrect reference to 43 CFR 4.21 in 4110.3-3(b)(2). A stay relative to grazing is granted in accordance with 43 CFR 4.472.

Response: The rule contains the correction.

5.4.9 Phasing in Changes in Active Use

Comment: Many comments opposed the provision allowing up to 5 years to implement changes in active use greater than 10 percent. Some stated that the provision is inconsistent with the regulatory objective: “to accelerate restoration and improvement of public rangelands to properly functioning conditions.” Others reasons given for opposing the provision included concerns that it would allow unhealthy range conditions to persist, delay range recovery, or lead to additional range degradation, especially of riparian and wetland habitats. They said the provision would have negative effects on natural resources and other uses

of the land. Some of these comments stated that the provision showed that BLM is more concerned with private financial well-being of permittees than with managing publicly owned natural resources in the public interest. One comment said that if the condition of the natural resources on a grazing allotment is so bad that a reduction in permitted livestock numbers in excess of 10 percent is necessary, then the situation is probably so bad that delaying implementation of the reductions would be tantamount to criminal neglect. Others said that such delays would lead to continued petitions for listing species under the Endangered Species Act. One comment opposed this provision because it would contradict the goal of increasing administrative efficiency, negate the requirement for prompt action to address harmful grazing practices, and limit the conditions under which BLM may revoke a grazing permit. Others said that it would tend to weaken the ability of the local BLM field offices to manage rangelands in a timely fashion by adding considerable time before we can take action.

Response: We believe the rule gives BLM sufficient discretion to handle a wide range of circumstances. The rule does not change the BLM’s ability to cancel a permit in whole or in part if necessary. The rule is flexible enough to provide for immediate, full implementation of a decision to adjust grazing use if continued grazing use poses an imminent likelihood of significant soil, vegetation, or other resource damage. The rule also allows BLM and the permittee to agree to a shorter timeframe for implementation. The rule allows BLM to initiate necessary adjustments while giving the permittee an opportunity to make changes in their overall business operation. The provision in the rule allows us to begin reducing active use when necessary, while considering the human aspect of the effects

of the reduction. Our cooperative approach should lead to a decreased likelihood of appeal on the part of the permittee or lessee. This decreased likelihood of appeal in turn should result in implementing necessary grazing reductions more quickly, thus allowing the BLM to remedy resource problems more efficiently. During the last 5 years, BLM has determined that 16 percent of the allotments with completed land health evaluations needed adjustments of current livestock grazing management in order to help make progress toward meeting the standards, as described in Section 4.3.1 of this EIS. Most of these adjustments have been made in the season of use, or movement and control of livestock rather than in levels of active use. An unknown portion of these adjustments were changes of more than 10 percent in active use. Where adjustments are needed to improve riparian or wetland condition, the adjustments are rarely in active use, but are frequently adjustments in season of use, or changes in length of time livestock are allowed access to the riparian area (e.g., grazing might be changed from 6 weeks in the summer to 3 weeks in the spring).

Comment: Several comments offered alternatives to the 10 percent threshold and the 5 year implementation period. One comment proposed that the threshold for changes that prompt a delay of 5 years in implementation should be increased from 10 percent to at least 25 percent, reasoning that small adjustments would result in ascertainable changes in resource condition in a season or two. Another comment suggested that the authorized officer implement changes in active use of 5 percent or less in 1 year, 5 to 15 percent equally over 3 years, and in excess of 15 percent equally over 5 years. The comment stated that this formulation would ensure equal, incremental decreases or increases in active use over time, and

accelerate decreases or increases in active use when a relatively small change is made.

Response: The 10 percent threshold and 5 year implementation period proved to be a practical combination prior to being changed in the 1995 rules. The lower threshold allows affected permittees to avoid rapid adjustments in such significant numbers. However, the number of permittees and allotments affected by this provision is not likely to be large, given that over the last 5 years, most adjustments in grazing management resulting from land health assessments have been made in the season of use, or movement and control of livestock rather than in levels of active use. At the end of fiscal year 2002, BLM found that 16 percent of the allotments with completed land health evaluations needed adjustments to current livestock grazing management in order to help make progress toward meeting the standards. See Section 4.3.1 of this EIS. An unknown portion of these adjustments were changes of more than 10 percent in active use.

Comment: Some comments expressed concern that annual conditions or fluctuations in weather could require more than 10 percent reductions on an annual basis, particularly in the arid southwest.

Response: In practice, during prolonged drought conditions, ranchers voluntarily reduce their livestock numbers because of the economics of their industry. However, this section of the rules applies to adjustments in the terms of the grazing permit, rather than in temporary adjustments made on an annual basis. When temporary adjustments need to be made because of annual conditions, BLM and the permittee or lessee can respond by:

- 1) resorting to temporary changes in grazing use within the terms and conditions of the permit or lease under section 4130.4(a);

- 2) electing temporary nonuse under section 4130.4(d);
- 3) decreasing active use through suspensions under section 4110.3-2; or,
- 4) in more extreme cases of drought, fire, flood, or insect infestation, closing or partially closing allotments under section 4110.3-3(b).

Comment: One comment pointed out that BLM has not reviewed many grazing allotments for over a decade. The comment concluded that, considering improvements in our knowledge of range science and of best management practices for rangelands over the past 20 years, it is likely that changes in active use in excess of 10 percent will be required on numerous allotments.

Response: BLM is evaluating current resource conditions in relation to land health standards. By the end of 2003, we had evaluated 40 percent of allotments, and plan to evaluate the remainder by the end of 2008. As we stated earlier, based on results and changes made because of these evaluations, most adjustments in grazing management are being made in the season of use, or movement and control of livestock, rather than in active use.

Comment: One comment stated that slowing the response to unhealthy rangelands seems to be inconsistent with the current Administration policy of accelerating management responses to fire and the conditions that lead to or exacerbate fires.

Response: This comment is attempting to compare two situations that are not comparable. Fires in the wrong locations threaten life and property, and it is vital to accelerate management efforts to deal with these threats. Rangeland degradation does not normally carry equivalent threats. The regulations are flexible enough to allow

accelerated management to address range degradation that cannot wait for the phase-in period provided in section 4110.3-3(a)(1). As stated earlier, the rule at section 4110.3-3(b)(1)(i) allows BLM to remove or modify livestock grazing when immediate protection is needed because of conditions such as drought, fire, flood, or insect infestation. In 1994, the BLM amended its grazing regulations to address the health of public rangelands. These changes, including the standards and guidelines for grazing administration, remain in the rule and continue to contribute to improving the health of public rangelands. The changes adopted in this final rule seek to refine, without altering the fundamental structure of, the grazing regulations. In other words, we are adjusting rather than conducting a major overhaul of the grazing regulations.

5.4.10 Range Improvements

Comment: Numerous comments opposed the change in section 4120.3-2 providing for shared title to permanent range improvements by BLM and the cooperators. One frequently expressed concern was that a shared title creates potential takings issues if the need to change from grazing to some other land use in an allotment arises in the future. Comments asserted that a permittee or lessee with shared title to a permanent structure on public land would demand compensation for the lost value of his or her property if the BLM proposed changes in the land use that would reduce or discontinue grazing in an allotment. Comments also stated that the BLM would lack the funds needed to compensate the permittee, and would be unable to take the management actions needed to sustain rangeland health.

Response: The BLM disagrees that a joint title to range improvements creates “takings” issues. The existing regulations already assure that permittees and lessees

are appropriately compensated for their investment in range improvements that can no longer be used because of government action. Section 4120.3-6(c) provides that “whenever a grazing permit or lease is canceled in order to devote the public lands covered by the permit or lease to another public purpose, including disposal, the permittee or lessee shall receive from the United States reasonable compensation for the adjusted value of their interest in authorized permanent improvements placed or constructed by the permittee or lessee on the public lands covered by the permit or lease.” The selected alternative does not change this requirement for compensation. The regulations do not address compensation for other types of cancellations. For example, there is no provision addressing compensation where permits are canceled for noncompliance. In another example, if a permittee or lessee voluntarily sells his property and interest, he may negotiate compensation with the new owner for the permittee’s share of a range improvement title. However, BLM would not be a party to that transaction, except to decline to approve the transfer of the preference in the event that the new owner has not agreed to compensate the transferrer, as described in section 4120.3-5.

Comment: Some comments stated that the provision for the United States to hold title to range improvement structures on public land was consistent with the TGA.

Response: BLM is choosing to share title to range improvement projects constructed under Cooperative Range Improvement Agreements to encourage greater private investment in range improvements. This is not inconsistent with the TGA.

Comment: Some comments concluded that the change in section 4120.3-2 gives permittees and lessees exclusive title to new range improvements. Other comments

opposed the change because, they asserted, it could create an interest in the land prohibited by the Taylor Grazing Act. A related concern expressed by comments was that BLM would be unable to take the management actions needed to sustain rangeland health when range improvements were owned by permittees. One comment took the opposite view that the change in the rules was not necessary, because the ranchers already have property rights on public lands.

Response: The rule change does not create an exclusive right, title, or interest in the public land, which is prohibited by the Taylor Grazing Act. Section 4120.3-2(b) specifically states: “Subject to valid and existing rights, cooperators and the United States share title to permanent structural range improvements...” The regulations are equally clear on the creation or the existence of an interest in the land prohibited by the Taylor Grazing Act. Holding a joint title to an improvement does not create a permittee interest in the public land. Section 4120.3-1(e) states, “A range improvement permit or cooperative range improvement agreement does not convey to the permittee or cooperator any right, title, or interest in any lands or resources held by the United States.” Since the United States retains ownership of the land, and shared ownership of the improvements, BLM management actions would not be constrained by a permittee’s interest in a range improvement.

Comment: Several comments noted that the changes would be inconsistent with common law or Forest Service regulations.

Response: BLM believes that consistency with Forest Service regulations, though desirable at times, is not necessary for implementing effective rangeland management practices. BLM is not obligated to accept common law rules for ownership of improvements on public lands (*Public Lands Council v. Babbitt*, 167 F.3d 1287, 1302 (10th

Cir. 1999), *aff'd on other grounds*, 529 U.S. 728 (2000)).

Comment: One comment objected to joint title to range improvements because it would increase the BLM's administrative burden.

Response: BLM disagrees that the proposed change will increase our administrative costs. BLM is currently obligated to record and track the value of contributions that cooperators provide for range improvements, including the imputed value of their labor. This is necessary under the current rules to meet our requirement that we reasonably compensate a cooperator if the permit or lease is canceled to devote to another use or for other purposes. Thus, our administrative responsibilities will exist whether BLM shares the title to the improvement, or holds it solely in the name of the United States. Consequently, the shared title does not result in an additional administrative burden.

Comment: One comment expressed concern about how joint title would affect Tribal consultation, cooperation, and coordination requirements and whether BLM is abdicating control of these responsibilities.

Response: BLM is responsible for consultation with the Tribes and will ensure that the required consultation will occur for all appropriate activities on public land. BLM does not believe that shared title with a cooperator for a range improvement is mutually exclusive with consultation. We again refer to section 4120.3-1(e), which states that establishing a range improvement does not convey any right, title, or interest in any lands or resources held by the United States. Under the rule, BLM retains control of when and where improvements are installed, and other terms and conditions of the development (section 4120.3-1). Also, the cooperators' title and interest are limited to the proportion of structural improvements in which they invested. Considering these

factors, cooperative range improvements should have no affect on Tribal consultations, BLM control of the land, or any Indian trust responsibilities.

Comment: Several comments observed that evidence is absent or inconclusive that joint ownership of title to improvements encourages permittees to invest in further improvements, thereby improving range conditions, or increases the permittee's ability to secure a loan.

Response: State-by-state data on range improvements is shown in the EIS in Table 3.4.3.1. It is clear from the data that the number of new range improvements has declined since 1995 when the rule was last changed. The number has declined in every state with grazing on public land. The average decline is 38 percent. From 1982 to 1994, BLM authorized an average of 1,945 range improvements per year. From 1995 to 2002, we authorized an average of 1,210 per year. Several factors may be contributing, but it is reasonable to conclude that some of that decline may have been the result of the 1995 rule change. It is logical to assume that 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. A permittees or lessee's belief that sharing the title to improvements in which he invests contributes to stable ranch operations is also significant. Shared title to range improvements also provides an opportunity for permittees and lessees to document investment in their business enterprises, which is useful for securing business capital and demonstrating value of their overall private and public lands operations. Permittees and lessees perceive this recognition of investment as crucial to their business and, therefore, as an important factor when considering personal investment

in range improvements. Beyond ranch economics, range improvements improve range conditions. Those benefits accrue to all land and resource managers. BLM may enter into a cooperative range improvement agreement with any person, organization, or other government entity to develop range improvements. The shared title to such improvements is expected to serve as an incentive for all potential cooperators to participate and partner with the BLM in the development of range improvements to assist in meeting management or resource condition objectives.

Comment: Other comments were concerned that the effects of shared title were not sufficiently analyzed, including the effect of increased wildlife use as range condition improves.

Response: The BLM considers improvement in wildlife habitat that may result from range improvements and subsequent upward trend of overall watershed condition to be benefits of the rule.

Comment: Some comments questioned the fairness of sharing title to improvements with permittees and lessees. They regarded the assignment of shared title as preferential treatment that is undeserved when terms and conditions of permits or leases are violated. One comment disapproved of shared ownership of improvements because they would be a constraint on other permittees or lessees in a common allotment.

Response: The BLM's commitment to fairness is an important aspect of the joint title to range improvements. A permittee's or lessee's share of the title to a development in which he or she invests has no affect on BLM's administration of terms and conditions of the grazing permit or lease. Under section 4120.3-6(c), permittees and lessees are only compensated for the adjusted value of their interest in range improvements in the event the permit or lease must be

canceled to allow the land to be devoted to another purpose. There is no compensation if there is no remaining value of their interest in the improvement. BLM believes this is an equitable approach. If a permittee or lessee loses his grazing preference due to noncompliance with the permit or lease, there is no compensation for range improvements that remain on the allotment. However, he or she would be given the opportunity to remove improvements unneeded by BLM. The former permittee or lessee would also be responsible for restoration of the improvement site. Regarding common allotments, planning and implementation of range improvements on common allotments is an inclusive process involving all permittees or lessees authorized to graze in the allotment. As provided in section 4120.3-2(a), BLM enters into cooperative range improvement agreements to achieve management or resource condition objectives and does so through a collaborative process.

Comment: One comment suggested that all range improvements, not just permanent improvements, should be eligible for shared title based on contributions of the cooperator.

Response: BLM currently allows title to temporary, removable range improvements installed under range improvement permits to be held by the permittee or lessee (section 4120.3-3). The existing regulations already incorporate the suggested provision.

Comment: One comment expressed concern about who would be liable if a public land user was injured in connection with a privately owned improvement.

Response: Based on our previous experience with joint Federal-private ownership, we do not recognize any liability issues that should be addressed in this rulemaking. Issues of liability generally are fact-specific, and are best resolved on a case-by-case basis. Moreover, cooperative range improvement agreements will continue to

include provisions that protect the interests of the United States in its lands and resources.

Comment: An additional comment suggested that BLM should retroactively provide for shared title to range improvements constructed under cooperative range improvement agreements after the 1995 rules changes took effect.

Response: The Department has declined to make the proposed change retroactive to 1995, since such retroactive changes have been discouraged by the Supreme Court (*Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)).

Comment: We received two comments recommending that BLM authorize permanent range improvements under range improvement permits, noting that such permits are allowed under Section 4 of the Taylor Grazing Act.

Response: Under Section 4 of TGA (43 U.S.C. 315), the Secretary has the authority to determine whether to issue permanent range improvements under range improvement permits or under cooperative range improvement agreements. BLM believes it is in the best interests of the public to authorize all permanent developments such as spring developments, wells, reservoirs, stock tanks, and pipelines under cooperative range improvement agreements to promote achievement of management and resource objectives.

Comment: We received an additional comment suggesting that BLM consult with all permittees associated with an allotment prior to approving nonrenewable use, and require cooperation from all permittees or lessees with the temporary operator.

Response: Under section 4130.6-2, which addresses nonrenewable grazing permits and leases, BLM is required to consult, cooperate, and coordinate with all affected permittees or lessees, as well as the state having lands or responsibility for managing

resources within in the area, before issuing a nonrenewable grazing permit or lease. If BLM issues such a nonrenewable permit or lease, the preference permittee or lessee shall cooperate with the temporary authorized use of forage by another operator. BLM agrees that all preference permittees or lessees in an allotment with temporary use authorized should be consulted and should cooperate. Therefore, we have amended section 4120.3-3(c) in the rule by adding “with all preference permittees or lessees within the allotment.”

Comment: One comment urged that we revise section 4120.3-3(c) to remove any reference to the permittee or lessee cooperating with a temporary authorized use of forage by another operator, stating that BLM should not have the discretion to allow someone other than an allotment’s preference holder to graze in an allotment. Doing so, according to the comment, could cause conflict among BLM, the preference holder, and the temporary grazers.

Response: BLM needs the discretion to authorize grazing use on public lands when forage is available. We realize that there is potential for conflict, as the comment describes. We have rewritten paragraph 4120.3-3(c) to make it clear that BLM will consult with the preference operator before authorizing such use.

5.4.11 Cooperation with Governments, Advisory Boards, and Other Agencies

Comment: BLM received comments regarding advisory council membership and function. A comment stated that we should re-establish Multiple Use Advisory Councils (MUAC) to resolve local issues, contending that the Resource Advisory Councils (RAC) that superceded MUACs and Grazing Advisory Boards in 1995 in many cases cover too large an area to respond adequately

to local issues. Such MUACs reorganized on a District or Field Office basis, according to the comment, could be a positive force for problem solving, conflict resolution, and vetting land management issues far beyond grazing management matters. Another comment suggested that RAC membership be made up of 50 percent conservationists, 10 percent community interests, and 30 percent independent biologists and not be dominated by ranchers who represent their narrow special interest. One comment stated that BLM should drop reference to resource advisory councils as public oversight bodies because they are ineffective at arriving at a decision.

Response: The suggestion to re-establish MUAC is outside the scope of this EIS. To the extent there is concern that RACs in many cases cover too large an area to address local issues adequately, the regulations pertaining to RACs at 43 CFR Subpart 1784 provide for the formation of RAC subgroups to gather local level input on specific issues. If you believe a particular issue should be addressed on a smaller subgroup scale by the RAC with which you are associated, you, as a member of the public, may suggest such an action to the RAC. The comment implies that RACs only consider grazing management matters. However, the regulations at 43 CFR Subpart 1784 provide that RACs can address all facets of public land management. Regarding RAC composition, regulations at section 1784.6-1(c) and (d) require that the Secretary provide for balanced and broad representation from commercial, environmental, scientific, and aesthetic interests, as well as the public, Tribes, and state and local governments. This composition of the RAC comports with the statutory requirements of Section 309 of FLPMA.

Comment: Some comments expressed disappointment that BLM choose not to propose reestablishment of Grazing

Advisory Boards as suggested during the public scoping process on the ANPR and the notice of intent to prepare an environmental impact statement. They further expressed disappointment in the justification for not pursuing regulations that would allow board establishment that was presented in the DEIS section 2.4.

Response: The Resource Advisory Councils (RAC) that were established following the 1995 grazing regulation amendments have generally assumed the role played by the Grazing Advisory Boards, whose authority “sunset” on December 31, 1985. RACs provide an evenly balanced advisory board to cooperate with BLM, and are available to represent local interests on all facets of public land management. The regulations governing board functions at 43 CFR Subpart 1784 also provide for the formation of RAC subgroups to gather local level input on specific issues. The suggestion to redefine the role of Resource Advisory Councils is outside the scope of the rulemaking and this EIS. Moreover, we disagree that they are ineffective as public oversight bodies. The RACs represent a balance of views among various interests concerned with the management and use of the public lands. Furthermore, the Councils are advisory in nature and have given the public an effective forum for participating in the management of the public lands, as well as giving land managers direct public insight into proposed programs and policies. BLM has included in the rule a provision that BLM cooperate with Tribal, state, county, or locally established grazing boards when reviewing range improvement projects and allotment management plans on public lands. We feel that these existing and proposed provisions adequately address the need for a forum for cooperation and coordination on both local and regional issues affecting livestock grazing on public lands.

Comment: One comment stated that BLM should collaborate with other agencies like FWS, and another stated that state wildlife agencies should be fully engaged, because BLM decisions can easily affect these other agencies and their work, because BLM decisions can affect species of concern, and because effective wildlife management requires coordination with uses related to grazing management.

Response: BLM routinely consults with FWS and NOAA Fisheries in accordance with the requirements of the ESA and BLM Manual 6840 on Special Status Species Management. This consultation ensures that actions requiring authorization or approval by the BLM are consistent with the conservation needs of species of concern and do not exacerbate the need to list additional species. As for state agencies, current regulations require cooperation with them. This rule does not change this. Section 4120.5-2 states, “The authorized officer shall, to the extent appropriate, cooperate with Federal, State, Tribal and local governmental entities, institutions, organizations, corporations, associations, and individuals.” Many specific provisions also call for cooperation and consideration with the staff having lands or managing resources in the area affected by proposed BLM grazing management decisions.

Comment: One comment urged BLM to address the concept of grazing associations, explain what they are and examine if all members of an association must own base property.

Response: A grazing association is a group of ranchers organized into an association for the common benefit and welfare of the members. Grazing associations are organized under the laws of the state where they are located. Under section 4110.1(a)(2), a grazing association may apply and qualify for grazing use on public lands if

all members of the association own or control land or water base property.

Comment: Many comments supported the addition of 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) to section 4120.5-2. These comments gave a variety of reasons.

Comment: A comment stated that the regulations should require agency cooperation with State, county, and local grazing boards, because the creation and use of grazing advisory boards would give BLM land managers direct resource-related information from subject matter experts in the local areas, increasing our ability to devise appropriate strategies for managing public lands under the multiple-use mandate. Another supported the amendment because state and local governments and local citizens have more at stake in the health of the land in their area than does BLM. The comment said that where state and local governments have established grazing advisory boards to provide for the health and management of public lands in their jurisdiction, they should be given maximum opportunity to do so. Other comments supported the proposed provision because consultations between grazing boards and BLM officials will provide for improved working relations on issues of significant importance to all stakeholders, and the new provision also fulfills statutory and regulatory requirements for consultation, cooperation, and coordination. One comment stated that grazing advisory boards can be used to help resolve conflicts between the agency and allotment owners, while another said that local grazing advisory boards allow for more efficient use of agency resources and money.

Response: The BLM intends cooperation with grazing boards to provide BLM land

managers local resource-related information from subject matter experts in local areas, thus increasing BLM's ability to develop and recommend appropriate strategies in developing allotment management plans and planning range improvements. BLM agrees that cooperation with local, county, and state agencies, governmental entities, and grazing boards established by state, county, and local governments will help us in considering how best to apply land management practices and spend range improvement funds. Cooperation with all groups and individuals, including Tribal entities, to achieve the objectives of grazing management, is required in section 4120.5-1 of the existing grazing regulations. Existing policy and law provides for the consultation, cooperation, and coordination with these groups as well as others. BLM recognizes that these entities have a high stake in promoting healthy public lands in their area. We therefore also intend the provision to direct BLM field managers to cooperate with state, county, and local government boards in carrying out the boards' functions. That is, we will participate in their meetings, provide information on request when it is legal and appropriate to do so, answer inquiries, provide advice, and generally interact with the boards in a cooperative manner. The amended regulations would formalize the role of grazing boards in providing input and helping to avoid or resolve conflicts between BLM and grazing permittees and lessees. However, it is not the intent of the regulations to confer upon any grazing board cooperating agency status.

Comment: One comment stated that BLM should provide an opportunity for local collaborative groups to be creative and proactive in the management of local public lands. The comment added that private lands adjacent to the public lands—often the base property for permittees—are usually the most

important habitat (for example, critical winter range) for many wildlife species.

Response: BLM agrees that informal collaboration with local publics is beneficial to management of public lands and recognizes that adjacent private lands and land and water base properties often provide important wildlife habitats, for the same reasons that historically these lands were more likely to have been homesteaded or otherwise converted from public domain to private ownership. Our regulations at section 4120.5-1 require us to cooperate with individuals and other local entities, to the extent appropriate, to achieve the objectives stated in the regulations. However, the only requirement added in section 4120.5-2 is that we cooperate with government and government-created boards, not informal citizen groups, in the administration of laws and regulations relating to livestock, livestock diseases, sanitation, and noxious weeds.

Comment: Many comments opposed the addition of paragraph (c) to section 4120.5-2. These comments also gave a variety of reasons.

Comment: One comment stated that the provision gives the impression that grazing board concerns have greater weight than the interests of other groups. The comment said that the perspectives of these other groups can also be valuable to the BLM decision-making process. Others stated that it will reduce BLM's role as an independent land management agency, and that it will duplicate or supplant the current arrangement BLM has with, and will undermine the efforts of, the Resource Advisory Councils (RAC).

Response: BLM is required, to the extent appropriate, to consider the views of all stakeholders providing input into BLM's decision-making process, and will not be constrained in its management by input from grazing boards. This means that, assuming

we have the manpower, we will attend their meetings when invited, provide information when requested, and invite their input when appropriate. The boards will provide expertise in reviewing range improvements and allotment management plans on public lands.

The role of the RACs is broader, in that it also encompasses input into and review of the Standards of Rangeland Health under Subpart 4180. There may be some overlap between these groups in the discussion of grazing allotment management issues. Nevertheless, this input will be valuable to BLM, broadening perspectives as to the issues. As a result, we expect that our decision-making process will be more effective and our data will be more comprehensive. Of course, laws, regulations, policy, and a multitude of other factors also guide and direct BLM's decision-making process.

Comment: A comment from a state wildlife management agency stated that specific language should be added to paragraph (c) to address appropriately the requirements for consultation with state wildlife management agencies called for in several Federal laws, including the Taylor Grazing Act.

Response: Section 4120.5-1 requires BLM to cooperate, to the extent appropriate, with Federal, state (including state wildlife management agencies), Tribal, and local government entities, institutions, organizations, corporations, associations, and individuals to achieve the objectives of the regulations in Part 4100. Section 7 of the Endangered Species Act requires formal consultation with the U.S. Fish and Wildlife Service or the NOAA, Fisheries if a federally listed species may suffer effects due to a proposed action. No additional language is necessary in the grazing regulations regarding coordination with state wildlife management agencies.

Comment: One comment stated that paragraph (c) should be removed because many states, counties, and local areas do not have any established grazing boards. Another stated that it is not clear how these grazing boards are defined or established, nor what it would take for a grazing board to qualify as "established." One comment stated that paragraph (c) was tantamount to the reestablishment of grazing advisory boards, the authority for which expired on December 31, 1985 (43 U.S.C. 1753(f)).

Response: The establishment of grazing boards is at the discretion of state, county, and local governments, and is not required or authorized by BLM. This rule change formally recognizes the benefit of consulting and cooperating with existing and any future grazing boards. Each specific grazing board, or the governmental entity creating or authorizing it, determines the grazing board's establishment, internal organization, and role.

Comment: One comment stated that BLM should include other groups and boards representing various public land resource interests in the local area (such as Tribal Associations) in section 4120.5-2(c), because many of these groups and agencies utilize BLM lands.

Response: In section 4120.5-2 of the grazing regulations, the authorized officer is required to cooperate, to the extent consistent with applicable laws of the United States, with the involved state, county, and Federal governmental agencies in administering certain laws and regulations. Section 4120.5-1 requires cooperation, to the extent appropriate, with all groups and individuals, including Tribal entities, to achieve the objectives of grazing management. Cooperation with grazing boards, where they exist, can give BLM land managers resource-related information from local subject matter experts, thus increasing our ability to develop appropriate strategies for

managing grazing allotments and developing range improvements under the multiple-use mandate. We have added Tribal associations to paragraph (c) in response to the comments.

Comment: One comment suggested that we expand the scope of paragraph (c) to require cooperation with local grazing boards as to other elements of rangeland management. The comment stated that these groups could assist with the resolution of such issues as conflicts between permittees and other users of the public lands and in designing monitoring programs.

