

# Proposed Revisions to Grazing Regulations for the Public Lands

*Addendum to the Final Environmental  
Impact Statement FES 04-39*



Prepared by  
The Department of the Interior  
Bureau of Land Management

*March 31, 2006*



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Final Environmental Impact Statement  
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# Bureau of Land Management

It is the mission of the Bureau of Land Management (BLM) to sustain the health, diversity, and productivity of the public lands for the use and enjoyment of present and future generations.

The BLM manages a wide variety of resources and uses, including energy and minerals; timber; forage; wild horse and burro populations; fish and wildlife habitat; wilderness areas; archaeological, paleontological, and historical sites; and other natural heritage values.

The BLM's task is to recognize the demands of public land users while addressing the needs of traditional user groups and working within smaller budgets. Perhaps one of the Bureau's greatest challenges today is to develop more effective land management practices, while becoming more efficient at the same time.

The American public values balanced use, conservation, environmental management, recreation, and tourism. Public lands are increasingly viewed from the perspective of the recreational opportunities they offer, their cultural resources, and—in an increasingly urban world—their vast open spaces. However, against this backdrop, the more traditional land uses of grazing, timber production, and mining are still in high demand.

# FEIS Addendum

Lead Agency: U.S. Department of the Interior, Bureau of Land Management (BLM)

Type of Action: Administrative

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## Abstract

This Addendum is issued as a companion document to the *Proposed Revisions to Grazing Regulations for the Public Lands Final Environmental Impact Statement (FEIS)*. The FEIS/Addendum responds to comments and, where appropriate, discusses responsible opposing views not adequately discussed in the draft EIS. The existing grazing regulations are found in Title 43 of the Code of Federal Regulations, Part 4100, Grazing Administration—Exclusive of Alaska (43 CFR 4100).

The FEIS/Addendum has been mailed to individuals who received the *Proposed Revisions to Grazing Regulations for the Public Lands Final Environmental Impact Statement* and appropriate Federal, tribal, State, and local agencies both electronically and in print form. The FEIS/Addendum is posted on the national Bureau of Land Management Web site at [www.blm.gov](http://www.blm.gov).

Questions regarding this document can be directed to Kenneth Visser at 775-861-6492 or E.Lynn Burkett at 202-785-6594.

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## Introduction

The Bureau of Land Management (BLM) published the *Proposed Revisions to Grazing Regulations for the Public Lands Final Environmental Impact Statement* (FEIS) in June 2005. After publication of the FEIS, the BLM became aware that some comments received after the close of the public comment period, most notably those comments from the U.S. Fish and Wildlife Service, had not been addressed in the FEIS. The BLM has used the time since publication of the FEIS to ensure a thorough search for and response to comments provided after the close of the public comment period. The BLM is also including at appropriate places in the FEIS/Addendum responses to responsible opposing views that were raised in comments.

In undertaking this review, the BLM determined that the comments and the responses to the comments, as set forth in 40 CFR 1503.4, do not trigger the need to supplement the FEIS under the “supplementation” provision of the Council on Environmental Quality (CEQ) regulations. The CEQ regulations require supplementation of a draft or final environmental impact only under certain circumstances; i.e., if “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns” or if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 CFR 1502.9(c)(1). The review did not trigger either of these circumstances for “supplementation” pursuant to the regulations.

The FEIS/Addendum should be used as a companion document to the FEIS. For ease of use, the numbering sequence in this document mirrors the numbering sequence in the FEIS. Except as otherwise noted, the contents of the document are additions to the FEIS.

## **Executive Summary**

(Page ES-10, under Proposed Action Alternative 2, add at the end of the description in the first box the following information:)

This provision was altered as a result of comments. The change clarifies that standards and guidelines developed or revised under 4180.2(b) must be consistent with the fundamentals set forth in 4180.1. The revised provision replaces the first paragraph of existing 4180.1, which requires that the Bureau of Land Management (BLM) take “appropriate action” by the start of the next grazing season when the fundamentals are not being met, with the following: “Standards and guidelines developed or revised by a Bureau of Land Management State Director under 4180.2(b) must be consistent with the following fundamentals of rangeland health.” The fundamentals themselves remain as approved in 1995. Comments received stated that the text as proposed was confusing.

## **Chapter 1. Introduction**

(Page 1-6, second column, following Section 1.2.2.5, add:)

- Section 1.2.2.8, Timeframe for Taking Action to Meet Rangeland Health Standards—The discussion pertaining to 4180.1, Fundamentals, was revised.

(Page 1-18, first column under Section 1.2.2.8, at the end of this section add the following paragraph:)

- The fundamentals revision at 4180.1 was altered from the proposed action. The provision, as revised, removes the requirement to take appropriate action after a determination that fundamentals are not being met. The new language provides: “Standards and guidelines developed or revised by a Bureau of Land Management State Director under 4180.2(b) must be consistent with the following fundamentals of rangeland health.” The fundamentals themselves remain as approved in 1995. This change was made as a result of comments on the proposed rule, which found the proposal confusing in light of the fallback standards and guidelines. The BLM ensures that the conditions described by the fundamentals exist by implementing actions that provide for meeting or making significant progress toward meeting the standards and conformance with the guidelines. Achievement of the conditions described by the broad fundamentals are also facilitated through permit and lease terms and conditions that reflect the requirements of statutes such as the Taylor Grazing Act, FLPMA, the Endangered Species Act, and the Clean Water Act. State and local standards and guidelines provide the focus for assessing local rangeland health and for making determinations regarding local grazing management. In light of this relationship between the fundamentals and the standards and guidelines, an administrative

mechanism that requires the BLM to take appropriate action to ensure that the conditions described by the fundamentals exist is duplicative and not necessary.

Standards and guidelines describe more particularly the biological and physical conditions that can be assessed to determine rangeland health and are designed to guide the BLM in determining appropriate grazing management. The fundamentals, in contrast, are designed as broad, overarching goals and are reflective of such relevant laws as the Clean Water Act, the Taylor Grazing Act, the Federal Land Policy and Management Act, and the Endangered Species Act.

## **Chapter 2. Description of the Proposed Action and Alternatives**

(Pages 2-8, first column, at the end of 2.2.8, insert:)

- The fundamentals provision was revised from the proposed alternative to provide that standards and guidelines developed or revised by the BLM must be consistent with the fundamentals of rangeland health.

### **2.2.8 Timeframe for Taking Action to Meet Rangeland Health Standards**

(After the second paragraph in 2.2.8 of the FEIS, insert the following information:)

As a result of comments, we are adjusting the proposed action to more clearly explain and reflect the relationship between the fundamentals and the standards and guidelines. Specifically, we are replacing the first paragraph of the existing 4180.1 with the following: “Standards and guidelines developed or revised by a Bureau of Land Management State Director under § 4180.2(b) must be consistent with the following fundamentals of rangeland health.” The fundamentals themselves remain as approved in 1995.

This change recognizes the relationship of the standards and guidelines to the fundamentals. The fundamentals are broad national goals, whereas the standards are applicable at the local and regional scale.

The proposed rule would have restricted regulatory action under 4180.1 to geographic areas without approved standards and guidelines. But these areas were already subject to the fallback standards and guidelines in 4180.2.

Comments received highlight that fallback standards and guidelines are in place if State or regional standards and guidelines have not been developed and so application of the fundamentals is not necessary in those instances. Comments also characterized the fundamentals as encompassing critical requirements not included in all standards and guidelines. The BLM believes a more precise way to look at the fundamentals and the

standards and guidelines is to examine the differing character of these provisions. Standards of land health are expressions of physical levels and biological condition, or the degree of function required for healthy lands and sustainable uses; these standards define minimum resource conditions that must be achieved and maintained. A guideline is a practice, method, or technique determined to be appropriate to ensure that standards can be met or that significant progress can be made toward meeting the standard. Guidelines are tools such as grazing systems, vegetative treatments, or improvement projects that help managers and permittees achieve standards. Guidelines may be adapted or modified when monitoring or other information has indicated the guideline is not effective, or a better means of achieving the applicable standards becomes appropriate. (BLM Handbook H-4180-1)

The 1994 Draft Environmental Impact Statement described the broad nature of the fundamentals, stating that they were intended to “reflect the fundamental legal mandates for the management of public lands under the Taylor Grazing Act, FLPMA, Endangered Species Act, Clean Water Act, and other relevant authorities.” (Draft EIS, page 1-16.) The Draft EIS also described the fundamentals as providing the foundation for developing the standards and guidelines. The fundamentals were intended to “establish clear national requirements for the preparation of State or regional standards and guidelines.” (Draft EIS, page 1-15.) The BLM complies with these broad requirements in relevant laws and regulation through permit and lease terms and conditions.

Once the standards and guidelines were developed, they became the focus for assessing rangeland health and for making determinations as to whether existing grazing management was a cause for not meeting standards and needed to be altered to achieve the locally applicable standards and guidelines. Since the adoption of State or regional standards and guidelines, the BLM has relied on the standards and guidelines to evaluate rangeland health. The BLM is not aware of instances where the standards and guidelines have not been relied upon. Before the regulatory deadline for completing State or regional standards and guidelines or the effective date of the fallback standards and guidelines (43 CFR 4180.2(f)), the BLM could have invoked the requirement that it take “appropriate action” under 4180.1 to make changes to grazing permits and leases. However, the BLM has relied on the similar, so-called “action forcing” provision in 4180.2 to change existing livestock management in order to achieve locally tailored State or regional standards and guidelines or the fallback once State or regional standards and guidelines were implemented, or the fallbacks became effective as per regulation. This is consistent with how the BLM described the standards and guidelines when they were first proposed in 1994—i.e., as functioning to “focus BLM’s management direction, promote biological diversity, and improve agency efficiency in meeting management objectives.” (Draft EIS, page 4-39.)

Standards describe the biological and physical conditions that can be assessed to determine rangeland health, and guidelines are designed to aid the BLM in determining appropriate grazing management. The fundamentals, in contrast, are designed as broad, overarching goals and are reflective of such relevant laws as the Clean Water Act, the Taylor Grazing Act, the Federal Land Policy and Management Act, and the Endangered

Species Act. Compliance with these laws already occurs through appropriate terms and conditions.

Although the 1995 rule established requirements for “appropriate action” when either the fundamentals or established standards and guidelines were not being met because of existing grazing, the redundancy of requiring “appropriate action” in both circumstances is unnecessary, inefficient, and presents impediments to implementation. The current rule is inefficient and imprecise and, as a result, is difficult to administer. The broad description of condition and general ecological processes set forth in the fundamentals make it very difficult to link these broad characteristics to a determination that livestock grazing is the cause of these watershed or ecological process conditions. As discussed previously, standards set forth a descriptive condition of expected rangeland health, and guidelines describe methods, practices, or techniques to meet standards. Fundamentals, on the other hand, are broad goals that are less susceptible to clear linkage to just one use.

Standards and guidelines have been developed in conformance with the fundamentals and adopted for all States and regions except southern California. These standards and guidelines provide the basis for the application of the broadly stated fundamentals to the management of public lands. In southern California, the fallback standards and guidelines provide for the application of the fundamentals to those public lands. Because the standards and guidelines are meant to provide specific measures for achieving healthy rangelands within the framework of the broad fundamentals, a duplicate administrative mechanism to require “appropriate action” under the fundamentals is unnecessary

### **Chapter 3. Affected Environment**

No additional information for this chapter.

### **Chapter 4. Environmental Consequences**

(At page 4-6 of the FEIS, column two, insert at the end of the clarifications and additions section:)

- As a result of comments, we have adjusted the proposed action. The change better reflects the relationship of the standards and guidelines to the fundamentals. The change would replace the first paragraph of the present 43 CFR 4180.1 with the following: “Standards and guidelines developed or revised by a Bureau of Land Management State Director under CFR 4180.2(b) must be consistent with the following fundamentals of rangeland health.” The fundamentals themselves remain as approved in 1995. The BLM does not anticipate an adverse environmental impact from the fundamentals provision, as revised, and anticipates overall long-term improvements in rangeland conditions. This determination is based on the continued application of the standards and guidelines, continued relevance of the fundamentals when standards and guidelines are developed or revised and continued application of relevant laws that are reflected in the fundamentals. Because the fundamentals identify general

characteristics of a functional rangeland ecosystem, they will continue to be captured in broad land use plans or allotment management plans.

## **4.2 Alternative One: No Change in Regulations (No Action)**

### **4.2.1 Grazing Administration**

(At page 4-12, column one at the end of the first full paragraph insert:)

The BLM would continue, pursuant to 4180.2, to utilize the fundamentals to ensure that any standards and guidelines developed or revised would fit within the broad umbrella of the fundamentals. The BLM would continue to focus its efforts on implementing the standards and guidelines and not rely on assessment of whether the conditions described by the fundamentals exist to trigger the need to take appropriate action as discussed in Chapter 2 of the Addendum. Continued long-term improvement in rangeland health is anticipated as the BLM continues to implement subpart 4180. The fundamentals reflect the basic requirements of relevant laws such as the Clean Water Act, the Taylor Grazing Act, the Federal Land Policy and Management Act, the Public Rangelands Improvement Act, and the Endangered Species Act. It is anticipated that the BLM would rely on these authorities, as well as standards and guidelines, for implementing practices that promote rangeland health. The fundamentals would continue to serve as broad, overarching goals. This relationship of the standards and guidelines to the fundamentals would be consistent with the BLM's experience since State, regional, and fallback standards and guidelines went into effect.

### **4.2.2 Vegetation**

#### **4.2.2.1 Riparian and Wetland Vegetation**

(At page 4-15, column two, insert a new first paragraph in column two:)

Continued long-term improvement for riparian and wetland vegetation is anticipated as the BLM continues to implement subpart 4180. The fundamentals reflect the basic requirements of relevant laws such as the Clean Water Act, the Taylor Grazing Act, the Federal Land Policy and Management Act, the Public Rangelands Improvement Act, and the Endangered Species Act. It is anticipated that the BLM would continue to rely on these authorities, as well as standards and guidelines, to modify grazing use and implement practices that promote the health of such vegetation. The fundamentals would continue to serve as broad, overarching goals. This relationship of the standards and guidelines to the fundamentals is consistent with the BLM's experience since state, regional, and fallback standards and guidelines went into effect.

### **4.2.6 Air Quality**

(At page 4-18, column one, at the end of this section insert:)

As discussed above, air quality on public lands is directly affected by the protection of soil by vegetation. Pursuant to 4180.2, the fundamentals would continue to serve as the general umbrella within which standards and guidelines must fit if standards and guidelines are developed or revised. The BLM would continue to evaluate the condition of the public land with respect to the fundamentals of rangeland health through the standards and guidelines, which include provisions for vegetation and soil standards. Since the fundamentals reflect the basic legal mandates for the management of public lands under the Taylor Grazing Act, FLPMA, Endangered Species Act, Clean Water Act, Clean Air Act, and other relevant authorities, the BLM would, independent of the fundamentals, continue to be able to address grazing management issues through relevant laws. The BLM would continue to utilize these authorities on a case-by-case basis to support grazing management decisions. It is anticipated that the BLM would continue to rely on these authorities, as well as standards and guidelines, to modify grazing use and to implement practices that promote rangeland health. The fundamentals would continue to serve as broad, overarching goals. This relationship of the standards and guidelines to the fundamentals would be consistent with the BLM's experience since State, regional, and fallback standards and guidelines went into effect.

#### **4.2.7 Wildlife**

(At page 4-18, column two, at the end of this section insert:)

Continued long-term improvement for wildlife is anticipated as the BLM continues to implement subpart 4180. The fundamentals reflect the basic requirements of relevant laws such as the Clean Water Act, the Taylor Grazing Act, the Federal Land Policy and Management Act, the Public Rangelands Improvement Act, and the Endangered Species Act. It is anticipated that the BLM would continue to rely on these authorities, as well as standards and guidelines, to modify grazing use and to implement practices that promote rangeland health. The fundamentals would continue to serve as broad, overarching goals. This relationship of the standards and guidelines to the fundamentals would be consistent with the BLM's experience since State, regional, and fallback standards and guidelines went into effect.

### **4.3 Alternative Two: Proposed Action**

#### **4.3.1 Grazing Administration**

(At page 4-26, first column, insert at the end of *Timeframe for Taking Action to Meet Rangeland Health Standards*:)

As discussed in section 2.2.8 above, we are adjusting the proposed action by replacing the first paragraph of section 4180.1, while leaving the fundamentals in place as proposed in 1995. The change is being made in response to comments that the proposal was unclear and that the fundamentals contain requirements different from the standards and

guidelines. It was also clear that some commenters were equating the fundamentals with the standards and guidelines.

This change recognizes the relationship of the standards and guidelines to the fundamentals, that the fundamentals are broad in nature, and that the standards are applicable to local and regional conditions. In implementing subpart 4180 of the 1995 regulations, nearly all determinations and “appropriate actions” to adjust livestock grazing have been based on section 4180.2, Standards and Guidelines for Grazing Administration.

The proposed rule would have restricted regulatory action under 4180.1 to geographic areas without approved standards and guidelines. But these areas were already subject to the fallback standards and guidelines in 4180.2.

