4310-84-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 4100

[WO-220-1020-24 1A]

RIN: 1004-AD42

Grazing Administration – Exclusive of Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Land Management (BLM) amends its regulations concerning how BLM administers livestock grazing on public lands. The changes ensure that BLM documents its consideration of the social, cultural, environmental, and economic consequences of grazing changes; provide that changes in grazing use will be phased in under certain circumstances; allow permittees, lessees, and others to share title to range improvements with BLM in certain circumstances; make clear how BLM will authorize grazing if a BLM decision affecting a grazing permit is stayed pending administrative appeal; remove provisions in the present regulations concerning conservation use grazing permits; ensure adequate time for developing and successfully implementing an appropriate management action when BLM finds that rangelands do not meet standards and guidelines for rangeland health and that authorized grazing is a significant factor in not achieving one or more land health standards or not conforming with guidelines for grazing administration; and revise some administrative service charges. We intend these changes to contribute to improving working relationships with

permittees and lessees, protecting the health of the rangelands and increasing administrative efficiency and effectiveness.

EFFECTIVE DATE: [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: You may send inquiries or suggestions to Director (220), Bureau of Land Management, Room 204 LS, Eastern States Office, 7450 Boston Boulevard, Springfield, Virginia 22153.

FOR FURTHER INFORMATION CONTACT: Ken Visser, Rangeland Management Specialist, Rangeland, Soils, Water and Air Group, (775) 861-6492, or Ted Hudson (202) 452-5042 of the Regulatory Affairs Group. Individuals who use a telecommunications device for the deaf (TDD) may contact them individually through the Federal Information Relay Service at 1-800/877-8339, 24 hours a day, seven days a week.

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I. Background

A. History

BLM administers livestock grazing on BLM lands within the continental United States under the regulations found at 43 C.F.R. 4100. Statutory authority for these regulations includes the following:

1. The Taylor Grazing Act (TGA) as amended (43 U.S.C. 315, 315a through 315r);
2. The Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1701 et seq.) as amended by the Public Rangelands Improvement Act (PRIA) (43 U.S.C. 1901 et seq.);
3. Section 4 of the Oregon and California Railroad Lands Act (43 U.S.C. 1181d);
4. Executive orders that transfer land acquired under the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1012) to the Secretary and authorize administration under TGA; and

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

Section 202 of FLPMA requires the development and maintenance of land use plans for public lands. BLM land use plans are designed to provide guidance for future management actions and the development of subsequent, more detailed and limited-scope plans for resources and uses. Land use plans are developed under the multiple-use and sustained-yield mandate of FLPMA. Land use plans identify lands that are available for livestock grazing and the parameters under which grazing is to occur. BLM issues grazing permits or leases for available grazing lands. Grazing permits and leases specify the portion of the landscape BLM authorizes to the permittee or lessee for grazing (i.e., one or more allotments) and establish the terms and conditions of grazing use. Terms and conditions include, at a minimum, the number and class of livestock, when and where they are allowed to graze, and for how long. Grazing use must conform to any applicable allotment management plans, the terms and conditions of the permit or lease, land use plan decisions, the grazing regulations, and other applicable laws.

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

• Revised the term “grazing preference” to mean a priority position against other applicants for receiving a grazing permit, rather than a specified amount of public land forage apportioned and attached to a base property owned or controlled by a permittee or lessee, and added the term "permitted use" to describe forage use amounts allocated by or under the guidance of an applicable land use plan, and authorized by grazing permits or leases;

• Provided that BLM could issue a “conservation use” permit to authorize permittees not to graze their permitted allotments;

• Limited authorized temporary nonuse to 3 consecutive years;

• Required grazing fee surcharges for permittees who do not own the livestock that graze under their permits;

• Provided that the United States holds 100 percent of the vested title to permanent range improvements, such as fences, wells, and pipelines, constructed under cooperative agreements dated after August 21, 1995, rather than proportionately sharing title with the cooperators;

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

• Provided that after August 21, 1995, any water right acquired on public land to be used for livestock watering on public land must be acquired, perfected, maintained, and administered under substantive and procedural laws of the state where the land is located, and that such water rights are to be acquired in the name of the United States, to the extent allowed by the law of the state;

- Established fundamentals of rangeland health; and
- Created a process for developing and applying state or regional standards for land health and guidelines for livestock grazing as a yardstick for grazing management performance.

Soon after the grazing regulations took effect on August 21, 1995, a lawsuit was filed challenging the validity of several of the new regulations. All challenged provisions except "conservation use" (see the second bullet, above) were upheld. Public Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999), aff'd, 529 U.S. 728 (2000).

On March 3, 2002, BLM published an Advance Notice of Proposed Rulemaking (ANPR) and Notice of Intent (NOI) to prepare an environmental impact statement (EIS) in the Federal Register (68 FR 9964-9966 and 10030-10032, respectively). These notices requested public comment and input to assist BLM with the scoping process for the proposed rule and the EIS. The comment period on the ANPR and the NOI ended on May 2, 2003.

During the scoping process, BLM held four public meetings to elicit comments and suggestions for the proposed rule and development of the draft environmental impact statement (DEIS). The meetings were held during March 2003 in Albuquerque, New Mexico; Reno, Nevada; Billings, Montana; and Washington, D.C. BLM received approximately 8,300 comments on the ANPR and the NOI. The majority of these were varying types of form letters.

We considered many of the issues that the public raised during the scoping period and discussed several of them as alternatives in the DEIS. We did not address, however, some of the issues that comments raised, because they were either beyond the scope of the document, did not meet the basic goals of these proposed changes to the regulations, or BLM decided we could better address the issues through internal policy changes. We listed and discussed these issues in the proposed rule (68 FR 68455), and in section 1.3.2 of the DEIS, and there is no need to repeat them here.

We published the proposed rule on December 8, 2003 (68 FR 68452), inviting public comments until February 6, 2004. On January 16, 2004, we published a notice to extend the comment period to March 2, 2004 (69 FR 2559). BLM held six public meetings in late January and early February, 2004, to provide the public an opportunity to comment on the proposed rule. Meetings were held in Salt Lake City, Utah; Phoenix, Arizona; Boise, Idaho; Billings, Montana; Cheyenne, Wyoming; and Washington, D.C. Approximately 250 individuals attended the public meetings and 95 provided oral comments. These were transcribed and can be viewed on the BLM web site at www.blm.gov/grazing. We received about 18,000 comment letters and electronic communications. Most of the comments were form letters or emails. An exact count of the comments is not available because of the large amount of duplication among the comments due to individuals or entities submitting identical comments multiple times or via different media. We did not attempt to keep track of all the duplications, although we observed many. You may view comment letters, including scanned images of faxes and

handwritten letters, on BLM's regulatory comment system accessible at www.blm.gov/nhp/news/regulatory/index.html.

B. Why We Are Amending the Regulations

The grazing regulations are being amended based largely on lessons learned in implementing the 1995 regulations. Other changes are designed to improve clarity, ensure internal consistency, and address the 10th Circuit holding regarding "conservation use" permits.

Many changes have been made in livestock grazing management and practices to improve the health of the public rangelands since the passage of the TGA in 1934 and FLPMA in 1976. The final rule recognizes the many benefits of livestock grazing on public lands, including its social and economic contributions to rural communities and its preservation of open space in the rapidly growing West, as well as the importance of maintaining healthy rangelands and wildlife habitat.

When we developed this final rule, we considered whether the changes facilitated improving working relations with grazing permittees and lessees, protecting the health of rangelands, or increasing administrative efficiency and effectiveness. The changes in the final rule enhance BLM's ability to accomplish each of these objectives.

The major changes in the final rule are listed below by objective.

Improving Working Relations with Grazing Permittees and Lessees

- Require BLM to follow a consistent approach in analyzing and documenting the relevant social, economic, and cultural effects of proposed changes in grazing preference and incorporate such analyses into appropriate National Environmental Policy Act (NEPA) documents.
- Require phase-in of changes in grazing use of more than 10 percent over a 5-year period, consistent with relevant law.
- Provide for joint ownership of range improvements—changes would allow BLM and a grazing permittee, or other cooperator, to share title to certain structural range improvements, such as fences, wells, or pipelines, if they are constructed under a Cooperative Range Improvement Agreement.
- Require BLM to cooperate with Tribal, state, county, and local government-established grazing boards in reviewing range improvements and allotment management plans on public lands.

Protecting the Health of Rangelands

- Remove the 3-consecutive-year limit on temporary nonuse of a grazing permit but continue to require BLM to review nonuse annually to make sure it is still necessary, whether for resource conservation, enhancement, or protection, or for personal or business purposes.
- Provide that a standards assessment will be used by the authorized officer to gauge whether rangeland is failing to achieve standards or that management

practices do not conform to the guidelines, and where assessments indicate failure to achieve standards or to conform with guidelines, require BLM to use existing or new monitoring data to identify the factors that significantly contribute to failing to achieve standards or conform with guidelines.

- Provide additional time after a determination that grazing practices or levels of use are significant factors in failing to achieve standards and conform to guidelines for BLM to formulate, propose, and analyze actions; to comply with all applicable laws; and to complete all consultation, cooperation, and coordination requirements before reaching a final decision on appropriate actions.

Increasing Administrative Efficiency and Effectiveness

- Eliminate the "conservation use" permit regulatory provisions to comply with the Tenth Circuit Court of Appeals decision in Public Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999), aff'd on other grounds, 529 U.S. 728 (2000).
- Expand the definition of "grazing preference" to include an amount of forage on public lands attached to a rancher's private base property, which can be land or water. This expanded definition, similar to one that existed from 1978 to 1995, makes clear that grazing preference has a quantitative meaning (forage amounts, measured in Animal Unit Months (AUMs)) as well as a qualitative one (priority of position "in line" for grazing privileges).
- Modify the definition of "interested public" to ensure that only those individuals and organizations who actually participate in the process are maintained on the list of interested publics. (The regulations with respect to the interested public are

also revised to improve efficiency in BLM's management of public lands grazing by reducing the occasions in which the Bureau is required to involve the interested public. Under this provision, BLM could involve the public in such matters as day-to-day grazing administration, but would no longer be required to do so. BLM would continue to require consultation, cooperation, and coordination with the interested public in grazing planning activities such as allotment management planning or range improvement project or program planning.)

- Provide flexibility to the Federal government in decisions relating to livestock water rights by removing the requirement that, if BLM acquires water rights for livestock watering on public land under state law, BLM must acquire, perfect, maintain, and administer those water rights in the name of the United States where allowed by State law.
- Clarify that an applicant for a new permit or lease will be deemed to have a record of satisfactory performance when the applicant has not had any Federal or state grazing permit or lease canceled, in whole or in part, for violation of the permit or lease within the 36 calendar months immediately preceding the date of application, and a court of competent jurisdiction has not barred the applicant or an affiliate from holding a Federal grazing permit or lease.
- Clarify what is meant by “temporary changes in grazing use within the terms and conditions of permits and lease." Under the 1995 regulations, BLM can approve temporary changes in grazing use within the terms and conditions of a permit or lease. The final rule clarifies that "temporary changes in grazing use within the

terms and conditions" means temporary changes to livestock number, period of use, or both, that would result in nonuse or in grazing use where forage removal does not exceed the amount of active use specified in the permit or lease, and such grazing use occurs not earlier than 14 days before the begin date specified on the permit or lease and not later than 14 days after the end date specified on the permit or lease, unless otherwise specified in the appropriate allotment management plan.

- Increase certain service charges to reflect more accurately the cost of grazing administration.
- Clarify that if a permittee or lessee is convicted of violating a Federal or state law or regulation, and if the violation occurs while he is engaged in grazing-related activities, BLM may take action against his grazing permit or lease only if the violation occurred on the BLM-managed allotment where the permittee or lessee is authorized to graze.
- Provide the authority for BLM to issue an immediately effective decision on non-renewable grazing permits or leases or on applications for grazing use on designated ephemeral or annual rangelands. Under the final rule, if a stay on an appeal of such a decision is granted, the decision would be inoperative and, if appropriate considering the specific stay, the livestock may have to be removed from the allotment.
- Clarify how BLM will authorize grazing when the Office of Hearings and Appeals (OHA) stays all or part of a BLM grazing decision affecting a permit or lease. Such decisions may:

- cancel, suspend or change terms and conditions of a permit or lease during its current term,
- renew a permit or lease, or
- grant or deny a permit or lease to a preference transferee.

Under the final rule, if OHA stays all or part of such a decision, then BLM will, with respect to any stayed portions of the decision, authorize grazing use on the allotment(s) or portions of the allotment(s) in question pursuant to terms or conditions that are the same as the permit or lease that immediately preceded BLM's decision, subject to any other provisions of the stay order.

- Clarify that a biological assessment or biological evaluation, prepared in compliance with the Endangered Species Act (ESA), is not a decision and therefore is not subject to protest or appeal.
- Provide that the primary function of the fundamentals of rangeland health is to describe land condition goals and to guide development of the Standards and Guidelines that must be implemented to ensure that the conditions described by the fundamentals of rangeland health exist.

The reasons for the changes in the final rule are described in the Record of Decision in Part III of this preamble.

C. Rules of construction: words and phrases.

For simplicity and to make the rule easier to read and understand we use words that signify the singular to include and apply to the plural and vice versa as provided in

43 CFR 1810.1. Words that signify the masculine gender also include the feminine. Words used in the present tense also apply to the future. The terms "BLM" and "authorized officer" are used interchangeably and include any person authorized by law or by lawful delegation of authority to perform the duties described in this final rule.

II. Changes Made Since the Proposed Rule

This part of the preamble describes briefly the changes we made since the proposed rule as a result of comments and our own review. A reader who is interested in a quick overview of the changes we made between the proposed and final rules may find this part useful. However, if you are looking for a detailed description of all the final rule changes from the existing regulations, you should look at the section-by-section analysis which appears later in this preamble.

Section 4100.0-5 Definitions.

We changed the definition section in several respects in the final rule.

"Active use." In this definition, we have substituted the word "livestock" for "rangeland" in the reference to carrying capacity. The change makes the definition consistent with all other references to "carrying capacity" in the rule.

"District." We have amended the definition for the term "District" to update the regulations as to the organization of BLM field offices.

"Ephemeral rangelands." We have revised the definition for this term by removing the misstatement that production of sufficient forage by ephemeral range was necessarily unusual.

"Interested public." We amended this section to make it clear that, in a request to be considered a member of the interested public, a person must identify the specific allotments in which the person or entity is interested. We also added language providing that when members of the interested public submit comments or otherwise participates, they must address the management of a specific allotment.

Subpart 4110 – Qualifications and Preference

Section 4110.2-3 Transfer of grazing preference.

In the final rule we amended this section to make it clear that a transfer application must show the base property and the grazing preference attached to that base property.

We also removed the phrase "if the applicant leases the base property" from the second sentence of paragraph (c), and removed the third sentence entirely. This will clarify that anyone with an interest in the base property, not just an owner who is leasing the property to the preference holder, must provide written consent before a preference

transfer can take place. The third sentence addressed a situation unique to the historical origins of grazing preference that is no longer applicable.

Section 4110.3 Changes in grazing preference.

We amended paragraph (a)(2) of section 4110.3 to make it clear that BLM can make changes in grazing preference to assist in making progress toward restoring ecosystems to properly functioning conditions. We also amended paragraph (c) to make it clear that the analysis of social, economic, and cultural factors that BLM will perform before changing preference will be under NEPA (42 U.S.C. 4332).

Section 4110.3-1 Increasing active use.

In the final rule we have added language in the introductory text of section 4110.3-1 to make it clear that decisions increasing active use are also based on monitoring or documented field observations, just as decisions decreasing active use must be. Changes in preference, whether increases or decreases, already must be supported by monitoring or documented field observations.

We have also amended paragraphs (a) and (b) to make it clear that BLM must determine that additional forage is available for livestock, as opposed to other consumption or use, before we can authorize livestock grazing use of it on a temporary or sustained-yield basis.

Section 4110.3-3 Implementing changes in active use.

We amended section 4110.3-3 in the final rule in 3 respects:

• We changed “shall” to “will” in paragraph (b)(1) to reflect standard usage in BLM regulations. This change has no practical effect on the obligatory nature of the provision.

• We added the word “or” in paragraph (b)(1)(i) as a grammatical correction.

• We corrected a cross-reference in paragraph (b)(ii).

Section 4120.2 Allotment management plans and resource activity plans.

In section 4120.2(c), we changed “shall” to “will” to reflect standard usage in BLM regulations. This change has no practical effect on the obligatory nature of the provision.

Section 4120.3-1 Conditions for range improvements.

In section 4120.3-1(f), we changed “shall” to “will” to reflect standard usage in BLM regulations. This change has no practical effect on the obligatory nature of the provision.

Section 4120.3-2 Cooperative range improvement agreements.

We further amended paragraph (b) by adding the word "will" to make it clear that shared ownership of range improvements is not merely descriptive but regulatory and prospective.

Section 4120.3-3 Range improvement permits.

We have revised paragraph (c) of section 4120.3-3 for purposes of clarification. The language in the existing text is unnecessarily convoluted and confusing. The point of the paragraph is to set the stage for what this part of the regulations is really about: if BLM lets a third party graze on your allotment, how do we address the use and maintenance of range improvements occurring on that allotment? We also removed a reference to conservation use.

Section 4120.5-2 Cooperation with Tribal, state, county, and Federal agencies.

In the final rule, we have amended the introductory text and added paragraph (c) of section 4120.5-2 to add Tribal grazing boards to the list of entities with which we will cooperate, and to make it clear that BLM is formally required to cooperate only with Tribal, state, county, or local grazing boards that are established under Tribal or government authority, as opposed to private organizations that might assume the title "grazing board." We also added "Tribal agencies" to the section heading and to the general provisions on cooperation.

Section 4130.1-1 Filing applications.

We further amended paragraph (b) of section 4130.1-1 to correct an unintentional flaw, in that the paragraph seemed to refer to renewal of new permits. We are also making it clear in paragraph (b)(2) that the section refers to permits and leases that authorize use of new or transferred preference.

Section 4130.3 Terms and conditions.

In the final rule, we amended proposed section 4130.3 by removing paragraphs (b)(1) and (b)(2) in response to comments. Paragraph (b)(1) referenced terms and conditions that are not subject to review by OHA, and identified terms and conditions derived from biological opinions as an example. Paragraph (b)(2) restricted the right of appeal and protest where it was not necessary to do so. We also amended paragraph (c) to make clear how BLM would authorize grazing if BLM made numerous changes in terms and conditions of a permit or lease, and upon an appellant's petition, OHA stayed only one or a portion of them. In this circumstance, BLM would authorize use, with respect to the stayed terms and conditions, according the comparable terms and conditions that were in effect prior to BLM's decision to change them in combination with the changed terms and conditions that were not stayed by OHA.

Section 4130.3-2 Other terms and conditions.

In the proposed rule, we amended section 4130.3-2 by removing paragraph (h), which provides that the authorized officer may include in permit and lease terms and conditions a statement disclosing the requirement that permittees and lessees shall provide administrative access across private and leased lands if it is necessary for the

orderly management and protection of public lands. In response to public comments, we have restored paragraph (h) in this final rule. (We did this by removing the amendatory text that appeared in the proposed rule directing the removal of paragraph (h). Thus, although the regulatory text in this final rule contains no mention of section 4130.3-2, the effect of the final rule is to leave paragraph (h) intact.)

Section 4130.3-3 Modification of permits or leases.

We removed the words "biological assessments or biological evaluations prepared under the Endangered Species Act, and other" from section 4130.3-3(b), because it is unnecessary to highlight biological assessments and biological evaluations as examples of reports during the preparation of which BLM seeks input from affected permittees, lessees, states, and the interested public. We added the word "otherwise" in paragraph (b) because increasing or decreasing grazing use is a change in terms and conditions of a grazing permit or lease. Without the word, the paragraph seems to read that such an increase or decrease is not a change in terms and conditions.

Section 4130.4 Authorization of temporary changes in grazing use within the terms and conditions of permits and leases, including temporary nonuse.

In the final rule, we added "temporary nonuse" to the heading of section 4130.4 as a convenience to readers. We also removed language in paragraph (a) of the section listing reasons for allowing temporary changes in grazing use within the terms and conditions of the grazing authorization.

We have amended paragraph (d)(2) of section 4130.4 of the proposed rule, which becomes paragraph (e)(2) in the final rule, by changing the word "will" to "may" in order to avoid an interpretation of this provision that BLM has no discretion to deny temporary nonuse.

We also amended paragraph (f) of the proposed rule, which becomes paragraph (g) in the final rule, to provide that permittees or lessees "must" apply if they need temporary changes in grazing use. The proposed rule stated that they "should" apply. The final rule also makes it clear that such an application must be in writing.

We amended paragraph (b) to recognize that the same application may cover both temporary nonuse and removal of forage either before the begin date or after the end date, and to allow such changes that conform to flexibility limits specified in an allotment management plan under § 4120.2(a)(3) despite the 14 day limit.

Finally, we reordered the paragraphs in the section more logically, redesignating paragraph (a)(2) as (c) and adjusting the succeeding paragraph designations accordingly, and made editorial changes for purposes of clarity.

Section 4130.6-2 Nonrenewable grazing permits and leases.

In the final rule, we redesignated the proposed text as paragraph (a) and added a new paragraph (b) allowing BLM to make a decision issuing a nonrenewable grazing

permit or lease, or affecting an application for grazing use on annual or designated ephemeral rangelands, effective immediately or on a date established in the decision.

For purposes of clarity and ease of usage, in the final rule we have amended the first sentence of section 4130.6-2(a) by adding a cross-reference to section 4110.3-1(a), which provides for the disposition of additional forage temporarily available.

Section 4130.8-1 Payment of fees.

In the final rule we further amended paragraph (h) of section 4130.8-1 to make it clear that failure to make payment within 30 days is a violation of a prohibited act in section 4140.1 and may result in enforcement action.

Section 4130.8-3 Service charges.

In the final rule we added language to paragraph (a) of section 4130.8-3 providing that BLM will adjust the service charges periodically as costs change, and publish notice thereof in the Federal Register, and revised paragraphs (a) and (b) for clarity. We also restored supplemental grazing fee billings to the list of services for which BLM imposes a service charge.

Section 4140.1 Acts prohibited on public lands.

In the final rule we made an editorial change in section 4140.1(a)(2) for purposes of clarity, and corrected a typographical error in section 4140.1(c)(3)(ii).

Section 4150.2 Notice and order to remove.

In the final rule we corrected an erroneous cross-reference in paragraph (d).

Section 4150.3 Settlement.

In the final rule, we amended new paragraph (f) of section 4150.3 to make it clear that "this part" refers to all of part 4100 and that grazing will continue pending completion of the administrative appeal process, as opposed to resolution of judicial appeals.

Section 4160.1 Proposed decisions.

In the final rule, we added necessary cross-references to paragraph (c) of section 4160.1, which was not amended in the proposed rule. These additions conform the paragraph to the addition of section 4130.6-2(b) in this rule, and the addition of section 4190.1(a) in a previous final rule (68 FR 33804, June 5, 2003).

Section 4160.3 Final decisions.

In the final rule, we also added necessary cross-references to paragraph (c) of section 4160.3 to conform the paragraph to the addition of section 4130.6-2(b) in this rule, and the addition of section 4190.1(a) in a previous final rule (68 FR 33804, June 5, 2003).

Section 4160.4 Appeals.

In response to comments by OHA and others, we have removed paragraph 4160.4(c) in the final rule, and simplified paragraph (b). We have revised paragraphs 4160.4(b)(1), (2), and (3) to clarify that, when OHA stays all or part of a decision modifying or renewing a grazing permit or lease, or a decision offering or denying a permit or lease to a preference transferee, grazing may proceed, with respect to the portions of the decision that were stayed, under comparable terms and conditions of the permit or lease that immediately preceded the decision that was stayed, subject to any relevant provisions of the stay order.

Section 4180.1 Fundamentals of rangeland health.

We have removed the language from the introductory text of this section that requires BLM to modify grazing management to ensure that the conditions described by the fundamentals of rangeland health exist only where standards and guidelines have not been established under section 4180.2, and added in its place a characterization of the purpose of the fundamentals of rangeland health.

We have also amended paragraph (d) of section 4180.1 to remove the reference to "at-risk" species.

Section 4180.2 Standards and guidelines for grazing administration.

As in section 4180.1, in section 4180.2 also we have removed references to "at-risk" species in paragraphs (d)(4), (e)(9) and (f)(2)(viii). We also changed "or" to "and" before the phrase "other special status species" in (d)(4).

We have added language in section 4180.2(b) allowing BLM to extend the deadline for making a decision following a determination when legally required processes that are the responsibility of another agency prevent completion within 24 months.

Finally, we made procedural changes in paragraph (c) to provide that if a standards assessment indicates to the authorized officer that the rangeland is failing to achieve standards or that management practices do not conform to the guidelines, then the authorized officer will use existing or new monitoring data to identify the significant factors that contribute to failing to achieve the standards or to conform with the guidelines.

III. Record of Decision under the National Environmental Policy Act

This preamble constitutes BLM's record of decision, as required under the Council on Environmental Quality regulations at 40 CFR 1505.2. The decision is based on the proposed action and alternatives presented in the Final Environmental Impact Statement, "Revisions to Grazing Regulations for the Public Lands."

A. Decisions

After considering all relevant issues, alternatives, potential impacts, and management constraints, BLM selects the Proposed Action, Alternative 2, in the Final EIS for implementation. Alternative 2 changes the existing grazing regulations in several areas as follows:

- A new provision requiring BLM to analyze and, if appropriate, document the relevant social, economic, and cultural effects as part of the NEPA analysis of proposed actions to change grazing preference;
- An amendment providing that, generally, changes in active use greater than 10 percent will be phased in over 5 years consistent with existing law;
- An amendment providing for proportional sharing of title to permanent range improvements between BLM and a cooperator, based on initial contribution to construction and installation;
- A new provision for cooperation with Tribal, state, county or local government-established grazing boards in reviewing range improvements and allotment management plans on public land;
- An amendment removing the 3-consecutive-year limit on temporary nonuse and substituting a provision for annual review of temporary nonuse.
- An amendment making BLM's finding that existing grazing management practices or levels of grazing use on public lands are significant factors in failing to achieve range health standards or conform with grazing management guidelines a two-step process. The authorized officer will use a standards assessment to gauge whether rangeland is failing to achieve standards or management practices do not conform to the

guidelines, and, if this is the case, he will use existing or new monitoring data to identify the significant factors contributing to not meeting standards or conforming with guidelines.

- An amendment providing BLM up to 24 months after making a determination that grazing practices or levels of use are significant factors in failure to achieve standards or conform to guidelines, (1) to formulate, propose, and analyze appropriate action, (2) to comply with all applicable laws, and (3) to complete all consultation, cooperation, and coordination requirements before reaching a final decision on the appropriate action. The amendment allows for additional time beyond 24 months if necessary to meet legal obligations that are the responsibility of another agency.
- An amendment removing the provision that requires BLM to modify grazing management to ensure that the conditions described by the fundamentals of rangeland health exist. This amendment recognizes that BLM relies on evaluation of achievement of the standards of rangeland health and conformance with grazing management guidelines to determine whether grazing management needs to be modified in order to achieve the general descriptions of land health described by the Fundamentals.
- Amendments removing "conservation use" permit regulatory provisions throughout the grazing regulations in accordance with Public Lands Council v. Babbitt, supra;
- An amendment revising the definition of "grazing preference" to mean, in addition to a priority position against others for the purpose of receiving a permit or lease, the total number of AUMs on public lands apportioned and attached to base property owned or controlled by a permittee, a lessee, or an applicant for a permit or lease.

Grazing preference includes active use and use held in suspension. Related to this change, we also removed the definition of "permitted use" from the regulations;

- Amendments revising the definition and role of the "interested public" to ensure that only those individuals and organizations who actually participate in the process are maintained on the list of interested publics, and to improve efficiency by reducing the occasions in which BLM is mandated to involve the interested public;
- An amendment removing the requirement that, if livestock water rights are acquired under state law, they must be acquired, perfected, and maintained in the name of the United States;
- An amendment clarifying the criteria that BLM considers when determining whether an applicant for a new permit or lease or a transfer of grazing preference has a satisfactory record of performance;
- An amendment defining the meaning of "temporary changes in grazing use within the terms and conditions of the permit or lease" and describing when and how BLM authorizes temporary changes in grazing use;
- An amendment raising service charges for a crossing permit, transfer of preference, and cancellation and replacement of a grazing fee billing;
- An amendment limiting the applicability of certain prohibited acts to those allotments where the permittee or lessee is authorized to graze;
- An amendment providing authority for BLM to issue immediately effective decisions on nonrenewable grazing permits or leases or on decisions affecting applications for grazing use on designated ephemeral or annual rangelands;

- An amendment clarifying the effect of an administrative stay on a decision to modify or renew a grazing permit or lease, or a decision to offer or deny a permit or lease to a preference transferee; and
- An amendment clarifying that a biological assessment or evaluation prepared for a Section 7 consultation under the ESA is not a decision for purposes of protest or appeal.

Additional amendments are also effected by this decision. They are identified in the Preamble, Part V. Section-by-Section Analysis and Response to Comments, as well as in the regulatory text in this final rule.

One comment on the DEIS stated that BLM "subverted" the NEPA process by issuing the DEIS after the proposed rule was published and rewriting an earlier draft.

We discuss this comment in detail under Response to General Comments, General Opposition, section IV.C. of this preamble.

B. Alternatives considered

BLM considered three alternatives in the EIS to address issues that were raised by the public during the EIS scoping period and issues that surfaced during implementation of the 1995 regulations. Alternatives were developed for 18 issues and combined. As stated in the EIS, the regulatory changes are narrow in scope, do not include changes in grazing fees or 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. The changes that are analyzed address specific issues and concerns that have come to BLM's attention. These issues and concerns came to the fore as areas where BLM could improve working relations with permittees and lessees, protect the health of the rangelands, and improve administrative efficiency and effectiveness, including resolution of legal issues. The alternatives included Alternative 1, the required "no action" alternative, which would have retained the 1995 regulations, Alternative 2, the proposed action alternative, and Alternative 3, the modified action alternative.

The following is a brief description of the alternatives:

Alternative 1, No Action - This alternative would not have changed the regulations. Its consideration is required under NEPA.

Alternative 2, Proposed Final Regulations - This alternative is BLM's proposed action and the agency's "preferred alternative." We modified the alternative between the draft and final EIS in response to public comments. This alternative represents BLM's preferred regulatory approach after the agency considered the results of public scoping and comments on the December 2003 proposed rule.

Alternative 3 – Modified Action Alternative - This alternative differs from the preferred alternative in several respects:

- The 5-year phase-in of changes in use greater than 10 percent would have been discretionary rather than mandatory,
- Temporary nonuse would have been limited to 5 years rather than the current limit of 3 years,
- BLM would not have been required to use both assessments and monitoring as bases for determinations of rangeland health,
- Prohibited acts would have included failure to use certified weed seed free forage, grain, straw or mulch when required by BLM,
- The third category of prohibited acts, which pertain to violations of certain Federal or state laws or regulations, would have been removed from the regulations.

C. Environmentally preferable alternative

The Council on Environmental Quality's regulations for implementing NEPA (40 CFR 1505.2(b)) require that the Record of Decision specify the environmentally preferable alternative.

We determined the environmentally preferable alternative to be the Proposed Action (Alternative 2). The Proposed Action provides for the beneficial use of the public lands for livestock grazing while maintaining and improving the health of the land. The reasons why we determined the Proposed Action to be environmentally preferable to each of the alternatives are listed below.

The Proposed Action may result in more short-term adverse impacts in some areas than under the No Action alternative. However, it is expected to result in more beneficial long-term impacts than either the No Action alternative or the Modified Action Alternative (Alternative 3).

We determined that the Proposed Action is environmentally preferable to the No Action alternative for the following reasons:

- Under the Proposed Action a standards assessment will be used by the authorized officer to assess whether rangeland is failing to achieve standards or that management practices do not conform to the guidelines. BLM will use standards assessment and existing or new monitoring data to identify significant contributing factors in failing to achieve standards or conform with guidelines. The No Action alternative does not require monitoring. Use of monitoring data will enable more rigorous scientific analyses. As a result changes in range management actions will be more effective and decisions to increase or decrease active use will be more sustainable and less vulnerable to appeal.
- The Proposed Action allows up to 24 months (or longer if necessary to accommodate legally-required processes of another agency) following a determination on rangeland standards for BLM to formulate, propose, and analyze the appropriate action. This will allow BLM to complete required analyses and consultations, and provide additional time to collaborate with the permittee/lessee to examine alternatives and select the best solution for a sustainable decision with

more acceptance from the permittee/lessee and more effective action to change grazing management to improve resource conditions. We expect the added collaboration to result in decisions that are less likely to be appealed. This will also allow more time to complete any necessary NEPA analysis and to ensure compliance with all applicable and relevant laws and regulations. BLM believes that adoption of the proposed rule will lead to improved land conditions in the long-term as indicated in the analysis in section 4.5 of the Addendum to the EIS. That analysis states that some adverse impacts are unavoidable, but in the long-term better and more sustainable decisions would be developed by using monitoring.

- The 5-year phase-in of reductions in active use of greater than 10 percent (which will likely be required on only a small percentage of allotments, as explained in detail in part III.D.3. of this preamble) may result in short-term adverse impacts to natural resources on some allotments. A phase-in period would avoid the adverse impacts of sudden herd size reductions on permittees/lessees. The ability of BLM to use the phase-in period helps BLM and the permittee/lessee to work collaboratively to ensure the appropriate changes in range management practices on a timely basis, while still retaining authority to implement changes on a faster time schedule if necessary to address ESA or other resource concerns.
- The provision for shared ownership in range improvements under the Proposed Action is expected to encourage investment in such projects by cooperators and result in improvements in resource condition.

- The Proposed Action has no limit on the number of years of nonuse that can be taken on an allotment. The No Action alternative has a 3 consecutive year limit on nonuse. The removal of the limit under the Proposed Action improves cooperation with the permittee/lessee when nonuse is the best management practice to benefit resource conditions, e.g., to remedy damage caused by fire, flood, drought, etc. BLM would be able to authorize nonuse on an annual basis for resource conservation, enhancement, or protection. The availability of nonuse as an easy-to-implement, collaborative option should result in more rapid recovery in damaged areas and more rapid progress toward meeting resource condition objectives. Further, it is a simpler process to approve an application for nonuse than it is to impose a formal suspension, thereby improving management efficiency in those cases where all involved parties agree that nonuse is warranted.
- The Proposed Action removes requirements that BLM consult with the interested public on day-to-day grazing matters, and requires that BLM provide opportunities for the interested public to participate in the decision-making process when the focus is on planning or on the preparation of reports that evaluate data that are used in grazing decisions. Less stringent requirements for public participation requirements in routine grazing management matters and excising non-participating interested publics from the list of those who it attempts to consult will free up BLM resources for more effective-management to benefit the natural environment.

- The Proposed Action removes the requirement that on Federal land BLM seek livestock watering water rights in the name of the United States to the extent allowed by State law, and thus provides BLM additional flexibility for cooperative development of water projects that will benefit livestock grazing management and wildlife.
- The Proposed Action removes the provision that directs BLM to take action to remedy improper grazing practices when the authorized officer determines that existing livestock grazing management needs to be changed to achieve the conditions described in the fundamentals of rangeland health, and makes it clear that standards evaluation and conformance determination will be the benchmark by which we determine the need to adjust grazing management. It retains the requirement that standards and guidelines developed by BLM State Directors be consistent with the Fundamentals. The resulting improved efficiency in implementing our rangeland health improvement processes will benefit the environment.

We determined that the Proposed Action is environmentally preferable to Alternative 3 (Modified Action) for the following reasons:

- Under the Proposed Action a standards assessment will be used by the authorized officer to gauge whether rangeland is failing to achieve standards or that management practices do not conform to the guidelines. BLM will use standards assessment and existing or new monitoring data to identify significant contributing factors in failing to achieve standards or conform with guidelines.

Under Alternative 3, monitoring is discretionary. Consequently, some rangeland health determinations would not be as rigorously developed as under the proposed action. Using existing or new monitoring data will lead to more scientifically sound analyses. As a result, changes in range management actions will be more effective, and decisions to increase or decrease active use should be less vulnerable to appeal.