Response: Tribal, state, county, and local government-established grazing boards are independent entities, set their own agendas, select their own members, and determine the level of their interest in reviewing allotment management plans and range improvements. Under this rule, BLM will not establish, sanction, or direct the function of grazing boards. BLM's role, as identified in the grazing regulations, is to weigh any input from the grazing boards as well as from others as we consider allotment management plans and range improvements. BLM coordinates with Federal, state, Tribal, and county government entities and RACs on a wide variety of public land management issues and proposed actions.

Comment: One comment stated that grazing boards should be consulted but should remain autonomous from Resource Advisory Councils, as provided in the Taylor Grazing Act. Another stated that grazing boards comprised of members of the general public may have personal concerns or pet issues that should not affect BLM management practices.

Response: Under the proposed grazing regulations, grazing boards established by state, county, and local government and Resource Advisory Councils will remain as distinct organizations. The grazing advisory boards referred to in the Taylor Grazing

Act were terminated in 1974 in accordance with Section 14 of the Federal Advisory Committee Act of 1972 (5 U.S.C. App. 1), and should not be confused with the grazing boards in the proposed grazing regulations. These grazing boards are neither established nor sanctioned by BLM. Partly in response to the confusion and concerns demonstrated by these comments, we are amending paragraph (c) to add the word "government" after the word "local." This should make it clear that the grazing boards referred to in the provision with which BLM must cooperate in administering livestock laws are only those created or sanctioned by state, county, Tribal, or local government entities.

Comment: One comment suggested that only affected permittees, and not individuals from other locations, should be consulted regarding section 4120.5-2, "Cooperation with State, county and Federal agencies."

Response: That section does not include a consultation requirement with the interested public, but does require BLM to cooperate with Tribal, state, county, and other Federal agencies regarding the administration of laws and regulations related to livestock, livestock diseases, sanitation, and noxious weeds. BLM believes it is important to continue to work cooperatively with other governmental authorities on these issues.

5.4.12 Temporary Nonuse

Comment: Several comments expressed general support for the changes in the temporary nonuse provisions. Various other comments suggested amendments for the definition of "temporary nonuse:"

- 1) To include nonuse that is required by BLM in response to fire, drought, or in other cases where range restoration or improvement is necessary;

- 2) To provide that BLM will manage decreases in livestock numbers by temporary nonuse rather than suspension; and
- 3) To require permittees and lessees to apply for temporary nonuse on an annual basis, in order to make the definition consistent with section 4130.4(d)(1).

Response: The first two suggestions are related. Some grazing permittees and lessees do not want to have authorizations suspended for drought, fire, and range restoration. Although no reason is given in the comments, apparently these grazing operators consider a suspension tantamount to a penalty. However, there is no stigma associated with this kind of suspension. Nonuse to allow fire rehabilitation or drought recovery at the request of BLM is properly achieved by suspension. Also, having a suspension imposed by BLM in this situation eliminates the paperwork burden associated with applying for temporary nonuse.

BLM cannot adopt the third suggestion. Definitions are in the regulations to describe what a term means. The definition is not the proper place to describe how to implement it. Section 4130.4 gives sufficient information about the implementation of temporary nonuse; it is unnecessary to repeat it in the definition.

Comment: One comment from a state fish and game agency opposed the definition of temporary nonuse, relating it to its opposition to the proposed definition of “preference.” The agency opposed institutionalizing a stocking number in grazing permits. Instead, the comment supported the definition in the current regulations, stating that forage allocations should be based on available forage.

Response: Changes in the definition of “temporary nonuse” in the rule are necessary

to implement the ruling of the 10th Circuit Court in *Public Lands Council v. Babbitt* (167 F.3d 1287 (10th Cir. 1999)) on conservation use. The interpretation in the comment of the relationship between temporary nonuse and grazing preference is incorrect. The rule defines “grazing preference” or “preference” as 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. A permit or lease is a long-term (up to 10 years) authorization to graze livestock on public land and is based on available forage. BLM may authorize temporary nonuse, on the other hand, for a short-term, one year, when applied for by a permittee or lessee, for a variety of reasons.

Comment: One comment stated that BLM should amend the rule with regard to temporary nonuse to make the negative effects on grazing permittees as predicted in the DEIS positive.

Response: We believe the long-term effects of the rule will be favorable to the health of the range. BLM is free to disapprove nonuse if resource conditions do not warrant approval of temporary nonuse for conservation reasons, and to allow temporary use by other operators if the nonuse is for personal or business reasons. The regulations contain checks and balances to minimize adverse effects.

Comment: Several comments expressed the concern that, if we adopt the rule as proposed, BLM would be unable to deny nonuse for conservation purposes. The comments pointed out the possibility that since the rules do not limit the number of years that a grazing operator could potentially be approved for nonuse of their grazing permit or lease, conservation organizations could acquire grazing permits and perpetually receive BLM approval not to use them for reasons of natural resource

conservation, enhancement, or protection. Another comment supporting the proposed rule expressed concern that BLM's discretion to grant nonuse for more than 3 years allows a *de facto* "conservation use" permit in violation of the TGA, FLPMA, and the decision in *Public Lands Council v. Babbitt*, *supra*. Also, the proposed rule stated that BLM "will" authorize nonuse to provide for natural resource conservation, enhancement or protection or for the personal or business needs of the permittee.

Response: In the rule, BLM has changed the term "will" to "may" to make clear that BLM retains the discretion to disapprove nonuse if BLM, based on the facts applicable to the circumstances, does not agree that nonuse is warranted.

The rule also does not change provisions that authorize BLM to cancel permits and leases if they are not used for the purpose intended — namely, to graze livestock — and to award them to other applicants in accordance with the decisions, goals, and objectives of the governing land use plan. BLM believes it necessary to retain discretion to approve or disapprove nonuse based on the facts and circumstances at hand, so that it may adapt its management to the needs of the resources as well as the resource user. The regulations adopted today provide that unless the BLM approves nonuse in advance, it is not approved. BLM may deny nonuse if we find that it is not needed either for natural resource conservation, enhancement or protection, or for personal or business needs of the permittee. If BLM denies a permittee's application for nonuse, the permittee would be obligated to graze in accordance with their permit or lease. If the permittee failed to make use as authorized by their permit or lease for two consecutive fee years, then BLM could cancel the unused preference under section 4140.1(a)(2) and allocate it to

other applicants under sections 4110.3-1(b) and 4130.1-2.

If the BLM approves nonuse for personal or business reasons of the permittee or lessee, we may authorize other qualified applicants to graze the forage that is temporarily made available due to the nonuse by the preference permittee under section 4130.4(e). If BLM approves nonuse for reasons of resource conservation, enhancement, or protection, and should a qualified applicant believe that BLM's approval of nonuse for any of these reasons is not justified, that applicant could apply to use the forage that he believes to be made available as a result of BLM's approval of nonuse. Because the regulation at section 4130.4(e) would not allow BLM to approve an application for forage made available as a result of temporary nonuse approved for reasons of resource conservation, enhancement, or protection, BLM would then necessarily deny such an application for use by grazing decision. This grazing decision would be subject to protest and appeal, thereby providing the applicant an opportunity to demonstrate to an administrative law judge or board why he believes BLM's decision to approve the nonuse application was in error, and to have the court compel BLM to either require that the forage be used by the preference permittee or to make the forage available for use by other applicants.

Comment: Some comments stated that the Supreme Court found that unlimited nonuse was not consistent with the TGA.

Response: The rule does not authorize BLM to grant unlimited nonuse. The rule restores to BLM flexibility to approve permittee or lessee applications for nonuse as long as BLM determines annually that the nonuse is warranted by resource needs or by the personal or business needs of the operator.

Comment: One comment questioned why temporary nonuse must be subject to annual application, stating that in at least some cases it should be easy to predict that the benefits from nonuse would take several or even many years to accumulate. The comment suggested that an analysis of historic employment of temporary nonuse might shed light on reasons ranchers applied for temporary nonuse: BLM proposals to reduce AUMs; business reasons of the permittee or lessee; or cooperative agreements to allow range or riparian recovery.

Response: Annual reconsideration of temporary nonuse allows BLM to determine whether it is still necessary. Of course, in some cases the determination will be easy to make. Historical analysis of temporary nonuse is not necessary. Of the three reasons for nonuse suggested in the comment, two are explicitly provided for in the regulations at section 4130.4(d)(2)(i) and (ii). As for the other reason suggested for temporary nonuse, that BLM is proposing to reduce AUMs, temporary nonuse may be a preferable, less drastic, alternative, which will give the range an opportunity to recover to forage levels that will support the permitted AUMs before BLM cancels the AUMs.

Comment: One comment urged BLM to ensure that the grazing regulations provide for maximum flexibility for nonuse, or reduced use, including allowing nonuse for 3 years for reasons other than resource management. Upon 3 years of nonuse, then, according to the comment, BLM should consult with the preference holder to determine how to make the nonuse AUMs temporarily available to other applicants engaged in the livestock basis, or to reallocate them permanently in accordance with the grazing regulations. The comment concluded that BLM should limit nonuse for resource protection reasons to 5 years to protect the range from rangeland health

concerns some contend start to accrue after 5 years without livestock grazing.

Response: The final regulations provide sufficient flexibility for approving nonuse for reasons other than resource management. BLM should not wait for 3 years before authorizing other applicants to graze AUMs made available due to a preference permittee's nonuse for personal or business reasons, as there may be times where the use can appropriately be made immediately. However, we disagree that there should be an arbitrary limit on nonuse for reasons of resource conservation, enhancement, or protection. There may be times when nonuse based on these needs is justified for longer than 5 years, which BLM will determine based on monitoring and standards assessment.

Comment: One comment urged that BLM should not propose reductions and eliminations in resting or nonuse because this action, which is only beneficial to the permittee or lessee, implies that the BLM is only concerned about short-term production of livestock and not the long term benefit of stewardship.

Response: BLM does not believe that granting nonuse when it is beneficial to a permittee or lessee implies that BLM is only interested in short-term livestock production. Long-term stewardship of public lands is inherent in the stated missions and goals of the agency in Section 102(a) of FLPMA. There are also many sections (such as section 4130.3-3(b), Subpart 4180, etc.) in the grazing regulations that provide mechanisms for exercising stewardship of the public lands to ensure that the lands are productive and available to future generations. Additionally, the concept is embodied in BLM's mission statement: "sustains the health, diversity, and productivity of the public lands for the use and enjoyment of present and future generations."

Comment: One comment suggested that the regulations should provide that when permit holders request nonuse or a reduction or suspension of what is currently permitted use, such requests would be granted.

Response: Section 4130.4 provides that BLM may authorize temporary nonuse for natural conservation reasons or for business or personal reasons of the permittee or lessee. If the applicant supports the request with appropriate reasons, BLM will normally approve the request, on a year-to-year basis, as provided by section 4130.4(d)(1)(ii). BLM believes it necessary to retain discretion to approve or disapprove nonuse based on the facts and circumstances at hand, so that it may adapt its management to the needs of the resources as well as the resource user.

Comment: One comment stated that BLM's consideration of a request for conservation use should consider whether that use would create a fire hazard.

Response: The rule allows permittees and lessees to apply for temporary nonuse for conservation purposes. BLM's deliberation regarding an application for nonuse for conservation purposes will include consideration of whether approval would result in other effects such as unhealthy buildup of fuels.

5.4.13 Fundamentals of Rangeland Health

Comment: Some comments expressed concern that BLM was replacing the fundamentals of rangeland health in section 4180.1 with the rangeland health standards in section 4180.2. The reasons given for concern were: (1) BLM might no longer take action if we determined that conditions expressed as fundamentals of rangeland health did not exist; (2) BLM would not be able to evaluate the effectiveness of state or regional guidelines; and (3) land health

standards would take precedence over the fundamentals.

Response: Land health standards do not replace or take precedence over the fundamentals of rangeland health, but further define the conditions that must exist in order to achieve Fundamentals of Rangeland Health at the local or regional level. Section 4180.2(b) clearly states that standards must provide for conformance with the fundamentals of section 4180.1. Because of the hierarchical relationship between the fundamentals and the standards of rangeland health, if the standards are met, then the conditions exist to meet the fundamentals. The effectiveness of state or regional guidelines will be determined by evaluating whether or not standards are met when the guidelines are followed. The purpose of the change in section 4180.1 is to make it clear that when standards describing the conditions necessary to meet the fundamentals have not yet been developed, that failure to achieve (or make progress toward achieving) fundamentals will be the basis for taking appropriate action.

Comment: A comment suggested removing or revising section 4180.1 because, as framed in the current rules, the fundamentals do not conform to the concepts and parameters presented in the National Research Council's 1994 publication "Rangeland Health, New Methods to Classify, Inventory, and Monitor Rangelands," and "New Concepts for Assessment of Rangeland Condition" (Journal of Range Management, SRM 48(3), May 1995). It also suggested that the Criteria and Indicators developed by the Sustainable Rangeland Roundtable be incorporated into Subpart 4180.

Response: BLM considered the National Research Council publication cited in the comments in 1995 in preparing the proposed

direction for developing state or regional standards and guidelines (*Rangeland Reform '94 Final Environmental Impact Statement*, page 13). These national concepts were retitled the “fundamentals of rangeland health” in the 1995 final rule (60 FR.9954). The Journal of Range Management article “New Concepts for Assessment of Rangeland Condition” provided a number of recommendations for assessing and reporting range condition based on ecological sites and “Site Conservation Ratings.” The fundamentals of rangeland health are not intended to describe a condition rating system; rather, they describe a threshold condition which either exists or does not exist, and provide BLM a criterion for taking corrective action. BLM has been a participant in the “Sustainable Rangeland Roundtable,” and that work is still in progress. We have determined that further adjustments of the regulations to be consistent with the “Sustainable Rangeland Roundtable” products would not be prudent at this time.

Comment: Other comments suggested moving the fundamentals of rangeland health from the grazing regulations in Subpart 4180 to the planning regulations in Subpart 1610, stating that the fundamentals are clearly planning rather than management concepts. According to the comments, the move would accomplish the 3 criteria listed in Federal Register (68 FR 68457): (1) promoting cooperation with affected permittees, especially land owners; (2) promoting practical mechanisms for protecting rangeland health, and (3) improving administrative efficiencies.

Response: As explained in the proposed rule, we did not consider it appropriate to expand of the scope of the rule and EIS to address planning regulations at Subpart 1610.

Comment: A number of comments addressed the references to “at-risk and

special status species” and the Endangered Species Act (ESA) in Subpart 4180. All suggested removing the term “at risk species” found in 4180.1(d), 4180.2(d)(4), 4180.2(e)(9) and 4180.2(f)(2)(viii) because it is not a term used or authorized in the ESA. Most expressed concern that including the term would lead to single species management when BLM should be managing for plant and animal communities and ecosystems. Some also suggested removing the term “special status species” for the same reasons.

Response: FLPMA directs BLM to manage for multiple uses, including native vegetation communities, and food and habitat for wildlife as well as livestock. Even though it is preferable to manage native plant and animal communities or ecosystems, the ESA requires threatened and endangered species to be managed by BLM, species by species. “Special status species” is defined in BLM Manual 6840, Special Status Species Management, and includes listed, proposed and candidate species, state-listed species, and sensitive species. Considering “other special status species” in standards and guidelines (4180) will identify potential management opportunities to avoid future listing of State listed and sensitive species. Once a species is listed under the ESA, multiple use management becomes increasingly complex and uses of the public lands may become more restrictive. Thus, BLM needs optimum habitat conditions for all special status species. However, because the term “at-risk species” is not defined in ESA or in BLM manuals or handbooks, we have removed it from the regulatory text. The rule retains the term “special status species,” because it is consistent with our objectives in Subpart 4180 and is clearly defined in BLM Manual 6840.

5.4.14 Basis for Rangeland Health Determinations

Comment: Some comments contained suggestions for implementing the rule. Many encouraged BLM to provide sufficient funding to collect the monitoring data needed under the rule, and one comment requested a funding strategy to show how BLM will provide the resources to complete the monitoring necessary to implement this rule. One comment suggested that permittees fund any monitoring above that currently required by BLM to make decisions. Some comments suggested priority-setting strategies so that high priority areas receive first consideration for monitoring.

Response: Priority setting is also a policy issue addressed during the annual budget development along with determinations on appropriate funding levels. Funding sources and amounts for monitoring vary from year to year, and BLM plans to work with permittees and others to determine how data collection will be funded or completed.

Comment: Several comments expressed a desire for BLM to update policy and handbooks to clarify methods and levels of monitoring needed so that there would be consistency in data collection and interpretation. One comment requested incorporation of “the Catlin *et al.* 2003 report and statistical tests (Grand Staircase or Escalante National Monument)” into the EIS because the report and statistical tests provide tools to assist BLM staff in making rangeland health determinations. Comments offered monitoring indicators for all the land health standards, and suggested that monitoring should be focused on goals and objectives agreed upon using the consultation, cooperation, and coordination. It was recommended that monitoring should be conducted by qualified professional agency personnel working with permittees

using approved agency methods to collect data relevant to the decisions being made.

Response: BLM agrees that clear guidance on monitoring methodologies is desirable. Many of the suggestions are more appropriately addressed in the development of policy, handbooks, and technical references, rather than in regulations. This applies particularly to techniques and methods for collecting and interpreting data. The suggestion to update policy and handbooks is appropriate, and BLM is planning on doing so.

Comment: One comment suggested the BLM should add the following wording to 4180.2 (c)(2): “If the appropriate action requires a change in active use, such change will be implemented in accordance with section 4110.3-3” to clarify that timing conflicts are not intended between the implementation requirements of this section and those of section 4110.3-3 on implementing changes in active use under the changes recommended herein.

Response: The regulations state in section 4180.2(c)(3), “Appropriate action means implementing actions pursuant to Subparts 4110, 4120, 4130, and 4160 of this part...” How changes in preference and active use will occur is specified in 4110.3-3, so we believe the suggested word change to section 4180.2 is unnecessary.

Comment: Some comments stated that the regulations in section 4180.2 should provide for individual allotment management plans with specific goals and objectives, and including monitoring plans be developed through consultation, cooperation, and coordination.

Response: Section 4120.2, on allotment management plans, directs that such plans provide for monitoring to evaluate the effectiveness of management actions in achieving the resource objectives of the

plan. These plans are to be developed in consultation, cooperation, and coordination with permittees, landowners, other agencies, and the interested public. Therefore, we believe the suggestion has already been addressed in the regulations.

Comment: A variety of comments opposed requiring both monitoring and assessments to make determinations that rangeland health standards are not being met because of current livestock grazing management. Most were concerned that BLM did not have the budgetary resources to provide adequate data collection and analysis and that the requirement would impose an unrealistic workload on the BLM staff, putting resources at risk by delaying appropriate actions. Setting priorities and assuring that low priority areas were not monitored at the expense of high priority areas was a concern.

Response: As previously stated, BLM prioritizes expenditure of resources for monitoring as well as for other activities in the range program. For example, BLM assigns high monitoring priority to areas it believes to be at risk, are in degraded condition, or in downward trend and in danger of losing capability. BLM believes that it is more effective to expend resources to collect data in these high priority areas, and to use that data to ensure sustainable decisions from a resource and implementation perspective.. Under the rule, monitoring would not be necessary on every allotment to make a determination that an allotment is failing to achieve standards and conform to the guidelines. The rule requires monitoring and data assessment only on those allotments which are found to have failed to meet standards or conform to guidelines, and if it is reasonably likely that the failure was caused by livestock grazing, to determine whether the failure is in fact due to levels of grazing use and grazing management

practices. As of the end of Fiscal Year 2002, about 16 percent of the 7,437 allotments evaluated were determined not to be meeting land health standards because of existing livestock grazing management. We focused our first round of assessments on areas with potential problems. Nevertheless, it is reasonable to use this experience as an indicator of the proportion of allotments that are likely to fail to meet standards as a result of livestock grazing practices in the future. Thus, we expect to be required to have monitoring data to support probably less than 16 percent of our determinations that we make after adoption of the revised regulations. Under projected budgets, we fully expect to have appropriate monitoring data to support a much larger proportion of our determinations, regardless of whether they lead to a finding of failure to meet standards due to livestock grazing.

Comment: Other comments expressed opinions that monitoring was unnecessary and existing direction was adequate for making determinations and necessary adjustments, including flexibility to use existing data, that using follow-up monitoring to determine if the change was needed is an appropriate strategy, and that allowing immediate action when destructive grazing practices and abuse are obvious is essential to good management. One comment stated that requiring monitoring would lead to increased litigation.

Response: The level of monitoring needed to determine whether existing livestock grazing is a significant factor in failing to achieve standards will vary depending on such factors as how obvious the causes are for not meeting standards, presence of threatened or endangered species, conflicts between uses, and other criteria. While BLM cannot control the number of appeals or the amount of litigation after issuing a grazing decision, we believe having

a defensible basis for the decision will reduce the number of instances where appropriate action is delayed because of protracted administrative and judicial processes. In addition, BLM would have stronger basis for implementing the corrective actions during a protest, appeal, or stay situation when the decision is founded on monitoring data.

Comment: Another comment maintained that range monitoring as practiced by BLM consistently under-reports biological impacts of cattle grazing on desert environments, particularly riparian areas, and that some monitoring methods do not report loss of habitat function for wildlife, increased susceptibility of soils to erosion, invasion of exotic plants, or destruction of cryptobiotic crusts.

Response: BLM does not agree with this comment. Monitoring is designed to document conditions of a particular attribute or set of attributes at the time data is collected. BLM uses a number of techniques and methods to measure wildlife habitat conditions (including cover, structure, and vegetation composition), ground cover, and presence of exotic plants. In doing so, we rely on many BLM Technical References and Technical Notes, including TR 1734-4 "Sampling Vegetation Attributes," 1996; TN-349 "Terrestrial Wildlife Inventories: Some Methods and Concepts," 1981; "Inventory & Monitoring of Wildlife Habitat," 1986, by Cooperider, Boyd, and Hansan; TN 395 "Evaluation of Bighorn Habitat: A Landscape Approach," 1996; TR 1730-1 "Measuring and Monitoring Plant Population," 1998; and TN 417 "Identifying and Linking Multiple Scale Vegetation Components for Conserving Wildlife Species that Depend on Big Sagebrush Habitat: A case Example – Southeast Oregon," 2004. This monitoring provides BLM with information about the condition and trend in condition of resources. When monitoring the effects of livestock

use, BLM commonly measures utilization, cover, and frequency, and relies on actual use reports and photographs. Data is then correlated to various management activities to determine effectiveness of management in achieving objectives.

Comment: Several comments recommended that the rule should allow BLM to use monitoring or assessment data or both for making determinations, as provided in Alternative 3 in the EIS. The comment stated that this flexibility would enhance efforts to protect rangeland health.

Response: We believe that devoting attention to areas with highest priority will allow us to address range health issues. In fact, at the end of Fiscal Year 2002, about 16 percent of the 7,437 allotments that had been evaluated were determined not to be achieving standards because of existing livestock grazing management. See section 4.3.1 of this EIS. This indicates that monitoring should be focused on high priority areas where there is a risk of not achieving land health standards because of existing livestock grazing.

Comment: The BLM should not unnecessarily place the burden of proof on itself to justify management changes by requiring years of monitoring data before management changes can be mandated because it will delay management changes.

Response: The rule only requires assessment and monitoring to show 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. For the most part, BLM has been focusing its monitoring efforts on those allotments where there are concerns or problems. We believe that this requirement is reasonable and necessary to ensure that we have adequate data to formulate and analyze an appropriate action. Further, as we have stated,

Careful monitoring will make for better, more defensible decisions. BLM is adding the requirement to use standards assessments and monitoring data to support determinations of failure to achieve standards and conform with guidelines because of existing grazing management practices or levels of grazing use because both the public and the livestock industry are concerned about a lack of existing data for making determinations. Although we often make these determinations based on existing monitoring data, adding this requirement provides for a consistent approach to making determinations.

We do not expect this provision to have significant budgetary effects because, as described in section 4.3.1, only 16 percent of the allotments assessed over the last 5 years have failed standards because of existing livestock grazing practices. While this requirement may increase the data collection workload in the grazing program, we expect to accomplish monitoring in those areas we believe to be at risk, in degraded condition, or in downward trend and in danger of losing capability. Refocusing data collection priorities may affect watershed assessment schedules and could delay the permit renewal process in areas where current monitoring data is not available. Under projected budgets we expect to have appropriate monitoring data to support our determinations. The amount of monitoring data needed is likely to vary from case to case. We will be developing guidance on monitoring to address such issues as timing and levels of monitoring.

Comment: Many comments addressed monitoring on public lands, and suggested ways that BLM could use monitoring to improve public land management. Comments stated that BLM should not authorize grazing on areas where it lacks adequate data to determine that standards are met or to ensure that resource damage is avoided. They

recommended that BLM set up exclosures as control sites representing various major ecological types of land in order to establish benchmarks for assessing grazing management.

Response: BLM authorizes livestock grazing on areas that have been determined through the land use planning process to be available for grazing. BLM determines whether lands are available for livestock grazing through the land use planning process in compliance with FLPMA and 43 CFR part 1600. The process involves public participation, assessment, decision-making, implementation, plan monitoring and evaluation, as well as adjustments through plan maintenance, amendment, and revision. This planning process adheres to the principles of multiple use and sustained yield and uses an interdisciplinary approach to integrate physical, biological, economic and other sciences. BLM is required to take appropriate action if we determine that existing grazing management practices or levels of grazing use are significant factors in failing to achieve the standards and conform to the guidelines for grazing administration. The rule emphasizes the importance of using monitoring data by adding a requirement for its use when determining whether existing grazing management is a significant factor in failing to achieve the standards and conform with the guidelines under section 4180.2(c). BLM endorses the use of exclosures to determine the compared effects of grazing and its absence on various ecological types of land, and discusses their use in several BLM and interagency rangeland monitoring technical references.

Comment: Comments suggested that monitoring was so critical to determining whether multiple use objectives are being met on grazing allotments that it should be specifically required in all allotments, along with other methodologies, in the regulations.

Response: BLM agrees that monitoring is important in measuring progress toward meeting objectives in grazing allotments and elsewhere on public land. Allotment-level monitoring is generally a component of allotment management plans, and is sometimes addressed in land use plans. Current allotment management planning includes monitoring on the maximum possible number of priority areas, limited only by budget and workforce. Specific methods are better addressed in handbooks and technical references, which are much more readily updated.

Comment: One comment stated that BLM should incorporate the scientific and economic principles expressed in Catlin *et al.* (2003) and Stevens *et al.* (2002) into its analysis and permit renewal processes, so that appropriate changes are made to ensure that native diversity and productivity are restored to grazed BLM lands. (The comment refers to Catlin, James, Jaro Walker, Allison Jones, John Carter, and Joe Feller, 2003: *Multiple use grazing management in the Grand Staircase National Monument. A tool provided to the Monument range staff by the Southern Utah Land Restoration Project* and Stevens, Laurence E., Peter Stacey, Don Duff, Chad Gourley, and James C. Catlin, 2002: *Riparian ecosystem evaluation: a review and test of BLM's proper functioning condition assessment guidelines.*)

Response: Employment of the technical procedures and principles described by these documents is appropriately addressed in policy, manuals, and guidance rather than in a rule.

Comment: One comment stated that BLM should clearly show its long-term budget strategy that outlines the monitoring programs, funding, and personnel that will be added to the agency's capacity to carry out the implied monitoring. The comment asserted that BLM does not have adequate

funding, personnel, and management support for adequate monitor vegetation, Special Status Species, and Birds of Conservation Concern, let alone other resources.

Response: Funding is provided by annual congressional appropriation. We will prioritize allocation of monitoring funding to address issues and provide a foundation for management adjustments. BLM agrees that monitoring is a critical component providing data for evaluation and adjustments of terms and conditions of grazing authorizations. We will continue to prioritize funding to fill monitoring needs.

Comment: Another comment stated that utilization studies sanctioned by BLM should include methodology for determining which species consumed the forage to ensure that measures taken to correct overutilization are effective.

Response: Methodologies for utilization studies are better addressed in reference manuals, guidance, and policy.

