

### **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.

## 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. The 1995 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.