- The Proposed Action has no limit on the number of years of nonuse that can be taken on an allotment. The Modified Action Alternative, Alternative 3, has a 5 consecutive year limit on nonuse. The removal of the limit under the Proposed Action enhances cooperation with the permittee/lessee when nonuse is the best management practice to benefit resource conditions, e.g., to remedy damage caused by fire, flood, drought, etc. BLM would be able to authorize nonuse on an annual basis for resource conservation, enhancement, or protection. The availability of nonuse as an option should result in more rapid recovery in damaged areas and more progress toward meeting resource objectives.
- Under the Proposed Action, BLM may impose civil penalties on a permittee/lessee (e.g., canceling his grazing permits) if he is convicted of violating certain specific Federal or state environmental and cultural laws. Alternative 3 would eliminate the potential civil penalty for a permittee/lessee because such an action is not included under "prohibited acts" under Alternative 3.
- Alternative 3 includes failing to use weed seed-free forage products (when required by the Authorized Officer) as a "prohibited act," and the Proposed

Action does not include it as a prohibited act. While a weed-seed free forage provision would be more environmentally desirable, due to the lack of state weed seed-free forage laws in some western states, BLM has decided to work with each state in its efforts to develop a law, and will pursue enforcement of weed seed-free forage on public lands through a subsequent, separate rulemaking.

D. Decision rationale

During the years that BLM has been working with the 1995 grazing regulations, we recognized several areas where BLM could benefit from amending the 1995 regulations. Based on the analysis in the EIS (including the Revisions and Errata document issued June 17, 2005, and the Addendum to the FEIS, published March 31, 2006), which analyzes three alternatives for amending the regulations, and a review of public comments, we selected Alternative 2 (Proposed Action).

BLM provided opportunities for public involvement throughout the process of preparing the EIS and the publication of the Advanced Notice of Proposed Rulemaking and the proposed rule in the Federal Register. We considered all public comments, both oral and written. We made changes in the final rule and EIS as a result of public comment and further review.

The Congressionally mandated purposes for managing BLM-administered lands (public lands) include both conserving the ecosystems upon which species depend and providing raw materials and other resources that are needed to sustain the health and

economic well-being of the people of this Nation. To balance these sometimes conflicting purposes, we selected the alternative that will reduce confusion that has been evident over recent years, increase clarity, enhance administrative effectiveness, and provide for grazing use while maintaining the health of the land. FLPMA clearly states that the Nation's public lands are to be managed on the basis of multiple use and sustained yield principles. FLPMA defines BLM's mission to include livestock grazing as one of many uses of public lands. However, FLPMA does not identify where livestock grazing will occur and how livestock grazing operations will be conducted. Those decisions are made during the preparation of land use plans and more site-specific decisions, such as allotment management plans, and through issuance of grazing permits and leases. These regulations provide the framework for managing livestock grazing where BLM has determined it to be an appropriate use under multiple use principles. The regulations provide for including all practical means to avoid or minimize environmental harm in implementing BLM's livestock grazing program and future decisions under these regulations within the context of BLM's multiple use and sustained yield mission under FLPMA.

The reasons for selecting Alternative 2 are that it—

- best meets the purpose of and need for the action, as described in the EIS;
- amends portions of the 1995 regulations and retains the emphasis on BLM's rangeland management objectives and the 1995 regulations to maintain and improve the health of the land;
- builds on the relationships between BLM and livestock permittees and lessees;

- makes changes in the 1995 regulations needed to comply with court decisions;
- clarifies certain provisions in the 1995 regulations that have been found to be unclear;
- is consistent with statutory requirements and national policy; and
- is the environmentally preferable alternative for the reasons described in the Environmentally Preferable Alternative section of this Record of Decision.

A specific rationale for the selection of each major regulatory amendment is discussed below. Rationale for other changes in the regulations appears in Part V of this Preamble under Section by Section Analysis and Response to Comments.

1. Analysis and documentation of social, economic and cultural effects

The final rule amends paragraph (c) of section 4110.3 on changes in grazing preference to provide that BLM will analyze and, if appropriate, document the relevant social, economic, and cultural effects of a proposed action. This will improve consistency when BLM documents its consideration of social, economic, and cultural effects of certain grazing decisions, thereby improving working relations with permittees and lessees.

Generally, BLM managers consider the possible effects of their decisions through the NEPA process. NEPA requires the analysis of social, economic, and cultural effects of proposed actions. However, the current grazing regulations are silent on the issue.

The preferred alternative adds a new provision requiring BLM to analyze and, if appropriate, document the relevant social, economic, and cultural effects of a proposed action before changing grazing preference. This will ensure a consistent approach to the decisionmaking process for those most directly affected by a decision to change grazing preference. We did not select Alternative 1, the continuation of the current regulations, because the regulations would remain silent on this issue and potentially foster inconsistent consideration of the social, economic, or cultural effects of changing preference. Alternative 3 does not differ from the preferred alternative.

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2. Phase-in of changes in active use of more than 10 percent

The final rule amends section 4110.3-3 on implementing changes in active use by providing for a 5 year phase-in of changes in active use when that change exceeds 10 percent. The rule provides that changes may be implemented in less than 5 years by agreement between BLM and the permittee or lessee. The preferred alternative gives BLM sufficient discretion to handle a wide range of circumstances when changing active use, while giving permittees and lessees additional time to make changes in their overall business operations. Changes in active use exceeding 10 percent are infrequent, but may create significant disruptions for an individual permittee or lessee when they do occur. On the other hand, as we have stated elsewhere in this preamble, if conditions are such that phasing in changes exceeding 10 percent would not prevent significant resource damage, or if conditions such as drought, fire, flood, or insect infestation require that resources be protected immediately, BLM can close allotments or portions of allotments under section 4110.3-3(b).

The 1995 regulation amendments deleted the then existing provisions regarding the timing of implementation of decisions to change grazing use. In some instances, this lack of guidance has led to decisions for full implementation of grazing reductions in a single season, resulting in disruptions of ranching enterprises.

The preferred alternative provides that BLM will implement changes in active use in excess of 10 percent over a 5-year period unless (1) an agreement with the affected permittee or lessee is reached to implement the change within a shorter period of time, or (2) the changes must be made before 5 years have passed in order to comply with applicable law. Prior to 1995, the regulations provided for a 5-year implementation period that proved to be a practical interval for implementing changes. The phase-in should help permittees and lessees to avoid sudden adverse economic effects resulting from a reduction by allowing time to plan livestock management changes such as in herd size. The total number of allotments affected by the preferred 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 the EIS. Most of these adjustments have been made in the season of use, or in movement and control of livestock, rather than in active use. Finally, the rule retains provisions 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.

We did not select Alternative 1, the continuation of existing regulations, because the 1995 regulations were silent regarding the timing of implementation of decisions to change grazing use. If, for example, a permittee or lessee challenged full implementation of a grazing reduction, appealed the decision, and was granted a stay of the decision by IBLA, then implementation of the grazing decision would be delayed. Until the appeal is resolved, grazing would continue at greater levels than are desirable, and delaying implementation of necessary changes. The ability to phase in changes may help avoid appeals and stays, thus improving administrative efficiency.

We did not select Alternative 3, which would have made the 5-year phase-in discretionary, because we felt that additional discretion was not warranted when considering the small number of allotments that would be affected. Since the rule retains provisions for immediate, full implementation of a decision to adjust grazing use, we believe the provision for phase-in of changes, coupled with the resulting improved cooperation with permittees and lessees, will result in greater efficiency and improved resource conditions in the long-term.

3. Sharing title to permanent range improvements

The final rule amends section 4120.3-2 on cooperative range improvement agreements by providing for shared title of permanent range improvements. Sharing title between cooperators and BLM allows operators to maintain some asset value for investments made, improving working relationships and encouraging private investment in range improvements.

In 1995, the regulations were revised to provide that permittees and lessees do not share title with the United States. BLM's data indicate that construction of range improvements has declined since that rule change. The 1995 rule change is one among several factors that may have contributed to the decline. The preferred alternative provides that BLM and cooperators share title to permanent structural range improvements in proportion to their contribution to on-the-ground project development and construction costs.

Private investment in range improvements may lead to better overall watershed conditions and improved wildlife habitat. BLM believes this will be the case because allowing shared title to range improvements provides an opportunity for permittees and lessees to document investment in their business enterprises, which is useful for securing business capital and demonstrating the value of their overall private investment in public and private lands. 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. Most existing and, since 1995, all new permanent structural range improvements are implemented through Cooperative Range Improvement Agreements that include provisions to protect the interest of the United States in its lands and resources and ensure BLM's management flexibility on public lands.

We did not select Alternative 1, which does not allow shared title of range improvements, because it did not contain any incentive for private investment on public lands or recognize the contributions made by permittees and lessees. This lack of recognition of investments may have contributed to the substantial drop in construction of new range improvement projects following the removal of shared title provision in the 1995 rule. Alternative 3 does not differ from the preferred alternative.

4. Cooperation with Tribal, state, county, or local government-established grazing boards

The final rule amends section 4120.5-2 on cooperation with Tribal, state, county, and Federal agencies by adding a requirement to cooperate with Tribal, state, county, or local government-established grazing boards for purposes of reviewing range improvement and allotment management plans. This will improve our cooperative relationship with government-established agencies and boards. The changes also comply with Executive Order 13352 of August 26, 2004 (69 FR 52989), on Facilitation of Cooperative Conservation.

State and local grazing interests had expressed concern that BLM has not used existing established grazing advisory boards effectively. Grazing board review and input, to the extent consistent with the applicable laws of the United States, will help us consider how to apply land management practices and spend range improvement funds. Cooperation with grazing boards, where they exist, will benefit BLM land managers because the boards can contribute resource-related information from local subject matter experts, thus increasing our ability to develop appropriate strategies for managing grazing

allotments and developing range improvements. This provision is consistent with section 4120.5-1, which requires cooperation, to the extent appropriate, with all groups and individuals, including Tribal entities, to achieve the objectives of grazing management. These locally established grazing boards, where they exist, would be a valuable tool for gathering additional local input for BLM's decisionmaking processes and would help satisfy the FLPMA Section 401(b)(1) provision that calls for BLM to consult with local user representatives when considering range rehabilitation, protection, and improvement actions.

We did not select Alternative 1, which did not require cooperation with grazing boards, because we want to encourage and institutionalize participation by these grazing boards when we are preparing range improvement or allotment management plans, to ensure a consistent, cooperative approach. Alternative 3 does not differ from the preferred alternative.

5. Removal of temporary nonuse limit

The final rule moves the provisions on temporary nonuse from section 4130.2(g) to section 4130.4 on authorization of temporary changes in grazing use within the terms and conditions of permits and leases including temporary nonuse, and amends this section by removing the 3-consecutive-year limit on temporary nonuse. The agency needs the flexibility to authorize temporary nonuse on an annual basis so that it may adapt its management to the needs of the resources as well as the resource user. This

flexibility will improve working relationships with permittees and lessees and provide another tool to protect the health of rangelands.

Prior to the 1995 regulatory change, a permittee or lessee could apply for temporary nonuse of all or a portion of his active grazing use, and there was no restriction on the number of consecutive years of nonuse. The 1995 rules established provisions for "conservation use," which provided an alternative to annually authorized nonuse and introduced a 3-consecutive-year limit on temporary nonuse. However, a 1999 court ruling determined that BLM did not have authority to issue conservation use permits, resulting in a regulatory framework that limits BLM's authority to approve temporary nonuse to 3 consecutive years.

Temporary nonuse is one of the most efficient means BLM has at its disposal to facilitate nonuse when drought, wildfire, or other episodic events dictate nonuse. The 3-consecutive-year limit on temporary nonuse restricts BLM's ability to respond to resource conservation, enhancement, or protection needs, or the personal or business needs of the permittee or lessee. Even if BLM believes that resources would benefit and would like to approve nonuse, we are prevented from using temporary nonuse after 3 years and forced to use alternative authority. The removal of the limitation on temporary nonuse in the preferred alternative provides regulatory flexibility for responsible and responsive rangeland management.

We did not select Alternative 1 or 3 because they restricted temporary nonuse to 3 or 5 consecutive years, respectively. We believe that there should be no rigid limit on the number of consecutive years of nonuse for reasons of resource conservation, enhancement, or protection (as opposed to nonuse for business or personal reasons). There may be times when nonuse is justified for longer than 5 years, which BLM will determine based on monitoring and standards assessment on a year-to-year basis.

6. Requiring assessment and monitoring for determinations

The final rule amends section 4180.2 on standards and guidelines for grazing administration to provide that BLM will use standards assessment and monitoring data to support a determination that existing grazing management or levels of use are significant factors in the failure to meet standards or conform to guidelines. If a standards assessment indicates to the authorized officer that the rangeland is failing to achieve standards or that management practices do not conform to the guidelines, then he will use relevant monitoring data to identify the significant factors contributing to the failure to achieve the standards or to conform with the guidelines. The preferred alternative will protect the health of the rangeland and improve working relations with permittees and lessees because determinations on the causes of failure to meet a standard will be based on monitoring and assessment data, thus helping to ensure comprehensive and sustainable decisions.

Many members of the public articulated a strong interest in BLM's monitoring program, and expressed concern about the adequacy of data used to support our decisions

and determinations. Some individuals are under the impression that BLM supports determinations with a one-time assessment of rangeland conditions. Current regulations do not specify the methods to be used to analyze and evaluate rangeland conditions. However, guidance exists in policy in BLM Manual Section 4180 and Handbook H-4180-1.

Raising the issue of monitoring from the policy level to the regulatory level will help BLM to focus monitoring efforts in those areas with critical resource issues, as disclosed by standards assessments. Under the preferred 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 or conform with guidelines due to levels of grazing use or management practices. By the end of Fiscal Year 2002, BLM had determined that about 16 percent of the 7,437 allotments evaluated were not meeting land health standards because of existing livestock grazing management. Since these assessments were first focused on areas with known problems, it is reasonable to assume that the proportion of allotments not likely to meet standards because of livestock grazing management practices or levels of use in the future will not exceed 16 percent. Thus, at a maximum, the preferred alternative may require monitoring data to support 16 percent of the future determinations. We expect to have appropriate monitoring data to support a significantly larger proportion of our determinations, regardless of whether or not they involve a finding of failure to meet standards due to livestock grazing. While BLM cannot control the number of appeals or lawsuits resulting from grazing decisions, we

believe ensuring sufficient monitoring will reduce the number of instances where appropriate action is delayed because of protracted administrative and judicial processes.

We did not select Alternative 1 because it left the regulations unchanged, that is, silent on the basis for supporting a determination. We did not select Alternative 3 because it required determinations to be supported by either standards assessments or monitoring, not both. Neither of these alternatives is responsive to the concern about monitoring data, and neither provides the level of assurance desired that critical management decisions would be based on appropriate monitoring data.

7. Time frame for taking actions

The final rule amends sections 4180.1 and 4180.2(c). These sections cover fundamentals of rangeland health, and standards and guidelines for grazing administration, respectively. We have removed the language in section 4180.1 of the proposed rule that would have required, for those areas where state or regional standards and guidelines have not been established and where conditions described by the fundamentals of rangeland health do not currently exist, that BLM modify grazing practices before the start of the next grazing year that follows BLM's completion of mandatory procedural and consultation requirements. However, the fundamentals themselves remain as approved in 1995. Section 4180.2(c) was amended to allow BLM adequate time (up to 24 months) for cooperative formulation, proposal, and analysis of appropriate management actions when we determine that changes in current management are necessary to ensure progress towards achieving standards and conforming with

guidelines. Allowing additional time for this process will help improve the health of rangelands, because cooperatively-developed management actions based on reasoned analysis have a greater likelihood of successful implementation, and yield long-lasting resource benefits.

The preferred alternative for section 4180.1 is Alternative 2 in the EIS. It would have directed the authorized officer to modify grazing management if BLM determined that conditions described by the fundamentals of rangeland health do not currently exist because of current grazing practices, but only where standards and guidelines have not been established. However, as a result of comments and implementation experience, we are adjusting the proposed action to achieve a better reflection of the relationship between the fundamentals and the standards and guidelines. The regulatory provision for adjusting management to ensure progress towards rangeland health would be in section 4180.2 rather than both sections 4180.1 and 4180.2. While BLM still must take appropriate action to remedy grazing management practices that are detrimental to rangeland health, now the final rule allows time for cooperative formulation, proposal, and analysis of appropriate management actions prior to their implementation.

As explained in the 1995 final rule, the "fundamentals will guide BLM in the development of plans for public lands and in the authorization of grazing related activities consistent with the provisions of FLPMA and TGA, that lead toward or maintain healthy sustainable rangelands." 60 FR 9954. The 1995 rule further explained the broad nature of the fundamentals: "[F]undamentals are statements of the conditions

that are representative of healthy rangelands across the West, and as such, are relatively broad….". Id. The fundamentals, therefore, reflect goals that may be incorporated into land use plans. With respect to grazing, the 1995 rule explained specifically that the "State or regional standards and guidelines will be developed under the umbrella of the fundamentals, to provide specific measures of rangeland health and to identify acceptable or best management practices in keeping with the characteristics of a State or region such as climate and landform." Id. In essence, the "overarching principles" set forth in the fundamentals were to be supplemented by standards and guidelines tailored to more local conditions.

Although the 1995 rule established requirements for "appropriate action" when either the fundamentals or established standards and guidelines were not being met due to existing grazing, we believe requiring "appropriate action" in both circumstances is unnecessary and inefficient. Standards and guidelines have been developed in conformance with the fundamentals and adopted for all states and regions except southern California. These standards and guidelines provide the basis for the application of the broadly stated fundamentals to the management of public lands. In southern California, the fallback standards and guidelines provide for the application of the fundamentals to those public lands. This means that, in the California Desert District, the fallback standards and guidelines will be applied until standards and guidelines for the District are developed and approved, so that requiring BLM action under section 4180.1 is unnecessary.

On all other public lands, the standards and guidelines provide specific measures for achieving healthy rangelands within the framework of the broad fundamentals. Therefore, a duplicate administrative mechanism to require "appropriate action" under the fundamentals is unnecessary. Further, as previously noted, the fundamentals are broad concepts that describe healthy rangelands. Because the standards and guidelines are more specific, they lend themselves to determining whether the ecosystem functions and processes as described by the fundamentals are in fact occurring, and to communicating achievement status in a way that the fundamentals do not. For this same reason, the standards also lend themselves to enforcement in a way that the fundamentals do not. Finally, we believe that removing the "appropriate action" requirement under the fundamentals will better enable authorized officers to focus on the implementation of the standards and guidelines, which we in turn expect to result in more efficient implementation of decisions that will maintain healthy rangelands.

The 1995 regulations sought to implement timely and responsive remedial action when BLM determines that existing practices are significant factors in failing to achieve standards and conform to guidelines. However, in practice, the requirement to take action "before the start of the next grazing year" has proven to be impracticable, often allowing BLM considerably less than a year to begin action. If BLM determines in October, for example, that an allotment failed a standard due to grazing management, in many cases only 4 months would be available before the typical March begin date under current regulations to develop new management alternatives before the beginning of the next grazing year for that allotment. This restricted time frame has made it difficult or

impractical to implement decisions, and has damaged working relationships with permittees and lessees. If a common allotment with several permittees or lessees does not meet a standard because of current grazing practices, and numerous public land users wish to participate in the formulation of remedial management actions, the time frame for reaching consensus may be lengthy. In these instances it is very difficult to develop and implement appropriate action before the next grazing year. Further, failing to meet the deadline in one case opens the involved BLM office to legal action, to which resources and personnel must be devoted, diminishing that office's ability to meet the deadline in all cases, possibly leading to a snowballing effect as litigation mounts.

During the formulation, proposal, and analysis of appropriate action, several steps are necessary to develop sustainable management strategies that will yield long-term improvements in rangeland health. Adequate time is needed to obtain comment and input from permittees, lessees, states and the interested public on reports that are used as bases for making decisions to modify permits or leases, or otherwise to consult and cooperate with permittees, lessees, states, and Tribes; to carry out consultation with the Fish and Wildlife Service (FWS) or the National Oceanic and Atmospheric Administration (NOAA Fisheries), or both, under Section 7 of the ESA, 16 U.S.C. 1536; and to complete analysis and documentation required by NEPA.

The preferred alternative for section 4180.2(c) establishes a more reasonable time frame within which BLM must take appropriate action if we determine that existing grazing management or levels of use are significant factors in the failure to meet

standards or do not conform with guidelines. Generally, under the final rule, BLM must develop appropriate action as soon as practicable but not later than 24 months after the determination and then implement that action no later than the start of the next grazing year.

The final rule at section 4180.2(c) has been amended between the proposed and final rule. It now includes a provision extending the deadline for developing appropriate action if legally required processes that are the responsibility of another agency prevent completion within 24 months. For example, if an ESA Section 7 consultation is required, it may be difficult to complete the process within the 24-month time frame.

This extended deadline will allow BLM to fulfill all required legal obligations and should result in more sustainable and effective decisions. Taking time at this stage of the process, and involving those most directly affected by BLM decisions, to propose, formulate, and analyze appropriate actions will save time in the future by reducing the likelihood of appeals and litigation that may occur as a result of hastily prepared management actions.

We did not select Alternative 1 because the 1995 regulations did not provide enough time to formulate and analyze management alternatives and complete all consultation and documentation requirements. Alternative 3 in this respect was the same as the proposed action.

8. Conservation use

The final rule amends several sections of the regulations by removing all reference to conservation use and authority to issue conservation use permits. This affects sections 4110.0-5 Definitions, 4120.3 Range improvement permits, 4130.2 Grazing permits or leases, 4130.5 Free use grazing permits, 4130.8 Service charges, 4140.1 Prohibited acts. The1995 regulations allowed BLM to issue "conservation use" permits for the purpose of protecting the land, improving rangeland conditions, or enhancing resource values. This authority was challenged in court, resulting in a ruling that BLM did not have authority to issue permits exclusively for conservation purposes. By removing conservation use references from the final rule we are bringing the regulations into compliance with the court's holding.

We did not select Alternative 1 because it proposed to leave the conservation use authority in the regulations. Alternative 3 does not differ from the preferred alternative.

9. Definition of preference, active use and removal of permitted use

The final rule revises the definition of "preference" and "active use" in section 4110.0-5 on definitions, and removes the term "permitted use" from the rule. Where it occurred in the rule, the term "permitted use" has been replaced by either "preference," "grazing preference" or "active use," depending on the regulatory context. These amendments make the definition of "preference" similar to the meaning first formally promulgated in 1978. Elimination of the concept of "conservation use" made necessary

the revision of the definition of “active use.” These changes will provide a consistent framework for the efficient administration of public lands.

The definition of “preference” – along with the synonymous term “grazing preference” – has been revised to include the total number of AUMs attached to base property, including active use and use held in suspension. The definition also retains the meaning of a priority position for the purposes of receiving a grazing permit or lease.

In 1978, BLM formally defined “grazing preference” to mean the total number of AUMs of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee. Grazing preference represented a specific portion of forage out of all the vegetation that a land use plan determined to be available for livestock. The 1995 rule introduced some inconsistencies in 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. For example, the regulations provide that an application to transfer preference shall describe the "extent" of the preference being transferred. This usage does not comport with the concept that preference is a singular "priority position," but rather, that it can be expressed in terms of its "extent" or quantity. Also, the current definition of “permitted use” is in some cases not appropriately used in the regulations. For example, even though permitted use encompasses "suspended use" and "active use," the regulations state that failure to make substantial use of the "permitted use" authorized by the grazing permit or lease shall give BLM cause to take action to cancel whatever

amount of "permitted use" the permittee has failed to use. This is paradoxical as "suspended use" is by definition not currently available for grazing use.

In the preferred alternative, the re-revised definition of grazing preference is once again consistent with its longstanding meaning – a meaning that was in formal usage for 17 years before it was changed by the 1995 grazing regulations. The definition is also consistent with how the term “preference AUM’s” was informally used before 1978. Attaching a forage allocation to base property provides a reliable way to associate ranch property transactions with the priority for use of public land grazing privileges. This has been a foundation of BLM’s system for tracking who has priority for those grazing privileges since the enactment of the TGA.

In revising the definition of “preference,” this final rule seeks to reinstate a familiar method of identifying the total number of AUMs apportioned and attached to base property. Preference includes both active use and use held in suspension. This definition of “preference” does not override the requirement that livestock forage allocations be made within a multiple use context as set forth in land use plans. The proposed definition should not be erroneously construed to imply that satisfying a permittee’s or lessee’s livestock forage allocation (his preference) has the highest priority when BLM employs land use planning or activity planning processes to determine the appropriate combination of resource uses on BLM-administered lands.

Since 1995, "active use" has meant "current authorized use, including livestock grazing use and conservation use." BLM must remove conservation use from the definition because of a court ruling that BLM could not issue permits exclusively for conservation purposes. In the final rule the term "active use" is the amount of forage that is available for grazing use under a permit or lease based on rangeland carrying capacity and resource conditions in an allotment.

Permitted use was introduced as a term in the 1995 regulations to define an amount of forage allocated by a land use plan for livestock grazing. It is expressed in terms of AUMs and includes "active use" and "suspended use". Since we have revised the definition of preference to include this same livestock forage allocation, the term is no longer necessary.

We did not select Alternative 1 because the definition of preference would have remained simply a priority position to receive a grazing permit or lease, a definition that was inconsistent with traditional usage of the term which identified the total AUMs attached to specific base property. The definition of active use would have remained unchanged and inconsistent with the need to remove "conservation use" from the regulations. Alternative 3 does not differ from the preferred alternative.

10. Interested public

The final rule amends sections 4100.0-5 Definitions, 4110.2-4 Allotments, 4110.3-3 Implementing changes in active use, 4130.2 Grazing permits and leases,

4130.3-3 Modification of permits or leases, and 4130.6-2 Nonrenewable grazing permits and leases, in order to streamline the role of the interested public. These changes should foster increased administrative efficiency by focusing the role of the interested public on planning decisions and reports that influence daily management, rather than on daily management decisions themselves.

Under the existing regulations, any person or group may obtain "interested public" status simply by requesting that status for a specific allotment in writing or by submitting a written comment on the management of livestock grazing on a specific allotment. Members of the interested public are mailed, at government expense, documents related to decisions on a particular grazing allotment. BLM must also consult, cooperate, and coordinate with members of the interested public on a host of decisions. The interested public provides valuable input, but some of those who have enlisted as interested public rarely, if at all, participate in the decisionmaking process. Others have obtained "interested public" status for numerous allotments, but only participate in the decision-making process for a select few. Additionally, management actions that now require consultation, cooperation, and coordination with the interested public include common management operations, such as the renewal or modification of individual permits, that are preceded by grazing decisions describing the management action to be implemented. These decisions are made available, with right of protest and appeal, to the interested public. Moreover, while formulation of grazing management decisions can greatly benefit from consultation with the interested public, we have found that consultation requirements for actions that implement those decisions and are intended to

achieve the resource management goals set forth in those decisions are unnecessarily duplicative. These consultation requirements can slow our ability to act promptly to further those goals when necessary to respond to changing range conditions or transitory management circumstances. Clerical demands associated with maintaining non-participating members of the interested public also divert limited BLM resources from other valuable uses.

The final rule has amended the definition of "interested public" so that one must actually participate in the decisionmaking process in order to maintain interested public status. This change should improve administrative efficiency by allowing BLM to purge the names of nonparticipating persons from its interested public lists. The regulations have also been amended to remove consultation, cooperation, and coordination requirements from the following decisions: (1) adjustments to allotment boundaries (section 4110.2-4); (2) changes in active use (section 4110.3-3(a)); (3) emergency allotment closures (section 4110.3-3(b)); (4) issuance or renewal of individual permits or leases (section 4130.2(b)); and (5) issuance of nonrenewable grazing permits and leases (section 4130.6-2). In adopting these changes, BLM has attempted to balance the important role of the interested public with the need for prompt decisionmaking on day-to-day management issues. Thousands of these decisions are made annually by BLM. Actions are guided by broader decisions (such as allotment management plans) and monitoring and other reports as to which the interested public will continue to have an opportunity to review and provide input. In addition, prior to considering any on-the-ground action, BLM must determine whether the proposed action conforms to the

applicable land use plan. If a proposed action does not conform to the land use plan, a land use plan amendment must be completed before BLM can further consider the proposed action. The public is assured involvement in the land use planning process.

We expect the changes in the definition and role of the interested public in the grazing program to improve administrative efficiency and lead to more timely decision making. It is BLM's expectation that this increased efficiency and faster reaction time will ultimately benefit overall rangeland health. Also note that these changes do not affect public participation opportunities available through the NEPA environmental analysis process, in administrative appeals of grazing decisions, or, to the extent practicable, in the preparation of reports and evaluations.

After publishing the Final EIS in June 2005, BLM proposed two categorical exclusions (CX) for issuing grazing permits (71 FR 4159, January 25, 2006). One of the proposed exclusions is for issuing grazing permits in general, and the other is for issuing nonrenewable permits. As proposed, the CXs would be limited to grazing permits where land health standards have been assessed and evaluated and the authorized officer has documented that the standards are achieved, or if not achieved, that livestock grazing is not a causal factor; and to permits issued as a result of administrative action such as changing the termination date or the name of the permittee, and where none of the 12 extraordinary circumstances listed in Appendix 2 of Departmental Manual 516 apply. If the CXs are approved, the public would continue to have opportunity to participate in the grazing permitting process on those allotments that qualify for a CX –

● through the development of Resource Management Plans and activity plans (section 4120.2),

● before a decision is made to increase a permittee's forage allocation (section 4110.3-1(c)),

● to the extent practicable in the preparation of reports and evaluations that are used to support modifications of grazing permits and leases (section 4130.3-3(b)), and

● in protests and administrative appeals of grazing decisions (subpart 4160).

We did not select Alternative 1, the continuation of existing regulations, because BLM's view is that those who become "interested public" oblige themselves to participate in the process that leads to a decision affecting management of the allotment(s) in which they are interested, and Alternative 1 does not provide for this. BLM has noted that in some cases, interested public who have been provided consultation opportunities regarding management of grazing on a specific allotment have failed to participate, but then file, in a relatively generic format, a protest and/or appeal of the final decision – which BLM then must address through a formal administrative process. BLM believes that it is appropriate to provide that those who forfeit their opportunities for participation in the processes leading up to the decision then also forfeit their opportunities to contest the decision after it is issued. BLM has noted that in other cases, some interested publics use the consultation opportunities provided to them as a forum for their advocacy of a particular position that has little direct bearing on issues at hand with respect to management of a specific allotment. The primary purpose for BLM

allowing participation by the interested public in its grazing decision making process is to obtain specific insights regarding specific management on specific allotments. Such interested public participation opportunity is not intended to serve as a forum for espousing general opposition (or support) regarding programs and policies of the United States Government. For this and other reasons, the interested public provisions have proven costly to implement, have decreased administrative efficiency, and have, at times, hindered the administration of daily grazing management. Alternative 3 did not differ from the preferred alternative.

11. Water rights

The 1995 rule added section 4120.3-9 on water rights. In simplified form, it provides that if livestock water rights are acquired under state law, they shall be acquired, perfected, and maintained in the name of the United States to the extent allowed by the pertinent state law. The final rule revises the section by limiting its applicability to water rights acquired by the United States and by removing the language stating that the water rights shall be acquired, perfected, and maintained in the name of the United States to the extent allowed by the applicable state law. Removal of this requirement will clarify BLM's flexibility in seeking water rights, and in pursuing administrative options including joint ownership of water rights with permittees or lessees.

Although the 1995 Federal Register preamble to the rule change stated that joint ownership of water rights was consistent with the regulations, some interpreted the provision to exclude cooperatively held water rights on public lands. Many water rights

are currently held by permittees or lessees, or jointly owned with BLM. We have not seen evidence in these instances that a permittee or lessee holding a water right discourages cooperation or compliance with terms and conditions of grazing permits or complicates land exchanges.

The preferred alternative retains the requirement that BLM follow the substantive and procedural laws of the state when acquiring, perfecting, maintaining, and administering livestock water rights on public lands. This language makes it clear that, within the scope of state processes, BLM may seek co-ownership of water rights with permittees and lessees or, in certain circumstances, agree that permittees and lessees own the water rights. BLM continues to have the option of acquiring an exclusive water right as long as we do so in compliance with state water law. States assign water rights under different state laws, regulations, and policies. The flexibility afforded by the preferred alternative will facilitate BLM's ability to administer grazing permits and leases in varied circumstances.

We did not select Alternative 1 because it retained the wording in the 1995 regulation, which decreases BLM's flexibility to obtain livestock water rights to an extent that is less than that allowed under state law when BLM deems it desirable to do so. We believe that the preferred alternative best provides BLM with the flexibility to seek water rights appropriate to the circumstances. Alternative 3 does not differ from the preferred alternative.

12. Satisfactory performance of applicants

The final rule amends section 4130.1-1, on filing applications, to clarify the requirements for satisfactory performance of a permit or lease applicant. Portions of the existing section 4110.1 on mandatory qualifications were moved to section 4130.1-1 and amended. These changes should provide applicants with a clearer statement of BLM's expectations, improving working relationships and increasing administrative efficiency.

The existing regulations at section 4110.1(b)(2) list 3 situations where an applicant for a new permit would "be deemed not to have a record of satisfactory performance." The regulation thus implied that more situations could lead to an unsatisfactory performance determination, but it did not specify further criteria. This produced some confusion among applicants, and it also led to some inconsistent application of this regulation within BLM. The final rule corrects this situation by stating that an applicant will be deemed "to have a record of satisfactory performance" when the applicant (1) has not had a Federal grazing permit or lease canceled for a violation, (2) has not had certain state grazing permits or leases canceled, or (3) has not been barred from holding a grazing permit or lease by a court. The 3 criteria remain essentially unchanged from the existing section 4110.1(b)(2). By stating the provision in a positive way, however, we make it clear that applicants have a satisfactory record of performance unless they fail to meet one of these criteria.

Other portions of existing section 4110.1 related to applications for renewal were also moved but not modified.

Alternative 1, the continuation of the existing regulations, was not adopted because: (a) satisfactory performance requirements are more appropriately addressed in the section of the regulations that addresses to whom BLM will issue a grazing permit or leases, rather than the section of the regulations that addresses who is qualified for grazing use on public lands; and (b) BLM intends that satisfactory performance requirements be clearly and unequivocally based on matters directly related to livestock grazing and not be based on violations of laws and regulations that may have no bearing on the potential ability of the applicant to manage grazing successfully under a BLM grazing permit or lease. This is consistent with the intent expressed by the Department when the regulations were first promulgated in 1995 that permittees be good stewards of the land (60 FR 9926), but sharpens the rule's focus on grazing lands. Alternative 3 did not differ from the preferred alternative.

13. Temporary changes in grazing use within the terms and conditions of permit or lease, including temporary nonuse

The final rule amends section 4130.4 on authorization of temporary changes in grazing use within the terms and conditions of a permit or lease, including temporary nonuse, by defining the phrase "temporary changes in grazing use within the terms and conditions of the permit or lease." Under existing regulations, this phrase is not defined. The clarification associated with this change should improve administrative efficiency.

Most permits or leases include a period of use described by specific dates. These dates do not always account for the natural fluctuations that can lead to forage availability outside the listed dates. Existing regulations allow for temporary changes but this authority has, at times, been applied inconsistently within BLM. The new definition clarifies the amount of flexibility BLM authorized officers will have when considering temporary changes. Under the new definition, a temporary change can be made to the livestock number and/or period of use. Temporary changes cannot result in the removal of more forage than the "active use" specified by the permit or lease. Neither can a temporary change authorize grazing earlier than 14 days before the grazing start date or later than 14 days after the grazing end date specified in the permit or lease, unless an allotment management plan under § 4120.2(a)(3) specifies different flexibility limits. This change will help ensure consistent application across BLM.

We did not select Alternative 1, the continuation of existing regulations, because of the inconsistent application associated with the current regulations. Alternative 3 did not differ from the preferred alternative in this regard.

14. Service charges

The final rule amends section 4130.8-3 on service charges in order to reflect more accurately the current costs of processing and, thereby, contribute to administrative efficiency. Editorial modifications have also been made to remove a reference to "conservation use," a term that has been removed from the regulations generally, and provide for increased clarity.

Current service charges are $10 for issuing a crossing permit, transferring grazing preference, or canceling and replacing or issuing a supplemental grazing fee bill. These charges are well below BLM's actual processing costs. The preferred alternative increases service charges to reasonable levels that capture more of the actual cost of processing. The change complies with section 304(a) of FLPMA, 43 U.S.C. 1734(a), where reasonable charges are authorized. The newly effective charges are $75 for a crossing permit; $145 to transfer grazing preference; and $50 to cancel and replace or to issue a supplemental grazing fee billing. These new charges are subject to later modifications through public notice in the Federal Register.

