

BEFORE THE SECRETARY OF THE DEPARTMENT OF INTERIOR  
AND UNITED STATES DEPARTMENT OF AGRICULTURE

**PETITION FOR RULEMAKING TO AMEND GRAZING FEE REGULATIONS TO  
REFLECT THE FAIR MARKET VALUE OF FEDERAL FORAGE**

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Respectfully submitted by

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**BEFORE THE SECRETARY OF THE DEPARTMENT OF INTERIOR  
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CENTER FOR BIOLOGICAL DIVERSITY,  
SAGEBRUSH SEA CAMPAIGN, FOREST  
GUARDIANS, GREAT OLD BROADS FOR  
WILDERNESS, OREGON NATURAL DESERT  
ASSOCIATION, AND THE WESTERN  
WATERSHEDS PROJECT,

Petitioners,

SECRETARY OF THE DEPARTMENT OF  
AGRICULTURE AND SECRETARY OF THE  
DEPARTMENT OF THE INTERIOR,

Responsible Officials.

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) **PETITION FOR RULEMAKING**  
) **TO AMEND GRAZING FEE**  
) **REGULATIONS TO REFLECT**  
) **THE FAIR MARKET VALUE OF**  
) **FEDERAL FORAGE**

**I. INTRODUCTION**

The Center for Biological Diversity is joined by the Sagebrush Sea Campaign, Forest Guardians, Great Old Broads for Wilderness, Oregon Natural Desert Association, and the Western Watersheds Project (collectively “Petitioners”) to hereby petition the United States Secretaries of the Department of Agriculture and Department of the Interior to initiate rulemaking to amend current grazing fee regulations pursuant to the Administrative Procedure Act,<sup>1</sup> 7 C.F.R. §1.28,<sup>2</sup> and 43 C.F.R. § 14.1-4.<sup>3</sup>

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<sup>1</sup> 5 U.S.C. 553(e) (2004) requires federal agencies to “give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”

<sup>2</sup> 7 C.F.R. § 1.28 (2004) states: “Petitions by interested persons in accordance with 5 U.S.C. 553(e) for the issuance, amendment or repeal of a rule may be filed with the official that issued or is authorized to issue the rule. All

Petitioners request that the Secretaries of Interior (DOI) and Agriculture (USDA) establish a fair and just fee for livestock grazing on certain federal lands in the sixteen western states.<sup>4</sup> Federal statutes require federal programs to be “self-sustaining to the extent possible,” and that the grazing fee be reasonable and equitable to the United States and federal grazing permittees and lessees. However, the current grazing fee charged by the Bureau of Land Management (BLM) and Forest Service on western public lands does not recoup even one-seventh of the expense of managing BLM and Forest Service grazing programs on federal lands, and it does not reflect the market rate for forage.<sup>5</sup>

The current grazing fee formula fails to track changes in market rates, overemphasizes “ability to pay” factors, and merely approximates what willing grazing permittees and lessees would pay for public lands forage, while DOI and USDA have failed to investigate what rate a willing seller of forage would otherwise agree to rent forage resources. For this reason, grazing fees paid on Forest Service and BLM lands continue to fall further behind grazing fees charged for equivalent forage on state and private lands.

Current federal grazing fee receipts fail to recover even 15 percent of the direct and indirect costs of administering the federal grazing program on Forest Service and BLM lands, which include vegetation restoration, range “improvements,” some, but not all, resource monitoring, and salaries and overhead expenses for range management personnel. The low fee also does not repay the ecological costs of public lands grazing: impaired watersheds and water quality; increased

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such petitions will be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions.”

<sup>3</sup> 43 C.F.R. § 14.2 (2004) states: “Under the Administrative Procedure Act, any person may petition for the issuance, amendment, or repeal of a rule (5 U.S.C. 553(e)). The petition will be addressed to the Secretary of the Interior, U.S. Department of the Interior, Washington, D.C. 20240. It will identify the rule requested to be repealed or provide the text of a proposed rule or amendment and include reasons in support of the petition.”

<sup>4</sup> This petition for rulemaking concerns the grazing fee charged on national forests and some grasslands managed by the Forest Service, and lands managed for livestock grazing both within grazing districts (administered under Section 3 of the Taylor Grazing Act), outside grazing districts (administered under Section 15 of the Taylor Grazing Act) and on Oregon and California Railroad grant lands managed by the Bureau of Land Management in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming.

<sup>5</sup> GAO (2005). Livestock grazing: Federal expenditures and receipts vary depending on the agency and the purpose of the fee charged. GAO-05-869. Government Accountability Office. Washington, DC: 21-22, 30.

flammability of forests; proliferation of invasive species; degraded wildlife habitat; and species imperilment. The ecological costs alone expose the exorbitantly high costs of renting public lands forage that supplies only two percent of the total feed consumed by beef cattle in the 48 contiguous states.<sup>6</sup>

The Forest Service/BLM grazing fee is also much less than rates charged on other federal, state and private lands in the West. The grazing fee charged on National Forest System and BLM lands in 2004 was \$1.43 per animal unit month (AUM), one-ninth of the average fee charged on equivalent private, non-irrigated grazing lands in the seventeen western states, where fees ranged from \$8.00 to \$23.00 per AUM and the average fee was \$13.40.<sup>7</sup> Grazing fees charged on lands managed by the National Park Service, U.S. Fish and Wildlife Service, Department of Energy, Bureau of Reclamation, and Department of Defense are generally higher than on BLM and Forest Service lands.<sup>8</sup> The Forest Service/BLM fee is also less than those charged on state lands, where the average fee in sixteen western states (excluding Texas) in 2004 was \$14.30.<sup>9</sup> In 2005, the federal fee was increased to \$1.79 per AUM.

The large discrepancy of fees across land ownership boundaries and the clear indication that livestock producers can and do pay higher prices for range forage on other federal and non-federal lands demonstrates that an increase in the federal grazing fee in the West would not significantly disrupt or cause harm to the livestock industry, but would help to stabilize it by creating a consistent market price for western forage resources, while generating more revenue to DOI and USDA to help offset the significant annual deficit in federal spending from operating their grazing programs.

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<sup>6</sup> Joyce, L. (1989). *An Analysis of the Range Forage Situation in the United States: 1989-2040*. USDA-Forest Service, Rocky Mountain Range and Forest Exp. Stn. Ft. Collins, CO: 136.

<sup>7</sup> The average fee charged for private forage in sixteen western states (excluding Texas) in 2004 was \$13.03. GAO (2005): 39-40.

<sup>8</sup> See GAO (2005).

<sup>9</sup> National Agricultural Statistics Service (2005). "Grazing Fee Rates for Cattle by Selected States and Regions" (table). Page 65 in *AGRICULTURAL STATISTICS*. USDA-National Agricultural Statistics Service. Washington, DC. (Jan. 5, 2005). (<http://usda.mannlib.cornell.edu/reports/nassr/price/pap-bb/2005/agpr0105.pdf>).

This petition for rulemaking presents the recent regulatory history of the grazing fee, the ecological cost of livestock grazing on public lands, and the statutory and other bases for amending the current fee formula, and proposes amended fee regulations for the Secretaries' consideration.

## II. BACKGROUND

The Department of Interior's Bureau of Land Management and the Department of Agriculture's Forest Service manage approximately 70 percent of all federally owned lands. Approximately 93 percent, or 167 million acres, of public lands managed by the BLM (exclusive of Alaska) are available for livestock grazing.<sup>10</sup> The Forest Service permits grazing on over 92 million acres of National Forest System lands in the western states, including national forests and grasslands.<sup>11</sup> Both agencies charge a fee for livestock grazing; the Forest Service has charged grazing fees since 1906, and the BLM has charged grazing fees since 1936.<sup>12</sup> Grazing is also permitted to a lesser extent and for a fee on some federal lands managed by the National Park Service, U.S. Fish and Wildlife Agency, Bureau of Reclamation, Department of Energy, the Army, Army Corps of Engineers, Air Force and Navy.<sup>13</sup>

The Forest Service/BLM grazing fee is calculated based on a formula established in the Public Rangelands Improvement Act of 1978. The fee is set annually, and is charged per "animal unit month" (AUM), or the amount of forage required to sustain one "animal unit" for one month.<sup>14</sup> An "animal unit" is defined as one cow and her calf, one horse, or five sheep or goats. More acreage per AUM is needed to sustain livestock on sparsely vegetated landscapes, whereas less acreage is required to sustain the same number of animals on densely vegetated lands. The price paid for the privilege of grazing a certain number of AUMs is the same, regardless of the acres involved. Over

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<sup>10</sup> Moskowitz, K. and C. Romaniello (2002). Assessing the Full Cost of the Federal Grazing Program. Report prepared for the Center for Biological Diversity. Tucson, AZ: 6.

<sup>11</sup> GAO (2005): 72-75.

<sup>12</sup> Cody, B.A. (1996). Grazing Fees: An Overview. CRS Report no. 96-450 ENR. Congressional Research Service. Washington, DC: 1.

<sup>13</sup> GAO (2005): 2.

<sup>14</sup> "Animal unit month" and "head month" are different measurements, the latter defined by the Forest Service as "the time in months that livestock spend on National Forest System land," that the agency uses for billing purposes.

12.6 million AUMs were permitted or leased on BLM lands in 2004;<sup>15</sup> and more than 9.1 million AUMs were approved on National Forest System lands in the West in 2004.<sup>16</sup>

Grazing fees received by the Forest Service and BLM reimburse only a small portion of the cost of administering their grazing program. Fifty percent of grazing fees collected from BLM and Forest Service lands are deposited into a “range betterment fund” that is used to construct range improvements, such as fences, cattle guards and water supplies, but which also may be applied to projects such as erosion and weed control that can help ameliorate some of the damaging effects of livestock grazing. Portions of the remaining fifty percent are allocated between the states and counties where the fees are collected and the U.S. Treasury, depending on the class of lands generating the receipts.<sup>17</sup>

### **III. STATUTORY BASES OF THE GRAZING FEE**

#### ***A. Independent Offices Appropriation Act of 1952***

The Independent Offices Appropriation Act (IOAA) authorizes federal agencies to charge user fees for federal services and resources, especially for agencies that have no other statutory or other guidance for setting fees.<sup>18</sup> The IOAA grants agencies the authority to charge fees for specific

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<sup>15</sup> GAO (2005): 71.

<sup>16</sup> GAO (2005): 75.

<sup>17</sup> Cody (1996) Grazing Fees: An Overview; 43 U.S.C. § 315(i) (2004); 16 U.S.C. §580(h) (2004).

<sup>18</sup> 31 U.S.C. § 9701(b) (2004): “The head of each agency . . . may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—

- (1) fair; and
- (2) based on--
  - (A) the costs to the Government;
  - (B) the value of the service or thing to the recipient;
  - (C) public policy or interest served; and
  - (D) other relevant facts.”

services provided to “identifiable recipients.”<sup>19</sup> The act also states an over-arching goal that federal agencies be “self-sustaining to the extent possible.”<sup>20</sup>

Full cost recovery, and even fees that generate revenue greater than full cost recovery, are consistent with the “self-sustaining” provision of the IOAA, regardless of incidental public benefits flowing from the provision of the service.<sup>21</sup> Case law has established that federal fees should reflect the value of the service provided to a recipient, including the costs of conducting Environmental Impact Statements.<sup>22</sup> Fair market value is not the only consideration in setting fees, however, and agencies have discretion to charge fees that bear only a “reasonable” relationship to the cost of services rendered.<sup>23</sup> Statutes specific to federal public lands grazing codify the considerations that the Secretaries must include in setting a fee for grazing livestock on public lands.

