

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 Division, 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. * * *

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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:

| <u>Action</u> | <u>Service Charge</u> |
|--|-----------------------|
| 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;

* * * * *