We did not select Alternative 1, continuation of the existing regulations, because those regulations contain a reference to "conservation use" that should be removed for consistency within these regulations. Under existing regulations service charges could still be adjusted through a Federal Register notice, but it is efficient to make these initial changes in this well-publicized rule. This technique has allowed for extensive public input on the issue. Alternative 3 did not differ from the preferred alternative as to this matter.

15. Prohibited acts

The final rule modifies section 4140.1 on acts prohibited on public lands in order to reduce ambiguity and contribute to administrative efficiency. Some minor editorial

modifications have also been made. The preferred alternative maintains the 3 sets of prohibited acts present in the existing grazing regulations.

The first set, section 4140.1(a), addresses various grazing-specific violations made by a permittee or lessee. The final rule clarifies that supplemental feed placed contrary to the terms and conditions of the permit or lease is a violation. The existing rule states only that supplemental feed placed "without authorization" was a violation, and this has produced some confusion among permittees, lessees, and BLM personnel. The added language clarifies that supplemental feeding made contrary to permit or lease terms and conditions is a violation even if the permittee or lessee is authorized to undertake some level of supplemental feeding.

The second set of prohibited acts, section 4140.1(b), applies to all persons performing acts on all BLM lands, not just permittees and lessees. The preferred alternative clarifies that the prohibited activity listed in the second set must occur on "BLM-administered lands." The existing phrase "related to rangelands" created confusion. The rule clarifies that it is a prohibited act to graze without a permit, lease, or other grazing use authorization. The amended language accounts for situations where BLM allows grazing through authorizations other than a term permit or lease, such as a crossing permit. Also, the final rule clarifies that grazing fees must be paid in a timely manner to avoid violating these regulations. Thus, this section provides, among other things, useful authority to encourage timely payment of grazing fees.

The third set of prohibited acts, section 4140.1(c), pertains to violations of certain Federal or state laws or regulations. The final rule now clarifies that the section applies to prohibited acts performed by a permittee or lessee "on the allotment where he is authorized to graze." This replaces ambiguous language that stated the provision applied to acts "where public land administered by the [BLM] is involved or affected [and] the violation is related to grazing use authorized by a permit or lease issued by the [BLM]." Few actions on lands outside the grazer's authorized allotment could have triggered a violation under the existing language. The existing language created confusion regarding its scope while providing BLM with little useful authority. The more precise language of the final rule will be more understandable and improve the efficiency with which this regulation can be enforced. Violations of statutes or regulations on non-allotment lands will continue to be subject to the normal penalties available under those authorities, regardless of whether the violations are related to grazing use.

We did not select Alternative 1, the continuation of existing regulations, due to the presence of the ambiguity previously discussed. Alternative 3, the Modified Action alternative, proposed two provisions that differed from the Proposed Action. The first provision would have required the use of weed seed-free forage, grain, straw, or mulch when required by the authorized officer. We did not include the provision at this time as we are still developing a nationwide weed-free policy for public lands. The second provision would have deleted the third category of prohibited acts, those pertaining to violations of certain Federal and state laws or regulations, from the regulations.

Although relatively few violations have been documented, BLM believes this category serves a deterrent purpose and has chosen to retain it.

16. Decisions on ephemeral or annual rangeland grazing use and nonrenewable permits

The final rule amends section 4130.6-2 on nonrenewable grazing permits and leases by adding a new paragraph (b) allowing BLM to make a decision issuing a nonrenewable grazing permit or lease, or affecting an application for grazing use on annual or designated ephemeral rangelands, effective immediately or on a date established in the decision. The final rule has removed language from existing section 4160.3(d) on final decisions that described the effect of an administrative stay on decisions related to designated ephemeral or annual rangelands and temporary nonrenewable grazing. The ability to make decisions on nonrenewable grazing permits and leases, or ephemeral or annual rangelands grazing use, effective immediately on a date established in the decision under final rule section 4130.6-2(b) has largely eliminated the need for any special stay provisions. These changes should improve administrative efficiency and effectiveness by allowing faster responses to time-sensitive requests and clarify compliance with legal requirements.

The existing regulations at section 4160.3(d) state that when OHA stays a decision regarding designated ephemeral or annual rangeland grazing "the authorized grazing use shall be consistent with the final decision pending" the final determination on the appeal. In addition, under the existing regulations a decision shall not be in effect for a 30-day period during which an appeal may be filed, and for an additional 45-day period

if a petition for stay is filed. This creates a problem where the decision is to grant (rather than deny) the application for nonrenewable use, or use on ephemeral or annual ranges, because in some cases the forage quality rapidly declines and loses its nutritional value during this combined 75-day waiting period. Thus, a simple appeal of a decision to grant an application for use of ephemeral or annual rangeland, or for temporary and nonrenewable use, can render both the application and approval futile for the purpose intended, namely, to use available forage to provide nutrition for livestock. BLM considers this to be a procedural flaw.

When BLM grants an application for temporary and nonrenewable use, or use on annual or ephemeral ranges, this indicates that BLM has evaluated the merits of the application and has determined that such use would be consistent with achieving resource management objectives specified in land use plans. BLM intends that the simple act of an appeal alone, with nothing more, should not render both the application and approval an exercise in futility.

The proposed rule addressed this 75-day waiting period issue by placing language similar to that in existing section 4160.3(c) into section 4160.4(c) on appeals. However, in response to comments from OHA, this section has now been removed from the final rule. Instead, BLM may now issue nonrenewable permits as immediately effective decisions under section 4130.6-2(b). This change will allow time-sensitive decisions on forage to be made and immediately put into practice, without waiting up to 75 days. If that decision to authorize the use is appealed and a stay is granted, the decision would be

inoperative and livestock would have to be removed. In the alternative, if the decision is appealed and a stay is denied, the appellant would have the option of seeking an injunction of the application approval in Federal court. In either case, an appellant would be required to show why it would have a reasonable chance of prevailing on the merits of the appeal in order to halt the action, and the act of filing an appeal, in and of itself, would not frustrate the purposes intended by the application and approval.

We did not select Alternative 1, the continuation of existing regulations, because of the issues discussed above. Alternative 3 did not differ from the preferred alternative.

17. Effect on grazing use when a stay has been granted on an appeal of a decision associated with changes to a permit or lease or grazing preference transfers

The final rule amends sections 4160.3 Final decisions and 4160.4 Appeals, as these sections relate to administrative stays of decisions associated with (1) changes made to a permit or lease (other than a nonrenewable permit), or (2) grazing preference transfers. The final rule will allow grazing to continue under the terms of an immediately preceding permit or lease if all or a part of a decision is stayed.

Under this provision, although the grazing decision appealed is stayed, grazing can continue at the previous levels of use. This ensures that the decision appealed is rendered inoperative for exhaustion purposes under 5 U.S.C. 704 and the status quo prior to issuance of the decision appealed remains in effect. In the instance of an appeal and stay preventing implementation of a new grazing authorization, the fact that a permittee

may still be authorized to graze at some level is not a function of the stayed decision being implemented. It is worth noting that the APA provides at 5 U.S.C. 558(c) that when a licensee has made a timely and sufficient application for a renewal or a new license in accordance with agency rules, a license authorizing an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Under the existing regulations, the effects of an administrative stay are addressed at paragraphs 4160.3(c)-(e). Existing paragraph 4160.3(d) allows grazing to continue at the previous year's level when a stay is granted unless the permit or lease applicant had no authorized grazing use during the previous year. The final rule clarifies, in paragraph 4160.4(b)(1), that BLM will continue to authorize grazing under prior terms when a stay is issued for all or part of a decision that (1) cancels or suspends a permit or lease, (2) changes the terms or conditions of a permit or lease during its current term, or (3) renews a permit or lease. Existing paragraph 4160.3(d) applied the continuation of prior terms to decisions on "an application for grazing authorization." This general phrase created some ambiguity that the more precise list in the final rule seeks to clarify.

The continuation of grazing under prior terms in existing paragraph 4160.3(d) does not apply to those who had no authorized grazing use in the prior year. Typically, this exception has affected applicants who obtained grazing preference through a transfer. For example, assume a person has recently purchased the base property of another, such as a ranch. The previous ranch owner's grazing preference can be transferred to the new owner; however, the new owner must apply for a new permit because the existing permit

automatically expires when the transfer is approved. *See* 43 CFR 4110.2-3. If the new owner is granted a permit authorizing less grazing than the previous owner's permit, the new owner can appeal to OHA. He can also seek a stay of the BLM decision. If a stay is granted, however, the new owner would not be authorized to graze at the higher level associated with the previous ranch owner's permit under existing section 4160.3(d). Conversely, had no ranch sale occurred and a renewal permit application led to a reduction in grazing use, the ranch owner would face a different situation. Should he appeal and receive a stay, the rancher would be allowed to continue grazing at the higher level under his previous permit. Many believed this differentiation in existing section 4160.3(d) between existing permittees and transferees was not justified. Also, requiring any grazer to reduce operational levels temporarily is contrary to a stay designed to maintain the status quo while the appeal is considered.

Existing paragraph 4160.3(e) also creates confusion among grazing users, the public, and BLM. This paragraph states that when OHA stays a final decision that changes authorized grazing use, the grazing use that will be authorized while the decision is stayed "shall not exceed the permittee's or lessee's authorized use in the last year during which any use was authorized." This paragraph has since been interpreted by OHA to mean that the use BLM can authorize cannot exceed the use specified by the grazer's existing permit or lease, regardless of the use that may have been made under that permit or lease in the immediately preceding year (Fallini, Fallini Living Trust, IBLA 2002-139, March 4, 2002).

The final rule has addressed these issues by removing the discussion of stays from section 4160.3 Final decision and placing that in section 4160.4 Appeals. Now, when a decision on a preference transferee's application is stayed, BLM will issue a temporary permit that contains the same terms and conditions as the permit previously applicable to the area in question, subject to any relevant provisions in the stay order itself. The permit will be in effect until OHA resolves the administrative appeal. This change will enhance the continuity of grazing operations and remove some of the uncertainty associated with preference transfers. This change does not prevent BLM from making emergency allotment closures or suspending grazing use to protect rangeland health, but it does allow grazing to continue under normal circumstances as a use compatible with BLM's multiple use mission. BLM is making these changes to balance the exhaustion of administrative remedies under the APA and our responsibilities under FLPMA and TGA to

- manage lands for multiple use and sustained yield,
- regulate the occupancy and use of the rangelands,
- safeguard grazing privileges,
- preserve the public rangelands from destruction or unnecessary injury, and
- provide for the orderly use, improvement, and development of the range.

Also, to address the unclear language in existing paragraph 4160.3(e), these stay regulations clearly reference grazing permits and leases as the document upon which BLM must rely to determine allowable grazing use levels, and removes the language that refers to the "authorized use in the last year during which any use was authorized."

Alternative 1, the continuation of existing regulations, was not selected because of the problems discussed above. Alternative 3 did not differ from the preferred alternative.

18. Biological assessments and evaluations are not decisions and therefore not subject to protest or appeal.

The final rule adds section 4160.1(d), stating that a biological assessment (BA) or biological evaluation (BE) is not a BLM decision for purposes of protest or appeal. BAs and BEs are documents prepared by BLM for ESA compliance purposes. This change should improve administrative efficiency by lessening the time associated with ESA consultation.

This change is made in response to the decision of the Interior Board of Land Appeals (IBLA) in Blake v. BLM, 145 IBLA 154, (1998), aff'd on reconsideration, 156 IBLA 280 (2002). There, the IBLA held that a change proposed by BLM in a permit or lease and evaluated in a BA or BE is a proposed decision under the existing regulations at section 4160.1. Blake (on reconsideration), 156 IBLA at 283-86. After the opportunity for a protest, that change could be set forth in a final decision subject to appeal under section 4160.4. Blake, 145 IBLA at 166. The Blake holding has led to a situation where a BLM BA or BE addressing possible grazing changes may trigger the need for two final decisions, the first of which cannot be directly implemented. BLM believes a BA or BE is better viewed as an intermediate step that may later lead to a single final decision that can be implemented. This regulatory change is designed to implement that view—a view

that formed the basis of BLM actions prior to the Blake decisions. By this change, the Secretary has prospectively superseded the Blake decisions through rulemaking.

For example, under the existing Blake interpretation, after any protests to a change evaluated in a BA or BE are resolved, the BA or BE would be subject to appeal. However, assuming there were no appeals, any grazing-related changes contemplated in this "final" decision would not be implemented at that time. Instead, the BA or BE is merely submitted by BLM for consideration by the FWS. If formal consultation is required, FWS later issues a biological opinion (BO) in response to the BA. This FWS BO may differ from BLM's BA or BE. Moreover, BLM may exercise discretion as it makes implementation decisions based on the findings and advice contained in the FWS BO. Any grazing-related changes are then issued as proposed decisions under section 4160.1 and subject to protest under section 4160.2. Assuming protests are resolved, a final decision is then issued and is subject to administrative appeal under section 4160.4. After any appeals are resolved, this final decision can then be implemented. This time-consuming process has slowed the ability of BLM to respond to ESA related issues.

The final rule eliminates the potential for protests and appeals of a BA or BE prepared by BLM. A BA or BE does not grant or deny a grazing permit application, assess trespass damages, or make other decisions that are typically subject to protest and appeal. Rather, a BA or BE is a tool used to decide whether to initiate formal consultation under section 7 of the ESA.

The TGA requires BLM to provide, by appropriate rules and regulations, for local hearings on appeals of grazing decisions. 43 U.S.C. 315h. These local hearings are administered by an administrative law judge (ALJ) from the Hearings Division of OHA. ALJ decisions can then be appealed to IBLA within OHA. While the Secretary has delegated review authority to OHA over decisions regarding land use, the Secretary has not delegated authority to OHA to review biological opinions of the FWS. See Secretarial Memorandum of January 8, 1993 (Secretary Lujan); Secretarial Memorandum of April 20, 1993 (Secretary Babbitt). This final rule does not modify this longstanding policy. The ESA does not mandate the creation of an administrative appeal procedure for biological opinions and instead authorizes a civil suit in Federal Court. 16 U.S.C. 1540(g). Biological opinions may also be challenged in Federal court under the Administrative Procedure Act (APA). See Bennett v. Spear, 520 U.S. 154, 178 (1997).

Alternative 1, the continuation of existing regulations, was not selected because it would continue the requirement that BLM issue a biological assessment that is created for the purposes of ESA consultation on a grazing-related proposed action as if it were a grazing decision under the TGA, and perpetuate the confusion and inefficiencies affecting BLM's grazing decision-making processes addressed above. On September 20, 2004, BLM issued Information Bulletin 2004-148. Among other things, this IB pointed out that BLM will notify applicants for grazing permits or leases that if ESA matters must be considered in the course of processing their application for issuance or renewal of a grazing permit or lease or other grazing use authorization, that under the ESA they may request BLM to grant them "applicant status" under 16 U.S.C. 1536(a)(3), and that

individuals with applicant status will be given the opportunity to comment on and provide input regarding:

- The modifications suggested by the Services (i.e., U.S. Fish and Wildlife Service (FWS) and/or National Marine Fisheries Service (NMFS)) during informal consultations, in order to avoid the likelihood of adverse effects on listed species or critical habitat. See 50 CFR 402.13(b).

- The submission of information to the Services for consideration during the consultation. See 50 CFR 402.14(d).

- Ensuring that they make no irreversible or irretrievable commitment of resources, with respect to the action, that has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives chosen to avoid violating Section 7(a)(2). See 50 CFR 402.09.

BLM believes that its guidance on early consultation with applicants addresses the need identified by Blake for consultation with existing or prospective permittees or lessees regarding the contents of biological assessments that BLM prepares for the purposes of ESA-required consultation.

Alternative 3 did not differ from the preferred alternative.

IV. Response to General Comments

The extended comment period on the proposed rule ended on March 2, 2004. We received about 18,000 comment letters and electronic communications. An exact count of the comments is not available due to 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. Large numbers of comments supported or opposed the proposed rule in general terms, or discussed issues without addressing specific sections. Most gave reasons that do not relate to specific provisions of the regulations. In this section, we will discuss the comments that addressed the regulatory process as it pertains to this rule, general comments supporting and opposing this rule, issue-oriented comments that do not address specific sections, and comments raising issues not addressed in the proposed rule. The comments are organized by subject and presented in groups that address a theme on the subject. We have grouped similar comments together into themes and addressed them with a single response.

BLM published a Notice of Availability for the associated Draft EIS on January 6, 2004 (69 FR 569). On January 16, 2004 BLM published a notice that extended the public comment period on the proposed rule and Draft EIS until March 2, 2004 (69 FR 2559) so that those commenting would have sufficient time to review the Draft EIS.

Over 18,000 comments were received combined on the draft EIS and proposed rule. Responses to those comments were summarized along with the comments and enclosed in the Final EIS that was published on June 17, 2005.

Approximately 188 comments were submitted after close of the extended public comment period. Five raised specific issues, and one was submitted from a sister agency, the U.S. Fish and Wildlife Service.

We decided that an additional document was necessary to respond to those comments, while also further clarifying issues in the FEIS, and began working on an Addendum to the FEIS. On March 31, 2006, BLM published the Notice of Availability for this Addendum to the original FEIS, which was entitled "Proposed Revisions to Grazing Regulations for the Public Lands Final Environmental Impact Statement."

A. The Regulatory Process

Some comments addressed the regulatory process itself. One comment urged 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 BLM should not ignore comments received from the public during the rulemaking process.

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, 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 this final rule or the final EIS (including the Revisions and Errata document and the Addendum to the FEIS), 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 in this preamble 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 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. We discuss either in this preamble or in the EIS 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. BLM has not ignored any comments received at any point during the rulemaking process.

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

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

One comment stated that 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.

BLM considered all 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.

One comment stated that BLM "subverted" the NEPA process by issuing the DEIS after the proposed rule was published.

We respond in detail to this comment in the discussion of NEPA compliance under Procedural Matters, section VI of this preamble.

B. General Support

Many comments supported the proposed rule because it recognized the socio-economic and cultural importance of public land grazing to adjacent and local communities and considered the concerns of public land grazing users. Others stated that the rule would protect the health of the land by relying on science, improving working relations with permittees and lessees, improving administrative effectiveness and efficiency, and making it clear that changes in use must be based on monitoring and assessment.

C. General Opposition

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 opposed the rule, expressing their opposition in terms of opposing public land grazing itself.

BLM makes no changes in the final rule in response to these comments. 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. BLM has never operated under the notion that the grazing operator in essence owns the public land, and these regulatory changes do not introduce provisions that would provide for rancher ownership of the public lands. 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 the public rangelands, to resolve some legal issues, and to improve administrative efficiency. The final rule continues to provide for BLM cooperation with other government agencies that have responsibility for grazing on public lands. The final 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 final rule retains interested public participation when preparing allotment management plans, developing range improvement projects, and apportioning additional forage. In the final 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.

BLM manages for multiple uses. We also restore degraded resources, and believe that we can pursue restoration while administering grazing in accordance with the regulations..

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 improve 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 final rule should help make BLM's field work more efficient and cost effective.

BLM does not believe that the final 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 help ensure defensible decisions if appealed and ultimately more effective decisions from both an implementation and land health perspective. The final rule retains the fundamentals of rangeland health and requires that Standards and Guidelines developed by BLM State Directors be consistent with these fundamentals. The final rule retains the regulatory requirement that BLM take

appropriate action whenever existing grazing management practices or levels of grazing use are significant factors in not achieving standards or conforming with guidelines. The final rule retains provisions that allow BLM to close areas to grazing or modify grazing practice when necessary for immediate protection of resources because of conditions resulting from fire, drought, flood, or insect infestation. The final rule retains provisions for BLM to review grazing permits and leases and to make changes as needed to maintain or improve rangeland productivity or assist in making progress toward restoring ecosytems to properly functioning condition. The final rule retains provisions that the range improvement fund be used for improvements that benefit rangeland resources, including riparian area rehabilitation, improvement, and protection, fish and wildlife habitat improvement or protection, soil and water resource improvement, wild horse and burro management facilities, vegetation improvement and management, and livestock grazing management. The final rule retains provisions that prohibit cutting, burning, spraying, destroying or removing vegetation without authorization. The final rule provides that BLM may suspend or cancel the permits or leases of operators who are convicted of performing environmentally degrading acts on allotments where they are permitted to graze. Nothing in the final 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 section 4130.1-1, below.

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

The changes in the regulations are designed to improve communication, consultation, and cooperation in the service of conservation. We explain elsewhere in this preamble 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.

One comment stated that BLM should revise the proposed regulations in order to better reflect its multiple use mandates, and that BLM failed to justify reversing current regulations. Another stated that the proposed rule represented fundamental policy shifts. Others stated that the current regulations were litigated and upheld in Federal court.

BLM stated the reasons for the changes in the grazing regulations in the proposed rule. The final rule does not contain fundamental policy shifts, although it amends aspects of 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 final 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, do not include changes in 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 BLM. The final 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.

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, 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 impacts 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.

These comments are largely directed at the grazing program itself, and are beyond the scope of this rule, which is focused on improving administration. The elimination of grazing from the public lands has not been considered here. This level of analysis was undertaken for the comprehensive changes made in the grazing regulations in 1995. Here, the changes are administrative in nature. Uses other than grazing can contribute to the problems discussed in the comments. 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 impacts so that, ideally, they are avoided or mitigated. 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 final rule will strengthen BLM's ability to implement grazing strategies that provide for maintenance or achievement of healthy rangelands.

A comment asserted that stocking levels are too high, and forage production is only 1/5 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.

These comments appear to suggest that stocking and utilization levels should be determined through a rulemaking process. 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. Stocking levels are better addressed during the land use and activity planning processes where the wide variety of relevant factors, such as climate, competing forage use, and other multiple use needs, can be addressed. The rule provides that monitoring data must be used to support a determination that livestock grazing is a significant cause for not achieving one or more rangeland health standards. Typically, utilization measurements or estimates are among the kinds of monitoring studies BLM conducts to inform analysis about the effects of stocking rates on land conditions at the local level.

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.

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.

A comment stated that BLM "subverted" the NEPA process by not adopting language contained in a preliminary internal administrative review copy of the draft EIS (DEIS) obtained by the commenting organization and submitted as an attachment to its comment. The draft document contained descriptions of significant adverse effects on wildlife, biodiversity, and special status species. The comment stated further that not using this document prevented BLM from taking a "hard look" at environmental consequences of the proposed rule, and resulted in an unlawful post-hoc rationalization.

BLM did not "subvert" the NEPA process by editing the administrative review copy of the DEIS. As is BLM's usual practice, staff scientists and analysts prepared preliminary drafts of portions of the DEIS, then circulated their preliminary drafts among their colleagues. We circulate such documents for internal review in an effort to produce a factually accurate, scientifically sound, and well-reasoned DEIS. The administrative review copy represents a "snapshot" of an early stage of BLM's deliberative internal

review process. The text identified in the comment was revised as a result of further internal review for the reasons explained below.

Some of the revisions updated the draft document to reflect the actual contents of the proposed rule. For example, the administrative review copy stated that upland and riparian habitats would continue to decline because the proposed rule would worsen an "already burdensome appeals process" and decrease BLM's "ability to control illegal activities on public lands." In fact, the rule did not propose to amend the "appeals process," but remove provisions from the grazing regulations that were redundant to regulations of the Office of Hearings and Appeals in 43 CFR part 4. With respect to illegal activities on public lands, the rule proposed specific prohibited acts on grazing allotments that would constitute violations of the grazing regulations, with penalties including possible forfeiture of the grazing permit. However, the rule does not prevent BLM from enforcing other regulatory or statutory provisions on allotments or any other public lands.

The administrative review copy also concluded that the proposed rule would "greatly [diminish] the ability of the BLM to regulate grazing," to the detriment of wildlife, because it would defer to state water law. Deference to state water law is an element of the existing provision on water rights (43 CFR 4120.3–9), and was not new in the proposed rule. BLM retains regulatory authority over grazing use on public lands regardless of ownership of water rights on public lands. A state water right does not confer an attendant right to graze livestock on public lands. Moreover, BLM may hold

water rights for other beneficial uses, such as for wildlife, wildlife habitats, and recreation, even if it is precluded from holding water rights for watering livestock, which is currently the case in some states.

The administrative review copy was also further edited to cite legal requirements more precisely. In some cases, the conclusion based on the legal requirement was changed to reflect the agency's assessment of the effects of the rule. For example, the administrative review copy stated that "the increasing and burdensome administrative procedural requirements for assessment and for acquisition of monitoring data … abrogate our responsibility for management of water quality as codified in Section 313 of the Water Quality Act of 1987 (P.L. 100-4); and further, committed to by [sic] designation by most [sic] as a 'Designated Management Agency.' Delaying modification of grazing prescriptions when an[d] where warranted and/or mitigation of damages created by failure to implement a Best Management Practices (BMP's) iterative process will continue to stress western watersheds."

Section 313 of the Water Quality Act of 1987 amended various civil penalty provisions of the Federal Water Pollution Control Act (FWPCA) (33 U.S.C. 1251 et seq.) that are not administered by BLM and are not relevant to federally-permitted grazing. BLM is, however, subject to requirements pertaining to nonpoint source pollution that may result from livestock grazing, and the appropriate citation is Section 313 of the FWPCA, 33 U.S.C. 1323, rather than Section 313 of the Water Quality Act of 1987.

Section 313 of the FWPCA requires Federal agencies to "comply with … all state … and local requirements … in the same manner and to the same extent as any nongovernmental entity." 33 U.S.C. 1323(a)(1). BLM does not believe that delay in modifying grazing prescriptions or implementing BMPs would necessarily lead to violations of state and local water quality requirements, and that delay may be warranted in order to gather data that would lead to better-supported or more effective prescriptions and/or BMPs.

The BLM has also revised the assessment of the effects of changes made to subparts 4110 and 4180, which were initially characterized as "delaying tactics [and] could result in a protracted 7-year period for full implementation and change and this would result in a long-term adverse impact upon wildlife and biological diversity, including threatened and endangered and special status species…Present BLM funding and staffing levels do not provide adequate resources for even minimal monitoring and the additional monitoring requirement will further burden the grazing decision process."

BLM does not believe that long-term adverse impacts to wildlife and biological diversity would occur as a result of these changes, because both this rule and the existing regulations provide BLM discretion to begin changing active use, or to close a grazing allotment, when necessary for the protection of natural resources. BLM funding and staffing levels are issues that arise in annual budget development, and we plan to work to ensure that collecting data through rangeland monitoring remains a priority. While BLM agrees that the time frame for making decisions may increase due to the changes in

subpart 4180, BLM anticipates that taking additional time to formulate, propose, and analyze an appropriate action will improve decision making, thus improving rangeland health in the long term.

We expect these aspects of the rule to have slight environmental effects because reliance on monitoring data is not new to the grazing program. At present, changes in grazing use may be supported by "monitoring, field observations, ecological site inventory, or other data acceptable to the authorized officer." 43 CFR 4110.3. Decreases in grazing use must be supported by monitoring or field observation. 43 CFR 4110.3-2. Allotment management plans and resource activity plans "shall" provide for monitoring. 43 CFR 4120.2. Thus, monitoring is already an acceptable method of collecting data under the existing grazing regulations. To the extent that authorized officers already collect monitoring data to reach determinations under section 4180.2, the rule should have no environmental effect. To the extent that authorized officers currently rely on faster methods of data collection, the final rule could slow down the process of making determinations and thus potentially cause adverse environmental effects in the short term. However, these effects would be mitigated to the extent that existing monitoring data may be sufficient to support determinations, and to the extent that better data result in more effective and more appropriate action.

The administrative review copy raised concerns pertaining to the definition in the rule of "interested public," to provisions that no longer require the participation of the interested public in routine decisions such as permit renewals, and to provisions requiring

cooperation with Tribal, state, county, or local grazing boards. The administrative review copy stated that these proposals would "limit the ability of environmental groups to participate in the appeals process in the interest of wildlife….This should result in long-term adverse impacts to wildlife and special status species." With respect to grazing boards, the administrative review copy stated that the rule would "give greater emphasis to local entities that favor extraction of forage and water resources at the expense of wildlife and biological diversity [and] give local entities greater influence over decision making than national interests who are excluded from this venue."

The DEIS did not reflect these concerns because the rule does not prevent or limit the ability of an environmental group, or any other interested public entity, to "participate in the appeals process." Under 43 CFR 4160.1, BLM would continue to provide copies of proposed and final grazing decisions to all members of the interested public. They would then have an opportunity to seek administrative remedies. With respect to grazing boards, BLM believes that cooperating with Tribal, state, or local-government established grazing boards in reviewing range improvements and allotment management plans on public lands would provide valuable input regarding these matters. Moreover, under section 4120.5-1, BLM would continue to cooperate with institutions, organizations (such as environmental groups), corporations, associations, and individuals to achieve the objectives of the grazing regulations. BLM notes that, often, national groups have local chapters and representatives that serve as a conduit for their views at the local level. BLM accepts input from all sources, regardless of affiliation. BLM believes that while some reduced input may result from changes in the rule, that this would not result in significant effects on wildlife because the interested public would be able to provide input into many grazing decisions and documents, such as range improvement plans, range development programs, Allotment Management Plans, Resource Management Plans (RMPs) and RMP amendments that govern these routine decisions.

The amendments of the administrative review copy were made before the DEIS was finalized, and they preceded the issuance of a final rule. The administrative review copy was amended to reflect the input from other reviewers regarding the likely effects of the rule and correct some factual errors.

D. Purpose and Need for Rulemaking

We received numerous comments regarding our reasons for this rule, including many form letters and form emails.

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.

We believe the changes made in this final 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 have

supplied the requisite reasoned analysis for the changes in the Record of Decision and in the respective section-by-section discussions in this preamble.

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.

The changes being made in this final rule are based on years of experience implementing the 1995 regulations, and on comments received on the proposed rule and DEIS. 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. In one of those legal challenges, a Federal appellate court interpreted existing section 4180.2(c) "to require the BLM not merely to begin the procedures set forth in 43 C.F.R. §§ (sic) 4110, 4120, 4130, and 4160, but rather to complete them and issue its final decision by the start of the next grazing year." Idaho Watersheds Project v. Hahn, 187 F.3rd 1035, 1037 (9th Cir. 1999). BLM had to divert

resources from other locations to comply with the court's ruling. 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.

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

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.

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

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

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 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 stated 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.

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. For example, a decision to delay turn-out, increasing number of livestock and shortening the season of use in response to delayed vegetative growth resulting from a cool, moist spring may not be possible if a large number of interested parties need to be consulted first. While this type of adjustment makes good management sense from a resource perspective, the time taken to meet the current administrative requirements may preclude being able to take this action. 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.

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.

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.

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 impacts 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.

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 if any 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 day-to-day

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 impacts on resources do not prevent achieving other multiple use management objectives.

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

The Rangeland Reform effort of 1994-95 made numerous significant changes directed at restoring rangeland health. The changes in this rule preserve the regulatory framework of Rangeland Reform and make its implementation more practicable. In this rule, some time frames 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 develop practical alternatives and make decisions will lead to better decisions, supported by reliable data gathered through monitoring, and 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.

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

FLPMA, the Fish and Wildlife Coordination Act, the Migratory Bird Treaty Act, the Public Rangelands Improvement Act (PRIA), the Sikes Act, and the TGA.

We are complying with all relevant laws. However, attempting to list 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, BLM utilizes manuals, handbooks, and other guidance to ensure compliance with relevant laws.

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."

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 managed by BLM are found elsewhere in Title 43 of the CFR.

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

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.

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 with our view 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. Some comments urged that BLM consider that healthy lands improve local economies.

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 the EIS and in the Addendum. 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.

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

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, as we explain later in this preamble in our discussions of changes in sections 4110.3-3 and 4180.2. Further, the change in section 4180.2(c) in the final rule, imposing the monitoring requirement only if a standards assessment indicates that the allotment is failing to achieve standards or that grazing management practices do not conform to the guidelines, rather than requiring existing or new monitoring data to support every standards attainment determination, will minimize the workload increase. Any workload increase that arises will require BLM to reprioritize work or to find alternative means of collecting the monitoring data we need, 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.

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.

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.

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.

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 this rule will broaden opportunities for partnerships.

One comment stated that 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.

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.

E. Environmental Effects of the Rule

Large numbers of comments addressed environmental effects of the proposed rule, mostly in opposition to the rule. Many of these comments also addressed the DEIS; these comments are discussed under VI. Procedural Matters later in the preamble.

One comment, however, stated that BLM has overstated the adverse impacts of the proposed rule, and that we should say that the short term impacts 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.

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 data to make a determination, allowing up to 24 months for appropriate agreement or to develop and analyze an appropriate action, and generally allowing 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. Impacts on wildlife and habitat, threatened and endangered species, invasive weed infestations, recreational uses, and BLM workload and funding were all issues of concern.

First of all, we anticipate the possibility of short term adverse effects occurring in those limited instances where vegetation recovery is delayed by the extended implementation deadline. Based on evaluations of land health from 1998 through 2003, this may be an issue on fewer than 16 percent of all allotments. In addition, BLM has the authority under section 4110.3-2 and section 4110.3-3 of the rule to decrease use or suspend use without a phase-in period if resource conditions demand. Only in those instances where longer term reductions are requested and rangeland health is not imperiled would the recovery of vegetation be somewhat delayed.

Furthermore, the time frames provided for each of the actions listed are limits. BLM, from its experience to date, expects that in most cases, the maximum amount of time allowed for each of the 3 steps (monitoring, appropriate action development, and implementing forage allocation changes of more than 10 percent) will likely not be needed. At the end of Fiscal Year 2002, only about 16 percent of the 7,437 high priority 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 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. An unknown portion of these adjustments were changes of more than 10 percent in active use. We do know from conversations with State Office range program leaders, and from information gathered during range program evaluations and field office visits that reductions in active use in excess of 10 percent are rare. In fact, 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 impacts if the full 24 months or more is needed, once we have sufficient data through

assessment or monitoring or both, to develop an appropriate action and complete the required coordination and consultation. Based on determinations made since 1998, only about 16 percent of allotments need adjustment in livestock management or levels of use to make progress toward achieving land health standards. The negative impacts of taking the full 24 months to develop an appropriate action can be expected to be limited to about 16 percent of allotments. 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 preferred alternative, using existing or new monitoring data 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 3 action issues (monitoring, 24 months to develop remedial action, and 5-year phase in of adjustments) are needed is expected to be small. Monitoring is necessary only for those allotments as to which a BLM status assessment indicates that rangeland is failing to achieve standards or that existing grazing

management practices do not conform with guidelines. Then BLM will use existing or new monitoring data to determine whether management practices or levels of grazing use are significant factors in failing to achieve standards and conform with guidelines. The extended phase-in period will apply only when conditions require forage allocation changes of 10 percent or greater. Furthermore, the final rule provides for exceptions to the phase-in period in section 4110.3-3(a). Finally, the final 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.

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.

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

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.

In the Rangeland Reform rule we recognized a need to prioritize our improvement of rangeland health. As of the end of 2002, we had completed evaluations on 7,437 higher priority allotments. We determined approximately 16 percent of those allotments not to be meeting land health standards because of current 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 to have failed to achieve the standards and conform with the guidelines. To the extent that more than 16 percent of allotments may have so failed, we have found that grazing is not a significant cause. We have begun actions to address the problems we identified. Whenever a grazing decision is appealed, changes in grazing management may be delayed. Responding to appeals, preparing for hearings, and responding to requests for data associated with the appeals also requires dedication of personnel and funds that would otherwise be used to implement effective changes to achieve improvement in condition of resources on the very allotments that need to have changes made. The changes made in this rule will improve our ability to implement effective corrective measures -- taking time to gather more data, if necessary, and engage knowledgeable and affected parties will improve the likelihood of an effective solution, and participation by the affected operator in determining the solution will increase his likelihood of complying with the corrective measures, and make BLM decisions less susceptible to appeal. This rule also improves BLM's ability to focus fiscal resources on those areas not meeting standards because of current livestock management, and to develop appropriate actions that 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, or where continued grazing use poses an imminent likelihood of significant resource damage (section 4110.3.3(b)). The long term goal of this final rule, as was the case in 1995, is to reverse declines in western rangeland health, in those areas where there are declines, through improved consultation and cooperation with ranchers, and interested state and local authorities, as well as the interested public, in devising means to restore degraded areas and maintain currently healthy areas.

The number of appeals has increased from 48 in 1998 to 139 in 2002, diverting resources from making on the ground improvements in rangeland health. By developing cooperative instead of adversarial roles, the fiscal resources being spent on appeals could be made available for making appropriate management changes and on the ground improvements.