All the 4180.2 standards and guidelines (i.e., both the fallbacks and those developed for specific States or regions) share the same characteristics. Standards of land health are expressions of physical levels and biological condition, or degree of function required for healthy lands and sustainable uses, and define minimum resource conditions that must be achieved and maintained. A guideline is a practice, method or technique determined to be appropriate to ensure that standards can be met or that significant progress can be made toward meeting the standard. Guidelines are tools such as grazing systems, vegetative treatments, or improvement projects that help managers and permittees achieve standards. Guidelines may be adapted or modified when monitoring or other information indicated the guideline is not effective, or a better means of achieving the applicable standards becomes appropriate. (BLM Handbook H-4180-1)

Standards and guidelines are tangible and readily observable. In contrast, fundamentals are broad goals. It has been the BLM’s experience since development of State or regional standards and guidelines or the effective date of the fallback standards and guidelines that in implementing part 4180 of the regulations, determinations and “appropriate action” to adjust livestock grazing have been based on part 4180.2, standards and guidelines for grazing administration. Since that time, the BLM is not aware of instances in which it has made a determination to take appropriate action based directly on 4180.1, the fundamentals. As originally proposed in 2003, the rule would have restricted regulatory action under 4180.1 to geographic areas without approved standards and guidelines. But these areas were already subject to the fallback standards and guidelines in 4180.2. The BLM believes section 4180.2 contains adequate requirements to take action to ensure achievement or progress toward achievement of rangeland health, and the similar requirement in part 4180.1 is unnecessary. However, as noted in the draft and final Environmental Impact Statements for the 1995 regulation, the fundamentals are reflective of the basic requirements of such relevant laws as the Clean Water Act, the Taylor Grazing Act, the Federal Land Policy and Management Act and the Endangered Species Act. As a result, the BLM would continue to utilize these authorities on a case-by-case basis to develop appropriate terms and conditions for permits and leases. In addition, the fundamentals would, because they identify general

characteristics of a functional rangeland ecosystem, continue to be captured in broad land use plans or allotment management plans.

The BLM believes that permit and lease terms and conditions, as well as action to attain State, regional, and fallback standards and guidelines, are sufficient to make progress toward attaining both the goals expressed in 4180.1, and the more tangible and observable conditions expressed in 4180.2, and that removing the “appropriate action” language from section 4180.1 would have no adverse effects on the quality of the human environment.

The proposed action, as refined by public comment, recognizes the relationship of the standards and guidelines to the fundamentals. The BLM does not anticipate an adverse environmental impact from the fundamentals provision, as revised, and anticipates overall long-term improvements in rangeland conditions. This is based on the continued application of the standards and guidelines, continued relevance of the fundamentals when standards and guidelines are developed or revised, continued application of relevant laws that were the basis for the fundamentals, and because of the continued use of the fundamentals to identify general characteristics of a functional rangeland ecosystem in broad land use plans or allotment management plans.

The BLM would utilize the fundamentals to ensure that any standards and guidelines developed or revised would be consistent with the fundamentals which remain unchanged from 1995. By requiring newly developed or revised standards and guidelines be consistent with the fundamentals, the BLM will provide clear guidance for and ensure consistency of any future effort to develop or revise the standards and guidelines. The BLM would continue to utilize the standards and guidelines to assure that livestock grazing is conducted consistently and in accordance with principles already being used in rangeland ecosystems.

### **4.3.2 Vegetation**

(At page 4-32 first column insert at the end of *Basis for Rangeland Health Determinations*.)

For the reasons discussed in 4.3.1, the proposed action is anticipated to result in long-term improvement to the rangelands.

#### *4.3.2.1 Riparian and Wetland Vegetation*

(At page 4-34 insert at the end of *Timeframe for Taking Actions to Meet Rangeland Health Standards*.)

For the reasons discussed in 4.3.1, the proposed action is anticipated to result in long-term improvement to the rangelands.

### **4.3.4 Soils**

#### 4.3.4.1 Upland Soils

(At page 4-35, second column, insert at the end of *Timeframe for Taking Action to Meet Rangeland Health Standards*.)

For the reasons discussed in 4.3.1, the proposed action is anticipated to result in long-term improvement to the rangelands.

#### 4.3.4.2 Riparian Soils

(At page 4-36, insert at the end of *Timeframe for Taking Action to Meet Rangeland Health Standards*.)

For the reasons discussed in 4.3.1, the proposed action is anticipated to result in long-term improvement to the rangelands.

### **4.3.7 Wildlife**

(At 4-38, column one, insert at the end of *Timeframe for Taking Action to Meet Rangeland Health Standards*.)

For the reasons discussed in 4.3.1, the proposed action is anticipated to result in long-term improvement to the rangelands.

### **4.3.8 Special Status Species**

(After the third paragraph in this section of the FEIS, please insert the following information:)

The 5-year phase-in provision for reductions in stocking rates that exceed 10% of current stocking may affect those Special Status Species outside the federally listed category. Any adverse effects, however, are expected to be limited to very few grazing allotments. As explained in section 4.3.1 of the FEIS, statistics derived from range assessments through fiscal year 2002 indicate that existing livestock grazing was a significant factor in not meeting land health standards on about 16% of the allotments that had been assessed and evaluated. Not all of those allotments required stocking rate reductions exceeding 10%. In many cases, the appropriate action was determined to be livestock management changes (such as changes in season of use and livestock rotation) without a reduction in AUM's.

(At the end of this section in the FEIS, please insert the following information:)

*Timeframe for Taking Action to Meet Rangeland Health Standards*: This 24-month provision seeks to accommodate typical timeframes required to complete coordination

requirements, NEPA documentation, and regulatory compliance with other agencies that are associated with such actions. As noted above, this provision would only affect a small percentage of allotments not meeting land health standards due to grazing, and for which range health assessments and subsequent adjustments have not already occurred. In those cases, and where NEPA documentation and regulatory compliance could have been completed in time for the next grazing period, some Special Status Species may be adversely affected by a potential delay of an additional year.

## **4.4 Alternative Three: Modified Action**

### **4.4.1 Grazing Administration**

(At 4-52, column one, insert at the end of *Timeframe for Taking Action to Meet Rangeland Health Standards*.)

Under the adjusted rule, the fundamentals provision would be the same as the proposed action, the effects of which are analyzed at 4.3.

## **4.5 Cumulative and Other Effects**

**(This section replaces Section 4.5 in the FEIS in its entirety)**

### **Introduction**

Several comments focused on the anticipated effects of the proposed action combined with the effects of other past, present, and reasonably foreseeable actions. The Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA) for 40 CFR Parts 1500–1508 identify requirements for the Federal agencies to address the cumulative effects of proposed actions. Cumulative effects are defined as the effects on the environment resulting from the incremental effects of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or non-Federal) or person undertakes such other actions.

The proposed action is to make limited changes to the existing grazing regulations to address certain discrete issues. As explained throughout the Final Environmental Impact Statement, these changes would not alter the fundamental structure of the grazing regulations nor are they expected to have a significant impact. The proposed action is to amend the livestock grazing regulations. As such, the EIS is programmatic and broad in scope. The BLM has developed an EIS under 40 CFR 1502.4(b) even though the effects of the rulemaking are not anticipated to be significant.

In analyzing the potential cumulative effects of the proposed action in accordance with the CEQ regulations, the effects of past actions, other present actions, and reasonably foreseeable future actions must be considered. As discussed throughout the FEIS and the Addendum, the proposed changes are primarily administrative and are expected to have

few or only short-term adverse impacts on the environment. Therefore, and as discussed in more detail here, the BLM believes that the impacts of the proposed changes, when added to past, present, and reasonably foreseeable future action, will not result in any significant cumulative impacts.

Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 CFR 1508.7. Agencies are to consider cumulative actions that, when viewed with other proposed actions, have cumulatively significant impacts and should therefore be discussed in the same impact statement. The analysis and disclosure of cumulative effects alerts decision makers and the public to the context within which effects are occurring, and to the environmental implications of the interactions of known and likely management activities.

### **Temporal and Spatial Setting for Analysis**

The analysis period covered by the cumulative effects analysis primarily begins in the 1930s with the passage of the Taylor Grazing Act; it continues to the present day and encompasses reasonably foreseeable activities. Because the proposed action would apply throughout the West, the analysis in this section is broad and programmatic in nature. For purposes of this analysis, the spatial domain for past, present, and reasonably foreseeable activities in the western States where livestock grazing occurs on public lands.

### **Assumed Resource Protection Measures and Other Assumptions**

A number of Federal State, local, and Tribal resource management and monitoring programs have been established to protect environmental resources and, in situations where there is environmental impairment, to effect restoration. The assessment of cumulative impacts recognizes the existence of these programs and assumes they will continue. The cumulative effects analysis assumes these programs effectively avoid or mitigate the environmental impacts that they are designed to address. These programs are:

Air quality: which is regulated under the PSD permitting process through State air quality agencies.

Water quality: which is regulated and/or monitored through various permitting and regulatory programs administered by EPA and State and local regulatory agencies.

Wetlands: impacts to which are mitigated through standard operating procedures, permits, and approvals issued at the project level, if needed, and under Section 404 of the Clean Water Act, administered by the Army Corps of Engineers and State certification programs to protect wetlands and ensure no net loss of wetlands, where practical.

Essential Fish Habitat: through the Magnuson-Stevens Act Federal agencies that authorize, fund, or conduct activities that may harm Essential Fish Habitat are to work with NOAA Fisheries to develop measures that minimize damage to these habitats.

Furthermore, drought or other natural factors can influence rangeland conditions, but nothing in the modified proposed rule will hamper the BLM's ability to respond to those changes to alter grazing use or close areas to use. The BLM retains its authority to address drought, fire, flood, insect infestation, or continued grazing use that poses an imminent likelihood of significant resource damage. 43 CFR 4110.3(b).

#### **4.5.1 Past Actions**

On June 24, 2005, the Council on Environmental Quality published guidance on how agencies can consider past actions in their cumulative effects analyses. The guidance reaffirms that the analysis required by NEPA is forward-looking in that it focuses on the potential direct and indirect impacts of a proposed future action and its alternatives. As such, review of past actions is required only to the extent that such a review would inform the agency decision-making process. The guidance further states: "Generally, agencies can conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions without delving into the historical details of individual past actions." (Council on Environmental Quality 2005, p.2)

The proposed action consists of relatively minor changes to existing grazing regulations. In this context, a detailed analysis of all past actions affecting rangelands is not necessary. Instead, a general summary of the major historical activities impacting rangelands are presented below.

Rangelands in the West have been grazed by livestock for more than 100 years. In portions of the Southwest and California, livestock grazing has been ongoing for almost 400 years. Decades of unregulated grazing prior to effective Federal regulation had major effects on watershed conditions, plant communities, soils, and fire regimes (Leopold 1924a, 1924b).

For example, certain areas such as the semidesert grasslands of portions of California, Arizona, and New Mexico were subject to severe soil erosion as a result of heavy grazing beginning as early as the late seventeenth century. Loss of soil combined with related factors such as changes in fire cycles and introduction of exotic plant species resulted in long-term alteration of site characteristics such that original plant communities are unlikely to ever be reestablished, even in the absence of grazing (Laycock, et al. 1996). Climatic factors including drought and unusually warm wet periods during the first 3 decades of the twentieth century, combined with grazing and altered fire frequencies, have also played a role in affecting present-day rangeland conditions by facilitating development of dense, even-aged ponderosa pine forests in portions of Arizona and New Mexico (Savage and Swetnam 1990). Likewise, in other areas of the Southwest, Swetnam et al. (1999) attribute a 55% reduction in open montane grasslands to tree community expansion caused by grazing and fire exclusion.

Passage of the Taylor Grazing Act in 1934 was the first step in Federal efforts to regulate grazing on what would become BLM-administered lands. The present-day grazing regulations have evolved through amendments to the Taylor Grazing Act, as well as other pieces of legislation and regulation changes such as those adopted in 1995. In the last decades of the twentieth century, regulation of grazing on public lands, combined with the changes in grazing techniques as the science of rangeland management evolved, resulted in substantially improved upland range condition on most public lands with the percentage of land rated in good-to-excellent condition more than doubling since 1936 (Laycock et al. 1996). Historical effects of grazing on riparian habitats are recognized but difficult to quantify (Armour et al. 1994). It was not until the mid-1970s that reclamation of riparian areas began to receive emphasis (Laycock et al. 1996). In 1993, the BLM adopted a standard methodology for inventorying and assessing the condition of riparian areas on public lands (BLM 1993) and, over the next decade, major emphasis was placed on obtaining good baseline information to use in management.

Present-day range management is based on evaluation of existing conditions and the potential for improving, maintaining, or restoring rangeland health. In analyzing the potential cumulative effects of the proposed action, the aggregate effects of past activities are accounted for in the present environmental conditions.

Other past activities that have affected rangeland conditions include surface mining for coal and other minerals, oil and gas development, and continued population growth and urban expansion. The effects of these activities have varied with location across the West, with many areas experiencing only small effects while other have undergone major changes.

#### **4.5.2 Present Actions**

The Draft EIS for the major regulation changes proposed in 1994 presented baseline conditions (Chapter 3) and environmental consequences (Chapter 4) in the primary area affected by the BLM grazing program (BLM 1994). The Draft EIS for the proposed action (BLM 2003) updated this information in the context of proposed regulation changes. Other ongoing human activities with effects on present rangeland conditions, including mining, energy development, urban expansion, and recreation, are activities with relatively local impacts that are addressed in detail in field level land use and activity level planning and environmental analysis. Because the proposed action would apply throughout the West, the analysis in this environmental impact statement is broad and programmatic in nature. It is therefore appropriate to consider in the cumulative effects analysis other broad initiatives that the BLM is presently undertaking. These are described below and include the Sustaining Working Landscapes policy initiative; the Healthy Forests Initiative and the National Fire Plan; the Vegetation Treatment EIS; and the BLM Sage-Grouse Habitat Conservation Strategy. In addition, the BLM's cumulative effects analysis of the proposed regulatory change considers other ongoing actions on the public lands, including energy development, that impact the environment.

As indicated in Chapter 1 of the DEIS, the BLM has initiated the Sustaining Working Landscapes policy initiative in an effort to promote sustainable rangeland and sustainable ranching. The overall purpose of this initiative is to improve the long-term health and productivity of the public lands through innovative partnerships with permittees and lessees within the regulatory framework. Twenty-four public workshops were held on this policy initiative in spring 2003. In summer and fall 2003, portions of the policy initiative were considered by 21 BLM Resource Advisory Councils throughout the West and recommendations were submitted to the Director. It was decided, however, that further action on the Sustaining Working Landscapes policy initiative would be deferred until comments had been received on the Proposed Rulemaking to amend the grazing regulations.

The BLM has completed two relatively recent programmatic EISs to support oil and gas development (Final EIS for the Powder River Basin Oil and Gas Project, 2003; Final EIS for Coal Bed Methane Oil and Gas, 2000; Healthy Forests Initiative, 2002; Healthy Forests Restoration Act, 2003). Under the National Energy Policy, the BLM continues to play a major role in implementing the President's National Energy Policy. This includes improving access to energy resources on public lands, while continuing to ensure the safe, environmentally sound development of these resources. The BLM gives high priority to the expeditious processing of applications for permits to drill. Through its rights-of-way processing system, the BLM will perform an analysis of and consider granting rights-of-way for wind power generation. A programmatic EIS that analyzed wind power development on BLM-managed lands was published in June 2005 (Final EIS on Wind Energy Development on BLM-Administered Lands in the Western United States.)

The Healthy Forests Restoration Act, the Healthy Forests Initiative, and the National Fire Plan have also been identified as programmatic level policies that will affect rangelands. (The National Fire Plan, 1995; A Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment 10-year Comprehensive Strategy, 2002. Report to the President in Response to the Wildfires of 2000, 2000). These initiatives are collaborative efforts with all stakeholders to reduce the potential for devastating wildland fires. These efforts focus on improving the health of both forests and rangelands. It is reasonable to assume that over time, rangelands would experience increasing positive benefit from these efforts. In addition, there are projects that train and equip ranchers to be qualified to assist in fire suppression and fuel treatment projects. These efforts promote partnership and cooperation with permittees and lessees in achieving mutually beneficial objectives.

Another initiative under way is the development of a programmatic Vegetation Treatment EIS. The goals of the Vegetation Treatment program are to manage vegetation to sustain the condition of healthy lands and, where land conditions have degraded, to restore vegetation to a more healthy condition. The vegetation treatment program, which covers a variety of vegetation treatment options and best management practices, will also complement the objectives of this Proposed Rulemaking. The BLM has developed two reports: the Draft Vegetation Treatments Using Herbicides on Bureau of Land

Management Lands in 17 Western States Programmatic Environmental Impact Statement and the Draft Vegetation Treatments on Bureau of Land Management Lands in 17 Western States Programmatic Environmental Impact Statement.

Another important initiative is the BLM Sage-Grouse Habitat Conservation Strategy (November 2004). The primary goal of the strategy is to help address the sudden population decline of the sage-grouse through a comprehensive habitat conservation strategy. (WAFWA Conservation Assessment of Greater Sage-Grouse and Sagebrush Habitats, June 2004). Today, the BLM manages more than 50% of the remaining sage-grouse habitat. The strategy is a sage-grouse range-wide effort that involves a diverse group of cooperators, including multiple Federal, State, and Tribal agencies as well as special interest groups and private landowners. Appropriate and timely conservation measures for sage-grouse are critical for preventing further population declines and ESA listing of the species. Conserving and improving habitat for native species such as sage-grouse are part of the objectives of improving rangeland health through better use of the Secretary's Four C's. Therefore, the Sage-Grouse Habitat Conservation Strategy is expected to compliment the objectives of this Proposed Rulemaking.

Recent census data confirms that population growth in the West is increasing. The population of the 12 western States increased by 27% over the last decade—more than twice the national average. Twenty-two million people now live within 25 miles of BLM-managed public lands. The public lands provide recreation opportunities, as well as important goods and services to these populations. The BLM's recreation program primarily provides resource-based recreation and tourism opportunities. The BLM will continue to focus on establishing a comprehensive approach to travel planning and management, enhancing and expanding visitor services, and encouraging sustainable travel and tourism development with gateway communities.

Policies and procedures for promoting the Secretary's "Four C's"—consultation, cooperation, and communication all in the service of conservation—are also being developed. One of the purposes of this rulemaking is to improve working relationships with BLM permittees and lessees, an important component in support of the Four C's philosophy.

#### **4.5.3 Reasonably Foreseeable Future Actions**

In addition to the ongoing initiatives described previously, there will be regionally and locally based actions that will occur in the future that could potentially have environmental effects. Also, the BLM will be implementing the specific provisions of the Energy Policy Act of 2005, which includes dedicated funding for the processing of applications for permits to drill—in several pilot offices in Wyoming, Utah, Colorado, and New Mexico—and incentives for the development of unconventional and renewable resources. Future Federal actions will be subject to additional NEPA analysis and, at times, specific analysis related to the project, issue, or subject matter. In addition to this analysis, mitigation, monitoring, and adaptive management strategies incorporated into these site specific analyses provide a basis for minimizing cumulative effects.