The Office of Management and Budget (OMB) issued a memorandum “to be applied by agencies in their assessment of user charges under the IOAA” to the extent permitted by law and not inconsistent with federal statutes or executive orders that address user charges.<sup>24</sup> This new memorandum states that the objectives of the United States government are to “ensure that each service, sale or use of Government goods or resources provided by an agency to specific recipients be self-sustaining”; and “promote efficient allocation of the Nation’s resources by establishing

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<sup>19</sup> Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 349 (1974), limiting Federal Power Commission fee collections to “specific charges for specific services to specific individuals or companies.”

<sup>20</sup> 31 U.S.C. § 9701(a) (2004): “It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.”

<sup>21</sup> Mississippi Power & Light Co. v United States Nuclear Regulatory Comm., 601 F2d 223 (1979, CA5), 13 Env't Rep Cas 1569, 9 ELR 20655, 51 ALR Fed 571, cert. den. 444 US 1102 (1980), 62 L Ed 2d 787, 100 S Ct 1066; Yosemite Park & Curry Co. v United States, 231 Ct Cl 393 (1982), 686 F2d 925 (finding that fees based on market comparison were within the statute and need not be restricted to cost recovery alone).

<sup>22</sup> Sohio Transp. Co. v United States, 5 Cl. Ct 620 (1984), 21 Env't Rep Cas 2010, aff'd 766 F2d 499 (1985, CA FC), 15 ELR 20778.

<sup>23</sup> Public Service Co. v Andrus, 433 F Supp 144 (1977, DC Colo.), 10 Env't Rep Cas 1951, 7 ELR 20715 (finding that BLM need set only reasonable fees); Mountain States Tel. & Tel. Co. v United States, 204 Ct Cl 521 (1974), 499 F2d 611 (that fees for siting a communication tower on Forest Service land need not only consider fair market value).

<sup>24</sup> Office of Management and Budget. Memorandum for Heads of Executive Departments and Establishments, re. User charges. Circular A-25 (revised) (undated, unpaginated). Available at <http://www.whitehouse.gov/omb/circulars/a025/a025.html>.

charges for special benefits provided to the recipient that are at least as great as costs to the Government for providing the special benefits.”<sup>25</sup>

***B. Forest Service Organic Administration Act of 1897, Granger-Thye Act of 1950, Multiple-Use Sustained Yield Act of 1960, and National Forest Management Act of 1976***

The Forest Service Organic Administration Act provided for the establishment of national forests, but offered no guidance for setting grazing fees on national forests (although the Forest Service began charging grazing fees as early as 1906).<sup>26</sup> The Granger-Thye Act of 1950 authorized the Forest Service to issue grazing permits on Forest Service lands,<sup>27</sup> and use grazing receipts for range improvements,<sup>28</sup> but provided no other direction on grazing fees. The National Forest Management Act of 1976<sup>29</sup> (NFMA) provided for a planning process for national forests, but also did not give specific direction for grazing fees.

More specific direction for the Forest Service grazing fee was provided in an OMB circular issued in 1959 regarding agency implementation of the IOAA. The Forest Service codified the memorandum in its regulations, which directed the agency to charge “fair market value” for forage

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<sup>25</sup> Id.

<sup>26</sup> Cody, B.A. and P. Baldwin (1998). *Grazing Fees and Rangeland Management*. CRS Report no. 96-006 ENR. Congressional Research Service. Washington, DC. (Feb. 20, 1998) (unpaginated).

<sup>27</sup> 16 U.S.C. § 580(l) (2004): “The Secretary of Agriculture in regulating grazing on the national forests and other lands administered by him in connection therewith is authorized, upon such terms and conditions as he may deem proper, to issue permits for the grazing of livestock for periods not exceeding ten years and renewals thereof.”

<sup>28</sup> 16 U.S.C. § 580(h) (2004): “Of the moneys received from grazing fees by the Treasury from each national forest during each fiscal year there shall be available at the end thereof when appropriated by Congress an amount equivalent to 2 cents per animal-month for sheep and goats and 10 cents per animal-month for other kinds of livestock under permit on such national forest during the calendar year in which the fiscal year begins, which appropriated amount shall be available until expended on such national forest, under such regulations as the Secretary of Agriculture may prescribe, for

- (1) artificial revegetation, including the collection or purchase of necessary seed;
- (2) construction and maintenance of drift or division fences and stock-watering places, bridges, corrals, driveways, or other necessary range improvements;
- (3) control of range-destroying rodents; or
- (4) eradication of poisonous plants and noxious weeds, in order to protect or improve the future productivity of the range.”

<sup>29</sup> 16 U.S.C. §§ 1600-1614 (2004).

resources. The memorandum forbid charging fees based on “permit value that may be capitalized into the permit holder's private ranching operation”;<sup>30</sup> fees were to be based only on the service provided, not on the market value of the permit.

The 1959 circular was eventually replaced by the updated memorandum described above (see *Independent Offices Appropriation Act of 1952*). However, the IOAA and OMB’s memoranda currently have little affect on Forest Service grazing fees as the agency has promulgated separate regulations for charging grazing fees in the western states in accordance with the Public Rangelands Improvement Act and as directed by an Executive Order (see below) that are well below market value.<sup>31</sup>

### ***C. Taylor Grazing Act of 1934***

Public lands not managed by the Forest Service (or other departments or agencies) were open for grazing use without regulation and free of charge until the Taylor Grazing Act (TGA) was enacted in 1934.<sup>32</sup> The purposes of the TGA, as stated in the preamble, are to prevent injury and soil deterioration on public lands caused by overgrazing, to provide a structure for the use, improvement and management of public lands, and to stabilize the livestock grazing industry. Agencies implementing the TGA have failed to meet these objectives, since overgrazing continues to cause long-term ecological harm to public lands and public lands livestock grazing remains an economically unstable industry.<sup>33</sup>

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<sup>30</sup> 36 C.F.R. § 222.50(b) (2004): “Guiding establishment of fees are the law and general governmental policy as established by Bureau of the Budget (now, Office of Management and Budget) Circular A-25 of September 23, 1959, which directs that a fair market value be obtained for all services and resources provided the public through establishment of a system of reasonable fee charges, and that the users be afford [sic] equitable treatment. This policy precludes a monetary consideration in the fee structure for any permit value that may be capitalized into the permit holder's private ranching operation.”

<sup>31</sup> Grazing fees in national forests in the Eastern Region (Region 9) and Southern Region (Region 8) (including Texas) are established by separate regulatory formulae based on “fair market value” or competitive bidding. 36 C.F.R. § 222.53-54 (2004).

<sup>32</sup> 43 U.S.C. § 315 et seq. (2004).

<sup>33</sup> See Donahue, D.L. (1999). *THE WESTERN RANGE REVISITED*. University of Oklahoma Press, Norman, OK.

The TGA authorizes the Secretary of the Interior (through the BLM) to “issue or to cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of *reasonable* fees in each case to be fixed or determined from time to time in accordance with governing law.”<sup>34</sup>

#### ***D. Federal Land Policy and Management Act of 1976***

The Federal Land Policy and Management Act (FLPMA) initiated a policy of retention of (previously disposable) public lands, and thus the BLM’s role shifted from grazing administrator to public lands manager.<sup>35</sup> FLPMA explicitly set out the rulemaking authority of both the Secretary of Interior and the Secretary of Agriculture with respect to public lands, and declared as one of the policies under the Act that the “United States receive *fair market value* of the use of the public lands and their resources unless otherwise provided by statute.”<sup>36</sup> While FLPMA still identifies domestic livestock grazing as one of the specifically enumerated “principle or major uses” of public lands, it also mandates that public lands must be managed in a sustainable manner to “prevent any unnecessary or undue degradation of the lands.”<sup>37</sup>

To carry out these broad policy objectives, Congress directed both Secretaries to conduct a study to determine the value of grazing on public lands with the goal of establishing a “fee to be charged for domestic livestock grazing on such lands which is *equitable* to the United States and to the holders of grazing permits and leases on such lands.”<sup>38</sup> Congress gave them one year (until October 21, 1977) to report the results and submit “recommendations to implement a *reasonable*

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<sup>34</sup> 43 U.S.C. § 315(b) (2004) (emphasis added).

<sup>35</sup> 43 U.S.C. §§ 1701-1784 (2004).

<sup>36</sup> *Id.* at §§ 1740, 1701(a)(9), respectively (emphasis added).

<sup>37</sup> *Id.* at §§ 1732(b), 1702(l), respectively.

<sup>38</sup> *Id.* at § 1751(a) (emphasis added).

grazing fee schedule based upon such a study.”<sup>39</sup> The subsequent report contributed to the enactment of the Public Rangelands Improvement Act shortly thereafter.

### ***E. Public Rangelands Improvement Act of 1978***

In enacting the Public Rangelands Improvement Act (PRIA), Congress found that the unsatisfactory condition of public rangelands “can be addressed and corrected by an intensive public rangelands maintenance, management, and improvement program involving significant increases in levels of rangeland management and improvement funding for multiple-use values.”<sup>40</sup> Congress also found that “to prevent economic disruption and harm to the western livestock industry, it is in the public interest to charge a fee for livestock grazing permits and leases on the public lands which is based on a formula reflecting annual changes in the costs of production.”<sup>41</sup> Furthermore, Congress reaffirmed a national policy and commitment to “charge a fee for public grazing use which is *equitable* and reflects the concerns addressed . . . above.”<sup>42</sup>

In an attempt to meet these goals, Congress established a temporary fee formula for the Secretaries to use to charge “fair market value for public grazing” from 1979 until 1985.<sup>43</sup> The PRIA formula starts with a base fee of \$1.23 per AUM, and is adjusted annually by indices of livestock market prices and rancher operating costs, otherwise known as “ability to pay” factors. The formula is based on value of forage to ranchers rather than the cost to the taxpayer of providing the public lands grazing.<sup>44</sup>

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<sup>39</sup> Id. (emphasis added).

<sup>40</sup> 43 U.S.C. § 1901(a)(4) (2004).

<sup>41</sup> Id. at § 1901(a)(5).

<sup>42</sup> Id. at § 1901(b)(3) (emphasis added).

<sup>43</sup> 43 USC § 1905 (2004): “For the grazing years 1979 through 1985, the Secretaries of Agriculture and Interior shall charge the fee for domestic livestock grazing on the public rangelands which Congress finds represents the economic value of the use of the land to the user, and under which Congress finds fair market value for public grazing equals the \$1.23 base established by the 1966 Western Livestock Grazing Survey multiplied by the result of the Forage Value Index (computed annually from data supplied by the Economic Research Service) added to the Combined Index (Beef Cattle Price Index minus the Price Paid Index) and divided by 100: *Provided*, That the annual increase or decrease in such fee for any given year shall be limited to not more than plus or minus 25 per centum of the previous year’s fee.”

<sup>44</sup> Moskowitz and Romaniello (2002): 9.