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 (Centrocercus urophasianus), 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. Another comment along the

same lines asked that we consider the potential impacts of implementing the proposed rule on our ability to implement the National Sage-Grouse Habitat Conservation Strategy. 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 non-game 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. One comment disagreed with the DEIS's statement that the proposed rule would have little or no effect on wildlife, stating that the proposed rule would fundamentally change the way BLM manages rangelands and have "profound" impacts on wildlife. One stated that the changes in the proposed rule may in some circumstances constrain biologists and range conservationists from recommending and implementing management changes in response to conditions that compromise the long-term health and sustainability of rangeland resources. The comment stated that these aspects of the rule would have the potential to be detrimental to fish and wildlife resources.

The final rule does not alter BLM's mission of managing the public lands under the multiple use and sustained yield standard as provided in FLPMA. Grazing is just one of the many multiple uses for the public lands. The final rule will not prevent specialists from recommending and implementing management changes in response to conditions that may compromise the long-term health and sustainability of rangeland resources. BLM has flexibility to effect changes in grazing management to address rangeland health, including:

● the use of permit/lease terms and conditions to achieve resource objectives (section 4130.3);

● modification of terms and conditions when active use or related management practices are not meeting plan objectives or standards and guidelines (section 4130.3-3);

● suspension of active use in whole or in part due to the reasons set forth in section 4130.3-3 based on monitoring, field observations, ecological site inventory or other acceptable methods (section 4110.3-2); and

● issuance of immediate full force and effect decisions to close areas to grazing when the authorized officer concludes that soil, vegetation, or other resources require immediate protection because continued grazing use poses an imminent likelihood of significant resource damage.

The comments appear to assume that the proposed changes make significant revisions in the existing regulations. This is not the case. The changes are largely administrative in nature, and are designed to ensure a more balanced approach to rangeland management, 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. The proposed rule would not fundamentally change the way BLM manages land and would not have a "profound" effect on wildlife. The proposed revisions do not alter BLM's responsibilities under existing statutes, including the Migratory Bird Treaty Act, the Endangered Species Act, the Sikes Act, and applicable Executive Orders. In addition, the standards and guidelines under section 4180.2 remain intact. As we have stated, BLM acknowledges that some of

the changes in implementation may have short-term impacts on wildlife on a small portion of BLM allotments. Any short-term impacts should be outweighed by long-term rangeland health benefits. In short, we have not changed our view that most of the changes in the final rule will have little or no detrimental effect on wildlife.

Land use plans and site-specific analyses are the proper vehicles for considering the site-specific effects of grazing on wildlife. General impacts on wildlife are addressed in the EIS. 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 impacts 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 ESA. The 5-year phase-in provision for reductions in stocking rates that exceed 10 percent of current stocking may affect Special Status Species not listed as threatened or endangered under the ESA. Any adverse effects on such species, however, should be limited to very few grazing allotments. BLM range assessments through fiscal year 2002 indicate that existing livestock grazing was a significant factor in not meeting land health standards on about 16 percent of the allotments that had been assessed and evaluated. Of that 16 percent, a lesser number of allotments required stocking rate reductions exceeding 10 percent. Many grazing system changes involved management of livestock rather than stocking rates, such as by limiting livestock access to certain portions of the allotments. 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, possibly including Special Status Species not listed as threatened or endangered, but will benefit wildlife in the long term. Based on the evaluations completed by the end of FY2002, this provision would affect less than 16 percent of allotments. The provision that allows 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 ESA 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. The EIS and Addendum discuss the sage-grouse conservation strategy at the end of Chapter 1, and address the impacts of this rule on the sage-grouse strategy in the cumulative impacts analysis in Chapter 4. Effects on wildlife in general are discussed are analyzed in Sections 4.3.7

through 4.3.9 of the EIS and Addendum.

Finally, these changes are based on our experience implementing the regulations adopted in 1995. The changes here do not significantly alter those provisions adopted in 1995 that were examined in the accompanying EIS for that rule. As discussed in that EIS, the changes adopted at that time were expected to improve rangeland health, including habitat for sage-grouse. The timing and phase-in provisions adopted here are not expected to have significant effects on the improvements in rangeland health derived from the 1995 regulatory changes. BLM's National Sage-Grouse Habitat Conservation Strategy (2004) reflects the combined Federal and state response to the sage-grouse situation, and outlines how BLM intends to achieve its goal of managing public lands to maintain, enhance, and restore sage-grouse habitats while providing for sustainable uses and development of public lands. The commitments made in the strategy are unaffected by the final grazing rule.

One comment stated that procedures followed by BLM in the management of public rangelands contribute to petitions for Federal listings under the ESA, 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 effect on western cultural, social, and economic values.

This rule focuses primarily on improving the efficiency of administrating livestock grazing 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 impact on the ability of the public to enjoy wildlife, and will not adversely affect the economic values associated with wildlife. Specific impacts on local or visiting wildlife enthusiasts would be more appropriately addressed in any subsequent land use plan or allotment management plan analysis. Finally, as stated above, these changes are based on our experience implementing the regulations adopted in 1995. The changes here do not significantly alter those provisions adopted in 1995 that were examined in the accompanying EIS for that rule. The provisions adopted here are not expected to have significant effects on the improvements in rangeland health derived from the 1995 regulatory changes.

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.

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 final rule makes no substantive changes in the fundamentals or standards themselves. Addressing more specific impacts on wild horses and burros is outside the scope of the rule. Specific impacts on wild horses and burros are more appropriately addressed in subsequent land use plans, landscape-level analyses, or undertaking-specific analyses.

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.

The final 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 impacts. 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 and 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. Therefore, we have not included such a requirement in the final rule.

F. Alternatives Considered

Three general objectives for the changes to the regulations were identified in the Draft EIS (Section 1.2.2): (1) improving working relationships with permittees and lessees; (2) protecting the health of the rangelands; and (3) increasing administrative efficiency and effectiveness of the process of managing livestock grazing on the public lands, including a means for resolving legal issues. The preceding section of this Preamble under Purpose and Need shows which objective primarily impels each change in the regulations.

The regulatory changes in this final rule are relatively narrow in scope, both individually and cumulatively. Most changes respond to a specific concern that arose through experience implementing the 1995 regulations. The changes clarify or improve

specific elements of the 1995 regulations. The changes were combined in a single rulemaking, including public participation and the NEPA process, because it was the most efficient way to amend those portions of the regulations. The changes in the regulations and alternatives to them do not fit into themes commonly used for the range of alternatives in an EIS concerning public land management, e.g., various levels of resource protection or resource use. Therefore, those categories were not used to frame the alternatives in the EIS.

The sections of the 1995 regulations for each of the changes to the regulations are discussed in Section 2.1 of the Draft and Final EIS (No Action). The changes are discussed in Section 2.2 (Proposed Action). Table 2.5 compares the three alternatives evaluated in detail. Some regulatory changes are primarily editorial. Some changes are more controversial than others.

Additional alternatives, in the form of different combinations of changes, were not developed for the EIS because each of the regulation changes is relatively independent of the others. Thus, there are many combinations of the 18 elements that could be changed or not changed and combined into an alternative. Such alternatives would not provide a clear basis of choice because the differences between them would be small. The broad comments regarding alternatives fall into several subject areas, which are addressed below.

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.

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 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.

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.

BLM does not believe that these changes will benefit the livestock industry at the expense of other users and the environment. The rules continue to promote consultation and coordination with other users, with other agencies and governments, and with tribes (4120.5). 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 an alternative was considered in the EIS for Rangeland Reform ’94 and the anticipated effects on many livestock operators who are dependent on public rangelands for their livelihood were displayed in that document. The changes to the regulations adopted here 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 action under consideration in the current EIS. Measures to protect sage-grouse and their habitat are appropriately considered in the Bureau’s sage-grouse conservation strategy, and at the land use plan and/or permit issuance levels. We addressed the sage-grouse conservation strategy generally in Chapter 1 and Chapter 4 of the EIS.

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.

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 bring efficiencies to the existing livestock grazing program, thus improving rangeland health on all allotments. The regulatory changes are narrow in scope, and include no changes in grazing fees, 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. 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.

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

At the rulemaking tier of decision, such as in the case of developing this rule, 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 relevant information (see Sections 4.3 and 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, and where active use may need to be changed by more than 10 percent. BLM will make grazing decisions to change management practices or

levels of grazing on all allotments that do not meet standards, if we find that failure to achieve the standards is due in significant part to existing grazing management practices or levels of grazing use. The time frames amended under this final rule may also affect those allotments. The numbers of allotments where assessments have been completed, and the percentage of those that meet standards and guidelines for rangeland health, provide a perspective on the proportion of allotments where this final rule, e.g., in section 4110.3, may apply. Because this final 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 the EIS is limited.

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.

The changes in the regulations were designed to accomplish one or more of the three objectives stated at the beginning of this section of the preamble and in Section 1.2.2 of the EIS, Purpose and Need by Topic. As in 1995, one of the overall objectives of this final rule 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 impaired BLM's flexibility to meet this goal. These have included the 1995 provisions regarding the relatively short timeframe (before the start of the next grazing year) within which BLM must develop and implement an appropriate remedial action after BLM determines that current livestock grazing practices significantly contribute to the non-achievement of one or more standards or do not conform with guidelines, the requirement that the United States must hold 100 percent of the title to permanent structural range improvements constructed under a Cooperative Range Improvement Agreement, the requirement the United States must hold, to the extent authorized by state law, the right to use water on public land for the purpose of livestock watering on public land and the requirement that authorized nonuse of a grazing permit is limited to no longer than 3 consecutive years. The latter arose from the Federal Court invalidation of the provision for conservation use permits, which 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 impacts or rangeland health. Those that do are addressed in the section-by-section analysis of comments.

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).

We examined what we believe to be an appropriate range of alternatives in the draft EIS, 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 rule, and sufficiently distinct to allow for meaningful comparisons in the analysis.

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Currently, section 4180.2(c) requires that BLM take appropriate action as soon as practicable but no later than the start of the next grazing year, after we determine that grazing is a significant factor in the failure to achieve a rangeland health standard or conform with a guideline. Similarly, section 4180.1 requires appropriate action no later than the start of the next grazing year, after BLM determines that grazing management needs to be modified to ensure that the conditions described by the fundamentals of rangeland health exist. While BLM prefers to take appropriate action as quickly as possible, recent experience has demonstrated that complex circumstances can sometimes require extended periods to form effective long-term solutions. The lack of standards attainment in rangelands, and the concomitant inability to achieve and provide the physical and biological conditions described by the fundamentals of rangeland health, often is a result of gradual deterioration over many years due to the interaction of many

factors, including inappropriate livestock grazing. The process to develop action plans to determine and implement appropriate corrective appropriate action can be complex. 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. We have removed the action timeframe requirement in section 4180.1 for the reasons stated in section V of this rulemaking and in the Addendum to the EIS.

BLM examined two alternatives for active use changes greater than 10 percent in the EIS, in addition to the current regulations. Scoping indicated that permittees and lessees supported a 5-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 the section-by-section analysis and response to comments.

G. Cross-cutting Issue-related Comments: Interested Public; Planning; Monitoring; and Enforcement

Many comments addressed issues that pertain to the grazing program as a whole or to multiple sections of the regulations. We will respond to these comments in this section of the preamble on the role of the interested public, planning, monitoring, and enforcement.

1. Role of the Interested Public.

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. BLM has considered the comments but has decided not to make major changes in the rule. The final 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, one could obtain interested public status 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. Under the final rule, submitting a written request is sufficient to obtain interested public status initially, but this alone is no longer sufficient to maintain that status. Instead, subsequent comment or other participation in the decisionmaking process is necessary. 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.

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. It is important to remember that the consultation opportunities available to the "interested public" under the grazing regulations are not the full extent of public involvement in BLM grazing and rangeland management matters. In addition to pursuing the opportunities afforded under the grazing regulations, any member of the public may attend meetings of Resource Advisory Councils, and may provide input and comments regarding general grazing

policy, meet with BLM managers and/or staff upon request, and participate in the land use planning and NEPA analysis and decision-making processes that concern rangelands. 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. The comments relating to the definition of interested public are addressed in more detail in the Section-by-Section Analysis portion of the preamble at section 4100.0-5.

The proposed rule also included changes in the role of the interested public. Special consultation requirements were reduced in situations involving day-to-day management activities but retained for broader level planning decisions that guide daily activities. For example, BLM is required to consult, cooperate, and coordinate with the interested public when planning range improvement projects, developing allotment management plans, and apportioning additional forage. The interested public is also provided, to the extent practical, an opportunity to review and provide input during the preparation of reports that evaluate monitoring and other data that are used as a basis for making decisions to increase or decrease grazing use or to change terms and conditions of a permit or lease. Such reports include monitoring reports, evaluations of standards and guidelines, BAs or BEs, and any other formal evaluation reports that are used in the decisionmaking process. Additionally, there are multiple opportunities for public involvement when land use plans are amended or revised. Under the final rule, though, BLM will no longer formally consult with the interested public when undertaking routine management tasks such as renewing individual grazing permits, actually modifying a

term in a grazing permit (as opposed to reviewing reports on monitoring and supporting data), or issuing temporary nonrenewable grazing permits.

Many comments opposed these reductions in consultation with the interested public. Some recreationists and other non-grazing 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.

Numerous comments supported the changes and expressed the view that the interested public consultation system has led to decisionmaking gridlock. Many of these comments noted the important role public input plays at the planning level but argued that the involvement in routine decisions is counterproductive for all involved. Some expressed the view that only those with an economic interest should participate in allotment-level decisions.

We have retained the proposed changes in the final 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. The changes are addressed in more detail later in this section of the preamble at sections 4110.2-4 (allotment boundary adjustments), 4110.3-3 (reductions of permitted use), 4130.2 (issuance and renewal of grazing permits and leases), 4130.3-3 (modifications to permits or leases), and 4130.6-2 (nonrenewable permits and leases).

2. Land Use and Allotment Management Planning

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.

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 periodic 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.

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 comments went on to say that the fact that AUMs are in suspension demonstrates that the range cannot support those levels of grazing.

This issue is outside the scope of this rule. 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.

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.

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 rule.

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

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.

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

FLPMA requires BLM to manage lands for multiple uses. 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.

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.

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. BLM believes we have sufficient guidance to consider the issue of “grazing retirement,” and so does not need a regulatory provision to address this topic.

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, and that whenever the Secretary retires public lands from grazing, she must 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. 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 grazing permits in a grazing district she must determine whether such lands remain chiefly valuable for grazing if any such retirement may ultimately result in the modification of the district's boundaries. 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).

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

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

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 ranchland, 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.

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 exchanging public lands for conservation easements on private lands after comments received in the spring of 2003 indicated general public opposition to this policy proposal.

One comment urged BLM to update our allotment management plans.

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 and planning processes, not in the grazing regulations. Therefore, this issue is outside the scope of this rulemaking.

3. Monitoring

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. Discussions of other comments on monitoring directed at specific regulations appear elsewhere in this preamble under the appropriate section.

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, decisionmaking, 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. This final 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). In the final rule, we have clarified the proposed rule by providing for the use of monitoring data if a standards assessment indicates to the authorized officer that the rangeland is failing to achieve standards or that management practices do not conform to the guidelines. 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.

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.

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. We currently administer grazing on about 21,535 allotments (2005). BLM has established monitoring sites in nearly 11,500 allotments, and currently collects monitoring data to some degree on about 3,500 of those allotments each year. These monitoring sites are used primarily to evaluate achievement of land use plan objectives, to ascertain changes in condition, and to determine trend (toward or away from a desired condition). Information is collected at some of the monitoring sites more often than at others, depending on priority and purpose. Specific methods of data collection are better addressed in handbooks and technical references, which are much more readily updated. However, it is not always necessary to monitor to find that rangeland is achieving standards and that management practices conform to the guidelines. Under the final rule,

if a standards assessment indicates that the rangeland is failing to achieve the standards or that grazing management practices do not conform to the guidelines, we will use monitoring data to support our determination regarding the significant contributing factors for failing to achieve the standards or to conform to the guidelines.

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

Funding is provided by annual congressional appropriation. We will prioritize allocation of our discretionary monitoring funding to address resource needs and provide a foundation for management adjustments. BLM agrees that generally, monitoring is a critical component providing data for evaluation and adjustments of terms and conditions of grazing authorizations, unless the need for the change in authorization terms and conditions is immediate and obvious, such as when conditions described at 43 CFR 4110.3-1(b) are encountered (e.g., wildfire burns available forage, necessitating temporary suspension of grazing use). We will continue to prioritize funding to meet the monitoring needs required by this rule. The change in the final rule that limits the monitoring requirement to those cases where a standards assessment indicates that the

rangeland is failing to meet standards or that management practices do not conform to the guidelines does not result in a negative budgetary impact.

4. Enforcement

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.

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 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.

H. Other Recommendations

Several comment letters offered additional recommendations for BLM actions that were not specific to any particular regulatory section.

1. Advisory councils and grazing advisory boards

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 RACs 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 RACs as public oversight bodies because they are ineffective at arriving at a decision.

The suggestion to re-establish MUACs is outside the scope of this rule. To the extent there is concern that RACs 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 balanced composition of the RAC comports with the statutory requirements of Section 309 of FLPMA. We have not adopted these suggestions in the final rule.

Some comments expressed disappointment that BLM chose 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 pursing regulations that would allow board establishment that was presented in the DEIS section 2.4.

The RACs 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 RACs is outside the scope

of this rulemaking. 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 this final 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.

2. Wild horses and burros

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."

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 impacts 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.

3. Reserve Common Allotments

We received several comments on the concept referred to as "Reserve Common Allotments" (RCA), which was discussed in the ANPR. We decided not to pursue the possibility of creating RCAs in the proposed rule following a generally unenthusiastic reception during the public scoping process. 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 ecological criteria.

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.

4. Incentives for good stewardship.

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. One comment suggested adopting conservation easement tax laws currently in effect in Colorado, New Mexico, and other states.

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.

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. Encouraging flexible management.

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.

The proposed 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.

6. Determining appropriate technical procedures.

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.)

Employment of the technical procedures and principles described by these documents is appropriately addressed in policy, manuals, and guidance rather than in a rule. When revising policy, manuals, and other guidance, BLM reviews all available technical materials, and will review the Catlin and Stevens articles before the next revision.

One comment stated that BLM policy should require 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).

As discussed above, BLM is not required to launch an affirmative defense of grazing permits in response to an administrative appeal to OHA. BLM may come forward with a rebuttal, but the appellant bears the ultimate burden of persuasion.

OHA may not be the forum of choice for raising questions with respect to BLM's compliance with the DQA's standards (i.e., "the quality, objectivity, utility, and integrity of information"). As required by the DQA, BLM has issued guidelines that provide an administrative mechanism for raising such questions directly with BLM (Bureau of Land Management Information Quality Guidelines, published October 1, 2002).

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 over-utilization are effective.

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

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.

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 understand that permittees and lessees are more likely to accept decisions and act cooperatively if the data we use to support changes in grazing preference are acceptable both to BLM and the affected permittees or lessees. However, if the data BLM uses to

support changes in grazing preference are not acceptable to a permittee or lessee, BLM is still obligated to make its management decision in light of its statutory management responsibilities.

7. Access to public lands.

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 and/or BLM staff will be out on the permittee's allotment.

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.

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.

Under the TGA (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, at 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).

8. Judicial matters.

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.

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. 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.

9. Interagency cooperation.

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.

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 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.

For more commentary regarding interagency cooperation, see the discussion of section 4120.5-2, Cooperation with Tribal, state, county, and Federal agencies, in Part V of this preamble.

V. Section-by-Section Analysis and Response to Comments

In the following paragraphs of the preamble, we discuss briefly the sections of the regulations that appeared in the proposed rule, how the proposed rule changed each section, whether and how we further amended each section in the final rule, the comments we received addressing each section, and how we respond to those comments.

Subpart 4100 -- Grazing Administration -- Exclusive of Alaska; General

Section 4100.0-2 Objectives.

In the proposed rule we made technical and editorial corrections to this section to remove reference to regulatory provisions that no longer exist and to acknowledge that the Public Rangelands Improvement Act (PRIA) contributes to the objectives of the

regulations. Several comments urged BLM to adopt section 4100.0-2 as proposed.

One comment addressed this section, stating that BLM should remove the statement “to accelerate restoration and improvement of public rangelands to properly functioning conditions” and 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.

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 TGA (“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 this final rule, continues to state unequivocally that

"… [l]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 and/or regionally in consultation with RACs. Once standards and guidelines were developed for a particular area, BLM reviewed the relevant land use plans to ensure that their provisions were consistent with achieving standards and conforming with guidelines. In some cases, it was necessary to amend land use plans to make their provisions consistent with achieving standards and conforming with guidelines. Restoration and improvement of rangelands to properly functioning conditions are objectives of the grazing regulations and are implemented in a manner that conforms with applicable land use plan decisions.

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 (43 CFR 1610.0-5(b)). 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 (43 CFR 1610.0-5(c)). 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.

Section 4100.0-3 Authority.

The proposed rule made 3 editorial corrections in this section. One comment stated that the proposed rule lacked reference to, and consideration of, 43 U.S.C. 315a and 1732(b), and 48 Stat. 1269, on management of use, occupancy, and development of public lands. These provisions are included in this section, either expressly or implicitly. We make no changes in this section of the final rule.

Section 4100.0-5 Definitions – "active use"

We amended the definition of "active use" to make it clear that the term refers to a forage amount based on the carrying capacity of, and resource conditions in, an allotment.

"Active use": In this definition, we have substituted the word "livestock" for "rangeland" in the reference to carrying capacity. The change makes the definition consistent with all other references to "carrying capacity" in the rule.

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."

We have made no change to the definition of "active use" in the final rule in response to these comments. In the final rule 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.

Section 4100.0-5 Definitions – "conservation use"

We removed the definition of the term "conservation use," and removed the term itself everywhere it appears in the existing regulations, in keeping with the 10th Circuit Court decision discussed earlier in this preamble.

Several comments opposed removing the concept of conservation use permits from the regulations. One comment expressed the need for a mechanism to rest rangelands for extended periods of time when necessary to recover plant composition and forage production or protect important habitats. 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 non-grazing would have minimal impact 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 acknowledged that changes in allotment use for conservation purposes is no longer permitted, because conservation use was set aside in the 10th Circuit Court of Appeals decision in Public Lands Council v. Babbitt, but encouraged BLM to continue to work within applicable laws and regulations to allocate rangeland uses that achieve multiple-use goals, such as providing important wildlife habitat and contributing to water quality and soil retention, while providing compensation to the public commensurate with what other range users provide.

The amendment in the final rule of the temporary nonuse section of the regulations removes the 3-year limit on nonuse by a grazing permittee. This proposed rule will achieve the goals set forth in this comment. 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. BLM can also make changes in grazing management such as adjusting, reducing, or eliminating grazing use based on a determination that existing livestock grazing management or levels of use are a significant factor in not achieving or making progress toward achieving land health standards.

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

The removal of the term "conservation use" from the regulations is required by Federal court decision (Public Lands Council v. Babbitt, supra). The final rule provides adequate options to achieve the purposes expressed in the comment supporting the need for a rest mechanism. Section 4130.4 provides the authorized officer the ability to authorize nonuse as needed to provide for resource conservation, enhancement, or protection. Even though the nonuse will be reviewed and approved on an annual basis, the rule provides the mechanism to accommodate nonuse for the time needed to achieve plant composition, forage production, or habitat improvement objectives.

Regional RACs may be one forum for permittees and/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. At regional RAC meetings, it may be appropriate to discuss conservation buy-outs, but, as noted earlier, BLM does not have authority at the present time to “buy out” permits.

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.

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.

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

Amending laws, such as the TGA, FLPMA, and PRIA, is not within the scope of the proposed rule or the authority of BLM.

Section 4100.0-5 Definitions – "District"

We have amended the definition for the term "District" to update the regulations as to the organization of BLM field offices. The term is not to be confused with "grazing district." The latter term either is used in its full form -- "grazing district"-- or appears in context so that its meaning is clear.

Section 4100.0-5 Definitions – "Ephemeral rangelands"

We have revised the definition for this term as well, as suggested in comments. This definition was not in the proposed rule, but the change suggested in the comments was more of a clarification than a change, removing the notion that production of sufficient forage by ephemeral range was necessarily unusual. Therefore, 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."

Section 4100.0-5 Definitions – "Grazing lease/grazing permit"

We amended the definitions of “grazing lease” and “grazing permit” for purposes of clarification, to make it clear that BLM issues grazing leases to authorize grazing on lands that are not within grazing districts established under the TGA, and permits to authorize grazing within grazing districts.

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.

We have not adopted this recommendation. 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 all 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 and to attain rangeland health.

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.

The TGA directs BLM to authorize livestock grazing through a permit or lease. NEPA provides requirements for Federal actions including the issuance of grazing permits and leases. BLM must comply with provisions of both laws.

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 TGA.

The TGA 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.

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.

BLM has not changed the final 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.

Section 4100.0-5 Definitions – "interested public"

Under the definition of "interested public" in the 1995 regulations, an individual, group, or organization could obtain interested public status by (1) submitting a written request for involvement in the decisionmaking process associated with specific allotments, or (2) by submitting written comments during a formal public comment period associated with a decision within a specific allotment.

In the proposed rule, we revised the definition of "interested public" to refer to an entity that has done one of two things: (1) submitted a written request to BLM to be provided an opportunity to be involved in the process leading to a BLM decision on the management of livestock grazing on public lands, and followed up that request by commenting on or otherwise participating in the decisionmaking process as to the management of a specific allotment if there has been an opportunity for such participation, or (2) submitted written comments to the authorized officer regarding the management of livestock grazing on a specific allotment. Thus, a person, group, or organization still would qualify as a member of the interested public simply by commenting on grazing management in a specific allotment during an announced public comment period.

In the final rule, we have further amended the definition to require a written request to cover individual allotments. Under current wording, a potential interested public could write one letter requesting interested public status as to all "public lands."

Each of BLM's 162 field offices would then be obligated to send this entity information, for purposes of local consultation/commenting opportunities, and then "weed out" the interested public from their local lists if the potential interested public does not specifically respond or take advantage of the consultation opportunity. Keeping the definition's focus on management of a specific allotment will keep the process more orderly and efficient.

Use of the term "grazing management" when speaking of allotments is redundant, given the definition of "allotment" elsewhere in the regulations. Therefore, there is no need to include it in the "interested public" definition – since the "interested public" definition uses the term "allotment."

We received many comments regarding this definition. 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 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.

BLM seeks to balance the legitimate need for public involvement in the management of public lands with the public interest in the cost-effective administration of the public participation process. 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 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.

One comment stated that, to enhance BLM's working relationship with the permittee and to bring cohesive management into the decisionmaking process, monitoring should be conducted only by the permittee and BLM, omitting the interested public.

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 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.

One comment stated that removing some requirements to consult with the "interested public" while adopting a requirement to cooperate with state, county, or locally-established grazing advisory boards provides preferential treatment to one group over another. The comment questioned whether this change ensures "a consistent community-based decision-making process."

The final rule retains requirements for consultation, cooperation, and coordination with the interested public for:

● apportioning additional forage on BLM-managed lands;

● developing or modifying an allotment management plan or grazing activity plan; and

● planning range development or improvement programs.

For example, the final rule provides for continued participation by the interested public at the same level as the state, county, or locally-established grazing advisory boards. The rule also retains requirements to

● allow the interested public to review and comment on grazing management evaluation reports; and

● notify the interested public of proposed and final grazing decisions.

The final rule provides the interested public with ample opportunities to participate and provide input to BLM on its management of public lands, even though the rule limits the interested public's role in day-to-day operational aspects of the grazing program. BLM's experience under the existing regulations is that this form of public participation is often inefficient and unproductive. The final rule allows the authorized officer discretion to determine appropriate on-the-ground management actions to achieve plan objectives and respond to various resource conditions.

Two related comments questioned BLM's proposal to restrict interested public participation to plan-level or program-level decisions. The comments stated that

information and decisions presented at this level are often too broad and general to allow specific and meaningful evaluations or comments, and site-specific actions have the greatest potential to impact fish and wildlife, including species listed under the Endangered Species Act. The comment asserted that it is therefore important to retain public consultation requirements for site-specific resource decisions.

An important element of BLM land use planning is the establishment of resource management objectives. These are designed to prompt managers to achieve standards and implement guidelines under pertinent state and Federal laws in order to improve the condition of the land resource. Most if not all of the site-specific actions that would affect fish and wildlife are included in the development or modification of an allotment management plan and the planning of range improvements. Both allotment management and range improvement planning continue to require consultation, cooperation, and coordination with the interested public under the final rule. BLM is seeking to balance the need for public involvement in the management of public lands with the public interest in the cost-effective management of those lands.

Still another comment expressed concern that members of the public (other than the grazing permittee) should be given the opportunity to submit comments regarding a grazing permit environmental assessment (EA). The comment stated that, because grazing management affects many resources on which fish and wildlife depend, it would be valuable to allow predecisional comments from all interested parties to be introduced into the public record. The comment stated that the opportunity for review under NEPA

may not allow for timely and site-specific public input. The comment stated that efforts to simplify and streamline the NEPA process could result in the agencies and the public being informed only about those projects that warrant an EIS, when most proposals for changes in rangeland management are evaluated in EAs.

The final rule does not change relevant requirements pertaining to public involvement in the NEPA process. While BLM has proposed CXs that would pertain to grazing decisions (71 FR 4159, January 25, 2006), at present BLM consults with the public and provides notice regarding NEPA activities to the public, pursuant to CEQ's regulations at 40 CFR 1501.4(b) and 40 CFR 1506.6(b). Grazing EAs are made available for public review if the manager responsible for authorizing the action believes it necessary. Public participation might also occur as part of determining the scope of the assessment.

Under the final rule, the interested public will still be provided a copy of the proposed decision and associated NEPA documents or notified of the availability of the NEPA document, may protest proposed decisions under section 4160.2, and may seek appeal of a final decision under section 4160.4.

Also, section 4130.3-3(b) provides the interested public opportunity to review and provide input to reports that lead to decisions to modify grazing use.

There are several opportunities for public involvement in the process of issuing grazing permits. The interested public may comment on or otherwise provide input in the development of reports leading to adjustments in terms and conditions, the development of allotment management plans (section 4120.2(a), (c), and (e)), which include terms and conditions that would be incorporated in the grazing permit, and in the permit decision process. At the authorized officer's discretion, the interested public may be, but is not required to be, consulted in the development of the terms and conditions of the permit.) BLM also consults Resource Advisory Councils during the preparation of Resource Management Plans (land use plans) and allotment management plans, providing the public an additional opportunity and means for participating in the land use planning process..

Another comment proposed that public input be sought when there would be a significant change of land use. The comment stated that this may provide for useful public input information for making management decisions, but limit the opportunity for obstruction due to individual entity or public agendas.

The comment seems to advocate a "significance" threshold for public participation. BLM declines to adopt such a threshold. BLM removed the requirement (but not the option) to consult with the interested public on actions that involve what BLM considers to be the day-to-day operational aspects of the grazing program, while preserving the requirement to consult with the interested public in apportioning additional forage, developing or modifying a grazing activity plan or range improvement plan, and

preparing reports evaluating range conditions. These are actions for which public input would be of the greatest value in deciding management direction for the public land. This final rule does not affect the public's ability to participate when BLM formulates plans and programs for land use.

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.

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.

Section 4100.0-5 Definitions – "grazing preference; permitted use"

We revised the definition of "grazing preference" to add the quantitative meaning of the term as it was used in the 1978 regulations, as opposed to the 1995 rule, which defined it in terms of priority of use as against other grazers. Under the final rule, preference is the sum of active and suspended use. Related to this change, we removed the definition of "permitted use," and substituted "preference" or "grazing preference," as appropriate, for "permitted use" in the regulations.

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. One comment stated that it was inappropriate to change the definition of "grazing preference" to include an amount of forage on public lands attached to a rancher's base property without considering other factors, such as species composition and diversity, vegetation structure and maturity, rare or ephemeral species,

and soil condition. The comment stated that these factors do not necessarily relate either to livestock forage quantity or to base property attributes, and that using these factors in the definition of "grazing preference" gives the operator an inappropriate expectation of what is available for his or her use. The comment suggested that BLM consider other factors in defining "grazing preference."

The final rule's modification of the definition of preference and the removal of 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. The definition of "preference" in the rule supports the requirement that livestock forage allocations on public land be made within a multiple use context in accordance with land use plans under section 4110.2-2. When BLM determines that additional forage is available for livestock within a planning area, under this definition the preference holder is "first in line" for that portion of the available forage that occurs within his/her allotment(s). The 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 upon available vegetation. BLM reconciles competing demands for public land resources through its land use planning process.

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.

The final 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 (see the discussion in section III.D.9. of this preamble) 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 and/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, BLM formally defined "grazing preference" to be a forage allocation on public lands, expressed in AUMs, 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 AUM's," 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 rulemaking 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 from those allocations in the course of implementing land use plans under FLPMA, do not "trump" BLM's multiple use mandate, which 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.

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 both to 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 the final rule at 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 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 contained in the final 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 AUM's" was informally used before 1978.

Section 4100.0-5 Definitions – "suspension"

We amended the definition of "suspension" to remove the qualifier "temporary," which is redundant.

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.

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.

Another comment stated that BLM should implement a process to ensure that suspended use is reinstated to active use. It stated that 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.

BLM agrees that it is important to keep track of grazing use that has been reduced, and the final rule provides at section 4110.3-2(b) 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, under the final rule at section 4110.3-1(b), such additional forage will be applied first to reduce or eliminate any suspensions. There is no need to change the final rule in response to this comment.

Some comments stated that BLM should not change the definition of suspended use, but rather retain the one in the 1995 regulations. BLM has not adopted the recommendation to retain the 1995 definition of "suspension." The proposed and final rules change the definition to be consistent with the restored definition of "preference."

Section 4100.0-5 Definitions – "temporary nonuse"

We amended the definition of "temporary nonuse" to mean that portion of active use that BLM allows a permittee or lessee not to use.

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).

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.

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.

We have not adopted the comment in the final rule. Changes in the definition of "temporary nonuse" proposed in the rule are necessary to implement the ruling of the 10th Circuit Court in Public Lands Council v. Babbitt, supra, on conservation use. The interpretation in the comment of the relationship between temporary nonuse and grazing preference is incorrect. The proposed rule defines "grazing preference" or "preference" as the total number of AUMs on public lands apportioned and attached to base property

owned or controlled by a permittee, lessee, or an applicant for a permit or lease. 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.

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.

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.

Section 4100.0-5 – Other comments and recommendations on definitions.

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.

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.

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 among themselves and throughout the existing rules and the proposed rules.

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

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.

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 final 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.

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.

We have not adopted this comment in the final rule. The suggestion to define an AUM in terms of livestock size and class would make implementation of the regulation prohibitively complex and costly.

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.

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.

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 AUM's included within the permittee's term grazing permit."

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, 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 final rule states unambiguously at § 4130.2(a) and through the definitions of “grazing permit” and “grazing lease” at § 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 TGA, and with the use of the term “permit or lease” in Section 402 of FLPMA, 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.

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.

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.

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."

We considered the definition suggested in the comment and determined that it would not add clarity to the regulations. This 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 describing 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. Also, adopting this suggestion would create an internal conflict with section 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.

Comments suggested that BLM should include in the definitions of "monitoring" and "rangeland studies" the requirement to apply BLM-approved analytical methodology. One comment criticized BLM's current practice of providing guidance for monitoring through manuals and handbooks, and not through regulations. 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.

We have not changed the regulations in response to these comments. The BLM Manual, handbooks, and other BLM internal instruction materials provide adequate opportunity for guidance on monitoring and rangeland studies, and these materials are more easily updated than regulations. For example, subsequent to implementation of the 1995 rules, BLM has been part of an interagency team that has developed and improved a method for assessing indicators of rangeland health. After 4 years of use, this Technical Reference has been modified to incorporate quantitative measures with the qualitative techniques. We have also been developing techniques for monitoring macro-invertebrates as indicators of water quality and have been researching the relationship between upland range condition and macro-invertebrate populations. 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.

Comments stated that BLM should restrict monitoring to rangeland studies. They suggested that “monitoring” should be defined as “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.

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.

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 FLPMA provides authority for managing lands on the basis of multiple use.

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 FLPMA and the BLM planning regulations (43 CFR 1600.0-5) and needs no further definition in these regulations.

One comment suggested that BLM should define the following: "affiliate," "terms and conditions," "cooperator," "qualified applicant," "community-based decision making," and "court of competent jurisdiction."

BLM does not believe this is needed. The term "affiliate" is defined in the current regulations and remains unchanged. Qualifications for holding a grazing permit or lease are set forth at subpart 4110 of the grazing regulations, and the proposed amendments simply reorder the mandatory qualifications provision found at section 4110.1. The meanings of the other terms, "terms and conditions," "cooperator," "community-based decision making," and "court of competent jurisdiction" are clear from their usage and the context in which they appear.