Comment: BLM does not have the monitoring data to assert that their management practices are having any effect on improvement of water quality on public lands.

Response: One of BLM's primary resource management objectives is to meet state water quality standards in water bodies affected by management activities on public lands. Achievement of state water quality standards is a rangeland health standard in each BLM region or state. BLM determines total maximum daily loads of pollutants and develops best management practices (BMPs), with coordination with and approval by each state's environmental quality office. We conduct water quality monitoring to assess the effectiveness of BMPs, as well as direct water column sampling to determine compliance with standards in cooperation with the appropriate state agencies. Streams and lakes are not removed from the states'

lists of impaired water bodies without full verification and direct sampling data. Monitoring to determine the effectiveness of each change in management is not possible, but priority watersheds with existing water quality problems are monitored sufficiently to determine whether new management practices designed to improve water quality are effective.

5.4.15 Timeframe for Taking Action to Meet Rangeland

Health Standards

Comment: Many comments supported the amendments in the proposed rule to allow BLM 24 months after determining that grazing management practices or levels of use were significant factors in failing to meet standards or conform to guidelines to formulate, propose, and analyze appropriate action. They stated that providing adequate time to develop and analyze appropriate actions with adequate public and permittee involvement would result in better decisions appropriate to the need. They said that the longer timeframes would allow a more accurate evaluation, and allowing 24 months instead of 12 months for initiating changing in grazing practices is more practical. BLM agrees and has not changed any of the pertinent provisions of the regulations in the rule.

Response: Under the rule, the BLM field manager has discretion as to whether to allow 24 months for BLM to address failure to meet rangeland health standards. There is no language in the rule that precludes a shorter deadline, once BLM meets its consultation, cooperation, and coordination requirements. Allowing 24 months to develop appropriate action should improve the likelihood of determining the correct remedy for a vegetative resource problem. Also, if immediate action is needed to protect soil,

vegetation, or other resources, BLM may invoke section 4110.3-3(b) and immediately close the area to grazing either totally or partially.

Comment: Those who made comments opposing the change in the amount of time to develop an appropriate action when livestock grazing was determined to be a significant factor in not achieving a land health standard focused on 3 areas. The first was that the extra time allowed is inconsistent with the objective of accelerating restoration and improving public rangelands and that it would create a delay leading to additional degradation of resources or harm to wildlife. The second was that current rules provided adequate time to take action, and that a ruling of the 9th Circuit Court of Appeals, upholding the current regulations, should be continued as a management directive. The third area of focus was that the change would provide preferential treatment not given to other permitted uses.

Response: With respect to the first concern, BLM believes that the proposal to allow up to 24 months (except in those cases where completing legal obligation that are beyond BLM's responsibility require additional time) to propose and analyze appropriate action needed to address the failure to meet a rangeland health standard will result in improvements rather than harm to resources, including wildlife. As stated in section 4.3.7 of the EIS, there may be limited, short-term adverse effects if BLM needs 24 months or more to develop an appropriate action that involves extensive coordination and consultation. However, we expect the extra time taken to develop a meaningful action to provide greater long term benefits to other resources and an overall improvement in rangeland condition. For example, just reducing the level of use in a riparian area, rather than developing a management system that considers timing of use, is not likely

to improve the riparian area condition. Taking the additional time to develop an appropriate action may actually reduce the amount of time taken to implement a decision, particularly if the decision is not appealed. Also, taking additional time should improve the quality of the BLM decisions and reduce the likelihood of successful appeal, and hopefully the number of appeals. Implementing decisions can be delayed by 18-36 months if appealed. At the end of FY2002, about 5 percent of grazing decisions issued after 1997 had been appealed. Labor and funds spent to address these appeals are diverted from developing and implementing workable plans. In many cases, the full 24 months may not be needed to develop appropriate actions. Based on determinations made through the end of Fiscal Year 2002, the number of allotments affected by this rule appears to be fairly limited. Of the 7,437 allotments assessed prior to October 1, 2002, BLM determined that 16 percent did not meet standards due at least in significant part to existing livestock grazing management or levels of use. See Section 4.3.1 of this EIS

Regarding the second area of concern, the BLM has determined that the additional time is needed to enable us to develop and implement better action strategies. We assume the ruling noted in the comments is *Idaho Watersheds Project v. Hahn*, 187 F.3d 1035 (9th Cir. 1999). In the proceedings that led up to that appellate decision, the district court provided a schedule for completing evaluations of land health standards and subsequent NEPA documents for 68 allotments, and issued interim management guidelines pending completion of the NEPA documents and issuing grazing permits. The decision referred to interprets the current regulations, the effects of which are analyzed as part of the No Action Alternative. The rule under consideration in this EIS will give managers and partners an opportunity

to develop, as a result of the additional time, better alternatives that will result in more positive long-term environmental effects. The fact that the 9th Circuit upheld the current regulations does not preclude the BLM from proposing to amend the regulations to improve our grazing management program.

We do not agree that the changes in the regulations give preferential treatment to grazing interests by extending the allowable timeframe for developing and implementing corrective actions. Grazing permittees are the only users required by these regulations to change management in a specified period of time if that management is a significant factor for not achieving rangeland health standards. If other activities are determined to be the cause for not meeting those standards, the regulations do not impose deadlines on making changes in such activities, or even require changes in them.

Comment: Comments provided suggestions for changing the proposed rule. One was to increase the time given to develop an appropriate action to more than 24 months, because climate, weather, or other conditions might require longer studies to determine rangeland health. Another was to provide for a variable timeframe on a case by case basis, because different problems required varying time periods for initiating and scheduling improvements. A third suggestion was to identify problems associated with grazing practices within 3-6 months, and devise measures to correct them within 2-4 months after they are identified, including (a) planning an appropriate action with appropriate consultation and coordination, (b) completing NEPA and Section 7 ESA requirements, and (c) issuing a final decision to implement the action.

Response: We have revised the rule to provide additional time to develop appropriate actions when legally required processes outside BLM's purview prevent

completion of all legal obligations within the 24 month time period. In most cases, 24 months is an adequate period of time to develop appropriate action. Sometimes a corrective action is as simple as changing a grazing period or rotation. In other circumstances, corrective actions are more complex and difficult to conceive and implement, such as when multiple permittees in large allotments with multiple resource issues are involved. When the process includes numerous legal requirements, such as ESA Section 7 consultation, or extensive consultation and coordination with numerous interests, we may need additional time to complete the process. Developing appropriate action to implement remedial grazing management can vary greatly in complexity depending on the management circumstances of the allotment. Sometimes a corrective action is as simple as changing a grazing period or rotation. In other circumstances, corrective actions are more difficult to conceive and implement, such as when working with multiple permittees in large allotments with multiple resource issues. In more complex circumstances, just developing the appropriate action(s) is often not straightforward. Time is needed for planning and budget considerations, such as developing and coordinating a workable proposal, engineering survey and design if range projects are a part of the corrective action, consulting with Tribes and complying with Section 106 of the NHPA, NEPA analysis including consultation with multiple entities and agencies, and securing moneys to support these processes. In practice, when faced with more complex circumstances, the relatively short period allowed by the current regulation within which to devise and implement the appropriate action(s) may not allow BLM time for internal alignment of the planning and budget needed for timely implementation of the corrective action.

Current resources available to BLM to assess rangeland conditions on 160 million acres make it impractical for BLM to implement and maintain a program to identify problems associated with grazing within “3-6 months.” Often, trends in range conditions are not discernible until several years of monitoring data are collected and analyzed. In light of these operational realities, BLM cannot adopt recommendations to shorten this timeframe.

Comment: One comment expressed concern that the effect of allowing up to 24 months to develop and analyze an action to make needed adjustments in grazing would be to protect poor stewards and uncooperative ranchers.

Response: The rule change is intended to provide adequate time “to formulate, propose, and analyze actions in an environment of consultation, cooperation and coordination.” Rather than protecting poor management, this rule provides opportunity to develop an appropriate action. BLM will still take appropriate action to modify livestock grazing management where changes are needed to achieve land health standards before the end of the 24-month period specified in the regulations. The proposed change to grazing management would be issued by a grazing decision under Subpart 4160. BLM is responsible for initiating a change in management regardless of the cooperativeness of the permittees or lessees or their management abilities. Additionally, section 4110.3-3(b)(1) includes the phrase “reasonable attempt to consult with” to allow BLM to implement immediate actions to address resource conditions in situations where an entity is uncooperative.

Comment: One comment urged BLM to eliminate completely the use of the “rapid assessment” or indicators of rangeland health (Technical Reference 1734-6) in assessing rangeland condition, stating that this is nothing more than the old apparent-trend

scorecard that the range management and scientific community abandoned 70 years ago as being too subjective.

Response: The authors of the 1994 National Research Council's (NRC) publication *Rangeland Health: New Methods to Classify, Inventory, and Monitor Rangelands* proposed an approach to assess rangeland health that uses integrity of soil and ecological process as measures of rangeland health (p. 95). They recommended the use of 3 criteria upon which to base an evaluation of rangeland health: (1) degree of soil stability and watershed function, (2) integrity of nutrient cycling and energy flow, and (3) presence of functioning recovery mechanisms (p. 97, 98). The report suggests a number of indicators that can be used to measure and assess rangeland health. The report also describes the use of indicators (soil and vegetation characteristics) that are used by the Natural Resources Conservation Service (NRCS—formerly the Soil Conservation Service, SCS) to indicate apparent trend (USDA, SCS, 1976). The majority of indicators listed in Technical Reference (TR) 1734-6 (jointly developed by United States Geological Survey, NRCS, Agricultural Research Service and Bureau of Land Management, 2000) are those listed in the NRC publication. BLM recognizes that the process for assessing and interpreting indicators of rangeland health as described in TR 1734-6 is qualitative, but is extremely useful for providing an initial assessment of land health. This initial assessment can then be substantiated by collection of quantitative data through monitoring on those areas where concerns are identified (BLM Manual Handbook H-4180-1 *Rangeland Health Standards*, chapter III). BLM expects to continue to use this tool in conjunction with monitoring to make determinations of rangeland health and whether or not existing

livestock grazing is a significant causal factor where land health standards are not achieved.

5.4.16 Rangeland Health Standards

Comment: Some comments included requests to provide BLM State Directors authority to petition the Secretary for additions or changes to current land health standards, stating that providing this authority would allow BLM to modify standards based on current conditions or needs and desires of local working groups.

Response: The final regulations retain the provisions in section 4180.2(b) that give the State Director the responsibility and authority to develop or modify regional standards, following consideration of Resource Advisory Council (RAC) recommendations. The Secretary of the Interior must approve state or regional standards or guidelines developed by the State Director prior to implementing them.

Comment: One comment urged BLM to find ways to reward ranchers who achieve 100 percent compliance with the standards for rangeland health, and to manage permittees who fail to achieve compliance with the standards in order to improve conditions on public lands.

Response: From a policy perspective, BLM does not agree that it should “reward” ranchers whose grazing practices do not prevent achievement of rangeland health standards. Under the rule, where grazing management practices or levels of grazing use are significant factors in failing to achieve the standards and conform to the guidelines, BLM must take appropriate action as soon as practicable, but no later than the start of the next grazing year that follows the execution of an agreement or the issuance of a grazing decision that addresses the causes of failing to achieve, or to progress towards achieving the standards or conform to the guidelines.

Comment: One comment stated that BLM grazing regulations should have provisions in Subpart 4180 that ensure protection of rangelands from further degradation, improvement of water quality, and restoration of areas adversely affected by grazing.

Response: BLM, in consultation with Resource Advisory Councils, has developed and approved regional standards for rangeland health and guidelines for grazing administration under section 4180.2 in all areas that BLM manages for livestock grazing, except for the California Desert District. In the California Desert District the fallback standards and guidelines in section 4180.2(f) currently apply. Section 4130.3-1(c) requires that permits and leases incorporate terms and conditions to require conformance to standards and guidelines. BLM believes that these standards and guidelines adequately provide for the protection of rangelands from degradation, improvement of water quality, and restoration of areas adversely affected by livestock grazing.

Comment: One comment requested that we restrict the fallback guideline in section 4180.2(f)(2)(x) to the use of native plants and eliminate the use of non-native plant species for rehabilitation or restoration projects. Another comment encouraged us to retain the use of non-native plants for restoration and rehabilitation projects under the conditions listed in the fallback guideline in section 4180.2(f)(2)(x).

Response: It is BLM policy to use native plant species in range improvement and other projects intended to re-establish vegetation where they are available and if we expect them to be effective. The current fallback guideline at section 4180.2(f)(2)(x) recognizes that at times native plant materials are in short supply and in certain circumstances native plant species cannot compete with established exotic

invasive species. Section 4180.2(d)(12) also continues to provide that state or regionally developed standards for rangeland health “[i]ncorporat[e] the use of non-native plant species only in those situations in which native species are not available in sufficient quantities or are incapable of maintaining or achieving properly functioning conditions and biological health.” State or regionally-developed standards created under this regulation have recognized that on some sites, native species are incapable of successfully competing with invasive exotics. Where this occurs, BLM uses non-natives in rehabilitation projects.

Comment: One comment asserted that it may be misleading to state that most BLM states have completed establishment of standards. The comment went on to state that, in many of these states, the grazing industry controls state legislatures or has influence over them out of proportion to the contribution of the industry to the economy and to society, and that this brings into question the validity of state rangeland health standards. BLM should have ultimate responsibility for making this determination on lands entrusted to it by the public, the comment concluded, and these determinations should be made using techniques of rangeland science, by qualified individuals, either employed by or under contract to BLM.

Response: The comment misinterpreted what we meant by “BLM states.” BLM is organized into different administrative levels and boundaries. One of those levels is by state and at the state level there is a state office. Some of the administrative states actually include more than one state. For example, the Montana State Office includes the states of Montana, North Dakota, and South Dakota. In the DEIS in Section 2.2.8, when we stated “Most BLM States have completed establishment of standards and

guidelines...,” we were referring to the BLM administrative State Offices.

BLM professionals, along with many of our interested publics, including but not limited to RACs, ranchers, and various organizations and individuals, were involved with the development of the BLM’s rangeland standard and guidelines. In most states, BLM coordinated or consulted with state agencies or the state Governor’s Office during the development of land health standards, but not with state legislatures. All rangeland standards and guidelines are based on current rangeland science. BLM is responsible for implementing the standards and guidelines and determining the condition of the public rangelands that we administer.

5.4.17 Conservation Use

Comment: Several comments opposed removing the concept of conservation use permits from the regulations. Others stated that the regulations should not make it difficult or a lower priority for a conservation group to buy grazing permits. They pointed out that if BLM collects its fees from a conservation group, from a revenue perspective it makes no difference if the conservation group decides not to graze livestock, and that such nongrazing would have minimal effect on western economies. The comment also said that such groups are often able to pay willing sellers higher prices for permits, and that such transactions result in healthier rangelands. Another comment said that BLM should convene a forum of permittees, conservationists, and agency representatives to explore regulatory options for facilitating “willing seller–willing buyer” grazing permit retirement.

One comment that supported removal of reference to “conservation use permits,” stated that not grazing can result in fuel build-up and catastrophic fires.

Response: The removal of the term “conservation use” from the regulations is required by Federal court decision (Public Lands Council v. Babbitt, 167 F.3d 1287, 1308 (10th Cir. 1999)), aff’d on other grounds, 529 U.S. 728 (2000)). Regional Resource Advisory Councils may be one forum for permittees or conservationists to discuss options for grazing permit retirement. However, creating and administering “willing seller–willing buyer” grazing permit retirement opportunities is beyond the scope of the rule.

Comment: Many comments urged BLM to provide means and methods for reducing or eliminating grazing in specific areas, such as by appealing and challenging the court’s ruling against conservation use permits or allowing conservation buy-outs as a provision of the regulations, giving a number of reasons:

- a. Some areas require long-term or permanent protection for rangeland environmental health.
- b. The proposed rule will not promote sustainable grazing.
- c. The elimination of conservation use also eliminates the opportunity for a conservation easement.
- d. Such arrangements can have substantial economic and other benefits for all concerned.
- e. Most people consider conservation to be a legitimate use of the land.

Response: BLM is able to designate areas as not available for grazing by decision based upon the land use plan’s multiple use objectives, or to withdraw areas from grazing

under Section 204 of FLPMA. The Bureau is also able to make changes in grazing management, such as reducing or eliminating grazing use, based upon a determination that livestock grazing is a factor in not meeting the standards for rangeland health.

“Conservation buy-outs” are outside the scope of the rule.

Removing the term “conservation use” from the regulations is required by the judicial decision (*Public Lands Council v. Babbitt*, *supra*).

Comment: One comment stated that BLM and Congress should consider amending the Taylor Grazing Act to allow for conservation use, because that might be the only legal way to protect resources from livestock grazing.

Response: Amending laws, such as the Taylor Grazing Act, FLPMA and PRIA, is not within the scope of the rulemaking or the authority of BLM.

5.4.18 Grazing Preference and Suspension

In the first part of this section on grazing preference we will deviate slightly from the format used earlier to describe and reply to comments. The first three paragraphs describe comments on grazing preference. This is immediately followed by a response that describes the concept and usage of the term over time.

Comment: BLM received some comments supporting and some comments opposing the removal of the term “permitted use” and expanding the definition of “grazing preference” to include a livestock forage allocation. Favorable comments suggested that the term connects a public land livestock forage allocation with base property owned by the preference holder, thus facilitating preference transfer when the property changes hands, thereby providing stability and certainty for grazing operations as well as ranching communities, and eliminating

the confusion that use of the term “permitted use” generated. Some of the comments in support of the change erroneously suggested that preference was somehow a fixed quantity, not subject to change.

Comments opposing the change stated that the definition of preference has no basis in law, that it weakens BLM’s administrative authority, that it will cause confusion unless further clarified, and that it would create expectations that BLM, when choosing among possible public land management actions, would be obligated to minimize livestock forage reductions, ensure they are temporary, and restore historical livestock forage allocations. Other comments opposing the change stated that, since allotments are quantified in terms of acres, further quantification in terms of forage is both unnecessary and unrealistic because the amount of forage produced on a given area is not a fixed quantity. Another comment suggested that the proposed definition of preference should not be adopted because it elevated a livestock forage allocation as first priority above other valid uses of vegetation, such as wildlife habitat and watershed protection. Some comments stated that the present definitions of preference and permitted use were consistent with the TGA.

Response: Amending the definition of preference and removing the term “permitted use” will remove administrative inconsistencies from the regulations and provide for improved BLM administration of forage allocations on public lands. The amendment will alleviate confusion in the regulated community that has existed since 1995. Further responses to comments in this section of the EIS will expand on this.

Comment: One comment suggested that the term preference should be redefined to mean the current livestock carrying capacity following forage allocations to wildlife, watershed protection, and land recovery.

Another comment suggested that the definition of preference should incorporate the concepts of distance from water and the percent slope or steepness of terrain. Another comment suggested that BLM should include in the definition of “grazing preference” the concept that forage is allocated according to land use plans, to emphasize the connection between permitted activities and the land use plan.

Response: The rule includes the definition of “grazing preference” or “preference” as proposed. As explained in the preamble to the proposed rule, the 1995 rules changes introduced some inconsistencies into the regulations by creating the term “permitted use” to mean the forage allocation, and narrowing the definition of “preference” to mean only a priority position as against other applicants for forage.

“Preference” or “grazing preference” is a grazing program-specific administrative term that connects an individual entity’s allocation of public land forage to property that it owns or controls. It allows BLM to record, in accordance with other applicable grazing regulations, a forage allocation on public lands, expressed in terms of “active use” and use that has been suspended, or “suspended use,” together constituting “preference,” and administratively connect it to privately owned base property. It facilitates both the transfer of preference from one party to another or from one property to another, and the making of equitable adjustments of preference in “common allotments” (allotments permitted or leased to more than one operator), when needed in the course of land management.

In the 1978 grazing regulations, the BLM formally defined “grazing preference” to be a forage allocation on public lands, expressed in Animal Unit Months, that is apportioned and attached to base property owned or controlled by a permittee or lessee. These regulations also stated that

“grazing preference shall be allocated to qualified applicants following the allocation of the vegetation resources among livestock grazing, wild free-roaming horses and burros, wildlife, and other uses in the land use plans.” Before 1978, BLM called livestock forage allocations on public lands “grazing privileges.” The amount of privileges awarded to individuals and attached to their base property was limited by the “qualifications” of the property. Determination of land base property qualifications was based in part upon the forage that was produced on the base property, and was used to help calculate BLM’s determination of the property owner’s forage allocation on public lands. Determination of water base property qualifications relied upon the forage production that occurred on public lands within the service area of the water that the water base property owner controlled. Adjudication of grazing privileges occurred independently from, and in many cases pre-dated, pre-FLPMA land use planning processes. Grazing privileges on public lands that were awarded in recognition of base property qualifications were informally referred to by ranchers and BLM alike as “preference AUMs,” and were distinguished from forage use approved on a temporary and nonrenewable basis and from forage consumed in the exercise of livestock crossing permits.

Following the 1978 grazing regulation changes that formally defined the term “grazing preference,” establishment of preference was based on forage allocations that occurred in the course of implementing land use plans under FLPMA. In the majority of cases, these forage allocations mirrored the apportionment of forage that occurred under pre-FLPMA livestock grazing adjudications. In any event, all allocations were supported by resource information, including inventory

and monitoring. Allocations that pre-dated FLPMA, and the preference that arose there from in the course of implementing land use plans under FLPMA, do not “trump” BLM’s multiple use mandate that was formalized under FLPMA. On the contrary, forage allocations made under the auspices of FLPMA land use plans superseded the forage allocations made by the pre-FLPMA adjudications. All BLM offices with a grazing program are covered by land use plans completed since the enactment of FLPMA.

The definition of “preference” corresponds with the requirement that livestock forage allocations on public land be made within a multiple use context as set forth in land use plans under section 4110.2-2. When BLM determines that additional forage is available for livestock within a planning area, through land use planning or activity planning, this definition, coupled with other grazing regulations, provides that the preference holder is “first in line” for that portion of the available forage that occurs within his permitted or leased allotment(s). The proposed definition does not mean and should not be construed to imply that satisfying a permittee’s or lessee’s livestock forage allocation (the preference) has the highest priority when BLM employs land use planning or activity planning processes to determine possible uses, or values to be managed for, that depend on available vegetation. Reconciling competing and possibly conflicting demands placed on public land resources still lies squarely within the realm of BLM’s land use planning process, and must be reflected in subsequent activity plans and management decisions. As discussed below, increasing active preference or activating suspended preference is a valid grazing program goal. However, when considering management opportunities presented by an increase in vegetation available for forage or other uses and values,

meeting this goal must be considered in concert with meeting other equally valid goals established by the land use plan.

BLM is aware that an absolute quantity of forage production on public lands is not fixed in time. In accordance with the TGA and FLPMA, the grazing regulations provide for monitoring and assessment to support both temporary and long-term adjustments in grazing use, including the amount of forage that may be removed under a permit or lease, when BLM determines that such adjustments are warranted. It has been BLM policy for two decades that changes in the amount of forage allowed for grazing use under a term permit or lease (regardless of whether it is called “active use” or “active preference”) must be supported by monitoring, or, since 1995, other resource information that indicates a need for adjustment, such as when the authorized livestock grazing significantly contributes to not meeting rangeland health standards (and excepting, of course, adjustments that are based on significant changes in management circumstances, such as land disposals rendering less land available for grazing use). However, although livestock grazing capacity can and does fluctuate in response to both natural events and to management inputs, BLM also seeks to provide reasonable stability to permittees and lessees who rely on public land forage authorized by their permit or lease. Therefore, BLM established a preference for removal of a specific amount of forage. There is no need to include a requirement for consideration of physical factors such as distance from water and steepness of terrain in the definition of preference. The appropriate place for including this type of guidance is in technical references and handbooks that address how to establish livestock grazing capacity. As indicated in section 4110.3, BLM may adjust preference for several reasons, including the need to conform the livestock grazing use

program to the provisions of applicable land use plans. BLM may also cancel preference outright when circumstances warrant, such as to impose a penalty for egregious regulatory violations, or when public land is transferred to private hands or devoted to another public purpose that precludes livestock grazing.

The regulatory provisions to place preference in “suspension” indefinitely apply when BLM adjusts allowable livestock forage removal based on a determination that grazing use or patterns of use are not consistent with the provisions of Subpart 4180, or grazing is causing unacceptable utilization, or when use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory, or other acceptable methods, or for other purposes consistent with legal and regulatory requirements. The assumption behind indefinitely suspending preference is that, should management inputs result in restoring acceptable patterns or levels of utilization, or increased production of forage available to livestock, then BLM may reinstate the suspended use under section 4110.3-1(b). BLM believes it appropriate to encourage management input by ranchers who hold preference by providing that when management inputs result in increased forage for livestock available on a sustained yield basis, they can expect that this forage will be made available to them without having to compete for it with other potential applicants. We view the reinstatement of suspended preference as an appropriate livestock grazing program goal that provides incentive to preference holders for improved livestock grazing management. Attaching the suspended preference to base property results in a record that transcends any one entity’s or individual’s tenure of ownership or control of that base property. In the event, perhaps decades later, that BLM determines that increased forage for livestock is

available within a specified area, this record allows BLM to make fair and appropriate distribution of the increased livestock forage first to those with preference for grazing use in the area in question.

To conclude, the definition of grazing preference in the rule is consistent with its longstanding meaning—a meaning that was in formal usage for 17 years before it was changed by the 1995 grazing regulations — and consistent with how the term “preference AUMs” was informally used before 1978.

Comment: Several comments stated that the definition of “suspension” could cause problems because it allows for withholding of active use “by agreement.” These comments urged that we remove the phrase “or by agreement” from the definition, so that the definition would read: “‘Suspension’ means the withholding from active use, through a decision issued by the authorized officer, of part or all of the grazing preference specified in a grazing permit or lease.” They stated that allowing suspensions by agreement could allow the creation of de facto conservation use permits, contrary to the decision of the Federal Court, and would short circuit the grazing decision process under Subpart 4160.

Response: We have not adopted the recommendation to change the definition of “suspension” in the proposed regulation. The phrase “or by agreement” was in the definition prior to the 1995 revision of the regulations. It is in the definition partly to recognize that the permittee may not wish to contest the suspension. The definition also supports our goal of using cooperation with permittees and lessees to achieve rangeland management objectives. When an action that meets the objective of achieving rangeland management objectives is implemented through agreement with affected permittees or lessees, the action carries no less weight than when it is implemented through decision. The implementation of an action to

place active use in suspension, for example, still requires sound rationale, whether implemented through agreement or decision, and may be appealed by parties with standing to appeal.

Comment: Another comment stated that BLM should implement a process to ensure that suspended use is reinstated to active use. The current regulations deprive permittees of this credit, unjustifiably eliminating base property qualifications that are kept on the books in suspended status at the time of permit renewal based on an allotment evaluation. The comment went on to suggest that, as range conditions improve, BLM should reinstate the active use that is presently in suspended use.

Response: BLM agrees that it is important to keep track of grazing use that has been reduced, and section 4110.3-2(b) provides that BLM will place such reductions in suspension. If range conditions improve in the future and BLM finds there is additional forage for livestock on a sustained yield basis, section 4110.3-1(b) requires such additional forage to be applied first to reduce or eliminate any suspensions.

Comment: Some comments stated that BLM should not change the definition of suspended use, but rather retain the one in the 1995 regulations.

Response: BLM has not adopted the recommendation to retain the 1995 definition of “suspension.” The rule changes the definition to be consistent with the restored definition of “preference.”

Comment: One comment on specifying grazing preference urged BLM to give preference to buffalo ranchers in issuing grazing permits because use by buffalo pre-dates use by cattle on the range, and they therefore have right by history to receive first consideration for grazing use. Another comment stated that BLM should let ranchers decide how many livestock should be grazed

and adjusted based on their judgment because most ranchers are good stewards of the land. Another comment urged BLM not to make changes in preference solely on the basis of forage allocations in land use plans, stating that monitoring must be used to justify changes in authorized levels of grazing use.