As a general matter, grazing on public lands will continue in the foreseeable future, in accordance with grazing regulations. It is also anticipated that the scientific debate about the impacts and sustainability of livestock grazing on the public lands will continue (Fleischner 1994, Laycock et al. 1996). In addition, it is anticipated that population growth in the western United States will continue and result in a slow decline in the amount of land available for grazing (Mitchell 2000). Subdivision of private lands and a concomitant reduction of associated Federal grazing permits will probably continue as more ranches are acquired for “amenity” uses and greater demand is placed on public lands for recreational uses (Holecheck 2001, Torell et al. 2004, Gosnell and Travis 2005).

It is reasonably foreseeable that policies would be developed and implemented through reinitiation of the Sustaining Working Landscapes policy initiatives to promote sustainable ranching and rangelands. However, the specifics of those policy proposals are unknown at this time. It is likely that any policies that may be developed would focus on encouraging partnerships with permittees and lessees and others who may be interested in improving the health and productivity of the rangelands, as well as promoting mechanisms to facilitate more efficient ranching operations. The policy emphasis, therefore, will generally complement the objectives of the proposed regulatory amendments.

Continued demand for energy resources and public land development for oil, gas, coal, and wind energy will result in declines in available forage for livestock and wildlife in localized areas (Riley 2004). The rate of decline will be reduced to some extent by the increased use of environmental Best Management Practices, on- and off-site rangeland and habitat improvement mitigation, and the reclamation and revegetation of dry oil or gas wells, particularly in the Powder River Basin coal bed natural gas fields and the older oil and natural gas fields.

Energy production activities are likely to affect some regions more than others, such as the Greater Green River, San Juan Basin, Uintah-Piceance, and the Powder River Basin. Cumulative effects assessments conducted for major land use planning efforts in these areas indicate that potential long-term loss of available livestock AUMs due to oil and gas development range from less than 1% in the Book Cliffs (Vernal RMP) to less than 4% in the San Juan Basin (Farmington RMP) and Powder River Basin (Billings and Powder River RMPs). Existing and potential major oil and gas production areas represent only about 28% of total grazing lands managed by the BLM. The effects of energy development on rangeland resources are considered in site-specific decision-making processes, such as permit renewals, and can be incorporated into assessments of rangeland health. The proposed regulation changes would not affect how energy development activities are analyzed in local decision making nor would they affect energy development activities on public lands.

Invasive species, both plant and animal, will continue to affect rangelands as increased public use results in more potential opportunities for the introduction of new species (DiTomaso 2000, National Invasive Species Council 2005). In the past, invasive species

have altered some ecosystems and reduced available plant resources for both livestock and wildlife. Continued implementation of the Rangeland Standards and Guidelines, as well as various Federal, State, and local initiatives to control the spread of invasive species, may help slow the adverse effects of invasive species. None of the proposed regulation changes would hinder these efforts.

The impacts of the potential future actions listed above are dependent on a wide variety of social and economic parameters that are difficult to quantify at this scale of analysis. For example, a significant drop in the price paid for beef could push more ranchers out of the livestock business, whereas an increase in prices could prompt ranchers to continue in the business. A drop in energy prices, although probably short term, could reduce the rate of impact growth from energy development on public lands while increasing impacts from motorized recreational users.

#### **4.5.4 Conclusion**

Neither the Proposed Action nor the Alternatives would be expected to have any significant cumulative effect across the area of analysis and would not have effects beyond those described in Chapter 4 of the FEIS. Likewise, neither the No Action nor the Modified Alternative would have any differing cumulative effects from the Proposed Action, as modified. Some localized impacts could occur in individual field offices, however those impacts and appropriate mitigation would be addressed as part of site-specific NEPA analysis and documentation or, where appropriate, through the land use planning process and associated NEPA analysis and documentation.

There are no irreversible or irretrievable commitments of resources directly resulting from the proposed regulation changes nor are there any projected discernable effects from short-term uses on long-term productivity for resources arising from this proposed rulemaking.

Most of the proposed regulatory changes would have few or no adverse impacts on the quality of the human environment. Some short-term adverse effects may not be avoided because of increases in timeframes associated with several components of this proposed rulemaking. These components include the provision for a 5-year phase-in of changes in use of more than 10%, the requirement that monitoring data be used to support a determination that livestock grazing is the cause of a failure to meet standards and conform to guidelines, and the extension of time allowed for developing and analyzing appropriate actions before decisions related to grazing administration must be made.

However, in the long term, better and more sustainable decisions will be developed by using monitoring data to analyze achievement of standards. Extending the time for decisions would allow field offices to carefully develop, formulate, and analyze the appropriate action while ensuring that all legal and consultation requirements are satisfied. It is expected that the long-term effects of these provisions will be beneficial to rangeland health.

Mitigation measures are addressed in the development of Alternative Three. Additional mitigation measures would be appropriately developed when site-specific NEPA analysis and documents are prepared to implement the regulatory provisions.

*Additions to References pertaining to Cumulative and Other Effects are listed in the References section.*

## **Chapter 5. Public Participation, Consultation, Coordination, and Response to Comments**

### **5.2 Consultation and Coordination Actions**

#### **5.2.2 Threatened and Endangered Species (Please see Appendix G)**

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**5.4 Response to Comments**

**5.4.5 Affected Environment and Impact Analysis**

*Comment:* One comment encouraged the BLM to consider the potential impacts of implementing the proposed rule for grazing management on its ability to effectively implement the National Sage-Grouse Habitat Conservation Strategy.

*Response:* Pages 1-23 of the DEIS and pages 1-29 and 1-30 of the FEIS discuss the BLM’s National Sage-Grouse Habitat Conservation Strategy (2004). This strategy reflects the combined Federal and State response to address the sage-grouse, and outlines how the BLM intends to achieve its goal of managing public lands to maintain, enhance, and restore sage-grouse habitats while providing for sustainable uses and development of public lands. The commitments outlined in the strategy remain unchanged and unaffected by the proposed grazing regulations. Under the revised regulations, site-level grazing management decisions would remain within the purview and discretion of BLM management at the Field Office level and would provide for addressing sage-grouse habitat needs on a local basis pursuant to an allotment-level or watershed-level management assessment process. The ability of BLM management to identify and to react to sage-grouse habitat needs is not affected by the administrative adjustments of the new regulations (such as the provision that would allow for shared title of range improvements) and these regulations would continue to provide the authorities under which field managers may implement effective conservation measures where needed.

*Comment:* One comment disagreed with the DEIS’s statement that the proposed rule would have little or no effect on wildlife. The commenter stated that the proposed rule “fundamentally changes the way BLM lands are managed temporally, spatially, and philosophically,” and that there could be “profound impacts on wildlife resources.”

**Response:** The BLM disagrees with the assertion that the proposed rule “fundamentally changes the way BLM lands are managed temporally, spatially, and philosophically” and that there could be “profound impacts on wildlife resources” as a result of the proposed rule. As discussed in Section 1.2 of the FEIS, the proposed revisions are primarily administrative in nature. They do not reorient the management of the public lands to secure the dominance of one use, grazing, over wildlife or other multiple uses. The proposed revisions do not alter the BLM’s broad discretion to manage the public lands, require terms and conditions, close areas to grazing on an immediate basis if necessary to protect rangeland resources, or take action under the standards and guidelines. The general assertions in the comment are not linked to specific proposed actions and instead appear to seek an analysis of whether grazing should occur on the public lands. That analysis is found in the EIS associated with Rangeland Reform 1994. The impacts of the proposed action are discussed in the FEIS starting at page 4.23. The BLM’s analysis does acknowledge minor impacts on wildlife, but its analysis does not support the broad impacts asserted in the comment. Impacts to wildlife and special status species are addressed on pages 3-43 through 3-57 of the FEIS.

**Comment:** One comment pointed out that the analysis estimates an improvement rate of streams classified as “properly functioning” and “functioning at risk with upward trend” at 1.5% to 3.5% annually, but it was unclear how these rates were formulated.

**Response:** The DEIS at pages 3-18 and 4-24 discusses trends in riparian condition and restoration. In 1993, the BLM adopted the process for assessing proper functioning condition (PFC) as its standard methodology for determining the condition of riparian resources on public lands and has compiled several years of information on status and trends of riparian condition. Tables 3.5.2.1 and 3.5.2.2 on page T-9 of the DEIS demonstrate how the percentages were derived. Briefly, the percentage of change, divided by the number of years of data, yields the percentage rates used in the DEIS. This calculation is derived from Technical Reference 1737-15, 1998, “User guide to assessing proper functioning condition and the supporting science for lotic areas.”

**Comment:** A related comment stated that no estimates were provided for a number of streams classified as “functioning at risk—no trend,” “functioning at risk—downward trend,” or “nonfunctioning.” The comment expressed concern that these are the streams that are most susceptible to alterations and they should be considered when making management decisions. The commenter recommended that the BLM provide clarification of what the percentages mean for improved conditions for fish and wildlife resources and evaluate whether this is an appropriate rate of improvement.

**Response:** The acceptable rate of improvement is dependent on site-specific management goals and objectives. BLM management decisions regarding riparian areas generally reflect their current PFC (Proper Functioning Condition) classifications. As noted in current BLM Technical Reference 1737-16, “[the] PFC assessment...provides a sorting that allows the establishment of priorities. Functional at-risk areas with downward trend should receive priority for treatment. These areas may be near the threshold or rapidly degrading into a nonfunctional condition...Information from the PFC

assessment, along with other watershed and habitat condition information helps provide a good picture of watershed health and possible causal factors affecting watershed health.” (See: A User Guide to Assessing Proper Functioning Condition and the Supporting Science for Lentic Areas, Technical Reference 1737-16, BLM, 1999-Revised 2003 pp. 15-16). Useful data on riparian condition is also found in BLM’s publication, Public Land Statistics. The functioning at risk and nonfunctioning categories are discussed in Section 3.5.2 of the DEIS and FEIS; Table 3.5.2.1 in the FEIS includes trend data for those riparian rating categories, as well as data for PFC and functioning at risk—upward trend. A 1.5 to 3.5% annual improvement in riparian function over the long term would benefit fish and wildlife. Table 3.5.2.1 within the FEIS translates these percentages into miles of improved riparian and aquatic habitat.

#### **5.4.6 Definitions—Other Recommendations**

*Comment:* One comment suggested that the BLM should define the following terms to further clarify their meaning in context of the proposed revisions: “affiliate,” “terms and conditions,” “cooperator,” “qualified applicant,” “community-based decision making,” and “court of competent jurisdiction.”

*Response:* The term “affiliate” is defined in the current regulations and remains unchanged. It is not necessary to define the term qualified applicants because qualifications for holding a grazing permit or lease are set forth at 43 CFR subpart 4110 of the grazing regulations and the proposed revisions simply reorder the mandatory qualifications provision found at 43 CFR 4110.1. The meaning of “terms and conditions,” “cooperator,” “community-based decision making,” and “court of competent jurisdiction” are easily discerned on the basis of their common usage, their definition within common dictionaries, and the context in which they appear.

#### **5.4.8 Active Use—Definitions, Increases, and Decreases**

*Comment:* One comment stated it was inappropriate to change the definition of “grazing preference” to include an amount of forage on public lands attached to a rancher’s base property without consideration of other factors, such as species composition and diversity, vegetation structure and maturity, rare or ephemeral species, and soil condition. The commenter stated these factors do not necessarily relate either to livestock forage quantity or to base property attributes and using these factors in the definition of “grazing preference” gives the operator an inappropriate expectation of what is available for his or her use. The commenter suggested that the BLM consider other factors in defining “grazing preference.”

*Response:* As stated on pages 2-23 and 5-90 of the FEIS, the definition of “preference” in the proposed rule corresponds with the requirement under 43 CFR, section 4110.2-2, that livestock forage allocations on public land be made within a multiple use context as set forth in land use plans. When the BLM determines that additional forage is available for livestock within a planning area, this definition provides that the preference holder is “first in line” for that portion of the available forage that occurs within his or her

allotment. The proposed definition does not mean and should not be construed to imply that satisfying a permittee's or lessee's livestock forage allocation (the preference) necessarily has the highest priority when the BLM employs land use planning or activity planning processes to determine possible uses, or values to be managed for, that depend on available vegetation. The BLM reconciles competing demands for public land resources through its land use planning process, and this is reflected in subsequent activity plans and management decisions.

#### **5.4.9 Phasing in Changes in Active Use**

**Comment:** Several comments addressed the BLM's proposed rule to phase in changes in active use of more than 10% over a 5-year period. The commenters understood that under some circumstances it may be possible to phase in the needed changes in grazing over a 5-year period without compromising long-term range sustainability, but stated that BLM range professionals needed the ability to respond immediately and to the extent necessary to avoid impacts to range condition or vegetation communities that may take decades to reverse.

**Response:** As discussed on pages 4-24 to 4-25 of the FEIS, the proposed rule contains an exception that allows changes in active use in excess of 10% to be implemented in less than 5 years to comply with applicable law, such as the Endangered Species Act (43 CFR 4110.3-3(a)(ii)). As stated on page 5-60 of the FEIS, the authorized officer is also provided discretion to implement changes in active use immediately to handle a wide range of circumstances. These circumstances may include fire, drought, the need to protect soil, vegetation, or other resources, or if continued grazing use poses an imminent likelihood of significant resource damage (43 CFR 4110.3-3(b)(1)(i) and (ii)).

**Comment:** Other comments expressed concern that the proposed 5-year phase-in period may be inadequate to protect sensitive species and their habitat. One commenter requested clarification of whether the proposed rule allows for livestock numbers to be adjusted over a shorter period of time to protect candidate or BLM-sensitive wildlife and plants, and whether the proposed rule was in compliance with the requirements of the Endangered Species Act.

**Response:** As noted in the previous response, under 43 CFR section 4110.3-3(b) of the existing regulations, the BLM has the authority to immediately implement grazing decisions where the authorized officer determines that soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, insect infestation, or if continued livestock grazing poses an imminent likelihood of significant resource damage. The BLM's responsibilities under the ESA and BLM special status species policy are discussed on pages 2-17 and 4-28 of the DEIS and pages 2-11 and 4-38 and of the FEIS. Implementing changes in less than 5 years is discussed on page 4-25 of the FEIS. These responsibilities are not affected by the proposed revisions.

**Comment:** One comment stated that implementing stocking rate changes of 10% or more over a 5-year period would only be significant for large operators. For most small permit holders, such changes would be a nuisance and administrative burden for permit managers to implement (citing an example of a 50 AUM permit). The comment stated that small changes to existing permits should be implemented in 2 years or less, since this would be more efficient for both the permittee and the public land manager. For larger permits, the comment suggested that the phase-in of changes should be dependent on situational conditions and their relationship to the need for improving rangeland health and permittee interests (up to 5 years).

**Response:** The proposed rule is flexible enough to provide for immediate, full implementation of a decision to adjust grazing use if continued grazing use poses an imminent likelihood of significant soil, vegetation, or other resource damage. As stated on page 5-60 of the FEIS, the proposed rule is also flexible enough to allow the BLM and the permittee to agree to a shorter timeframe for implementation. We anticipate that permittees and authorized officers are likely to agree mutually to waive the 5-year phase-in requirement for small allotments. The rule allows the BLM to initiate necessary adjustments while giving the permittee an opportunity to make changes in his or her overall business operation.

**Comment:** One comment cited situations when it would be desirable to increase grazing to enhance habitat for “Federal trust species.” The commenter also asked whether the BLM could solicit livestock from another operator to enhance habitat, if permission would be required of the public land grazing permit holder, or if permission could be granted only to a “qualified applicant.”

**Response:** It is advantageous at times to increase livestock numbers for weed or vegetation management that enhances habitat and reduces brush cover for specific wildlife species (e.g., burrowing owl or mountain plover). In these situations, the BLM has several options. The BLM would first contact the existing permittee to discuss needs and options feasible to the permittee. If the permittee is unable to increase stocking numbers, the BLM may advertise an available opportunity to “qualified applicants” (43 CFR 4110.1), offer a free-use permit, or contract to have vegetation reduced by goats, mechanical thinning, or manual pulling and weeding. Although the BLM does not need permission from the permit holder to enhance habitat for “Federal trust species,” the BLM makes every effort to collaborate and work with permit holders and neighbors.

#### **5.4.10 Range Improvements**

**Comment:** One comment noted that in the proposed rule, cooperators and the United States would share title to permanent structural range improvements constructed on public lands under cooperative range improvement agreements. The commenter expressed concern that sharing title may limit the BLM’s ability to retain sole authority over the management of its grazing allotments.

**Response:** Sharing title to range improvements would not limit the BLM’s ability to manage grazing allotments. 43 CFR Section 4120.3-2(b) states, “Subject to valid and existing rights, cooperators and the United States share title to permanent structural range improvements....” As explained on page 5-63 of the FEIS, the Taylor Grazing Act provides that a grazing permit does not create an exclusive right, title, or interest in the public land. The existing regulations are equally clear that holding a joint title to a range improvement does not create a permittee interest in the public land. 43 CFR Section 4120.3-1(e) states, “A range improvement permit or cooperative range improvement agreement does not convey to the permittee or cooperator any right, title, or interest in any lands or resources held by the United States.” Since the United States retains ownership of the land and shared ownership of the improvements, BLM management actions would not be constrained by a permittee’s interest in a range improvement.

**Comment:** Another comment stated that the analysis should clarify ESA and NEPA responsibilities for shared range improvements.

**Response:** The BLM will continue to fulfill the requirements for consultation in accordance with Section 7 of the ESA. The grazing regulations at 43 CFR 4120.3-1(f) have provided, and will continue to provide, that “proposed range improvement projects shall be reviewed in accordance with the requirements of [NEPA].” The fact that a permittee holds a joint title with the BLM for a range improvement has no effect on the BLM’s obligations under the ESA and NEPA.