Section 4100.0-9 Information collection.

This section is in the regulations for information purposes. It recites the fact that the Office of Management and Budget has approved BLM's collection of information to

enable the authorized officer to determine whether to approve an application to use public lands for grazing or other purposes. No public comments addressed this section, and we have made no changes in the final rule.

Subpart 4110–Qualifications and Preference.

Section 4110.1 Mandatory qualifications.

We amended this section by moving the provisions containing BLM's procedures for determining whether an applicant has a satisfactory record of performance to section 4130.1-1, which addresses filing applications, and adding a cross-reference to that section. No public comments addressed this rearrangement. We will discuss the comments that addressed the procedures themselves when we discuss section 4130.1-1.

Comments urged BLM to add a requirement that permittees "must be engaged in the livestock business," stating that this requirement is in the TGA, 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.

We have not adopted this comment in the final rule. 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 TGA 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 TGA 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.

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, supra.

We have not adopted this suggestion in the final rule. The Supreme Court upheld the deletion of the phrase "engaged in the livestock business" from the regulation

enumerating "mandatory qualifications" for permittees and lessees. 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 TGA 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 final rule and provide that permittees or lessees 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.

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.

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.

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.

It is not within BLM's authority to adopt this suggestion. The TGA 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.

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

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 must be a citizen or have filed a declaration of intention to become a citizen or petition for naturalization, or be 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 be 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, association, or corporation authorized to conduct business in the state in which the grazing use is sought. Therefore, 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, may apply for the associated grazing

preference on public lands, and may 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.

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.

We have not adopted this comment in the final rule. Permit renewal time frames 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.

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

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.

Section 4110.2-1 Base property.

In this section, we proposed an editorial change, dividing paragraph (c) of the existing regulations into two parts, designated (c) and (d), since the paragraph addressed two subjects: the requirement to provide a legal description of the base property, and the sufficiency of water as base property. No public comments addressed this section, and we have made no changes in the final rule.

Section 4110.2-2 Specifying grazing preference.

We amended this section in the proposed rule to replace the term "permitted use" with the term "grazing preference" or "preference." We discuss comments on the change in terminology under the definitions section. No comments addressed this section as such, and we have made no changes in the final rule.

One comment on this section 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.

We have not changed the final rule in response to these comments. BLM has no authority to give priority 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.) Therefore, under the TGA, the kind of animal an applicant for a permit or lease wishes to graze on public lands has no bearing on whether the applicant has or will be granted preference for a grazing permit or lease. BLM may issue permits to graze privately owned or controlled 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 TGA 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 BLM. 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.

Section 4110.2-3 Transfer of grazing preference.

The proposed rule made editorial changes to this section to conform the rule to the definition of "grazing preference."

A comment on this section 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.

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.

Section 4110.2-4 Allotments.

In the proposed rule, we removed the requirement that BLM consult with the interested public before making an allotment boundary adjustment because it is primarily an administrative matter that we implement by decision or agreement following a NEPA analysis of the action. This means that, under the final rule, allotment boundary changes will no longer trigger required consultation, cooperation, and coordination with the interested public. This change is intended to improve the administrative efficiency of grazing management.

Many comments expressed opposition to any reduction in the role of the interested public, but relatively few comments addressed this particular function. One comment stated that this change would affect the public role in NEPA analysis of boundary changes. That is incorrect. The public role under NEPA is unaffected by this rule change.

One comment stated that boundary adjustments could affect native plant populations and requested continued public involvement. Environmental issues such as impacts on native plants are best addressed through the NEPA process, which is unaffected by this change. BLM has found that much of the required consultation with the interested public is duplicative of these other processes and often delays routine, non-controversial 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. Thus, no changes have been made in the final rule.

One comment on this section suggested that 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.

We have not adopted these comments in the final rule. 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.

Section 4110.3 Changes in grazing preference.

In the proposed rule, we removed the term "permitted use" wherever it occurred in this section and replaced it with the term "grazing preference" for the reasons explained previously. We also added a third paragraph to provide that our NEPA documentation addressing changes in grazing preference would include consideration of the effects of changes in grazing preference on relevant social, economic, and cultural factors.

Numerous comments addressed both aspects of this section.

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 is 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.

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 TGA 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.

We received several comments that opposed including in this section 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 impacts, 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; BLM field managers have routinely considered social, economic, and cultural effects, despite the fact that NEPA does not require analysis of these considerations except in connection with preparing an EIS, 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 impacts 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.

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 …"ecological…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 impacts 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.

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 impacts on multiple resource values of the public rangelands, not just grazing impacts, including: the environmental, 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.

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 and/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.

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 impacts 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).

With respect to considering impacts 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 impacts of BLM actions and undertakings with respect to the concerns and traditional cultural properties of federally recognized Indian Tribes. The final rule does not subvert this direction.

One comment stated that the analysis did not adequately consider the impacts of grazing, and of the proposed revisions, on American Indian sacred sites. The comment also stated that additional analysis focused on protecting the physical integrity of such sites is necessary. The comment noted particularly the sacredness attributed by Tribes to natural springs and surface waters.

BLM recognizes its responsibility to manage heritage and cultural resources, including sacred sites under the National Historic Preservation Act and other authorities (e.g., Executive Order 13007), "Indian Sacred Sites"). Inventory, protection, stabilization, and enhancement of cultural resources have become integral parts of BLM management practices and planning initiatives. BLM does not believe any additional analysis is necessary. Beginning on page 4-41, the FEIS discusses the potential impacts of the proposed revisions on heritage resources. For example, the FEIS notes that new project developments will continue to be analyzed for effects on heritage resources on a case-by-case basis. For field office planning efforts and in accordance with BLM Manual 8100-The Foundations for Managing Cultural Resources, BLM will continue to address livestock grazing impacts at the land use or allotment management planning level, and conduct cultural resource surveys before taking management actions that could damage heritage resources. Historic and prehistoric sites found during such surveys would be protected in accordance with the National Historic Preservation Act of 1966 and other laws or executive orders as provided in 36 CFR part 800.

The FEIS also states that Tribal consultation begins as soon as possible in any case where it appears likely that the nature and/or location of the activity could affect Native American interests or concerns. Finally, section 4120.5-2(c) of the final rule provides that BLM will cooperate with Tribal agencies, including Tribal grazing boards, in reviewing range improvements and allotment management plans on public lands. During such Tribal consultation, Tribes may submit information about all sites, including

natural features such as springs and surface waters that have cultural or religious significance. BLM will consider all relevant information before making decisions about grazing.

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.

NEPA is a procedural statute, and does not direct the outcome of any agency decisionmaking 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 is tied to these selections. BLM believes the consideration of social, economic, and cultural factors provided for in section 4110.3(c) of the proposed rulemaking -- “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 impacts 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.

One comment stated that there are thousands of archaeological, historical, and cultural sites that are eligible or potentially eligible for the National Register of Historic Places that have been and are being damaged by livestock grazing on BLM-administered allotments. The comment also stated that BLM did not adequately consider these impacts, and that case-by-case review of range improvement projects will be insufficient for assessing the effect of grazing within the boundaries of documented historic properties.

BLM adequately evaluated and disclosed the effects of the proposed rule on cultural resources in the FEIS. For example, as noted in the above response, page 4-41 of the FEIS discusses the potential impacts of the proposed revisions to the grazing regulations on heritage resources. New project developments will continue to be analyzed for effects on heritage resources on a case-by-case basis, and BLM will analyze the impacts on such resources from grazing at the land use or allotment management planning level. BLM disagrees with the comment's assertion that review of individual range improvement projects will not be sufficient to assess grazing impacts on historic

properties. Before authorizing surface disturbance, BLM must identify cultural properties that are eligible for inclusion in the National Register of Historic Places and consider the effects of the action through the consultation process in Section 106 of the National Historic Preservation Act of 1966.

BLM notes that this final rule does not constitute an "undertaking" with the potential to affect historic properties as defined in 36 CFR 800.16, since promulgating the rule is not an on-the-ground activity affecting such resources. Promulgating a rule makes certain activities possible but does not mean that these activities can be tied to specific historic properties in specific places. However, NEPA and FLPMA do apply, and cultural resources were broadly considered in our planning and regulatory activities. This was done at a programmatic level for this rule in the FEIS, where the effects of the proposed rule (generally) were assessed with regard to potential effects on cultural resources (generally). Absent any specific actions it is not possible to identify potential effects on specific historic properties, and the rule does not become an "undertaking" with the potential to affect historic properties as defined in the regulations. The regulations established by the Advisory Council for Historic Preservation make clear that once an agency determines there is no undertaking, or that its undertaking has no potential to affect historic properties, the agency has no further Section 106 obligations.

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 impacts 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.

We have not materially changed current policy with regard to the consideration of social, economic, and cultural impacts 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 consistency across the Bureau in the analysis of social, economic, and cultural impacts. 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 impacts are analyzed and disclosed where appropriate. Since this provision requires no more 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.

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, and state and local government in this section, and to give consideration to provision for local, state, and regional governance.

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.

Section 4110.3-1 Increasing active use**.**

In keeping with the changes in the meanings of "preference" and "active use," in the proposed rule we amended the heading of this section to refer to active use and removed the term "permitted use" throughout. Because the provision affects how we regulate available forage, we asked the public to comment on whether BLM should use the term "available forage" instead of "active use."

BLM also asked for specific comments on this section to help determine whether there have been situations in which the ability of permittees or lessees to obtain loans was adversely affected by having some of their forage allocation suspended.

We proposed to reorganize this section to describe how we authorize increased grazing use when additional forage is available either temporarily, or on a sustained yield basis. BLM added two new paragraphs to clarify who has priority when we grant additional grazing use because livestock forage has become available on either a nonrenewable basis or a sustained yield basis.

In the final rule we have added language in the introductory text of this section that makes it clear that decisions increasing active use are also based on monitoring or documented field observations, just as decisions decreasing active use must be. Changes in preference, whether increases or decreases, already must be supported by monitoring or documented field observations under section 4110.3.

A number of comments raised issues relating to additional forage temporarily available. Before discussing the comments, we will briefly describe how BLM handles forage that is temporarily available.

In conformance with land use plan multiple-use objectives and decisions, BLM may allocate additional forage that is temporarily available for use by livestock, and authorize its use on a nonrenewable basis. Because it is a temporary forage allocation, the action of authorizing such use does not increase active preference. BLM commonly refers to such temporary forage allocations as “TNR,” which stands for “temporary and nonrenewable” livestock grazing use. Before authorizing TNR livestock grazing use, either by issuing a nonrenewable grazing permit, or by temporarily modifying the grazing

permit or lease of a preference operator, BLM ensures compliance with NEPA analysis requirements and documents that this action conforms to applicable land use planning decisions. 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 TNR livestock grazing use.

We have not changed the regulations in response to these comments, which we discuss below.

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.

Additional forage that is temporarily available most often occurs in years when favorable growing conditions result in above-average forage production. 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.

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

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.

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.

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 a qualified applicant applies for it first. 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.

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.

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.

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.

BLM retained the term “may,” rather than “will,” as it pertains to apportioning additional forage available for livestock grazing, in order to retain our complete discretion in this matter. The wording in the final 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.)

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.

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.

The next group of comments addressed increases generally. BLM made one change to the final regulations in response to these comments.

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.

Section 4110.3-1 (b)(2) is within paragraph (b), which we have amended in this 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, in contrast to, 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.

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.

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.

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

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.

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.

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.

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.

The section discussed in this portion of the preamble already contains, and this rule does not remove, procedures to allow grazing to be increased.

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

We have not adopted this suggestion in the final rule. 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 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.

Section 4110.3-2 Decreasing active use**.**

Again, in this section we replaced the term "permitted use" with the term "active use" throughout. We also amended paragraph (a) to provide that BLM will document its observations that support the need for temporary suspension of active use, and amended paragraph (b) to provide that BLM will place any reductions in active use made under this paragraph into suspension rather than require a permanent reduction.

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.

BLM has not adopted this suggestion in the final rule. 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/protection purposes." This pre-1995 terminology created 3 categories of preference: "active," "suspended" and "nonuse for conservation/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 / protection purposes. Further conceptual blurring was created by BLM policy, as stated in our handbook, that a permittee/lessee could annually apply and receive approval for nonuse of all or a part of his 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 that 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/protection" under the pre-1995 regulations, is the practical equivalent of suspended preference as this term is used in this rule.

This final 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/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 or be a party to a documented agreement 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 or have a documented agreement 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 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.

One comment requested that BLM not change the regulation and continue to provide that the active use that is reduced under this paragraph be terminated rather than suspended.

We did not adopt this comment in the final rule. 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.

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.

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.

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.

We have not adopted the comment in the final rule. BLM believes that these criteria are sufficiently clear to serve the purpose intended by the regulation. These criteria allow for the effects 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.

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.

BLM acknowledges that use of 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.

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 ESA.

It is not clear from the comment why it concluded 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 ESA. 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.

Finally, 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.

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.

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.

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 this rule. 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.

Section 4110.3-3 Implementing changes in active use.

In the proposed rule, we changed the title of this section to reflect that it pertains to both increases and decreases in grazing use. We also modified how BLM implements changes in active use. The amended section provided that BLM will phase in changes in active use of more than 10 per cent over a 5-year period unless the affected grazer agrees to a shorter period or the changes must be made before the end of 5 years to comply with relevant law. This 5-year phase in period is similar to that in the pre-1995 regulations.

BLM also amended paragraphs (a) and (b) by removing the phrase "the interested public." Changes in active use must be preceded by reports, including NEPA documents, that analyze data BLM uses to support the change. Under section 4130.3-1, BLM provides the interested public the opportunity to comment on these reports. Under

section 4160.1, BLM provides a copy of the proposed and final grazing decisions to implement the change to the interested public. BLM will provide the interested public full opportunity for participation and comment on the action prior to actual implementation. For this reason additional consultation with the interested public regarding the actual scheduling of the change is redundant.

Under the final rule, changes in active use levels and emergency closures made due to drought, fire, flood, insect infestation, or when grazing poses an imminent threat to the resource, no longer trigger required consultation, cooperation, and coordination with the interested public. This change is intended to improve the administrative efficiency of grazing management operations.

Many comments opposed any reduction in the role of the interested public, 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.

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. These changes make the grazing program similar to other BLM programs in the level of coordination required for actions under various BLM permits and leases. Therefore, we have made no changes in the final rule.

A number of comments supported the proposed provision in section 4110.3-3 for phasing in changes in active use greater than 10 percent over 5 years. These comments stated that the provision would ensure more orderly administration of grazing on BLM administered lands and protect the resource better than the current regulations do. Others agreed that it would improve the ability of local BLM field managers to use the variety of rangeland management tools available, including range improvements and changes in grazing strategies, to accomplish resource objectives because of the additional time allowed. Most of the supportive comments agreed that permittees should be given the opportunity to make adjustments over a period of time in order to incorporate the reductions into their entire operation/business without unnecessary economic disruption.

Other 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 impacts 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 ESA. 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. Some comments conceded that under some circumstances it may be possible to phase in the needed changes in grazing over a 5-year period without compromising long-term range sustainability, but stated that BLM range professionals needed the ability to respond immediately and to the extent necessary to avoid impacts on range condition or vegetation communities that may take decades to reverse. Other comments expressed

concern that the proposed 5-year phase-in period may be inadequate to protect sensitive species and their habitat. One comment requested clarification as to whether the provision allow BLM to adjust livestock numbers over a shorter period of time to protect wildlife and plants that are candidates for listing as threatened or endangered or determined by BLM to be sensitive, and whether the proposed rule was in compliance with the requirements of the Endangered Species Act. (The sensitive species designation is normally used for species that occur on BLM-administered lands, and for which BLM can significantly affect their conservation status through management. See BLM Manual 6840.06E (Release 6-121, 01/19/01).)

We believe the final rule gives BLM sufficient discretion to handle a wide range of circumstances. The rule does not change 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 time frame 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 impacts of the reduction. Our cooperative approach should lead to a decreased likelihood of appeal on the part of the permittee or lessee. In turn, we expect this decreased likelihood of appeal to result in implementing necessary grazing reductions more quickly, thus allowing BLM to remedy resource problems more

efficiently. Recent experience (1998–2002) indicates that current livestock grazing or level of use was a significant factor in not meeting land health standards on only 16 percent of the allotments evaluated, requiring adjustments in current livestock management. From 1998 to 2005, 15 percent of the evaluated allotments were determined to be in this category. 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, but likely small, 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). The rule contains an exception, in section 4110.3-3(a)(ii), that allows changes in active use in excess of 10 percent to be implemented in less than 5 years to comply with applicable law, such as the Endangered Species Act. BLM also has discretion under section 4110.3-3(b)(l)(i) and (ii) to implement changes in active use immediately to handle a wide range of circumstances. These circumstances may include fire, drought, the need to protect soil, vegetation, or other resources, or if continued grazing use poses an imminent likelihood of significant resource damage.

BLM has the authority to implement grazing decisions immediately if the authorized officer determines that soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, or insect infestation, or if continued livestock grazing poses an imminent likelihood of significant

resource damage. BLM's responsibilities under the ESA and BLM special status species policy are not affected by the final rule.

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.

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. Again, recent experience (1998–2002) indicates that current livestock grazing or level of use was a significant factor in not meeting land health standards on only 16 percent of the

allotments evaluated, requiring adjustments in current livestock management. From 1998 to 2005, 15 percent of the evaluated allotments were determined to be in this category. See Section 4.3.1 of the EIS and page 33 of the EIS Addendum.

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.

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).

One comment stated that implementing stocking rate changes of more than 10 percent over a 5-year period would only be significant for large operators. For most small permit holders such changes would be a nuisance and administrative burden for

permit managers to implement (citing an example of a 50 AUM permit). The comment stated that small changes to existing permits should be implemented in 2 years or less, since this would be more efficient for both permittee and public land manager. For larger permits, the comment suggested that the phase-in of changes should be dependent on situational conditions and their relationship to the need for improving rangeland health and permittee interests (up to 5 years).

The final rule is flexible enough to allow BLM and the permittee to agree to a shorter time frame for implementation. The regulations allow BLM to initiate necessary adjustments while giving permittees opportunity to make changes in their overall business operations.

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.

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.

One comment cited situations when it would be desirable to increase grazing in order to enhance habitat for "federal trust species." The comment also asked whether BLM needs permission from an allotment's existing permittee before it could allow another grazing operator to graze additional livestock on an allotment when desired to enhance habitat for Federal trust species, and asked also whether such an operator would need to meet mandatory qualifications.

It is advantageous at times to increase livestock numbers for weed or vegetation management for purposes of enhancing habitat and reducing brush cover for specific wildlife species (e.g., burrowing owl or mountain plover). In these cases BLM has several options. The BLM would first contact the existing permittee to discuss needs and options feasible to the permittee. If the permittee is unable to increase stocking numbers, BLM may advertise an available opportunity to applicants qualified under section 4110.1, offer a free-use permit, or contract to have vegetation reduced by goats, mechanical thinning, or manual pulling and weeding.

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.

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, 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.

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.

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. We would use agreements in relatively simple management circumstances, such as with the holder of a small allotment with relatively few management issues. For example, an operator who agrees with the need for a change in his forage allocation, and has no interested public, would be a likely candidate for implementing a change in preference by agreement. In contrast, decisions are more likely to be used in complex management circumstances such as might be encountered, for example, when addressing the needs of a large allotment that has several resource issues, is permitted to several operators, and has several interested publics, some of whom might dispute the need for, or the appropriate level of, the preference change. 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 must 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 is an adequate substitute for indefinite suspension of active use. For example, a new water development may improve grazing distribution enough so that forage not previously available becomes available for livestock use. However, range improvements are not always the appropriate management response. It is in the interest of sound management to provide BLM with the flexibility to modify active use, or authorize range improvements, depending on the circumstances.

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.

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.

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.

The regulations, at section 4110.3-3, already allow BLM to act more quickly to avoid significant resource damage by closing all or portions of an allotment in the circumstances described in the 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 decisionmaking on management objectives stated in land use plans, activity plans, and grazing decisions.

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.

Several comments suggested modifications of this section 4110.3-2 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 amend paragraphs 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.

BLM is not changing the regulations in response to these comments. BLM implements changes in active use by grazing decision or by documented agreement. When changes are implemented by 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 decisionmaking 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 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.

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.

We have not adopted this suggestion in the final rule. The phrase "or where continued use poses an imminent likelihood of significant resource damage" is in fact a prerequisite that must occur or be found to exist before BLM can take action. The phrase covers 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.

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.

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, 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.

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.

The final rule contains the correction.

Section 4110.4-2 Decrease in land acreage**.**

In the proposed rule, we removed the term “permitted use” from this section and replaced it with the term “grazing preference” for the reasons explained previously. No public comments addressed this specific change, and we have made no further changes in the final rule as to this aspect of the proposed rule.

Several comments raised issues that are tied to this provision. 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 non-use 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.

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. In some land use plans, 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.

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."

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.

Subpart 4120 -- Grazing Management

Section 4120.2 Allotment management plans and resource activity plans.

We amended paragraph (c) of this section in the proposed rule to state BLM's internal procedural requirement more straightforwardly. The current rule provides that the decision document following the environmental analysis supporting proposed plans affecting the administration of grazing is considered a proposed decision for purposes of subpart 4160. This implies, but does not specify, that we must issue such decision documents following the procedures of section 4160.1 on proposed decisions. The final rule merely makes it clear that we issue these decisions in accordance with the procedures in section 4160.1.

No public comments addressed the changes in this section, and we have made no changes in the final rule.

Section 4120.3-1 Conditions for range improvements.

In the proposed rule we revised paragraph (f) for clarity and to correct a citation to NEPA. No public comments addressed this section, and we have made no changes in the final rule.

Section 4120.3-2 Cooperative range improvement agreements.

In the proposed rule we amended paragraph (b) to provide that, subject to valid existing rights, cooperators and the United States would prospectively share title to permanent structural range improvements constructed under cooperative range improvement agreements on public lands. Such structural improvements include wells, pipelines, and fences constructed on BLM-managed public lands. BLM and cooperators will share title to range improvements of public lands in proportion to the value of their contributed labor, material, or equipment to make on-the-ground structural improvements, subject to valid existing rights. This returns the provision on how title for improvements constructed under Cooperative Range Improvement Agreements is shared to the regulation in place before 1995. The current regulations provide that the United States has title to new permanent structural range improvements.

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 BLM proposed changes in the land use that would reduce or discontinue grazing in an allotment. Comments also stated that BLM would lack the funds needed to compensate the permittee, and would be unable to take the management actions needed to sustain rangeland health. 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. One comment stated that sharing title to range improvements may make it more difficult to impose restrictions or modify grazing management because of these issues regarding regulatory takings and access to private property. A similar comment asserted that allowing shared title to range improvements gives away some of the public rights on public lands, making it more difficult for the public to redirect or reallocate the use of public lands as priorities change. The comment stated that public rights should not be "given away" and that they would have to be purchased back at a later date as circumstances change. Another comment questioned whether future rights or privileges to access "titled" range improvements will be conveyed to those holding the title that would not be extended to the general public. The comment requested that we clarify whether any priority would be conveyed to the "titled" holder for any land leases.

BLM is choosing to share title to range improvement projects constructed in the future under Cooperative Range Improvement Agreements to encourage greater private investment in range improvements. This is not inconsistent with the TGA. Under the final rule, permanent structural range improvements will be jointly owned by the United States and permittees in proportion to their respective investments. The final rule provides operators an opportunity to maintain some asset value for their investments in

range improvements, and thereby encourages private investments in them. However, an operator's interest in a permanent structural range improvement would not reduce BLM's ability to manage or obtain access to public lands. Sections 4120.3-1(e) and 4120.3-2(d), which are not changed in the final rule, provide that a cooperative range improvement agreement conveys no right, title, or interest in any lands or resources held by the United States, and does not confer upon a cooperator or permittee the exclusive right to use a range improvement or the affected public lands. Under these provisions, cooperative range improvement agreements would continue to include provisions that protect the interests of the United States in its lands and resources, and ensure BLM's management flexibility on public lands.

Title to range improvements has no bearing on whether or to what extent BLM will allow access. Individuals would still have to seek authorization for access to maintain range improvements, whether they hold title to them or not. BLM gives no special privileges to "titled" holders of range improvements.

BLM disagrees that a joint title to range improvements creates "takings" issues. The full extent to which permittees and lessees may be eligible for compensation is spelled out in the existing regulations. 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 final rule 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 transferor, as described in section 4120.3-5.

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 TGA. 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, and that BLM's authority to manage its grazing allotments would be limited. 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.

The rule change does not create an exclusive right, title, or interest in the public land, which is prohibited by the TGA. Section 4120.3-2(b) specifically states that shared

title to range improvements is "[s]ubject to valid and existing rights." The regulations are equally clear on the creation or the existence of an interest in the land prohibited by the TGA. Holding a joint title to an improvement does not create a permittee interest in the public land, and will not limit BLM's ability to manage grazing allotments. 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 shares ownership of the improvements, BLM management actions would not be constrained by a permittee's interest in a range improvement.

One comment asked whether BLM would have independent authority to remove, replace, or modify a structure, or if the cooperator's permission would be required. Another comment expressed concern that "sharing of titles on permanent structures" may limit BLM's ability to implement effective conservation measures for sage-grouse, or to remove or modify structures, which may be negatively affecting sage-grouse.

Cooperative range improvement agreements (which allow installation of permanent structural range improvements) include provisions that protect the interest of the United States and its lands and resources. These provisions make it clear that the ownership of improvements does not confer exclusive right to the permittee or cooperator to use the improvement or the land affected by the range improvement work. Section 4120.3-1(a) provides that range improvements are to be installed, used, maintained, and/or modified or removed in a manner consistent with multiple use management. BLM

retains authority to specify the design, construction, and maintenance criteria for the range improvement, and may require permittees or lessees to remove range improvements if they no longer help achieve land use plan or allotment goals and objectives.

Joint title to permanent range improvements will not limit BLM's ability to take measures to protect sage-grouse. The Memorandum of Understanding (MOU) the BLM, Forest Service, and FWS signed with the Western Association of Fish and Wildlife Agencies (WAFWA) to conserve the greater sage-grouse and its habitat states our commitment to protect sage-grouse.

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

Nothing in the TGA "denies the Secretary authority reasonably to decide when or whether to grant title to those who make improvements." Public Lands Council v. Babbitt, 529 U.S. at 750. While we draw parallels between Federal and common law rules in explaining the rationale for existing section 4120.3-2, and note that the Forest Service had a similar policy, BLM is not obligated to accept common law rules or Forest Service statutes or policies in setting the terms for ownership of range improvements on public lands.

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

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 public lands 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.

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.

BLM is responsible for consultation with the Tribes and will ensure that the required consultation occurs 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 final 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 effect on Tribal consultations, BLM control of the land, or any Indian trust responsibilities.

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.

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 permittee's 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 are tools for improving range conditions. Those benefits accrue to both public and private 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 BLM in the development of range improvements to assist in meeting management or resource condition objectives.

Other comments were concerned that the impacts of shared title were not sufficiently analyzed, including the impact of increased wildlife use as range condition improves.

BLM analyzes the anticipated impacts of shared title in the FEIS on pages 4-25, 4-31, 4-42, and 4-48. To the extent that shared title provisions will stimulate investment in range improvements intended to improve or enhance grazing management practices, or the quantity and quality of forage, BLM expects that such actions will result in improved habitat for wildlife. 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 final rule. However, the nature of the regulatory change does not lend itself to broad analysis of the topic raised by comment. Anticipated impacts that may result from increased wildlife use because of improvements, regardless of whether they

are constructed as a result of the shared title provision, will be analyzed under NEPA on site-specific basis as part of the preliminary work that precedes the construction of any range improvement.

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.

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 effect 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.

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

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). If the comment was suggesting that BLM should share title to non-structural improvements that cannot reasonably be removed from the land, such as a seeding or a prescribed fire treatment, BLM rejects this suggestion because it is impractical and would unduly complicate land administration. Where a cooperator permittee or lessee has contributed to an improvement that cannot be removed from the land, and BLM cancels the associated grazing permit or lease to devote the land to another public purpose that precludes livestock grazing, the permittee will be eligible for compensation for the adjusted value of their interest in the improvement, as documented in a cooperative agreement, under section 4120.3-6(c) and Sec. 402(g) of FLPMA (43 U.S.C. 1752(g)). BLM will continue to hold 100 percent of the title to range improvements that cannot be removed from the land.

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

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.

One comment asked that we clarify agency and permittee responsibilities under the Endangered Species Act (ESA) and NEPA for shared range improvements. Another comment stated that if grazing permittees share title to range improvements, they may be accountable for any taking under ESA that occurs as a result of these improvements. Another comment stated BLM should consider and allow modification of range improvements if they are negatively affecting sensitive species. In addition, this comment stated that modification may be necessary to minimize the effects and "avoid jeopardy to listed species." One comment stated that, at a minimum, the rule should make it clear that ESA section 7 consultation requirements and consideration of state-listed or sensitive species would still be applicable to grazing activities.

Additional clarification is not needed to set forth BLM's responsibility to consult with the appropriate service agency pursuant to the ESA when a discretionary BLM action triggers the application of the ESA. BLM will continue to fulfill the requirements

for consultation in accordance with Section 7 of the ESA. Section 4120.3-1(f) provides, and will continue to provide, that "proposed range improvement projects shall be reviewed in accordance with the requirements of [NEPA]." The fact that a permittee holds a joint title with BLM for a range improvement has no effect on BLM's obligations under the ESA and NEPA.

As part of NEPA analysis and the decision making process, BLM considers potential impacts of the range improvements to special status species (including listed species) and either avoids or mitigates them. Listed species are protected by the ESA. Therefore, BLM is obligated to make modifications as necessary to avoid jeopardy or to minimize incidental take as directed by the FWS or the National Marine Fisheries Service in a biological opinion.

BLM expects individuals to take steps to ensure they are in compliance with the appropriate provisions of ESA. It is a prohibited act under section 4140.1(b)(2) for any person to install, use, maintain, modify, or remove range improvements on public lands without BLM authorization. If any person did such an act without BLM authorization and thereby violated the ESA, he or she would be liable for the applicable penalties for violations of the grazing regulations as well as those for any violation of the ESA.

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.

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)).

Section 4120.3-3 Range improvement permits.

We modified paragraph (c) in this section of the proposed rule to remove a reference to conservation use.

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 TGA.

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. We have not adopted this recommendation in the final rule.

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.

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 final rule by adding a cross-reference to the section 4130.6-2 requirement.

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.

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. In the

final rule, we have rewritten paragraph 4120.3-3(c) to make it clear that BLM will consult with the preference operator before authorizing such use.

Section 4120.3-8 Range improvement fund.

We amended this section only to correct a misspelling. One comment objected to the correction, but provided no reason. We have made no changes in the final rule.

Section 4120.3-9 Water rights for the purpose of livestock grazing on public lands.

We proposed to amend this section by removing the requirement that livestock water rights be acquired, perfected, maintained, and administered in the name of the United States to the extent allowed by the laws of the states where the rights would be acquired. We made this change to provide BLM greater flexibility in negotiating arrangements, within the scope of state processes, for construction of watering facilities in states where the United States is allowed to hold a livestock water right. BLM continues to have the ability to acquire the water right to the extent allowed by state water law.

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.

We believe that the predicted complications that may be triggered by removing the requirement that water rights for livestock use be held 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 removing the requirement that water rights be acquired, perfected, maintained, and administered in the name of the United States, BLM may be in a position 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 effect 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 transferor 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. We disagree that private ownership of water rights on public lands will lead to successful takings claims. A water right is a property right that is distinct from title to the land managed by BLM. Land management decisions do not affect title to water. Finally, we disagree with the comment that the value of public land may be reduced if BLM does not control the water rights. The value of the land and the water right are two separate things. BLM also believes, however, that any such decrease will not affect our ability to manage the public lands.

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.

We disagree that this is likely to occur. 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's authority to take action under subparts 4140, 4150, and 4160 is not affected by the name in which the water right is held.

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.

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 proposed rule will benefit BLM in cooperating with permittees and states. We believe that any inconsistencies are unlikely to interfere with BLM land management.

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 stated that the water right should be public, if BLM was investing public funds in the developments.

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. Moreover, BLM does benefit from water developments, regardless of funding, because water developments improve grazing management and watershed conditions.

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

Ownership of water rights does not affect the approval of water developments. Further, BLM disagrees that encouraging more livestock water developments would harm 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, positive as well as negative, and the ultimate authorization would include the mitigation measures necessary to limit any negative impacts.

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

BLM disagrees with this statement as contrary to current and proposed regulations, and contrary to the intent of most state water laws to put water to beneficial use by the senior appropriator and claimant. Neither the current regulations nor this final rule prevents BLM from filing on water rights now or prospectively, 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.

One comment stated that the changes made in the BLM grazing regulations in 1995 that require livestock operators and BLM to use cooperative agreements to authorize new permanent water developments and direct the United States, if allowed by State water laws, to acquire livestock water rights on public lands, should be retained in the grazing rule.

The final rule requires BLM to use cooperative range improvement agreements to authorize all new permanent water developments under section 4120.3-2(b). The intent of the rule is to provide greater flexibility to the United States in this regard.

One comment recommended that BLM better explain its need to pursue water rights cooperatively with the permittee.

Under the current grazing regulations, BLM must seek to acquire, perfect, maintain, and administer state-based livestock water rights in the name of the United States, to the extent allowed by state law. BLM therefore has little flexibility to seek

alternative arrangements with permittees. We expect that the increased flexibility allowing cooperative pursuit of livestock water rights to stimulate greater permittee and lessee support for the development of additional water resources on public land in accordance with resource objectives found in BLM land use plans, allotment management plans, activity plans, and vegetation management plans. This will contribute to an overall beneficial effect on vegetation resources. Having determined that permittees and lessees can hold livestock water rights, BLM may be able to negotiate better cooperative agreements, resulting in improved cooperation among BLM, states, and permittees and lessees.

One comment recommended that BLM discuss the environmental consequences to sensitive wildlife and plants if BLM were to retain the existing provision on water rights, that is, solely acquire livestock water rights from the state, without cooperatively sharing that right with a permittee or lessee.

BLM has observed a significant decrease in the number of water-related range improvements (especially reservoirs and wells) since adopting the existing regulations in 1995. It is widely recognized that water-related range improvements may be beneficial to sensitive wildlife and plants. One reason BLM is proposing to change the existing regulations is to provide an incentive for operators to install water-related range improvements, and thereby potentially benefit sensitive wildlife and plants.

Another comment stated that it is unclear whether BLM's ability to make changes in livestock management to protect sensitive wildlife, plants, and their habitat will be affected by the permittee or lessee having shared water rights.

BLM's ability to make changes in livestock management to protect sensitive wildlife, plants, or their habitat will not be affected by permittee or lessee sharing ownership of livestock water rights. The current grazing regulations, at section 4130.3-3, provide BLM with authority to make changes to the terms and conditions of a grazing permit or lease when management objectives are not being met or when grazing does not conform to the provisions of subpart 4180 (Fundamentals of Rangeland Health and Standards and Guidelines). This provision is not changed in the final rule. Permittee or lessee ownership of livestock water rights does not affect BLM's management discretion and authority.

Many livestock water rights are currently held by permittees or lessees, or jointly owned with BLM. BLM has seen no evidence that holding a livestock water right discourages cooperation or compliance with the terms and conditions of grazing permits. Nor is there evidence that BLM's ability to enforce and administer other provisions of the grazing regulations is affected by a permittee or lessee holding a livestock water right.

One comment recommended that BLM clarify its ability to control water at a spring if the water rights are shared with a permittee or lessee.

Shared livestock water rights are not expected to impair BLM's ability to control water at a spring. In cases of jointly held water rights, water cannot be moved from the source without the consent of both owners, and neither owner can prevent usage of the water at its source by the other owner.

Two similar comments stated it is extremely important for BLM to seek ownership of water rights where allowed by state law, and that if BLM authorizes a water development on public land, the associated water rights should belong to the public. One of the commenters stated that there is no more important resource for fish and wildlife in the arid west than water. A third comment expressed a variation of this concern.

The BLM agrees that water is an important resource for fish and wildlife in the West. The proposed rule does not mean BLM will not seek ownership of livestock water rights when allowed by state law. Rather, the proposed revision will allow BLM increased flexibility to seek alternative approaches to ensuring that water developed on public lands can be used to benefit multiple uses, including wildlife uses. 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.

A comment asserted the need for BLM to have flexibility in cooperatively pursuing water rights with the permittee or lessee. The comment stated that we should make it clear whether under a cooperative water right BLM would have the senior water right.