Response: BLM has no authority to give preference to buffalo ranchers when issuing grazing permits or leases. The TGA requires that when issuing grazing permits, the Secretary must give preference to landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them. Grazing permits authorize grazing use on lands within grazing districts established under Section 1 of the Act. The Act also requires that when issuing grazing leases, the Secretary must give preference to owners, homesteaders, lessees, or other lawful occupants of lands contiguous to the public lands available for lease, to the extent necessary to permit proper use of such contiguous lands, with certain exceptions. Grazing leases authorize grazing on public lands outside grazing districts. The regulations define livestock to be cattle, sheep, goats, horses, or burros, but not buffalo. Thus, a change in this provision is outside the scope of the rule. BLM may issue permits to graze privately owned buffalo under the regulations that provide for “Special Grazing Permits or Leases” for indigenous animals (section 4130.6-4), so long as the use is consistent with multiple use objectives expressed in land use plans.

Both Sections 3 and 15 of the Taylor Grazing Act and Sections 402(d) and (e) of FLPMA entrust to the Secretary of Interior the responsibility for determining and adjusting livestock numbers on public lands. The Secretary has delegated this responsibility to the Bureau of Land

Management. BLM may not delegate this responsibility to the ranchers. BLM works cooperatively with ranchers, the state having lands or responsibility for managing resources, and the interested public in determining terms and conditions of grazing permits and leases, including the number of livestock to be grazed. Permits and leases contain terms and conditions to ensure that grazing occurs in conformance to land use plans which are developed with public involvement.

The regulations at section 4110.2-2 do not provide for the establishment of preference solely on the basis of the forage allocation contained in the land use plan. Rather, they state that, alternatively, preference may be established in an activity plan or by decision of the authorized officer under section 4110.3-3. Some land use plans determined a forage allocation for livestock on an area-wide basis and apportioned that allocation among qualified applicants. Other land use plans simply recognized previous allocations and stated that future adjustments to these allocations would be guided by the multiple use objectives contained in the land use plan, be implemented by grazing decisions, and be supported by monitoring information.

Comment: A comment on transfer of grazing preference suggested that before issuing a permit or lease that arises from transfer of preference, BLM should conduct capacity surveys, condition assessments, evaluate monitoring data, and complete NEPA compliance documentation so that the terms and conditions of the permit or lease that we issue reflects current allotment conditions.

Response: BLM does not control when or for what allotments it will receive applications to transfer grazing preference and issue a permit arising from that transfer. By the end of fiscal year 2003, BLM had assessed about 40 percent of its allotments

for achievement of standards of rangeland health. In these areas, BLM reviews the application in light of the existing assessment and NEPA compliance documentation and issues the permit or lease with appropriate terms and conditions. BLM continues to prioritize its data gathering needs based on known resource management issues. If BLM does not conduct an assessment of rangeland health and otherwise “fully process” a permit or lease application that accompanies a preference transfer, it includes terms and conditions on the newly issued permit or lease to ensure achievement of the standards and conformance to appropriate guidelines. These permit or lease terms and conditions include a statement that, if a future assessment results in a determination that changes are necessary in order to comply with the standards and guidelines, BLM will revise the permit or lease terms and conditions to reflect the needed changes.

Comment: One comment stated that BLM should only consider changes in preference when there has been a permanent change in the number of AUMs available for attachment to base property. The comment asserted that, because AUMs of preference were established through formal adjudication, it would be inappropriate for BLM to change grazing preference as needed to manage, maintain, or improve rangeland productivity, to assist in restoring ecosystems to properly functioning condition, to conform to land use plans or activity plans, or to comply with the provisions of Subpart 4180. Another comment stated that it was important for permittees and lessees to retain preference as to potential AUMs that have been suspended, so that when productivity improves the AUMs are awarded to those who own or control the base property to which the suspended preference is attached. Yet another comment stated that BLM should make clear in this section that any changes to grazing

preference must be supported by monitoring that is conducted using BLM-approved Manual procedures.

Response: BLM rejects the contention that because a forage allocation reflected by an existing preference may have at its roots a pre-FLPMA formal adjudication, it would be inappropriate to change it when needed to improve rangeland productivity, restore ecosystems to properly functioning condition, conform to land use plans or activity plans, or comply with the provisions of Subpart 4180. As pointed out by the Supreme Court in *Public Lands Council v. Babbitt, supra*, “the Secretary [of the Interior] has since 1976 had the authority to use land use plans to determine the amount of permissible grazing, 43 U.S.C. § 1712.” Further discussion of the role of FLPMA-mandated land use plans with respect to BLM’s statutory multiple use mission, including the mission to provide for the orderly administration of livestock grazing on public lands under the Taylor Grazing Act and to improve rangeland conditions, is included in the previous section that addresses removing the definition of “permitted use” and redefining “preference” to include a forage allocation element.

The final regulations in section 4110.3-2(b) provide that when BLM decreases active use on an allotment, we will put the reduction in suspension and it will remain associated with base property to which the preference for use in the allotment is attached. This will ensure that the preference holder will be given first consideration for use of the additional forage as provided at section 4110.3-1(b)(1). BLM considered the comment that urged requiring that changes in grazing preference be supported by monitoring methods contained in BLM Manuals and determined that that BLM needs flexibility to use site-specific methods in addition to those monitoring methods set forth in Manual guidance. This flexibility

will allow BLM to use techniques that meet local needs and that BLM may develop in cooperation with other agencies and partners.

Comment: One comment urged BLM to include, in addition to the provision as proposed, provisions to require BLM to work closely with local planning departments, to include consultation, cooperation, and coordination with the grazing permittee or lessee, state and local government in this section, and to give consideration to provision for local, state and regional governance.

Response: Under 43 U.S.C. 1712(c)(9), 40 CFR 1500.4(n), 1501.2(d)(3), 1501.7(a)(1), 1506.2(b), and Departmental Manual and BLM Handbook 1790, BLM is directed to coordinate to the degree feasible with state and local governments. BLM sees no need to reaffirm existing guidance on this aspect of planning and environmental analysis in this rule.

Comment: One comment stated that BLM should require data used to support changes in grazing preference to be acceptable to the permittee or lessee, as well as to the BLM authorized officer.

Response: Congress entrusted the Secretary of the Interior with the responsibility to manage the public lands. The Secretary, in turn, has delegated this responsibility to BLM. We do prefer the data we use to support changes in grazing preference to be acceptable both to BLM and the affected permittees or lessees. However, if the data BLM uses is not acceptable to a permittee or lessee, BLM is still obligated to make its management decision in light of its statutory management responsibilities.

5.4.19 Definition and Role of the Interested Public

Comment: We received many comments regarding the definition of “interested public.” Many of the comments on the

topic were concerned that this change could unduly exclude public input from the grazing management decision process. Some comments stated that this change could lead to secretive decision-making by the BLM. Others stated that the new qualification criteria posed an unreasonable barrier to participation. Contrarily, a significant number of comments stated that more requirements should be imposed to avoid what they saw as unnecessary delays and frivolous protests and administrative appeals. Suggestions for additional requirements included an annual application process or other time limit on interested public status. Creating a substantive standard for the participation requirement was also suggested. Some comments suggested that the interested public be narrowed to include only grazing lessees and permittees and local users of the land. Finally, a significant number of comments supported the changes as proposed.

Response: BLM seeks to balance the legitimate need for public involvement in the management of public lands with the public interest in the cost-effective management of those same lands. Since the definition of interested public was last changed in 1995, BLM has devoted substantial resources to the public participation process. Some of these resources have been devoted to tasks such as maintaining lists that include individuals and groups that have not participated in allotment management activities in years. These uninvolved members of “interested public” still receive periodic mailings at taxpayer expense.

BLM recognizes the importance of public participation and desires to provide an opportunity for all those who demonstrate an ongoing interest in an allotment to participate. Requiring some follow-up activity is not unreasonable, but allows the individual or group to demonstrate true continuing interest in the activities on the

allotment. BLM has not adopted any further qualification requirements, in order to maintain an open process available to all of the public. Annual applications or minimum substantive criteria standards would create additional paperwork requirements, and could run counter to the administrative efficiency goal. Also note that the change to the interested public definition does not in any way affect the public notice and public participation opportunities available when potential grazing decisions are analyzed under NEPA.

Comment: One comment stated that, to enhance BLM’s working relationship with the permittee and to bring cohesive management into the decision-making process, monitoring should be conducted only by the permittee and BLM, omitting the interested public.

Response: Section 202(f) of FLPMA makes clear that it is the direction of Congress that BLM must allow for public involvement and allow the public to comment upon and participate in the formulation of plans and programs relating to the management of public lands. An important element of our plans is the establishment of resource management objectives, which then must be monitored. The grazing regulations do not address who should or should not be involved in monitoring. It is BLM’s policy to encourage partnerships with appropriate interests to accomplish our work. When the interested public joins in conducting monitoring studies with the BLM, they bring their perspective to the management of resources, which often is different from the perspective of BLM or the permittee. BLM benefits from this perspective by receiving more diverse information upon which to base its decisions. BLM retains discretion to reject monitoring information that does not meet agency standards, regardless of who collects it.

Comment: One comment suggested that, in the definition of “interested public”, we should specifically identify that a “lienholder of record” is an entity that may be considered an interested public.

Response: We have not adopted this suggestion. A lienholder of record would be an individual, a group, or an organization, and there is no need to mention them specifically in the definition.

Comment: Numerous comments addressed the role of the interested public in grazing management. The proposed rule contained a definition change for the term and also modified the special involvement opportunities for those with interested public status.

Response: BLM has considered the comments but has decided not to make major changes in the rule. The rule represents what BLM believes to be the proper balance between public participation and the need for flexibility in day-to-day grazing management operations.

Under the previous regulations, you could gain interested public status simply by (1) making a written request to be treated as the interested public or (2) by submitting comments regarding grazing management on a specific allotment during formal public comment periods. Submitting a written request is sufficient to obtain interested public status initially, but this alone is no longer sufficient to maintain that status. Instead, you must also subsequently comment or otherwise participate in the decision-making process when an opportunity arises. This requirement is designed to avoid an inefficient use of Federal resources on clerical duties associated with persons and entities that have no longer expressed an active interest in the issue. Submitting comments during formal public comment periods, however, is still enough to qualify as a member of the interested public. In short,

those who request the status must follow up with later actions, while those who initially demonstrate their interest via comments automatically qualify as the interested public for that decision process. Any member of the general public may initially achieve interested public status through these means, and former members of the interested public may also regain that status through these same means at any time.

Comment: Many were concerned that this definition change would unduly limit participation by the public. On the other hand, some comments on the proposed rule expressed the opinion that the term was still too broadly defined, and more requirements should be implemented before one qualifies as a member of the interested public.

Response: It is important to remember that the opportunities available to the “interested public” are not the full extent of public involvement. Any member of the public can provide input and comments regarding general grazing policy, and many decisions involve formal public comment periods where anyone may comment or be heard at public meetings. By modifying the definition, though, BLM hopes to avoid the sometimes inefficient use of Federal resources that has been associated with the interested public system, while still maintaining a valuable outlet for public participation.

Comment: Many comments opposed these reductions in consultation with the interested public. Some recreationists and other nongrazing public land users were particularly opposed to having opportunities for the interested public limited in any way. These comments emphasized the view that multiple use public lands are best managed when multiple interests are involved with both planning level and implementation level decisions. Some stated that while the system may lead to some inefficiency, when viewed

from a grazing economics perspective, democratic principles favored more public involvement on public lands.

Response: We have retained the proposed changes in the rule. BLM is confident that consultation with the interested public on the larger scale planning decisions will continue to provide ample opportunity for public input. These broader scale decisions then guide the day-to-day management. The changes will, in turn, allow these daily decisions to be made in a more timely and efficient manner.

Comment: Many comments expressed opposition to any reduction in the role of the interested public, and many cited the modification of permits as a general concern. Many felt it was important to have nongrazing interests involved in both planning and implementation-level decisions. Numerous other comments supported a general reduction in mandatory consultation with the interested public, seeing these as activities that would benefit from faster and more efficient action.

Response: Permit and lease modifications are routine management activities. BLM modifies permits and leases to maintain consistency with broader planning decisions such as land use plans and allotment management plans. These planning-level decisions are made with extensive involvement of the interested public and public participation opportunities through environmental analysis under NEPA. Modifications may also be made as a result of monitoring studies, evaluations of rangeland health standards and guidelines for grazing administration or biological assessments or evaluations prepared as part of the Section 7 consultation requirements under the Endangered Species Act. In these cases, BLM provides the interested public, to the extent practical, an opportunity to review and provide input on these reports and evaluations during their preparation, in

accordance with section 4130.3-3(b). Most modification decisions themselves require site specific NEPA analysis leading to public notice and potential public participation. Additionally, the interested public will be specially notified of a proposed decision and can protest if so desired.

In BLM's view, informal consultations and the ability to review the NEPA document and protest a proposed decision provide adequate mechanisms for identifying legitimate public concerns over permit modifications. The rule maintains the opportunity, to the extent practical, for the interested public to review and provide input on reports that evaluate monitoring or other data. BLM appreciates that the interested public can potentially provide important insights on reports that will be used to shape implementation decisions. Because this is information that postdates planning decisions, yet will influence future daily implementation decisions, it is appropriate for the interested public to participate in reviewing this data.

Comment: Many comments opposed any reduction in the role of the interested public when considering changes in active use, but relatively few comments addressed these particular functions. Some comments supporting the change noted active use changes as an area where efficiency could be improved by removing the interested public consultation requirement.

Response: Note again that the role of the public under NEPA is unaffected by this rule change. Additionally, members of the interested public will have an opportunity to review and provide input on any reports used as a basis for decisions on changes in grazing use. The interested public will still receive the proposed and final decisions for changes in active use, and they could protest the proposed decision if so desired.

In BLM's view, the NEPA process, informal consultations, the opportunity to

review and provide input on reports used as a basis for decisions, and the ability to protest before a decision is final, all are adequate mechanisms for identifying legitimate public concerns over active use changes. No protest could be filed against an emergency closure, which is issued as a final decision, but these decisions require management flexibility to allow a quick response to changing circumstances on the ground

Comment: One comment stated that removing the requirement that BLM consult with the interested public before making an allotment boundary adjustment would affect the public role in NEPA analysis of boundary changes.

Response: That is incorrect. The public role under NEPA is unaffected by this rule change.

Comment: One comment stated that allotment boundary adjustments could affect native plant populations and requested continued public involvement. Environmental issues such as effects on native plants are best addressed through the NEPA process, which is unaffected by this change.

Response: The BLM has found that much of the required consultation with the interested public is duplicative of these other processes and often delays routine, noncontroversial decisions. In BLM's view, the NEPA process, informal consultations and the ability to protest before a decision is final provide adequate mechanisms to identify legitimate public concerns over boundary changes.

5.4.20 Land Use Planning and Grazing Retirement

Comment: BLM received numerous comments addressing the types of uses that are generally allowed on public lands. They suggested eliminating some uses or dedicating lands to a single use. The comments included eliminating livestock

grazing on areas with wild horses and burros, establishing rules to optimize wildlife habitat, phasing out livestock grazing completely, selling public lands, not allowing any commodity uses, and dedication of land for water conservation.

Response: BLM manages public lands in accordance with numerous laws passed by Congress, including FLPMA, which requires these lands to be managed for multiple use and sustained yield. FLPMA defines "multiple use" as "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of land for some or all of these resources or related services over acreages large enough to provide sufficient latitude for period adjustments in use to conform to changing needs and conditions; the use of some of the land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output." 43 U.S.C. 1702(c).

BLM cooperatively develops local land use plans in order to determine balanced, appropriate, and sustainable land uses, following processes defined by various laws, regulations, and policies. These grazing regulations govern management of grazing

on lands that have been determined through land use planning to be appropriate for livestock grazing. BLM's land use planning processes are governed by regulations in 43 CFR part 1600, and are not addressed in this rule. The sale of BLM lands, while permitted by FLPMA, is outside the scope of this rule.

Comment: Comments stated that BLM should determine the forage capacity of its land using scientific livestock utilization rates and re-set permitted use or preference to reflect that condition. The comment went on to say that the fact that AUMs are in suspension demonstrates that the range cannot support those levels of grazing.

Response: This issue is outside the scope of this EIS. BLM makes the determinations referred to in the comment during the planning process. AUMs are in suspension due to current conditions that may not be permanent, such as, for example, drought conditions. Forage availability may also change in the future as a result of range improvements or improved health of the rangelands.

Comment: We received several comments that addressed our land use planning processes, suggesting that better control of motorized vehicle use and access would improve rangeland conditions. Others suggested that BLM should lease lands for recreation, wildlife, and water conservation rather than assign grazing as a sole use. Still others urged BLM not to recommend or provide interim protection for more Wilderness Study Areas or Wild and Scenic Rivers, stating that their management overtaxes BLM's capability.

Response: BLM develops local land use plans to address land use activities such as off-road vehicle and other recreational uses, wildlife, and water conservation uses. Local land use planning allocations are beyond the scope of this rule. BLM will not recommend or designate any additional Wilderness Study

Areas under the Utah Wilderness Settlement and its application, by policy, to BLM lands outside of Utah. IM No. 2003-274 and IM No. 2003-275. The regulations governing management of Wilderness Areas and Wild and Scenic Rivers are in 43 CFR part 6300 and 43 CFR 8351.2, respectively. Those regulations are beyond the scope of this EIS.

Comment: A comment stated that Federal rangeland health standards demand that BLM's rule focus decision-making on management objectives stated in land use plans, activity plans, and grazing decisions.

Response: The rule provides that its objectives will be realized in a manner consistent with land use plans. The regulations also provide that 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. The regulations allow BLM to make changes in the grazing preference as needed to conform to land use plans or activity plans, to apportion additional forage to qualified applicants for livestock grazing use consistent with multiple-use management objectives specified in the applicable land use plan. BLM may modify terms and conditions of permit and leases when the active use or related management practices do not meet management objectives specified in the land use plan, allotment management plan or other activity plan, or an applicable decision.

Comment: A comment stated that BLM has not effectively addressed resolution of multiple use conflicts that leads to demands for livestock-free lands.

Response: FLPMA requires BLM to manage lands for multiple. We resolve conflicts among competing uses on individual tracts of public land through land use planning, with participation by the interested public and by or on behalf of the proponents of the competing uses.

Comment: One comment stated that either BLM should establish regulations that provide for making land use planning-level determinations regarding whether public lands are “chiefly valuable for grazing” as described in the October 2002 Solicitor’s Memorandum, or the Secretary should withdraw that memorandum and provide for grazing permit “retirement” within its land use planning process or through its permit issuance or renewal processes.

Response: The comment alludes to an M-Opinion issued on October 4, 2002. M-Opinions (i.e., major opinions) usually are responses to requests by agencies of the Department of the Interior regarding the interpretation of statutes administered by the Department. M-Opinions are signed by the Solicitor or his designee, may receive the concurrence of the Secretary, and are binding on all agencies of the Department of the Interior.

Grazing retirement and the TGA’s chiefly valuable standard have been discussed in two recent Solicitor’s memoranda, as well as the 2002 M-Opinion. In one memorandum, Solicitor Leshy concluded that Congress, at 43 U.S.C. 1752(c) and 1903(c), specifically provided for the possibility of retiring public lands from livestock grazing, but that BLM must make such a decision in a land use plan or an amendment to a land use plan. Memorandum to the Director of BLM from the Solicitor (January 19, 2001).

While the later M-Opinion supersedes the 2001 Solicitor’s memorandum, it agrees that land use planning is an appropriate process for considering retirement of grazing. In addition, the M-Opinion concludes that a decision to cease livestock grazing is not permanent. Memorandum to the Secretary from the Solicitor, M-37008 (October 4, 2002). The M-Opinion was later clarified in a memorandum stating that, whenever the Secretary considers retiring public lands from

grazing, she generally need not determine that such lands are no longer chiefly valuable for grazing and raising forage crops, within the meaning of Section 1 of the TGA, 43 U.S.C. 315. Instead, a chiefly valuable determination is required only when the Secretary is considering creating or changing boundaries of grazing districts. Memorandum to the Assistant Secretary for Policy, Management and Budget, Assistant Secretary for Land and Minerals Management, and the Director of BLM from the Solicitor (May 13, 2003).

Thus, a rulemaking is not needed to address the “chiefly valuable” standard. Moreover, land use planning – the appropriate process for considering grazing retirement – is governed by 43 CFR part 1600, which is outside the scope of this rule. For these reasons, we have not adopted the suggestion for a rule.

Comment: One comment stated that BLM should provide for permit or lease retirement with compensation to the permittee.

Response: The suggestion that permittees and lessees be compensated for grazing retirement is not adopted. BLM lacks statutory authority to provide for such compensation.

Comment: One comment stated that, if BLM considers itself obligated to preserve public land ranching in the West in the face of competing economic pressures for use of ranches and rangeland, then we should reconsider previous policy proposals that were dropped, such as conservation easements and acquisition of ranches, because these may be creative ways to sustain viable operations without inducing further damage to the land.

Response: Under FLPMA, BLM is obligated to manage the public lands on the basis of multiple use and sustained yield unless otherwise specified by law. FLPMA includes livestock grazing as one of the

principal or major uses of the public lands, along with fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production. BLM never proposed acquisition of ranches as a policy proposal. BLM dropped consideration of trading public lands for conservation easements on private lands after comments received in the spring of 2003 indicated general public opposition to this policy proposal.

Comment: One comment urged BLM to update our allotment management plans.

Response: BLM usually determines which allotments require allotment management plans (AMPs) in land use plans. The timing, development, and updating of AMPs is determined through BLM's budgeting process, not in the grazing regulations. Therefore, this issue is outside the scope of this rulemaking.

Comment: Some comments suggested that BLM should enforce all of its current regulations or strengthen them to prevent environmental damage caused by livestock grazing or coal bed methane development. Another comment stated that BLM should allow permittees and lessees to "manage" recreation on public lands.

Response: BLM agrees that it should enforce all of its public land regulations and does so with the resources and authority provided to it by Congress. We believe that the final grazing regulations provide adequate authority for BLM to take action when necessary to arrest and reverse environmental damage attributable to the livestock grazing on public lands. Regulations governing coal bed methane development are found in 43 CFR part 3100 and are not addressed in this rule. BLM cannot grant management authority for one user group, as such, to "manage" another user group. However, any qualified individual or business entity may obtain a permit under BLM regulations to

carry on specific activities on public lands. For example, a rancher can obtain a special recreation permit under 43 CFR part 2930 and operate as an outfitter or guide. However, the rancher cannot obtain authority to bar casual recreational use of the allotment he uses, as the comment seems to suggest would be desirable.

Comment: Several comments raised issues that are tied to the provision on decreases in land acreage in section 4110.4-2. One comment suggested that BLM should be able to designate lands as not available for grazing when this is needed to protect critical or sensitive areas. Another comment stated that BLM should develop regulations providing: (a) for the retirement or nonuse of grazing permits by conservation organizations; (b) that a voluntary permit relinquishment automatically triggers the immediate permanent closure an allotment to livestock grazing when that closure would benefit conservation purposes; and (c) that at the request of the permittee, BLM will promptly initiate a planning process to determine whether the applicable land-use plan should be amended to provide that all or a portion of an allotment will be made unavailable for grazing authorized by FLPMA and PRIA. The comment stated that "voluntary retirement" of grazing permits is sometimes the fastest, simplest, most effective, and most amicable method of resolving disputes over livestock grazing in environmentally-sensitive areas.

Response: FLPMA directs BLM to develop and maintain land use plans to provide for multiple use of the public lands, including livestock grazing use. Land use plans, which are developed at the local office level with the involvement of the general public, identify lands available and not available for livestock use and management. BLM can and does designate lands as not available for grazing, and assigns them to

other uses. This results in reductions in land acreage available for grazing, and BLM acts under section 4110.4-2 to implement the reductions by canceling grazing preference.

BLM amends or revises land use plans under the planning regulations (43 CFR part 1600) and the BLM land use planning handbook. An agreement on voluntary relinquishment of a grazing permit (and preference) for purposes of furthering a proposal to amend a land use plan to provide for the retirement of an area from livestock grazing is not a permanent contractual relationship between the entity relinquishing the permit and BLM. Even if BLM amends the land use plan and effectively retires the area from grazing for the immediate or foreseeable future, this action can be amended or reversed under subsequent BLM planning and decision processes.

Comment: One comment stated that, in addition to the permittee or lessee, BLM also should give 2-year notification to any base property lien holder before canceling a permit or lease when the lands under the permit or lease will be devoted to a public purpose that precludes livestock grazing as stated in 4110.4-2(b) because this will level the playing field.

Response: This suggestion is consistent with existing BLM policy to provide as a courtesy, upon request, notification to known base property lien holders of actions that may affect the value of that property. BLM does not believe, however, that it should require itself by regulation to provide lienholder notice in this circumstance. Lenders normally include provisions in their contracts with the borrower requiring the borrower to notify them of actions that will affect the value of their collateral.

5.4.21 Water Rights

Comment: We received many comments objecting to the change in the water

rights provision. Most common were the general concerns that the proposed change communicated less commitment by the United States to hold the water rights on public land which would result in more water rights in the name of permittees or others, complicating multiple use land management in a variety of ways. The identified complications included clouding title, hindering land exchanges and transfers of preference, encouraging takings claims by privatizing public resources, and devaluing public land. The over-riding concern of these comments was the supposed rejection by the proposed rule change of the fundamental connection of water to the land.

Response: We believe that the predicted complications that may be triggered by removing the requirement for BLM to apply for water rights for livestock use in the name of the United States have a low probability of occurring. First, an increase in the number of water rights for livestock use on public lands held in the name of permittees or lessees is probable, but we believe it unlikely to compromise our ability to manage public lands effectively in accordance with FLPMA's requirement of multiple use management. Use of water on public land for wildlife, recreation, mining, and other uses will continue with rights for those uses usually in the name of the United States. By agreeing that permittees and lessees will hold livestock water rights, BLM may be able to negotiate better cooperative agreements, resulting in improved cooperation between BLM, States and permittees and lessees. Second, ownership of water rights by permittees will have no affect on title to the land, since land remains in the ownership of the United States (section 4120.3-1(e)). Third, complications in exchanges or preference transfers resulting from permittee ownership of water rights for livestock use could occur, although we do not expect

them to be common. When they occur, they can often be resolved through negotiated settlements among all parties. Moreover, in most cases, BLM will not exchange or dispose of large tracts of the public lands; thus, private party ownership of water rights on these lands will have little impact. In addition, a transfer of preference would likely involve a transfer or sale of a permittee's base property or base water to a new permittee. A settlement would have to be reached between transferrer and transferee on compensation for range improvements and water rights. BLM does not believe that the necessity for this type of agreement will hinder transfer. BLM disagrees that private ownership of water rights on public lands will lead to takings claims. A water right is a property right that is distinct and separate from title to the land. Finally, BLM agrees with the comment that the value of public land may be reduced if BLM does not control the water rights. BLM also believes, however, that any such decrease will not affect our ability to manage the public lands.

Comment: Several comments anticipated a loss of incentive to comply with grazing rules or consult and cooperate with BLM by permittees who own the livestock water rights.

Response: We disagree that this expectation is likely. Many water rights are currently held by permittees, or jointly owned with BLM, and we have not seen evidence that holding a water right discourages cooperation or compliance with terms and conditions of grazing permits. BLM will enforce the regulatory procedures in Subparts 4140 and 4160 regardless of the name in which the water right is held.

Comment: Two comments observed that the proposed rule was inconsistent with laws governing water rights ownership on most state land, on land managed by the U.S. Forest Service, and on privately owned land.

Response: BLM agrees that there is inconsistency among the laws and policies governing water rights ownership in states and agencies throughout the country. For example, the BLM grazing program is guided by different laws, regulations and policies than the Forest Service's program. Further, states assign water rights under different state laws, regulations, and policies. In this patchwork regulatory setting the flexibility afforded by the regulatory changes will benefit BLM in cooperating with permittees and states. We believe that any inconsistencies are unlikely to interfere with BLM land management.