PRIA directed the Secretaries to report to Congress “their evaluation of the fee established . . . and other grazing fee options, and their recommendations to implement a grazing fee schedule for 1986 and subsequent grazing years.”<sup>45</sup> The PRIA formula applied to public rangelands in the sixteen contiguous western states,<sup>46</sup> although the fee formula was based on production costs in eleven western states.

PRIA repeated the FLPMA provision that the fee be “equitable,” and reiterated FLPMA’s directive that the grazing fee be based on a formula that represented “fair market value” during the 1979-1985 period. Congress declared that fair market value would be achieved by the formula prescribed in PRIA, though this has not proven to be the case.<sup>47</sup>

#### **IV. ECOLOGICAL IMPACTS OF LIVESTOCK GRAZING ON PUBLIC LANDS**

The short- and long-term ecological impacts of livestock grazing on public lands are many and well understood. Although Congress has determined livestock production to be one of the acceptable multiple uses of federal public lands, it is important to note that the consequences of grazing are not just the fiscal debits considered above. The General Accounting Office (GAO) has reported that the current grazing fee formula does not meet an objective of providing a revenue base that can be used to better manage and improve the ecological health and productivity of federal lands.<sup>48</sup>

Agencies frequently cite insufficient funding for the lack of intensive resource monitoring and restoration activities on federal lands. However, these management activities are crucial to ensuring no undue harm to ecological resources. Wildlife and wildlife habitat, riparian corridors, migratory

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<sup>45</sup> 43 U.S.C. § 1908 (2004).

<sup>46</sup> Arizona, California, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. 43 U.S.C. § 1902(i) (2004).

<sup>47</sup> See Torrell, A., et al. (2001). An Evaluation of the PRIA Grazing Formula, paper presented at the Annual Meeting of the Society for Range Management; Feb. 17-23, 2001: Kailua-Kona, HI (“The 1977 Grazing Fee Study [commissioned by the USDI and USDA] stated that a desirable fee formula should prevent future discrepancies and adjust so that fair market value is charged in future years as well as the present. By this standard, the PRIA formula has not been a desirable fee formula.”)

<sup>48</sup> GAO (1991). Rangeland management: Current formula keeps grazing fees low. RCED-91-185BR. General Accounting Office. Washington, DC: 1.

bird flyways, grasslands, deserts, forests, native fish, soils, air, and scenic values are all adversely impacted by livestock grazing, and the costs to these fragile environmental resources from grazing are immense. The determination of grazing fees therefore represents a significant impact on the environment, and an environmental assessment (and possibly Environmental Impact Statement) should be prepared whenever changes to the fee are proposed.<sup>49</sup>

Livestock grazing damages native plants and the soil in which they germinate and take root. A review of 54 studies of arid grasslands throughout the West showed grazed areas averaged 80 percent more soil erosion, 24 percent less biomass, and 45 percent less coverage by biological soil crust than comparable ungrazed areas.<sup>50</sup> Biological soil crusts contain algae, lichens, mosses and microbes that reduce erosion, enhance water infiltration, fix nitrogen and prevent the spread of exotic weeds. These valuable soil crusts are reduced significantly in areas subjected to livestock grazing.<sup>51 52 53</sup>

Livestock grazing is especially detrimental to riparian areas, which are a limited and precious resource in the arid West. Riparian zones are characterized by ephemeral or perennial watercourses that sustain diverse vegetation, amphibian, avian, and mammalian communities. Livestock trample stream banks, damage tree seedlings and denude streamside vegetation in riparian zones.<sup>54</sup> Riparian vegetation often provides the bulk of forage for livestock on a public lands grazing allotment, and

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<sup>49</sup> See *NRDC v. Hodel and Lyng*, No. S-86-0548 (E.D. Cal. Oct. 13, 1987).

<sup>50</sup> Jones, A. (2000). Effects of cattle grazing on North American arid ecosystems: a quantitative review. *Western N. Amer. Natur.* 60: 155-164.

<sup>51</sup> Beymer, R. J., and J. M. Klopatek (1992). Effects of grazing on cryptogammic crusts in pinyon-juniper woodlands in Grand Canyon National Park. *Amer. Midland Natur.* 127: 139-148.

<sup>52</sup> Brotherson, J. D., S. R. Rushforth, J. R. Johansen (1983). Effects of long-term grazing on cryptogam crust cover in Navajo National Monument, Arizona. *J. Range Manage.* 36(5): 579-581.

<sup>53</sup> Brotherson, J. D. and S. R. Rushforth (1983). Influence of cryptogammic crusts on moisture relationships of soils in Navajo National Monument, Arizona. *Great Basin Natur.* 43(1): 73-78.

<sup>54</sup> Kauffman, J. B. and W. C. Krueger (1994). Livestock impacts on riparian plant communities and streamside management implications...a review. *J. Range Manage.* 37(5): 430-438.

the domestic animals usually only reluctantly move far from water sources.<sup>55</sup> A Bureau of Land Management report estimated that livestock had damaged 80 percent of the West's riparian areas.<sup>56</sup>

Livestock grazing also inhibits the recovery of degraded riparian areas: two separate studies concluded that tree seed and sapling survival were significantly reduced in grazed riparian areas in southeastern Arizona, compared to areas protected from livestock.<sup>57</sup> Trout recovered in Pacific Northwest streams closed to livestock,<sup>58</sup> and riparian canopy-dependent bird species increased 20-fold along the San Pedro River after cattle were removed in 1986.<sup>60</sup> Grazing fees that fail to recover the costs of livestock management are incapable of funding the restoration work that would help undo the damage caused by ongoing livestock production on public lands.

Additional impacts of livestock grazing on riparian areas are documented in a review of more than 120 published scientific studies that found:

- Reduced herbaceous cover, biomass, productivity and native species diversity (14 studies).
- Reduced diversity and abundance of native reptiles and amphibians (4 studies).
- Wider stream channels, less stable stream banks, and higher peak water flows (16 studies).
- Reduced soil fertility, water infiltration and resistance to erosion (12 studies).
- Higher water temperature and lower dissolved oxygen (5 studies).
- Reduced tree and shrub cover and biomass (8 studies).
- Shift from cold-water fish and aquatic invertebrates to warm-water species (8 studies).
- Higher water loads of sediments, nutrients and pathogens (10 studies).
- Lower water tables (2 studies).
- Shift from riparian bird species to upland-generalist species (6 studies).<sup>61</sup>

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<sup>55</sup> Holechek, J. L., R. D. Pieper, C. H. Herbet (1998). RANGE MANAGEMENT: PRINCIPLES AND PRACTICES. 3<sup>rd</sup> ed. Prentice Hall. Upper Saddle River, NJ: 256.

<sup>56</sup> Bureau of Land Management (1994). Rangeland Reform '94 Final Environmental Impact Statement. Bureau of Land Management. Washington, DC.

<sup>57</sup> Glinski, R. (1977). Regeneration and distribution of sycamore and cottonwood trees along Sonoita Creek, Santa Cruz County, Arizona. Tech. Rept. RM-43. USDA-Forest Service.

<sup>58</sup> Szaro, R. C. and C. P. Pase (1983). Short-term changes in a cottonwood-ash-willow association on a grazed and an ungrazed portion of Little Ash Creek in central Arizona. *J. Range Manage.* 36: 382-384.

<sup>59</sup> Bowers, W. B., A. Hosford, A. Oakley, C. Bond (1979). Wildlife habitat in managed rangelands in the Great Basin of northeastern Oregon. USDA-Forest Service.

<sup>60</sup> Krueper, D. J. (1993). Effects of land use practices on western riparian ecosystems. Pages 281-301 in D. M. Finch and P.W. Stangel (eds.). Status and Management of Neotropical Migratory Birds. Gen. Tech. Rept. RM-229. USDA-Forest Service, Rocky Mountain Forest and Range Exp. Stn. Fort Collins, CO.

<sup>61</sup> Belsky, J., A. Matzke, and S. Uselman (1999). Survey of livestock influences on stream and riparian ecosystems in the western United States. *J. Soil & Water Conserv.* 54: 419-431.

Livestock production has long-term physical impacts on watersheds. Livestock trampling and the subsequent loss of stabilizing vegetation from stream banks results in higher peak water flows, channel scouring, erosion and down-cutting, which in turn lower water tables, end or reduce permanent stream flows and dry out watersheds.<sup>62 63 64 65</sup> The degradation of riparian areas is especially harmful to riparian-dependent wildlife, and the fiscal costs of these effects are immeasurable.

The impacts of livestock production on riparian conditions go well beyond the immediate and direct effects within riparian areas and extend across entire watersheds. Livestock grazing in upland areas, even at modest levels, causes soil erosion, due to the destruction of stabilizing microbiological soil crusts and other destructive factors. Livestock compact soils, inhibiting aquifer recharge, which causes water to instead flow overland.<sup>66 67 68</sup> Vegetation that might slow overland runoff and decrease erosion is often removed by grazing.<sup>69</sup> Additionally, eroding soil and manure end up in streams, increasing sediment load, excessive nutrients and pathogen contamination in surface water.

Livestock production within watersheds also raises public health concerns. In 2003 the Natural Resources Defense Council (NRDC) published a report which assessed drinking water quality in nineteen cities, documenting a wide range of results including evidence of *Cryptosporidium* in the

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<sup>62</sup> Kovalchik, B. L., and W. Elmore (1992). Effects of cattle grazing systems on willow dominated plant associations in central Oregon. Pages 111-119 in W. P. Clary, E. D. McArthur, D. Bedunah, C.L. Wambolt (eds.). Proc. Symposium on Ecology and Management of Riparian Shrub Communities. Gen. Tech. Rept. INT-289. USDA, Intermountain Res. Stn. Odgen, UT.

<sup>63</sup> Rangeland Reform (1994).

<sup>64</sup> Trimble, S. W., and A. C. Mendel (1995). The cow as a geomorphic agent, a critical review. *Geomorphology* 13: 233-253.

<sup>65</sup> Belsky, J., A. Matzke, S. Uselman (1999): 419-431.

<sup>66</sup> Arnold, J. F. (1950). Changes in ponderosa pine-bunchgrass in northern Arizona resulting from pine regeneration and grazing. *J. Forestry* 48: 118-126.

<sup>67</sup> Johnson, W. M. (1956). The effect of grazing intensity on plant composition, vigor, and growth of pine-bunchgrass ranges in central Colorado. *Ecology* 37: 790-798.

<sup>68</sup> Jones (2000).

<sup>69</sup> Sharp, A. L., J. J. Bond, J. W. Neuberanger, A. R. Kuhlman, J. K. Lewis (1964). Runoff as affected by intensity of grazing on rangeland. *J. Soil & Water Conserv.* 19: 103-106.

drinking water supplies of five major cities and violations and monitoring deficiencies in at least seven cities.<sup>70</sup> Cattle are vectors of this type of bacteria and their presence within municipal watersheds threatens the health of drinking water downstream at the faucets of the American public. Indeed, a 1995 study found that, in a single year, more than 45 million Americans drank tap water from sources that contained *Cryptosporidium*.<sup>71</sup> Recent studies indicate that *Cryptosporidium* is present in 65–97 percent of surface waters (rivers, lakes, streams, and springs) tested throughout the country.<sup>72</sup> These high numbers are due in part to “non-point source pollutants,” such as animal feces.<sup>73</sup>

*Cryptosporidium* in drinking water is particularly dangerous for people with weakened immune systems, including infants, the elderly, and people with immune-system suppressing illnesses. Even microscopic amounts of the bacteria can make people seriously ill.<sup>74</sup> Symptoms of a *cryptosporidium* infection include nausea, vomiting, fever, headaches, watery diarrhea, and severe abdominal pain. There is no known effective treatment. The risk of water contamination from livestock grazing in municipal watersheds is an important issue to consider when assessing the reasonableness of livestock management on our public lands.