The increased flexibility provided by the final rule may stimulate greater permittee and lessee support for the development of additional water resources on public land. These resources would be developed in accordance with resource objectives found in BLM land use plans, allotment management plans, activity plans, and vegetation management plans, contributing to an overall beneficial effect on vegetation resources. Agreeing that permittees and lessees can hold livestock water rights should enable us to negotiate better cooperative agreements, and in turn leading to improved cooperation between BLM, states, permittees, and lessees.

Whether the United States holds a senior livestock water right in joint-ownership situations would depend upon individual circumstances and priority dates under applicable state water law. BLM's ability to negotiate the terms of joint ownership agreements with permittees is critical in being able to achieve acceptable settlement to avoid litigation of water rights and to enhance accomplishment of federal responsibilities in land management.

One comment asked whether removing the provision that BLM can acquire livestock water rights would put the state in a position where it could prevent BLM from holding livestock water rights. The comment also asked whether this revised provision pertains only to livestock waters, or also to BLM filings for wildlife, fish, or instream flow.

States control their water law procedures for granting, adjudicating, and administering livestock water rights, independent of the content of the Federal grazing regulations. Therefore, regardless of whether the existing regulations remain in place or whether the proposed rule is adopted, states may prevent BLM from holding livestock water rights. In fact, after 1995, when the grazing regulations were changed to require the United States to file for livestock water "to the extent allowed by State law," two states – Nevada and Arizona – enacted laws to prevent BLM from claiming livestock water rights.

The grazing regulations address state water rights for livestock watering purposes, not other purposes. The regulations therefore do not affect other potential BLM filings, such as for fish, wildlife, or instream flow.

One comment pointed out that BLM has authority and discretion to apply penalties for specific prohibited acts. The comment stated that BLM may withhold, suspend, or cancel a grazing permit, and recommended clarification of the effect of sharing water rights if BLM needs to impose a penalty for a prohibited act if the permittee had a shared livestock water right on that allotment. The comment stated that a state water right can be looked upon as a property right and asked whether this could make it difficult for BLM to transfer a canceled permit to a new permittee.

BLM's authority and discretion to impose penalties for prohibited acts is independent of and unaffected by ownership of livestock water rights. BLM's authority

to take action under subpart 4140 (Prohibited Acts), subpart 4150 (Unauthorized Grazing Use) and subpart 4160 (Administrative Remedies) is not affected by the name in which the water right is held. Thus, when a permittee engages in a prohibited act that triggers BLM's authority to suspend or cancel the grazing permit (e.g., grazing in violation of the terms and conditions of the permit), BLM may take appropriate action, regardless of who owns the water right. Indeed, even where a permittee has sole ownership of a livestock water right, BLM's authority to issue a new permit is unaffected. (Contrary to the way the comment stated the question, BLM does not transfer a canceled permit. BLM would issue a new permit, which may have terms and conditions reflecting the availability of less water for watering livestock within the allotment if the former permittee retained the water rights, unless the new permittee has acquired the water rights from the former permittee). The suspended or canceled permittee may sell or otherwise transfer its water rights in the absence of its ability to make use of the water right by grazing on public lands.

Another comment stated that it is unclear how cooperative water rights will affect BLM's ability to manage sensitive wildlife and plants on an allotment, and suggested that BLM management would become less flexible if water rights become cooperative.

The proposed water right policy changes would have no effect on water resources as long as the water resources remain available for use on public land. Also, the changes in the final rule should have no effect on special status species, as the changes largely

provide clarification of the existing regulations or bring regulations into compliance with court rulings.

BLM does not anticipate significant impacts on special status species from the new livestock water rights policy for several reasons. First, the number of new water developments on which permittees would be able to claim livestock water rights will be very small relative to the total number of water sources on public land. Before such developments are constructed, BLM will analyze them under NEPA to identify potential impacts on special status species, and impose terms and conditions in the cooperative range improvement permit to protect those species. Current land use management plans, activity plans, grazing permits, right-of-way permits, and other land use authorizations govern the usage of water sources that have already been developed. They also govern usage of undeveloped water sources that provide livestock water. A claim for a livestock water right by a grazing permittee on existing undeveloped or developed water sources would not be capable of changing on-the-ground management at the source without explicit authorization from BLM.

One comment stated that "giving up" water rights inhibits BLM's flexibility in making management decisions and has the potential for impacts on water resources.

We disagree that BLM is "giving up" any of its water rights or its ability to obtain new water rights under state law. Moreover, the final rule will not result in less flexibility for water usage on public lands. 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. Section 4130.3-3 provides BLM authority to make changes in the terms and conditions of a grazing permit or lease when it authorizes active use or a related management practice that does not meet management objectives or otherwise does not conform to the standards and guidelines established under subpart 4180. Usage of public lands is also subject to BLM land use authorizations, which contain appropriate terms and conditions to support continued multiple uses on public lands. Thus, the number of AUMs in a grazing permit or lease, or any other term or condition, is unrelated to the extent of state-granted water rights. Also, many livestock water rights are currently held by permittees, or jointly owned with BLM, and BLM has not seen evidence that holding a livestock water right discourages cooperation or compliance with terms and conditions of grazing permits.

One comment expressed concern that, although the rule stipulates livestock water development, the holder of the water right could subsequently request a transfer of use for some other purpose. The comment stated that this policy sacrifices future public value and multiple use opportunities that water might provide, such as in-stream flows, wildlife habitat, and recreation use. The comment went on to say that allowing private acquisition of a water right gives ownership of a public resource to a private entity in perpetuity, and concluded that, without landowner control of water, public benefit and associated land management opportunities will be severely restricted.

States have control over their own water law procedures regardless of the content of Federal grazing regulations. The 1995 regulations acknowledged this control by directing the United States to acquire stock watering rights "to the extent allowed by State law." Before 1995, permittees were able to file joint water rights applications with the United States on livestock water sources.

The concerns raised in the comment related to removing the requirement that water rights for livestock use be held in the name of the United States are unlikely to occur. 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 unlikely to compromise BLM's ability to manage public lands in accordance with FLPMA's multiple use mandate. Use of water on public land for wildlife, recreation, mining, and other uses will continue with water rights for those uses usually in the name of the United States. By agreeing that permittees and lessees can hold livestock water rights, BLM anticipates that it will be able to negotiate better cooperative agreements, resulting in improved cooperation between BLM, states, and permittees and lessees. Ownership of water rights by permittees will have no effect on title to the land, since land remains in the ownership of the United States. Exchanges or preference transfers resulting from permittee ownership of water rights for livestock use could occur, although BLM does not expect them to be common. When they occur, they can often be resolved through negotiated settlements among all parties.

<u>Section 4120.5-2 Cooperation with Tribal, state, county, and Federal agencies.</u>

We amended this section in the proposed rule by adding a new paragraph (c) adding 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. Field-level range improvement and allotment management planning programs will benefit from the additional perspective that locally established grazing advisory boards could provide.

In the final rule, we have amended paragraph (c) to add Tribal grazing boards to the list of entities with which we are required to cooperate. We also modified the language in paragraph (c) to make it clear that BLM is required to cooperate only with Tribal, state, county, or local grazing boards that are established under government authority, as opposed to private organizations that assume the title "grazing board." In addition, we amended the heading of the section and the introductory text so that they refer to Tribal as well as the other government agencies.

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

A comment stated that the regulations should require agency cooperation with state, county, and local grazing boards, because the creation and use of such 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.

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 areas. 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 and/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.

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.

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 sections 4120.5-1 and 4120.5-2 require us to cooperate with individuals and other local (along with Federal,

state, and Tribal) entities, to the extent appropriate and consistent with the applicable laws of the United States, 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.

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

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 decisionmaking 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 RACs.

As a general matter, BLM considers the views of all stakeholders providing input into BLM’s decisionmaking process, but will not be constrained in its management by input from grazing boards. This means that, assuming we have the manpower, we will attend their public meetings when invited, provide information when requested, and invite their input when appropriate. BLM will cooperate with the boards to facilitate their review of range improvements and allotment management plans on public lands, but we will retain our independent decisionmaking role.

The role of the RACs is broader, in that it also encompasses input into and review of the standards and guidelines for grazing administration under subpart 4180. There may be some overlap among 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 decisionmaking 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 decisionmaking process.

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 TGA.

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 ESA requires formal consultation with FWS and/or NOAA Fisheries if a federally-listed species may be adversely affected due to a proposed action. Furthermore, the grazing regulations specifically require BLM to consult with states having lands or responsibility for managing resources within the area—

- before adjusting allotment boundaries,

● before apportioning additional livestock forage,

● before implementing changes in active use,

● before closing allotments or modifying grazing for immediate protection of resources,

● during the preparation of allotment management plans,

● before revising or terminating allotment management plans, or issuing or renewing grazing permits or leases, including nonrenewable permits, and

● before modifying the terms and conditions in permits or leases.

No additional language is necessary in the grazing regulations to ensure coordination with state wildlife management agencies.

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)).

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 cooperating with existing and any future Tribal, state, county, or local government-established grazing boards in reviewing range improvements and allotment management plans. Each specific grazing board, or the governmental entity

creating or authorizing it, determines the grazing board's establishment, internal organization, and role.

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.

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 Federal, state, Tribal, and local entities, as well as individuals, institutions, organizations, corporations, and associations 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) of section 4120.5-2 in response to the comments.

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.

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. Under section 4120.5, BLM coordinates with Federal, state, Tribal, and county government entities and RACs on a wide variety of public land management issues and proposed actions.

One comment stated that grazing boards should be consulted but should remain autonomous from RACs, as provided in the TGA. 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.

Under the proposed grazing regulations, grazing boards established by state, county, and local government and RACs will remain as distinct organizations. The grazing advisory boards referred to in the TGA 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) in the final rule 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.

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."

That section addresses cooperation with Tribal, state, county and Federal agencies and thus does not include a consultation requirement with the interested public, that is, individuals. The section 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. No changes were made in the final rule as a result of this comment. BLM believes it is important to continue to work cooperatively with other governmental authorities regarding the administration of laws and regulations related to livestock, livestock diseases, sanitation, and noxious weeds.

One comment expressed concern that the rule may lead to inconsistency and inefficiency between BLM and the Forest Service in the areas of water rights,

management of "federal trust" resources, range improvement ownership, temporary nonuse, prohibited acts, the definition and role of the interested public, and the ability of the agencies to ensure that fish and wildlife are managed in a sustainable manner across administrative boundaries. One comment stated that, although the FWS is not specifically mentioned in the FEIS, consultation with the Service should occur as required under Section 7(a)(2) of the ESA (50 CFR 402.14).

BLM will coordinate and consult with the Forest Service and state agencies when administering the grazing program. Consistency with the Forest Service regulations, though desirable at times, is not necessary for implementing effective rangeland management practices. Specific inconsistencies between the regulations and policies of BLM and the Forest Service related to fish and wildlife resources have not been identified. In general, however, inconsistencies continue to exist largely because the two agencies have different statutory requirements that govern their regulations and policies. However, nothing in the proposed revisions will preclude BLM and the Forest Service from working across administrative boundaries to manage fish and wildlife in a sustainable manner.

BLM consults with the FWS when an evaluation of a discretionary action results in a determination that there may be an effect on an endangered species. Although BLM coordinated with the FWS on various aspects of the rule, ultimately BLM concluded that the rule will have no effect. Consultation under Section 7(a)(2) of the ESA is not required under 50 CFR part 402 on an action that has no effect on an ESA-listed species.

One comment referred to an MOU that BLM, the Forest Service, and the FWS signed with WAFWA to conserve the greater sage-grouse and its habitat. The comment stated BLM should consider the commitments of the MOU in the proposed revisions to grazing regulations.

The WAFWA MOU outlines the roles of state and Federal partners throughout the 11 Western States in conservation of the currently-occupied range of the sage-grouse. Our commitments under this MOU are compatible with grazing management. Under the MOU, BLM will continue to coordinate with the states and local working groups to develop state and local conservation strategies. The administrative changes in the final rule will have no effect on this coordination commitment. In addition, and to complement the WAFWA MOU commitments, BLM released the National Sage-Grouse Habitat Conservation Strategy in 2004. This strategy describes agency actions necessary to conserve the sage-grouse and its habitat on BLM land, and includes a detailed timeline of actions that BLM is implementing through agency directives. The grazing rule amendments will have no effect on BLM's implementation of the sage-grouse strategy.

One comment urged BLM to include the FWS among the entities it must consult before changing grazing allotment boundaries under 43 CFR 4110.2-4.

Where a proposal to undertake a discretionary action under the grazing regulations, such as designating or adjusting an allotment boundary under 43 CFR 4110.2-4, triggers ESA consultation requirements, BLM will meet those requirements.

However, BLM does not believe it appropriate to list in its grazing regulations all instances where discretionary action taken under the regulations may trigger ESA consultation.

One comment encouraged BLM to consider how the rule would affect the ability of local sage-grouse working groups to implement conservation actions for this species.

The working groups and their commitments are outlined in the WAFWA MOU, and are unchanged by the proposed regulations. Site-level decisions remain within the purview and discretion of BLM field offices, and address sage-grouse habitat needs in an allotment-level assessment process outlined in the existing regulations, using local working group recommendations. BLM's ability to identify and react to sage-grouse habitat needs will not be affected by the proposed administrative adjustments of the grazing regulations.

Section 4130.1-1 Filing applications.

In the proposed rule, we moved the provisions on determining satisfactory record of performance from section 4110.1 to section 4130.1-1 on filing applications, where they more logically fit. We also amended the provisions to clarify the factors that we take into account in determining whether an applicant for a new permit has a satisfactory record of performance. The rule deems applicants for issuance of a new permit or lease to have a satisfactory record of performance if:

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

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

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

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.

The changes made 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)(i) states that the authorized officer will consider applicants for a new or transferred preference 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.

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.

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 section 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.

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)).

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.

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.

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.

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.

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.

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.

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 the final rule 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 obtaining gainful employment.

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.

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, and have not changed it in this final rule.

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.

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.

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. Therefore, we have not adopted this suggestion in the final rule. 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 APA (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.

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.

The TGA, FLPMA, and other laws authorize grazing on public land for private business purposes.

Section 4130.1-2 Conflicting applications.

In the proposed rule we made no changes in this section, which provides for how we resolve the situation when more than one qualified applicant seeks a permit or lease for grazing use of the same public lands or where additional forage or acreage becomes available. However, questions raised in comments indicated a degree of confusion as to the meaning of one paragraph of this section, and suggested that we should change the wording for purposes of clarification.

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." Several comments stated that BLM should remove paragraph (d) because "[p]ublic access across private lands should be given voluntarily and never become a condition for consideration by BLM under any part of these regulations."

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 changing this provision in a future rulemaking exercise.

Other comments suggested that we amend the introductory text of section 4130.1-2 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.

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.

Section 4130.2 Grazing permits and leases.

In the proposed rule, we revised paragraph (a) in this section to make it clear that the grazing permit or lease, as distinguished from other documents such as a grazing fee billing, is the document BLM uses to authorize grazing use for those who hold grazing preference on BLM-managed lands. BLM also uses "other grazing authorizations" such as free use permits, exchange-of-use permits, and crossing permits to authorize grazing for preference and non-preference holders in limited circumstances. These are addressed in sections 4130.5 and 4130.6.

We removed the phrase "types and levels of use authorized" from paragraph (a) and replaced it with the term "grazing preference" because the level of use, the forage amount expressed in AUMs, and the "type" of use, whether active or suspended, are

embodied in the term “grazing preference.” We removed the term “conservation use” from this paragraph for reasons stated in the discussion of section 4100.0-5.

We also removed the requirement in paragraph (b) that BLM consult, cooperate, and coordinate with the interested public prior to the issuance or renewal of grazing permits and leases. Comments and responses to this change can be found in the discussion of section 4100.0-5 as well as below.

We added a provision to paragraph (f) that requires BLM and the permittee or lessee to sign the permit or lease in order to validate it.

We revised the provisions in paragraphs (g) and (h) on temporary nonuse and moved them to section 4130.4, which contains provisions for authorization of temporary changes in grazing use in order to clarify the regulations. We removed all references to conservation use. Other changes to provisions on temporary nonuse are described in the discussion of that section.

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 BLM to prepare NEPA analysis before 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.

The Taylor Grazing Act directs BLM to authorize livestock grazing through a permit or lease. NEPA requires site-specific analysis of impacts 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.

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.

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/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.

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.

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.

Some comments suggested that a requirement for consultation, cooperation, and coordination with permittees or lessees should be reiterated at section 4130.2(f) in order

to emphasize the importance of consultation regarding permit or lease terms and conditions.

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).

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 BLM and permittees and lessees should be directly involved in this process.

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 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, BAs or BEs, and any other formal evaluation reports that are used in the decisionmaking 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. No changes have been made in the final rule.

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).

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 this final rule is adequate.

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 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.

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.

Section 4130.3 Terms and conditions**.**

We added a new paragraph (b) to this section in the proposed rule specifying that when BLM offers a permit or lease, the terms and conditions may be protested and appealed unless the terms and conditions are not subject to OHA appeals, or the terms and conditions pertain to a permit or lease for grazing use of additional acreage under section 4110.4-1. We gave an example of terms and conditions that would be exempt from administrative appeal to OHA, namely those mandated by a biological opinion (BO) issued under the ESA. We also added paragraph (c) providing that if terms and conditions are stayed, BLM could authorize grazing use in accordance with section 4160.4. By adding this language, we sought to clarify that we are providing the opportunity to protest and appeal decisions that specify the terms and conditions of the permit or lease we are offering. In this final rule, we have removed the example of terms and conditions that are exempt from appeal presented at section 4130.3(b)(1). The proposed example was based on a policy articulated in two Secretarial memoranda, and those memoranda address the issue adequately.

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 stated

that 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 BE, BA, or biological opinion, the affected permittee should be entitled to an opportunity to rebut such fact.

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. 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 ESA. Under these Secretarial memoranda, if BLM decides to implement a reasonable and prudent alternative set forth in a 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)). This issue is further addressed in the preamble discussion of section 4160.1. We dropped this provision because BLM believes the Secretarial memoranda signed by Secretaries Lujan and Babbitt provide sufficient clarity regarding the inability of OHA to review the merits of FWS biological advice. This example has been removed from the final rule.

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.

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. 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.

Some comments stated that 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 TGA 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.

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

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.

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 in the final rule.

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

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.

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.

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, 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.

Section 4130.3-2 Other terms and conditions.

In the proposed rule, BLM proposed to remove paragraph (h) from this section. Paragraph (h) authorizes BLM to include in a grazing permit or lease a statement disclosing the requirement that a permittee or lessee provide reasonable administrative access to BLM across non-federal lands owned or controlled by the permittee or lessee, for the orderly management and protection of the Federal lands under BLM management. BLM reasoned that the absence of such disclosure under the proposed rule would not

affect the underlying principle that reasonable administrative access is an implied condition of grazing permits.

In response to public comments, as explained below, we have restored paragraph (h) in this final rule. Paragraph (h) provides that optional terms and conditions include a "statement disclosing the requirement that permittees or lessees shall provide reasonable administrative access across private and leased lands to the Bureau of Land Management for the orderly management and protection of public lands."

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.

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 necessary 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.

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.

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.

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.

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 will not adopt 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.

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.

We have not adopted this suggestion in the final rule. 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/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.

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 and/or BLM staff will be out on the permittee's allotment.

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. We have not adopted this suggestion in the final rule.

Section 4130.3-3 Modification of permits or leases.

In the proposed rule, we amended this section in order to clarify that BLM may modify terms and conditions of a permit or lease if we determine that either the active use or related management practice is no longer meeting the management objectives specified in the land use plan, an allotment management plan, an applicable activity plan, or any applicable decision issued under section 4160.3. We may also modify permit or lease terms and conditions that do not conform to the provisions of subpart 4180.

Also, we removed the regulatory requirement that we consult with the interested public on any decisions to modify terms and conditions on a permit or lease. The interested public retains, to the extent practical, the opportunity to review and provide input on reports supporting BLM's decisions to increase or decrease grazing use. The interested public, permittees and lessees, and the state should all have opportunity to review and submit input to BAs and BEs when they are used to supplement grazing management evaluations. However, since they are among the body of documents that qualify as “reports,” there is no need to highlight them in the regulations. Therefore, the

specific reference to BAs or BEs at section 4130.3-3(b) has been removed from the final rule.

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.

We have not adopted this comment in the final rule. BLM developed rangeland health standards and guidelines for livestock grazing administration in consultation with RACs 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. This final rule further emphasizes the importance of using monitoring data by adding, at section 4180.2(c), a requirement for its use to identify what the significant contributing factors are,, once a standards assessment has indicated that the rangeland is failing to meet standards or that management practices do not conform to the guidelines. The final rule retains the provision on conformance to subpart 4180.

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 and/or changes in other grazing permit terms and conditions must be supported by monitoring done by BLM-approved Manual procedures.

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. This final rule further emphasizes the importance of using monitoring data by adding a requirement at subpart 4180.2(c) that it be used to identify significant contributing factors for failure to meet standards, once a standards assessment has indicated that the rangeland is in fact failing to meet the standards or that management practices do not conform to the guidelines. 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.

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, is often governed by other laws or regulations.

Section 4120.3 governs the installation, construction, and maintenance of range improvements. Permittees or lessees must enter into a cooperative range improvement agreement with 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.

Under the final rule, consultation, cooperation, and coordination with the interested public is no longer required before a term or condition in a grazing permit or lease is modified due to active use or related management practices not meeting relevant

plans or decisions. This change is intended to improve the administrative efficiency of grazing management operations.

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 non-grazing 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.

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 BAs or BEs prepared as part of the Section 7 consultation requirements under the ESA. 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 final rule maintains the opportunity, to the extent practicable, 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.

The proposed rule specifically referred to the preparation of BAs or BEs prepared pursuant to the ESA as being open for review. Several comments requested that these reports be removed from the rule because of their technical nature.

A change has been made in the final rule to remove the specific listing of these example reports. While the range of reports subject to this review procedure would include, in most circumstances, BAs or BEs, it is not BLM's intention nor is it appropriate to create an exhaustive list of reports subject to review in the regulations. Listing these particular reports could have unduly narrowed the perceived range of what should be made available for review and input.

One comment stated that BLM should clarify that it maintains sole responsibility and authority to ensure the accuracy of the biological assessment and the conclusions therein, and to ensure that listed species are not likely to be jeopardized, regardless of economic considerations.

There is adequate direction provided in the ESA and in the FWS and National Marine Fisheries Service regulations on these requirements. BLM will continue to use the procedures specified in BLM Manual section 6840 to carry out our responsibilities under the ESA and coordinate with other agencies

Section 4130.4 Authorization of temporary changes in grazing use within the terms and conditions of permits and leases, including temporary nonuse.

In the proposed rule, we revised section 4130.4 to provide additional detail on what is meant by the phrase "within the terms and conditions of the permit or lease." When we refer to "temporary changes within the terms and conditions of the permit or lease," we mean changes to the number of livestock and period of use that BLM may grant in any one grazing year. We authorize such changes in response to annual variations in growing conditions that arise from normal year-to-year fluctuations in temperature and the timing and amounts of precipitation and to meet locally established range readiness criteria. Most permits or leases include a period of use described by specific dates. These dates do not always account for the natural fluctuations that can lead to forage availability outside the listed dates. Existing regulations allow for

temporary changes, but this authority has, at times, been applied inconsistently within BLM. The new definition clarifies the amount of flexibility BLM authorized officers will have when considering temporary changes. Under the revised section, "temporary changes in grazing use within the terms and conditions of a permit or lease" includes temporary changes in livestock number, period of use, or both, that would—

(1) Result in temporary nonuse; or

(2) Result in forage removal that does not exceed the amount of active use specified in the permit or lease, and occurs either not earlier than 14 days before the begin date specified on the permit or lease, and not later than 14 days after the end date specified on the permit or lease, or that conforms to flexibility limits specified in an allotment management plan under section 4120.2(a)(3).

The provision also applies to temporary changes that result in both temporary nonuse and forage removal 14 days or less before the begin date and/or after the end date, as just described in (2), above.

In the final rule, we removed language listing reasons for allowing temporary changes in grazing use within the terms and conditions of the grazing authorization. First, comments objected to the reference to locally established range readiness criteria, and second, the list may be too restrictive. We also removed paragraph (a)(2), because it is unnecessary to require consultation, cooperation, and coordination with the applicant.

We have amended paragraph (d)(2) of this section in the final rule by changing the word "will" that appeared in the proposed rule to "may" in order to avoid an interpretation of this provision that BLM has no discretion to deny temporary nonuse. We also added a reference to "temporary nonuse" in the section heading as a convenience to readers, and reorganized the section to increase clarity.

In the proposed rule we moved provisions addressing approval of "temporary nonuse" from section 4130.2 to section 4130.4 and amended them to give BLM discretion to approve applications on a year-to-year basis for temporary nonuse of all or part of the grazing use authorized by a permit or lease when the nonuse is warranted by rangeland conditions or the personal or business needs of the permittee or lessee. When rangeland conditions are such that less grazing use would be appropriate, BLM encourages operators, if they have not done so already, to apply for nonuse for "conservation and protection of rangeland resources." Events such as drought, fire, or less than average forage growth typically result in "rangeland conditions" that will prompt the need for temporary nonuse of all or part of the grazing use allowed by the permit or lease.

Paragraph (f) of this section (paragraph 4130.2(h) in the existing regulations, as revised for clarity) continues BLM's current discretion to issue a nonrenewable authorization to other qualified applicants to use the forage that became temporarily available as a result of nonuse approved for business or personal reasons. On the other

hand, when BLM approves nonuse because we agree that rangeland conditions would benefit from temporary nonuse, we do not authorize another operator to use it.

We also moved current paragraph (a) to the end of section 4130.4 and redesignated it as paragraph (g). In newly designated paragraph (g), we made editorial changes.

The principal change that we made in the proposed rule with regard to temporary nonuse was to remove the current three-consecutive-year limit on temporary nonuse. We proposed that BLM should have the same discretion to approve temporary nonuse as existed before the 1995 rule changes, to provide us with management flexibility needed to respond to the common occurrence of site-specific fluctuations in available forage levels that may occur for a variety of reasons as explained above.

First we will consider the comments that discussed temporary changes in grazing use within the terms and conditions of the permit or lease, and then the comments that discussed the changes that we proposed with regard to temporary nonuse.

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.

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 provide for achievement of the rangeland health standards. The proposed rule at 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 conditions as observed by the authorized officer, following the criteria in internal guidance and in the standards and guidelines under subpart 4180.

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.

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.

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.

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.

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.

We have amended this section in the final rule by removing the references to the reasons for authorizing temporary changes in grazing use. Thus, the final rule does not contain any reference to "range readiness criteria." We made these deletions for two reasons. First, we did 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.

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.

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 in the final rule 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.

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.

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 turn out, 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.

Many comments raised concerns about the temporary nonuse provisions in section 4130.4(c) through (e).

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 his 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.

In the final 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 final 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 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 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.

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

The final rule does not authorize BLM to grant "unlimited" nonuse. The final 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.

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.

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.

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 business, 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 that some contend start to accrue after 5 years without livestock grazing.

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.

One comment supported the proposed policy that removes the current 3 consecutive year limit on temporary nonuse of a grazing permit, because it gives BLM and the permittee more flexibility in resting allotments to protect and restore natural resources.

One comment suggested the rule should include a description of the types of information and documentation that a permittee must submit to "justify" nonuse. The comment expressed concern that if the level of detail required is too great, it may become too burdensome on the permittee at the expense of the wildlife or habitat resource. The comment also stated that the requirement that nonuse be re-authorized annually could prove burdensome to the permittee. Finally, there was concern that these requirements may ultimately conflict with Sections 7(a)(1) and 7(a)(2) of the ESA and conservation agreements and strategies for sensitive species.

BLM does not believe that the application process will be burdensome. BLM's long-standing procedure is annually to provide its permittees and lessees a grazing application reflecting the use authorized by their permit or lease, with an invitation to amend it within certain parameters if it does not meet their needs for that year. The new nonuse provision will not create any additional burden. Further, BLM does not believe that expanding its flexibility to allow longer periods of temporary nonuse will ultimately conflict with Sections 7(a)(1) and 7(a)(2) of the ESA or conservation agreements and strategies for sensitive species. In fact, just the opposite is expected with the use of this flexible resource conservation tool.

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 BLM is only concerned about short-term production of livestock and not the long term benefit of stewardship.

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."

Another comment supported the proposal to allow annual re-authorization of nonuse, based on the local manager's judgment, to promote flexibility in management of BLM grazing permits. The comment noted, however, that this flexibility would also provide a permittee the opportunity to retain monopoly control of an allotment and its resources at low or no cost. The comment suggested a limit on nonuse of 3 to 5 years. At that point, a more careful review of the situation and future alternatives would be conducted, and a decision could be made to continue the nonuse or move ahead with other options.

It is necessary to retain discretion to approve or disapprove temporary nonuse based on the facts and circumstances at hand, so that BLM may adapt its management to the needs of the resources as well as the resource user. BLM may deny nonuse if we find that it is not needed for natural resource conservation, enhancement, or protection, or for the personal or business needs of the permittee. Under the final rule, however, temporary nonuse may be approved annually for longer than three years, if the reasons for nonuse remain. BLM believes it is important to require an annual request for temporary nonuse in order to re-assess the circumstances. With this annual re-assessment, establishing a firm limit on the number of years of nonuse is unnecessary.

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.

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.

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

The final 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.

Section 4130.5 Free-use grazing permits.

In the proposed rule, we removed all references to conservation use, including in paragraph (b)(1) of this section, to conform the regulation to the decision of the Tenth Circuit Court of Appeals. We also removed the word "authorized" to keep the rule internally consistent. No comments addressed these changes.

Section 4130.6-1 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.

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).

We have made no change in the final rule in response to these comments. 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.

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."

We have not adopted this comment in the final rule. 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.

Section 4130.6-2 Nonrenewable grazing permits and leases.

In this section we removed the requirement that BLM consult with the interested public before issuing nonrenewable permits and leases. BLM issues nonrenewable permits and leases to allow grazing use of additional forage that is temporarily available. Here are two examples of when we apply this provision: when BLM has approved an application for nonuse for personal or business reasons under section 4130.4; and when we need to manage grazing use authorized on "cheatgrass" ranges.

For purposes of clarity and ease of usage, in the final rule we have further amended the second sentence of paragraph (b) by adding a cross-reference to section 4110.3-1(a), which provides for the disposition of additional forage temporarily available.

Under the final rule, consultation, cooperation, and coordination with the interested public is no longer required before a nonrenewable grazing permit or lease is issued. This change is intended to improve the administrative efficiency of grazing management operations and allow for a rapid response during the limited time periods when additional forage, such as cheatgrass forage, is available.

In the final rule, we have added a new paragraph (b) giving the authorized officer the option of making a decision that issues a nonrenewable grazing permit or lease, or that affects an application for grazing use on annual or designated ephemeral rangelands, effective immediately or on a date established in the decision. This provision replaces and meets the need served by paragraphs (c)(2) and (3) of section 4160.4 in the proposed rule. Those paragraphs would have provided that decisions authorizing temporary nonrenewable grazing or grazing on ephemeral or annual rangeland are to be implemented despite a stay by OHA.

We have decided to allow such grazing to proceed, pending appeal, for several reasons. In some cases, we have a limited time to authorize forage to be grazed before it loses its nutritional value. Under existing rules, upon an appeal and petition for stay (regardless of whether the stay is granted), BLM cannot authorize the use until the end of the regulatory time frames for addressing the stay petition (45 days in addition to the 30-day appeal period, for a total of 75 days, or 2.5 months), and often by that time it is too late to utilize the forage because the forage has lost most of its value. In annual range (or converted annual range such as cheatgrass ranges), this may result in a buildup of wildfire fuels. BLM believes that this approach is a more efficient management tool. Parties may still appeal and seek a stay, but the decision will be immediately effective and there will be no protest period.

This allows BLM to manage the utilization of annual or ephemeral rangelands on a real time basis (under land use plans, activity plans and other documents that contain

multiple use objectives), and allows those who may wish to dispute such a decision the opportunity for review.

Moreover, the provision does not exempt the action of issuing a nonrenewable permit or lease or approving or disapproving an application for use in annual or designated ephemeral rangelands from the normal consultation, NEPA review, and approval requirements.

The phrase "orderly administration of the rangelands" in this provision requires BLM to explain in its decision the circumstances that justify placing such a decision in full force and effect.

Other sections of the rules are cross-referenced accordingly (those being sections 4160.1(c) and 4160.3(c)).

A comment urged BLM to reconsider the proposal to increase grazing on cheatgrass ranges because of the potential impact of cheatgrass on native grasses and ecosystem functions.

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.

A few comments expressed concern 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.

At the time the October 2004 FEIS was published (June 2005), BLM was not proposing a categorical exclusion (CX) for issuing nonrenewable permits, and responded accordingly. On January 25, 2006 (71 FR 4159), BLM proposed a CX for issuing nonrenewable permits, limited to those allotments that have been assessed and evaluated and the authorized officer determines and documents that the allotment meets land health standards or where existing livestock grazing is not a factor in not achieving land health standards. The number of permit or lease decisions that could make use of the CX would be further limited by the 12 extraordinary circumstances listed in Appendix 2 of Departmental Manual 516 DM 2, and BLM must document that the grazing use authorized by the nonrenewable permit would not change the status of the land health standards. This CX proposal (which is not a part of this rulemaking), if adopted, would lead to a change in the result of the rule, changing somewhat the ability of interested publics to participate in the consideration of issuing nonrenewable permits. However, if the CX were to be adopted, the interested public would still be able to participate in the

process of developing land use plans and activity plans, where resource objectives, allocation of resource use (including allocation of excess forage through nonrenewable permits), and parameters for resource management (including the dates of use that could be allowed under a nonrenewable permit) are established; in developing reports that lead to a determination regarding status of land health; and at the decision stage under subpart 4160.

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 non-use by livestock exceeds a period of time appropriate to the respective western ecosystem.

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 final 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.

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.

We believe that it is unnecessary to address these concerns in the regulations, since BLM undertakes appropriate environmental review before issuing nonrenewable permits. Any impacts, such as those identified in the comment, would be addressed as a result of that environmental review.

Section 4130.8-1 Payment of fees.

We proposed editorial changes to this section to make it easier to read, and to correct a cross-reference in the existing regulations in paragraph (f) (paragraph (h) in the proposed rule) to subpart 4160. In the final rule we further amended paragraph (h) of section 4130.8-1 to make it clear that failure to make payment within 30 days is a violation of a prohibited act in section 4140.1 and may result in enforcement action. As a practical matter, if a payment is late by only a few days, there will not be time for BLM to issue an enforcement decision. However, BLM will consider such late payments in determining whether a permittee or lessee has a satisfactory record of performance.

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 it is appropriate to reduce 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.

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 preservation of Western heritage that is important to the American identity.

As indicated in the Advanced Notice of Proposed Rulemaking (68 FR 9964, March 3, 2003), as well as the proposed rule (68 FR 68452, 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 proposed or final rule, and have not adopted any of the recommendations. The existing fee structure is not altered by this rule.

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.

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.

Many comments recommended that the sheep/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 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. non-lactating 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

The sheep to cattle ratio is strictly a matter involving grazing fees and is therefore outside the scope of this rule. Confusion regarding the role of the sheep to cattle ratio is understandable due to the two distinct definitions of "animal unit month" 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 and/or quality, topography, pasture, allotment, grazing management, breed, size, weight, physiological stage, metabolic rate, etc.

On the other hand, one comment stated that each sheep and goat should be counted as 1 animal unit because all animals should be charged, and because any other way of accounting allows too much grazing.

As previously indicated, issues related to the fee structure, including the definition of an AUM for purpose of calculating fees, are not being addressed in this rule. In response to this comment, however, we wish to clarify that, as defined in section 4100.0-5, an 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.

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.

As previously stated, we are not addressing issues related to the fee structure, including the definition of an AUM 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.

Another comment urged BLM to amend the definition of an AUM in section 4130.8-1 by specifying that 2 steers or heifers that are between 1 and 2 years old will equal one AUM 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.

The definition of an AUM 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 rule. Therefore, the definition of AUM in section 4130.8-1(c) is outside the scope of this rule.

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.

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 thereunder, 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, Pub. L. 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).

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.

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.

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.

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.

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 non-resident 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.

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 (Section 3.16 of EIS). 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 impacts do not justify changing the surcharge regulation.

Some comments stated that the surcharge was instituted as a penalty, and that the surcharge is not a grazing fee issue. To the contrary, it 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. See 60 FR 9945.