Permittees not in compliance with the ESA may be subject to penalties. 43 CFR 4140.1(b)(2) provides that it is a prohibited act for any person to install, use, maintain, modify, or remove range improvements on public lands without BLM authorization. Insofar as any person would do such acts without BLM authorization and such acts resulted in violation of the ESA, he or she would be liable for the applicable penalties for violations of the grazing regulations, as well as those for any violation of the ESA.

**Comment:** One comment stated the BLM should consider and allow modification of range improvements if they are negatively affecting sensitive species (e.g., fences result in sage-grouse mortalities). In addition, it stated that modification may be necessary to minimize the effects and “avoid jeopardy to listed species.” Another comment stated that if grazing permittees share title to range improvements, they may be accountable for any take under ESA that occurs as a result of these improvements.

**Response:** The grazing regulations at 43 CFR 4120.3-1(f) provide that “proposed range improvement projects shall be reviewed in accordance with the requirements of [NEPA].” As part of NEPA analysis and the decision-making process, potential impacts of the range improvements to special status species (including listed species) would be considered and either avoided or mitigated. Listed species are protected by the ESA. Therefore, the BLM is obligated to make modifications as necessary to avoid jeopardy or to minimize incidental take as directed by the Fish and Wildlife Service or the NOAA Fisheries Service in a biological opinion.

**Comment:** One comment expressed concern that sharing title to range improvements may make it more difficult to impose restrictions or modify grazing management because of issues regarding regulatory takings and access to private property. A similar comment stated the belief that allowing shared title to range improvements gives away some of the public rights on public lands, making it more difficult for the public to redirect or reallocate the use of public lands as priorities change. The commenter stated that public rights should not be “given away” and that they would have to be purchased back at a later date as circumstances change.

**Response:** Under the proposed rule, permanent structural range improvements would be jointly owned by the United States and permittees in proportion to their respective investments. The proposed rule would provide operators an opportunity to maintain some asset value for their investments in range improvements, and may thereby stimulate an increase in private investments in range improvements. However, an operator’s interest in a permanent structural range improvement would not diminish the BLM’s ability to manage or obtain access to public lands. Existing regulations, which would not be changed by the proposed rule, provide that a cooperative range improvement agreement conveys no right, title, or interest in any lands or resources held by the United States, and does not confer upon a cooperator or permittee the exclusive right to use a range improvement or the affected public lands. 43 CFR 4120.3-1(e) and 4120.3-2(d). Thus, cooperative range improvement agreements would continue to include provisions that protect the interests of the United States in its lands and resources, and ensure the BLM’s management flexibility on public lands. Under this framework, assertions of regulatory takings would not be successful and would not affect the BLM’s management of the public lands.

**Comment:** One comment asked whether the BLM would have independent authority to remove, replace, or modify a structure, or if the cooperator’s permission would be required. A similar comment expressed concern that “sharing of titles on permanent structures” may limit the BLM’s ability to implement effective conservation measures for sage-grouse, or to remove or modify structures that may be negatively impacting sage-grouse.

**Response:** The grazing regulations changes would not affect the BLM’s existing independent authority to remove, replace, or modify a structure if needed, following consultation and due process that respects the rights of a grazing permittee who may own all or a part of the structure, for the reasons that are explained below.

As discussed on page 2-16 of the DEIS and page 2-19 of the FEIS, Cooperative Range Improvement Agreements (which are the mechanisms for allowing the installation of permanent structural range improvements) include provisions that protect the interest of the United States and its lands and resources. These provisions make clear that the ownership of improvements does not confer exclusive right to the permittee or cooperator to use the improvement or the land affected by the range improvement work (43 CFR 4120.3-2(d)). See also pages 5-62 through 5-66 of the FEIS. The regulation at 43 CFR 4120.3-1(e) similarly provides that a cooperative agreement does not convey to the

permittee or cooperator any right, title, or interest in any lands or resources held by the United States. The regulations also provide that range improvements are to be installed, used, maintained, and modified or removed in a manner consistent with multiple use management (43 CFR 4120.3-1(a)). The BLM retains authority to specify the design, construction, and maintenance criteria for the range improvement and may require permittees or lessees to remove range improvements if they no longer help achieve the land use plan, which includes multiple use management or allotment goals and objectives. If the permittee or lessee refuses to comply with a BLM requirement to remove or modify a range improvement, the BLM can then take additional steps to protect the interests of the United States pursuant to the provisions of the document that authorized the improvement (such as the Cooperative Range Improvement Agreement or Range Improvement Permit), provisions of the grazing regulations (43 CFR 4140.1(a)(5)), and other relevant law depending on the circumstances. In addition, the Memorandum of Understanding (MOU) the BLM, Forest Service, and Fish and Wildlife Service signed with the Western Association of Fish and Wildlife Agencies (WAFWA) to conserve the greater sage-grouse (*Centrocercus urophasianus*) and its habitat promotes the protection of sage-grouse.

**Comment:** A comment questioned whether future rights or privileges to access “titled” range improvements will be conveyed to those holding the title that would not be extended to the general public. The commenter requested clarification of whether any priority would be conveyed to the “titled” holder for any land leases.

**Response:** 43 CFR Section 4120.3-1(e) states, “A range improvement permit or cooperative range improvement agreement does not convey to the permittee or cooperator any right, title, or interest in any lands or resources held by the United States.” As a matter of general policy, the title for range improvements does not affect whether or to what extent the BLM will allow access. Individuals would still have to seek authorization for access to maintain range improvements, whether they hold title or not. No special privileges are given to “titled” holders of range improvements.

#### **5.4.11 Cooperation with Governments, Advisory Boards, and Other Agencies.**

**Comment:** One comment referred to a Memorandum of Understanding (MOU) the BLM, Forest Service, and Fish and Wildlife Service signed with the Western Association of Fish and Wildlife Agencies (WAFWA) to conserve the greater sage-grouse (*Centrocercus urophasianus*) and its habitat. The commenter stated the BLM should consider the commitments of the MOU in the proposed revisions to grazing regulations.

**Response:** The WAFWA MOU outlines the roles of State and Federal partners in conservation throughout the 11 western States of presently occupied range of the sage-grouse habitat. The BLM’s commitments under this MOU and grazing management are compatible. Under the MOU, the BLM will continue to coordinate with the States and local working groups to develop State and local conservation strategies. The administrative changes in the proposed regulations will have no effect on this

coordination commitment. In addition, and to complement the WAFWA MOU commitments, the BLM released the National Sage-Grouse Habitat Conservation Strategy in 2004. Pages 1-23 and 1-24 of the DEIS and pages 1-29 and 1-30 of the FEIS discuss this strategy, which describes agency actions necessary to conserve sage-grouse and habitat on BLM land and includes a detailed timeline of actions the BLM is maintaining through agency directives. As with the WAFWA MOU, the proposed grazing revisions will have no effect on the BLM's implementation of the sage-grouse strategy.

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

**Response:** The working groups and their commitments are outlined in the WAFWA MOU and are unchanged by the proposed regulations. Site-level decisions that implement terms and conditions of grazing permits and leases that address sage-grouse habitat needs will continue to be made by BLM field managers following an assessment process as provided for in the existing regulations, for example, 43 CFR 4120.2 and 4130.3-3. The BLM's ability to identify and react to sage-grouse habitat needs is not affected by the proposed administrative adjustments of the grazing regulations.

**Comment:** One comment expressed concern that the proposal may lead to inconsistency and inefficiency between the BLM and Forest Service in the areas of water rights, management of "Federal trust" resources, range improvement ownership, temporary nonuse, prohibited acts, the definition and role of the interested public, and the ability of the agencies to ensure fish and wildlife are managed for sustainability across administrative boundaries.

**Response:** As stated in our response to similar comments (see comment and response on page 5-26, column 1, of the FEIS regarding legal requirements and coordinating with other agencies, and on page 5-70, column 2, regarding cooperation with other agencies) the BLM will coordinate and consult with the Forest Service and State agencies when administering the grazing program. As stated on page 5-63 of the FEIS, "consistency with the Forest Service regulations, though desirable at times, is not necessary for implementing effective rangeland management practices." In general, inconsistencies exist because the two agencies have different statutory requirements that influence their regulations and policies. Specific inconsistencies between the rules and policies of the BLM and the Forest Service, specifically those related to fish and wildlife resources, would be site-specific and have not been identified at this level of analysis. However, nothing in the proposed revisions will preclude the BLM and the Forest Service from working across administrative boundaries to manage fish and wildlife in a sustainable manner.

**Comment:** One comment stated that although the Fish and Wildlife Service is not specifically mentioned in the FEIS, consultation with the Service should occur as required under Section 7(a)(2) of the ESA (50 CFR 402.14).

**Response:** The BLM consults with the FWS when an evaluation of a discretionary action results in a “May Affect” determination. Although the BLM coordinated with the FWS on various aspects of the regulation, ultimately a “No Effect” determination was concluded. Consultation under section 7(a)(2) is not required under the 50 CFR 402 regulations on an action that has no effect on an ESA-listed species.

#### **5.4.12 Temporary Nonuse**

**Comment:** One comment recommended that the BLM amend existing 43 CFR 4140.1(a)(2), which prohibits failure to make substantial grazing use as authorized for 2 consecutive fee years. Further, the commenter cited the proposed rule that states “the BLM may deny nonuse if the permittee cannot justify that nonuse is for resource stewardship” and recommended that the rule provide a clear exception if nonuse would be beneficial for listed or sensitive species and their habitats.

**Response:** An amendment of this provision is not needed because the proposed rule allows the authorized officer to grant nonuse for the number of years needed to provide for natural resource conservation, including threatened and endangered species. The present regulations that limit the BLM’s ability to allow for annual temporary nonuse for more than 3 years were changed. Under the proposed rule, temporary nonuse can be approved annually for longer than 3 years. The BLM believes it is important to require an annual request for temporary nonuse. The annual process allows the BLM to assess the reasons for the request and to gauge the success of range recovery (if temporary nonuse was issued for resource conservation purposes). To do otherwise could lead to less active BLM oversight and management of public lands. The provision that prohibits failure to make substantial grazing use as authorized for 2 consecutive years applies to situations where a nonuse application has not been approved. Responses to temporary nonuse comments are found on pages 5-71 to 5-75 of the FEIS.

**Comment:** One comment suggested the proposed rule should include a description of the types of information and documentation necessary to “justify” a nonuse. The commenter was concerned that if the level of detail required is too great, it may become too burdensome on the permittee to seek nonuse for the protection of wildlife or habitats. Similarly, the commenter was concerned that the requirement that nonuse be authorized on a 1-year basis could also prove burdensome to the permittee. And finally, there was concern that these requirements may ultimately conflict with sections 7(a)(1) and 7(a)(2) of the ESA and conservation agreements and strategies for sensitive species. One comment acknowledged the proposed policy that removes the present 3-consecutive-year limit on temporary nonuse of a grazing permit. The commenter supports the rule change because it gives the BLM and the permittee more flexibility in resting allotments to protect and restore natural resources.

**Response:** The BLM’s long-standing procedure is to annually provide its permittees and lessees a grazing application reflecting the use authorized by their permit or lease with an invitation to amend it within certain parameters if it does not meet their needs for that

year. The proposed revision will not create any additional burden. The BLM does not believe that expanding its flexibility to allow longer periods of temporary nonuse will ultimately conflict with sections 7(a)(1) and 7(a)(2) of the ESA or conservation agreements and strategies for sensitive species. In fact, just the opposite is expected with the use of this flexible resource conservation tool. Benefits of removing the consecutive 3-year limitation to nonuse are explained on pages 4-25, 4-31, 4-33, 4-35, 4-36, 4-38, 4-39, 4-42 and 4-48 of the FEIS.

**Comment:** A related comment stated that removal of the 3-year limit on temporary nonuse will provide opportunities to improve range and fish and wildlife habitat. The commenter expressed dismay at the loss of the option of issuing long-term “conservation use” permits. The comment expressed the need for a mechanism to rest rangelands for extended periods of time when necessary to recover plant composition and forage production or protect important habitats.

**Response:** Removal of the reference to long-term conservation use permits is in compliance with the Tenth Circuit’s decision in *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1302 (10<sup>th</sup> Cir. 1999), rev’d on other grounds, 529 U.S. 728 (2000). The revised rule provides adequate options for achieving the purposes expressed in the comment. 43 CFR Section 4130.4 provides authorized officers the ability to authorize nonuse as needed to provide for resource conservation, enhancement, or protection. Even though the nonuse would be approved on an annual basis, the proposed rule would provide the mechanism to accommodate nonuse for the time needed to achieve plant composition, forage production, or habitat improvement objectives.

**Comment:** Another comment supported the proposal to allow annual reauthorization of nonuse, based on the local manager’s judgment, to promote flexibility in management of BLM grazing permits. The comment noted, however, that this flexibility would also provide a permittee the opportunity to retain monopoly control of an allotment and its resources at low or no cost. The commenter suggested an outside limit on nonuse of 3–5 years. At that time, a more substantive review of the situation and future alternatives would be conducted, and a decision could be made to continue the nonuse or move ahead with other opportunities.

**Response:** As stated on pages 5-71 to 5-73 of the FEIS, it is necessary to retain discretion to approve or disapprove temporary nonuse according to the facts and circumstances at hand, so that the BLM may adapt its management to the needs of the resources as well as the resource user. The BLM may deny nonuse upon finding that it is not needed or desirable either for natural resource conservation, enhancement, or protection, or for the personal or business needs of the permittee. Under the proposed rule, however, temporary nonuse may be approved annually for longer than 3 years, if the reasons for nonuse remain. The BLM believes it is important to require an annual request for temporary nonuse in order to reassess the circumstances. With this annual reassessment establishing some outside limit on the number of years nonuse could occur is unnecessary.

**Comment:** One comment stated that the discussion regarding 3-year temporary nonuse and conservation use is confusing. The commenter stated that the discussion in the *Federal Register* notice was clear, but the discussion in the FEIS should be rewritten for clarity in the rule.

**Response:** The FEIS, Section 1.2.2.6 *Temporary Nonuse*, discusses the reason for changing the current rules to allow the authorized officer to approve temporary nonuse for more than 3 consecutive years. The BLM believes that the discussion within the FEIS is a clear presentation of the reasons for the change.

#### **5.4.14 Basis for Rangeland Health Determinations**

**Comment:** Some commenters stated that their experience shows that monitoring of rangeland standards is not being completed in a timely, effective manner under current requirements because of BLM funding and staffing limitations, and recommended that the BLM remove this requirement from the proposed rule. The comments suggested an alternative evaluation process, where an interagency (and interdisciplinary) team evaluates range conditions and determines management strategies in cases where adequate monitoring data are not available. Three comments supported the need for a comprehensive monitoring strategy to chronicle the influence of grazing on rangeland health and federally listed species.

Other comments regarding monitoring include whether: monitoring should be a prerequisite for determining conformance with the fundamentals or the standards and guidelines (S&G); support for increased monitoring means making monitoring data a prerequisite to conformance determinations; monitoring data is necessary or helpful for making some S&G determinations; the BLM collects the right data for determinations; the BLM collects adequate data; and the DEIS adequately assessed the impacts of making monitoring data a prerequisite to determinations under S&Gs.

**Response:** The regulations at subpart 4180 provide a framework for efficient evaluation of rangeland health and development of remedial action when necessary. The proposed rule, like the existing regulations, would assist the BLM in prioritizing and using its resources efficiently in this effort. This framework was influenced by the 1992 General Accounting Office (GAO, now Government Accountability Office) report, which identified a need for the BLM to more effectively marshal its funding and staff (GAO/RCED-92-51, *Rangeland Management—Interior’s Monitoring Has Fallen Short of Agency Requirements*, 1992). As a result of comments, the BLM modified and clarified the proposed action. This change was discussed in the Revisions and Errata sheet issued with the FEIS. The proposed action was altered to make assessments and determinations a two-step process instead of a combined process. A standards assessment will first 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. Determinations that existing grazing management practices or levels of grazing use are significant factors in failing to achieve standards and conform to guidelines would be based on standards assessment and monitoring.

If an assessment indicates a failure to achieve standards or conform to the guidelines, then the BLM will use existing or new monitoring data to ascertain whether existing grazing management practices or levels of grazing use are significant factors in failing to achieve standards and conform to guidelines. The BLM believes this approach will ensure that subsequent corrective action is focused on remedying the factors that monitoring and assessment have indicated are likely contributing to not achieving standards or not conforming with applicable guidelines. Once a standards assessment indicates that the rangeland is failing to achieve standards or that management practices do not conform to guidelines, the type and amount of new monitoring data, if any, that the BLM will need to help identify determine the significant contributing factors in failing to achieve standards or conform to guidelines will vary depending on such variables as how apparent the causes are for not meeting standards, the quantity and quality of existing relevant monitoring data, the presence of threatened or endangered species, conflicts between uses, and other criteria. The grazing regulations (43 CFR 4100.0-5) define monitoring as "...the periodic observation and orderly collection of data to evaluate: (1) Effects of management actions; and (2) Effectiveness of actions in meeting management objectives." The BLM is aware that some types of monitoring it typically conducts are used to determine status or progress toward achieving described conditions and cannot be used to conclusively identify a resource response to a particular management activity. Other data gathered by the BLM in the course of habitat monitoring (BLM TR-1730-1), actual use studies (BLM TR-4400-2), utilization studies (TR-1730-4) collecting weather data, and other types of monitoring such as repeated photo-points are useful in helping to ascertain probable causes for not meeting one or more standards or conforming with guidelines.