In addition to the impacts to soils, riparian areas, watersheds and water supplies, native wildlife are adversely affected by livestock on our public lands. In particular, species that are federally listed as “threatened” or “endangered” are affected by grazing practices. A Forest Service report

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<sup>70</sup> Natural Resource Defense Council. “What’s on tap? Grading drinking water in U.S. Cities.” (June 2003).

<sup>71</sup> Environmental Working Group, Natural Resources Defense Council (1995). “You Are What You Drink,” cited in J. Gerstenzang. “EPA Begins to Check Water for Deadly Microbe.” *San Francisco Chronicle* (May 3, 1996): A3.

<sup>72</sup> Rose, J. B. (1988). Occurrence and significance of *Cryptosporidium* in water. *J. Amer. Water Works Assoc.* 80: 53-58; J. B. Rose, C. P. Gerba, W. Jakubowski (1991). Survey of potable water supplies for *Cryptosporidium* and *Giardia*. *Environ. Sci. Technol.* 25: 1393-1400; M. W. LeChevallier, W. D. Norton, R. G. Lee (1991). Occurrence of *Giardia* and *Cryptosporidium* spp. in surface water supplies. *Appl. Environ Microbiol.* 57: 2610-2616; M. W. LeChevallier and R. H. Moser (1995). Occurrence of *Giardia* and *Cryptosporidium* in raw and finished drinking water. *J Amer. Water Works Assoc.* 87: 54-68; M. W. LeChevallier, W. D. Norton, R. G. Lee (1991). *Giardia* and *Cryptosporidium* spp. in filtered drinking water supplies. *Appl. Environ. Microbiol.* 57: 2617-2621.

<sup>73</sup> Hansen, N. R., H. Babcock, E. H. Clark (1988). *Controlling Nonpoint Source Water Pollution: A Citizen’s Handbook*. The Conservation Foundation. Washington, DC.

<sup>74</sup> See San Francisco Public Utilities Commission. Protozoa Parasites Fact Sheets: *Cryptosporidium*. (viewed Sept. 15, 2005; available at [http://sfwater.org/detail.cfm/MSID/51/MTO\\_ID/64/MCID/10/C\\_ID/676#cryptosporidium](http://sfwater.org/detail.cfm/MSID/51/MTO_ID/64/MCID/10/C_ID/676#cryptosporidium)).

summarizing threats to threatened and endangered species from 1976 to 1994 identified livestock grazing as a factor in the endangerment of 15 of the 27 species then listed as threatened or endangered in the Southwest.<sup>75</sup> In the western United States, species imperilment is often caused by habitat loss that is at least partially the result of habitat degradation and vegetation-type conversion associated with livestock production.<sup>76 77</sup> Many federally listed species are dependent upon the riparian areas which are historically and presently bearing the brunt of livestock production on public lands in the West.<sup>78</sup>

Other wildlife species are also negatively impacted by the presence of livestock on public lands. Native ungulate species must compete for browse and forage, water and space with domestic livestock. Studies have demonstrated adverse effects of livestock production on elk, deer, bighorn sheep, and pronghorn populations.<sup>79 80 81</sup>

Livestock grazing impacts wildlife not only through habitat degradation and competition for resources, but in a physical sense as well: fences, range “improvements” and distribution of non-native (forage, weed and predator) species cause harm to native animals. Wildlife are trapped by or impaled on fences, drown in stock-tanks and water developments, and are subject to increased

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<sup>75</sup> Flather, C. H., L. A. Joyce, C. A. Bloomgarden (1994). Species endangerment patterns in the United States. Gen. Tech. Rept. RM-241. USDA-Forest Service, Rocky Mountain Research Stn. Ft Collins, CO: 42.

<sup>76</sup> Langer, L. L. and C. H. Flather (1994). Biological diversity: Status and trends in the United States. Gen. Tech. Rept. RM-244. USDA-Forest Service, Rocky Mountain Research Stn. Fort Collins, CO.

<sup>77</sup> Rees, E. (1993). Threatened, endangered and sensitive species affected by livestock production: a preliminary survey of data available in ten western states. Audubon Society of Portland. Portland, OR.

<sup>78</sup> Johnson, A. S. (1989). “The Thin Green Line” *in* In Defense of Wildlife: Preserving Communities and Corridors. Defenders of Wildlife. Washington, D.C.

<sup>79</sup> Mackie, R. J. (1978). Impacts of livestock grazing on wild ungulates. Trans. N. Amer. Wildl. and Nat. Res. Conf. 43: 462-476.

<sup>80</sup> Ragotzkie, K. E. and J. A. Bailey (1991). Desert mule deer use of grazed and ungrazed habitats. J. Range Manage. 44: 487-490.

<sup>81</sup> McNay, M. E. and B. W. O'Gara (1982). Cattle-pronghorn interactions during the fawning season in northwestern Nevada. Pages 593-606 *in* J. M. Peek and P. D. Dalke (eds.). Proc. Wildlife-Livestock Relationships Symp. Univ. Idaho.; USDA-Forest Service, Wildl. Range Exp. Sta. Moscow, ID.

predation by non-native species which spread with livestock.<sup>82 83 84</sup> The price of these losses cannot be calculated; certainly, there is no grazing fee formula that addresses these unnecessary deaths.

Native plant species are also continually threatened by livestock grazing. Aside from direct impacts, including trampling and grazing, plants are subject to competition pressure with introduced forage species and non-native weeds that flourish with livestock disturbance.<sup>85</sup> Changes in fire regimes due to introduced vegetation also adversely impact native species.

Entire vegetation communities are altered by livestock production. In particular, the loss of grasslands throughout the West due to grazing and fire suppression has led to broad-scale ecotype conversions to woody shrub lands.<sup>86 87 88</sup> The landscape level changes of the last century are largely the result of grazing by large herds of domestic livestock and the inability of generally arid public lands to even marginally recover from this widespread abuse.

The scenic and wilderness values of public lands are difficult to quantify, but several studies have documented the diminished scenic and recreational values associated with public lands grazing. Preservation of land for environmental purposes has a higher value than the collection of grazing fees.<sup>89</sup>

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<sup>82</sup> Craig, T. H. and L. R. Powers (1978). Raptor mortality due to drowning in a livestock watering tank. *Condor* 78: 412.

<sup>83</sup> Knight, R. L., J. Skriletz, D. C. Ryan (1980). Four additional cases of bird mortality on barbed-wire fences. *Western Birds* 11: 202.

<sup>84</sup> Berry, K. H. (1979). Livestock grazing and the desert tortoise. Proc. 43rd N. Amer. Wildl. and Nat. Res. Conf.; Phoenix, AZ.

<sup>85</sup> Arnold, J. F. (1950): 118-126.

<sup>86</sup> Covington, W. W. and M. M. Moore (1992). Post-settlement changes in natural fire regimes: implications for restoration of old-growth ponderosa pine forests. Pages 81-99 in M. R. Kaufmann, W. H. Moir, R. L. Bassett (tech. coords.). *Old-Growth Forests in the Southwest and Rocky Mountain Regions: Proceedings of a Workshop*; Mar. 9-13, 1992; Portal, AZ. Gen. Tech. Rept. RM-213. USDA-Forest Service, Rocky Mountain Forest and Range Exp. Stn. Fort Collins, CO.

<sup>87</sup> Blackburn, W. H. and P. T. Tueller (1970). Pinyon and juniper invasion in black sagebrush communities in east-central Nevada. *Ecology* 51: 841-848.

<sup>88</sup> Belsky, A. J. and D. M. Blumenthal. 1997. Effects of livestock grazing on stand dynamics and soils in upland forests of the Interior West. *Conservation Biol.* 11 (3): 316-327.

<sup>89</sup> GAO (1991). Rangeland management: BLM's hot desert grazing program merits reconsideration. RCED-92-12. General Accounting Office. Washington, DC.

An additional consequence of livestock production on public lands is the impact of livestock on archeological resources and fossil remains. Federal agencies must assess resource damage to historical and cultural resources under the National Environmental Policy Act and the National Historic Preservation Act,<sup>90</sup> but this analysis does not preclude ongoing and permanent damage to undocumented sites or to artifacts scattered across the landscape. Artifacts are trampled, broken, and displaced by livestock.<sup>91</sup> The value of these non-renewable resources cannot be offset by grazing fees; however, increased revenue to federal agencies from a higher grazing fee may allow for further investigation and protection of these resources.

Unfortunately, resource monitoring on National Forests is inconsistent and range utilization compliance is not assured even when monitoring is conducted.<sup>92</sup> Utilization monitoring is only a small part of the ecological picture, and other impacts of livestock grazing are monitored with even less frequency. If the agencies do not have sufficient funding to monitor resource-extractive activities on our public lands, then these activities should not be permitted. A lack of resource monitoring data may lead to legal violations, and it makes it impossible to determine resource needs. Raising the grazing fee and reallocating resources to ecological monitoring would ensure that federal lands are not being unnecessarily abused by livestock grazing.

## **V. RECENT REGULATORY HISTORY OF THE GRAZING FEE**

### ***A. President Reagan's Executive Order Extended the Expired PRIA Fee Formula***

In February 1986, just as the PRIA formula was set to expire, President Reagan issued Executive Order 12548, which indefinitely extended the use of the PRIA fee formula past the trial deadline.<sup>93</sup> The Executive Order was issued in response to the requests of Congressional

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<sup>90</sup> 16 U.S.C. § 470 et seq. (2004).

<sup>91</sup> Osborn, A., S. Vetter, R. Hartley, L. Walsh, J. Brown (1987). Impacts of domestic livestock grazing on the archeological resources of Capitol Reef National Park, Utah. National Park Service Cooperative Report, Utah Proj. U86-NA-266N.

<sup>92</sup> Forest Guardians (2004). *Grazing Out of Control*. Forest Guardians. Santa Fe, NM.

<sup>93</sup> Executive Order 12548 (Feb. 14, 1986); *and see* Congl. Rec. 132 (14) (Feb. 17, 1986); *and* Congl. Rec. 132 (14) (Feb. 18, 1986) (address of Senator Malcolm Wallop in the Senate).

delegations from some Western states to extend the PRIA formula,<sup>94</sup> and due to the fact that the grazing fee study mandated by PRIA was produced too late for consideration by Congress in 1985.<sup>95</sup>

In March 1986, the Secretaries of Interior and Agriculture, acting on the Executive Order, issued new rules to continue the use of the PRIA formula, with the additional qualification that the fee would not be less than \$1.35 per AUM and carrying forth PRIA's provision that fees would not increase by more than 25 percent in any year.<sup>96</sup> In so doing the Secretaries claimed that, as the new grazing fee rules essentially preserved the status quo, they were not considered a major federal action requiring analysis and public input under the Administrative Procedure Act (APA) or National Environmental Policy Act (NEPA).<sup>97</sup>

However, in 1986 these fee notices were subject to a legal challenge resulting in a court order to the Secretaries to reopen their respective rulemakings for the fee and allow public participation in the rulemakings as required by the APA and NEPA.<sup>98</sup> The Secretaries subsequently issued notices of proposed rulemaking, solicited public comment and conducted court-ordered environmental assessments.