Comment: Several comments questioned why permittees had any need for a water right that was associated with a water development. One asked why water right ownership would affect a permittee, as long as he had the water needed for his operation. Another said that water right ownership by the permittee was unnecessary now that the permittee has title of the water development. Another felt the water right should be public, if BLM was investing public funds in the developments.

Response: The BLM disagrees with these comments. Although many water rights for livestock use are associated with water developments, it is not always the case. Moreover, water rights are separate and distinct from water developments. The water right provides for appropriation of water for a specified beneficial use for a specified season of use according to the applicable state law. A cooperative range improvement agreement authorizes the development of and provides the terms, specifications, and conditions for the construction, maintenance, or abandonment of a water development or other range improvements. The permittee or lessee and BLM share the cost of and title to the development; not all the funds used for a water development are public. Ownership

of the water right could benefit the permittee or lessee by ensuring that the water will remain available to him for livestock, and by increasing the value of the permittee's private property.

Comment: One comment urged BLM not to implement the proposed change because it would encourage more livestock water developments to the detriment of wildlife.

Response: Ownership of water rights does not affect the approval of water developments. Further, BLM disagrees that encouraging more livestock water developments would be to the detriment of wildlife. Water developments are constructed to improve grazing management and watershed condition. Before BLM authorizes a water development, the development is analyzed in accordance with NEPA. Such analysis will consider the development's impacts on wildlife, often positive as well as negative, and the ultimate authorization would include the mitigation measures necessary to limit any negative effects. Ownership of water rights does not affect the approval of water developments, nor does it imply a guarantee of approval of any water development.

Comment: Several comments stated that BLM should not acquire or retain water rights for livestock use on public lands.

Response: The BLM disagrees with this statement as contrary to current and proposed regulations, and contrary to the intent of most state water laws to put the states' water to beneficial use by the senior appropriator and claimant. Neither the current regulations nor the rule prevents BLM from filing on some water rights, or filing jointly with a permittee or lessee, when it is in the interest of good rangeland management, supports meeting the objectives of BLM land use and activity plans, and is in accordance with state law.

5.4.22 Qualifications, Applications, Service Charges, and Satisfactory Performance

Comment: Comments urged BLM to add a qualification requirement that permittees "must be engaged in the livestock business," stating that this requirement is in the Taylor Grazing Act, but not in the regulations. The comment went on to say that addition of that statutory requirement would ensure that a permittee has an economic motive to graze livestock on the permitted allotment and is not merely acquiring a permit in order to retire it.

Comment: Although those engaged in the livestock business are preferred recipients of permits, being engaged in the livestock business is not a statutory prerequisite for permit eligibility. Section 3 of the Taylor Grazing Act states that grazing permits shall be issued only to U.S. citizens or those who have filed a valid declaration to become a U.S. citizen, or to corporations, groups, or associations authorized to conduct business under the laws of the states within which the grazing district is located. Section 3 of the Act also states that "[p]reference shall be given in the issuance of grazing permits to those within or near a [grazing] district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied or leased by them... ." For lands outside grazing districts, Section 15 of the Taylor Grazing Act provides that the Secretary may issue leases for grazing purposes to nearby landowners and does not require that before they can receive a lease, they must be engaged in the livestock business. BLM requires that to receive and retain preference for a term grazing permit or lease, one must own or lease land or water that serves or is capable

of serving as a base for livestock operations and either be a citizen or have filed a valid petition to become a citizen, or be a group or corporation authorized to conduct business in the state where the permit or lease is sought, and must have a satisfactory record of performance as defined by the regulations.

Comment: One comment urged that the regulations should require that to hold a grazing permit or lease, one must own livestock, stating that this is a clear requirement of the Taylor Grazing Act as most recently clarified by the Supreme Court in *Public Lands Council v. Babbitt*.

Response: Our approach is consistent with the TGA, which directs that “[p]reference shall be given to landowners engaged in the livestock business” (43 U.S.C. 315b). Adopting the comment could unduly interfere with a permittee’s or lessee’s ability to pasture leased livestock on the BLM allotment where they are permitted to graze. BLM has long allowed a permittee or lessee to “control,” rather than own, the livestock grazing under their permit or lease. It also is common in the livestock industry that livestock are routinely bought and resold during the course of a year, and it may happen during a typical year that a permittee may not, in fact, own livestock on a particular date. It would be impractical for BLM to track, much less enforce, a requirement that, to maintain status as a BLM permittee or lessee, one must maintain ownership of at least one cow, sheep, goat, horse or burro throughout the entire year.

In *Public Lands Council v. Babbitt*, supra, where the plaintiff objected to BLM’s 1995 removal from the grazing regulations the requirement that one must be “engaged in the livestock business” to qualify for a grazing permit or lease, the Supreme Court found that the Taylor Grazing Act continues to limit the Secretary’s authorization to issue grazing permits to bona fide settlers, residents, and

other stock owners and that BLM need not repeat that requirement in their regulations for it to remain a valid requirement. However, the Court also looked behind the issue at the plaintiff’s concern that with the removal of the requirement that an applicant must be “engaged in the livestock business,” entities could acquire permits specifically to not make use of them (ostensibly for conservation or speculative purposes), thereby excluding others who could make use of the range. The Court pointed out that under the regulations, a permit holder is expected to make substantial use of the permitted use set forth in the grazing permit. These provisions remain in the rule and provide that a permittee or lessee may lose their grazing privileges if they fail to make substantial use of them, as authorized, for two consecutive fee years. The phrase, “as authorized,” is included to make clear that BLM-approved (i.e. authorized) nonuse of grazing privileges, or privileges that BLM has suspended, are not at risk of loss for failure to use.

Comment: One comment stated that BLM should not allow large corporations to acquire grazing permits but instead reserve permits for local families who have a tradition of farming and ranching in the area.

Response: It is not within BLM’s authority to adopt this suggestion. The Taylor Grazing Act authorizes the Secretary to issue grazing permits to “corporations authorized to conduct business under the laws of the State in which the grazing district is located.” The TGA does not place limits on which corporations may be issued permits based on their size.

Comment: One comment asked BLM to clarify whether state government agencies are qualified to hold public land grazing permits.

Response: Section 4110.1 on mandatory qualifications states that to qualify for grazing use on public lands, one must own

land or water base property and either must be a citizen, or have filed a declaration of intention to become a citizen or petition for naturalization, or a group or association authorized to conduct business in the state where the grazing use is sought, all members of which are citizens or have filed petitions for citizenship or naturalization, or, a corporation authorized to conduct business in the state in which the grazing use is sought. Although state agencies may acquire base property, they are not a citizen, group or association, or corporation authorized to conduct business in the state in which the grazing use is sought. As such, state agencies are not qualified under the grazing regulations for grazing use on public lands. Thus, unless the exception for base property acquisition by an “unqualified transferee” in the circumstances described at section 4110.2-2(e) applies (which provides for issuing a permit or lease to an unqualified transferee for up to two years when they acquire base property by “operation of law or testamentary disposition”), state agencies may not be granted a grazing permit or lease.

BLM recognizes that at times a state agency, typically the state wildlife agency, will acquire base property for various purposes, and may apply for the associated grazing preference on public lands, express their wishes that the grazing preference be reallocated to wildlife, or express an interest to limit use of the grazing preference and permit to grazing treatments that are, for example, necessary for maintenance or improvement of habitat for wildlife. BLM will cooperate with state agencies wherever possible to pursue common goals. However, BLM land use plans set forth management goals and objectives and the ways and means available for achieving those objectives. Where state agencies have acquired base property and do not wish to use the public land grazing preference associated with that

property in conformance to the governing land use plan, BLM may work with the state agency, affected permittees or lessees, and any interested public to consider options regarding the management of affected public lands. This could include reallocating the forage to another permittee or lessee. It is not within BLM’s authority to issue term grazing permits to state agencies, even if they own livestock, because they do not meet mandatory requirements to qualify for grazing use on public lands. This, however, does not preclude other arrangements such as where the state agency may form a separate corporation chartered by the state for purposes of holding and managing a public lands grazing permit.

Comment: One comment suggested that we amend section 4130.1-1 to require that BLM offer permittees and lessees a new permit or lease 150 days in advance of their permit or lease expiration date, and suggested that we amend section 4110.1(b) to refer to this proposed requirement.

Response: Permit renewal timeframes are best addressed in BLM’s policy guidance and the BLM Manual rather than in regulations. Also, section 4110.1 deals only with qualifications of applicants, and the only necessary cross-reference is to provisions in section 4130.1-1 on determining satisfactory performance, which is a mandatory qualification. Other procedural matters are not relevant to section 4110.1.

Comment: Finally, one comment urged BLM to prohibit the transfer of preference to groups seeking to eliminate grazing.

Response: BLM has not changed its regulations in response to this comment. In order to qualify for grazing use on public lands, one must still meet the requirements of section 4110.1. Other regulatory provisions allow BLM to cancel preference should a permittee or lessee fail to make grazing use as authorized.

In the proposed rule we invited comments on whether we should require an application for renewal of a grazing permit or lease (68 FR 68456). Several comments addressed this issue.

Comment: Several comments urged BLM to change section 4130.1-1(a) to provide that only new applicants for grazing permits or leases need to submit a formal application, so that it is clear that the holder of an expiring 10-year term permit or lease does not have to submit a formal application for renewal of that permit or lease. These comments stated that Section 402(c) of FLPMA provides that, so long as the lands under the permit or lease remain available for livestock grazing, the holder of the expiring permit has complied with applicable regulations and accepts the terms and conditions of the new permit or lease, the holder of the expiring permit must be given first priority for receipt of the new permit or lease. They offered several policy reasons for not requiring preference holders to reapply for permits every ten years, stating that requiring such applications would allow the agency too much discretion; be used by environmental groups as tools to force review of environmental conditions on allotments; consume agency resources; burden permittees and lessees; increase the importance of performance reviews and perhaps lead to using the performance review as an excuse to deny a new permit; have allowed or will allow agency personnel to use the lease renewal process to extract inappropriate concessions from, or impose inappropriate requirements, on permittees and lessees on environmental and other issues. They stated that FLPMA allows a preference holder the right to renew. One contended that, if grazing allotments are designated in the land use plan, they should not be considered discretionary activities requiring periodic review before renewal.

One comment, however, felt that permittees and lessees should submit an application for renewal when their permits or leases expire. It stated that the renewal application should be thoroughly reviewed by BLM before a decision is made to renew.

Response: The first group of comments is correct in that BLM must give the holder of an expiring permit or lease priority for receipt of a new permit or lease, so long as the conditions of Section 402(c) of FLPMA are met. However, there is administrative utility in requiring application for the renewal of an expiring permit or lease. The regulatory text does not explicitly require an application, but by referring to “the applicant” it implies the requirement. Submitting a permit or lease renewal application by the holders of an expiring permit or lease documents their interest in their continued use of the permit or lease and that they are aware that their permit or lease will be expiring and must be renewed. Submitting an application for renewal also allows an opportunity for the holders of the expiring permit or lease to apply for changes in its terms and conditions that they may desire, and provides them certainty under the Administrative Procedure Act (5 U.S.C. 558 (c)(2)) as to continued use of their permit or lease in the event that its renewal is delayed due to BLM’s inability to process the application in a timely manner. The application will also be a useful element of the administrative record.

Comment: Other comments suggested that we amend the introductory text of section 4130.1-2 (conflicting applications) to provide that applicants with preference have priority for receipt of increased available forage, rather than that preference is treated co-equally with the other factors listed in paragraphs (a) through (h) of the section.

Response: Priority for preference holders in apportioning additional forage is

already required by section 4110.3-1. It is unnecessary to restate this priority in this section. This section, however, directs BLM to consider the other factors in addition to preference, to resolve conflicts among applicants with preference.

Comment: Some comments generally supported increases in the service charges, stating that they would allow BLM's services to be self-supporting, or stating that the service charges should better reflect the costs of grazing administration. However, some of these comments objected to the size of the proposed increases. One comment stated that the maximum service charge should be \$25. Another stated that increases ranging from 500 percent to 1,450 percent appeared excessive. Finally, one comment stated that the proposed service charges were too low, and suggested \$275 for the issuance of a crossing permit, \$2,045 for the transfer of a grazing preference, and \$250 for the cancellation and replacement of a grazing fee billing, in order to shift the full cost of those services to permittees.

Some comments opposed service fee increases for a number of reasons. For example, they stated that increases would not improve working relations between BLM and permittees, would not address legal issues or administrative inefficiencies, and would be too expensive for operators to afford. One comment stated that BLM should reduce the costs of providing services rather than increasing service charges. Some comments objected specifically to the proposed service charge for issuance of a crossing permit. One comment stated that crossing permits merely authorize an operator access to his own allotment, and many such permits are consistent with historical usage or consent of neighboring operators. Some comments supported the increases for preference transfers and for canceling and replacing a grazing bill, but stated that increasing

the service charge for crossing fees would provide operators a disincentive to report a need to cross lands occupied by others. These comments stated that BLM needs to know when operators are crossing public lands occupied by others, that there are safety concerns when operators trail livestock along highways, and that there may be concerns about insurance.

Response: We believe the proposed service charges will not damage working relationships with permittees, will contribute to the goal of covering a portion of administrative costs, and will not likely lessen BLM's goal of protecting rangelands. We do not believe that operators will avoid contacting BLM for a crossing permit in order to avoid the service charge, since this could lead to a trespass violation with serious consequences. We also believe that the proposed service charges are reasonable, as required by Section 304(a) of FLPMA, 43 U.S.C. 1734(a). They range from \$50 to \$145, reflecting the processing costs associated with transactions that require BLM officers to engage in analysis and decision-making activities. Issuing a crossing permit involves analysis of terms and conditions for the grazing use that is incidental to a crossing. The transfer of a grazing preference requires findings with respect to base property, qualifications, and other matters. The \$75 service charge for the cancellation and replacement of a grazing fee billing will be assessed only when a BLM officer must change a billing notice because a permittee or lessee files an application to change grazing use after BLM has issued billing notices for the affected grazing use. That service charge can be avoided altogether merely by applying to change grazing use, in those cases where a permittee knows of the grazing use change, before BLM issues the annual bill in March. Additionally, BLM will not assess the service charge if, after a grazing fee billing

is issued, BLM changes the grazing fee bill because BLM has approved an operator's grazing application not to use all or a portion of their preference for reasons of resource conservation, enhancement, or protection.

Comment: Some comments suggested that BLM add a service charge of \$50 to \$75 for filing a protest, and \$100 to \$150 for filing an appeal, in order to reimburse BLM for a portion of the initial costs of processing protests and appeals. One comment supported the proposed service charges, and suggested that BLM add a service charge of about \$50 to accompany applications for cooperative agreements or permits for range improvements, stating that permittees and lessees would become more serious about implementing a project, having more invested in it.

Response: Instituting additional service charges is not necessary or appropriate at this time. Parties, including permittees and lessees, may be discouraged from filing legitimate protests or appeals of grazing decisions if they have to pay service charges. Further, aggrieved parties do not generally have to pay service charges in order to seek administrative remedies in other BLM programs. Applications for range improvements should not be subject to service charges because range improvements are useful to BLM in rangeland management, and because the public receives more palpable benefits from range improvements than they do from crossing permits, transfers of grazing preference, or the cancellation and replacement of a grazing fee billing.

Comment: One comment stated that, instead of increasing service charges, BLM should increase grazing fees to fair market value because such fees would eliminate the need for the proposed service charges.

Response: As previously indicated, grazing fees and related issues are not

being addressed in this rulemaking. BLM believes the proposed changes in service charges respond to the increasing need for cost recovery. Further, it would not be fair to operators who do not need to transfer their preference, obtain a crossing permit or ask for a rebilling, to subsidize those who do. Although a fair market value fee system may result in higher revenues, this is a separate and more complex issue that is outside the scope of this rulemaking.

Comment: One comment urged BLM to clarify when BLM or the permittee will absorb charges for grazing fee billings under certain circumstances, for example, when permittees take temporary nonuse at the suggestion of BLM due to continuing drought.

Response: Section 4130.8-3(b) in the rule provides that BLM will not assess a service charge when BLM initiates the action. That provision is adopted as proposed. Thus, if BLM suggests temporary nonuse due to drought, there will be no service charge.

Comment: One comment noted the absence of specific information on the proposed increases in service charges.

Response: In response to this concern, we included in the EIS additional information on current average costs associated with the proposed service charges. Specific information on the average cost of issuing billings, free use permits, exchange of use permits, trailing permits, temporary nonrenewable permits and the average cost of processing preference transfers including issuance of a permit to a preference transferee with all NEPA compliance, ESA consultation and protests and appeals, and data management support including GIS costs during Fiscal Year 2003 is found in Section 2.2.15 of the EIS.

Comment: One comment urged BLM not to adopt the proposed rule provision

regarding satisfactory record of performance, stating that the proposed wording is an attempt to show favoritism to someone with past recent violations that did not occur on the allotment for which the applicant is applying. Another comment stated that permittees could avoid violations by timing applications to particular grazing allotments where they had not committed a violation in the last 3-year period.

Response: The consequences of a grazing permittee or lessee not having a satisfactory record of performance remain the same under this rule as they were in the existing grazing regulations. We made minor changes to provide consistent direction on what constitutes a satisfactory record of performance. Determining a satisfactory record of performance is not limited to grazing permit or lease violations on the particular allotment for which an application is being made. Section 4130.1-1(b)(2) states that the authorized officer will consider applicants to have a satisfactory record of performance when the applicant has not had any Federal grazing permit or lease canceled for violation of the permit or lease within the 36 months preceding the date of application.

Comment: One comment suggested that BLM should subject a permit applicant who has a poor management record to a public hearing as part of its process for determining whether the applicant has a satisfactory record of performance. The author of the comment stated that legitimate users of the land do not need to have someone who is known to ignore good range management standards abusing the land or BLM's staff, and added a request for open hearings so that the public interest could be heard.

Response: BLM will determine whether applicants for renewal or issuance of new permits and leases and any affiliates have a satisfactory record of performance. BLM agrees that a poor operator who abuses

public land is detrimental to sound land management. BLM will not approve such renewal or issuance unless the applicant and all affiliates have a satisfactory record of performance, as provided in 4130.1-1(b). BLM does not believe that any useful purpose would be served by including a public hearing as part of the process of determining whether an applicant for a permit or lease has a satisfactory record of performance. If rejected applicants appeal BLM's decision to deny them a permit or lease based on an unsatisfactory record of performance, they would have the right to a hearing of their appeal before an Administrative Law Judge under 43 CFR Part 4, which would be open to the public.

Comment: Several comments urged BLM to remove section 4130.1-1(b)(2)(ii), stating that cancellation of a state grazing permit should not be grounds for determining that a permittee or applicant has an unsatisfactory record of performance. The comments stated that some state rules go beyond practices directly related to livestock grazing. Another comment stated that the provision exceeds BLM's authority under Section 302(c) of FLPMA (43 U.S.C. 1732(c)).

Response: The provision in question provides standards for determining that an applicant has a satisfactory record of performance. BLM will find a record of performance satisfactory if the applicant has not had a state permit or lease of lands within the allotment for which the applicant seeks a Federal authorization, canceled for violation of its terms or conditions within the preceding 36 months. Note that the threshold in the regulations is cancellation, in whole or in part, for violation of the state permit or lease rather than for other reasons under state law, such as cancellation because the state declines to issue permits for the particular time or land or the state has disposed of the land. Section 302(c) states that any

instrument authorizing the use of public lands shall include a provision authorizing BLM to revoke or suspend the instrument upon a final administrative finding of a violation of any term or condition of such instrument. Section 302(c) does not limit the scope of what BLM may require of an applicant.

Comment: One comment requested BLM to clarify whether a person has a satisfactory record of performance if he is damaging the public lands, but has not had a Federal permit or lease canceled, has not had a state permit or lease canceled on the pertinent allotment, and has not been barred from holding a Federal permit or lease by a court of competent jurisdiction. On the other hand, another comment stated that requiring a permittee to apply for renewal will increase the importance of the performance review in the renewal process, but could lead to using the performance review as an excuse not to renew a permit.

Response: BLM will consider the question whether a person is damaging the public lands in determining whether he is in substantial compliance with the terms and conditions of his permit or lease and with the regulations applicable to the permit or lease. Whether or not there has been a cancellation, BLM may find a permittee not in substantial compliance with permit or lease terms and conditions or with the regulations, and consider this finding in determining whether to renew the permit or lease. BLM will also consider whether the lack of substantial compliance was due to circumstances beyond the control of the permittee or lessee.

Comment: One comment suggested that section 4130.1-1(b)(2) also provide that a party would not be considered to have a satisfactory record of performance if he –

1) Obstructs public access to public lands;

- 2) Grazes livestock after the end of the grazing period;
- 3) Removes water sources used by wildlife; or
- 4) Poaches or kills wildlife.

Response: A permittee or lessee who does things like those listed in the comment may be found not in substantial compliance with the terms and conditions of the permit or lease, and thus not to have a satisfactory record of performance.

Comment: One comment stated that BLM should change its qualifications to receive a grazing permit so that applicants with a criminal background are barred from getting a permit.

Response: We have considered the comment and decided that it would be impractical for BLM to bar applicants with a criminal background from getting a grazing permit, unless the criminal conviction was directly related to the loss of a Federal or state grazing permits or leases due to violations, or the applicant was barred from holding a Federal grazing permit or lease by a court of competent jurisdiction as provided in section 4130.1-1 *et seq.* Furthermore, it is not Federal or BLM policy to prevent a person who has been convicted of a crime, served his sentence, and been rehabilitated, from gainful employment.

Comment: One comment stated that BLM should consider increasing the “statute of limitations” on conditions for having a satisfactory record of performance in section 4130.1-1(b)(2) to more than 3 years.

Response: The 36-month period has been in the regulations since the requirement to have a satisfactory record of performance was added in the 1995 rule. We have no evidence that this threshold is not working.

5.4.23 Grazing Permits and Leases

Comment: Some comments stated that the amendment of this section for the purpose of clarifying that the grazing permit or lease is the document that BLM uses to authorize grazing creates an unnecessary burden on the BLM to prepare NEPA analysis prior to issuing a permit or lease. The comment stated that grazing use on public lands is authorized by the land use plan coupled with grazing preference, and that therefore NEPA analysis is not necessary when issuing a permit or lease.

Response: The Taylor Grazing Act directs BLM to authorize livestock grazing through a permit or lease. NEPA requires site-specific analysis of effects before an agency can authorize activities on public land. Most land use plans do not meet site-specific NEPA analysis requirements for issuing permits or leases on individual allotments. The IBLA Comb Wash decision (94-264) reaffirmed the need to prepare site-specific NEPA analysis when issuing grazing permits and leases.

Comment: A comment suggested that BLM should not state that the grazing permit or lease is the only document that authorizes grazing use because each year BLM may approve applications for grazing use under terms and conditions that do not exactly match the terms and conditions listed on the grazing permit or lease. Therefore, the comment went on, BLM should also consider the approval of such an application as a grazing authorization. BLM also should require proof of payment of grazing fees before allowing grazing.

Response: The TGA directs BLM to authorize livestock grazing through a permit or lease. FLPMA provides that a grazing permit or lease will have a 10-year term with certain exceptions. BLM evaluates permits and leases before it issues them pursuant to its obligations under NEPA and its land use planning regulations. One outcome of

this process is permit or lease terms and conditions of grazing use that are compatible with achieving multiple-use management objectives specified in BLM land use plans. The grazing regulations require that terms and conditions of permits and leases include, as a minimum: the allotment(s) to be grazed, the number of livestock, the period of use, and the amount of forage to be removed. Since forage growth and livestock operation needs can change slightly from year to year, BLM allows or requires adaptive minor adjustments in the number of livestock, use period, and amount of forage, so long as the adjustments are within the terms and conditions of the permit or lease and accord with applicable land use plans. These adjustments are documented by BLM case records, decisions and grazing fee billings or payment records. Such adjustments become a part of the term grazing permit or lease for the period the adjustments are in effect. However, the term permit or lease is the document that authorizes the grazing use, not the application and paid grazing fee bill.

Comment: Another comment suggested that grazing permit changes that do not affect the environment or change the terms and conditions of a permit, but only involve paper changes such as a transfer, should not be subject to NEPA, or at most should only involve a categorical exclusion.

Response: Addressing whether the issuance of a permit or lease that is a result of a preference transfer and that is substantially unchanged from the immediately preceding permit or lease should be subject to NEPA is not within the scope of this rulemaking. In a separate effort to streamline permitting processes, BLM is reviewing its current list of actions that are categorically excluded and examining whether a permit or lease that meets specific criteria also should be categorically excluded.

Comment: Some comments suggested that a requirement for consultation, cooperation and coordination with permittees or lessee should be reiterated at section 4130.2(f) in order to emphasize the importance of consultation regarding permit or lease terms and conditions.

Response: While we recognize the importance of coordinating with permittees and lessees when developing terms and conditions, there is no need to restate this requirement because it is redundant. The requirement for consultation, cooperation, and coordination with affected permittees or lessees before issuing or renewing grazing permits and leases is already provided for at section 4130.2(b).

Comment: Numerous comments expressed displeasure with any reduction in the role of the interested public, and many cited the issuance or renewal of permits and leases as specific instances where the rule should not be changed. These comments stated that the issuance of a grazing permit or lease was a significant decision worthy of extensive public involvement. Comments also argued that reliance on NEPA's public participation opportunities was not sufficient, due to the backlog of grazing permit environmental assessments and the recent history of special legislation authorizing renewals without traditional NEPA compliance. Other comments supporting the rule described the grazing permit or lease as the decision that has suffered the most inefficiency because of the interested public consultation requirements. Some argued that grazing permits and leases should be processed in a timely manner and only the BLM and permittees and lessees should be directly involved in this process.

Response: BLM issues or renews an average of nearly 2,000 permits and leases each year, and, thus, we view these as day-to-day grazing management decisions. Permits

and leases implement decisions made in land use plans, allotment management plans and other grazing activity plans—decisions made with significant public input. Many of the comments requesting continued interested public consultation actually raised broad level allocation issues (*i.e.* whether grazing should occur at all) that would properly be addressed in a land use plan rather than at the permit issuance stage. There currently is a backlog of grazing permits requiring final NEPA compliance. BLM is working hard to eliminate this backlog as soon as possible. Under current funding levels, BLM is scheduled to complete full NEPA processing of all permits and leases by 2009. Although timely NEPA participation may be temporarily delayed for some permits, the interested public will ultimately have the opportunity to participate in the NEPA process. If BLM contemplates any changes in levels of grazing use or in permit or lease terms and conditions, we will provide the interested public an opportunity to review and provide input during the preparation of any evaluation or other reports that the authorized officer may use as a basis for such changes. Such reports may include monitoring reports, evaluations of standards and guidelines, biological assessments or evaluations, and any other formal evaluation reports that are used in the decision-making process. Also, the interested public will be notified of proposed decisions and retains the option to protest before a decision is final. This level of participation should achieve a balance that utilizes public input while allowing for timely processing of permits and leases.

Comment: One comment stated that BLM should not grant priority for renewal of permits and leases to permittees and lessees who hold expiring permits and leases unless they, in addition to meeting the other criteria found at section 4130.2(e), have a

satisfactory record of performance. This would make section 4130.2(e) consistent with the proposed rule at section 4130.1-1(b) and (b)(1).

Response: The existing regulations in section 4130.2(e)(2) require, under Section 402(c)(3) of FLPMA (43 U.S.C. 1752(c)(3)), that the permittee or lessee be in compliance with the rules and regulations and the terms and conditions in the permit or lease to have first priority for a new permit or lease. This provision is very similar to language at section 4130.1-1(b)(1)(i) that addresses satisfactory performance. We determined that the language in the rule is adequate.

Comment: Another comment suggested that BLM should remove the requirement that acceptance of terms and conditions of a new permit or lease is required of holders of expiring permits and leases in order for them to receive priority for receipt of the permit or lease. It stated that this requirement is redundant to the statement that “a permit or lease is not valid unless both the BLM and the permittee or lessee have signed it,” and that it is also an inappropriate condition upon which to base priority for renewal of a permit or lease.