The BLM believes that the proposed rule would help focus resources, including funding and staffing, on monitoring where additional monitoring data is needed to help identify the causal factors for not meeting the land health standards. In the BLM's Handbook 43 CFR 4180.1 Rangeland Health Standards, interdisciplinary teams are instructed to use existing monitoring data in the evaluation process to determine status of the current conditions in relation to the land health standards. Where adequate monitoring information is not already available, the BLM will focus its monitoring resources on gathering the needed information. The BLM does not anticipate that the proposed monitoring activity will overwhelm its capability to effectively manage the public lands and implement needed management action within regulatory deadlines. This is because, as discussed in the FEIS on 4-31 and elsewhere in the document, the BLM anticipates, based on experience, that the total number of allotments needing additional monitoring is relatively small. Recent experience (1998–2002) indicates that current livestock grazing or level of use was a significant factor for not meeting land health standards on only 16% of the allotments evaluated, requiring adjustments in current livestock management. From 1998 to 2005, 15% of the evaluated allotments were determined to be in this category. The BLM does not anticipate a substantial increase in monitoring because it already has some monitoring data for most of the allotments anticipated to fall into this category, and because allotments reviewed to date reflect those that were identified as being the highest priority or with the greatest potential for not meeting standards (See

BLM Washington Office Instruction Memorandum 98-91, Manual Handbook H-4180-1 [page III-4, 5] and Annual Work Plan Directives from 2003 through 2006). It is anticipated that fewer allotments assessed in the future will require monitoring to make a determination because more of them will be in the lower priority categories and will be more likely to meet land health standards. As a result, the number of allotments that need additional monitoring is anticipated to be within the BLM's capabilities. (Also see page 5-78 of the FEIS, addressing a suggestion to remove the monitoring requirement). The commenters suggested the alternative evaluation process closely mirrors the current process where existing monitoring data are not available. The BLM believes that determinations regarding the cause for not meeting one or more standards that are supported by existing or new monitoring data are less likely to be challenged administratively or judicially. Finally, the comment does not accurately reflect the proposed changes for the Fundamentals and seems to apply the proposed changes to the Standards and Guidelines provision to the Fundamentals provision.

**Comment:** One comment stated that the proposed rule requiring monitoring before a rangeland health determination is made has implications for measures needed to conserve special status species in order to preclude listing. Where proactive rangewide measures are needed, such as in the case of the sage-grouse, a requirement for monitoring before a remedial action can be initiated may amount to an inadequate regulatory mechanism. The commenter recommended assessment and disclosure of the impacts of the monitoring requirement on the BLM's ability to take timely action to effectively implement conservation strategies that preclude the need to list special status species.

**Response:** Adding a requirement that monitoring data must be used to support a determination as to the cause for not meeting one or more standards is not the same as a requirement that the BLM must monitor before remedial action can be initiated to address resource issues. The grazing regulations do not absolutely require that the BLM assess standards and determine through assessment and monitoring the causal factors for not meeting standards before it can implement remedial actions needed to conserve special status species or for any other reason. Insofar as the implementation of remedial action that consists of measures needed to conserve habitat of special status species, 43 CFR 4130.3-3 provides that the BLM may modify terms and conditions of a permit or lease either with or without a determination under subpart 4180. For example, terms and conditions may be modified when the active use or related management practices are not meeting management objectives specified in land use plans, pertinent allotment management plans, or other activity plan or an applicable decision. The proposed rule regarding use of assessments and monitoring data to support a determination regarding the cause of not meeting a standard is intended to provide a greater measure of assurance to the authorized officer that the appropriate action selected in fact addresses the causes for not achieving one or more standards. Subpart 4180 is not the sole regulatory mechanism for implementing measures that are needed to conserve special status species. Therefore this regulatory change does not affect the BLM's authority to take timely action to effectively implement conservation strategies that preclude the need to list special status species.

### **5.4.15 Timeframe for Taking Action to Meet Rangeland Health Standards**

**Comment:** Three comments expressed similar concern that extending the deadline to 24 months for taking appropriate action could be detrimental to long-term range health and fish and wildlife resources. The commenters were concerned that if appropriate action is not implemented for 2 years, the result may be adverse consequences to listed species or their habitat.

**Response:** Page 4-26 of the FEIS explains, “Under the rule the BLM field manager has discretion as to whether to allow the 24 months for BLM to address a failure to meet rangeland health standards.” The authorized officer may take appropriate action before the 24-month deadline if all required consultation and data collection are completed before then. The BLM’s experience implementing the existing regulations is that the regulatory requirement to take appropriate action no later than the start of the next grazing season did not always provide sufficient time for compliance with relevant laws, including requirements in the grazing regulations to undertake consultation and coordination to develop an appropriate action, NEPA, and, if applicable, ESA consultation.

For example, the FEIS explains in Section 5.4.15 that the proposed rule does not change the BLM’s discretion to immediately implement decisions to adjust grazing use if continued grazing use poses an imminent likelihood of significant soil, vegetation, or other resource damage such as immediate threats to listed or other sensitive species. The proposed rule also contains provisions that allow the BLM and permittee to enter into an agreement for shorter timeframes for implementation (43 CFR 4110.3-3). The BLM believes that the proposed rule provides sufficient time for compliance with all applicable legal requirements, while ensuring protection of fish and wildlife resources.

**Comment:** Another comment stated that the purpose of extending the time to take appropriate action is to allow BLM staff time to bring together the appropriate information and conduct necessary public involvement. The commenter encouraged the BLM to retain opportunities for public involvement; however, the comment stated in this circumstance that a timely response to changing resource conditions overrides this purpose.

The commenter also suggested that the proposed rule be clarified because some of the terms were confusing, making it difficult to determine the effect of the extended deadline on the viability of species. For example, the commenter stated that the wording “to take action” does not indicate if the deadline of 2 years requires action be “initiated” or “completed” by that date. The commenter recommended a more thorough discussion in the FEIS to better describe the delays that may result with adoption of this proposed rule change, and the potential effects to listed resources.

**Response:** The commenter is correct that the reason for extending the time allowed to initiate action is to allow BLM staff time to bring together the appropriate information

and conduct necessary public involvement. This provision would enable the BLM to develop a thorough action plan, consult with the Fish and Wildlife Service, if applicable, and work through the NEPA process, which involves the public. The proposed rule would generally require that an authorized officer finalize a decision or execute an agreement to implement appropriate action as soon as practicable, but not more than 24 months after a determination is made under 43 CFR 4180.12(c). The 24-month deadline could be extended to accommodate legally required processes of another agency. In addition, the authorized officer would be required to act more quickly if such action were compelled under other application laws or regulations, if continued grazing use posed an imminent likelihood of significant resource damage, or upon determining that the soil, vegetation, or other resources required immediate protection because of conditions such as drought, fire, flood, or insect infestation.

The BLM believes that taking as long as 24 months to develop a meaningful action and issue a decision would lessen the chances of appeal and thereby allow for timelier implementation of appropriate action.

#### **5.4.17 Conservation Use**

**Comment:** One comment acknowledged that the BLM does not have the authority to issue “conservation use” permits as a result of the 10<sup>th</sup> Circuit Court of Appeals decision in *Public Lands Council v. Babbitt*, and encouraged the BLM to continue to work within applicable laws and regulations to allocate rangeland uses that achieve multiple use goals, such as providing important wildlife habitat and contributing to water quality and soil retention.

**Response:** The BLM’s proposed revisions to the temporary nonuse section of the regulations removes the 3-year limit on applications for nonuse by a grazing permittee. This proposed rule will achieve the goals set forth in this comment. The BLM responded to similar comments on pages 5-87 through 5-88 of the FEIS. Our response to those comments stated that the BLM is able to designate areas as not available for grazing by decision, based upon the land use plan’s multiple use objectives, or to withdraw areas from grazing under Section 204 of the Federal Land Policy Management Act. The BLM is also able to make changes in grazing management such as reducing or eliminating grazing use on the basis of a determination that existing livestock grazing management or levels of use are a significant factor in not achieving or making progress toward achieving land health standards.

#### **5.4.19 Definition and the Role of the Interested Public**

**Comment:** One comment stated that removing some requirements to consult with the “interested public” while adopting a requirement to cooperate with State, County, or locally established grazing advisory boards conveys preferential treatment to one group over another. The commenter questioned whether this change ensures “a consistent community-based decision-making process.”

**Response:** The proposed rule provides the interested public with a variety of opportunities to participate and provide input to the BLM on its management of public lands, although the proposed rule modifies the interested public's role in the day-to-day operational aspect of the grazing program, as stated on pages 2-24 and 2-25 of the FEIS. While public input may help identify environmental impacts, the BLM's experience under the existing regulations is that public participation in the day-to-day operational aspects can be inefficient and unproductive and, in some instances, redundant. For example, the proposed revision retains requirements that allow the interested public to review and comment on grazing management evaluation reports and to notify the interested public of proposed and final grazing decisions. This is discussed on pages 5-24 and 5-25 of the FEIS. The proposed rule would allow the authorized officer and the grazing operator the discretion to determine appropriate on-the-ground management actions to achieve plan objectives or respond to variable resource conditions (page 2-25 of the FEIS). The proposed revision retains requirements for consultation, cooperation, and coordination with the interested public for: apportioning additional forage on BLM-managed lands, developing or modifying an allotment management plan or grazing activity plan, and planning range development or improvement programs. For example, as discussed on pages 5-20 and 5-24 of the FEIS for range improvements, the proposed rule provides for continued participation by the interested public at the same level as the State, County, or locally established grazing advisory boards. The proposed rule would also retain the following existing regulatory provision, "[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." Proposed rule at 4130-3-3(b) and current rule at 4130-3-3. The proposed revision also retains requirements to notify the interested public of proposed and final grazing decisions.

**Comment:** Two related comments questioned the BLM's proposal to restrict interested public participation to plan-level or program-level decisions. The commenters stated that information and decisions presented at this level are often too broad and general to allow specific and meaningful evaluations or comments, and the site-specific actions have the greatest potential to impact fish and wildlife, including species listed under the Endangered Species Act. Thus, it is important to retain public consultation requirements for site-specific resource decisions.

**Response:** Responses to similar comments regarding discretionary public interest involvement are found on pages 5-94 through 5-98 of the FEIS. As discussed on page 5-95, an important element of BLM land use planning is the establishment of resource management objectives to organize efficient and effective goals toward implementing standards and guidelines within pertinent State and Federal laws, and to better the condition of the land resource. Most, if not all, of the site-specific actions on an allotment that would impact fish and wildlife are included in the development or modification of an allotment management plan and the planning of range improvements,

both of which would continue to require consultation, cooperation, and coordination with the interested public. The BLM is pursuing a balance of public involvement in the management of public lands with the public interest in the cost-effective management of those same lands (see discussion in the FEIS at page 1-19 and page 5-95).

**Comment:** Still another comment expressed concern that members of the public (other than the grazing permittee) should be given the opportunity to submit comments regarding a grazing permit environmental assessment (EA). Because grazing management affects many resources of importance to fish and wildlife, the commenter stated that it would be valuable to allow predecisional comments from all interested parties to be introduced into the public record. The commenter stated that the opportunity for review under the National Environmental Policy Act (NEPA) process may not allow for timely and site-specific public input. The commenter stated that efforts to simplify and streamline the NEPA process could result in the agencies and the public being informed only about those projects that warrant an EIS, when most proposals for changes in rangeland management are evaluated as EAs.

**Response:** The proposed regulations do not change the requirement to involve the interested public in the NEPA process. The BLM consults with the public and provides notice regarding NEPA activities to the interested publics, pursuant to CEQ's regulations at 40 CFR 1501.4(b) and 40 CFR 1506.6. In addition, the BLM's Manual Handbook H-1790-1 at IV (B)(4)(a) states that an EA will be made available for public review if the manager responsible for authorizing the action believes that it is necessary. Public participation might also occur as a part of determining the scope of the assessment (H-1790-1 IV (B)(1)). As a matter of course, the public will be involved with grazing permit environmental assessments according to the law and to the extent practicable.

Under the proposed grazing rule, the interested public will still be provided a copy of the proposed decision and associated NEPA documents or notified of the availability of the NEPA document (BLM Manual Handbook H-1790-1), will be able to protest proposed decisions (43 CFR section 4160.2), and may seek appeal of a final decision (43 CFR section 4160.4). As discussed on page 5-95 of the FEIS, an important outcome of BLM land use planning is the establishment of resource management objectives. Most, if not all, of the site-specific actions on an allotment that would impact the environment are usually included in the development of an allotment management plan and the planning of range improvements, both of which would still continue to require consultation, cooperation, and coordination with the interested public. 43 CFR Section 4130.3-3(b) provides the interested public opportunity to review and provide input to reports that lead to decisions to modify grazing use.

Beyond the formal opportunities for public involvement in the decision-making process, the BLM manager has the option and is encouraged to seek information and input from the public in the development of a NEPA document when he or she finds it appropriate to do so, and within the limits of the law.

**Comment:** One comment stated that, at a minimum, the proposed grazing administration revisions should clarify that ESA section 7 consultation and consideration for State-listed or sensitive species would still be applicable to grazing activities.

**Response:** The BLM will consult with the appropriate service agency pursuant to the ESA when a discretionary BLM action triggers the application of the ESA. The BLM's responsibilities under Section 7 of the Endangered Species Act and BLM special status species policy are discussed on pages 2-17 and 4-28 of the DEIS and pages 2-11 and 4-38 and of the FEIS. In addition, page 3-33 of the DEIS and page 3-33 of the FEIS discuss the requirements for implementation of BLM Special Status Species Manual 6840 and define what species are considered special status species.

**Comment:** Another comment proposed that public input be sought when there would be a significant change of land use. The commenter stated that this may provide for useable public input information to make management decisions, but limit the opportunity for obstruction from individual entity or public agendas.

**Response:** The comment seems to advocate a "significance" threshold for public participation. The BLM declines to adopt such a threshold. As explained on pages 2-20 and 2-21 of the DEIS and on page 2-24 of the FEIS, the BLM removed the requirement (but not the option) to consult with the interested public on actions that involve what the BLM considers to be the day-to-day operational aspects of the grazing program, while preserving the requirement to consult with the interested public in apportioning additional forage, developing or modifying a grazing activity plan or range improvement plan, or preparing reports evaluating range conditions. These are actions for which public input would be of the greatest value in setting management direction for the public land. This proposed rule does not affect the public's ability to participate when the BLM formulates plans and programs for land use, as required by the Federal Land Policy and Management Act.

#### **5.4.20 Land Use Planning and Grazing Retirement**

**Comment:** One comment expressed concern that the proposed revisions would have the effect of making grazing a priority over other resource values and uses, and may in some circumstances constrain biologists and range conservationists from recommending and implementing management changes in response to conditions that compromise the long-term health and sustainability of rangeland resources. The commenter stated that these aspects of the proposed revisions would have the potential to be detrimental to fish and wildlife resources.

**Response:** As explained on pages 5-20 and 5-21 of the FEIS, the proposed regulations do not alter the BLM's mission to manage the public lands based on FLPMA's multiple use and sustained yield standard. The DEIS on pages 1-5 to 1-9, and the FEIS on pages 1-7 to 1-10 discuss grazing as just one of the many multiple uses for the public lands. The BLM does not believe that the proposed revisions would constrain specialists from recommending and implementing management changes in response to conditions that may compromise the long-term health and sustainability of rangeland resources. We are

aware of peer-reviewed scientific literature that compares grazing to no grazing or that recommends significant or profound changes in grazing policy. Those recommendations are beyond the scope of this rulemaking. The discussion on pages 1-7 to 1-10 of the FEIS highlights the BLM's flexibility to effect changes in grazing management to address rangeland health, including: the use of permit or lease terms and conditions to achieve resource objectives (43 CFR 4130.3); modification of terms and conditions when active use or related management practices are not meeting plan objectives or standards and guidelines (43 CFR 4130.3-3); suspension of active use in whole or in part due to the reasons set forth in 43 CFR 4130.3-3 based on monitoring, field observations, ecological site inventory, or other acceptable methods (43 CFR 4110.3-2); and issuance of immediate full force and effect decisions to close areas to grazing when the authorized officer concludes that soil, vegetation, or other resources require immediate protection if continued grazing use poses an imminent likelihood of significant resource damage.

#### **5.4.21 Water Rights**

**Comment:** A comment stated concern that the DEIS did not clearly analyze and disclose the potential impacts of the proposal to remove the requirement that water rights for livestock be acquired, perfected, maintained, and administered in the name of the United States to the extent allowed by State law on sensitive wildlife and plant habitat management, especially in light of the statements in the 1995 Rangeland Reform EIS.

**Response:** Before 1995, the BLM generally sought to hold livestock water rights under State law. The regulatory changes in 1995 increased the certainty that the BLM would hold those rights by requiring that the BLM seek such rights to the extent allowed by State law. The proposed rule change eliminates this requirement to give the BLM the flexibility to pursue a variety of arrangements, including joint ownership. The proposed rule also allows the BLM to forgo seeking livestock water rights, when appropriate, so that a permittee can seek sole ownership of such rights (e.g., where permittees finance the entire livestock water right development on BLM-administered land). The proposed rule is designed to promote administrative flexibility and efficiency, as well as cooperation with grazing permittees, which is anticipated to result in reduced conflicts over water sources.

While the BLM agrees that numerous sensitive species of wildlife and plants depend upon water, it does not agree that the DEIS is inadequate in its description of the impacts of the proposed rule to such species. As discussed on page 4-28 to 4-29 of the DEIS and 4-37 to 4-39 of the FEIS, the proposed revision is not expected to have an effect on water resources or special status species.

**Comment:** One comment recommended that the BLM clarify its need to cooperatively pursue water rights with the permittee.

**Response:** Under the present grazing regulations, the BLM has no option other than to seek to acquire, perfect, maintain, and administer State-based livestock water rights in the name of the United States, to the extent allowed by State law. The BLM therefore has

little flexibility to seek alternative arrangements with permittees. The BLM anticipates, as stated on page 4-32 of the FEIS, that the increased flexibility to cooperatively pursue livestock water rights may stimulate greater permittee and lessee support for the development of additional water resources on public land in accordance with resource objectives found in BLM land use plans, allotment management plans, activity plans, and vegetation management plans, contributing to an overall beneficial effect on vegetation resources. As further explained on page 5-102 of the FEIS, “[b]y agreeing that permittees and lessees will hold livestock water rights, BLM may be able to negotiate better cooperative agreements, resulting in improved cooperation between the BLM, States, permittees, and lessees.”