### ***B. Current Grazing Fee Set by 1988 Regulations***

In 1988, both Secretaries issued final rules that returned to the use of the same formula set out in PRIA for setting the grazing fee, claiming as direction FLPMA, PRIA and Reagan's Executive Order.<sup>99</sup>

In its rulemaking, the Secretary of Agriculture admitted on behalf of the Forest Service that the fee was significantly less than needed for full cost recovery for the agency's grazing program: "[i]n

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<sup>94</sup> 53 Fed. Reg. 2978 (Feb. 2, 1988).

<sup>95</sup> 53 Fed. Reg. 2984 (Feb. 2, 1988).

<sup>96</sup> 51 Fed. Reg. 8861 (Mar. 14, 1986); 51 Fed. Reg. 8564 (Mar. 12, 1986).

<sup>97</sup> *Id.*

<sup>98</sup> *NRDC v. Hodel and Lyng*, No. S-86-0548 (E.D. Cal. Oct. 13, 1987).

<sup>99</sup> 53 Fed. Reg. 2978 (Feb. 2, 1988); 53 Fed. Reg. 2984 (Feb. 2, 1988).

1986, to recover the total cost of the livestock grazing program on National Forest lands in the 16 Western states, it would have been necessary to collect \$3.57 per Animal Unit Month” compared to the \$1.35 actually charged.<sup>100</sup> The Secretary noted that “the prescribed formula annually recovers about one-third of the cost administering National Forest grazing permits in the 16 Western States.”<sup>101</sup> The Secretary also acknowledged that the PRIA formula was a double-counting formula,<sup>102</sup> that it was inequitable to non-National Forest System ranchers,<sup>103</sup> and that it was inequitable to states and counties that receive 25 percent of grazing fee receipts.<sup>104</sup>

### *C. Rangeland Reform: Changes Proposed to Flawed, Inequitable Fee*

Due in part to concerns over the grazing fee formula adopted by the Secretaries in 1988, Congress directed the Forest Service and the BLM to reevaluate the PRIA formula and other options in 1991.<sup>105</sup> The Secretaries’ 1992 update made yet another appraisal of the “fair market value” of federal forage, and the costs of the Forest Service and BLM grazing programs. According to the study, regional market value of private rangeland ranged from \$4.68 to \$10.26 per AUM while the cost to the U.S. Treasury of providing public lands grazing in FY1990 was between \$2.40 and \$3.24 per AUM on Forest Service lands and \$2.18 - \$3.21 for BLM rangeland. In contrast, the grazing fee calculated by the PRIA formula was \$1.97 per AUM that year, falling short of break-even price by up to \$1.27 per AUM, and falling short of market rates by up to \$8.29 per AUM for cattle.<sup>106</sup> In 1990, the grazing program cost the Treasury \$52.0 million, and the total may have been

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<sup>100</sup> 53 Fed. Reg. 2978 (Feb. 2, 1988).

<sup>101</sup> Id.

<sup>102</sup> Id. (“Some double counting of ability to pay and cost of production occurs through the addition of these components.”)

<sup>103</sup> Id. (“The proposed fee formula ...will not solve the broader equity issue of agricultural income because the grazing fee is only available to those livestock producers who are also users of National Forest and BLM administered public rangelands.”)

<sup>104</sup> Id. (“The proposed fee system has the least negative impact on local and state personal income because of the low fee level, but has the greatest impact on the level of receipts to States for roads and schools.”)

<sup>105</sup> Cody and Baldwin (1998) (unpaginated).

<sup>106</sup> Cody (1996): 3.

as high as \$200 million when the costs of federal activities that indirectly support public lands grazing are taken into account.<sup>107</sup>

In 1991, the General Accounting Office (later the Government Accountability Office: GAO) reported that “low [grazing] fees are *an inherent result* of the existing [fee] formula's design. The formula begins with a low base grazing fee value and adjusts this value in subsequent years using an index that heavily weights factors aimed at measuring rancher 'ability to pay.' The formula includes these ability-to-pay factors twice using a mathematical design that has served to suppress increases in the fee over time. As a result, the federal grazing fee is 15 percent lower now than it was 10 years ago. This contrasts with a 17-percent increase in private grazing land lease rates over the same period.”<sup>108</sup> The report detailed the precise error in the PRIA formula that results in double counting: “The inclusion of this separate index of profitability [Combined Index] *double-counts ability-to-pay* considerations already captured in the forage value index... The method ... [has] caused a growing gap between prices paid for forage by public lands ranchers and those without access to public lands. This is occurring even though public and private land ranchers face essentially the *same market conditions*.”<sup>109</sup> The “Combined Index” effectively subtracts “ability to pay” twice from the net index of change in value of public land forage.<sup>110</sup>

The 1991 GAO study also found that the PRIA formula “does not achieve an objective of recovering reasonable program costs...[or] of providing a revenue base that can be used to better manage and improve federal lands,” which was one of the principal objectives of PRIA.<sup>111</sup> The

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<sup>107</sup> Cody and Baldwin (1998) (unpaginated).

<sup>108</sup> GAO (1991) Current formula keeps grazing fees low, cover letter by James Duffus III, Director of Natural Resources Management Issues, GAO to Hon. Mike Synar, Chairman House subcommittee on Environment, Energy, and Natural Resources, dated June 11, 1991.

<sup>109</sup> Id. at 17 (emphasis added).

<sup>110</sup> The “Combined Index” was intended to estimate percentage change in the livestock producers' “ability to pay” grazing fees, and supposedly would incorporate “annual changes in the cost of production” as PRIA required. It is defined as the “Beef Cattle Price Index,” or the percentage change in revenue from the sale of beef cattle relative to the 1966 base year, minus the “Prices Paid Index,” or the percentage change in non-forage costs of all western farm production relative to the 1966 base year. Therefore, it is an index of the average relative change in net profitability of cattle production, not of costs of production alone. 43 U.S.C. § 1905 (2004).

<sup>111</sup> GAO (1991) Current formula keeps grazing fees low: 17.

GAO concluded that environmental harm was resulting from an inadequate fee revenue base to “better manage and improve federal lands” as required by FLPMA and PRIA.<sup>112</sup> GAO’s analysis indicated that elimination of the Combined Index from the flawed PRIA formula would remove erroneous double-counting of costs of production, while still satisfying PRIA’s policy of considering costs of production in setting grazing fees so as to prevent disruption and harm to the public lands livestock industry.

Faced with these studies and much other evidence of the increasing damage to public lands and resources from livestock grazing, the Secretaries proposed new rules under the joint banner of “Rangeland Reform” in 1994.<sup>113</sup> The Secretaries proposed to use only the Forage Value Index, or the percentage change in market value of private rangeland forage relative to the 1966 base year, and dispense with the Combined Index for the new fee formula, in line with recommendations from GAO and the Secretaries own studies. A new base rate for the base years of 1990-1992 of \$3.96 per AUM was estimated using the results of two separate studies of real market value of federal forage.<sup>114</sup> Rangeland Reform then proposed to adjust this value annually according to the Forage Value Index, although the resulting fee would be capped never to change by more than 25 percent per year.

Rangeland reform was predicted to significantly increase cost recovery for the Treasury: “[t]arget net revenues for the increase[d fee] were \$76 million over five years, beginning with an increase of \$6 million in 1994 up to \$35 million in 1997. (For comparison, net receipts for 1992 totaled approximately \$10.7 million)”<sup>115</sup>

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<sup>112</sup> Id.

<sup>113</sup> Rangeland Reform (1994), Appendix B; 59 Fed. Reg. 14314 (Mar. 25, 1994); 59 Fed. Reg. 22094 (Apr. 28, 1994) (proposed BLM rules); 59 Fed. Reg. 22094 (Apr. 28, 1994) (proposed Forest Service rules).

<sup>114</sup> Rangeland Reform (1994), Appendix C.

<sup>115</sup> Cody and Baldwin (1998) (unpaginated).

***D. The Secretaries Declined to Adopt New Fee Formula as Part of 1995 Rangeland Reform Grazing Regulations***

In February 1995, the Department of Interior issued a final notice that BLM “decided not to promulgate the fee increase provision of the proposed [Rangeland Reform] rule[s] in order to give the Congress the opportunity to hold additional hearings on this subject and to enact legislation addressing appropriate fees for grazing on public lands.”<sup>116</sup> In 1995, the BLM grazing fee of \$1.61 was set using the old formula according to the agencies’ 1988 regulations.<sup>117</sup> The BLM continues to use the old formula.

The Forest Service did not issue any comparable notice in the Federal Register to indicate that it also had abandoned the proposed fee rule, and would continue to set fees by its 1988 regulations as well.

In 2001, the federal grazing fee was \$1.35 per AUM, the lowest possible under the terms of PRIA and President Reagan’s Executive Order and significantly less than the \$2.39 predicted for 2001 by Rangeland Reform assuming that the PRIA formula would continue to be used (see Table 1). The current fee for 2005 grazing season, effective March 1, 2005, is only \$1.79.<sup>118</sup> By comparison, the average market rate for renting private non-irrigated rangeland in the 16 western states in 2004 was \$13.03/AUM.<sup>119</sup>

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<sup>116</sup> 60 Fed. Reg. 9899 (Feb. 22, 1995).

<sup>117</sup> 60 Fed. Reg. 6280 (Feb. 1, 1995).

<sup>118</sup> Associated Press. “BLM announces grazing fee increase on public lands.” *Casper Star Tribune* (Feb. 7, 2005).

<sup>119</sup> GAO (2005): 39-40.

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**Table 1. Federal Grazing Fee per Animal Unit Month on Forest Service and BLM Lands since 1980.**<sup>120</sup>

YEAR	FEE	YEAR	FEE	YEAR	FEE	YEAR	FEE
1980	\$2.36	1987	\$1.35	1994	\$1.98	2001	\$1.35
1981	\$2.31	1988	\$1.54	1995	\$1.61	2002	\$1.43
1982	\$1.86	1989	\$1.86	1996	\$1.35	2003	\$1.35
1983	\$1.40	1990	\$1.81	1997	\$1.35	2004	\$1.43
1984	\$1.37	1991	\$1.97	1998	\$1.35	2005	\$1.79
1985	\$1.35	1992	\$1.92	1999	\$1.35		
1986	\$1.35	1993	\$1.86	2000	\$1.35		

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***E. The Secretary of Interior Declined to Address Grazing Fee Changes in 2003 and 2005***

In December 2003, the BLM proposed to amend its grazing regulations to comport with recent court decisions concerning the 1995 Rangeland Reform regulations, and explicitly stated that “BLM does not want to open issues related to grazing fees at this time.”<sup>121</sup>

In June 2005, the BLM released a final Environmental Impact Statement (EIS) (dated October 2004) titled “Proposed Revisions to Grazing Regulations for the Public Lands,” in which the agency again declined to address grazing fees, but did reveal basic administrative costs of the BLM

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<sup>120</sup> Gorey, T. , Senior Public Affairs Specialist, Bureau of Land Management, pers. comm. with Greta Anderson, Center for Biological Diversity (Sep. 20, 2005); C. H. Vincent (1996). *Grazing Fees: An Overview*. Congressional Research Service. Washington, DC: 3 (June 4, 1996).