Response: We have determined that retention of section 4130.2(e)(3) reflects criteria established in Section 402(c)(3) of FLPMA regarding priority to receive new permits and leases.

5.4.24 Terms and Conditions of Permits or Leases, and Administrative Access

Comment: Some comments objected to the exemption from appeal for those terms and conditions resulting from a biological opinion. In cases where a biological opinion (BO) is the basis for additional terms and conditions in a grazing permit or lease, they felt the affected permittee or lessee should be able to appeal those additional

terms or conditions that are based on the biological opinion. They asserted that in those cases, as may be necessary for a full and true disclosure of the facts, where the BLM authorized officer’s decision rests, in whole or in part, on a material fact not appearing in the agency’s record, such as the material constituting a biological evaluation, biological assessment, or biological opinion, the affected permittee should be entitled to an opportunity to rebut such fact.

Response: Currently, terms and conditions required in a BO, as well as implementation of a reasonable and prudent alternative if required in the BO, are the only terms and conditions not subject to OHA review. However, this exclusion from OHA review is based on Secretarial memoranda dated January 8, 1993, signed by Secretary Lujan, and April 20, 1993, signed by Secretary Babbitt. It has thus been the policy of the Department of the Interior that the Office of Hearing and Appeals (OHA) does not have the authority to review BOs issued under Section 7 of the Endangered Species Act (ESA). Under these Secretarial memoranda, if BLM decides to implement a reasonable and prudent alternative set forth in a Fish and Wildlife Service (FWS) BO, or if BLM implements the mandatory terms and conditions of a BO, OHA is not entitled to “second guess” the FWS findings in the guise of reviewing the BLM decision. Any review of FWS BOs is limited to the Federal courts pursuant to the review mechanism created by Congress in Section 11(g) of ESA (16 U.S.C. 1540(g)). We dropped this provision because BLM believes the Secretarial memoranda signed by Secretaries Lujan and Babbitt provide sufficient clarity regarding the inability of the Office of Hearings and Appeals to review the merits of FWS biological advice. This example has been removed from the rule.

Comment: Some comments stated that BLM should remove the requirement that “grazing permits and leases shall contain terms and conditions...to ensure conformance to the provisions of Subpart 4180” at section 4130.3(a) and section 4130.3-1(c). Subpart 4180 describes Fundamentals of Rangeland Health and Standards and Guidelines for Grazing Administration. The comments reasoned that this change would clarify that permits and leases must be in conformance to all of the provisions of Part 4100 and the management objectives established by applicable land use plans. They felt that these provisions were redundant because standards and guidelines developed under Subpart 4180 are made a part of land use plans and there is an existing requirement that livestock grazing activities conform to land use plans.

Response: It is true that terms and conditions included in permits and leases implement all the provisions of Part 4100 pertinent to the permit or lease. The provision on conformance to Subpart 4180 does not mean that the terms and conditions must only conform to the fundamentals of rangeland health, standards, and guidelines found in Subpart 4180. They must also conform to the appropriate land use plans. The reference to Subpart 4180 appears in this newly designated paragraph (a) (which was the entire section 4130.3 in the 1995 regulations) as a matter of emphasis. Management objectives from applicable land use plans also establish desirable outcomes that BLM strives to achieve. As such, terms and conditions of permits and leases should conform to and not hinder progress towards management objectives, fundamentals, and standards. BLM has considered these comments and has determined that, despite the redundancy pointed out by the comment, it would be best to continue to state plainly in the regulations that permits and leases must

incorporate terms and conditions that ensure conformance to Subpart 4180.

Comment: Some comments stated the BLM should remove the proposed language at section 4130.3(b)(2) which would not allow protest or appeal of terms and conditions placed on grazing use on additional land acreage outside designated allotments. The comment stated that this would violate Taylor Grazing Act Section 9 hearing rights relative to grazing use upon “additional land acreage” within a Grazing District, and that there is no rational basis to treat appeal rights for permits issued for additional land acreage different from appeal rights for permits issued as a result of preference transfer or permit renewal.

Response: In response to this comment we have removed the provision at section 4130.3(b)(2) from the rule.

Comment: Comments suggested that BLM insert a standard term and condition into all grazing permits that states unequivocally that nothing in the terms and conditions of the permit shall be construed as affecting valid existing rights of way, easements, water rights, land use rights, vested rights, or any other property rights of any kind.

Response: The comment expresses concern that the issuance of a grazing permit or lease and the BLM management of the public lands associated with the permit or lease may affect valid existing rights, including, among other things, “property rights of any kind.” The TGA provides that the Secretary “shall make such rules and regulations ... enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of” the TGA “and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, , preserve the land and its resources from destruction

or unnecessary injury, to provide for the orderly use, improvement, and development of the range.” BLM accomplishes these goals through grazing permits and leases, which authorize grazing use on the public lands. Typically, the terms and conditions of a permit or lease specify such things as seasons of use and numbers of livestock. If we were to adopt the comment and add a term and condition in grazing permits that would prohibit BLM from doing anything that would affect any valid existing rights or any other property rights of any kind, it would impose an unlawful limit on the Secretary’s broad authority to regulate the use of the public rangelands. Because of the potential confusion the suggestion in the comment would create, because property rights are adequately protected by the U.S. Constitution, and because there are established avenues for seeking compensation for “takings,” we have not adopted the comment.

Comment: One comment suggested that BLM include a statement in section 4130.3 that terms and conditions will include compliance with management goals and objectives.

Response: Authority to include terms and conditions in a grazing permit or lease to assist in achieving management goals and objectives is sufficiently addressed in section 4130.3-2.

Comment: Another comment stated that the regulations should provide that the new permit or lease that BLM offers to the holder of an expiring permit or lease should reflect changes in terms and conditions that apply at the time of renewal, or reflect the terms and conditions of the expiring permit or lease until the terms and conditions are officially changed.

Response: When renewing a permit or lease, BLM must retain the discretion to authorize grazing use under terms

and conditions that it determines to be appropriate, even if those terms and conditions are different from the permit or lease that recently expired. The final regulations also provide in section 4160.4 that, should OHA stay any term or condition included in a BLM decision that renews a permit or lease, the BLM will continue to authorize grazing under the permit or lease, or the relevant term or condition thereof, that was in effect immediately before the decision was issued, subject to any relevant provisions of the stay order.

Comment: One comment stated that BLM should discourage the use of supplemental feed on public land because such feed can introduce weeds and pollute water with excess nutrients.

Response: Supplemental feed, as referred to in section 4130.3-2(c), means a feed that supplements the forage available from the public lands and that the operator provides to improve livestock nutrition or rangeland management. BLM grazing regulations allow placement of supplemental feed, including salt, for improved livestock and rangeland management, but prohibit placement of supplemental feeds on public lands without authorization, or contrary to the terms of the permit or lease. When BLM authorizes the use of supplemental feed it includes all necessary restrictions, including any requirements for avoiding the introduction or spread of noxious weeds, and directions for placement to ensure that its use does not contribute to resource degradation. We have not amended the regulations in response to this comment.

Comment: Some comments suggested that BLM should include in section 4130.3-2(f) a requirement that the Bureau must develop a “findings” document containing the relevant facts, based on documented resource data, supporting decisions BLM issues to change current terms and conditions

of grazing permits or leases for any of the reasons stated in paragraph (f). They stated that such a “findings” document also should accompany any grazing decision placed in full force and effect by the Bureau.

Response: Section 4130.3-2(f) provides that BLM may temporarily delay, discontinue, or modify grazing use as scheduled by the permit or lease to allow for plant recovery, improvement of riparian areas, protection of rangeland resources or values, or to prevent compaction of wet soils, such as when delay of spring turnout is required because of weather conditions or lack of plant growth. This provision allows for timely implementation of temporary changes to grazing use that are needed to respond to on-the-ground conditions that cannot be reliably predicted when the permit or lease is issued. Similarly, BLM makes grazing decisions effective immediately (“full force and effect”) only when needed to respond to temporary and unpredictable conditions such as lack of forage due to wildfire, drought, or insect infestation, or to close grazing areas to abate unauthorized grazing use.

In most cases, the resource conditions that trigger a temporary change in terms and conditions should be evident to both the permittee or lessee and BLM. In the event that they are not and the permittee or lessee does not voluntarily agree to such temporary changes, BLM would need to issue a grazing decision to require the temporary changes. Such a grazing decision would include a rationale for the temporary changes and be subject to appeal and petition for stay.

Because the need for changes cannot be reliably predicted and can arise suddenly, BLM cannot accept the suggestion that a “findings” document be required before making temporary changes or before making changes by grazing decision effective immediately. Such a requirement could result

in unnecessary delay of actions that are needed to conserve and protect resources.

Comment: Some comments stated that BLM should modify the regulation at section 4130.3-2(g) by removing the phrase, “within the allotment” with respect to lands allowed for exchange of use, so that a permittee or lessee who owns land within another permittee’s or lessee’s allotment may be credited on his grazing fee bill for the forage that their lands are providing to the other permittee.

Response: An exchange of use agreement is not the appropriate instrument to document the arrangement described by the comment. The arrangement described by the comment is where BLM acts as an intermediary between two permittees or lessees by: (1) collecting grazing fees from the first party for their grazing use of the second party’s private lands that are located in the first party’s grazing allotment; and (2) then crediting the grazing fee billing of the second party (for grazing use in a different allotment) in the amount collected from the first party. BLM suggests that a more appropriate approach to this situation would be: (1) the first permittee lease for grazing purposes land owned by the second permittee that is located in the first permittee’s allotment; and, (2) the first permittee then provide BLM a copy of the lease to show evidence of control sufficient for BLM to enter into an exchange of use agreement with them. BLM recognizes that where the second permittee does not fence his land and state or local law provides that lands must be fenced before a landowner can gather stray livestock from their land, there is no incentive, other than good will, for the first permittee to lease the second permittee’s land because he can graze the second permittee’s land for free (although they cannot stock to the capacity of the public and private lands considered together because they cannot demonstrate control of

the private land). Therefore, at the local office level, BLM may be willing to provide the intermediary billing services described above through the terms of a cooperative agreement or service contract with all involved parties.

The purpose of an exchange of use agreement is to allow a permittee who owns or controls land that is intermingled with and unfenced from public land within his allotment to stock to the capacity of the public and private lands considered together and be charged grazing fees only for the forage that occurs on the public lands. Removing the phrase “within the allotment” from this paragraph would allow permittees to offer lands in exchange of use that are not within the allotment for which they have a permit. Although removing this phrase could facilitate BLM performing the intermediary billing service described above in some circumstances, generally allowing lands outside allotments to be offered in exchange of use could create an expectation that the permittee would be allowed to stock his permitted allotment to the extent of the forage produced on the land outside his allotment offered in exchange of use, plus the forage that occurs on lands within his allotment. This expectation could not be met by BLM because the resulting stocking level would not comply with the requirement at section 4130.3-1(a) that livestock grazing use authorized by a grazing permit or lease not exceed the livestock carrying capacity of the allotment.

Comment: Several comments stated that the regulations should retain the provision in section 4130.3-2(h) regarding administrative access across private lands in order for agency staff to perform resource management activities on public lands efficiently. Comments expressed concern that removal of this provision might impede the agency’s management of public lands, and pointed out that such access is an implied condition of a

grazing permit. Other comments supported the removal of this provision, asserting that the agency should only have access across private property by permission of the land owner or to respond to an emergency. Some comments thought this provision should be retained because its removal would limit public access to public lands, misinterpreting the intent of this provision. This provision does not apply to public access across private land; it only applies to agency administrative access to perform necessary resource management activities on the public lands.

Response: In response to comments, the final rule retains the language at section 4130.3-2(h) that we considered removing in the proposed rule. Administrative access is an important component of BLM’s ability to manage the lands for which it is responsible, including, but not limited to, Federal grazing lands. The provisions of paragraph (h) regarding administrative access refer to reasonable access across a permittee’s or lessee’s owned or controlled lands to reach Federal lands so that BLM, including BLM staff and third party contractors working for BLM, may perform necessary resource management activities on those lands. These include such activities as range use supervision, compliance checks, trespass abatement, monitoring of resource conditions, and evaluating the conditions of or the need for range or other improvements. Land management agencies, like any landowner, need appropriate access to the lands they manage. Efficient and reasonable access to, for example, grazing allotments, is needed and is consistent with the partnership between grazing permittees or lessees and the agency to manage rangelands properly. Retaining paragraph (h) is the most effective and efficient means of informing the public, including interested parties, of the requirement that a permittee or lessee provide reasonable administrative access across lands

owned or controlled by them to BLM for the orderly management and protection of the Federal lands under BLM management.

Comment: One comment suggested that BLM should require other users of the public lands to get permission to be on public land from BLM and BLM should inform the permittee when other users or BLM staff will be out on the permittee's allotment.

Response: Determining whether and under what circumstances users other than livestock permittees need approval to use public lands is outside the scope of this rulemaking. Whenever feasible, BLM will inform the livestock operators in advance about BLM field operations that affect grazing management of allotments where they have permits or leases in the spirit of consultation, cooperation, and coordination. A regulation requiring advance notification, however, would be impractical to implement and detract from efficient management of the public lands.

Comment: Several comments stated that BLM should remove paragraph (d) from section 4130.1-2, Conflicting applications, because [p]ublic access across private lands should be given voluntarily and never become a condition for consideration by the BLM under any part of these regulations.

Response: Section 4130.1-2(d) provides that when BLM must decide among conflicting applicants who is to receive grazing use, it may consider, along with the several other factors listed in this section, [p]ublic ingress or egress across privately owned or controlled land to public lands. This provision first appeared in the regulations (Grazing Administration – Outside Grazing Districts and Exclusive of Alaska) in 1968, in the following form:

§4121.2-1 (d)(2) The Authorized Officer will allocate the use of the public land on the basis of any or

all of the following factors: (i) Historical use, (ii) proper range management and use of water for livestock, (iii) proper use of the preference lands, (iv) general needs of the applicants, (v) topography, (vi) public ingress and egress across preference lands to public lands under application (where access is not presently available), and (vii) other land use requirements.

Paragraph (d)(2)(vi) included a footnote that stated, "Where the United States obtains such a right-of-way, it will assume responsibility therefore to the full extent authorized by law." The major rewrite of the regulations in the mid-1970s combined the regulations for inside and outside grazing districts. The provision in the current regulations is a "carry over" from the Section 15 grazing lands regulations. The regulation in its original form does in fact direct that, all other factors being equal, if there were several applicants for use of a specific tract of public land, and one applicant offered public access across their base property to the public lands and the others did not, we would choose the applicant that did, and obtain and manage a right-of-way across their lands. BLM obtains public ingress and egress across the successful applicant's base property and the successful applicant receives a grazing permit or lease, so that both parties benefit.

We may consider amending this provision in a future rulemaking exercise.

5.4.25 Modification of Permits or Leases

Comment: Some comments suggested that BLM not use the need to conform to the provisions of Subpart 4180 as justification for modifying terms and conditions of a permit or lease. The comment stated that standards developed under Subpart 4180 are subjective,

and there are no requirements to collect data to support a determination of achievement or failure to meet those standards.

Response: BLM developed rangeland health standards and guidelines for livestock grazing administration in consultation with Resource Advisory Councils in most states and regions. The fundamentals of rangeland health and standards and guidelines recognize rangeland ecological complexity and multiple values, and are among the many tools BLM uses to ensure sustainable multiple use of public lands. Evaluation of rangeland conditions is carried out using all available monitoring, inventory, and assessment data. Permit modifications are based on range health assessments and evaluations, completed by an interdisciplinary team, using all available monitoring data and all available resource information. The rule further emphasizes the importance of using monitoring data by adding a requirement for its use when making a determination that existing grazing management is a causal factor in the failure to meet a standard at section 4180.2(c). The rule retains the provision on conformance to Subpart 4180.

Comment: Another comment suggested adding requirements to collect monitoring data that shows that current grazing use or management is the cause of not meeting management objectives. A similar comment suggested adding requirements to document facts and findings, supported by resource data, as a justification for changing terms or conditions. Finally, another comment stated that BLM should make it clear in Subparts 4110 and 4130 that any changes in grazing preference or changes in other grazing permit terms and conditions must be supported by monitoring done by BLM-approved Manual procedures.

Response: Permit and lease modifications are based on land health assessments and evaluations, completed

by an interdisciplinary team, using all available monitoring data and all available resource information. BLM documents facts and findings during the evaluation process by preparing an evaluation report and NEPA documents that reference all data and information used as a basis for recommending changes in terms and conditions. The rule further emphasizes the importance of using monitoring data by adding a requirement for its use when making a determination that existing grazing management is a causal factor in the failure to meet a standard at Subpart 4180.2(c). BLM needs flexibility to use site-specific methods in addition to those monitoring methods set forth in Manual guidance. This flexibility will allow BLM to use techniques that meet local needs and that we may develop in cooperation with other agencies and partners.

Comment: Another comment suggested that we consider adding a provision at section 4130.3-2 stating that this regulation does not obviate the need to obtain other Federal, state or local authorizations required by law. The comment pointed out that the construction of range improvements associated with grazing activities, such as water improvements and storage structures, are often governed by other laws or regulations.

Response: Section 4120.3 governs the installation, construction, and maintenance of range improvements. Permittees or lessees must enter into a cooperative range improvement agreement with the BLM before building water improvements or storage structures. Through the cooperative agreement, BLM retains control over standards, design, construction and maintenance criteria. The provision suggested by the comment is unnecessary because BLM has a responsibility to ensure compliance with applicable law. Nothing in the regulations prevents BLM from adding such

a term where it is warranted. BLM still must comply with NEPA, the Clean Water Act, and state water rights laws. Since BLM maintains control over range improvement planning, implementation and maintenance, existing regulations and policies ensure compliance with applicable Federal, state, and local law and regulations.

5.4.26 Temporary Changes in Grazing Use Within Terms and Conditions of Permit or Lease

Comment: One comment stated that grazing permits should contain soil, water, riparian vegetation, and wildlife objectives, in order to help determine whether it is appropriate to authorize early opening or late closing of grazing. The comment continued that most detrimental changes in condition of soil, water, riparian vegetation and wildlife result from ill-planned season of livestock use, duration of use, or amount of utilization. It concluded that terms and condition of the permit need to contain objectives that can address these activities, and that BLM should only change grazing use within the terms and conditions of permit or lease if they have monitoring and assessment data to support the change in use, and the change does not result in removing more forage than the “active use” specified by the permit or lease.

Response: Objectives for soil, water, riparian, wildlife and other resources are usually developed through the planning process and included in land use plans, allotment management plans or activity plans, becoming more site specific at each level of planning. A grazing permit must conform to the objectives of land use plans, therefore terms and conditions are designed to achieve the objectives established in the relevant land use plans and it is not necessary to restate objectives in the permit. In addition to objectives established in

overarching plans, standards for rangeland health provided for in section 4180.2 establish levels of physical and biological condition or degree of function and minimum resource conditions that must be achieved or maintained. Terms and conditions of permits must conform to these rangeland health standards. Section 4130.4(b)(1) already limits the temporary use provided for in this section to the amount of active use specified in the permit or lease. Approval of applications for temporary changes will be dependent on range readiness as observed by the authorized officer, following the criteria in internal guidance and in the standards and guidelines under Subpart 4180.

Comment: Another comment suggested that the rule should provide that grazing use that removes more forage than active use specified in the permit or lease be justified by monitoring and assessment data.

Response: The regulations in this rule already address this situation. If BLM were to authorize use greater than the active use specified in the permit or lease, we would do so under section 4110.3-1, which addresses increasing active use, and base it on monitoring or documented field observations.

Comment: Several comments, including one from a state wildlife agency, stated that the rule should provide for consultation with state wildlife departments before BLM authorizes changes within the terms and conditions of the permit. It went on to say that, just as the criteria to be used in justifying temporary changes in grazing use within the terms and conditions of a permit or lease include annual fluctuations in timing and production of forage and rangeland readiness criteria, so are the needs of wildlife species dependant upon these fluctuations. One comment agreed with BLM’s approach on this issue, but stated that we should consider wildlife-critical periods when deciding whether to authorize the temporary

changes in grazing terms within the terms of the permit or lease.

Response: Consideration of wildlife habitat needs occurs during all stages of planning the multiple use of public lands. During each stage of this planning process -- land use planning, allotment management planning and the formulation of individual permits and leases -- the state is invited to participate in developing objectives and strategies to protect wildlife habitat. Since the temporary changes are by definition within the terms and conditions of permits or leases, we believe the state has had ample opportunity to communicate the wildlife-critical periods and specific habitat needs that BLM must consider while processing an application for temporary changes in grazing use.

Comment: Other comments urged BLM to reconsider applying range readiness criteria, and one asked for a definition of range readiness. They opposed the idea of using “locally established range readiness criteria” in this context, stating that the concept of “range readiness” is no longer supported by the range science community. Another comment stated that BLM should amend paragraph 4130.4(a)(1)(ii) to provide that the “locally established range readiness criteria” must have been established in applicable land use plans, activity plans, or decisions. The comment strongly supported recognizing that range readiness for turn out may vary from year to year, and stated that providing a 14-day window is prudent. Several comments stated that the authorization of temporary changes of use should not be based on active use or preference, but on whether forage is actually available.

Response: We are amending this section in the rule by removing the references to the reasons for authorizing temporary changes in grazing use. Thus, the rule will not contain

any reference to “range readiness criteria.” We make these deletions for two reasons. First, we do not want to limit our discretion as to why we may authorize temporary changes in grazing use, and second, we recognize that the method for determining “range readiness” is controversial and technical in nature. It is therefore more appropriately addressed in manual, handbook or other technical guidance. This guidance will include the criteria BLM will follow in authorizing such changes, and appropriate consultation requirements. BLM considers the availability of forage as well as many other physical and biological factors when processing an application for temporary changes in grazing use.

Comment: One comment urged BLM to allow changes within the terms of the permit or lease only if BLM determines it appropriate before the grazing season, to avoid the possibility of legitimizing trespass by changing grazing use periods or numbers part way through the grazing year.

Response: BLM will not use the provision to approve changes in use after the fact, agreeing that it is inappropriate to legitimize grazing trespass. It is also impossible to determine before the grazing season starts what conditions will exist in ensuing months. We have amended paragraph (e) of this section to make it clear that applications for changes within the terms and conditions must be filed in writing on or before the date the change in grazing use would begin. We have also amended paragraph (b) by adding language recognizing that the allotment management plan may allow grazing beyond the 14-day limit. Nevertheless, grazing would still be limited to the total active use allowed in the permit or lease.

Comment: One comment urged BLM to consider shortening the limit for grazing within the terms and conditions of the permit or lease to 7 days instead of 14 days.

The comment stated that some permittees will request a 14-day opening as soon as forage is bite high. It went on to say that 7 days is plenty to allow for varying weather conditions. The comment also said that the same limit should apply at the end of the grazing season, and that if there is more than 7 days of forage remaining, it should be banked for the next year. Another comment asked BLM to explain how the possible 28-day combined extension of the grazing period will not result in overgrazing.

Response: We have determined that 14 days before the begin date in the permit or lease provides an appropriate degree of flexibility in determining when to allow turnout, as does 14 days after the end date to require round up. As for the suggestion that excess forage measured in days should be saved for the next year, it is unnecessary to state this in the regulations. The provision already limits its application to the amount of active use called for in the permit or lease. Forage in excess of this amount will not be allocated under this provision, so this provision will not lead to overgrazing. The regulations allow increases in active use under section 4110.3-1 in appropriate circumstances.

5.4.27 Nonrenewable Grazing Permits and Leases

Comment: A comment urged BLM to reconsider the proposal to increase grazing on cheatgrass ranges because of the potential effect of cheatgrass on native grasses and ecosystem functions.

Response: Grazing of cheatgrass ranges was given as an example in the preamble of the proposed rule when BLM would not be obliged to consult with the interested public. BLM would need to implement cheatgrass range grazing promptly at specific times and under specific conditions. BLM is not

proposing permanent increases in grazing on cheatgrass ranges.

Comment: A few comments expressed concern over removal of the interested public consultation requirements, they believe that public participation under NEPA would not be sufficient, and noted the possibility that a NEPA categorical exclusion could be implemented. One comment requested that the rule be modified to exclude any possibility of a categorical exclusion. Several comments supported the change as proposed.

Response: The NEPA process was not altered by the proposed change. Environmental analysis on nonrenewable grazing permits would continue under NEPA as before. BLM completes NEPA-required analysis either in response to a specific circumstance following an application for additional use, or by completing a regionally-based analysis, in anticipation of applications, that specifies natural resource and weather-based criteria or thresholds that must be met or crossed as well as other conditions that must be met before BLM will authorize a nonrenewable grazing permit or lease. Further, BLM is not proposing a categorical exclusion related to nonrenewable permits and leases at this time. Categorical exclusions are appropriate when a category of actions “do not individually or cumulatively have a significant effect on the human environment.” 40 CFR 1508.4. Nonrenewable grazing permits and leases have not been analyzed to determine if they meet this criterion. It is possible that these permits and leases, or a distinct subset of them, could qualify for a future categorical exclusion. While no such exclusion is sought at this time, BLM does not believe that a blanket ban on any categorical exclusion is warranted.

Comment: Comments stated that BLM should retain the authority to authorize livestock grazing by issuing nonrenewable

permits or leases to help maintain the health of rangelands in situations where significant authorized nonuse by livestock exceeds a period of time appropriate to the respective western ecosystem.

Response: BLM retains the authority to authorize livestock grazing on an allotment even if the preference permittee is granted nonuse of his permit to graze that allotment for personal or business reasons. Although the rule no longer restricts nonuse of a grazing permit or lease to 3 consecutive years, section 4130.6-2(d) allows BLM to issue a temporary and nonrenewable grazing permit or lease to a qualified applicant when forage is temporarily available, the use is consistent with multiple use objectives, and it does not interfere with existing livestock operations. Under that provision and section 4130.4(e), when an allotment has livestock forage available that is not being used by a preference permittee whom BLM has approved for temporary nonuse for business or personal reasons, BLM may grant other qualified applicants a nonrenewable permit or lease to graze it. Section 4120.3-3(c) requires that the preference permittee or lessee cooperate with the temporary use of forage by the permittee or lessee with a temporary, nonrenewable authorization from BLM. In contrast, if BLM approved an application by the preference permittee for nonuse for reasons of resource conservation, enhancement, or protection under section 4130.4(d)(2)(i), BLM would deny an application for a nonrenewable permit under section 4130.4(e) and Subpart 4160. In this circumstance, if the applicant for a temporary, nonrenewable permit or lease disagreed with BLM's determination that the nonuse was warranted for reasons of resource conservation, enhancement, or protection, he would have the option to protest and appeal the grazing decision that denies his application, and BLM would need to defend

the determination that the nonuse was warranted for the reasons specified.

Comment: One comment stated that BLM should address the effects of the grazing use that would be authorized by a nonrenewable permit on seed replenishment by annual forbs, root reserve replenishment by perennial grasses and forbs, and the potential for damage to soil crust.

Response: We believe that it is unnecessary to address these concerns in the regulations, since BLM undertakes appropriate environmental review before issuing nonrenewable permits. Any effects, such as those identified in the comment, would be addressed as a result of that environmental review.

5.4.28 Prohibited Acts, Settlement, and Enforcement

Comment: Many comments supported the proposed changes to the section on prohibited acts. They agreed that BLM should only enforce actions against permittees if the violations occur while grazing on their permitted allotments. Many comments stated that the proposed changes will promote better cooperation with operators.

Comment: Many comments opposed the changes in section 4140.1 that applied civil penalties only if the acts prohibited took place on the allotment that was subject to the permit or lease. They stated that permittees and lessees should be subject to civil penalties set forth in section 4170.1-1 for performance of prohibited acts in section 4140.1 on any public lands, not just those public lands that are part of their grazing permit or lease. The comments gave a number of reasons for this view. They stated that this policy seems inconsistent with the stated intent of the rule to promote strong partnerships with good stewards of the land by development of simple and practicable ways to attain our shared purpose of

sustaining open space, habitat, and watershed values; permittees should be held accountable and responsible for all local, state and Federal resource related laws; it weakens BLM's enforcement of terms of its own leases and permits; it would have a negative effect on wildlife and their habitats and could lead to the degradation of resources; no analysis is provided for the validity of or necessity for the provision; it makes it easier for permit holders to violate environmental laws without fear of repercussions to their permit; it should require tougher enforcement, not more lenient enforcement; a convicted criminal should not be able to hold a grazing permit; BLM should discontinue leasing to individuals who violate BLM requirements on their allotments.