**Comment:** Another comment stated that it is unclear if the BLM’s ability to make changes in livestock management to protect sensitive wildlife or plants or their habitat will be affected by the permittee or lessee having shared water rights.

**Response:** The BLM’s ability to make changes in livestock management to protect sensitive wildlife, plants, or their habitat will not be affected by permittee or lessee ownership of livestock water rights. The current grazing regulations, at 43 CFR 4130.3-3, provide the BLM with authority to make changes to the terms and conditions of a grazing permit or lease when management objectives are not being met or when grazing does not conform to the provisions of 43 CFR subpart 4180 (Fundamentals of Rangeland Health and Standards and Guidelines). This provision is not being changed by the proposed rule changes. Permittee or lessee ownership of livestock water rights does not affect the BLM’s management discretion and authority.

Page 5-103 of the FEIS notes that many livestock water rights are presently held by permittees or lessees, or jointly owned with the BLM. The BLM has seen no evidence that holding a livestock water right discourages cooperation or compliance with the terms and conditions of grazing permits. Nor is there evidence that the BLM’s ability to enforce and administer other provisions of the grazing regulations is affected by a permittee or lessee holding a livestock water right.

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

**Response:** Shared livestock water rights are not expected to negatively impact the BLM’s ability to control water at a spring. In instances of jointly held water rights, water cannot be transferred from the source without the consent of both owners. With respect to actual beneficial use of the resource, either owner cannot prevent usage of the water by the other owner.

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

**Response:** The BLM agrees that water is an important resource for fish and wildlife in the West. The proposed rule does not mean the BLM will never seek ownership of livestock water rights. Rather, the proposed revision will allow the BLM increased flexibility to seek alternative approaches to ensuring that water developed on public lands can be used to benefit multiple uses, including wildlife uses. As noted on page 5-102 of the FEIS, “[u]se of water on public land for wildlife, recreation, mining, and other uses will continue with rights for those uses usually in the name of the United States. By agreeing that permittees and lessees will hold livestock water rights, BLM may be able to negotiate better cooperative agreements, resulting in improved cooperation between BLM, States, and permittees and lessees.”

**Comment:** One comment stated that the Proposed Action in the DEIS does not discuss the need for the BLM to have flexibility in cooperatively pursuing water rights with the permittee or lessee. The commenter stated that it is unclear if under a cooperative water right the BLM would have the senior water right.

**Response:** The analysis in the DEIS and the FEIS addresses the BLM’s need for flexibility in cooperatively pursuing livestock water rights with permittees and lessees. The increased flexibility provided by the proposed rule change may stimulate greater permittee and lessee support for the development of additional water resources on public land in accordance with resource objectives found in BLM land use plans, allotment management plans, activity plans, and vegetation management plans, contributing to an overall beneficial effect on vegetation resources. Agreeing that permittees and lessees will hold livestock water rights may enable us to negotiate better cooperative agreements, which will result in improved cooperation between the BLM, States, permittees, and lessees.

Whether the United States holds a senior livestock water right in joint ownership would depend upon individual circumstances and applicable State water law governing priority dates. The BLM’s ability to negotiate junior, senior, or equivalent priority dates with permittees has been critical in being able to achieve settlement agreements in water rights adjudications.

**Comment:** One comment questioned if removing the provision that the BLM must acquire livestock water rights would put the State in a position where they could prevent the BLM from holding livestock water rights. The comment also questioned if this revised rule concerns only livestock waters, or if BLM filings for wildlife, fish, or instream flow would be affected as well.

**Response:** States control their water law procedures for granting, adjudicating, and administering livestock water rights, independent of the content of the Federal grazing regulations. Therefore, regardless of whether the existing regulations remain in place or whether the proposed rule is adopted, States may prevent the BLM from holding livestock water rights. To be sure, after 1995, when the grazing regulations were changed to require the United States to file for livestock water “to the extent allowed by

State law,” two States—Nevada and Arizona—enacted laws that prevent the BLM from claiming livestock water rights.

The grazing regulations address State water rights for livestock watering purposes, not other purposes. The regulations therefore do not affect other potential BLM filings.

**Comment:** One comment pointed out that the BLM has the authority and discretion to apply penalties for specific prohibited acts. The comment stated that the BLM may withhold, suspend, or cancel a grazing permit, and recommended clarification of BLM’s flexibility if the permittee had a shared livestock water right on that allotment. The commenter stated that a State water right can be looked upon as a property right and asked whether this could make it difficult for the BLM to transfer a cancelled permit to a new permittee.

**Response:** The BLM’s authority and discretion to impose penalties for prohibited acts is independent of and unaffected by ownership of livestock water rights. As is specifically noted on page 5-103 of the FEIS, the BLM will enforce the regulatory procedures in 43 CFR subparts 4140 (Prohibited Acts) and 4160 (Administrative Remedies), regardless of the name in which the water right is held. Thus, when a permittee engages in a prohibited act that triggers the BLM’s authority to suspend or cancel the grazing permit (e.g., grazing in violation of the terms and conditions of the permit), the BLM may take appropriate action, regardless of who owns the water right. Even where a permittee has sole ownership of a livestock water right, the BLM’s authority is unaffected.

**Comment:** One comment recommended that the BLM include a discussion of the environmental consequences on water rights in Alternative One, including the environmental consequences to sensitive wildlife and plants if the BLM were to solely acquire livestock water rights from the State, without cooperatively sharing that right with a permittee or lessee.

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

**Comment:** Another comment recommended expanding the discussion on environmental consequences of the BLM cooperatively sharing livestock water rights with the permittee or lessee. The commenter stated that it is unclear how cooperative water rights would affect the BLM’s ability to manage sensitive wildlife and plants on an allotment; or if BLM management would become less flexible if water rights became cooperative.

**Response:** On page 4-37 of the FEIS, the BLM stated, “The proposed water right policy changes would have no effect on water resources as long as the water resources remain

available for use on public land.” Also, as noted in the FEIS, page 4-38, “The changes under the proposed regulations are expected to have no effect on special status species, as the changes largely provide clarification of the existing regulations or bring regulations into compliance with court rulings.”

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

**Comment:** One comment expressed concern with the statement on page 4-27 of the DEIS, that “The proposed rule would have little or no effect on present water resource conditions.” The commenter stated that “giving up” water rights inhibits the BLM’s flexibility in making management decisions and has the potential to impact water resources.

**Response:** The proposed rule will not result in less flexibility for water usage on public lands. As noted in the livestock water rights policy discussion on page 5-102 of the FEIS, “we believe it is unlikely to compromise our ability to manage public lands effectively in accordance with FLPMA’s requirement of multiple use management. Use of water on public land for wildlife, recreation, and mining, and other uses will continue with rights for those uses usually in the name of the United States.” The grazing regulation at 43 CFR 4130.3-3 provides the BLM authority to make changes to the terms and conditions of grazing when it does not meet management objectives or it otherwise does not conform to the provisions of 43 CFR subpart 4180. Usage of water sources on public lands is also subject to BLM land use authorizations, which contain appropriate terms and conditions to support continued multiple uses on public lands. Also, as the BLM notes on page 5-103 of the FEIS, many livestock water rights are presently held by permittees, or jointly owned with the BLM, and the BLM has not seen evidence that holding a livestock water right discourages cooperation or compliance with terms and conditions of grazing permits.

**Comment:** One commenter objected to allowing others to file for water rights on BLM lands. The comment was concerned that the proposed rule stipulates livestock water development, but the right holder could then request a transfer of use for some other purpose. The commenter was concerned that this policy sacrifices future public value and multiple use opportunities that water might provide, e.g. instream flows, wildlife

habitat, recreation use, etc. Allowing private acquisition of a water right gives ownership of a public resource to a private entity in perpetuity. Without landowner control of water, public benefit and associated management opportunities land will be severely restricted.

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

As explained on pages 5-102 and 5-103 of the FEIS, the concerns raised by proposing to remove the requirement for the BLM to apply for water rights for livestock use in the name of the United States are unlikely to occur. An increase in the number of water rights for livestock use on public lands held in the name of permittees or lessees is probable, but unlikely to compromise the BLM’s ability to manage public lands in accordance with FLPMA’s multiple use mandate. Use of water on public land for wildlife, recreation, mining, and other uses will continue with rights for those uses usually in the name of the United States. By agreeing that permittees and lessees will hold livestock water rights, the BLM will be able to negotiate better cooperative agreements, resulting in improved cooperation between the BLM, States, and permittees and lessees. Ownership of water rights by permittees will have no effect on title to the land, since land remains in the ownership of the United States (43 CFR section 4120.3-1(e)). And exchanges or preference transfers resulting from permittee ownership of water rights for livestock use could occur, although the BLM does not expect them to be common. When they occur, they can often be resolved through negotiated settlements among all parties.

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

**Response:** The proposed rule retains the requirement to use cooperative range improvement agreements to authorize all new permanent water developments 43 CFR 4120.3-2(b). The proposed rule does not require the United States to acquire water rights, nor does it prevent the United States from doing so. The intent of the proposed revision is to provide greater flexibility to the United States in this regard.

#### **5.4.28 Prohibited Acts, Settlement, and Enforcement**

**Comment:** One comment stated the proposed rule implies that a permittee convicted of violating the Bald and Golden Eagle Protection Act (BGEPA) on any lands outside his or her BLM grazing permit boundary would not risk loss of grazing privileges. The commenter noted that the BGEPA (16 USC 668(c)) provides specifically for revocation of permits for violations of the BGEPA regardless of where the violation occurs (i.e., the

violation does not have to occur within the grazing permit boundary), and stated the grazing rule should be consistent with the BGEPA.

**Response:** The BGEPA provides authority to the Director of the BLM to immediately cancel leases, licenses, permits, or agreements authorizing livestock grazing on Federal lands for violations of the BGEPA. The statute, however, leaves the decision of whether to cancel a lease, license, permit, or agreement to the BLM's discretion. The proposed rule does not alter the BLM's authority granted under the BGEPA, but would clarify how it would be applied in the grazing context.

**Comment:** Another comment expressed concern that the proposed rule does not provide for revocation of a permit when a prohibited act occurs outside of the grazing permit boundary. The commenter stated that this contradicts the stated objectives of the proposed rule, to improve cooperation, promote practical mechanisms for assessing rangeland change, and enhance administrative efficiency. Further, the commenter stated that the proposed rule may result in more livestock trespass violations on Fish and Wildlife Service Refuge lands. The commenter noted that the present rule, which allows the BLM to determine whether cancellation or suspension of a permit is appropriate, probably helps deter trespass violations.

Finally, the commenter stated that the FEIS should report the miles of boundaries shared by BLM grazing allotments and Refuge land and assess the implications of the proposed rule for the FWS mission.

**Response:** The BLM believes it is appropriate that penalties applied to grazing permits be directly linked to the abuse of the permission being granted by the permits. In the BLM's view, the most effective and direct deterrent to livestock trespassing onto Refuge lands or any other Federal lands is for the managers of those lands to take action directly against the violator. This is preferable to relying upon "secondary" sanctions against the violator's BLM permit.

The BLM does not disagree that the threat of additional penalty against an operator's BLM permit for violation of another Federal or State agency's regulations has deterrence value. Violation of Federal and State law and regulation already carry penalties. To include additional penalty in the grazing regulations unintentionally and unfairly treats grazing permittees inequitably. The present regulations single out a particular use for additional penalty to which other violators are not subject. It is not anticipated that the proposed change will have any effect on lands adjacent to BLM-managed lands. Furthermore, as noted above, existing law should be sufficient to protect against trespass.

The proposed change will clarify the instances where conviction or violation of a limited number of Federal or State laws or regulations pertaining to health or the environment may subject a permittee to penalties under 4140.1(c)(1). The BLM does not believe this is as significant a change as the commenter seems to believe. Under both the present regulation and the proposed regulation: the same limited number of prohibited acts is listed, conviction or violation has to occur and there cannot be any outstanding appeals

pending, the authorized officer's action to impose an additional penalty is discretionary, and the violation has to be associated with permitted grazing use. The clarification is that the action has to occur on the allotment associated with the grazing permit rather than "where public lands administered by the Bureau of Land Management is involved or affected." Since the limited lists of Prohibited Acts appearing in subsection 4140.1(c)(1) have penalties and enforcement mechanisms administered by other agencies, there has been some confusion as to whether potential loss of a grazing permit should be faced for conviction or violation of the subset of Prohibited Acts. As a result, there is a concern that, as presently written, this provision could result in unintended or unfair consequences. The BLM believes that in limited instances of violation of Prohibited Acts, it is an effective deterrent to rely on BLM authority to take action against a trespasser directly for actions occurring on the allotment rather than to rely on secondary penalties linked to activities outside of the grazing allotment. While threatened additional penalty may serve as an additional deterrent, it is very difficult to measure the environmental impact resulting from a subjective deterrent in this instance.

The BLM remains committed to cooperating with Refuge and other Federal and State land managers on a case-by-case basis to address incidents of livestock grazing trespass that emanate from BLM lands. The BLM believes that the actions arising from such cooperation would result in the most effective on-the-ground solution to the concerns raised by the comment.

Finally, the proposed rule change would not prevent the BLM from penalizing a permittee if the permittee unlawfully trespasses on another allotment. Nor would the proposed revisions prohibit the BLM from penalizing a permittee by altering his or her permit if convicted of destroying government property on Federal lands other than on his or her allotment (43 CFR Section 4170.1).

#### **5.4.30 Administrative Appeals, Stays of Appeals, and Judicial Matters**

**Comment:** One comment stated that the BLM should clarify exactly which terms and conditions in a permit or lease resulting from a biological opinion are appealable to the Office of Hearings and Appeals (OHA).

**Response:** 43 CFR Section 4130 (b)(1) of the proposed rule included a provision that specified that the terms and conditions mandated by a biological opinion are not subject to review by OHA and are therefore not appealable. As explained on page 5-114 of the FEIS, the BLM is removing paragraph (b)(1) because the Secretarial memorandums provide sufficient clarity regarding the inability of OHA to review the merits of biological advice from the Fish and Wildlife Service. The proposed regulatory language reflects Departmental policy as explained in two 1993 Secretarial memorandums. These memorandums state that the OHA has no authority under existing delegation to review the merits of biological opinions.

**Comment:** Another comment stated that an appeal to OHA should not be allowed for stipulations resulting from interagency programmatic consultations, or from interagency

coordination intended to substitute for formal consultation. The commenter expressed concern that if these stipulations could be removed through appeal, reinitiation of formal consultation or renegotiation of interagency agreements may be required, which would negate the streamlining efforts by both the BLM and the Fish and Wildlife Service.

**Response:** Issues of OHA jurisdiction are better addressed in the OHA regulations or through Secretarial directives. The BLM maintains the responsibility to avoid jeopardizing the continued existence of any listed species and will formally consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service whenever appropriate.

**Comment:** One comment suggested that the rule be amended to state that although biological assessments are not decisions that can be protested or appealed, the facts and findings of biological assessments may be challenged in a grazing protest or appeal.

**Response:** 43 CFR Section 4160.1(d) of the proposed rule states that a biological assessment prepared for the purposes of an Endangered Species Act consultation or conference is not a decision for purposes of protest or appeal. As explained on page 5-129 of the FEIS, this provision ensures consistency with the ESA regulations, which define biological assessments as documents that evaluate the potential effects of an action or management proposal on listed or proposed species and designated or proposed critical habitat. Biological assessments are not documents that authorize an action. As such, biological assessments—including their findings—cannot be protested or appealed. The BLM believes that the proposed rule is clear and appropriate in this regard and does not agree with the comment's proposal.

**Comment:** One comment stated that whether grazing may continue while an administrative stay is in effect is a decision that should be based on what is best for the resource. A similar comment stated that maintaining or improving rangeland health should be the overriding concern in grazing management, including how the range is managed during appeal. Another comment asked specifically that the BLM clarify how threatened and endangered species would be protected when grazing continues during the Office of Hearings and Appeals' (OHA) consideration of an appeal and how any loss of species or habitat would be restored once the appeal is resolved.

**Response:** 43 CFR Section 4160.4(b) of the proposed rule clarifies that in some situations grazing may continue when a decision on appeal has been stayed by OHA. The BLM believes that actively managing the use of the rangelands and not automatically halting grazing when a stay is issued is consistent with the BLM's obligations under the Federal Land Policy Management Act and the Taylor Grazing Act. Moreover, as discussed on pages 5-131 to 5-132 of the FEIS, the proposed rule recognizes the continuing nature of grazing operations and is consistent with the Administrative Procedure Act's requirement that "a license with reference to an activity of a continuing nature" does not expire until an agency makes a new determination, 5 U.S.C. 558.

As discussed on page 5-132 of the FEIS, in response to comments, the BLM plans to limit the application of paragraph (b) to certain types of grazing decisions—those that modify terms and conditions of a permit or lease during its current term or during the renewal process, and those that deny a permit or lease to a preference transferee, or offer a preference transferee a permit or lease with terms and conditions that differ from those in the previous permit or lease. In addition, as noted on page 5-132 of the FEIS, the BLM is entirely removing proposed paragraph 4160.4(c) from the rule.

The BLM agrees that the condition of the rangeland and protection of listed species must be taken into consideration in making grazing decisions and in instances where there is a stay. The BLM takes these into account in making grazing decisions and, when necessary to protect resources or species, can issue a decision that is effective immediately (43 CFR 1440.3-3(b)). The Board also has the flexibility to condition any stay so that resources and species are protected (43 CFR 4.21(b)(4)).

### **5.4.35 Miscellaneous Comments**

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

**Response:** There is adequate direction provided in the Endangered Species Act and in the Fish and Wildlife Service and National Marine Fisheries Service regulations on these requirements. The BLM will continue to use the procedures specified in Manual 6840 to fulfill its responsibilities under the ESA and coordinate with other agencies.