<sup>121</sup> 68 Fed. Reg. 68455 (Dec. 8, 2003).

grazing program. The EIS reported that the costs of processing grazing permits and billings totaled \$8,133,935 in 2003; and the cost of transferring grazing preferences among grazing permittees and lessees and associated compliance was \$2,401,956 in the same year.<sup>122</sup> Thus, the total cost for one year of basic administration of BLM grazing permits and leases in the eleven western states was \$10,535,891. This amount fails to account for range improvements, monitoring, range staff salaries and other grazing management expenses, unless they are specifically related to permit administration.

The BLM proposed to increase certain “service fees” in the EIS to cover the basic costs of permit administration. For example, the agency proposed increasing the permit preference transfer fee from \$10 to \$145 per instance.<sup>123</sup> Some of this administrative shortfall could be offset by an increase in the annual fee charged for grazing on BLM lands

The final EIS was withdrawn from consideration shortly after it was released in summer 2005, though the inadequate treatment of cost recovery was not likely the reason.

#### ***F. GAO Report on Grazing Fees, Cost Recovery, and the Purpose of Grazing Fees in 2005***

At the behest of six congressional requesters, the GAO (Government Accountability Office) produced a report in 2005 presenting:

- the extent of, and purposes for, grazing on public lands managed by ten federal departments and agencies in fiscal year 2004;
- the amounts spent by federal departments and agencies to manage public lands grazing in FY 2004;
- the total fees collected by federal departments and agencies for public lands grazing in FY 2004, and how those monies were disbursed; and
- the grazing fees charged by the federal departments and agencies, western states, and ranchers in 2004, as well as reasons for any differences in fees.<sup>124</sup>

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<sup>122</sup> Bureau of Land Management (2004). Proposed Revisions to Grazing Regulations for the Public Lands, Final Environmental Impact Statement. FES 04-39. Bureau of Land Management. Washington, DC: 2-28 – 2-29.

<sup>123</sup> Id. at 4-44.

<sup>124</sup> GAO (2005): 2-4.

The GAO discovered that the federal government spends *at least* \$144 million annually to support public lands grazing, principally on Forest Service and BLM lands, and recovers less than one-sixth of that cost in grazing fees. The GAO acknowledged that some federal agencies failed to provide grazing costs in response to its data call, and that some costs in the report are estimates.<sup>125</sup> The GAO also acknowledged that inconsistent accounting practices across federal agencies and departments likely contribute to an artificially low estimate of expenditures on grazing programs.<sup>126</sup>

The GAO report concludes that the vast discrepancy between expenditures and receipts in the federal grazing program is a reflection of legislative and executive policies to support local economics and ranching communities by keeping grazing fees low, and that BLM and Forest Service are charging a fee that supports this purpose. However, the 23,000 public lands ranchers represent only two percent of all livestock producers in the United States, and therefore, the fee subsidy is grossly unfair to other private producers and the American public.

Further, the GAO report noted that the BLM and Forest Service grazing fee *decreased* by 40 percent between 1980 and 2004, while fees charged by private ranchers *increased* 78 percent over the same period.<sup>127</sup> The report suggested that the competitive market practices used by other agencies to set the grazing fees could help to close the gap between expenditures and receipts in the Forest Service and BLM grazing programs, and more closely align the fee with market prices.<sup>128</sup>

## **VI. THE SECRETARIES SHOULD CONDUCT NEW RULEMAKING ON THE GRAZING FEE**

Authority to set the grazing fee is vested in the Secretaries by (1) the IOAA, which authorizes federal agencies to assess fees for specific services provided to “identifiable recipients”;<sup>129</sup> (2) NFMA, which provides for issuance of grazing permits by the Secretary of Agriculture “under such

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<sup>125</sup> Id. at 5-7.

<sup>126</sup> Id. at 20.

<sup>127</sup> Id. at 7 (emphasis added).

<sup>128</sup> Id.

<sup>129</sup> OMB Circular A-25.

terms and conditions as he may deem proper”;<sup>130</sup> and (3) the TGA, which states that the “Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock . . . upon the payment annually of *reasonable* fees...”<sup>131</sup>

The current formula violates Congressional guidance to the Secretaries under the TGA, FLPMA, and PRIA because it produces a fee that is (a) unreasonable, (b) unrepresentative of fair market value, and (c) inequitable to the United States and to the majority of livestock producers. Alternatively, the current fee formula established by PRIA expired following the seven-year trial period, President Reagan had no authority to extend the formula by Executive Order, and therefore the Secretaries should consider a new formula that complies with the TGA and FLPMA, and also the IOAA. In either case, the current fee formula fails to recover a fraction of the cost of the Forest Service and BLM grazing programs. The Secretaries have the ability to correct these problems by initiating rulemaking and amending the grazing fee formula to comport with the federal laws concerning grazing fees.<sup>132</sup>

***A. Current Fee Formula Violates TGA because it is Not “reasonable”***

The TGA calls for the development of a “reasonable” grazing fee.<sup>133</sup> In FLPMA, which amended the TGA, Congress defined “reasonable” as the consideration of “costs of production normally associated with domestic livestock grazing in the eleven Western States, differences in forage values, and such other factors as may relate to the reasonableness of such fees.”<sup>134</sup>

As Rangeland Reform and associated studies demonstrated, the Forage Value Index alone is sufficient to incorporate “costs of production” in the grazing fee. The additional indices used by the PRIA formula are flawed by double counting, and are not therefore “reasonable” because the formula keeps the grazing fee artificially low by failing to track changes in market rates by

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<sup>130</sup> 16 U.S.C. § 580(l) (2004).

<sup>131</sup> 43 U.S.C. § 315(b) (2004) (emphasis added).

<sup>132</sup> FLPMA grants the Secretaries rulemaking power over federal lands. 43 U.S.C. § 1740 (2004).

<sup>133</sup> 43 U.S.C. § 315(b) (2004).

<sup>134</sup> 43 U.S.C. § 1751(a) (2004).

deducting annual increases in rancher costs twice, but adding the annual increase in beef prices paid to ranchers only once.<sup>135</sup>

An unfair comparative advantage in livestock production is afforded to federal grazing permittees and lessees solely due to their good fortune of holding qualifying base property adjacent to federal public lands, allowing them to benefit from these artificially low fees. This further undermines the “reasonableness” criterion.

Finally, the fee is not reasonable to the taxpayer who must pay for federal management of rangelands for the private benefit of a small minority of livestock operators because of the failure of fee receipts to cover even a fraction of the cost of the Forest Service and BLM grazing programs.

***B. Current Fee Formula Violates FLPMA and PRIA because it does Not Represent the “fair market value” of Public Lands Forage***

Congress explicitly stated in FLPMA that “the United States receive fair market value of the use of the public lands and their resources...”<sup>136</sup> In 1977, shortly after the enactment of FLPMA, the Secretaries conducted a grazing fee study in which they recognized that a desirable fee formula should prevent future discrepancies between fees charged on private and public lands, and also adjust annually so that fair market value is charged in future years as well as present years.<sup>137</sup> Congress reflected this desire to obtain fair market value for grazing on public lands by enacting PRIA, though the formula it adopted to meet the aforementioned goals has not yet produced fees that achieve this goal.<sup>138</sup> Since the agencies and Congress are the sellers of public land forage that represent the public, one would expect them to incorporate all costs to the taxpayers when charging reasonable fees for grazing.<sup>139</sup>

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<sup>135</sup> Torell et al. (2001); *see also* GAO (1991) Current formula keeps grazing fees low.

<sup>136</sup> 43 U.S.C. § 1701(a)(9) (2004).

<sup>137</sup> Torell et al. (2001) (citing USDI/USDA (1977) Grazing Fee Study at 1-8).

<sup>138</sup> 43 U.S.C. § 1905 (2004).

<sup>139</sup> Moskowitz and Romaniello (2002): 9.

“Fair market value” is the price at which a good or service can be sold by a willing seller to a willing buyer, neither of which are under any pressure to buy or sell. Furthermore, it's assumed that both parties are dealing rationally, have knowledge of relevant facts, and are not related.<sup>140</sup> The grazing fee on western federal lands is much less than the “fair market value” of federal forage, as the Secretaries admitted in their 1988 rulemakings that remain in force today,<sup>141</sup> and in the subsequent Rangeland Reform studies. The fee produced by the PRIA formula continues to slip further and further behind private grazing fees every year.

The grazing fees for private, non-irrigated lands in the western states ranged from \$8.00 to \$23.00 per AUM in 2004, compared to equivalent federal range leased at \$1.43/AUM the same year.<sup>142</sup> Furthermore, grazing fees on state lands in the West are also consistently higher than federal fees for comparable rangeland; fees for state educational and trust lands varied from an average of \$2.23 per AUM in Arizona to \$28 per AUM in parts of Nebraska.<sup>143</sup> These discrepancies indicate the federal grazing fees are not equitable to the United States or to livestock producers who do not have public lands grazing permits or leases.

***C. Current Fee Formula Violates FLPMA and PRIA because it is Not “equitable to the United States” or to the Majority of Livestock Producers***

The current grazing fee formula does not meet FLPMA's requirement that the fee be “equitable to the United States and to the holders of grazing permits and leases,” nor PRIA’s commitment to “charge a fee for public grazing use which is equitable.”<sup>144</sup>

GAO’s 1991 study showed that the PRIA fee formula is deficient on three counts:

- The fee has not followed the increase in grazing land lease rates paid by operators on private lands;
- The fee does not cover the government's costs of managing the federal grazing program;

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<sup>140</sup> Small Business Taxes & Management. “Glossary” (<http://www.smbiz.com/sbgl001.html>; accessed 9/21/2004).

<sup>141</sup> 53 Fed. Reg. 2978 (Feb. 2, 1988); 53 Fed. Reg. 2984 (Feb. 2, 1988).

<sup>142</sup> GAO (2005): 39.

<sup>143</sup> Id. at 39.

<sup>144</sup> 43 U.S.C. § 1751(a) (2004); 43 U.S.C. § 1901(b)(3) (2004).

- The fee does not provide sufficient funding to support an adequate level of resource protection and mitigation from livestock grazing.<sup>145</sup>

The 2005 GAO report provides evidence of the same deficiencies:

- The federal grazing fee in 2004 was \$1.43 per AUM. This is less than the average price paid on equivalent private land of \$13.40/AUM and less than the average cost of state grazing fees in the West;
- In 2004, the BLM and Forest Service lost *at least* \$115 million administering their grazing programs.<sup>146</sup>

The 2005 GAO report attributes the inadequate cost recovery of the grazing fee to an underlying policy decision to support public lands ranching through low grazing fees. However, the maintenance of this lifestyle choice costs the public at least \$11.5 billion every ten years, no small price to pay to support marginal private economic ventures on arid public lands in the West.

Full cost recovery should be the goal of any grazing fee formula that is “equitable to the United States” consistent with the IOAA and ensures that a service provided by an agency be “self-sustaining to the extent possible.”<sup>147</sup> Costs should include not only the tangible monetary costs of implementation, administration and enforcement of grazing programs, but also the less tangible costs of degraded natural resources and lost opportunities for ecological services, hunting, fishing, recreation, wilderness, and wildlife protection attributable to public lands grazing. By failing to substantially recover costs, including intangible costs, the grazing fee under the current fee formula may not, in law, be “equitable to the United States,” nor is it consistent with statutory resource protection obligations.