Response: We intend the change in this provision to clarify whether or not the performance of the prohibited act must occur on the allotment for which the permittee or lessee has a BLM permit or lease. There is also some concern that some of the laws and regulations identified in this category of prohibited acts could result in penalties against permittees and lessees that are unfair because they involve a secondary penalty for a violation of a law or regulation whose primary enforcement is by another agency, with its own separate statutory enforcement and penalty authorities. BLM permittees and lessees are still accountable and responsible for violations of local, state, and Federal resource related laws since they are subject to these other penalties for violations of the acts listed in section 4140.1(c). These other penalties will still serve as a deterrent to violation of the prohibited acts. In addition, if the violation occurs on the allotment of the BLM permittee or lessee, that person is subject to the penalties in Subpart 4170. The amendment in section 4140.1(c) has no effect on enforcement of violations occurring on the permittee s or lessee s allotment.

BLM has not frequently had need to apply this provision of the grazing regulations in the past. A prospective permittee or lessee must meet the requirements stated in section 4110.1 and have a satisfactory record of performance under section 4130.1-1(b). The permittee or lessee must have substantial compliance with the terms and conditions applied to their grazing permit or lease and with the rules and regulations applicable to that permit or lease. The overall purpose for our amendments of the grazing regulations, including those in this section, is to develop strong relationships with all partners. As to whether or not a convicted criminal should be able to hold a permit, it is not Federal or BLM policy to prevent a person who has been convicted of a crime, served his sentence, and been rehabilitated, from gainful employment.

Comment: Comments stated that the rule should not prohibit failure to make grazing use as authorized for 2 consecutive fee years, saying only that the provision does not make sense. Another comment stated that the rule should not cancel permitted use for failure to make substantial use as authorized or for failure to maintain or use water base property because threats to cancel use present an obstacle to developing a financial plan acceptable to a lender.

Response: The prohibition of failing to make grazing use as authorized for 2 consecutive fee years ensures that those who acquire grazing permits or leases will use them for the purposes intended, namely to graze livestock. Originally, the purpose of this regulation was to discourage acquisition of base property and grazing permits or leases by land speculators whose primary business was not livestock-related. It may now also be applicable to those who acquire ranch base property and a permit or lease, yet do not graze so that their permitted allotments are "rested" from grazing, ostensibly realizing

conservation benefits. Failing to make grazing use as authorized for 2 consecutive fee years would occur when a permittee or lessee does not obtain BLM approval for nonuse of their permit or lease and does not graze livestock as authorized by their permit or lease for two years in a row.

BLM believes the rule, and the proposed changes, are rational and do not constitute any threat to operators' finances. Failure to make substantial grazing use as authorized for 2 years, and failure to maintain or use water base property, are listed as prohibited acts so that BLM can ensure that permittees are grazing at authorized levels. This helps ensure accurate monitoring and data collection, and in general supports management of the public lands. The provision is also helpful in recognizing if someone does not intend to graze livestock. Such recognition can be applicable to BLM's implementation of FLPMA, which designates livestock grazing as a "principal or major use" of public lands. 43 U.S.C. 1702(1).

Comment: Comments stated that BLM should not make it a prohibited act for a permittee to violate Federal or state laws relating to placement of wildlife destruction devices, pesticide application or storage, alteration or destruction of stream courses, water pollution, illegal take, harassment or destruction of fish and wildlife, or illegal removal or destruction of archaeological resources. The comment stated these provisions will tend to remove permittees from Federal lands.

Response: BLM disagrees entirely with the implication of the comments that unless permittees are allowed to perform these acts, they will be driven from public lands. The vast majority of BLM permittees and lessees do not perform these acts and yet are able to maintain commercial livestock enterprises that depend upon grazing use of public lands.

Such acts can have a negative effect on the natural resource values of the allotment.

Comment: One comment stated that BLM should not make it a prohibited act for a permittee to violate state brand laws because BLM does not have authority to enforce state brand laws.

Response: BLM agrees it does not have the authority to enforce State brand laws. A permittee or lessee who violates State brand laws would be subject to state penalties enforced by the state, as well as the Federal penalties set forth in the rule. BLM believes that violation of state brand laws is a significant infraction that warrants the penalties as stated in the grazing regulations. While states enforce their respective brand laws, compliance with such laws is also an integral part of a permittee's operations on public lands, and facilitates BLM's own management of public lands. Section 4140.1(c)(1)(ii) makes it clear that being convicted under the state enforcement authority is a condition precedent for being found in violation of this prohibited act. This provision will not be removed from the rule.

Comment: Several comments urged that the rule should not include a prohibited act to place supplemental feed on public lands without authorization, stating that BLM has no personnel who are knowledgeable in livestock nutrition.

Response: The prohibition on placing supplemental feed on public lands without authorization is already stated in the regulations; it is not new in the rule. The rule does, however, add a reminder that information regarding the authorization of placement of supplemental feed on public lands may be in the terms and conditions of the permit or lease, and those must be adhered to as well. We disagree with the assertion that BLM has no personnel knowledgeable in livestock nutrition. One of

the intents of the prohibited act on placing supplemental feed on public lands without authorization is to manage distribution of livestock for improved livestock and rangeland management on an allotment. The requirement for BLM authorization of supplemental feeding should reduce the risk of spread of noxious weeds and other undesirable exotic plants that could be introduced by supplemental feeding. Also, supplemental feeding can influence diet selection of the livestock among established plant species, and thus potentially change plant species composition on the allotment.

Comment: Several comments recommended that BLM adopt as a prohibited act the provision set forth in Alternative 3 of the EIS: “Failing to comply with the use of certified weed-seed free forage, grain, straw or mulch when required by the authorized officer. Comments stated that such a provision would contribute to the ongoing efforts to control the alarming invasion and spreading of exotic and noxious plant species and would benefit wildlife and watersheds.

Response: BLM has decided not to pursue adding a prohibited act to section 4140.1(b) addressing noncompliance with weed-seed free forage requirements on public lands at this time. We agree that promoting the use of weed-seed free forage products on public land will help control the introduction and spread of invasive and noxious plants. BLM will continue to develop and implement a nationwide weed-seed free forage, grain or mulch policy for the public lands, working closely with state and local governments.

Comment: One comment from a state department of agriculture urged BLM to remove all of section 4140.1(c) of the proposed rule. The comment stated that, if a permittee or lessee were convicted of a crime and paid the consequences under that conviction, any additional penalties imposed

by the BLM or another entity would be arbitrary, and that there are other ways to encourage good stewardship of the public lands.

Response: The intent of section 4140.1(c), as amended by this rule, is to help enforce provisions of prohibited acts that would affect the integrity of natural resources on the allotment on which the permittee or lessee has a grazing permit or lease. Stewardship of the land includes protection of endangered species and wildlife, protection from pollution by hazardous materials, protection of streams and water quality, and protection of cultural resources. In this rule, as explained above, we have limited the scope of paragraph (c) to actions on the allotment in question.

Comment: One comment suggested reorganizing section 4140.1(c) of the proposed rule so that the Bald Eagle Protection Act and State livestock laws and regulations are not contained in the same numbered paragraph (3), even though they are in separately numbered subparagraphs (i) and (ii). The comment stated that there was no nexus that justified their designation together under paragraph (3).

Response: There is no substantive basis for changing the organization of section 4140.1(c)(3). There is no qualitative difference between numbering the references to the Bald Eagle Protection Act and the state livestock laws (c)(3) and (c)(4)), respectively, and numbering them (c)(3)(i) and (c)(3)(ii). The nexus between them, if any were needed, is that the same penalty applies.

Comment: One comment suggested that the regulations should provide that any grazing use that was canceled as a penalty is available to other applicants.

Response: Grazing permits and leases that are canceled due to noncompliance with terms and conditions of a permit may be available under section 4130.1-1 to other

qualified applicants who apply for grazing use on that allotment.

Comment: A few comments addressed the section on settlement of the proposed rule. One urged BLM to change the regulations to provide that a nonwillful livestock grazing use violation can only occur upon a finding that a nonvolitional act or an act of negligence by the permittee or lessee (or their affiliates) caused the violation. It stated that section 4150.3 should provide that an act of negligence by the permittee or lessee is required as a precedent to a finding of nonwillful livestock grazing trespass, so that BLM does not cite permittees and lessees for trespass when, for example, livestock stray from their authorized pasture because another party left a gate open.

Response: BLM disagrees with this view. Nonwillful unauthorized grazing use occurs when the operator is not at fault, such as when cattle stray from their authorized place of use because a third party left a gate open. In contrast, willful unauthorized grazing use occurs, for example, when the use results from a volitional act or act of negligence committed by a permittee, lessee, or affiliate. The grazing regulations continue to provide that, under certain circumstances, nonwillful violations are eligible for nonmonetary settlement. It also remains a prohibited act under the grazing regulations for any person to fail to reclose any gate or livestock entry during periods of livestock use.

Comment: Another comment urged that we add language to section 4150.3(e) to clarify that BLM cannot withhold a grazing authorization unless: (a) attempts at settlement have failed; (b) BLM has issued a decision that finds there has been a violation, demands payment for the amounts due, and provides that grazing will not be authorized until payment has been received; and (c) any petition for stay of such a decision has been denied. The comment stated that

some BLM offices have been withholding grazing authorizations based on allegations of trespass that have not been finally determined upon review, and that this is contrary to legal administrative procedure.

Response: BLM agrees that the regulations require clarification on this matter. The proposed rule included new paragraph 4150.3(f) providing that, should a decision issued under section 4150.3(e) that demands payment for outstanding unauthorized use fees and penalties be administratively stayed, BLM will authorize grazing under the regulations pending resolution of the appeal. BLM may not withhold authorization to graze under this section unless BLM has issued a decision under Subpart 4160 demanding payment for the amount due, the decision is in effect, and the amount has not been paid.

Comment: One comment urged BLM to provide in the regulations for mandatory cancellation or suspension of grazing authorizations, or denial of applications for grazing use, if permittees or lessees fail to pay trespass fees and fines that BLM finds are due under section 4150.3, so that the permittee or lessee does not unduly evade or delay payment.

Response: The regulation referenced by the comment provides that “[t]he 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.” This regulation gives BLM permission to take action under 4160—in other words, issue a grazing decision—in this circumstance. Subpart 4160 requires BLM to issue a grazing decision, with right of protest and appeal, to cancel or suspend grazing authorizations or to deny approval of applications for grazing use. BLM sees no need to mandate that failure to pay trespass fees will result in suspension. Facts

and circumstances in each trespass case are unique, and BLM prefers to retain its discretion to determine when it would be appropriate to cancel or suspend a permit or lease.

5.4.29 Proposed and Final Decisions

Comment: Comments opposed the amendment to provide that a biological assessment or biological evaluation that BLM prepares for purposes of the Endangered Species Act (16 U.S.C. 1531 –1544) 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. They stated that it effectively eliminates all administrative appeals of grazing permit or lease terms and conditions that result from a biological assessment (BA) and related biological opinion (BO). Other comments said that where the terms and conditions of a grazing lease or permit were mandated by a BO, the terms and conditions should be subject to appeal if they were substantially the same terms and conditions submitted by BLM in a BA or biological evaluation (BE). Both the TGA, 43 U.S.C. 315, and the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, provide a right of administrative appeal, comments noted.

Other comments pointed out that proposed section 4130.3(b)(1) presented similar problems. That section states that permit or lease terms and conditions may be protested and appealed unless they are not subject to review by the Office of Hearings and Appeals (OHA). This would include terms and conditions mandated by a biological opinion prepared under ESA. Comments opposed this provision, arguing that it denied permittees and members of the public opportunities to correct mistakes in an agency BE.

Response: Section 9 of the TGA, 43 U.S.C. 315h, states that the Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedures in the land department. This provision has been construed to require a hearing on the record under Section 5 of the APA, 5 U.S.C. 554. The regulations called for by Section 9 appear at 43 CFR Subpart 4160 and 43 CFR 4.470 - 4.480. Appeals of BLM grazing decisions under these rules (or their predecessors) have occurred for decades.

Key to Section 9 is the notion that a decision is a prerequisite to an appeal. The rule states at section 4160.1 that a BA or BE is not a decision. This provision makes plain a fact that has long been clear from regulations of FWS. As defined at 50 CFR 402.02, a BA refers to information prepared by a Federal agency about a proposed or listed species that may be present in an action area, and the evaluation of the potential effects of the action on the species. Regulations at 50 CFR 402.12(a) provide that a BA shall evaluate the potential effects of an action on listed and proposed species and determine whether any such species are likely to be adversely affected by the action. A BA is used to determine whether formal consultation is necessary.

These regulations at 50 CFR make clear that a BA or BE is an intermediate step that BLM will take in assessing its obligations under the ESA. A BA or BE does not grant or deny a permit application, modify a permit or lease, or assess trespass damages, which actions are examples of BLM decisions that are subject to appeal.

A BA or BE is not a proposed decision for purposes of a protest to BLM, or a final decision for purposes of an appeal to OHA under the Taylor Grazing Act. The rule at

section 4160.1(d) prospectively supersedes the decision of IBLA in *Blake v. BLM*, 45 IBLA 154 (1998), *aff'd*, 156 IBLA 280 (2002), which held that the protest and appeal provisions of 43 CFR Subpart 4160 apply to a BA or BE.

As explained in the preamble to the proposed rule at 68 FR 68464, a BA or BE is a tool that FWS and NOAA Fisheries use to decide whether to initiate formal consultation under Section 7 of the ESA. Formal consultation results in a biological opinion prepared by FWS. If BLM were to issue a decision implementing a reasonable and prudent alternative set forth in a BO, or if it issued a decision implementing the mandatory terms and conditions of an incidental take statement attached to the BO, any review by OHA would be limited to the merits of BLM's decision. OHA could not second-guess the BO or the findings of FWS, because its review authority does not extend to decisions of FWS. This policy is set forth in a memorandum of Secretary Lujan, dated January 8, 1993, and affirmed by Secretary Babbitt on April 20, 1993.

Concerns in comments as to review of the terms and conditions of a BO are addressed by Secretary Lujan's memorandum in this way: "In summary, OHA has no authority under existing delegations to review the merits of FWS biological opinions. Any review of biological opinions would necessarily be limited to the Federal district courts pursuant to Section 11(g) of the ESA. The longstanding administrative practice of not providing OHA review of the biological determinations of the FWS under the ESA, the specific remedies provided by the ESA itself, and the need for expedited treatment, all militate against a change to the existing delegations."

Comment: Comments urged that BLM amend section 4160.3 so that the authorized officer cannot make decisions adverse to

the livestock grazing permittee or lessee effective immediately unless he has found after a hearing on the record that the current authorized grazing use poses an imminent likelihood of irreparable resource damage. The comment also recommends that BLM be barred from making a decision effective immediately before the hearing unless the authorized officer declares an emergency, after having applied the IBLA standards for a stay found in 43 CFR 4.21(b)(1), in which case the decision would be in effect only for the 30-day period allowed for filing an appeal. In addition, the comment recommended retaining the consultation requirements already proposed for section 4160.1. The comment based these recommendations on the arguments that BLM grazing decisions over the past 10 years have not been based on state of the art rangeland studies, and the OHA regulations misplace the burden of proof on appellants in justifying stays.

Response: Consultation, cooperation, and coordination with affected permittees and lessees is already required before active use can be decreased. *See* 43 CFR § 4110.3-3. Further, any reduction in active use must be issued as a proposed decision, subject to a possible protest before it is finalized, unless the authorized officer documents the emergency-type situations listed in section 4110.3-3(b)(1). A decision may also be appealed after it is finalized, and a stay of the decision may be sought. Thus, the current requirements provide ample opportunity for affected permittees and lessees to participate in the decision-making process. Adding a pre-decisional hearing based on the OHA stay standards would unnecessarily limit the BLM's ability to respond in a timely manner to changing range conditions.

Comment: A number of comments addressed proposed section 4160.3. That section provides that, notwithstanding section

4.21(a), BLM may provide that a final decision shall be effective upon issuance or on a date established in the decision when BLM has made a determination under sections 4110.3-3(b) or 4150.2(d). (The latter two provisions authorize final decisions effective upon issuance where reductions in permitted use or temporary closures are necessary.)

Comments expressed the opinion that BLM decisions, as a general matter, should be suspended pending resolution of an appeal. Comments acknowledged that special circumstances could apply, such as the likelihood of irreparable resource damage, to render a decision effective during this time.

Response: The comments, if adopted, would, in effect, revive the provisions of section 4.21(a) prior to its amendment on January 19, 1993, at 58 FR 4939. Prior section 4.21(a) provided that “except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal.” (A grazing regulation similar to prior section 4.21(a) was only changed in 1995) This prior section was criticized because it allowed the filing of an appeal to halt agency action without regard to the merits of the appeal.

Current section 4.21 sets forth a general rule that suspends an agency decision for the 30-day period during which appellant may file an appeal and request for stay. An appellant seeking a stay must demonstrate, among other factors, the likelihood of success on the merits of the appeal. We believe this to be a superior rule. It allows agency decisions to go into effect reasonably quickly, but allows for a stay of such decisions upon a showing as to the likelihood of success on the

merits and other requirements under section 4.21.

Proposed section 4160.3 acknowledges the vitality of current section 4.21(a) even as it sets forth an exception to its terms. It is not necessary to promulgate a general rule that would suspend a decision during appeal.

5.4.30 Administrative Appeals, Stays of Appeals, and Judicial Matters

Comment: Comments expressed support for proposed section 4160.4(b), stating that, in effect, the immediately preceding authorization would not be terminated, but would be extended for purposes of the stay. This is consistent with a stay allowing the status quo to continue, comments stated, and allows for continuity of operations when grazing decisions are appealed. Other comments thought that our use of the terms “authorized” and “authorization” in the proposed rule was confusing and should be clarified.

Response: We have clarified section 4160.4(b) in the final rule to reflect these comments. We state that, upon OHA’s issuance of a stay of a decision described at paragraph (b)(1), BLM will continue to authorize grazing under the permit or lease that was in effect immediately before the decision was issued. Clarifying language has also been added to paragraphs (b)(2) and (b)(3).

We invited comment (at 68 FR 68465) on how we might effectively incorporate the exhaustion requirement of the APA at 5 U.S.C. 558(c) and the APA judicial review “finality” provision at 5 U.S.C. 704. Section 558(c) provides in part, “When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been

finally determined by the agency.” The APA’s exhaustion requirements are found at 5 U.S.C. 704. As explained in our proposed rule at 68 FR 68465, an agency action is not considered final for purposes of judicial review 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.

Comment: A comment from OHA suggested elimination of proposed section 4160.4(c), stating that the rationale for authorizing grazing consistent with the stayed decision does not logically apply to the cases described at paragraphs (c)(2) and (c)(3), which addresses forage available on ephemeral or annual rangeland or temporarily available is, inherently, not reliably available from year to year, and BLM allocates it on a short-term basis of a year or less. Decisions allocating this type of forage do not involve activity of a continuing nature under 5 U.S.C. 558(c). We agree with this comment, and have adopted section 4130.6-2(b) in lieu of proposed regulations at section 4160.4(c)(2) and (c)(3)

This same comment stated that it is difficult to evaluate proposed section 4160.4(c)(4) without knowing the full range of decisions to which it would apply, and added that it seems odd to provide for stay petitions in a given category of cases and also provide that, if a stay is granted in such cases, grazing will be authorized irrespective of the stay. If an administrative process is worth having, the comment stated, effect arguably should be given to any stays that are granted.

Other comments expressed concerns about trying to identify the types of cases to which paragraphs (b) and (c) of section 4160.4 might apply. It is impossible to anticipate all types of appeals that might be encountered because grazing decisions do

not fit neatly into one of the listed categories, these comments stated.

Response: As a result of the concerns expressed in these comments, we have entirely removed proposed section 4160.4(c) from the rule and limited paragraph (b) to apply to a very circumscribed set of circumstances. With the intention of simplifying these provisions, and improving administrative efficiency, we are revising the regulations proposed at section 4160.4(b) to address the following kinds of BLM grazing decisions:

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

If a BLM decision makes changes to terms and conditions of a permit or lease, and all or some of these changes are stayed by OHA pending appeal, then the affected permittee, lessee, or preference transferee may graze in accordance with the comparable provisions of the immediately preceding permit or lease that were changed or deleted by the BLM decision under appeal, subject to any applicable provisions of the stay order and subject to proposed section 4130.3(c).

There is no need for a provision equivalent to section 4160.4(c)(1) in the proposed rule. That paragraph provided that, notwithstanding a stay order by OHA, we would authorize grazing consistent with our decision that modifies a permit or lease because of a decrease in acreage available for grazing. On internal review, we found the proposed provision unnecessary in light of

the provision in section 4110.4-2(b), which gives grazers a 2-year lag time to reduce grazing in decreased acreage situations.

Comment: In our proposed rule at 68 FR 68455, we noted that we were not addressing whether BLM would be assigned the burden of proof in appeals. A number of comments thought that this topic should have been addressed, and moreover that BLM should bear the burden of proof to support its decisions. Several cited the APA in support. Section 7 of the APA, 5 U.S.C. 556(d), provides that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”

Response: We believe the comments lack merit for the reasons stated in our proposed rule. Each case must be analyzed on its own terms to determine the identity of the proponent of a rule or order. A one-size-fits-all rule would be difficult to craft. Case law of IBLA has answered this question in one context: where a rancher is claimed to have allowed cattle to graze in trespass, BLM has the burden of proof. *BLM v. Ericsson*, 88 IBLA 248, 255, 261 (1985). However, as we pointed out in the proposed rule (68 FR 68456), if BLM denies a permit or lease to a new grazing applicant, that applicant would have the burden of showing where BLM erred in its decision. See *West Cow Creek Permittees v. BLM*, 142 IBLA 224, 236 (1998).

Comment: One comment said that we should not have cited in our proposed rule a workers compensation board case when discussing who bears the burden of proof in grazing appeals.

Response: We cited *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994), in our proposed rule because it is a fairly recent case of the U.S. Supreme Court that examines section 7 of the APA in considerable detail. Section 7 is key to any

decision assigning the burden of proof in a formal APA hearing.

Comment: A number of comments suggested that BLM consider imposing bonds on appellants who are not directly affected by a BLM decision in order to help pay for adverse economic effects to permittees during the adjudication of an appeal. We have not adopted the comment.

Response: In order for an appeal to be filed, the person or entity filing an appeal must be adversely affected by a decision of BLM. 43 CFR 4160.4. It is thus unclear who would have to obtain the bond suggested by comments. A bond is ordinarily required by BLM to protect the interests of the United States. In such a case, the holder of a permit would have to obtain a bond in order to secure the obligations imposed by the permit and applicable laws and regulations. See, e.g., 43 CFR 2803.1-4 (bonding for rights-of-way.)

Comment: One comment stated that only those individuals who are directly affected by a decision and can meet the standing requirements of 43 CFR Part 4 should be able to appeal terms and conditions contained in a BLM grazing decision.

Response: Regulations at 43 CFR 4.470(a) provide that any applicant, permittee, lessee, or any other person whose interest is adversely affected by a final decision may appeal to an administrative law judge. Thus, the requirement that an appellant be directly affected appears to be set forth in existing regulations. This requirement is also set forth in the standing regulations of IBLA, which require that an appellant be a party to the case and adversely affected by the decision on appeal. A party is adversely affected when that party has a legally cognizable interest and the decision on appeal has caused, or is substantially likely to cause, injury to that interest (43 CFR 4.410(d)).

Comment: One comment stated that BLM regulations should provide for independent science panels to examine and resolve grazing-related disputes.

Response: We believe that the formal APA hearing provided by the Taylor Grazing Act, with its opportunity for presentation of evidence, cross examination of witnesses, and decision by an impartial tribunal, provides an opportunity for the evidence, including scientific evidence, to be impartially examined.

It should be noted that there are mechanisms in place for providing science advice and input before the issuance of a proposed and final grazing decision. Existing regulations at 43 CFR 1784.6-1 and 1784.6-2 provide for the formation of Resource Advisory Councils (RACs), whose function is to “advise ... the Bureau of Land Management official to whom it reports regarding the preparation, amendment and implementation of land use plans for public lands and resources within its area.” RACs, in turn, may provide for the formation of “Rangeland Resource Teams,” whose function is “providing local level input to the resource advisory council” regarding issues pertaining to the administration of grazing on public land within the area for which the rangeland resource team is formed. While a rangeland resource team is not an independent science panel, one of its functions is to examine and provide the RACs advice regarding grazing-related disputes. The rangeland resource team, in turn, may request that BLM form a technical review team from Federal employees and paid consultants whose function is to “gather and analyze data and develop recommendations [for consideration by the rangeland resource team] to aid the decision-making process... .” Ultimately, if BLM’s decision is disputed despite the efforts and

advice of these groups, it may be protested and appealed under Subpart 4160 and Part 4.

Comment: One comment said that BLM should add to its regulation a requirement that all parties in a dispute must first litigate under the OHA administrative process to allow field solicitors to develop and resolve cases before they are filed in Federal Court.

Response: The comment is in effect asking for a regulation requiring exhaustion of administrative remedies. The APA addresses exhaustion at 5 U.S.C. 704, and OHA regulations cross-reference this provision. OHA’s exhaustion requirement appears at 43 CFR 4.21(c). That regulation states that no decision which at the time of its rendition is subject to appeal to OHA shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for stay of the decision has been filed in a timely manner and the decision being appealed has been made effective pending the appeal.

Comment: A comment stated that BLM should add a provision to the grazing regulations requiring BLM to notify permittees when BLM has received a Notice of Intent to sue or has been sued under ESA, Clean Water ACT (CWA) or other environmental law, when the outcome of the lawsuit may affect the permittee’s allotments or grazing privileges. This advance notification would allow the permittee to take whatever action he deems necessary to protect his interests.

Response: Notification procedures for potential challenges under various Federal laws are more appropriately handled through policy rather than regulation. This is because as statutory or regulatory provisions change BLM may have to undertake a regulatory change which is time consuming. The BLM does not have rulemaking authority to implement CWA or ESA as to citizen-suit

provisions or notice of intent provisions. The CWA provides that notice “shall be given in such manner as the Administrator [of the Environmental Protection Agency] shall prescribe by regulation.” 33 U.S.C. 1365(b). The FWS and NOAA Fisheries) may promulgate regulations for the enforcement of the ESA, by citizen suit and by other means. 16 U.S.C. 1540(f). BLM will defer to the rulemaking authorities of these agencies. As a matter of policy and customer service, however, BLM routinely informs grazing operators of such eventualities as lawsuits that may affect their allotments.

Comment: One comment asserted that a rancher does not have to have a grazing permit to access his vested rights, and that the rancher’s ownership of water rights, forage rights, and improvements are issues that are not appealable, and cited several court decisions.

Response: Under the Taylor Grazing Act (sections 3 and 15), ranchers must hold a BLM permit or lease in order to graze livestock on public lands. The current regulations, as well as the proposed regulations, reiterate this requirement, 40 CFR Subparts 4130 and 4140, which has been upheld by decisions of Federal courts. See, e.g., *Osborne v. United States*, 145 F.2d 892, 896 (9th Cir. 1944) (livestock grazing on public lands is “under the original tacit consent or ... under regulation through the permit system ... a privilege which is withdrawable at any time for any use by the sovereign.”) Although the Court of Federal Claims ruled in 2002 that a holder of ditch right-of-way established under the Act of 1866 also has an appurtenant right for livestock to forage 50 feet on each side of the ditch, this matter is still in litigation and no final decision has been rendered by the court. *Hage v. United States*, 51 Fed. Cl. 570, 580-84 (2002).