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. These suggestions, like all those pertaining to fees, are beyond the scope of this rule. 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.

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.

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 (January 28, 2004).

One comment stated that BLM should not allow "after-the-grazing-season" payment of grazing fees.

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.

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.

This issue is not addressed in the regulations. It is, however, addressed in the TGA. Under 43 U.S.C. 315i, 12½ 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.)

Section 4130.8-3 Service charge.

The proposed rule removed the reference to conservation use in this section to conform to the Tenth Circuit decision. We also proposed to raise service charges for issuing crossing permit, transferring grazing preferences, and canceling and replacing grazing fee billings.

The proposed rule provided for the following increases in service charges:

Action	Current Service Charge	Proposed Service Charge
Issue crossing permit	$10	$75
Transfer grazing preference	$10	$145
Cancel and replace grazing		

fee billing	$10	$50

Upon internal review, we have expanded the third action in the table to include a $50 fee for supplemental grazing fee billings, which BLM employs from time to time in lieu of canceling and replacing billings. The current regulations include a service charge for supplemental as well as replacement billings, so this change makes the final rule consistent with the current regulations except as to the amount.

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 and/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.

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 decisionmaking 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 $50 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 grazing fee billing for grazing use specified in the permit or lease. This typically occurs 30 days before the first grazing begin date listed on the permit or lease and 30 days after BLM has provided the operator a "courtesy grazing application" that lists grazing use shown on the permit or lease and invites application for changes in this use as may be needed or desired by the permittee or lessee. Additionally, BLM will not assess the service charge if, after a grazing fee billing is issued, BLM changes the grazing fee bill because we have approved an operator's grazing application not to use all or a portion of his preference for reasons of resource conservation, enhancement, or protection.

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.

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.

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.

As previously stated, 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.

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.

Section 4130.8-3(b) in the proposed 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.

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

In response to this concern, we included in the final 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 non-renewable 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 final EIS

Section 4140.1 Acts prohibited on public lands.

In the proposed rule, we amended the prohibition of the placement of supplemental feed on public lands in section 4140.1(a)(3) to make it clear that the prohibition applies if the placement of supplemental feed was without authorization or contrary to the terms and conditions of the permit or lease.

We also revised section 4140.1(b)(1)(i) to state that it is a prohibited act to graze without a permit or lease or other grazing use authorization and timely payment of grazing fees. We also amended paragraph (b) to make it clear that the acts listed in the paragraph are prohibited on all BLM-administered lands, rather than that the acts are prohibited if they are related to rangelands.

We amended section 4140.1(c) to limit its application to prohibited acts performed by a permittee or lessee on his allotment where he is authorized to graze under a BLM permit or lease. It pertains to violations of certain Federal or State laws or regulations, including placement of poisonous bait or hazardous devices designed for the destruction of wildlife; pollution of water resources; and illegal removal or destruction of archeological or cultural resources. It also pertains to the violation of specific laws and regulations including the Bald and Golden Eagle Protection Act, ESA, and any provision of the regulations concerning wild horses and burros, and to the violation of state livestock laws or regulations relating to branding and other livestock related issues. We retained the provisions that allow us to withhold, suspend, or cancel all or part of a grazing permit if the lessee or permittee is convicted of violating any of the prohibited acts in paragraph (c).

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.

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 has 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; and BLM should discontinue leasing to individuals who violate BLM requirements on their allotments.

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, as we stated earlier, it is not Federal or BLM policy to exclude a person who has been convicted of a crime, paid his penalty or served his sentence, and been rehabilitated, from gainful employment.

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. A second comment recommended that BLM amend the provision that prohibited failure to make substantial grazing use as authorized for two consecutive fee years. The comment cited the proposed rule provision that states "the BLM may deny nonuse if the permittee cannot justify that nonuse is for resource stewardship," and recommended that the rule provide a clear exception if nonuse would be beneficial for listed or sensitive species and their habitats.

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.

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 his permit or lease and does not graze livestock as authorized by his permit or lease for 2 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 whether 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(l).

No amendment of this provision is necessary. Under the final rule, the authorized officer may grant nonuse for the number of years needed to provide for natural resource conservation, including threatened and endangered species. The present regulations that limit BLM's ability to allow for annual temporary nonuse for more than 3 years were changed. Under the final rule, temporary nonuse can be approved annually for longer than 3 years. BLM believes it is important to require an annual request for temporary nonuse. The annual review process allows BLM to assess the reasons for the request and to gauge the success of range recovery (if temporary nonuse was issued for resource conservation purposes). To do otherwise could lead to less active BLM oversight and management of public lands. The provision that prohibits failure to make substantial

grazing use as authorized for 2 consecutive years applies to situations where a nonuse application has not been approved.

Several comments stated that BLM should not make it a prohibited act to place supplemental feed on public lands without authorization, asserting that BLM has no personnel who are knowledgeable in livestock nutrition.

The prohibition on placing supplemental feed on public lands without authorization is already stated in the regulations; it is not new in this rule. This 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.

Comments stated 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 that these provisions will tend to remove permittees from Federal lands.

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 impact on the natural resource values of the allotment.

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.

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 this 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.

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 expressed concern about the adverse impacts of invasive plants on native ecosystems, and 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.

BLM has decided not to pursue adding a prohibited act to section 4140.1(b) addressing non-compliance 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, and mulch policy for the public lands, working closely with state and local governments. We will also continue to implement our Partners Against Weeds strategy plan, which includes measures for controlling and preventing the spread and introduction of noxious and invasive weeds.

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 BLM or another entity would be arbitrary, and that there are other ways to encourage good stewardship of the public lands.

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.

One comment suggested reorganizing section 4140.1(c) of the proposed rule so that the Bald and Golden Eagle Protection Act (BGEPA) 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).

We have not adopted this comment in the final rule. There is no basis for changing the organization of section 4140.1(c)(3). There is no qualitative difference between numbering the references to the BGEPA 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.

One comment stated the proposed rule implies that a permittee convicted of violating the BGEPA on any lands outside his BLM grazing permit boundary would not risk loss of grazing privileges. The comment noted that the BGEPA (16 USC 668(c)) provides specifically for revocation of permits for violations of the BGEPA regardless of where the violation occurs (i.e., the violation does not have to occur within the grazing permit boundary), and stated that the grazing rule should be consistent with the BGEPA.

The BGEPA provides authority for the Director of BLM to impose a penalty of immediate cancellation of leases, licenses, permits, or agreements authorizing livestock grazing on Federal lands for violations of the BGEPA. The statute, however, leaves the decision of whether to cancel a lease, license, permit, or agreement to BLM's discretion. The final rule does not alter BLM's discretionary authority granted under the BGEPA, but would clarify and limit BLM's enforcement authority under its grazing regulations by limiting its application to prohibited acts performed by a permittee or lessee on his allotment where authorized to graze under a BLM permit or lease. BLM permittees and lessees are still accountable and responsible for violations of the BGEPA, which carries civil and criminal penalties other than permit or lease cancellation (16 U.S.C. 668(a) and (b)). These other penalties will still serve as a deterrent to violation of the BGEPA on areas other than the allotment where the permittee or lessee is authorized to graze.

Another comment expressed the broader concern that the rule does not provide for revocation of a permit when a prohibited act occurs outside of the grazing permit boundary. The comment stated that this contradicts the stated objectives of the proposed rule: to improve cooperation, promote practical mechanisms for assessing rangeland change, and enhance administrative efficiency. Further, the comment stated that the rule may result in more livestock trespass violations on Fish and Wildlife Service refuge lands. The comment noted that the current rule, which allows BLM to determine whether cancellation or suspension of a permit is appropriate, likely helps deter trespass violations.

Finally, the commenter stated that the FEIS should report the miles of boundaries shared by BLM grazing allotments and refuge land and assess the implications of the proposed rule for the FWS mission.

BLM believes it is appropriate that penalties applied to grazing permits be directly linked to the abuse of the permission being granted by the permits. In BLM's view, the most effective and direct deterrent to livestock trespassing onto refuge lands or any other Federal lands is for the managers of those lands to take action directly against the violator. This is preferable to relying upon "secondary" sanctions against the violator's BLM permit.

BLM does not disagree that the threat of additional penalty against an operator's BLM permit for violation of another Federal or state agency's regulations has deterrence value. Violations of Federal and state law and regulation already carry penalties. To

include an additional penalty in the grazing regulations unintentionally and unfairly treats grazing permittees inequitably. The 1995 regulations single out a particular use for additional penalty to which other violators are not subject. We do not expect that the proposed change will have any effect on lands adjacent to BLM-managed lands. Furthermore, as noted above, existing law should be sufficient to protect against trespass. BLM remains committed to cooperating with other Federal and state land managers on a case-by-case basis to address incidents of livestock grazing trespass.

Finally, the final rule does not prevent BLM from penalizing a permittee if the permittee unlawfully trespasses on another allotment. Nor does the final rule prevent BLM from penalizing a permittee by altering his permit if he is convicted of destroying government property on Federal lands other than on his allotment (section 4170.1).

One comment suggested that the regulations should provide that any grazing use that was canceled as a penalty is available to other applicants.

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.

Subpart 4150 -- Unauthorized Grazing Use

Section 4150.3 Settlement.

In the proposed rule we amended section 4150.3 by adding a new paragraph (f) specifying that if a permittee or lessee obtains a stay of a decision that demands payment or cancels or suspends a grazing authorization, BLM will allow him to graze under his existing authorization pending resolution of the appeal.

In the final rule, we amended paragraph (f) to make it clear that "this part" refers to all of part 4100, for the benefit of readers who may not be familiar with CFR conventions. We also amended this paragraph to make it clear that BLM will allow grazing pending the completion of the administrative appeal process, rather than judicial appeals.

A few comments addressed this section 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 volitional act and/or an act of negligence by the permittee or lessee (or an affiliate) 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.

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 and/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 re-close any gate or livestock entry during periods of livestock use.

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.

BLM agrees that the regulations require clarification on this matter. Some BLM field staff persons have erroneously interpreted section 4150.3(e) to mean that they must refuse to process grazing applications of and issue grazing fee billings to an alleged trespasser during the period after BLM has issued a decision demanding payment but before the decision has been finally determined upon review. 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.

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.

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.

Subpart 4160 -- Administrative Remedies

Section 4160.1 Proposed decisions.

Existing section 4160.1(c) provides that an authorized officer may elect not to issue a proposed decision where he has made a determination in accordance with section 4110.3-3(b) or section 4150.2(d), which allow under certain circumstances the authorized officer to make a decision effective upon issuance or a date specified in the decision. The final rule amends section 4160.1(c) to reflect the addition of section 4130.6-2(b) in this rule, and the addition of section 4190.1(a) in a previous rulemaking (68 FR 33804, June 5, 2003). The final rule now includes cross-references to all BLM grazing regulations allowing decisions to be made effective upon issuance or a date specified in the decision.

We also proposed to amend this section to provide that a BA or BE that BLM prepares for purposes of the ESA (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 OHA under the TGA. Pursuant to the Secretary's supervisory authority, this provision prospectively supersedes the decision in Blake v. BLM, 145 IBLA 154, 166 (1998), aff'd, 156 IBLA 280 (2000), which held that the protest and appeal provisions of 43 CFR subpart 4160 apply to a proposed change in a permit or lease evaluated in a BA or BE.

Proposed section 4160.1(d) provided that a BA or BE prepared for purposes of an ESA consultation or conference is not a decision for purposes of protest or appeal. The final rule clarifies the proposed rule by adding the words "by BLM" after the word "prepared."

Comments opposed this section and stated that it effectively eliminates all administrative appeals of grazing permit or lease terms and conditions that result from a BA and related BO. Other comments said that where the terms and conditions of a grazing lease or permit were required 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 BE. Both the TGA, 43 U.S.C. 315, and the APA, 5 U.S.C. 551 et seq., provide for administrative appeals, 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 OHA. This would include grazing permit or lease terms and conditions required as a result of ESA consultation. Comments opposed this provision, arguing that it denied permittees and members of the public opportunities to correct mistakes in an agency BE.

Regulations at 50 CFR 402.02 and 402.12 make it clear that a BA or BE is an intermediate step that BLM will take in assessing its obligations under the ESA, and thus is not subject to appeal. A BA or BE does not grant or deny a permit application, modify a permit or lease, or assess trespass damages, which 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 TGA. The final rule at section 4160.1(d) prospectively supersedes a requirement imposed by IBLA in Blake v. BLM, 145 IBLA 154 (1998), aff'd, 156 IBLA 280 (2002), that BLM issue a BE or BA as a proposed decision that may be protested and appealed (as if it were a grazing decision), even though a BE or BA does not take action, require action, or implement anything.

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 BO prepared by FWS. TGA Section 9 hearings are administered by OHA, a body that has been delegated authority regarding public land use decisions, but has not been delegated authority over FWS actions. See Secretarial Memorandum of January 8, 1993 (Secretary Lujan); Secretarial Memorandum of April 20, 1993 (Secretary Babbitt). The ESA does not require or authorize the creation of an administrative appeal procedure for biological opinions, and instead authorizes direct suit in a Federal court. 16 U.S.C. 1540(g). A BO may be challenged in Federal court under the APA. Bennett v. Spear, 520 U.S. 154, 178 (1997). Thus, direct legal remedies are already in place and OHA has not been delegated administrative review authority over BOs issued by FWS.

OHA's review is limited to the merits of the BLM decision and can not extend to the validity of the BO findings or the FWS procedures used to produce the opinion. This final rule does nothing to change this longstanding policy, which is summarized in

Secretary Lujan's memorandum as follows: "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."

One comment stated that BLM should clarify exactly which terms and conditions in a permit or lease resulting from a biological opinion may be appealed to the Office of Hearings and Appeals (OHA).

Section 4130.3(b)(1) of the proposed rule included a provision that specified that the terms and conditions mandated by a biological opinion are not subject to review by OHA. BLM intends to drop this provision in the final rule. The regulatory language in the proposed rule at section 4130.3-3(b) reflected Departmental policy as explained in two 1993 Secretarial memoranda. These memoranda state that the OHA does not have the authority to review biological opinions. Such review is provided by the Federal Courts through Section 11(g) of the ESA. Although we have removed proposed paragraph (b)(1) in the final rule, BLM is not changing its longstanding policy. BLM is dropping proposed paragraph (b)(1) because the Secretarial memoranda are sufficient.

Another comment stated that an appeal to OHA should not be allowed as to stipulations resulting from interagency programmatic consultations, or from interagency coordination intended to substitute for formal consultation. The comment stated that if these stipulations could be removed through appeal, it may be necessary to re-initiate formal consultation or renegotiate interagency agreements, which would negate the streamlining efforts by both BLM and the FWS.

Issues of OHA jurisdiction are better addressed in the OHA regulations or through Secretarial directives. BLM must avoid jeopardizing the continued existence of any listed species, and will formally consult with the FWS and the National Marine Fisheries Service whenever appropriate.

One comment suggested that the rule be amended at section 4160.1(d) to state that, although biological assessments are not decisions that can be protested or appealed, the facts and findings of biological assessments may be challenged in a grazing protest or appeal.

Section 4160.1(d) states that a BA prepared for the purposes of an ESA consultation or conference is not a decision for purposes of protest or appeal. This provision ensures consistency with the ESA regulations, such as 50 CFR 402.02 and 402.12, which define BAs as documents that evaluate the potential effects of an action or management proposal on listed or proposed species and designated or proposed critical habitat. BAs are not documents that authorize an action. Therefore, BAs cannot be

protested or appealed. BLM believes that the language in the final rule at section 4160.1(d) is clear and appropriate in this regard, and we have not adopted the comment in the final rule.

One comment stated that whether grazing may continue while an administrative stay is in effect is a decision that should be based on what is best for the resource. A similar comment stated that maintaining or improving rangeland health should be the overriding concern in grazing management, including how the range is managed during appeal. Another comment asked specifically that BLM clarify how threatened and endangered species would be protected when grazing continues during OHA consideration of an appeal, and how any loss of species or habitat would be remedied once the appeal is resolved.

The proposed rule recognizes the continuing nature of grazing operations and is consistent with the Administrative Procedure Act requirement that "a license with reference to an activity of a continuing nature" does not expire until an agency makes a new determination (5 U.S.C. 558). In light of this, section 4160.4(b) provides that grazing may continue when a decision affecting a grazing permit or lease has been stayed by OHA. BLM believes that actively managing the use of the rangelands and not automatically halting grazing when a stay is issued is consistent with BLM's obligations under FLPMA and the TGA.

In response to comments, BLM plans to limit the application of paragraph (b) to certain types of grazing decisions –

● Those that cancel or suspend a permit or lease, or change any term or condition during its current term or renew a permit or lease,

● Those that issue or 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.

In addition, BLM is entirely removing proposed section 4160.4(c) from the rule.

BLM agrees that the condition of the rangeland and protection of species listed under the ESA must be considered in making grazing decisions and in instances where there is a stay of a decision. BLM takes these matters into account in making grazing decisions and, when necessary to protect resources or species, can issue a decision that is effective immediately (section 4110.3-3(b)(2) in the final rule). The IBLA also has the flexibility to issue a stay in whole or in part so that resources and species may be protected (43 CFR 4.21(b)(4)).

Section 4160.3 Final decisions**.**

We proposed to amend section 4160.3 by moving the discussion of appeal procedures in paragraph (c) to, and combining it with, existing section 4160.4 as a new paragraph (a).

We also moved and revised paragraphs (d) and (e) of section 4160.3, regarding grazing use when OHA has granted a stay of a final grazing decision, to section 4160.4.

In the final rule, we have added necessary cross-references to paragraph (c) to conform the paragraph to changes made in other sections in this rule and in a previous final rule (68 FR 33804, June 5, 2003). The final rule now includes cross-references to sections 4110.3-3(b), 4130.6-2(b), 4150.2(d) and 4190.1(a), all of which allow under certain circumstances for a decision to be made effective upon issuance or a date specified in the decision.

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 recommended 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 contended that BLM grazing decisions over the past 10 years have not been based on state of the art rangeland studies, and that the OHA regulations misplace the burden of proof on appellants in justifying stays.

We have not amended the section 4160.3 in the final rule in response to these comments. Consultation, cooperation, and coordination with affected permittees and lessees are 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 decisionmaking process. Adding a pre-decisional hearing based on the OHA stay standards would unnecessarily limit BLM's ability to respond in a timely manner to changing range conditions.

A number of comments addressed proposed section 4160.3. That section provided 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.

The comments, if adopted, would, in effect, revive the provisions of section 4.21(a) as they existed before 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 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. Comments in favor of a general rule that would suspend a decision during appeal have not been adopted in the final rule.

Section 4160.4 Appeals**.**

The proposed rule amended section 4160.4 by adding language clarifying the extent, if any, that grazing activities are permissible after OHA grants a stay of a grazing decision. We are adopting the proposed rule with revisions. We are also adopting regulations at 4130.6-2(b) that address grazing use following a stay of decisions regarding annual or ephemeral use and temporarily available forage.

The current regulations, at section 4160.3(d) and (e), specify a number of variables that determine the extent of grazing that will be allowed between the grant of an administrative stay and the resolution of an administrative appeal. For example, three of the variables in the current regulations are whether grazing was authorized in the preceding year, whether the decision is "regarding an application for grazing authorization," and whether "grazing use in the preceding year was authorized on a temporary basis under section 4110.3-1(a)." 43 CFR 4160.3(d). If only the first two variables are present, the applicant may continue grazing use at the same level as the preceding year. However, if all three variables are present, the regulations imply (but do not expressly provide) that "grazing use shall be consistent with the final decision pending the Office of Hearings and Appeals final determination on the appeal." Id.

Proposed section 4160.4 described the effects of a stay granted by OHA on a grazing decision under appeal, i.e., what happens when OHA stays implementation of a grazing decision. In three types of cases identified at paragraphs (b)(1), (2), and (3), the proposed rule provided that a rancher's immediately preceding authorization and any

terms and conditions therein will not expire, and the permittee, lessee, or preference applicant may continue to graze under the immediately preceding grazing authorization, subject to the stay order and section 4130.3(b). Proposed paragraphs (b)(1), (2), and (3) described those cases that (1) change the terms and conditions of a permit or lease during the current term; (2) offer a permit or lease to a preference transferee with terms and conditions that are different from the permit or lease terms and conditions that are most recently applicable to the allotment or portion of the allotment in question; and (3) renew a permit or lease with changed terms and conditions.

The proposed rule also described four types of cases at paragraphs (c)(1), (2), (3), and (4) that call for BLM, upon the grant of a stay by OHA, to authorize grazing consistent with the final decision under appeal. Briefly stated, proposed paragraphs (c)(1), (2), (3), and (4) described those cases that (1) modify a permit or lease because of a decrease in available acreage; (2) affect an application for ephemeral or annual rangeland; (3) affect an application for forage temporarily available under section 4110.3-1(a); and (4) affect an application for a permit or lease not made in conjunction with a preference transfer.

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. We have clarified section 4160.4(b) in the final rule to reflect these comments. In the final rule, 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). BLM believes it is important to actively manage the use of the rangelands and not automatically halt grazing when a stay of a decision is issued. This approach recognizes the continuing nature of grazing operations that are authorized through permits and leases as contemplated in the APA (5 U.S.C. 558(c)).

We invited comment (at 68 FR 68465) on how we might effectively incorporate the provisions 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.

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 address forage available on ephemeral or annual rangeland or "temporarily available." Such forage 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 was difficult to evaluate proposed section 4160.4(c)(4) without knowing the full range of decisions to which it would apply, but that it seemed 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 regardless 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.

As a result of the concerns expressed in these comments, we have entirely removed proposed section 4160.4(c) from the final 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 cancel or suspend a permit or lease, those that renew a permit or lease, and those that modify terms and conditions of a permit or lease during its current term;
- Those that issue or deny a permit or lease to a preference transferee; and
- Those that 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 renews, cancels, or suspends a permit or lease, or 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, under paragraph (b)(1), the affected permittee or lessee 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.

Under paragraphs (b)(2) and (b)(3), stays of decisions relating to preference transfers are treated in an analogous manner. If the stay is of a decision issuing or denying a permit or lease to a preference transferee, BLM will issue the preference

applicant a permit or lease with the same terms and conditions as the most recent permit or lease of that allotment or part thereof, under paragraph (b)(2). If the stay is of a decision issuing the preference transferee a permit or lease, but with changed terms and conditions, BLM will offer the permit or lease with those stayed terms and conditions stated as they appeared in the most recent grazing authorization pertinent to that allotment, under paragraph (b)(3).

So, although the grazing decision appealed is stayed, grazing can continue at the previous levels of use, as provided by the APA. This ensures that the decision appealed is rendered inoperative for exhaustion purposes under 5 U.S.C. 704 and the status quo prior to issuance of the decision appealed remains in effect. In the instance of an appeal and stay preventing implementation of a new grazing authorization, the fact that a permittee may still be authorized to graze at some level is not a function of the stayed decision being implemented, but is consistent with the APA's concept that existing authorizations remain in effect until an agency makes a final decision on a new authorization. It is worth noting that the APA provides at 5 U.S.C. 558(c) that existing authorizations remain in effect until an agency makes a final decision on a new authorization. BLM is making these changes to balance the exhaustion of administrative remedies under the APA and our responsibilities under FLPMA and TGA to--

- manage lands for multiple use and sustained yield
- regulate the occupancy and use of the rangelands,
- safeguard grazing privileges,
- preserve the public rangelands from destruction or unnecessary injury, and

- provide for the orderly use, improvement, and development of the range.

There is no need for a provision equivalent to proposed section 4160.4(c)(1) in the final 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.

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."

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).

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.

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.

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 impacts to permittees during the adjudication of an appeal. We have not adopted the comment.

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 2805.12(g) (bonding for rights-of-way.)

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.

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)).

One comment stated that BLM regulations should provide for independent science panels to examine and resolve grazing-related disputes.

We have not adopted this comment in the final rule. We believe that the formal APA hearing provided by the TGA, 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 a RAC , 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. 43 CFR 1784.6-2(a)(1)(iv). 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 decisionmaking process… ." Id. 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.

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.

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) and 4.479(e). Those regulations state 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. For further discussion of administrative exhaustion and judicial review, see the proposed rule at 68 FR 68465.

Subpart 4170 – Penalties

Section 4170.1-2 Failure to use.

The proposed rule removed the term "permitted use" from this section and replaced it with the term "active use" to be consistent with the definitions in section 4100.0-5.

One comment addressed this section, 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.

BLM disagrees. As indicated by the TGA, 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, occupied, 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.

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

Section 4180.1 Fundamentals of rangeland health.

In the proposed rule, we revised the introduction of section 4180.1 to provide that BLM will take action to change grazing management so that it will assist in achieving the fundamentals only if there are no applicable standards and guidelines in place. Also, we amended the introduction to change the amount of time within which BLM would need to take action to ensure that resource conditions conform to the requirements of this section. In the proposed rule the deadline changed from not later than the start of the next grazing year to not later than the start of the grazing year following BLM's completion of action, including consultation under sections 4110.3-3 and 4130.3-3 and meeting all relevant and applicable requirements of law and regulations.

As a result of comments, we are amending section 4180.1 in the final rule to clarify the relationship between the fundamentals and the standards and guidelines. Specifically, we are replacing the first paragraph of the existing 4180.1 with the following: "Standards and guidelines developed or revised by a Bureau of Land Management State Director under § 4180.2(b) must be consistent with the following fundamentals of rangeland health." The fundamentals themselves remain as approved in 1995.

This change recognizes the relationship of the standards and guidelines to the fundamentals. The fundamentals are broad national goals, whereas the standards are applicable at the local and regional level. The proposed rule would have restricted regulatory action under section 4180.1 to geographic areas without approved standards

and guidelines. But these areas were already subject to the fallback standards and guidelines in section 4180.2.

Comments received highlighted that fallback standards and guidelines are in place if state or regional standards and guidelines have not been developed, and so application of the fundamentals is not necessary in those instances. Comments also characterized the fundamentals as encompassing critical requirements not included in all standards and guidelines. A more precise way to look at the fundamentals and the standards and guidelines is to examine the differing character of these provisions. Standards of land health are expressions of physical levels and biological condition, or the degree of function required for healthy lands and sustainable uses. These standards define minimum resource conditions that must be achieved and maintained. A guideline is a practice, method, or technique determined to be appropriate to ensure that standards can be met or that significant progress can be made toward meeting the standard. Guidelines are tools such as grazing systems, vegetative treatments, or improvement projects that help managers, permittees, and lessees achieve standards. A guideline may be adapted or modified when monitoring or other information has shown that the guideline is not effective, or that a better means of achieving the applicable standards is available. (BLM Handbook H-4180-1)

The 1994 Draft Environmental Impact Statement described the broad nature of the fundamentals, stating that they were intended to "reflect the fundamental legal mandates for the management of public lands under the Taylor Grazing Act, FLPMA,

Endangered Species Act, Clean Water Act, and other relevant authorities." (1994 Draft EIS, page 1-16.) The 1994 Draft EIS also described the fundamentals as providing the foundation for developing the standards and guidelines. The fundamentals were intended to "establish clear national requirements for the preparation of State or regional standards and guidelines." (1994 Draft EIS, page 1-15.) BLM complies with these broad requirements in relevant laws and regulations through permit and lease terms and conditions.

Once the standards and guidelines were developed, they became the focus for assessing rangeland health, and for making determinations as to whether existing grazing management was a cause for not meeting standards and needed to be altered to achieve the locally applicable standards and guidelines. Since the adoption of state or regional standards and guidelines, BLM has relied on the standards and guidelines to evaluate rangeland health. BLM is not aware of instances where the standards and guidelines have not been relied upon. Before the regulatory deadline for completing state or regional standards and guidelines or the effective date of the fallback standards and guidelines (43 CFR 4180.2(f)), BLM could have invoked the requirement that it take "appropriate action" under section 4180.1 to make changes to grazing permits and leases. However, BLM has relied on the similar, so-called "action forcing" provision in section 4180.2 to change existing livestock management in order to achieve locally tailored state or regional standards and guidelines, or the fallback standards and guidelines, once state or regional standards and guidelines were implemented, or the fallbacks became effective as provided in the regulations. This is consistent with how BLM described the standards

and guidelines when they were first proposed in 1994—i.e., as functioning to "focus BLM's management direction, promote biological diversity, and improve agency efficiency in meeting management objectives." (1994 Draft EIS, page 4-39.)

Standards describe the biological and physical conditions that can be assessed to determine rangeland health, and guidelines are designed to aid BLM in determining appropriate grazing management. The fundamentals, in contrast, are designed as broad, overarching goals, and reflect such relevant laws as the Clean Water Act, TGA, FLPMA, and the Endangered Species Act. Compliance with these laws already occurs through appropriate terms and conditions.

Although the 1995 rule established requirements for "appropriate action" when either the fundamentals or established standards and guidelines were not being met because of existing grazing, the redundancy of requiring "appropriate action" in both circumstances is unnecessary and inefficient, and impedes implementation. The current regulations are inefficient and imprecise and, as a result, difficult to administer. The broad description of condition and general ecological processes set forth in the fundamentals make it very difficult to link these broad characteristics to a determination that livestock grazing is the cause of these watershed or ecological process conditions. As discussed previously, standards set forth a descriptive condition of expected rangeland health, and guidelines describe methods, practices, or techniques to meet standards. Fundamentals, on the other hand, are broad goals that are less susceptible to clear linkage to just one use.

Standards and guidelines have been developed in conformance with the fundamentals and adopted for all states and regions except southern California. These standards and guidelines provide the basis for the application of the broadly stated fundamentals to the management of public lands. In southern California, the fallback standards and guidelines provide for the application of the fundamentals to those public lands. Because the standards and guidelines are meant to provide specific measures for achieving healthy rangelands within the framework of the broad fundamentals, a duplicate administrative mechanism to require "appropriate action" under the fundamentals is unnecessary.

The final rulemaking recognizes the relationship of the standards and guidelines to the fundamentals. We do not anticipate an adverse environmental impact from the fundamentals provision, as revised, but rather anticipate overall long-term improvements in rangeland conditions. This is based on the continued application of the standards and guidelines, continued relevance of the fundamentals when standards and guidelines are developed or revised, continued application of relevant laws that were the basis for the fundamentals, and continued use of the fundamentals to identify general characteristics of a functional rangeland ecosystem in broad land use plans and allotment management plans.

BLM will ensure that any standards and guidelines developed or revised are consistent with the fundamentals, which remain unchanged from 1995. By requiring

newly developed or revised standards and guidelines to be consistent with the fundamentals, the final rule will provide clear guidance for any future effort to develop or revise the standards and guidelines. BLM will continue to utilize the standards and guidelines to assure that livestock grazing is conducted consistently and in accordance with principles already being used in rangeland ecosystems.

In the final rule, in response to public comments as discussed below, we have also amended paragraph (d) to remove the reference to "at-risk" species.

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.

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. The effectiveness of state or regional guidelines will be determined by evaluating whether or not standards are met when the guidelines are followed. The purposes of the change in section 4180.1 are –

● to make it clear that the fundamentals are the overarching principles that managers aspire to meet when devising standards and operating under guidelines in accordance with section 4180.2, and

● to remove an operational redundancy.

This redundancy in the current regulations requires BLM to do two things:

(1) to modify grazing practices or take other possible appropriate action when we determine that livestock grazing is a significant contributing factor to failing to meet one or more standards or conform with guidelines (the final rule retains this requirement), and

(2) to modify grazing practices or take other possible appropriate action when we determine that it is necessary to do so to ensure that the conditions described by the fundamentals exist (the final rule removes this requirement).

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.

BLM considered the National Research Council publication in 1995 in developing national requirements that describe the necessary physical components of healthy

rangelands. (Rangeland Reform '94 Final Environmental Impact Statement, p13). These national requirements 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. BLM has been a participant in the "Sustainable Rangeland Roundtable," and the work of that group is ongoing. We have determined that further adjustments of the regulations to be consistent with the "Sustainable Rangeland Roundtable" products would be premature at this time.

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 the 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.

As explained in the proposed rule (68 FR at 68457), we did not consider it appropriate to expand the scope of this rulemaking to address planning regulations at subpart 1610.

A number of comments addressed the references to “at-risk and special status species” and the ESA in subpart 4180. All suggested removing the term “at risk species” found in sections 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.

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 restricted. 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 final rule. 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.

Section 4180.2 Standards and guidelines for grazing administration

In the proposed rule we would have revised paragraph (c) of section 4180.2 to provide that we would require both assessments of standards attainment and monitoring to support a determination that grazing practices are a significant factor in failing to achieve, or not making significant progress towards achieving, rangeland health standards. We have amended this proposal in the final rule. Under the final rule, if a standards assessment indicates to the authorized officer that the rangeland is failing to achieve standards or that management practices do not conform to the guidelines, then he will use existing or new monitoring data to identify the significant factors that contribute to the failure or lack of conformance.

We also amended paragraph (c) in the proposed rule to provide that within 24 months following a determination that current grazing practices are a significant factor in failing to achieve or make progress towards achievement of standards and/or conform with guidelines, BLM will, in compliance with applicable law and with consultation requirements, analyze appropriate action and then issue a final decision regarding the appropriate action it intends to implement to remedy the failure to meet the standards and/or execute a documented agreement regarding the appropriate action with the permittee(s) or lessee(s) and the interested public. This change recognizes the decision process specified at subpart 4160 that BLM employs to implement management actions.

This requirement to issue a “final” decision within 24 months recognizes that in most cases, in accordance with subpart 4160, BLM final decisions are preceded by proposed decisions that may be protested within 15 days of receipt, and that BLM then must address any protest in the final decision. The 24-month deadline within which BLM must issue a final decision (in the absence of, or in addition to, the execution of an agreement) is intended to accommodate both the 15-day protest period afforded to recipients of proposed decisions and the time needed for BLM then to address the protest and issue its final decision.

We are adopting the proposal in the final rule. BLM may extend the 24-month deadline when the legal responsibilities of another agency prevent completion of all legal obligations within the 24 months. We made this change to allow for the infrequent occasions when additional time is needed to fulfill required legal and consultation obligations that are outside BLM’s purview and control. Upon executing the agreement, or in the absence of a stay of the final decision, BLM must implement the appropriate action as soon as practicable but not later than the start of the next grazing year. We made this change in recognition that legal proceedings can at times delay or halt implementation of actions deemed appropriate by BLM.

We also removed the phrase "Category 1 or 2" with respect to the designation of special status to candidate threatened and endangered (T&E) species because the FWS no longer uses these designations.

As in section 4180.1, in this section also we have removed references to “at-risk” species in the final rule.

Finally, we made changes in paragraph (c) that better reflect field practice. Both paragraphs 4180.2(c)(1)(i) and (c)(2), as proposed, erroneously implied that an agreement or a grazing decision are mutually exclusive. However, we often reach agreement and then issue a final decision to implement the agreement to ensure administrative finality. On the other hand, some field managers are comfortable with just an agreement and do not necessarily want to follow up with a decision. Such agreements, when they occur, must be signed by the interested public, in addition to the permittee/lessee. Also, at times, state agencies are signatory parties to agreements as well.

A number of comments supported the proposed rule provision that BLM will use a combination of monitoring and assessment information to determine whether existing grazing management practices or levels of grazing use on public land are significant factors in failing to achieve standards. The comments stated that the monitoring and assessment requirement would lead to BLM having more defensible data to support decisions, supply data from more than one point in time, ensure that partnerships are producing desired results, foster stable range condition and upward trend while maintaining custom and culture of the West, and enhance efforts to protect the health of the land. Supportive comments also referred to increasing credibility of determinations by using quantitative data to support qualitative observations and reducing the

subjectivity involved in making a determination that leads to changing terms and conditions in grazing permits.

The use of existing or new monitoring data to identify what factors significantly contribute to not meeting standards or to conform to guidelines and to support determinations regarding such failure will focus and better inform the subsequent actions that BLM takes to improve rangeland health as compared with actions taken based solely on assessments. When monitoring data is used to identify livestock grazing as a significant contributing factor, the range management actions taken will be more effective and less vulnerable to appeal. The rule thus would result in expediting actions to improve rangeland health.

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.

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 accomplished on high priority areas within the allocated budget amounts. The budgetary effects of the monitoring requirement in proposed section 4180.2(c) will be mitigated by the amendment in the final rule that limits the need to use existing or new monitoring data to those cases where a standards assessment indicates that the rangeland is failing to achieve standards or that management practices do not conform to guidelines.

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/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 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.