**Comment:** One comment expressed concern with the adverse impacts of invasive plants on native ecosystems. The commenter stated that “failure to comply with the use of certified weed–seed free forage, grain, straw, or mulch when required by the authorized officer” (presently only included in Modified Alternative 3) should be included as a prohibited act under the Proposed Action.

**Response:** The BLM supports State and local weed–seed free forage, grain, and mulch programs; will continue to develop and implement a nationwide weed–seed free forage, grain, and mulch policy for the public lands; and will continue to work closely with State and local governments to implement their weed–seed free programs. We agree that promoting the use of weed–seed free forage products will help control the introduction and spread of invasive and noxious plants. However, the BLM has decided not to pursue adding a prohibited act to 43 CFR section 4140.1(b) addressing noncompliance with weed–seed free forage requirements on public lands at this time.

**Comment:** One comment stated that the BLM “subverted” the National Environmental Policy Act (NEPA) process by issuing the DEIS after the proposed rule was published.

**Response:** The DEIS was available to the public approximately 1 month after the proposed rule was published in the *Federal Register*. The 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 and the proposed rule were available early enough in the process to be useful to the BLM and the public in their deliberations.

**Comment:** This same comment also stated that the BLM “subverted” the NEPA process by editing an internal administrative review copy of the draft EIS (DEIS) so that the published DEIS did not include language written by two BLM employees who were professional resource specialists. According to the comment, the edited version of the DEIS concealed significant adverse effects on wildlife, biodiversity, and special status species. The comment stated further that the editing prevented the BLM from taking a “hard look” at environmental consequences of the proposed rule, and resulted in an unlawful post-hoc rationalization.

**Response:** The BLM did not “subvert” the NEPA process by editing the administrative review copy of the DEIS. Consistent with the BLM’s customary practice, staff scientists and analysts prepared preliminary drafts of portion of the DEIS, then circulated their preliminary drafts among their colleagues. Comments were exchanged, edits were made, and the DEIS was finalized. These steps were taken in an effort to produce a factually accurate, scientifically sound, and reasoned DEIS. The administrative review copy represents a “snapshot” of the BLM’s deliberative process. The text identified by the commenter was revised for legitimate reasons.

Some of the revisions corrected misstatements about the proposed rule. For example, the administrative review copy stated that upland and riparian habitats would continue to decline because the proposed rule would worsen an “already burdensome appeals process” and decrease the BLM’s “ability to control illegal activities on public lands.” In fact, the proposed rule would not alter the “appeals process,” but would merely remove provisions from the grazing regulations that were redundant with regulations of the Office of Hearings and Appeals. With respect to illegal activities on public lands, the proposed rule would provide that prohibited acts on grazing allotments would constitute violations of the grazing regulations, but would not prevent the BLM from enforcing other regulatory or statutory provisions on other public lands.

The administrative review copy also concluded that the proposed rule would “greatly [diminish] the ability of the BLM to regulate grazing,” to the detriment of wildlife, because it would defer to State water law. In fact, deference to State water law is an element of an existing regulation (43 CFR 4120.3–9) and would not be new under the proposed rule. Moreover, even if State water law in Nevada or elsewhere prohibits the BLM from holding water rights for the purpose of watering livestock, it does not necessarily prohibit the BLM from holding water rights for other beneficial uses, such as for wildlife, wildlife habitats, and recreation

Other types of errors in the administrative review copy are mischaracterizations of legal requirements that led to imprecise analyses. For example, the administrative review copy stated that “the increasing and burdensome administrative procedural requirements for assessment and for acquisition of monitoring data...abrogate our responsibility for management of water quality as codified in Section 313 of the Water Quality Act of 1987 (P.L. 100-4); and further, committed to by [sic] designation by most [sic] as a “Designated Management Agency.” Delaying modification of grazing prescriptions when an[d] where warranted and/or mitigation of damages created by failure to implement a Best Management Practices (BMP’s) iterative process will continue to stress western watersheds.”

Section 313 of the Water Quality Act of 1987 amended various civil penalty provisions of the Federal Water Pollution Control Act (FWPCA) that are not administered by the BLM and are not relevant to federally permitted grazing. If the authors of the administrative review copy intended to refer to nonpoint source pollution that may result from livestock grazing, the appropriate citation might have been section 313 of the FWPCA, 33 USC 1323, which generally requires the BLM to comply with State water pollution laws when engaged in an activity that may result in the runoff of pollutants. *National Wildlife Federation v. BLM*, 151 IBLA 66 (1999) (setting aside and remanding grazing decision for further NEPA analysis of impacts on a “unique water” covered by Section 313.)

The proposed rule’s effects on “best management practices” would be negligible. Conformance with guidelines (described as “best management practices” in the 1995 rule at 60 Fed. Reg. at 9899) would be the first part of a “determination” under 43 CFR 4180.2 through an assessment process. Assessment is one of the quickest methods of supporting a determination. The second part of a 4180.2 determination is focused on finding an effective way to correct any nonconformance by identifying the cause. The proposed rule would require this part of the determination to be supported by new or existing monitoring data.

Monitoring can be more painstaking than assessment, and it can take longer. However, the stakes are higher at this second step. If the diagnosis is incorrect, the remedy will be ineffective. The adverse environmental effects of an incorrect diagnosis are likely to be longer lasting than the increment of extra time that would be needed to collect monitoring data.

Another example of an imprecise analysis was a statement that proposed revisions of subpart 4180, as well as a proposal to phase in some changes in active use, would be “delaying tactics [and] could result in a protracted 7-year period for full implementation and change and this would result in a long-term adverse impact upon wildlife and biological diversity, including threatened and endangered and special status species...Present BLM funding and staffing levels do not provide adequate resources for even minimal monitoring and the additional monitoring requirement will further burden the grazing decision process.”

These proposed provisions are not “delaying tactics,” as explained at sections 5.4.9, 5.4.14, and 5.4.15 of the FEIS. The proposed rule and the existing regulations provide discretion to begin changing active use, or to close a grazing allotment, when necessary for the protection of natural resource. BLM funding and staffing levels are issues that arise in annual budget development, and the BLM plans to work regularly to ensure that data collection remains a priority. With regard to the timeframe for taking action under subpart 4180, the BLM anticipates that taking additional time to formulate, propose, and analyze an appropriate action would improve decision making, and thus improve rangeland health in the long term.

The BLM anticipates that these aspects of the proposed rule will have incremental environmental effects. For example, reliance on monitoring data is not new to the grazing program. At present, changes in grazing use may be supported by “monitoring, field observations, ecological site inventory, or other data acceptable to the authorized officer.” 43 CFR 4110.3. Decreases in grazing use must be supported by monitoring or field observation. 43 CFR 4110.3-2. Allotment management plans and resource activity plans “shall” provide for monitoring. 43 CFR 4120.2. Thus, monitoring is already an acceptable methodology for collecting data under the grazing regulations. To the extent authorized officers already collect monitoring data to support determinations under section 4180.2, the proposed rule would have no environmental effect. To the extent authorized officers currently rely on faster methods of data collection, the proposed rule could slow down the process of making determinations and thus have the potential to cause adverse environmental effects in the short term. However, these effects would be mitigated to the extent existing monitoring data may be sufficient to support determinations, and to the extent the collection of higher quality data results in more effective and more appropriate action.

The proposed rule’s effects would also be mitigated because of the requirement to “take appropriate action as soon as practicable” after making a determination under 43 CFR 4180.2. The proposed rule would not compel an authorized officer to wait 24 months before taking action, and the existing regulation would compel an authorized officer to take action more quickly if practicable.

The administrative review copy associated “a protracted 7-year period” with “full implementation and change,” and with “a long-term, adverse impact upon wildlife resources and biological diversity.” This analysis fails to take into account another core provision of the existing regulations that is not changed by the proposed rule, namely, the definition of “appropriate action” as “implementing actions pursuant to subparts 4110, 4120, 4130, and 4160 that will result in significant progress toward fulfillment of the standards and significant progress toward conformance with the guidelines.” Proposed 43 CFR 4180.2(c)(3). When a BLM field manager determines that “appropriate action” is necessary, it is that manager’s literal responsibility to formulate, propose, and analyze action that “will result in significant progress.”

The BLM has learned that information is not always available to measure rangeland health, to discern the cause or causes for what is observed, or to make a decision that will

ensure significant progress. The proposed rule would improve the BLM's ability to make positive changes on the ground by improving its ability to obtain accurate information and make sound decisions. These provisions in some instances will take more time to implement than was projected when subpart 4180 was promulgated. However, they are not "delaying tactics" because they are accompanied by core provisions that continue to define the benchmarks for healthy rangelands.

Other misstatements and analytical errors in the administrative review copy pertained to the proposed rule's definition of "interested public," to proposed regulations that would no longer require the participation of the interested public in routine decisions such as permit renewals, and to provisions of the proposed rule that would require cooperation with Tribal, State, County, or local grazing boards. The administrative review copy stated that these proposals would "limit the ability of environmental groups to participate in the appeals process in the interest of wildlife....This should result in long-term adverse impacts to wildlife and special status species." With respect to grazing boards, the administrative review copy stated that the proposed rule would "give greater emphasis to local entities that favor extraction of forage and water resources at the expense of wildlife and biological diversity [and] give local entities great influence over decision making that national interest who are excluded from this venue."

It is important to note that the proposed rule would not prevent or limit the ability of an environmental group, or any other interested public, to "participate in the appeals process." Pursuant to 43 CFR 4160.1, the BLM would continue to provide copies of proposed and final grazing decisions to all members of the interested public. They would then have an opportunity to seek administrative remedies.

Moreover, as explained at section 5.4.19 of the FEIS, it would not be difficult to obtain and maintain "interested public" status, nor would there be any shortage of opportunities for the interested public to provide input on BLM's development, analysis, and modification of range improvement plans, range development programs, Allotment Management Plans, Resource Management Plans (RMPSs) and RMP amendments, and NEPA documents. Participation in these planning decisions provides an opportunity to influence more routine decisions (for example, the modification of permits and leases), which must be consistent with land use plans. In addition, to the extent practicable, the BLM would continue to seek the views of the interested public on reports and evaluations that are used 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. Proposed 43 CFR 4130.3-3(b). Finally, cooperation with government-established grazing boards would be undertaken in compliance with applicable laws and be in addition to—not "at the expense of"—participation by environmental groups in planning and decision making.

The revisions of the administrative review copy were not post-hoc rationalizations. They were made before the DEIS was finalized, and they preceded the issuance of a final rule. The administrative review copy was revised in order to correct erroneous interpretations of the proposed rule, correct misstatements of law, and improve its logic. Revision was necessary to fully consider and disclose the environmental effects of the proposed rule.

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

**Response:** Administrative provisions, such as those in the proposed rule, do not raise the comprehensive, programwide issues raised in this comment. As discussed on page 3-64 of the FEIS, the BLM recognizes its responsibility to manage heritage and cultural resources, including sacred sites, under the National Historic Preservation Act and other authorities (e.g., Executive Order 13007, “Indian Sacred Sites”). Pages 3-64 and 3-65 of the FEIS also explain how inventory, protection, stabilization, and enhancement of cultural resources have become integral parts of BLM management practices and planning initiatives. The BLM does not believe any additional analysis is necessary. Beginning on page 4-41, the FEIS discusses the potential impacts of the proposed revisions on heritage resources. For example, the FEIS notes that new project developments will continue to be analyzed for effects on heritage resources on a case-by-case basis. Moreover, the FEIS notes that for field office planning efforts and in accordance with BLM Manual 8100, The Foundations for Managing Cultural Resources, the BLM will continue to address livestock grazing impacts at the land use or allotment management planning level and conduct cultural resource surveys before taking a management action that could damage heritage resources. Historic and prehistoric sites found during such surveys would be protected in accordance with the National Historic Preservation Act of 1966 and other laws or executive orders, as stated at 36 CFR Part 800.

The FEIS also states that Tribal consultation begins as soon as possible in any case where it seems likely that the nature or location of the activity could affect Native American interests or concerns. Finally, 43 CFR Section 4120.5-2(c) of the proposed rule provides that the BLM will cooperate with Tribal agencies, including Tribal grazing boards, in reviewing range improvements and allotment management plans on public lands. During such Tribal consultation, Tribes may submit information about all sites, including natural features such as springs and surface waters that have cultural or religious significance; the BLM may consider such information in making decisions about grazing.

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

**Response:** The FEIS adequately evaluates and discloses the effects of the proposed rule on cultural resources. For example, as noted in the preceding response, page 4-41 of the

FEIS discusses the potential impacts of the proposed revisions to the grazing regulations on heritage resources. The FEIS notes there that new project developments will continue to be analyzed for effects on heritage resources on a case-by-case basis and that the impacts on such resources from grazing will be analyzed at the land use or allotment management planning level. The BLM disagrees with the comment's assertion that review of individual range improvement projects will not be sufficient for assessing grazing impacts on historic properties since, as discussed on page 3-64 of the FEIS, before authorizing surface disturbance the BLM must identify cultural properties that are eligible for inclusion in the National Register of Historic Places and consider the effects of the proposed action through the consultation process in Section 106 of the National Historic Preservation Act of 1966.

The BLM notes that this rulemaking does not constitute an "undertaking" as defined in 36 CFR 800.16. The regulations established by the Advisory Council for Historic Preservation make clear that once an agency determines there is no undertaking, or that its undertaking has no potential to affect historic properties, the agency has no further Section 106 obligations.

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# Appendix G. Effects Determination Under the ESA

## I. Background Information

The purpose of this document is to evaluate the 2005 *Proposed Revisions to Grazing Regulations for the Public Lands (Proposed Revisions)* for potential effects to Endangered Species Act (ESA) listed, proposed, and candidate species and to determine if reinitiation of consultation on the 1995 Rangeland Reform grazing revisions is warranted. The *Proposed Revisions* provide clarification and changes to eighteen administrative components of Rangeland Reform '94. The BLM determined, and the Services concurred, the administrative components of Rangeland Reform '94 were “no effect” (1994 Biological Assessment (BA) pages 35–38; 1994 Biological Opinion (BO) pages 27–29). The basis for the consultation in 1994 was to evaluate the effects of Rangeland Reform, including the standards and guidelines of the proposed action on federally listed and proposed species (see 1994 BA, page 30). In 1994, the BLM requested formal consultation on the national standards and guidelines since it was determined that they “May Affect” ESA-listed and proposed species. The 1994 BO concluded that component of the proposed action would not jeopardize the continued existence of listed or proposed species, and would not likely result in the destruction or adverse modification of designated or proposed critical habitat.

The Final Environmental Impact Statement for Proposed Revisions to Grazing Regulations for the Public Lands (FES 04-39), issued June, 2005, documents the ecological, cultural, social, and economic effects that would result from revising the Bureau of Land Management’s (BLM) grazing regulations (43 CFR Part 4100—Grazing Administration, Exclusive of Alaska), which were last revised in 1995. These regulations govern the administration of grazing on BLM lands in the western continental United States. The proposed action is designed to address eighteen discrete issues in the administration of livestock grazing under these regulations.

The proposed action proposes no changes to the 1995 grazing regulation revisions (analyzed in Rangeland Reform '94 Final Environmental Impact Statement, USDI-BLM, 1994) other than those that are administrative, adds no fundamentally new regulatory topics, and removes no substantial sections of the regulations that were the basis for the “no effect” determination and concurrence in 1994. The original substantive components of Rangeland Reform '94 remain intact based on the retention of national requirements, known as the Fundamentals of Rangeland Health, and the requirement that livestock grazing shall conform with locally developed State or regional standards and guidelines for livestock grazing, or, if no standards and guidelines are developed, then with “fallback” standards and guidelines. The Fundamentals of Rangeland Health, as defined in 43 CFR §4180.1, remain unchanged as follows:

- 1) Watersheds are in, or are making significant progress toward, properly functioning physical condition, including their upland, riparian-wetland, and aquatic components; soil and plant conditions support infiltration, soil moisture storage, and the release of water that are in balance with climate and landform and maintain or improve water quality, water quantity, and timing and duration of flow.

- 2) Ecological processes, including the hydrologic cycle, nutrient cycle, and energy flow, are maintained, or there is significant progress toward their attainment, in order to support healthy biotic populations and communities.
- 3) Water quality complies with State water quality standards and achieves, or is making significant progress toward achieving, established BLM management objectives such as meeting wildlife needs.
- 4) 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.

The basis for the 1994 effects determination of “May Affect” is stated in the 1994 BA:

“Standards and Guidelines would be developed at a State or regional level, at which time section 7 consultation/conference will be initiated, within 18 months of the record of decision. If State or regional standards and guidelines are not developed within that timeframe, BLM national standards and guidelines will apply. BLM national standards and guidelines will result in effects if they are implemented at the grazing allotment level. BLM is requesting formal consultation since the abovementioned portion of the proposed action may affect threatened, endangered, or proposed species, or their critical or proposed habitat.” (1994 BA page 41)

The BO concluded the action is not likely to jeopardize listed species, and is not likely to result in the destruction or adverse modification of critical habitat. The basis for this conclusion as stated in the BO remains unchanged by the 2005 revisions as follows:

Rangeland Reform '94 sets forth policy and regulations on a programmatic level. Later, BLM regional and State level of standard and guideline development will undergo NEPA compliance procedures. Furthermore, in the event that BLM regional or State level standards and guidelines are not developed within 18 months, fallback standards and guidelines contained in Rangeland Reform '94 will be implemented subject to compliance with NEPA and ESA (1994 BO, page 20).

Following promulgation of the 1995 grazing regulation revisions, the BLM, in consultation with the Resource Advisory Councils, developed regional and State-level standards and guidelines for all areas (except the California Desert District, which operates under the fallback standards and guidelines), which then were approved by the Secretary. The 2005 proposed revisions do not change any aspect or management requirement of these standards and guidelines.

The *Proposed Revisions* of the administrative components of Rangeland Reform '94 do not themselves authorize actions. Subsequent project-level actions and decisions that may affect ESA-listed or proposed species will be subject to section 7 consultation or conference. The regulations require compliance with other applicable law, including the Endangered Species Act. In the event a grazing action does not allow attainment of management objectives and results in unforeseen impacts, the regulations under 43 CFR 4110.3-3 (b)(i)(ii) allow a Federal officer to issue decisions with immediate full force and effect, thus timeframes for implementing actions established under the *Proposed Revisions* can be superseded.