While the Secretaries may cite a desire to prevent the “economic disruption and harm to the western livestock industry” as a reason to retain the current fee formula, the admitted failure to recover costs with the PRIA formula could itself be a cause of economic disruption and harm to public lands livestock operators due to cumulative failure of agencies to protect, manage and restore range resources from grazing fee receipts as found in the 1991 and 2005 GAO reports.

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<sup>145</sup> GAO (1991) Current formula keeps grazing fees low: 23.

<sup>146</sup> GAO (2005): 31 (emphasis added).

<sup>147</sup> 31 U.S.C. § 9701(a) (2004).

In many western states, state trust lands are often intermingled with BLM lands and are leased to ranchers at rates that are universally higher than the Forest Service/BLM grazing fee. Apparently the higher fees charged by western states have not resulted in disruption and harm to the western livestock industry. Nor has disruption or harm resulted from higher grazing fees on other federal lands in the West that are based on fair market value, such as those charged by the Department of Defense, Bureau of Reclamation, U.S. Fish and Wildlife Service, and the National Park Service. By comparing the costs of grazing to livestock operators with and without federal grazing permits/leases, Rangeland Reform estimated that the federal subsidy per cow was “about \$40 per cow higher” for operators with federal grazing permits/leases than those without permits/leases.”<sup>148</sup>

The current fee is also not equitable to livestock operators who do not have access to public rangelands. In such cases, livestock operators without enough private rangeland to meet their business needs must lease private rangeland on the open market or sublease public rangelands at market rates (often illegally) from federal permittees who pay much less than market rate to the federal government for exactly the same forage resource.

Illegal subleasing is rampant on federal lands and Rangeland Reform did result in the institution of a subleasing surcharge on BLM lands. Illegal subleasing continues and it is difficult to estimate profits earned by permittees who sublease federal grazing lands, profit that should be going into the federal treasury. Anecdotal evidence suggests that in some areas, such as Idaho, with good forage production on federal rangelands, subleasing rates can be as high as \$26 per AUM, more than 10 times the federal grazing fee. The inequity of this situation for ranchers who do not have the advantage of a qualifying base property is severe in particular cases, as in Idaho, where “grazing privileges for which the permit-holder of record was charged only \$891 were costing the evidently desperate cattleman \$18,000.”<sup>149</sup>

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<sup>148</sup> Rangeland Reform (1994): 29.

<sup>149</sup> Stein, M. A. and L. Sahagun. “Controversial BLM grazing program; ranchers turn a profit by subletting U.S. land.” *Los Angeles Times* (May 23, 1989) Home Edn. pt. 1: 1.

This unfair competitive advantage conferred in a discriminatory manner on public lands grazing permittees/lessees by the current fee formula may actually cause disruption and harm to the western livestock industry as a whole, by allowing public lands users to undercut other producers in beef pricing, and so burden the larger sector of western livestock producers who do not have federal grazing permits/leases.

Private land ranchers greatly outnumber public lands permittees/lessees in the western livestock industry and this inequity could be considered a source of “disruption and harm” to the industry, since low fees charged to a minority of livestock producers provide an unfair competitive advantage that makes production more difficult economically for non-permittees. There are only 23,000 ranchers with permits on western BLM and Forest Service public lands, representing a small fraction of the 989,460 livestock producers nationwide.<sup>150</sup> Increasing the Forest Service/BLM grazing fee would help to eliminate inefficient operators from the western livestock industry, thereby improving opportunities for remaining ranchers to make a profit and stabilizing the industry as a whole. A new rulemaking on grazing fees should consider the benefits of increasing the Forest Service/BLM grazing fee on the livestock industry.

Neither is the current formula equitable to livestock operators on Forest Service rangelands in the eastern states or on federal lands in the western states managed by agencies other than the BLM and Forest Service. In 2004, the \$1.43 per AUM fee charged by the Forest in the west was less than the range of fees charged in eastern states, which was \$2.47 and \$5.03 per AUM. The National Park Service charged an average of \$4.30 per AUM, the Bureau of Reclamation charged an average of \$10.93/AUM, and the U.S. Fish and Wildlife Service charged an average of \$11.24/AUM.<sup>151</sup> In some cases, livestock operators must pay “fair market value” that is established by competitive bidding. These operators might well ask why western BLM and Forest Service permittees have statutes and an Executive Order peculiarly attentive to their interests, while eastern ranchers and those holding permits/leases to graze lands managed by other federal agencies do not.

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<sup>150</sup> GAO (2005): 10.

<sup>151</sup> *Id.* at 39-40.

The failure of the current grazing fee to recover even one-sixth of the direct and indirect costs of the Forest Service/BLM grazing programs, combined with the unfair advantage that public land ranchers have over private land ranchers, indicates that the current fee formula is inequitable to the United States as well as to a majority of livestock producers.

***D. Increasing the Grazing Fee would Recover Costs of the Grazing Program and Meet Statutory Goals for Federal User Fees on Public Lands***

The 1991 GAO study noted that the PRIA formula “does not achieve an objective of recovering reasonable program costs,” indicating that the formula does not satisfy the “reasonable” fee requirement of FLPMA and PRIA itself, nor the “equitable” criteria in FLPMA, nor the goal of the IOAA to make the grazing program “self-sustaining.”<sup>152</sup> Current grazing fees are too low to allow public land grazing programs to become self-sustaining, as they do not generate enough revenue to recover the full cost of the BLM and Forest Service grazing programs.<sup>153</sup>

A fee increase using a formula that does not double count and that effectively calculates the annual fair market value of federal forage, such as the one proposed in this petition, would remedy the statutory violations of the current grazing fee.

**VII. PROPOSED RULE AMENDMENTS**

Petitioners propose the following revisions to current grazing fee rules to help the agencies comply with mandates in the TGA, FLPMA, NFMA, and PRIA. An equitable and reasonable grazing fee that reflects the actual and competitive market value of the public lands forage would help the Secretaries decrease the federal debt incurred by public lands grazing and provide a more ecologically and economically balanced public lands grazing program. Petitioners suggest adopting the fair market value of forage as determined by the GAO and the Secretaries in Rangeland Reform, and then multiplying that amount by the Forage Value Index divided by 100. Using \$3.96

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<sup>152</sup> GAO (1991) Current formula keeps grazing fees low: 1.

<sup>153</sup> See generally Moskowitz and Romaniello (2002).

as the base price does not account for inflation or market changes since 1992, but would be closer to achieving an equitable fee than the current formula.

***A. Bureau of Land Management***

1. 43 C.F.R. § 4130.8-1(a) presently reads:

“(a) Grazing fees shall be established annually by the Secretary.

(1) Except as provided in paragraphs (a)(2) and (a)(3) of this section, the calculated fee or grazing fee shall be equal to the \$1.23 base established by the 1966 Western Livestock Grazing Survey multiplied by the result of the Forage Value Index (computed annually from data supplied by the National Agricultural Statistics Service) added to the Combined Index (Beef Cattle Price Index minus the Prices Paid Index) and divided by 100; as follows:

$$CF = \$1.23 \times (FVI + BCPI - PPI) / 100$$

CF = Calculated Fee (grazing fee) is the estimated economic value of livestock grazing, defined by the Congress as fair market value (FMV) of the forage;

\$1.23 = The base economic value of grazing on public rangeland established by the 1966 Western Livestock Grazing Survey;

FVI= “Forage Value Index” means the weighted average estimate of the annual rental charge per head per month for pasturing cattle on private rangelands in the 11 Western States (Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, and California) (computed by the National Agricultural Statistics Service from the June Enumerative Survey) divided by \$3.65 and multiplied by 100;

BCPI = “Beef Cattle Price Index” means the weighted average annual selling price for beef cattle (excluding calves) in the 11 Western States (Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, and California) for November through October (computed by the National Agricultural Statistics Service divided by \$22.04 per hundred weight and multiplied by 100; and

PPI = “Prices Paid Index” means the following selected components from the National Agricultural Statistics Service's Annual National Index of Prices Paid by Farmers for Goods and Services

adjusted by the weights indicated in parentheses to reflect livestock production costs in the Western States: 1. Fuels and Energy (14.5); 2. Farm and Motor Supplies (12.0); 3. Autos and Trucks (4.5); 4. Tractors and Self-Propelled Machinery (4.5); 5. Other Machinery (12.0); 6. Building and Fencing Materials (14.5); 7. Interest (6.0); 8. Farm Wage Rates (14.0); 9. Farm Services (18.0).

(2) Any annual increase or decrease in the grazing fee for any given year shall be limited to not more than plus or minus 25 percent of the previous year's fee.

(3) The grazing fee for any year shall not be less than \$1.35 per animal unit month.”

2. 43 C.F.R. § 4130.8-1(a) should be amended to read:

"(a) Grazing fees shall be established annually by the Secretary.

(1) Except as provided in paragraph (a)(2) of this section, the grazing fee shall be equal to the \$3.96 base rate for 1990-1992 multiplied by the Forage Value Index (computed annually from data supplied by the National Agricultural Statistics Service) divided by 100; as follows:

$$GF = \$3.96 \times FVI / 100$$

GF = Grazing fee, the estimated fair market value (FMV) of the forage;

\$3.96 = The fair market value of grazing on public rangeland in the base years of 1990-1992;

FVI = “Forage Value Index” means the weighted average estimate of the annual rental charge per head per month for pasturing cattle on private rangelands in the 11 Western States (Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, and California) (computed by the National Agricultural Statistics Service from the June Enumerative Survey) divided by the estimate for base years of 1990-1992 of \$8.67 and multiplied by 100;

(2) Implementation. Where implementation would raise the current grazing fee, the increase shall be phased in over a 5-year period. The full fee as calculated in paragraph (1) of this section will be reached in 5 years.”

#### ***B. Forest Service***

1. 36 C.F.R. § 222.51(b) presently reads:

“(b) Notwithstanding the provisions of § 222.50, paragraph (b), the calculated grazing fee for 1988 and subsequent grazing fee years represents the economic value of the use of the land to the user and is the product of multiplying the base fair market value of \$1.23 by the result of the annual Forage Value Index, added to the sum of the Beef Cattle Price Index minus the Prices Paid Index and divided by 100; provided, that the annual increase or decrease in such fee for any given year shall be limited to not more than plus or minus 25 percent of the previous year's fee, and provided further, that the fee shall not be less than \$1.35 per head per month. The indexes used in this formula are as follows:

(1) Forage Value Index means the weighted average estimate of the annual rental charge per head per month for pasturing cattle on private rangelands in the 11 Western States (Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming) (computed by the National Agricultural Statistics Service) from the June Enumerative Survey) divided by \$3.65 per head month and multiplied by 100;

(2) Beef Cattle Price Index means the weighted average annual selling price for beef cattle (excluding calves) in the 11 Western States (Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming) (computed by the National Agricultural Statistics Service) for November through October (computed by the National Agricultural Statistics Service) divided by \$22.04 per hundred weight and multiplied by 100; and

(3) Prices Paid Index means the following selected components from the National Agricultural Statistics Service "Annual National Index of Prices Paid by Farmers for Goods and Services" adjusted by the weights indicated in parentheses to reflect livestock production costs in the Western States:

1. Fuels and Energy (14.5);
2. Farm and Motor Supplies (12.0);
3. Autos and Trucks (4.5);
4. Tractors and Self-Propelled Machinery (4.5);
5. Other Machinery (12.0);

6. Building and Fencing Materials (14.5);
7. Interest (6.0);
8. Farm Wage Rates (14.0);
9. Farm Services (18.0).”

2. 36 C.F.R. § 222.51(b) should be amended to read:

“(b) Grazing fees shall be established annually by the Secretary.