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, which may be subject to

modification as new findings are announced in the scientific literature. The suggestion to update policy and handbooks is appropriate, and BLM plans to do so. We anticipate that we will consider the information in the Catlin report as we develop and update guidance. In the meantime, BLM follows monitoring guidance at Manual Section 1734, and Manual Handbooks 1734-1 and 4180-1. BLM also monitors the status of objectives from land use plans and activity plans, and considers this monitoring information in evaluating land health standards. BLM receives and considers other data and information provided by affected permittees and others, to the extent practical, during the development of evaluation reports. These reports include evaluations of land health standards, evaluations of land use plan and activity plan objectives, and biological evaluations relating to consultation under Section 7 of the Endangered Species Act.

One comment suggested that BLM should add the following wording to section 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.

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 section 4110.3-3, so we believe the suggested word change to section 4180.2 is unnecessary.

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, to be developed through consultation, cooperation, and coordination.

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.

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.

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. The final rule requires that existing or new monitoring data be used to identify significant contributing factors and support determinations regarding the same only on those allotments that standards assessment indicates are failing to meet standards or conform to guidelines. This will ensure that subsequent corrective action is focused on remedying the factors that monitoring has verified are contributing to not achieving standards or not conforming to applicable guidelines.

BLM currently administers grazing on about 21,535 allotments (2005). We have established monitoring sites in nearly 11,500 allotments, and currently collect monitoring data to some degree on about 3,500 of those allotments each year. BLM uses these monitoring sites primarily to evaluate achievement of land use plan objectives, to ascertain changes in condition, and to determine trend. Information is collected at some of the monitoring sites more often than at others, depending on priority and purpose.

As of the end of Fiscal Year 2002, about 16 percent of 7,437 allotments evaluated by that time (1213 allotments) 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. Field offices were directed beginning in 1998 to prioritize allotments, watersheds, or other areas and “to give highest priority to

areas believed to be at risk – in degraded condition or downward trend and in danger of losing potential." (Washington Office Instruction Memorandum 98-91) Additional guidance for assessing high priority areas was provided in Manual Handbook 4180-1 and annual work plan directives since fiscal year 2001. This experience should be a good 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, extrapolating from our experience leading up to the end of FY 2002, we expect to need monitoring data to support less than 16 percent of our determinations that we make after [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Under projected budgets, we fully expect to have appropriate monitoring data to support our determinations, regardless of whether they lead to a finding of failure to meet standards due to livestock grazing.

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.

Once a standards assessment indicates that the rangeland is failing to achieve standards or that management practices do not conform to guidelines, the level of new monitoring, if any, needed to determine what are the significant contributing factors in

failing to achieve standards or conform to guidelines will vary depending on such variables as how obvious the causes are for not meeting standards, the quantity and quality of existing relevant monitoring data, 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.

One comment, supporting the adoption of a comprehensive monitoring strategy to chronicle the effect of grazing on rangeland health and Federal trust species found on allotments, stated that rangeland health determinations are the first step in identifying a need, if any, for changes in livestock management to improve rangeland health conditions and to ensure the sustainability of fish and wildlife resources. Until such a determination is made, according to the comment, only limited management actions can be initiated, and under current management, again according to the comment, there are no specific requirements on how to make these determinations.

While the comment generally supports the provisions on monitoring in the proposed rule, it does not entirely accurately depict the situation regarding rangeland health determinations. There is no specific regulatory requirement that we must wait for a determination before we can take an action. However, although the regulations do not absolutely require a determination before BLM can take action, as a matter of practicality and workload prioritization, we find the determination process a useful tool. The

comment also errs somewhat in stating that there are no specific requirements on how these determinations are made. It is true that there are no specific requirements in the regulations. However, guidance for making determinations appears in Manual Handbook H-4180-1.

Some comments stated that experience shows that monitoring of rangeland standards is not being completed in a timely, effective manner under current requirements due to BLM funding and staffing limitations, and recommended BLM remove this requirement from the rule. The comments suggested an alternative evaluation process, where an interagency (and interdisciplinary) team evaluates range conditions and determines management strategies in cases where adequate monitoring data are not available. A few comments supported a comprehensive monitoring strategy to chronicle the influence of grazing on rangeland health and federally-listed species.

BLM believes that monitoring is an important component of evaluating land health and making rangeland health standard determinations. The final rule will enable the authorized officer to have a solid factual basis for making decisions to adjust grazing use, and could reduce the number of instances where implementation is delayed because of protracted administrative appeal and judicial processes. The proposed rule would help focus BLM budgetary and staffing resources on monitoring where data are needed to determine the reasons for not meeting the land health standard(s). Under BLM procedures, interdisciplinary teams use existing monitoring data in the evaluation process to determine status of the current conditions relative to the land health standards. Where

adequate monitoring information is not already available, BLM will focus its monitoring resources on gathering the needed information. The alternative evaluation process suggested in the comments closely mirrors the current process where existing monitoring data are not available. We believe that decisions will be implemented more efficiently on the ground when they are based on monitoring data, and may be less likely to be subjected to administrative or judicial challenge.

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.

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. 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 of use, and relies on actual use reports and photographs. BLM then correlates data to various management activities to determine effectiveness of management in achieving objectives.

One comment stated that requiring monitoring before a rangeland health determination is made has implications for measures needed to conserve special status species in order to preclude listing. It stated that where proactive range-wide measures are needed, such as in the case of the sage-grouse, a requirement for monitoring before a remedial action can be initiated may amount to an inadequate regulatory mechanism. The comment recommended assessment and disclosure of the impacts of the monitoring requirement on BLM's ability to implement effective and timely conservation strategies to avoid the need to list special status species.

Requiring monitoring data to make a determination of the cause for not achieving a land health standard does not preclude BLM from modifying grazing use to meet other resource management objectives. Section 4130.3-3 provides that BLM may modify terms and conditions of a permit or lease either with or without a determination under subpart 4180. Subpart 4180 is not the sole regulatory mechanism for implementing measures that are needed to conserve special status species. Therefore, this regulatory

change does not impair BLM's ability to take timely action to implement effective conservation strategies that preclude the need to list special status species.

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. A related comment stated that 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 required.

We have not adopted this suggestion in the final rule. BLM believes that if determinations regarding the cause for not meeting one or more standards are supported by existing or new monitoring data, they are less likely to be challenged administratively or judicially. 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. 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. The final rule does add a provision to section 4180.2(c) that limits the monitoring requirement to those cases where a standards assessment indicates that the rangeland is failing to achieve standards or that management practices do not conform to guidelines. In such cases, we will use existing or new monitoring data to identify and support a determination regarding the significant factors that contribute to the failure to achieve standards. The final rule only

requires the use of monitoring data to determine causation in cases where assessment indicates that rangelands are failing to achieve the standards or conform to 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 where we find 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. Further, as we have stated, determinations that are supported by monitoring will make for better, more defensible decisions, especially when we need to change grazing practices on allotments. BLM is adding the requirement to use standards assessments and existing or new monitoring data to support determinations of failure to achieve standards and conform to 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 adequate 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 of the EIS, 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 ongoing data collection workload in the grazing program, we expect to continue to monitor in those areas we believe to be at risk, in degraded condition, or in downward trend and in danger of losing capability, within our

funding allocation without needing additional funding. Further, the change in the final rule limiting the monitoring requirement to cases where standards assessments indicate rangeland failure to achieve standards or management failure to conform to guidelines should reduce the workload and budgetary effects of the final rule. Refocusing data collection priorities may affect watershed assessment schedules and could delay the permit renewal process in areas where relevant 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 continue to refine, as necessary, our guidance on monitoring to clarify such issues as timing and levels of monitoring.

A comment asserted that BLM does not have the monitoring data to show that their management practices are having any effect on improvement of water quality on public lands.

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.

Many comments supported the amendments of this section 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 time frames 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 final rule.

Another comment stated that the purpose of extending the time to take appropriate action is to allow BLM staff time to bring together the appropriate information and conduct necessary public involvement. The comment encouraged BLM to retain opportunities for public involvement. However, the comment stated, in this connection, that a timely response to changing resource conditions overrides this need.

The comment also suggested that the proposed rule be clarified, stating that some of the terms were confusing and made it difficult to determine the effect of the extended deadline on the viability of species. The comment stated that the wording "to take action" does not indicate whether the deadline of 2 years requires action to be "initiated" or "completed" by that date. The comment asked for a more thorough discussion in the FEIS describing the delays that may result with adoption of the 2-year deadline, and the potential effects on listed resources.

The comment is correct that the reason for extending the time allowed to initiate action is to allow BLM staff time to bring together the appropriate information and conduct necessary public involvement. This provision would enable BLM to develop a thorough action plan, consult with the FWS or the NMFS, and to solidify the decision to work through the NEPA process, which involves the public. The proposed rule would require an authorized officer to issue a final decision or execute an agreement to implement appropriate action within 24 months of a determination made under section 4180.2(c). The requirement to take action within 2 years means that appropriate action would need to be initiated via a final decision or agreement on or before that time, but not necessarily completed on or before that time.

Taking up to 24 months to develop a meaningful action and issue a decision less vulnerable to appeal will be more effective than issuing a decision and waiting even longer for an appeal to IBLA to be heard and resolved.

Under the rule, the BLM field manager has discretion 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.

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 fish and wildlife, and detrimental to long-term range health. 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.

With respect to the first concern, BLM believes that allowing up to 24 months (except in those cases where legally required processes that are the responsibility of another agency 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 impacts 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 to 36 months if they are 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 (out of 21,535) assessed prior to October 1, 2002, BLM determined that 16 percent did not meet standards with at least one of the significant causal factors identified as existing livestock grazing management or levels of use. Of the 10,455 allotments assessed from 1998 through 2005, existing livestock grazing or

levels of use were determined to be a significant causal factor for not meeting standards on about 15%, or 1537 allotments.

Regarding the second area of concern, 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 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 in the EIS. The final rule gives 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 BLM from proposing to amend the regulations to improve our grazing management program. BLM's experience implementing the existing regulations is that the regulatory requirement to take appropriate action no later than the start of the next grazing season did not always provide sufficient time to ensure compliance with relevant laws and regulations, including requirements in the grazing regulations to undertake consultation and coordination to develop an appropriate action, NEPA, and, if applicable, ESA consultation.

The proposed rule does not change BLM's discretion to implement decisions to adjust grazing use immediately if continued grazing use poses an imminent likelihood of significant soil, vegetation, or other resource damage, including immediate threats to listed or other sensitive species. The proposed rule also contains provisions that allow BLM and the permittee to enter into an agreement for shorter time frames for implementation (section 4110.3-3). The final rule provides sufficient time for BLM to comply with all applicable legal requirements, while protecting fish and wildlife resources.

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, these regulations do not impose deadlines on making changes in such activities, or even require changes in them.

The 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 time frame 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 to 6 months, and devise measures to correct them within 2 to 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.

We have revised the final 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. 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 National Historic Preservation Act (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." In light of these operational realities, BLM cannot adopt recommendations to shorten this time frame. We have therefore not adopted these comments in the final rule.

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.

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 may 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 authorized in the regulations. We recognize that, in the case of an uncooperative rancher, it is unlikely that we would be able to obtain agreement regarding the necessary appropriate action, and if that was the case, the proposed change to grazing management would be implemented 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.

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.

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 and guidelines, following consideration of RAC recommendations. The Secretary of the Interior must approve state or regional standards or guidelines developed by the State Director prior to implementing them.

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.

The grazing regulations provide sufficient incentives for good stewardship. Successful rangeland management may enable ranchers to reap rewards in the form of

sustainable levels of forage from year to year. Ranchers who have a demonstrated record of good stewardship may become eligible for additional forage if it becomes available, or may want to explore with BLM the possibility of developing an allotment management plan that potentially could result in greater operational flexibility. However, BLM will not abrogate its responsibility to manage public lands, regardless of whether grazing management practices conform with applicable guidelines and/or an allotment achieves all standards.

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.

We have not adopted this idea in the final rule. 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 NEPA analyses that we conduct. In order to ensure consistent disclosure and consideration of social and economic impacts, we have included requirements in section 4110.3(c) to analyze and, if appropriate, document relevant social, economic, and cultural effects as required by NEPA before changing grazing preference.

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.

BLM, in consultation with RACs, 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.

One comment urged BLM to eliminate completely the use of the "rapid assessment" or indicators of rangeland health (Tech. Ref. 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.

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 the method described in TR 1734-6, Interpreting Indicators of Rangeland Health, 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. We have made no change in the final rule in response to this 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).

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.

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.

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 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.

VI. Procedural Matters

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget determined that this final rule is a significant regulatory action and therefore subject to review under Executive Order 12866. The final rule would not have an effect of $100 million or more on the economy. The regulatory changes would not adversely affect, in a material way, the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or Tribal governments or communities.

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

Despite these and other differences, BLM believes that any inconsistencies between BLM's grazing program and that of the USFS are not serious and will not interfere with actions taken or planned by the agencies. They merely represent differences in management approach and philosophy.

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

Regulatory Flexibility Act

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

The final rule does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The rule does not alter the budgetary

effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients; nor does it raise novel legal or policy issues, except as discussed in the previous section of the preamble.

Small Business Regulatory Enforcement Fairness Act

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

The changes BLM is making will clarify existing requirements and qualifications. These changes will positively affect all applicants, whether small entities or not.

Unfunded Mandates Reform Act

This amendment of 43 CFR part 4100 will not result in any unfunded mandate to state, local, or Tribal governments, or to the private sector, in the aggregate, of $100 million or more. The rule continues and strengthens requirements for BLM to consult with all of these governmental and other entities whenever our actions relating to livestock grazing are likely to affect them.

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

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

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 ESA.

As stated above, a grazing permit or lease authorizes a privilege or revocable license, not a property right protected under the Constitution.

Executive Order 13132, Federalism

The final rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The rule would continue and strengthen requirements for BLM to consult with all of these governmental

and other entities whenever our actions relating to livestock grazing are likely to affect them. Therefore, in accordance with Executive Order 13132, BLM has determined that this final rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments.

In the proposed rule, we included a statement that, in accordance with Executive Order 13175, we determined that the rule does not include policies that have Tribal implications. We stated that the rule expressly does not apply to, and these regulations expressly exclude, Indian lands set aside or held for the benefit of Indians from the effects of the rule. Comments challenged this determination.

While BLM does not manage grazing on Indian trust land, such land can serve as base property, so that grazing management on public land for which such Indian land serves as base property could have an effect on the value of such land. Also, Indian cultural sites on public land could be affected by grazing activities and BLM management of those activities. In such circumstances, BLM consults with Tribal interests on a case-by-case basis.

In recognition of these potential effects of grazing management on Indian Tribal interests, 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 Environmental Impact Statement and proposed rule were ready for release and public review, including review by Tribal governments, over 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, as well as website information to find the document on the internet.

The executive order requires any Federal policy that may have Tribal implications to be guided by three fundamental principles, namely, recognition of the United States' unique legal relationship with Indian Tribal governments, recognition of the Tribes' right to self-government, and support for Tribal sovereignty and self-determination. For clarification, this final rule does not change or have any effect on BLM's fiduciary responsibilities, the agency's Tribal consultation and coordination requirements and processes, BLM's government-to-government obligations, or the distribution of power and responsibilities between BLM and Indian Tribes.

BLM will continue to analyze effects on heritage resources, at the land use planning or allotment management planning level, or on a case-by-case basis as appropriate. Besides the requirements for heritage resource inventories and/or surveys, Tribal consultation will begin as soon as possible in any case where it appears likely that the nature or location or both of the activity could affect Native American interests or

concerns. BLM will give due consideration to Indian Tribal rights established by treaties, and to requests by Tribes, consistent with such rights, in the administration of grazing management and range improvement programs.

Executive Order 12988, Civil Justice Reform

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

Paperwork Reduction Act

The information collection requirements contained in Group 4100 have been approved by the OMB under 44 U.S.C. 3501 et seq. and assigned the following clearance numbers: 1004-0019 and 1004-0041. The information collected will permit BLM to determine whether to approve an application to utilize public lands for grazing or other purposes. This rule does not contain any new information collection requirements that the Office of Management and Budget (OMB) must approve under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

National Environmental Policy Act (NEPA)

Under NEPA, section 102(2)(C) (42 U.S.C. 4332(2)(C)), a Federal agency must prepare an Environmental Impact Statement (EIS) when a proposed major Federal action may result in significant impacts to the quality of the human environment. BLM

prepared a Final EIS dated October 2004 and made available on June 17, 2005 (70 FR 35299 and 35251), in compliance with the procedures for implementing NEPA, for these changes to the grazing regulations. On the same date, BLM released an "Errata and Revisions" document, making corrections in the EIS, and on March 31, 2006 (71 FR 16274 and 16302), an Addendum to the FEIS. The EIS stated that many of the proposed changes are largely administrative and are intended to improve agency administrative efficiency and effectiveness, improve consistency across BLM, or meet other non-environmental objectives, and would have little direct or indirect effect on the environment. The EIS also indicated that although most of the proposed regulatory changes have little or no adverse impacts on the human environment, some short-term adverse effects may occur because of increases in timeframes associated with several components of the rule. These include the provision for a 5-year phase-in of changes in use of more than 10 percent, the requirement that existing or new monitoring data be used to support a determination that livestock grazing significantly contributes to not meeting one or more standards or does not conform to guidelines, and the allowance of 24 months for analysis, formulation and initiation of appropriate remedial action following a determination that that livestock grazing significantly contributes to not meeting one or more standards or does not conform to guidelines. The EIS stated also, however, that implementing these changes would result in the development of better and more sustainable decisions, because determinations would be based on monitoring information. Also, the rule provides a more reasonable time (up to 24 months) following a determination for satisfying legal consultation requirements and analyzing, formulating, and beginning implementation of appropriate action to ensure progress towards standards

attainment or to conform with guidelines. In the long-term, we expect that implementing these provisions will be beneficial to rangeland health.

Since publication of the existing regulations in 1995, we found that some sections of the regulations resulted in unforeseen problems. As BLM continued to gain experience in implementing the regulations, we found that some of the difficulties could be resolved by minor clarifications or changes in the regulations. We refined the list of sections of the regulations that we believed would benefit from a change, and reduced the number of changes. As we worked with the public, it became clear there would be some controversy over impacts of the changes. As we continued working with the public, we expected there would be controversy over impacts of the changes. We decided early in the process to prepare an EIS because we wanted to develop the rule in a way that solicited continued public involvement and comment in a manner typical of an EIS. We believed that such an open public process would provide helpful added exposure resulting from using an EIS as the environmental document soliciting public review and comment. BLM published an Advance Notice of Proposed Rulemaking (ANPR) and Notice of Intent to Prepare an EIS (NOI) in the Federal Register on March 3, 2003 (68 FR 9964-9966 and 10030-10032).

BLM's Final EIS is on file and available in the BLM Administrative Record at the address specified in the **ADDRESSES** section. The EIS considers the impacts of these changes to the grazing regulations. You may review the EIS and related documents via the interactive ePlanning website at www.blm.gov/grazing.

Many comments raised questions about the adequacy of the Draft EIS, specifically with regard to the range of alternatives considered in the EIS. We considered these comments and responded to the concerns earlier in this Preamble (Section IV. General Comments, under the headings "Purpose and Need" and "Range of Alternatives"). We responded to comments regarding the adequacy of the NEPA analysis associated with specific regulatory amendments in Section V. "Section-by-Section Analysis and Response to Comments."

One comment stated that BLM "subverted" the NEPA process by issuing the DEIS after the proposed rule was published.

The DEIS was available to the public as of January 6, 2004 (69 FR 569), approximately one month after the proposed rule was published in the Federal Register. BLM extended the public comment period to take this time lag into account and to afford the public sufficient time to comment on the proposed rule and DEIS. The fact that the DEIS was published after the proposed rule in no way interfered with or "subverted" the NEPA process. The DEIS was available early enough in the process to be useful to BLM in its deliberations.

Executive Order 13211, Action Concerning Regulations that Significantly Effect Energy Supply, Distribution, or Use.

In accordance with Executive Order 13211, BLM finds that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rule has no bearing on the distribution or use of energy.

Data Quality Act.

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub.L. 106-554).

Author

The principal author of this rule is Ken Visser, Rangeland Management Specialist; Rangeland, Soil, Water and Air Divison, assisted by Richard Mayberry of that division, and Ted Hudson of the Regulatory Affairs Division, Washington Office, BLM.

List of Subjects in 43 CFR Part 4100

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

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

_____ _____

Date Deputy Assistant Secretary of the Interior

PART 4100 -- GRAZING ADMINISTRATION -- EXCLUSIVE OF ALASKA

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

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

Subpart 4100 -- Grazing Administration -- Exclusive of Alaska; General

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

§ 4100.0-2 Objectives.

* * * * *

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

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

§ 4100.0-3 Authority.

* * * * *

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

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

* * * * *

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

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

§ 4100.0-5 Definitions.

* * * * *

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

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

(2) Not in suspension.

* * * * *

District means the specific area of public lands administered by a District Manager or a Field Manager.

Ephemeral rangelands means areas of the Hot Desert Biome (Region) that do not consistently produce enough forage to sustain a livestock operation, but from time to time produce sufficient forage to accommodate livestock grazing.

* * * * *

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

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

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

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

(1) (i) Submitted a written request to BLM to be provided an opportunity to be involved in the decisionmaking process as to a specific allotment, and

(ii) Followed up that request by submitting written comment as to

management of a specific allotment, or otherwise participating in the decisionmaking process as to a specific allotment, if BLM has provided them an opportunity for comment or other participation; or

(2) Submitted written comments to the authorized officer regarding the management of livestock grazing on a specific allotment.

* * * * *

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

* * * * *

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

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

* * * * *

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

§ 4100.0-9 Information collection.

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

Subpart 4110 -- Qualifications and Preference

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

§ 4110.1 Mandatory qualifications.

* * * * *

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

* * * * *

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

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

§ 4110.2-2 Specifying grazing preference.

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

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

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

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

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

9. Amend § 4110.2-3 by revising paragraphs (b) and (c) to read as follows:

§ 4110.2-3 Transfer of grazing preference.

* * * * *

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

(c) If a grazing preference is being transferred from one base property to another base property, the transferor shall own or control the base property from which the grazing preference is being transferred and file with the authorized officer a properly completed transfer application for approval. No transfer will be allowed without the written consent of the owner(s), and any person or entity holding an encumbrance of the base property from which the transfer is to be made.

* * * * *

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

§ 4110.2-4 Allotments.

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

11. Revise § 4110.3 to read as follows:

§ 4110.3 Changes in grazing preference.

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

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

(2) Assist in making progress toward restoring ecosystems to properly functioning condition;

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

(4) Comply with the provisions of subpart 4180 of this part.

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

(c) Before changing grazing preference, the authorized officer will undertake the appropriate analysis as required by the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.). Under NEPA, the authorized officer will analyze and, if appropriate, document the relevant social, economic, and cultural effects of the proposed action.

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

§ 4110.3-1 Increasing active use.

When monitoring or documented field observations show that additional forage is available for livestock grazing, either on a temporary or sustained yield basis, BLM may

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

(a) Additional forage temporarily available. When the authorized officer determines that additional forage is temporarily available for livestock, he may authorize its use on a nonrenewable basis under § 4130.6-2 in the following order:

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

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

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

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

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

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

(ii) Permittees or lessees in proportion to the amount of their grazing preference; and

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

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

§ 4110.3-2 Decreasing active use.

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

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

paragraph, BLM will suspend active use.

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

§ 4110.3-3 Implementing changes in active use.

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

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

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

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

(b) (1) After consultation with, or a reasonable attempt to consult with, affected permittees or lessees and the state having lands or responsibility for managing

resources within the area, the authorized officer will close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use notwithstanding the provisions of paragraph (a) of this section when the authorized officer determines and documents that—

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

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

(2) Notices of closure and decisions requiring modification of authorized grazing use may be issued as final decisions effective upon issuance or on the date specified in the decision. Such decisions will remain in effect pending the decision on appeal unless the Office of Hearings and Appeals grants a stay in accordance with § 4.472 of this title.

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

§ 4110.4-2 Decrease in land acreage.

(a) * * *

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

* * * * *

Subpart 4120 -- Grazing Management

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

§ 4120.2 Allotment management plans and resource activity plans.

* * * * *

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

* * * * *

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

§ 4120.3-1 Conditions for range improvements.

* * * * *

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

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

§ 4120.3-2 Cooperative range improvement agreements.

* * * * *

(b) Subject to valid existing rights, cooperators and the United States will share title to permanent structural range improvements such as fences, wells, and pipelines where authorization is granted after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER] in proportion to their contribution to on-the-ground project development and construction costs. The authorization for all new permanent water developments, such as spring developments, wells, reservoirs, stock tanks, and pipelines, shall be through cooperative range improvement agreements. The authorized officer will document a permittee's or lessee's interest in contributed funds, labor, and materials to ensure proper credit for the purposes of §§ 4120.3-5 and 4120.3-6(c).

* * * * *

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

§ 4120.3-3 Range improvement permits.

* * * * *

(c) If forage available for livestock is not or will not be used by the preference permittee or lessee, BLM may issue nonrenewable grazing permits or leases to other qualified applicants to use it under §§ 4130.6-2 and 4130.4(d), or § 4110.3-1(a)(2). The term "forage available for livestock" does not include temporary nonuse that BLM approves for reasons of natural resource conservation, enhancement, or protection, or use suspended by BLM under § 4110.3-2(b). Before issuing a nonrenewable permit or lease, BLM will consult, cooperate, and coordinate as provided in § 4130.6-2. 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.

* * * * *

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

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

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

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

22. Amend § 4120.5-2 by removing the word "and" after the semicolon at the end of paragraph (a), removing the period at the end of paragraph (b) and adding in its place a semicolon and the word "and", by revising the section heading and the second sentence of the introductory text, and by adding paragraph (c), to read as follows:

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

* * * The authorized officer will cooperate with Tribal, state, county, and Federal agencies in the administration of laws and regulations relating to livestock, livestock diseases, sanitation, and noxious weeds, including –

* * * * *

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

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

§ 4130.1-1 Filing applications.

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

(b) The authorized officer will determine whether applicants for the renewal of permits and leases or issuance of permits and leases that authorize use of new or transferred preference, and any affiliates, have a satisfactory record of performance. The authorized officer will not renew or issue a permit or lease unless the applicant and all affiliates have a satisfactory record of performance.

(1) Renewal of permit or lease.

(i) The authorized officer will deem the applicant for renewal of a grazing permit or lease, and any affiliate, to have a satisfactory record of performance if

the authorized officer determines the applicant and affiliates to be in substantial compliance with the terms and conditions of the existing Federal grazing permit or lease for which renewal is sought, and with the rules and regulations applicable to the permit or lease.

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

(2) New permit or lease or transfer of grazing preference. The authorized officer will deem applicants for new permits or leases or transfer of grazing preference, including permits or leases that arise from transfer of preference, and any affiliates, to have a record of satisfactory performance when --

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

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

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

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

24. Amend § 4130.2:

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

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

c. In redesignated paragraph (g), by revising the reference "(see § 4130.3-2)" to read "(see § 4130.3-2(g))"; and

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

§ 4130.2 Grazing permits and leases.

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

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

* * * * *

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

* * * * *

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

§ 4130.3 Terms and conditions.

* * * * *

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

(c) If any term or condition of a BLM-offered permit or lease is stayed pending appeal, BLM will authorize grazing use as provided in § 4160.4 with respect to the stayed term or condition.

26. Revise § 4130.3-3 to read as follows:

§ 4130.3-3 Modification of permits or leases.

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

(1) Do not meet management objectives specified in:

(i) The land use plan;

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

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

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

(b) To the extent practical, during the preparation of reports that evaluate monitoring and other data that the authorized officer uses as a basis for making decisions to increase or decrease grazing use, or otherwise to change the terms and conditions of a permit or lease, the authorized officer will provide the following with an opportunity to review and offer input:

(1) Affected permittees or lessees;

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

(3) The interested public.

27. Revise § 4130.4 to read as follows:

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

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

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

(1) Result in temporary nonuse; or

(2) Result in forage removal that—

(i) Does not exceed the amount of active use specified in the permit or lease; and

(ii) Occurs either not earlier than 14 days before the begin date specified on the permit or lease, and not later than 14 days after the end date specified on the permit or lease, unless otherwise specified in the appropriate allotment management plan under § 4120.2(a)(3); or

(3) Result in both temporary nonuse under paragraph (b)(1) of this section and forage removal under paragraph (b)(2) of this section.

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

(d) Permittees and lessees must apply if they wish –

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

(2) To use forage previously authorized as temporary nonuse; or

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

(e) (1) Temporary nonuse is authorized –

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

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

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

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

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

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

(g) Permittees or lessees who wish to obtain temporary changes in grazing use within the terms and conditions of their permit or lease must file an application in writing with BLM on or before the date they wish the change in grazing use to begin. The authorized officer will assess a service charge under § 4130.8-3 to process applications for changes in grazing use that require the issuance of a replacement or supplemental billing notice.

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

29. Revise § 4130.6-2 to read as follows:

§ 4130.6-2 Nonrenewable grazing permits and leases.

(a) Nonrenewable grazing permits or leases may be issued on an annual basis, as provided in § 4110.3-1(a), to qualified applicants when forage is temporarily available, provided this use is consistent with multiple-use objectives and does not interfere with existing livestock operations on the public lands. The authorized officer shall consult, cooperate, and coordinate with affected permittees or lessees, and the state having lands or responsibility for managing resources within the area, before issuing nonrenewable grazing permits and leases.

(b) Notwithstanding the provisions of § 4.21(a)(1) of this title, when BLM determines that it is necessary for orderly administration of the public lands, the authorized officer may make a decision that issues a nonrenewable grazing permit or lease, or that affects an application for grazing use on annual or designated ephemeral rangelands, effective immediately or on a date established in the decision.

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

§ 4130.8-1 Payment of fees.

* * * * *

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

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

(2) Weaned regardless of age; or

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

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

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

* * * * *

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

31. Revise § 4130.8-3 to read as follows:

§ 4130.8-3 Service charge.

(a) Under Section 304(a) of the Federal Land Policy and Management Act of 1976, BLM may establish reasonable charges for various services such as application processing. BLM may adjust these charges periodically to account for cost changes. BLM will inform the public of any changes by publishing a notice in the Federal Register.

(b) The following table of service charges is applicable until changed through a Federal Register notice as provided in paragraph (a) of this section. Except when the action is initiated by BLM, the authorized officer will assess the following service charges:

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

Subpart 4140 -- Prohibited Acts

32. Amend § 4140.1 by –

a. Removing the introductory text; and

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

§ 4140.1 Acts prohibited on public lands.

(a) * * *

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

(3) Placing supplemental feed on these lands without authorization, or

contrary to the terms and conditions of the permit or lease;

* * * * *

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

(1) * * *

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

* * * * *

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

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

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

(iii) No further appeals are outstanding.

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

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

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

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

(iv) Pollution of water sources;

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

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

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

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

Subpart 4150 -- Unauthorized Grazing Use

33. Amend § 4150.2 by revising the last sentence of paragraph (d) to read as follows:

§ 4150.2 Notice and order to remove.

* * * * *

(d) * * * Such notices of closure may be issued as final decisions effective upon issuance or on the date specified in the decision and shall remain in effect pending the decision on appeal unless a stay is granted by the Office of Hearings and Appeals in accordance with 43 CFR 4.472(d).

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

§ 4150.3 Settlement.

* * * * *

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

(f) Upon a stay of a decision issued under paragraph (e) of this section, the authorized officer will allow a permittee or lessee to graze in accordance with this part 4100 pending completion of the administrative appeal process.

Subpart 4160 -- Administrative Remedies

35. Amend § 4160.1 by revising paragraph (c) and adding paragraph (d) to read as

follows:

§ 4160.1 Proposed decisions.

* * * * *

(c) The authorized officer may elect not to issue a proposed decision prior to a final decision where the authorized officer has made a determination in accordance with §§ 4110.3-3(b), 4130.6-2(b), 4150.2(d), or 4190.1(a).

(d) A biological assessment or biological evaluation prepared by BLM for purposes of an ESA consultation or conference is not a proposed or final decision for purposes of protest or appeal.

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

§ 4160.3 Final decisions.

* * * * *

(c) Notwithstanding the provisions of § 4.21(a) of this title pertaining to the

period during which a final decision will not be in effect, the authorized officer may provide that the final decision shall be effective upon issuance or on a date established in the decision, and shall remain in effect pending the decision on appeal unless a stay is granted by the Office of Hearings and Appeals when the authorized officer has made a determination in accordance with §§ 4110.3-3(b), 4130.6-2(b), 4150.2(d), or 4190.1(a). Nothing in this section shall affect the authority of the Director of the Office of Hearings and Appeals, the Interior Board of Land Appeals, or an administrative law judge to provide that the decision becomes effective immediately as provided in §§ 4.21(a)(1) and 4.479(c) of this title.

37. Revise § 4160.4 to read as follows:

§ 4160.4 Appeals.

(a) Any person whose interest is adversely affected who wishes to appeal or seek a stay of a final BLM grazing decision must follow the requirements set forth in § 4.470 et seq. of this title. The appeal and any petition for stay must be filed with the BLM office that issued the decision within 30 days after its receipt or within 30 days after the proposed decision becomes final as provided in § 4160.3(a).

(b) When OHA stays all or a portion of a BLM grazing decision that affects a grazing permit or lease, BLM will authorize grazing use as follows:

(1) When OHA stays implementation of all or part of a grazing decision that cancels or suspends a permit or lease, changes any term or condition of a permit or lease during its current term, or renews a permit or lease, 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. This continued authorization will expire upon the resolution of the administrative appeal. Such continued authorization is not subject to protest or appeal.

(2) When OHA stays implementation of a grazing decision that issues or denies issuance of a permit or lease to a preference transferee, BLM will issue the preference applicant a permit or lease with terms and conditions that are the same as the terms and conditions of the most recent permit or lease applicable to the allotment or portion of the allotment in question, subject to any relevant provisions of the stay order. This temporary permit will expire upon the resolution of the administrative appeal. Issuance of the temporary permit is not a decision subject to protest or appeal.

(3) When OHA stays implementation of a grazing decision that issues a permit or lease to a preference transferee with terms and conditions different from terms and conditions of the most recent permit or lease applicable to the allotment or portion of the allotment in question, BLM will issue the preference applicant a permit or lease that, with respect to any stayed term or condition, is the same as the terms and conditions of the most recent permit or lease applicable to the allotment or portion of the allotment in question, subject to any relevant provisions of the stay order. This temporary permit will

expire upon the resolution of the administrative appeal. Issuance of the temporary permit is not a decision subject to protest or appeal.

Subpart 4170 – Penalties

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

§ 4170.1-2 Failure to use.

If a permittee or lessee has, for 2 consecutive grazing fee years, failed to make substantial use as authorized in the lease or permit, or has failed to maintain or use water base property in the grazing operation, the authorized officer, after consultation, cooperation, and coordination with the permittee or lessee and any lienholder of record, may cancel whatever amount of active use the permittee or lessee has failed to use.

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

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

§ 4180.1 Fundamentals of rangeland health.

Standards and guidelines developed or revised by a Bureau of Land Management State Director under § 4180.2(b) must be consistent with the following fundamentals of rangeland health**:**

* * * * *

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

40. Amend § 4180.2 by—

a. Removing the third sentence of paragraph (b);

b. Removing the semicolon at the end of paragraph (e)(12) and adding in its place a period;

c. Revising paragraph (c), the introductory text of paragraph (d), paragraph (d)(4), paragraph (e)(9), the introductory text of paragraph (f), and paragraph (f)(2)(viii), to read as follows:

§ 4180.2 Standards and guidelines for grazing administration.

* * * * *

(c) (1) If a standards assessment indicates to the authorized officer that the

rangeland is failing to achieve standards or that management practices do not conform to the guidelines, then the authorized officer will use monitoring data to identify the significant factors that contribute to failing to achieve the standards or to conform with the guidelines. If the authorized officer determines through standards assessment and monitoring that existing grazing management practices or levels of grazing use on public lands are significant factors in failing to achieve the standards and conform with the guidelines that are made effective under this section, the authorized officer will, in compliance with applicable laws and with the consultation requirements of this part, formulate, propose, and analyze appropriate action to address the failure to meet standards or to conform to the guidelines.

(i) Parties will execute a documented agreement and/or the authorized officer will issue a final decision on the appropriate action under § 4160.3 as soon as practicable, but not later than 24 months after a determination.

(ii) BLM may extend the deadline for meeting the requirements established in paragraph (c)(1)(i) of this section when legally required processes that are the responsibility of another agency prevent completion of all legal obligations within the 24-month time frame. BLM will make a decision as soon as practicable after the legal requirements are met.

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

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

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

* * * * *

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

* * * * *

(e) * * *

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

* * * * *

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

* * * * *

(2) * * *

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

* * * * *