## II. Analysis of Effects of Revision Provisions

Eighteen discrete revisions are proposed to clarify the application and implementation of the administrative components of Rangeland Reform '94. The following is a description of these revisions with a statement of potential effect.

- 1) **Documentation of Social, Economic, and Cultural Considerations when the BLM adjusts livestock forage allocations:**  
Specifically emphasizes this aspect of BLM's NEPA compliance process by stating that the BLM will consider, and when appropriate, document its analysis in these areas to ensure consistent documentation in the administrative record. There is no resource effect, or federally listed species effect, from this change, as it is strictly administrative in nature.
  
- 2) **Implementation of Changes in Grazing Use:**  
Inserts a regulatory provision that if the BLM decides to change a forage allocation and the change is 10% or more of the current active use, the BLM will implement the change over a 5-year period. The provision is subject to the exceptions under the proposed final regulations at 43 CFR 4110.3-3(a)(1)(ii) and 4110.3-3(b)(1)(i) and (ii). These exceptions would override the 5-year provision when the BLM reaches agreement to implement the change in less than 5 years, or if the change must be made in less than 5 years if necessary to comply with applicable law, or if the authorized officer determines and documents that the soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, insect infestation; or, that continued grazing use poses an imminent likelihood of significant resource damage. The "applicable law" provision is specified in the FEIS to include the example of a biological opinion under Section 7 of the ESA (§2.2.2, page 2-19). ESA compliance would take precedence and the 5-year phase-in would not be applied in that instance. Thus, any potential unanticipated effects to federally listed species would be precluded as a result of specifying a 5-year implementation schedule for active use reductions that are 10% or more; hence this administrative provision is "no effect."
  
- 3) **Range Improvement Ownership:**  
Changes the ownership status of range improvements completed under a Cooperative Range Improvement Agreement from: a) title being solely in the name of the United States; and b) documenting "a permittee's or lessee's interest in contributed funds, labor, and materials" for purposes of facilitating assignments of right, title and interest in the improvements to a successor permittee or to help determine legally required compensation to the grazing operator in the event that "the grazing permit or lease is cancelled in order to devote the lands covered by the permit to another public purpose;" to: a) "cooperators and the United States will share title in proportion to their initial contribution to on-the-ground project development and construction costs" (43 CFR 4120.3-2(b)); and b) documenting "a permittee's or lessee's interest in contributed funds, labor, and materials" for purposes of facilitating assignments of right, title and interest in the improvements to a successor permittee or to help determine legally required compensation to the grazing operator in the event that "the grazing permit or lease is cancelled in order to devote the lands covered by the permit to another public purpose." All other provisions from the 1994 regulations remain in place. Shared title to these improvements expressly does not convey to the permittee either right to exclusive use of the improvement or title to the underlying lands themselves. The authorized officer retains management authorities including the design, construction, and maintenance criteria for the range improvement and may require permittees or lessees to remove range improvements if they are no longer helping to achieve land use plan or allotment goals and objectives. Therefore, this provision has no effect on federally listed or proposed species.

- 4) **Cooperation with State, local, and County Established Grazing Boards:**  
Codifies the generally applied practice of cooperating with State, County, or local government-established grazing boards where they exist, and adds Tribal grazing boards to this list. The provision makes no change to the functions or responsibilities of the authorized officer in managing grazing use as it would apply to federally listed species on public lands. Therefore, this provision has no effect on federally listed or proposed species.
  
- 5) **Temporary Nonuse:**  
This revision provides minor administrative changes to provisions that allow the BLM to authorize a permittee to not use all or part of the grazing use authorized by their grazing permit or lease (a.k.a. “nonuse”). The key feature is the removal of the provision that limits the BLM’s ability to approve nonuse for no more than 3 consecutive years. The new provision would provide that the BLM may approve applications for nonuse on a year-to-year basis indefinitely for the legitimate purposes described which include, 1) natural resource conservation, enhancement, or protection, including more rapid progress toward meeting resource condition objectives or attainment of rangeland health standards; or 2) the business or personal needs of the permittee or lessee (43 CFR 4130.4(e)(2)(i) and (ii)). No aspect of this provision limits the ability of the authorized officer in managing grazing use as it would apply to federally listed species on public lands. Therefore, this provision has no effect on federally listed or proposed species.
  
- 6) **Basis for Rangeland Health Determinations:**  
Clarifies present policy and procedural guidance, which recommends that both standards assessments and monitoring data be used as the basis for making a determination as to causes for not achieving standards or conforming to guidelines. The rule is intended to ensure that the BLM employ monitoring data in its identification of the cause(s) for not meeting one or more standards (current livestock grazing, recreation activities, oil and gas development, changed fire frequency, etc.) so that appropriate action can be taken to make progress toward achieving the unmet standards. If livestock grazing is implicated, the authorized officer retains under 43 CFR 4110.3-3 the authority to effect immediate grazing modifications where warranted to comply with applicable law and as described in subparts (b)(1)(i) and (ii) of that section. Therefore, this provision has no effect on federally listed or proposed species.
  
- 7) **Timeframe for Taking Action to Meet Rangeland Health Standards:**  
In those instances where the BLM determines that existing grazing management practices or grazing levels are a significant contributing factor to not achieving standards or conforming to guidelines, this provision extends the timeframe for the authorized officer to issue a grazing decision or sign an applicable grazing agreement to implement appropriate action that will result in achievement or significant progress towards achievement of standards and conformance to guidelines from “as soon as practicable, but not later than the start of the next grazing year” to “as soon as practicable, but not later than 24 months.” This 24-month provision seeks to accommodate typical timeframes required to complete coordination requirements, NEPA documentation, and regulatory compliance with other agencies that are associated with such actions. The BLM proposes to replace the first paragraph of 43 CFR 4180.1 as described in section 2.2.8, but leave in place the fundamentals as approved in 1995. This change would, among other things eliminate the current redundancy in requiring the authorized officer to take “appropriate action” both under the fundamentals as well as the standards and guidelines and allow the BLM to focus on implementing the standards and guidelines. Regardless, in specific cases where the authorized officer determines that changes to grazing use must occur immediately to protect resources, or to comply with other applicable law, the authorized officer has the authority to invoke 43 CFR 4110.3-3(b)(i)(ii). Therefore, these provisions do not limit the functions or responsibilities of the authorized officer in managing on-the-ground grazing use as it would apply to federally listed species on public lands. Consequently, these provisions have no effect on federally listed or proposed species.

8) Conservation Use:

Deletes all reference to and provisions regarding the issuance of “conservation use” permits (which would authorize no grazing for extended periods up to 10 years) in conformance with 1999 10<sup>th</sup> Circuit Court decision which found that the Secretary is not authorized to issue such permits. Provisions for temporary nonuse (see revision number 5 above) are expanded to improve the BLM’s flexibility to approve applications for nonuse to meet business or personal needs of the grazing operator, or when the BLM concurs that nonuse is warranted for natural resource conservation. In addition, the 3-consecutive-year limit on nonuse is removed, thus expanding use of this tool. Deletion of the “conservation use” terminology has no effect on federally listed or proposed species.

9) Definition of Grazing Preference, Permitted Use, and Active Use:

The “grazing preference” definition is expanded to include both the livestock forage allocation on public lands as well as the priority for receipt of that allocation, which is attached to the grazing operator’s base property. The “permitted use” terminology is deleted in favor of “grazing preference,” “preference,” or “active use.” The “active use” definition is modified to clarify its reference to livestock carrying capacity and resource conditions and not to forage that had been allocated at some point in the past. These definition changes are strictly administrative in nature to ensure consistency in various regulatory contexts and therefore have no effect on grazing management practices or to federally listed or proposed species.

10) Definition and Role of the Interested Public:

Definition: Defines “interested public” as an individual, group, or organization that has: (1)(i) Submitted a written request to the BLM to be provided an opportunity to be involved in the decision-making process as to a specific allotment; and (ii) Followed up that request by submitting written comments as to management of a specific allotment, or otherwise participated in the decision-making process as to a specific allotment, if the 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. This provision has no effect on federally listed or proposed species.

Role: The provision segregates plan-level activities from those activities considered day-to-day, removing the regulatory requirements for consultation, cooperation, and coordination with the interested public for day-to-day management activities. Consultation, cooperation, and coordination with the interested public requirements remain in effect for apportioning additional forage, developing or modifying allotment management plans, planning range developments or improvements, and for review and comment on grazing management evaluation reports. The provision provides the authorized officer with increased flexibility to manage day-to-day operations in response to changing conditions on an allotment through the season without the delays inherent in the consultation, cooperation, and coordination process. The provision makes no change to the functions or responsibilities of the authorized officer in managing grazing use as it would apply to federally listed species on public lands. This provision has no effect on federally listed or proposed species.

11) Livestock Water Rights:

Provides that the BLM will acquire livestock water rights on public lands per State law and removes the requirement that such rights be acquired in the name of the United States *to the extent allowed* by State law. The provision applies to water rights for stock watering only and is intended to clarify and broaden the BLM’s administrative options, including joint ownership of water rights with permittees and lessees. This is particularly applicable in States which allow the United States to acquire 100% of a livestock water right in that under the revised provision, the BLM would no longer be required by regulation to acquire 100% of the livestock water right. This provision would not affect the BLM’s ability to file for water rights for uses other than livestock water. Previously acquired water rights in the name of the United States are unaffected

by this provision. The BLM retains the ability to protest livestock and other water rights filings where they conflict with management objectives such as those which may include conservation of federally listed species or their habitats, therefore this provision has no effect on federally listed or proposed species.

**12) Satisfactory Performance of Permittee or Lessee:**

Articulates specific criteria for determining satisfactory record of performance and clarifies that the scope of the criteria that the BLM would consider is limited to these. The revision consists of moving an existing section from one subpart of the regulations (43 CFR 4110-Qualifications) to another (43 CFR 4130-Authorizing Grazing Use) and clarification of language. This revision would make no change to the functions or responsibilities of the authorized officer in managing grazing use as it would apply to federally listed species on public lands. Therefore, this provision has no effect on federally listed or proposed species.

**13) Changes in Grazing Use Within Terms and Conditions of Permit or Lease:**

Defines the terminology of “temporary changes within the terms and conditions of the permit or lease” as changes to the number of livestock and/or period of use which could occur within 14 days prior to the grazing begin date or 14 days after the grazing end date but which does not exceed “active” use. Begin/end dates and active use refer to those specified by the permit or lease. The provision allows for minor adjustments in grazing use in response to seasonal variations in range “readiness” as plant growth is dictated by weather factors. The provision makes no change to the functions or responsibilities of the authorized officer in managing grazing use as it would apply to federally listed species on public lands. Therefore, this provision has no effect on federally listed or proposed species.

**14) Service Charges:**

Outlines a cost structure for permit processing. This administrative process adjustment does not influence on-the-ground management activities and therefore has no effect on federally listed or proposed species.

**15) Prohibited Acts:**

Specifies that prohibited acts identified under 43 CFR 4140.1 and subject to the civil penalties under 4170.1 are limited to those acts prohibited “on public lands” (for those listed under 4140.1(a)), “on BLM-administered lands” (for those listed under 4140.1(b)), and “on an allotment where he is authorized to graze under a BLM permit or lease” (for those listed under 4140.1(c)). Previous references to lands subject to the provisions of this section were, respectively, “public lands and other lands administered by the Bureau of Land management”, “related to rangelands”, and “where public land administered by the Bureau of Land Management is involved or affected.” The new language removes ambiguity inherent in the previous terminology making clear the precise extent and scope of authority of the regulation to the authorized officer, the permittee or lessee, and for interpretation in the courts. All permittees, lessees, and authorized officers remain subject to the prohibitions of other authorities such as Section 9 of the Endangered Species Act, and the Bald Eagle Protection Act, and to the authorities of other agencies in enforcing those regulations. Therefore, this provision has no effect on federally listed species.

**16) Enable Decision Approving Nonrenewable Grazing Use to be Issued Effective Immediately**

Allows the BLM to issue a decision to authorize nonrenewable grazing use effective immediately when necessary for orderly administration of the public lands. This provision augments existing regulation that the BLM may authorize nonrenewable grazing use when forage is temporarily available, provided that this use is consistent with multiple use objectives and does not interfere with existing livestock operations on the public lands. The culmination of this process would be the issuance of a decision to authorize the nonrenewable grazing use, or to deny authorization. Under this revision, a decision to authorize nonrenewable use could then be issued effective

immediately. Such authority might be invoked if the forage being authorized for use is transient in nature—such as may occur in annual rangelands, ephemeral rangelands, or perennial rangelands in a “disclimax” state that are dominated by exotic annual grass—and would no longer have nutritional value following the standard 75-day period allowed for receipt of decision appeal and OHA determination on a petition for stay of the decision. This provision does not negate the standing requirement that the BLM first must conduct all applicable agency processes and procedures to ensure compliance with applicable law, including NEPA and the ESA, prior to issuing a permit authorizing nonrenewable grazing use. Therefore, this provision has no effect on federally listed or proposed species.

- 17) **Grazing Use Pending Resolution of Appeals When Decision Has Been Stayed:** Maintains existing management with respect to grazing use in allotments where grazing decisions that affect a grazing permit or lease have been stayed by the Office of Hearings and Appeals (OHA). This provision recognizes that jurisdiction under stay is not under the purview of the authorized officer and, because it renders the stayed decision inoperative, retains OHA (and USDI) jurisdiction over the appeal, thus providing a more comprehensive administrative record should the appeal be elevated to district court following exhaustion of administrative remedies. The authorized officer retains the authority to make decisions effective immediately under 43 CFR 4110.3-3, 4130.6-2(b), or 4150.2(d). Therefore this provision has no effect on federally listed or proposed species.

- 18) **Treatment of Biological Assessments and Evaluations in the Grazing Decision-Making Process:** Reestablishes that the culmination of the BLM’s grazing decision-making process is a single, appealable decision, that being the final grazing decision itself. Resource assessments, such as a biological assessment prepared in accordance with section 7 of the Endangered Species Act (viewing those assessments as intermediate steps in a decision-making process), are not appealable. The permittee or lessee would still retain the ability to review and provide comment on biological assessments (if that BA was used to support a decision action to increase or decrease grazing use or otherwise change the terms and conditions of a grazing permit or lease) under 43 CFR 4130.3-3(b) and rights for input into the Section 7 process under the “applicant status” provisions of that act. This rule would preclude the potential for major delays in the decision-making process and expedite Section 7 compliance. Therefore, the provision has no effect on federally listed or proposed species.

### **III. Determination**

The basis for the section 7 consultation on Rangeland Reform '94 was to evaluate the potential effects of the Rangeland Reform, including standards and guidelines of the then-proposed grazing regulations on federally listed and proposed species and proposed and designated critical habitat (see 1994 BA, page 30). The BLM determined, and the Services concurred, that the administrative components of the Rangeland Reform '94 would have “no effect” on species or habitat. With respect to the standards and guidelines, the BLM requested formal consultation since that component might affect listed or proposed species or designated or proposed critical habitat (see 1994 BA, page 41). The subsequent 1994 biological opinion concluded that the proposed action was not likely to jeopardize the continued existence of listed or proposed species and was not likely to result in the destruction or adverse modification of designated or proposed critical habitat. With regards to the standards and guidelines and any anticipated incidental take, the biological opinion stated:

...the proposed action, by itself, is one of many steps in the planning process by the action agencies. The likelihood of incidental take, and the identification of reasonable and prudent measures and terms and conditions to minimize such take, are addressed at many of these planning and implementation levels. These levels could include, but are not limited to, development and implementation of standards and guidelines, adoption and amendment of land use plans and land and resource management plans, and approval and carrying out of site-specific projects....Incidental take and reasonable and prudent measures may be identified adequately through subsequent action subject to section 7 consultations.

Although the 2005 FEIS recognizes the potential for some short-term environmental impacts from grazing programs, these impacts do not translate into an effect to ESA-listed species through proposed revision of the administrative procedures or the fundamentals. Effects to species may occur through implementation of the standards and guidelines as previously consulted upon in 1994, but the standards and guidelines remain unchanged in this proposal. The consultation requirement in the 1994 Biological Opinion for planning and implementation levels ensures actions are consistent with the 1994 no jeopardy or adverse modification conclusion. Additional assurances are afforded through the regulations at 43 CFR 4110.3-3(b), which provide BLM managers with explicit authority to make grazing decisions immediately effective “if resources on the public lands require immediate protection or if continued grazing use poses an imminent likelihood of significant resource damage.” Moreover, the regulations (43 CFR 4110.3-3(a)) recognize that compliance with applicable law, such as the ESA, can require the immediate implementation of changes in grazing use. Thus, plan, program, and site-level section 7 compliance and full adherence with the terms and conditions provided therein are the main operation mechanisms through which effects to listed species are managed, and remain within the functions and responsibilities of the authorized officer in managing grazing use as it would apply to federally listed species on public lands.

The 1994 biological opinion describes the conditions that must occur to trigger reinitiation of consultation on the grazing regulations. One of these conditions is if “...the agency action is subsequently modified in a manner that causes an effect to listed species or critical habitat that was not considered in this opinion.” As described above, the proposed revisions do not change the existing grazing provisions related to standards and guidelines. Thus, the 1994 biological opinion remains valid with respect to the standards and guidelines (see Biological Opinion and Conference Report for Rangeland Reform '94 in Appendix T of Rangeland Reform '94, Final Environmental Impact Statement). As also described previously, the proposed revisions provide clarification and changes to eighteen administrative components of the existing grazing regulations, and none of these eighteen administrative changes will have an effect on listed or proposed species or proposed or designated critical habitat. Reinitiation of consultation is therefore not triggered. Thus, for the reasons described above, the BLM has fulfilled its obligations under section 7 of the ESA and has determined that the proposed revisions will have no effect on listed or proposed species or proposed or designated critical habitat.