5.4.31 Grazing Fees

Comment: We received numerous comments on grazing fees. Many comments favored increasing BLM’s grazing fees to help fund monitoring activities and range improvements and to offset the costs of managing public rangelands. The reasons cited for raising fees included the following: the current system skews the market, below-market fees promote overgrazing, it is inequitable to increase fees for recreation and not for grazing, and reduction of taxpayer burden. Comments stated that BLM should no longer subsidize public land ranching. Several comments recommended that BLM increase fees to fair market value or to private land lease rates but offer ranchers the financial incentives of lowered fees in return for conservation easements or for management that improves riparian areas, land health, and maintenance of wildlife habitat and corridors. Many comments stated that BLM should allow competitive bidding for allotments, and listed a number of reasons, including economic efficiency, promotion of multiple use and rangeland health, reduction of taxpayer burden, and emulation of state and eastern national forest grazing fees.

Response: The grazing program has many purposes. Congress, in relevant statute, has directed that a reasonable fee be charged for grazing use. There are many requirements that we have under the law, two of which are to protect the health of the land and to manage the public lands on a multiple use basis, which includes livestock grazing. The 1995 regulations and the changes contained in this rule combine to protect the health of the land while allowing appropriate public land grazing. The amount of appropriated funds that go toward the grazing program as opposed to that which is returned in various fees and charges does not amount to a subsidy. Additionally, there are benefits to

the general public in open space preserved as private ranch land attached to Federal allotments that might not exist but for the grazing program. Benefits also include the production of beef as well as the Western heritage that is important to the American identity.

As indicated in the ANPR (FR Volume 68, Number 41, March 3, 2003) as well as the proposed rule (FR Volume 68, Number 235, December 8, 2003), we were not intending to address grazing fee issues in this rulemaking. We specifically stated that increasing grazing fees and restructuring grazing based on market demand were outside the scope of this rulemaking. We have not analyzed any of the grazing fee related options presented in comments, have not addressed grazing fees in the rule, and have not adopted any of the recommendations. The existing fee structure is not altered by this rule.

Comment: One comment stated that BLM should implement grazing fee increases immediately rather than implement them over 5 years because public land ranchers should not be protected from market forces.

Response: We did not propose any changes in grazing fees nor in how changes in grazing fees would be implemented. It appears that the individual making this comment misinterpreted our proposal to phase in implementation of changes in active use over a 5 year period when such changes were in excess of 10 percent. This proposal applied only to changes in grazing use—not changes in grazing fees.

Comment: Many comments recommended that the sheep or goat to cattle equivalency be changed from “5 sheep or 5 goats” to “7 sheep or 7 goats.” They asserted that this proposed change would not involve a change in any portion of the established grazing fee formula, but would track more closely the amount of forage used by sheep as compared to cattle. Several comment

letters pointed out that the 5:1 ratio used by the BLM, originated from data collected on sheep and cattle grazing in Utah from 1949 to 1967. The research data was collected by Dr. C. Wayne Cook, who used the concept of metabolic body weight to reflect the differences between nutritional requirements of different species. Dr. Cook’s research was based on forage consumption and energy expenditures for sheep and cattle and indicated an approximate 5:1 ratio; although Dr. Cook concluded that “these calculations do not represent a conversion factor for exchanging numbers of one kind of animal for another on the range.” This early research was also based upon using a 914 lb. lactating cow and her calf as an AUM, and a 139 lb. ewe and her lamb for forage consumption estimates. The comments stated that in 1991, the Forage and Grazing Terminology Committee with participation from the U.S. Departments of Agriculture and Interior published new standardized definitions of animal units. The animal unit was defined as a 1,100 lb. nonlactating bovine, and estimated the weight of a mature ewe at 147 pounds. This new definition indicated that a 6.5:1 ratio would be appropriate. Comments also cited a study by the USDA-ARS 1994, Animal Unit Equivalents: An Examination of the Sheep to Cattle Ratio for Stocking Rangelands which supported a 7:1 ratio. This study was submitted with comments by several organizations. Several of the comments objected to the rationale given in the proposed rule for not addressing this issue, which was that the ratio is used for the purpose of calculating grazing fee billings and is therefore outside the scope of the rule. Comments stated that this issue is not a grazing fee issue but an issue of equity and improved management for the health of western rangelands

Response: The sheep to cattle ratio is strictly a matter involving grazing fees and is

therefore outside the scope of the proposed rule. Confusion regarding the role of the sheep to cattle ratio is understandable due to the two distinct definitions of Animal Unit Month (AUM) in the grazing regulations. However, a sheep to cattle ratio is only stipulated in one of these definitions.

The first definition is used in all aspects of grazing administration except fee calculation. See section 4100.0-5. Here, an AUM is defined as follows: "Animal unit month (AUM) means the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month." No sheep to cattle ratio is stipulated, no specific amount of forage is designated, and no equivalency to any other animals is mentioned.

The second definition of AUM, the definition at issue here, is found at section 4130.8-1(c). It is as follows: "For the purposes of calculating the fee, an animal unit month is defined as a month's use and occupancy of the range by 1 cow, bull, steer, heifer, horse, burro, mule, 5 sheep, or 5 goats..." This definition strictly pertains to the calculation of fees. The ratios of all kinds and classes of livestock to one another are based upon the administration of a month's use and occupancy, not the amount of forage necessary for their sustenance or any other biological measure. This method of calculating the fee facilitates efficiency and consistency in permit administration by controlling variables associated with ecological site, vegetation composition or quality, topography, pasture, allotment, grazing management, breed, size, weight, physiological stage, metabolic rate, and so forth.

Comment: On the other hand, one comment stated that each sheep and goat should be counted as one animal unit because all animals should be charged, and because any other way of accounting allows too much grazing.

Response: As previously indicated, issues related to the fee structure, including the definition of an animal unit month for purpose of calculating fees, are not being addressed in this EIS. In response to this comment, however, we wish to clarify that, as defined in section 4100.0-5, an animal unit month (AUM) is "the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month." On a forage-consumption basis, 5 sheep or goats grazing for one month is, by regulation, "equivalent" to one cow grazing for one month, and therefore comports with the regulation.

Comment: One comment stated that BLM's practice of not charging a grazing fee for calves under 6 months is antiquated, and BLM should charge a fee for such calves.

Response: As previously stated, we are not addressing issues related to the fee structure, including the definition of an animal unit month for the purpose of calculating fees. In response to this comment, however, we provide the following information for clarification of the exclusion of calves 6 months or younger from the calculation of fees. Typically, calves under 6 months of age are not weaned and therefore rely on their mother's milk rather than forage as their primary source of sustenance. Because grazing fees are charged for the amount of forage consumed, an animal unit is considered to be a mother cow and her calf less than 6 months of age, unless the calf has been weaned or becomes 12 months of age during the authorized period of use.

Comment: Another comment urged BLM to amend the definition of an animal unit month in section 4130.8-1 by specifying that 2 steers or heifers that are between 1 and 2 years old will equal 1 animal unit month for the purposes of calculating the grazing fee. The comment explained that a heifer will not calve until she is over 24 months of age. Her

weight is not equal to that of a grown cow. A weaned steer or heifer that weighs 500 lbs. going on an allotment will not consume forage equal to that consumed by a cow. In daily intake, it will require 2 steers to equal 1 cow. The comment concluded that this change would allow for more flexibility in livestock operations.

Response: The definition of an animal unit month in section 4130.8-1(c) is strictly for “the purposes of calculating the fee.” As we have stated throughout this rulemaking process, matters involving grazing fees are outside the scope of this EIS. Therefore, the definition of animal unit month in section 4130.8-1(c) is outside the scope of this rule.

Comment: Numerous comments recommended that BLM recognize that the surcharge, which is added to grazing fee billings under section 4130.8-1(d) of the current regulations where an operator does not own the livestock that are authorized by permit or lease to graze on public lands, is not a grazing fee and eliminate or reduce surcharges.

Response: We have not changed the requirement that a surcharge be added to grazing fee billings where an operator does not own the livestock that are authorized by permit or lease to graze on public lands (except that the paragraph is redesignated (f) in the rule). The surcharge equals 35 percent of the difference between current Federal grazing fees and the prior year’s private grazing land lease rates for the appropriate state as determined by the National Agricultural Statistics Service. Sons and daughters of the permittee or lessee are exempt from the surcharge where they meet the conditions listed at section 4130.7(f).

The surcharge is BLM’s most recent response to a longstanding problem, i.e., a potential for windfall profits stemming from pasturing agreements. In 1984, Congress enacted legislation that was intended to

recapture such profits for the Federal treasury. The legislation provided that “the dollar equivalent of value, in excess of the grazing fee established under law and paid to the United States Government, received by any permittee or lessee as compensation for assignment or other conveyance of a grazing permit or lease, or any grazing privileges or rights there under, and in excess of the installation and maintenance cost of grazing improvements provided . . . shall be paid to the Bureau of Land Management.” Continuing Appropriations, 1985 – Comprehensive Crime Control Act of 1984, Public Law No. 98-473, 98 Stat. 1839 (1984). The penalty for noncompliance was mandatory cancellation of the operator’s permit or lease. BLM promulgated regulations to implement the 1984 legislation.

In 1986, the General Accounting Office reviewed the extent to which BLM permittees and lessees sublease their grazing privileges, and the adequacy of our regulations to control this practice. One of the recommendations in the resulting report (RCED-86-168BR) was to require that subleasing arrangements be approved for a minimum of 3 years. Such a lease constitutes a long-term commitment, and thus reduces the potential for large, short-term profits. This recommendation was promulgated in 1995, and continues in effect at section 4110.2-3(f).

In 1992, the Inspector General for the Department of the Interior recommended that BLM adopt more stringent measures further reducing the potential for collecting windfall profits through pasturing agreements or subleasing of base property. Selected Grazing Lease Activities, Bureau of Land Management, Report No. 92-I-1364 (Sept. 1992). BLM responded by promulgating the existing surcharge provision at section 4130.8-1(d).

Comment: One comment stated that the surcharge is an obstacle to finding ways to

adapt to drought conditions. This comment stated that short-term flexibility is important so that livestock can be moved rapidly from an area in decline to an area where forage is available. Some other comments stated that the surcharge is an obstacle to adjusting stocking rates quickly when weather conditions change, and that the surcharge results in the loss of cooperation among ranchers in the event of a natural disaster. Finally, some comments stated that the elimination of surcharges would improve management flexibility, resulting in more effective relationships between BLM and operators, as well as better land management.

Response: Drought and other weather-related conditions are a perennial risk in ranching and farming. We are not persuaded that the claimed extra increment of risk, which may or may not be added by the surcharge, is significant enough to warrant rescission.

Comment: Many comments suggested that the surcharge discourages livestock owners from entering into pasturing agreements with permittees who pass through their costs to livestock owners. According to these comments, the surcharge causes permittees to lose opportunities to collect income that could help them weather cycles of prosperity and hardship. These comments also allege that the surcharge causes destabilization of ranching operations, loss of open spaces and western communities, and fragmentation of wildlife habitat.

Response: The concerns expressed in these comments provide no basis for BLM to eliminate or reduce the surcharge. Permittees who want to augment their income without purchasing livestock may sublease all or some or all of their public land grazing privileges to another operator along with the base property associated with those grazing privileges. While BLM must approve the transfer of the grazing preference and permit

in connection with the transaction, BLM assesses no surcharge.

Comment: Some comments suggested that the surcharge is too high for permittees to profit from their operations while paying the surcharge. Several of these comments stated that the surcharge makes public land ranchers less competitive than ranchers who use only private land. One of these comments stated that the surcharge gives nonresident interests a foothold on public rangelands, and increases financial pressures for owner-operated ranches. Finally, some of these comments included two illustrations intended to show financial difficulties resulting from the surcharge. In one illustration, a young rancher is forced to abandon his efforts to establish a cow-calf operation. In another, a rancher's widow incurs expenses in order to avoid the surcharge, so that she and her family can remain on their ranch.

Response: It is unreasonable to assign the surcharge the sole blame for an individual rancher's financial success or failure. Ranching tends to be a low- or negative-profit enterprise on both private and public lands. There are many factors in addition to the grazing fee surcharge that may affect whether a rancher will have financial success; the rancher's business acumen, operating loan interest rates, mortgage rates, livestock prices, business efficiency of the enterprise, and the weather are among those factors. The comments we received on financial effects do not justify changing the surcharge regulation.

Comment: Some comments stated that the surcharge was instituted as a penalty, and that the surcharge is not a grazing fee issue.

Response: To the contrary, the surcharge was implemented as a component of the grazing fee to reduce the potential for windfall profits, as identified by the General Accounting Office and the Office of the Inspector General. 60 FR at 9945.

Comment: One comment stated that BLM should not exempt children of permittees from the surcharge in order to reduce the taxpayers' burden for the management of public lands. One comment stated that, assuming windfall profits are a large enough concern to justify the surcharge, BLM should waive it in cases of drought and stewardship contracts, and otherwise retain the requirement. Another comment stated that there is no windfall profit to the rancher if he brings in outside cattle. A few comments suggested that the surcharge should be eliminated because it represents an unnecessary workload for BLM. One of these comments stated that administering the surcharge takes valuable time away from on-the-ground monitoring and management activities. Another stated that the surcharge complicates the paperwork for both the operator and the land manager. Some other comments requested that we consider providing relief from the surcharge in cases of extreme drought, or where permittees' finances are strained. Some comments stated that the surcharge should not apply where ranchers sublease their private property rights in their allotments.

Response: These suggestions, like all those pertaining to fees, are beyond the scope of this EIS. Moreover, none of the comments provide persuasive evidence that the original rationale – the potential for windfall profits – has changed. We have not changed the provision establishing a surcharge.

Comment: One comment stated that BLM should waive surcharges for permittees who enter into stewardship contracts to make surplus forage available to other operators, pursuant to Section 323 of Public Law No. 108-7. This comment states further that a permittee who provides surplus forage under a stewardship contract performs a public service by helping to preserve ranches, with

their attendant benefits to local economies, open spaces, and wildlife habitats.

Response: As we have stated, we are not addressing issues related to grazing fees, including surcharge issues. Furthermore, this rule is not promulgated to implement the legislation (16 U.S.C. 2104 note) that authorizes BLM to enter into stewardship contracts with private persons or entities, or with other public entities. That legislation is the subject of guidance issued by BLM and the U.S. Forest Service. 69 FR 4107, 4174 (Jan. 28, 2004).

Comment: One comment stated that BLM should not allow “after-the-grazing-season” payment of grazing fees.

Response: After-the-grazing-season billing is allowed only where BLM has made an allotment management plan (AMP) a part of the permit or lease and it provides for the privilege of after-the-grazing-season billing. AMPs generally contain grazing systems that prescribe limits of flexibility in the number of livestock and period of use, allowing operators to adjust grazing practices within such limits to meet the resource use and management goals specified in the AMP. BLM may cancel the privilege of after-the-grazing-season billing if the operator fails to submit the required report of actual grazing use on time, fails to pay the grazing fee billing on time, or if BLM finds that the use is erroneously reported. BLM believes that after-the-grazing-season billing remains a useful management and administrative tool that happens to be advantageous to operators. In addition to relieving operators of the requirement to pay fees in advance, it provides flexibility for operators to make adjustments in grazing use, within pre-set limits, without first having to apply for and receive approval for such adjustments. BLM benefits from reductions in paperwork, and both BLM and operators benefit from the

improved working relationships that result from AMPs.

Comment: One comment urged BLM to find a means of reimbursing counties for bearing the burden of high Federal land ownership in parts of the West. They suggested that BLM allocate a portion of grazing lease and permit fees to the counties.

Response: This issue is not addressed in the regulations. It is, however, addressed in the Taylor Grazing Act. Under 43 U.S.C. 315i, 12 ½ percent of revenues from grazing permits and 50 percent of revenues from grazing leases are distributed to the states in which the lands producing the revenues are situated. The state legislature then decides how to spend those funds for the benefit of the affected counties. We note also that counties do receive Federal payments in lieu of property taxes under 31 U.S.C. 6901-6907. (In 2003, those payments totaled \$2,050,000.)

5.4.32 Reserve Common Allotments

Comment: We received several comments on the concept referred to as “Reserve Common Allotments” (RCA), a proposal and accompanying regulations that would have established forage reserves.

Response: We decided not to pursue the possibility of creating RCAs in the proposed rule following a generally unenthusiastic reception during the public scoping process.

Comment: Comments that opposed this concept speculated that it would foster abuse and excessive grazing on the one hand, or could lead to a loss of preference AUMs on public lands on the other. Some comments supported designation of RCAs on a temporary basis only, not permanent designation that would eliminate those AUMs from term permit availability. Comments that supported the RCA concept expressed disappointment that we did not propose them because they recognized the RCA as

a potential solution to environmental and economic challenges confronting modern-day ranching. Another comment suggested that RCAs could provide an outlet for producers whose allotments are unusable due to weather, fire, or scheduled range improvements such as prescribed burning or stream restoration. This comment also suggested implementing the concept on a pilot basis and monitoring performance on a set of administrative and environmental criteria.

Response: BLM recognizes that these thoughtful comments demonstrate cautious interest and qualified support of the RCA concept. It is also obvious that the proposal rolled out in the ANPR was insufficiently defined and inadequately developed to gain full public support. We will continue to examine the concept of establishing temporary or permanent forage reserves, or alternative management scenarios, through future policymaking processes. Due to the keen interest in this subject, we will communicate with the public during any policy development process on RCAs.

5.4.33 Stewardship Incentives

Comment: Some comments stated that rangeland conditions would improve if BLM regulations established various incentives for ranchers who implement good management practices, or allowed “considerations” for permittees who voluntarily reduce livestock numbers or build wildlife projects, or provided for purchasing willow whips from private landowners for planting on public lands

Response: In past decades, BLM, in consultation with user groups and the public, has examined various programs (e.g. Incentive Based Grazing Fees - 1993; Cooperative Management Agreements—1984) intended to provide incentive for rancher stewardship of public lands for

multiple uses, including wildlife habitat. Ultimately, consensus could not be achieved and these efforts were set aside. More recently, in early 2003, BLM's Sustaining Working Landscapes (SWL) policy development initiative explored possible incentives for ranchers to engage in partnerships to achieve conservation ends, while encouraging and enabling good stewardship. In mid-2003, BLM decided to focus its grazing program resources on this rulemaking effort, rather than attempt simultaneously to accomplish SWL policy development and a rule. Upon completion of this rule, BLM intends to revisit SWL policy concepts and focus on updating grazing manuals and technical procedures needed to implement the grazing rules.

Comment: One comment suggested adopting conservation easement tax laws currently in effect in Colorado, New Mexico, and other states.

Response: While BLM supports the use of conservation easements for protection of watershed and habitat values on private lands, we do not have authority to change the tax laws of individual states.

5.4.34 Exchange-of-Use Grazing Agreements

In the proposed rule, BLM invited comment regarding whether BLM should facilitate "trade-of-use" arrangements between operators (68 FR 68456). As stated in the proposed rule, this type of arrangement allows one permittee or lessee to own or control unfenced intermingled private lands that are not within his allotment, but in the allotment of a second permittee or lessee.

Some comments urged that BLM facilitate "trade-of-use" in this type of situation by collecting a grazing fee from the second permittee for the 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 bills.

Comment: Comments on the proposed rule either urged BLM to facilitate this arrangement or urged BLM not to facilitate this arrangement, but did not provide reasons other than either that it would "contribute to multiple use benefits" (from comments supporting BLM facilitation), or that it would not (from comments opposing BLM involvement).

Response: BLM continues to believe that "trade-of-use" arrangements between private parties are best handled by the private parties. The regulation continues to provide that lands offered in exchange-of-use must be unfenced and intermingled with the public lands in the same allotment.

Comment: Another comment urged BLM to include in this section a provision stating, "BLM will include in calculation of the total allotment or lease livestock carrying capacity, the total number of livestock carrying capacity AUMs of lands offered for exchange of use as determined by a rangeland survey conducted by persons qualified as professional rangeland managers."

Response: The regulation continues to limit the level of use on public lands authorized by an exchange-of-use agreement on public lands to the livestock carrying capacity of the lands offered in exchange-of-use. Guidance regarding how this level is determined is best contained in grazing management handbooks and technical references, not in the grazing regulations.

5.4.35 Miscellaneous Comments

Comment: One comment expressed concern that proposed changes in the regulations would limit adaptive management options, and urged BLM to increase opportunities for adaptive management for unforeseen circumstances such as drought.

Response: The rule is designed to improve working relations with permittees and lessees. Better working relationships should result in more frequent communication and greater willingness to consider additional management alternatives.

Comment: One comment stated that BLM should require other users of the public lands to get permission to be on public land from BLM, and that BLM should inform the permittee when other users or BLM staff will be out on the permittee's allotment.

Response: Determining whether and under what circumstances public land users other than livestock permittees need approval to use public lands is outside the scope of this rule. Casual recreationists normally do not need permits to visit public lands, so there is no way BLM can inform grazers in advance of such visitation. Whenever feasible, in the spirit of consultation, cooperation, and coordination, BLM will inform the livestock operators in advance about BLM field operations or public uses under permit, lease, or license that affect grazing management of allotments where they have permits or leases. However, a provision requiring advance notification would be impractical to implement and detract from efficient management of the public lands. BLM declines to adopt this suggestion.

Comment: One comment addressed the substance of the section describing the objectives of the grazing regulations (4100.0-2), stating that BLM should remove the statement "to accelerate restoration and improvement of public rangelands to properly functioning conditions" and should change the words "consistent with" to "that is in conformance with," for several reasons. First, removal of this objective would ensure that the public is not distracted from the real objectives of grazing management, which are expressed in the applicable land use plans. These plans may or may not

require the "restoration and improvement of public rangelands to properly functioning conditions" upon every acre of the public lands. Second, removal of the objective would make it clear that the applicable land use plan and relevant laws guide management.

Response: We have not amended the objectives section in response to this comment. "[T]o accelerate restoration and improvement of public rangelands to properly functioning conditions" is a proper objective for these regulations, and consistent with Section 2 of the Taylor Grazing Act ("The Secretary ... shall make provision for the protection...and improvement of ...grazing districts and do any and all things necessary to insure the objects of such grazing districts, [including] ... to preserve the land and its resources from destruction or unnecessary injury [and] to provide for ... improvement of the range; and the Secretary ... is authorized to ... perform such work as may be necessary amply to protect and rehabilitate the areas subject to the provisions of this Act ..."). To ensure clarity regarding the role of land use plans and grazing management, section 4100.0-8 of the regulations, which is not changed by the rule, continues to state unequivocally that "... [I]ivestock grazing activities and management actions approved by the authorized officer shall be in conformance with the land use plan as defined at 43 CFR 1601.0-5(b)."

Rangeland Standards and Guidelines (43 CFR Part 4180) have been or are required to be developed statewide or regionally in consultation with Resource Advisory Councils. Consistent with the fundamentals of rangeland health, rangeland watersheds are to be in, or making significant progress toward, proper functioning physical condition. This regulatory language does not imply, nor does BLM subsequently interpret in policy or guidance, that every single

acre of a watershed is in proper functioning condition. Proper functioning condition refers to the ability of an area to sustain natural plant communities and basic ecological functions. BLM determines functionality at the watershed scale, determining functionality for each one of the 160,000,000 acres managed is impractical.

BLM planning regulations define “conformity” or “conformance” as meaning that a resource management action is specifically provided for in the land use plan or, if not specifically mentioned, clearly consistent with the terms, conditions and decisions of the plan. The planning regulations define “consistent” as meaning that plans will adhere to the terms, conditions, and decisions of resource related plans, or in their absence with policies and programs. We cannot anticipate in land use plans the specific circumstances involved in subsequent grazing decisions. Therefore, the specific term chosen for use in this rule, either “conformance” or “consistent,” would not alter the intent of the objective described in this rule. Finally, all individual records of decision issued when BLM adopted land health standards pursuant to section 4180.2 amended applicable land use plans to include those land health standards.

Comment: One comment suggested that BLM should provide for payment to the permittee or lessee for any cuts in permit numbers at the prevailing appraised rate, in order to curtail cutting permits under the pretense of the Endangered Species Act.

Response: 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. A grazing permit or lease authorizes a privilege or revocable license, not a property right protected under the Constitution.

Comment: One comment addressed the Failure to Use provision (4170.1-2), stating that BLM should not cancel a permit or lease for failure to make substantial use as authorized or for failure to maintain or use water base property for 2 consecutive grazing fee years. The comment averred that this provision could be construed to mean that if a well on private property is not used for 2 years then BLM can cancel all or part of the lease. It went on to say that BLM through its regulations is placing an unfair burden on the lessee in his ability to obtain financing from a local lender, that BLM’s threat to cancel or suspend active use creates a major obstacle in producing a feasible financial plan required by the lender, and that lenders would not be impressed with a plan that would force them to term out a loan over a period of time based on BLM’s whim to create uncertainty and prevent a positive cash flow for the borrower.

Response: BLM disagrees. As indicated by the Taylor Grazing Act, Congress intends grazing permits and leases to be used for grazing purposes as “necessary to permit the proper use of lands, water or water rights owned or leased by” the permittees or lessees. Failure of a permittee or lessee to maintain or use water base property in the grazing operation would indicate that the grazing operator is not making “proper use” of the water. Under these circumstances, it would be appropriate to revoke the grazing privileges that had been associated with that water, and to award them to someone who would maintain or use some other nearby water in the furtherance of his livestock operations. Agricultural lenders are, or should be, aware that retention of a BLM permit or lease is contingent upon the permittee or lessee complying with the grazing regulations that govern the permits and leases.

Comment: When adjusting allotment boundaries BLM should consult with base property lien holders before adjusting

allotment boundaries, and should remove its authority to adjust allotment boundaries by decision so that the permittee or lessee has control over allotment boundaries rather than BLM.

Response: Under section 4110.2-4, BLM will consult with affected permittees or lessees before adjusting allotment boundaries. Should permittees or lessees wish to consult regarding boundary adjustment proposals with those holding liens on their base properties, they may do so at their option. It is necessary for BLM to retain authority to adjust allotment boundaries by decision for those situations where all affected parties cannot reach consensus regarding an allotment boundary adjustment.

Comment: BLM policy should reflect that grazing decisions always be based on appropriate scientific data because it is required by the Data Quality Act. Some comments maintained that BLM is required to prove, on administrative appeal, that the terms and conditions of grazing permits are consistent with the Data Quality Act (DQA), Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554).

Response: As discussed above, BLM is not required to launch an affirmative defense of grazing permits in response to an administrative appeal to the Office of Hearings and Appeals. BLM may come forward with a rebuttal, but the appellant bears the ultimate burden of persuasion.

The Office of Hearings and Appeals may not be the forum of choice for raising questions with respect to BLM's compliance with the DQA standards (i.e., "the quality, objectivity, utility, and integrity of information"). As required by the DQA, BLM has issued guidelines which provide an administrative mechanism for raising such

questions directly with BLM (Department of the Interior's Data Quality Guidelines, published October 1, 2002).

Comment: In case of fires in allotments the allotment should be rested for a minimum of 3 years and 5 years if any BLM permittee has livestock on a burn area prior to approval plus a substantial reduction in their grazing permit.

Response: This issue of how much rest from livestock grazing is needed after a fire is outside the scope of this rulemaking and is not examined in the DEIS. Administrative remedies and penalties are listed in the rules in Subparts 4160 and 4170.

Comment: One comment letter stated the BLM should correct an error that appears in Appendix C of the DEIS, in which a number of references stated "The University of Wyoming Law School commented" The letter concluded by saying the University of Wyoming Law School did not make the comments, but rather that they were those of Debra L. Donahue.

Response: We explain without excusing this error by stating that the email containing the comment on the ANPR identified the author with her employer in the signature block. Since there were so many letters received, over 8,300, letters were divided into individual comments to group like comments together so that we could capture the essence of the various concerns expressed, the statement in the letter, "Please note that the opinions expressed herein are my own, and not those of my employer" was separated from the various comments contained in the letter. The comments were then tagged as coming from the University of Wyoming. The author of the letter should have received a letter of apology already and we hereby retract the error that appeared in the DEIS.

