**Background: BLM Administration of Nonuse of Grazing Permits or Leases and the Advent and Overruling of "Conservation Use"**

The grazing regulations at 43 CFR § 4100.0-5 (2005) define the term "temporary nonuse" to mean:

> "[T]he authorized withholding, on an annual basis, of all or a portion of permitted livestock use in response to a request of the permittee or lessee."

The grazing regulations define term "conservation use" to mean:

> "[A]n activity, excluding livestock grazing, on all or a portion of an allotment for purposes of – (1) Protecting the land and its resources from destruction or unnecessary injury; (2) Improving rangeland conditions; or (3) Enhancing resource values, uses, or functions."

Both of these definitions first appeared in the grazing regulations in 1995. The preamble to the 1995 rulemaking explained that "*[t]emporary nonuse* is for the convenience of a permittee's or lessee's livestock operation …" and that "*conservation use* is intended to protect the land…" [emphasis added] (60 FR 9894, 9921-9922, Feb. 22, 1995). Although the definition of "conservation use" does not specify that it would be approved in response to a request of the permittee or lessee, the preamble explains that "[c]onservation use is requested by the permittee…" and that "[t]he BLM will not impose conservation use on an unwilling permittee" (*Id.* at 9939).

The regulations before 1995 did not provide definitions for the terms "conservation use," "nonuse," or "temporary nonuse." They did provide, however, that "where active use was reduced it shall be held in suspension or nonuse for conservation/protection purposes" and that the BLM could approve nonuse of all or part of the use authorized by a permit or lease upon application by the grazing operator (43 CFR §§ 4110.3-2(c) and 4130.1 (1993)). Then, as now, BLM *Form 4130-1: Grazing Schedule – Grazing Application* states that if an operator is requesting nonuse of all or a part of the use authorized by its permit or lease, it must indicate the reason for nonuse. The application provides the following selection of reasons:

- Conservation and protection of the public lands;
- Annual fluctuations of livestock operations;
- Financial or other reasons beyond the control of the operator; or
- Livestock disease or quarantine.

Guidance regarding nonuse at sections .15(B) and (D) of BLM Handbook H-4130-1, *Authorizing Grazing Use* (1984 – written before the 1995 regulation changes) provides that "[t]he authorized officer considers the reasons for which the application for nonuse is made. If the applicant indicates that the reason is for conservation and protection of the public lands, the authorized

officer verifies that need before approving the nonuse;" and "[w]hen nonuse has been approved, the grazing regulations allow for applicants other than the permittees or lessees involved to apply for nonrenewable grazing use or grazing use to the extent of the nonuse." For self-evident reasons, some BLM offices adopted a policy that if nonuse were approved for reasons of conservation and protection of the public range, then the office would not approve use by other applicants of the forage made available by that approved nonuse. Likewise, applications from the preference operator to reactivate previously approved nonuse would not be approved, unless the circumstances prompting the need to conserve and protect the public lands (from otherwise sustainable uses) had abated.

The current 1995 regulations significantly expanded the regulatory treatment of nonuse. First, they provide definitions at 43 CFR § 4100.0-5 for "temporary nonuse" and "conservation use," the latter being similar to that previously referred to as "nonuse for conservation/protection purposes" at 43 CFR § 4110.3-2(c) (1993). Second, they provide at 43 CFR § 4130.2(g)(1) and (h) that "[c]onservation use may be approved for periods of up to 10 years when … the proposed use will promote rangeland resource protection or enhancement of resource values or uses" and that "[a]pplications for nonrenewable grazing permits for areas … for which conservation use has been authorized will not be approved." Third, they provide at 43 CFR § 4130.2(g)(2) and (h) that "[t]emporary nonuse for reasons including but not limited to financial conditions or annual fluctuations of livestock, may be approved on an annual basis for no more than 3 consecutive years" and that "[f]orage made available as a result of temporary nonuse may be made available to qualified applicants …"). Other 1995 grazing regulations allowed BLM to issue permits for up to a 10-year term for "conservation use" (43 § CFR 4130.2(g)) and stated that the level of authorized conservation use would be specified in permits or leases (43 CFR § 4130.2(a)).

The Secretary's authority to issue "conservation use" permits was successfully challenged in litigation before the U.S. District Court in Wyoming in 1996. *Public Lands Council v. Babbitt*, 929 F.Supp 1436 (D. Wy. 1996). That court determined at 1444 that "[t]he Taylor Grazing Act does not permit the Secretary to *issue permits* allowing the permittee to put the land to any use except livestock grazing" [emphasis added] and concluded that "the Secretary exceeded his statutory authority by enacting this provision [43 CFR 4100.0-5 – active use] of the 1995 regulations." The Wyoming District Court's judgment on this provision was upheld on appeal before the U.S. Court of Appeals for the Tenth Circuit in *Public Lands Council v. Babbitt*, 167 F.3d 1287 (10th Cir. 1999), *aff'd*, 529 U.S. 728 (2000)). However, the Tenth Circuit's ruling acknowledged at 1308 that "[i]f range conditions indicate that some land needs to be rested, the Secretary may place that land in non-use on a temporary basis, in accordance with Congress's grants of authority that the Secretary manage the public lands 'in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, [and other] values,'…" and "[w]hen range conditions are such that reductions in grazing use are necessary, temporary non-use is appropriate … even when that temporary non-use happens to last the entire duration of the permit." In its decision, the Tenth Circuit suggested at 1308 that an annual evaluation of range conditions is prerequisite to a determination that temporary nonuse is appropriate.

It is clear from the context of the court's discussion that it used the term "temporary nonuse" to mean nonuse for purposes similar to "conservation use," as defined by the current (1995) grazing regulations, and the concept of nonuse for reasons of conservation and protection of the public lands as set forth in this IM. It is also clear that, in contrast to the court's usage, the term

"temporary nonuse" is used by the current grazing regulations and preamble to mean nonuse requested by the permittee for the convenience of the permittee's livestock operation. Before the 1995 regulatory changes, this concept was deemed nonuse for reasons of either annual fluctuations of livestock operations, financial or other reasons beyond the control of the operator, or livestock disease or quarantine.