(1) Except as provided in paragraph (a)(2) of this section, the grazing fee shall be equal to the \$3.96 base rate for 1990-1992 multiplied by the Forage Value Index (computed annually from data supplied by the National Agricultural Statistics Service) divided by 100; as follows:

$$GF = \$3.96 \times FVI / 100$$

GF = Grazing fee, the estimated fair market value (FMV) of the forage;

\$3.96 = The fair market value of grazing on public rangeland in the base years of 1990-1992;

FVI = “Forage Value Index” means the weighted average estimate of the annual rental charge per head per month for pasturing cattle on private rangelands in the 11 Western States (Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, and California) (computed by the National Agricultural Statistics Service from the June Enumerative Survey) divided by the estimate for base years of 1990-1992 of \$8.67 and multiplied by 100;

(2) Implementation. Where implementation would raise the current grazing fee, the increase shall be phased in over a 5-year period. The full fee as calculated in paragraph (1) of this section will be reached in 5 years.”

## **VIII. THE PRIA FEE FORMULA EXPIRED, THE SECRETARIES SHOULD CONDUCT NEW RULEMAKING ON THE GRAZING FEE**

An alternative to promulgating a new fee formula adapted from the PRIA formula as presented above is for the Secretaries to acknowledge that the PRIA fee formula lapsed in 1985, President

Reagan's Executive Order extending the PRIA formula was invalid, and that the Forest Service and BLM should establish new grazing fee rules pursuant to the TGA, FLPMA, and the IOAA

***A. President Reagan's Executive Order Extending the Expired PRIA Fee Formula is Invalid***

Article IV of the United States Constitution reserves the right to “make all needful Rules and Regulations respecting ... Property belonging to the United States” to the Congress,<sup>154</sup> including the establishment of grazing fees.<sup>155</sup> Congress' power to control the public lands is “without limitations,”<sup>156</sup> and neither the courts nor executive agencies may proceed contrary to the express will of Congress in matters concerning federal lands.<sup>157</sup>

The authority of the Executive branch is limited to the express and implied powers of Article II of the Constitution, insofar as those powers are not inconsistent with Congress' legislative authority as defined in Article I. The Executive branch cannot act as a lawmaker without a delegation of authority or mandate from Congress,<sup>158</sup> and it cannot nullify legislative acts or ignore statutory directives.<sup>159</sup> In accordance with these Constitutional principles, the Supreme Court has stated that a Presidential “order must stem either from an act of Congress or from the Constitution itself.”<sup>160</sup> An Executive Order cannot supersede a statute which Congress has enacted pursuant to its constitutional powers.<sup>161</sup>

In PRIA, Congress adopted a temporary grazing fee formula for Forest Service and BLM lands to last for seven years, from 1979 to 1985 (see *Public Rangelands Improvement Act of 1978*

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<sup>154</sup> U.S. Const. art. IV, § 3, cl. 2.

<sup>155</sup> See, e.g., *Taylor Grazing Act of 1934*, *Granger-Thye Act of 1950*, *National Forest Management Act of 1976*, *Federal Land Policy and Management Act of 1976*, *Public Rangelands Improvement Act of 1978* above.

<sup>156</sup> *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 21 (1952).

<sup>157</sup> *United States v. California*, 332 U.S. 19, 27 (1947).

<sup>158</sup> See *Commissioner v. Acker*, 361 U.S. 87, 92 (1959); *Independent Meat Packers Assoc. v. Butz*, 526 F.2d 228, 235 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976).

<sup>159</sup> See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411-413 (1971).

<sup>160</sup> *Youngstown Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

<sup>161</sup> *Cole v. Young*, 351 U.S. 536 (1956).

above).<sup>162</sup> PRIA directed the Secretaries to report to Congress “their evaluation of the fee established . . . and other grazing fee options, and their recommendations to implement a grazing fee schedule for 1986 and subsequent grazing years.”<sup>163</sup> The PRIA formula applied to Forest Service and BLM rangelands in the sixteen contiguous western states.<sup>164</sup>

The Secretaries failed to produce timely evaluations of the PRIA grazing fee as directed by Congress before the temporary fee formula expired (see *President Reagan’s Executive Order Extended the Expired PRIA Fee Formula* above). However, rather than allow the Forest Service and BLM to revert to other existing authority to set grazing fees, including the TGA, FLPMA and the IOAA, President Reagan ordered the agencies to continue the expired PRIA fee formula indefinitely.<sup>165</sup>

President Reagan’s Executive Order extending the PRIA fee formula is invalid.<sup>166</sup> Congress, in accordance with its Constitutional authority to manage federal lands, explicitly stated that the PRIA fee formula would expire in 1985. President Reagan had no explicit or implied Constitutional authority, nor did Congress grant the President specific executive authority to extend the fee formula contrary to PRIA.

***B. The Secretaries should Conduct New Rulemaking on the Grazing Fee Based on the TGA, FLPMA and IOAA***

Although the PRIA fee formula lapsed in 1985, the TGA, FLPMA and IOAA remained in force to direct the Secretaries to establish a new grazing fee formula. As described above, the TGA stated

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<sup>162</sup> 43 USC § 1905 (2004).

<sup>163</sup> 43 U.S.C. § 1908 (2004).

<sup>164</sup> 43 U.S.C. § 1902(i) (2004).

<sup>165</sup> Executive Order 12548 (Feb. 14, 1986).

<sup>166</sup> Litigants in federal court have previously contended that direction contained within the President’s Executive Order was inconsistent with federal statute, namely that the President ordered the Forest Service and BLM to ignore the procedural requirements of the APA and NEPA and Congressional directives to set an “equitable” and “reasonable” grazing fee that attempts to achieve “fair market value” for federal forage. *NRDC v. Hodel and Lyng*, No. S-86-0548 (E.D. Cal. Oct. 13, 1987); see Plaintiffs’ Notice of Motion and Memorandum of Points and Authorities in Support of Plaintiff’s Motions for Summary Judgment, Civil no. S-86-0548. Nov. 21, 1986. However, Petitioners here contend that the Executive Order is itself invalid under federal law.

that grazing fees should be “reasonable” and FLPMA directs that the grazing fee be “equitable to the United States.” The IOAA authorizes federal agencies to charge user fees for federal services and resources, and especially applies to agencies that have no other statutory or other guidance for setting fees.<sup>167</sup> When the PRIA fee formula lapsed, the IOAA may have replaced PRIA as the Secretaries’ primary authority for setting grazing fees.

The OMB has issued guidance for agencies to implement the IOAA.<sup>168</sup> The OMB memorandum is explicit that the objective of the U.S. government is to “ensure that each service, sale, or use of Government goods or resources provided by an agency to specific recipients be self-sustaining”; “promote efficient allocation of the Nation’s resources by establishing charges for special benefits provided to the recipient that are at least as great as costs to the Government of providing the special benefits”; and “allow the private sector to compete with the Government without disadvantage in supplying comparable services, resources or goods where appropriate.”<sup>169</sup>

Agencies may charge user fees pursuant to IOAA to “identifiable recipients” of “special benefits.”<sup>170</sup> Federal grazing permittees/lessees are identifiable, and the OMB memorandum specifically includes “various kinds of public land use” as a “special benefit.”<sup>171</sup> User fees must be sufficient to recover “full cost” to the federal government of providing a good, resource or service;

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<sup>167</sup> 31 U.S.C. § 9701(b) (2004): “The head of each agency . . . may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—

- (1) fair; and
- (2) based on--
  - (A) the costs to the Government;
  - (B) the value of the service or thing to the recipient;
  - (C) public policy or interest served; and
  - (D) other relevant facts.”

<sup>168</sup> OMB Circular A-25. The OMB memorandum also “provides guidance to agencies regarding their assessment of user charges under other statutes,” such as the TGA and FLPMA. Id. (unpaginated).

<sup>169</sup> Id. (unpaginated). OMB Circular A-76, “Performance of Commercial Activities” (Aug. 4, 1983) also warns that, since “the competitive enterprise system . . . is the primary source of national economic strength, “ the “government should not compete with its citizens” in the provision of goods, resources and services.

<sup>170</sup> Id. (unpaginated).

<sup>171</sup> Id. (unpaginated).

should be “based on market prices”; and fees “should be set as rates rather than fixed dollar amounts in order to adjust for changes in the costs to the Government or changes in market prices of the good, resource, or service provided.”<sup>172</sup>

The “full cost” of the provision of a good or service by the federal government includes “all direct and indirect costs to *any* part of the Federal Government of providing a good, resource, or service.”<sup>173</sup> These include personnel costs, including salaries, travel and overhead; costs of materials and supplies; management and supervisory costs; and costs associated with enforcement, collection, research, establishment of standards, and regulation, *including any required environmental impact statements*.<sup>174</sup>

The OMB defines “market price” as the price for a good, resource or service that is based on competition in open markets.<sup>175</sup> The OMB memorandum notes that agencies can set market prices by comparing prevailing prices in the competitive market for goods, resources and services to those provided by the government, such as comparing the price for forage on public “grazing lands in the general vicinity of private ones.”<sup>176</sup>

The OMB memorandum advises that user charges should be instituted through the promulgation of regulations and provides guidelines for developing regulations.<sup>177</sup> Accordingly, to comply with the IOAA and foregoing direction in the OMB memorandum, the Secretaries should develop new grazing fee rules that:

1. ensure that the Forest Service and BLM grazing programs are self-sustaining;

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<sup>172</sup> Id. (unpaginated).

<sup>173</sup> Id. (unpaginated) (emphasis added).

<sup>174</sup> Id. (unpaginated).

<sup>175</sup> Id. (unpaginated).

<sup>176</sup> Id. (unpaginated).

<sup>177</sup> Id. (unpaginated).

2. recover the “full cost” of the federal grazing program, including costs to the Forest Service, BLM and other agencies as identified by the GAO;<sup>178</sup> and
3. base the grazing fee on the market price that allows the private sector to compete with the federal government without disadvantage in supplying comparable forage resources.

## **IX. CONCLUSION**

As a matter of law and as a matter of sound policy, the Secretaries should revise their grazing fee regulations to accurately reflect the fair market value of grazing on public lands. These amendments are belated: Congress, the Administration, and auditing agencies have known for years, and even decades, that the grazing fee does not cover the costs of the federal grazing program.

The current grazing fee on Forest Service/BLM lands in the West is inequitable to state and private land fees, and unfair to ranchers without adjacent base property to qualify for low-cost federal grazing lands. Livestock grazing on federal lands in the western states is losing money, destroying the landscape, and endangering native flora and fauna.

Because the current grazing fee formula violates the TGA, NFMA, FLPMA, PRIA, and the IOAA, and fails to meet even the agencies own estimates of full-cost recovery, amending the grazing fee would be legal, prudent, and fair. Petitioner’s request that the Secretaries take prompt action in this matter; adjustments to the grazing fee formula are long overdue.

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<sup>178</sup> See GAO (2005).